

2 Conclusions

Contents

	<i>Page</i>
The reference.....	5
The companies.....	6
The acquisition	7
The merger situation.....	9
Assessment of whether there is a merger situation.....	10
The markets affected	14
Assessment	17
The UK retail market for pay-TV.....	18
Third party views.....	21
Issues	21
Effect on acquisition of rights	21
Sports rights.....	21
Assessment.....	23
Film rights	24
Conditional access technology	26
Other issues	29
Conclusions	29

The reference

2.1. Under the reference (see Appendix 1.1) dated 12 November 1999 (made under sections 64 and 69(2) of the Fair Trading Act 1973—the Fair Trading Act) we are required to investigate and report whether a merger situation qualifying for investigation has been created in that enterprises carried on by or under the control of Vivendi have within the four months preceding the date of this reference ceased to be distinct from enterprises carried on by or under the control of BSKyB, a body corporate incorporated in the UK. If either the share of supply test or the assets tests (referred to in sections 64(1)(a) and (b) respectively of the Fair Trading Act) are satisfied, the reference requires us to exclude the other from our consideration. If we find that a merger situation exists, we are required to investigate whether it operates or may be expected to operate against the public interest.

2.2. As noted in paragraph 3.169, on 22 July 1999 Vivendi and Pathé SA (Pathé) entered into a merger agreement which was completed on 10 September 1999. As a result, Vivendi acquired inter alia Pathé's direct shareholding of 12.66 per cent in BSKyB. It also acquired Pathé's shareholding of 33.1 per cent in BSB Holdings Ltd (BSBH) which owned a further 11.78 per cent interest in BSKyB.

2.3. As further noted in paragraph 3.176, on 22 July 1999 Vivendi also entered into agreements with Pearson plc (Pearson) and Granada Group plc (Granada) to acquire the remaining interests in BSBH, giving Vivendi full ownership of BSBH. Those transactions were completed

on 10 September 1999 and 1 October 1999 respectively. As a result of all three transactions, therefore, Vivendi acquired an interest of 24.44 per cent of the issued share capital of BSkyB. Vivendi also acquired the right to appoint a director to the BSkyB board (see paragraph 2.10).

2.4. As is apparent from Table 3.7, the gross assets of BSkyB exceed £70 million as required by the assets test. Vivendi, however, argued that the acquisitions would not enable it materially to influence the policy of BSkyB, hence no merger situation qualifying for investigation had been created. Before discussing whether, in our view, Vivendi is in a position materially to influence BSkyB, we briefly describe the companies involved.

The companies

2.5. As noted in Chapter 3, Vivendi is a public company listed on the Paris stock exchange. Formerly named Compagnie Générale des Eaux, its current main areas of activity are environmental services (comprising activities in water, energy, waste management and transport) and communications (comprising activities in telecommunications, publishing and multimedia and audio-visual services). In the year to December 1998, Vivendi's turnover was some £20.6 billion and its net income £729 million. Net operating assets were around £10 billion and share capital and reserves £6.6 billion.

2.6. As shown in Table 3.13, in 1998 Vivendi Communications division had turnover of £4 billion and operating profit of £188 million. Its interests include a 44 per cent interest in Cégétel, the leading private telecommunications operator in France, and a 49 per cent shareholding in Canal+ (the balance being listed). Canal+ is a terrestrial broadcaster, a broadcaster by satellite, and a provider of pay-TV channels in a number of EC countries other than the UK, and also has cable operations in France. It is described as the European leader in pay-TV with 12 million subscribers in 12 countries at the end of 1998, and being at the forefront of digital TV in France and various other European countries. Vivendi said that it wished to reduce its shareholding in Canal+ to 40 per cent. Vivendi's shareholding in Canal+, and its directorships in Canal+, are described in paragraphs 3.129 to 3.131. In our view, Vivendi is likely to have the ability to control the policy of Canal+. Canal+ also has a 50 per cent interest in SECA, which has developed the Mediaguard conditional access technology for use in digital pay-TV systems (see paragraph 3.179). In our view, Canal+ has the ability to exercise at least considerable influence over the policy of SECA. In this report we refer to the Vivendi group as including Canal+ and SECA.

2.7. Turnover of Canal+ in 1998 was £1.7 billion, with operating profit of £34 million, but a net loss after tax and minority interests. SECA in that year had turnover of £22 million and operating profit of £7.9 million.

2.8. The main activities of BSkyB are the distribution of pay-TV programming via satellite and the creation of pay-TV programme content for distribution by satellite, cable and digital terrestrial TV. In the year to June 1999, turnover was £1.5 billion, operating profit £185 million (but with retained losses of £332 million) and net operating assets of £445 million. The retained losses in that year largely reflected an exceptional provision for the costs connected with moving subscribers from analogue to digital services. During the course of our inquiry, BSkyB announced a proposal to acquire a 24 per cent shareholding in KirchPayTV, the leading German pay-TV broadcaster, which would involve KirchPayTV taking a 4 per cent interest in BSkyB, slightly diluting the Vivendi interest.

2.9. Before the acquisition by Vivendi, the approximate shareholdings in BSkyB were as follows:


News International	40%
Pathé	13%
BSBH (Pathé, Pearson, Granada)	12%
Others	36%

News International is a wholly-owned subsidiary of News Corporation, an Australian company. Based in the UK, News International has other media assets including the newspapers *The Times*, *The Sun*, *News of the World* and *The Sunday Times*. News Corporation is 30 per cent owned by the Murdoch family, Rupert Murdoch being a director on the boards of each of News Corporation, News International and BSkyB. News Corporation's latest published accounts to 30 June 1999 showed turnover of A\$21.8 billion (£8.3 billion). Together, BSkyB and the News Corporation group have a one-third stake in Stream, an Italian digital TV terrestrial platform, and equity interests in satellite platforms in Asia, Latin America and Australia. News Corporation also owns the majority of shares in NDS, an electronic data compression and encryption company which owns the VideoGuard conditional access technology used by BSkyB. News Corporation's interests include the ownership of the Twentieth Century Fox film studios.

2.10. Pathé had the right to appoint two members to the BSkyB board, a right which was not assignable and terminated when Pathé ceased to exist at the time of its merger with Vivendi. Pathé's President had been Chairman of the BSkyB board. BSBH was entitled to appoint one member to the BSkyB board, which Vivendi is now able to do and has done.

The acquisition

2.11. Vivendi told us that the motives which had led to its acquisition of a stake in BSkyB were threefold:

- (a) *A strategic defensive policy unconnected to BSkyB.* Pathé had owned a stake of approximately 20 per cent in CanalSatellite, the majority of which was owned by Canal+. Vivendi was concerned that a major competitor of Canal+ might acquire a significant stake in Pathé and thus indirectly in CanalSatellite. It said that the primary motive for Vivendi's initial acquisition of a stake in Pathé was to prevent such an acquisition, since the constitution of CanalSatellite at that time gave significant influence to the holder of a 20 per cent stake. The subsequent full merger between Vivendi and Pathé was mainly at the initiative of the Seydoux family (previously Pathé's largest shareholder) which was keen to reacquire full control over the businesses operated by Pathé (which in fact occurred) but allowed Vivendi to consolidate its hold over CanalSatellite. However, [] and Articles of Association of BSBH provided certain rights of pre-emption in the event of a transfer by any shareholder to a third party and [*Details omitted. See note on page iv.*]. These provisions gave rise to legal uncertainties, which could have had a significant impact on the value to Vivendi of Pathé's stake in BSBH, and the acquisition of those stakes was regarded as the best solution to those uncertainties.
- (b) *A financial investment.* Vivendi was able to acquire its stake in BSkyB [*Details omitted. See note on page iv.*] (the aggregate acquisition price representing an attractive investment opportunity). The shares had subsequently performed strongly (Vivendi estimating that its stake had gained some £4.5 billion in value) and the transactions had been more than justified on financial grounds alone.
- (c) *The acquisition of a long-term strategic stake.* Vivendi said that the broadcasting sector in Europe was developing and changing at an unprecedented pace, and believed it would undergo significant and further consolidation, development and change. Reasons for that change included technological developments and convergence and the deployment of

new marketing strategies. Vivendi intended to be a long-term participant in European broadcasting markets, and considered BSkyB as one of the most innovative, well-managed and dynamic participants in the pay-TV sector. The rate and unpredictability of change was such that the acquisition of minority stakes was not an unusual strategy in this sector, and given the strength of BSkyB, Vivendi considered that a stake in it represented a robust strategy in the face of these future uncertainties. Because of the financial performance of Vivendi's stake in BSkyB, Vivendi was able to take a long view of its position. It said that the stake was of sufficient size that any transaction with a third party including a merger or other business combination with BSkyB would need to take Vivendi's position into consideration.

2.12. Both Vivendi and BSkyB told us that they did not see any cost savings or efficiency gains resulting from the share acquisition: although there had been earlier discussions between BSkyB and Canal+ about a merger, we were told that no synergies were envisaged even in those discussions.

2.13. A meeting of the Vivendi board on 22 July 1999 considered the acquisition of shares in BSkyB. The minutes of this board meeting refer to the acquisition providing an opportunity for the unhurried exploitation of the possibility of joint projects between Canal+ and BSkyB in the fields of technology convergence, digital decoders and the Internet. We also saw press reports that a senior executive of Canal+ had said that BSkyB and Canal+ could bid jointly for sports rights and for rights to Hollywood films, and cooperate in other matters, and that the Chairman of BSkyB had referred to discussion of cooperation with Vivendi (which, we were told, was only an informal comment).

2.14. However, at our hearing with Vivendi, we were told that it envisaged no synergies; and no cost saving or efficiency gains arising from the share acquisition. We were told that the statement of the Canal+ executive was speculative. Subsequently, at a late stage of our inquiry, we saw a paper that had been submitted to Vivendi board members in preparation for their meeting on 22 July. This paper had been prepared by one of Vivendi's internal financial analysts, at the request of Vivendi's Finance Manager (who is not a member of the board but attends board meetings). The paper stated that the pay-TV sector offered many opportunities for cooperation between BSkyB and other companies within the Vivendi group (for example, Cégétel for telecommunications and Havas for multimedia). An annex to the paper stated that Vivendi's position as the second largest shareholder in BSkyB would permit the encouragement of cooperation between Canal+ and BSkyB with regard to the development of a new generation of decoders, the purchasing of programmes (with specific reference to strengthening the position of the two groups vis-à-vis US programme suppliers and to the emergence of new football competitions), and the marketing of Internet services. An extension to the inquiry was necessary in order to consider fully the significance of that paper.

2.15. Vivendi told us that this was an informal working paper, prepared without consultation with Canal+ and neither seen nor approved by the Canal+ board or management. It said that, although circulated to the Vivendi board, the paper was neither approved nor discussed by them. Vivendi said that it did not, therefore, reflect the reasons for the Board's decision.

2.16. We also noted press reports during our inquiry that the Chairman and Chief Executive of Vivendi attempted to reopen talks with News Corporation about how the two companies might join forces (merger discussions between Canal+ and BSkyB earlier in 1999 having proved unsuccessful). Vivendi was reported as referring to the risk of BSkyB and Canal+ having difficulties acquiring content after the announcement of the planned merger between AOL and Time Warner. Vivendi said that this interview was given on the announcement of an alliance between Vivendi and Vodafone Airtouch plc (Vodafone), and the opportunity was taken to communicate the desire of the Vivendi group to play a part in the new, evolving media industry: when asked about Vivendi's relationship with BSkyB, the Vivendi Chairman said that he was open to discussion and exchanges of views with the Chairman of BSkyB on the global evolution of the industry. Vivendi told us that this merely confirmed that Vivendi was open to

discussion with all international players in the industry, at a time when the industry was in full reorganization and gestation. We accept that these other comments do not necessarily call into question Vivendi's formal position to ourselves, but they suggest that Vivendi's intentions and the use it makes of its position are themselves likely to continue to evolve.

The merger situation

2.17. Section 65 of the Fair Trading Act provides that when a person is able, directly or indirectly, to control or materially to influence the policy of a body corporate, but without having a controlling interest in that body, that body may be treated as being under the control of that person, and thus as ceasing to be distinct.

2.18. In view of the strong position of News International, with a shareholding of nearly 40 per cent and the right to appoint 5 of 14 members of the board of BSkyB, we consider that there is no question of Vivendi having acquired the ability to control the policy of BSkyB. Accordingly, we are concerned with the question whether Vivendi has acquired the ability materially to influence its policy.

2.19. For a finding that a merger situation qualifying for investigation has been created, it is not necessary for there to be evidence that material influence has been exercised or that it is intended that it should be exercised. Material influence is not defined in the Act; consequently it is necessary to consider the particular circumstances of each case where it may arise.

2.20. We therefore have to determine whether, in the four months ending on 12 November 1999, the acquisition by Vivendi, by means of the transactions described in paragraphs 2.2 and 2.3, of some 24.4 per cent of BSkyB's shares, together with the right to appoint one director, were sufficient to give Vivendi the ability materially to influence the policy of BSkyB. We are satisfied that the holding was built up to that figure, and the right to appoint a director was acquired, during that period.

2.21. Vivendi argued that it had not acquired the ability materially to influence the policy of BSkyB within the meaning of section 65(3) of the Fair Trading Act and therefore no merger situation qualifying for investigation existed.

2.22. In particular, Vivendi argued that the level of influence over BSkyB exercised by News Corporation was such as to exclude any possibility of Vivendi being able materially to influence the policy of BSkyB. In addition to News International's shareholding of almost 40 per cent in BSkyB, five of the 14 members of the board of BSkyB were appointed by News International; the Chief Executive and Managing Director of BSkyB was an ex-employee of News Corporation; and a non-executive director had advised another subsidiary of News Corporation. The position was also affected by the arrangement between BSkyB and KirchPayTV whereby the Vice Chairman of KirchPayTV was to become a non-executive director of BSkyB. It was also relevant to take account of the personal position and influence of the Chairman of BSkyB, who was widely seen as being able to speak unilaterally on all matters concerning BSkyB and the way in which it conducts its policy. Vivendi noted that in previous reports the Commission had recognized the possibility that the personalities appointed to the board of the company could affect the issue of material influence in the policy of that company. There were other personal and contractual links between BSkyB and News International including the ownership by News International of the conditional access system used by BSkyB, and the extensive use made by BSkyB of the film resources of the News Corporation group. Indicative of Vivendi's lack of material influence over BSkyB, it was neither informed nor consulted about BSkyB's intention to acquire an interest in KirchPayTV in December 1999.

2.23. Although Vivendi acknowledged that at most shareholders' meetings it would be able to block the passing of a special resolution, it said that only a very narrow range of issues

required a special resolution. Other shareholders' resolutions could be passed by ordinary resolution, which required only a simple majority of votes, and Vivendi considered it would not be possible for it successfully to oppose an ordinary resolution proposed and supported by News International. On the other hand it did regard a stake of at or near the 25 per cent level as providing an important level of protection against dilution, and creating an economic premium and a strategic negotiating position for any major reorganization or merger.

2.24. Vivendi said that, even if the Commission were to conclude that Vivendi was able to exercise material influence, the Commission would have to go on to consider whether that influence was sufficient to create a merger situation qualifying for investigation, the test in section 65(3) of the Fair Trading Act being permissive, not mandatory. In circumstances where (as here) there is a shareholder in the position of News International (with the shareholding, board, personal and contractual links described), it would be entirely appropriate for the Commission (even were it to conclude that Vivendi has material influence) to go on to conclude that, in the circumstances, that did not amount to a merger situation qualifying for investigation.

2.25. We asked BSkyB whether it is to be expected that its board and senior management would have regard to the interests and wishes of Vivendi before finalizing some, if not all, major decisions. BSkyB replied that its senior management did not have any information on how Vivendi will use the rights it has in relation to the policies of BSkyB, and that in the circumstances it was not yet clear whether any working relationship might develop between the senior management at BSkyB and Vivendi.

Assessment of whether there is a merger situation

2.26. We consider that Vivendi's acquisition of its shareholding in BSkyB, and the right to appoint a director, need to be assessed against the background of the scope for cooperation between the Vivendi group and BSkyB and the Vivendi group and other companies owned or otherwise under the control of News Corporation, and the interests of Vivendi and BSkyB in there being such cooperation.

2.27. The Vivendi group (including Canal+) and BSkyB or its associated companies have common activities. Both groups operate platforms for pay-TV, acquire programme rights, provide content to other TV platforms, provide interactive and Internet services, and supply and acquire conditional access technology and equipment. Through Cégétel, Vivendi has major telecommunication interests: BSkyB, on the other hand, has joint ventures with, inter alia, British Telecommunications plc (BT) on interactive services using a combination of satellite transmission and transmission over local phone networks, and with Kingston Communications (Hull) plc (Kingston Communications) for use of digital subscriber line technology, which allows pay-TV services to be offered, in appropriate circumstances, over the local network.

2.28. Vivendi and BSkyB argued that they operated in different national markets, with little scope for cooperation. However, we have noted that there were previous merger discussions between Canal+ and BSkyB, and in the paper circulated to the Vivendi board and in other comments to the press we have seen references to developments relating to the Internet, development of conditional access and other technology and acquisition of rights. As evident from Chapter 5, third parties have also expressed particular concern about the scope for the two companies to collaborate on developments in conditional access technology, and acquisition of both film and sports rights.

2.29. In our view, the scope for cooperation over time is considerable, in fields such as those specified in the previous two paragraphs. We believe it will be in the interests of BSkyB and Vivendi and of their associate companies to cooperate to some degree, and we expect them to do so.

2.30. Vivendi denied that it intended to seek to influence the policy of BSKyB (see paragraph 2.11). It has presented itself to us as a passive investor, not intending to extend its influence before the departure of Mr Rupert Murdoch from the board of BSKyB. We note that some executives of Vivendi/Canal+ saw the scope for synergies from cooperation across a range of activities (see paragraph 2.13). We note too that the Chairman of Vivendi has been reported as saying that, since the AOL/Time Warner merger, he saw the need for TV companies to join forces in the acquisition of rights. We think that commercial logic will drive Vivendi to seek to influence BSKyB's policy in due course in areas such as those referred to in paragraphs 2.27 and 2.28, even if it does not yet intend to do so, and (as discussed below) we expect that BSKyB will be receptive to any proposals made. We think that this is relevant to the expected outcome of relations between Vivendi and BSKyB, although (as noted in paragraph 2.19) it is not necessary for us to find evidence that it is intended that influence should be exercised, in order for us to find that a merger situation has been created.

2.31. We now consider whether there are factors which would enable Vivendi to exercise material influence over the policy which BSKyB adopts, both generally and with particular regard to cooperation between the two.

2.32. First, we consider the risks for BSKyB if it consistently opposes the wishes of Vivendi, or seeks partners other than Vivendi for joint ventures in which Vivendi would wish to be the preferred partner, and generally fails to develop a cooperative relationship with Vivendi. These risks, which stem from Vivendi's 24 per cent shareholding and its seat on the board, are discussed in paragraphs 2.33 to 2.43.

2.33. The effect of the holding depends on the distribution of other holdings in BSKyB. The distribution of holdings is set out in paragraphs 6.222 and 6.297. Just prior to the date of the reference, News International's holding was 39.75 per cent of the total issued share capital, ie 15.3 per cent more than that of Vivendi. The next 12 largest holdings amounted in aggregate to 14.8 per cent, varying between 0.7 and 2.2 per cent. They were all owned by institutions. The six largest amounted in aggregate to 10.0 per cent. We were told that the BSKyB management had no significant holdings.

2.34. In December 1999 BSKyB and KirchPayTV entered into an agreement whereby KirchPayTV will acquire 4.3 per cent of BSKyB's enlarged share capital. That agreement was and remains conditional on regulatory approval by the European Commission (which was given on 21 March 2000). It was made subsequent to Vivendi's acquisition of shares in BSBH, and—for the purpose of considering whether Vivendi has acquired material influence—we should not take account of arrangements made subsequently. However, even if we were to assume that KirchPayTV will have a 4.3 per cent stake and a directorship, and also that KirchPay-TV would be likely to side with BSKyB on contested votes (a matter about which we have not needed to reach any conclusion), that would not affect the views which we reach in paragraphs 2.36 to 2.42.

2.35. To pass a special resolution of BSKyB requires a minimum of 75 per cent of the votes cast. Ordinary resolutions require a simple majority of the votes cast. So the effect of Vivendi's votes will depend on the extent to which other shareholders exercise their votes at general meetings. BSKyB provided us with information on voting at general meetings over the last five years: details are given in paragraph 6.213 et seq. These show very low voting by shareholders other than News International, Vivendi, or in past years Pathé, BSBH and Granada. We consider that historic voting patterns are not a useful guide to the level of turnout to be expected in future if there were a dispute between News International and Vivendi, for example with regard to the contested election of a director. We believe that a higher turnout could be expected.

2.36. Vivendi would have a near certainty of being able to defeat special resolutions. With Vivendi holding almost 24.5 per cent of votes, the votes of holders of over 98 per cent would

be required for the proposer of the resolution to have any chance at all of getting it passed in opposition to Vivendi (ie of achieving a 75 per cent majority). Even after dilution if the KirchPayTV agreement goes ahead, a turnout of the holders of at least some 94 per cent would be needed. It is unrealistic to expect that such a high turnout could be achieved. Vivendi acknowledged that it was likely to be able to block the passing of special resolutions, but argued that only a very narrow range of issues required a special resolution under BSKyB's constitution.

2.37. The matters for which special resolutions of BSKyB have been proposed during the last five years are described in paragraph 6.212. They were mainly amendments to the Articles of Association to bring them into line with current best practice, and authorities to purchase the company's shares in the market. BSKyB did not expect that special resolutions would be required for other purposes over the next two years. Vivendi told us that special resolutions were required only for 'housekeeping matters' by BSKyB, and that it would not be in Vivendi's own interests to seek to block them. We think that it may be in Vivendi's interest to block a resolution as put to the last four AGMs, disapplying pre-emption rights under section 95 of the Companies Act 1985, as this resolution would enable BSKyB to dilute existing shareholdings. Further, we consider that BSKyB cannot be at all sure, particularly given the changing commercial and technological environment, that it may not wish to seek an amendment to its Articles, to which Vivendi might object.

2.38. As regards ordinary resolutions, there are some types of matters in respect of which News International may be precluded from voting its BSKyB shares. If News International were excluded from voting on an ordinary resolution, Vivendi would have some 40.5 per cent of the votes. If it opposed the transaction, it would need to win over shareholders with only some 5.7 per cent of the issued share capital, in order to be able to be certain of defeating the ordinary resolution.

2.39. We consider next whether Vivendi may be able to influence the outcome of decisions made by the board of BSKyB. News International has the right, entrenched in the Articles, to appoint 5 of the 14 directors. The Chief Executive Officer of BSKyB, though not appointed as a director by News International, is an ex-employee of the Fox Group, in which News Corporation has an interest. The Chairman of BSKyB is Mr Rupert Murdoch, who is the Chief Executive of News Corporation. The board membership is described in more detail in paragraphs 3.96 et seq and 6.303 et seq.

2.40. The Articles of BSKyB require that a majority of directors present at board meetings must be appointed by neither a shareholder with over 30 per cent of the equity share capital, nor executive directors (see paragraphs 6.185 and 6.210). Contracts with a value of £100 million or more require board approval. News International-appointed directors are excluded from voting on resolutions concerning matters in which the principal shareholder, News International, or any associate has an interest (see paragraphs 6.185 and 6.211), for example contracts with companies in the News Corporation group or in which a member of that group has a substantial stake. An example is the film output and library contract with Twentieth Century Fox put to the board in May 1999. BSKyB told us that it found it difficult to predict what transactions with the News Corporation group will arise in the next two years, but that one such transaction which would require board approval is currently under negotiation.

2.41. It appears to us that, in circumstances where the News International-appointed directors were not able to vote, there would be uncertainty as to the outcome of voting on a board resolution, were the Vivendi-appointed director to seek support for opposition to it.

2.42. Thus, the existence of Vivendi's holding and directorship would create continuing uncertainty for the board of BSKyB and give Vivendi significant negative power. If Vivendi were to take obstructive action in relation to resolutions put to general meetings or to the board, we think this would be a real constraint on BSKyB, making it difficult for it to execute its policy as it would wish. Further, such dissension by a major shareholder would be likely to lead

to publicity which a major listed company like BSkyB would find damaging to its interests. Accordingly, we think that BSkyB would be prepared to go to some lengths in adapting its policy, to avoid these risks.

2.43. If Vivendi were to find that its proposals were constantly blocked by BSkyB, Vivendi may look for an exit. This would raise for BSkyB the prospect that a 24 per cent block of its shares could end up in hands which BSkyB might find considerably less attractive or that a large number of the shares could come on to the market, possibly resulting in a large reduction in its share price (and which BSkyB was particularly anxious to avoid when asked about a possible requirement for sale of those shares). We consider that those are additional risks which would encourage BSkyB to seek an amicable relationship with its second largest shareholder. It is unlikely that BSkyB's board would wish to allow its management to be subject to the uncertainties that would follow disagreements between Vivendi and BSkyB. We expect, therefore, that at some point in time the uncertainties would lead BSkyB to seek some form of accommodation with Vivendi.

2.44. Secondly, BSkyB may in time see benefits from its association with Vivendi given its standing and financial strength. Canal+, in which Vivendi has a 49 per cent interest, is the leading pay-TV operator in Europe, and the conditional access technology system of SECA, in which Canal+ has a 50 per cent shareholding, is the leading digital system in Europe. Vivendi's seat on the BSkyB board will enable its representative to meet and discuss business regularly with the BSkyB executive directors including matters such as BSkyB's plans and problems. We consider that the expertise of the Vivendi group (including Canal+ and Cégétel) in similar markets will enable it to contribute constructively to these discussions. Vivendi will also gain early notice of areas in which there are opportunities for collaboration (such as those mentioned in paragraphs 2.27 and 2.28 and, possibly, a range of other activities throughout Europe) and will be in a position to offer itself as the preferred partner. Finally, BSkyB could have further need for large investment, for example in digital pay-TV (including asymmetric digital subscriber line (ADSL) broadcasting—see paragraph 2.75) and providing Internet content and related activities: although BSkyB has been capable of raising finance on its own, the added support of Vivendi could make the raising of funds more efficient.

2.45. We therefore expect that relations are likely to develop constructively and amicably between them, and that BSkyB will be receptive to policy proposals from Vivendi.

2.46. Thirdly, we consider the likely reaction of News International, the largest shareholder in BSkyB. We would expect News International to perceive that cooperation with Vivendi will generally be in the interests of BSkyB, for the reasons cited above. Thus, cooperation will also be in the interests of News International with its near 40 per cent stake in BSkyB's overall value. Furthermore Vivendi may be able to offer the benefit of joint ventures to other companies in the News International group. For example, there may be scope for a joint venture between CanalSatellite and Open Interactive Ltd (Open), for the development of interactive services (see paragraph 2.71). We expect that News International would act rationally in its own commercial interest, and we therefore expect that it will cooperate with Vivendi, when exercising its rights. These arguments apply equally to News Corporation.

2.47. We consider that it is to be expected, on the basis of the factors discussed in paragraphs 2.32 to 2.46, that BSkyB would be influenced by the wishes of Vivendi when reaching major decisions. We therefore conclude that Vivendi has acquired the ability materially to influence the policy of BSkyB, and that it did so within the four months preceding the date of the reference.

2.48. Vivendi has argued that, under section 65(3) of the Fair Trading Act, even were the Commission to determine that Vivendi is able materially to influence the policy of BSkyB, it does not follow automatically that a merger situation qualifying for investigation is created.

Vivendi referred to the Commission's report on Mid Kent Holdings/General Utilities/SAUR,¹ where the Commission recognized that section 65(3) conferred on it a discretion in the matter. Vivendi argued that, in circumstances where a shareholder is in the position of News International (with its shareholding, board, personal and contractual links), it would be entirely appropriate for the Commission to conclude that, even if Vivendi had material influence, that did not amount to a merger situation qualifying for investigation.

2.49. We asked Vivendi to explain what particular factors it thought we should take into account. Vivendi said that we should take into account all the circumstances, including events occurring since the reference was made. It reiterated its arguments as to why it could in fact exercise very little influence, being faced with a much larger shareholder with close links to BSkyB and with a very considerable degree of influence. It said that it was reasonable to proceed on the basis that KirchPayTV would not vote in a way contrary to the wishes of News International. It also said that we should take account of the unusual way in which the circumstances under investigation arose, and the rapid rate of change in the broadcasting sector, which takes place in a global context.

2.50. We note that the Commission in the Mid Kent Holdings report considered that the circumstances there were very unusual. They included the fact that General Utilities and SAUR had entered into an agreement for the specific purpose of setting in train the process of obtaining regulatory approval, that the agreement would be terminated if approval was not forthcoming, and that it did not provide for the parties to control Mid Kent Holdings before any bid was successful.

2.51. In reaching our conclusion in paragraph 2.47, we have already taken into account Vivendi's arguments regarding the degree of influence which it is able to exercise, and regarding the position of News Corporation. Even if we were to take into account KirchPayTV's shareholding and directorship, and were to assume that they would not be voted contrary to the wishes of News International, we consider that these factors are not significant enough to alter the views we have reached in paragraphs 2.32 to 2.43, regarding the pressures on BSkyB to reach an accommodation with Vivendi. Vivendi's arguments about the rate of change in the sector are taken into account below, in considering the effects of the merger relevant to the public interest. We conclude that we see no valid reason here to refrain from treating Vivendi as having acquired 'control' of BSkyB for the purposes of section 65(3) of the Fair Trading Act. Accordingly, we consider that Vivendi and BSkyB are to be regarded as having ceased to be distinct for the purposes of the merger provisions of the Fair Trading Act, and we conclude that a merger situation qualifying for investigation has been created.

The markets affected

2.52. We have concluded that Vivendi is in a position materially to influence BSkyB and that Vivendi and BSkyB may be expected to cooperate as a result of the merger situation we have identified and when it is in their interests to do so. At the same time, Vivendi is in a position to influence the strategy, if not day-to-day management, of the Canal+ group and SECA. We would also expect it to be in the interests of BSkyB, its ultimate main shareholder, News Corporation and other parts of the News Corporation group, and of Canal+ and SECA to cooperate: [

Details omitted. See note on page iv.

]. We have therefore to consider the likely effects of the future relationship between BSkyB and NDS being part of the News Corporation group on the one hand, and Vivendi,

¹*Mid Kent Holdings plc and General Utilities PLC and SAUR Water Services plc: a report on the proposed merger*, The Stationery Office, Cm 3514, January 1997.

Canal+ and SECA on the other. The merger situation having only recently come about, we have concentrated on investigating whether it may be expected to operate against the public interest.

2.53. We consider first the appropriate definitions of the markets affected by the merger situation: in particular whether pay-TV in the UK is the most appropriate definition of the retail market. Similar issues, of the definition of the market and its structure, also arose in our separate consideration of the proposed acquisition by NTL Incorporated (NTL) of the cable interests of Cable & Wireless Communications plc (CWC) which was conducted at the same time, and the analysis of the two groups conducting these inquiries is, where appropriate, common to both reports.

2.54. During the course of this inquiry and the inquiry into the proposed acquisition by NTL of CWC, the other operators of pay-TV in the UK and many others from whom we heard believed pay-TV services could be regarded as a relevant market, separate from that of free-to-air TV. This has also been the view of the Director General of Fair Trading (DGFT), the Independent Television Commission (ITC), the European Commission and this Commission in previous reports.

2.55. In this Commission's report on the proposed merger between BSkyB and Manchester United PLC¹ the Commission noted that the characteristics of pay-TV were different from those of free-to-air TV, there being many more channels on pay-TV including some devoted to specialist programmes, exclusive live coverage of many sporting events and showing of films considerably earlier than they were permitted to be shown on free-to-air TV. Pay-TV was financed by subscribers, over and above the TV licence fee paid by subscribers. The structure of retail prices of cable operators and that of ONdigital were similar to that of BSkyB, the price being related to the number of packages or channels purchased by subscribers; the price structure of these operators was also related to the wholesale prices they paid BSkyB, which in turn was related to BSkyB's retail prices. Prices for pay-TV had increased relative to the retail prices index (RPI) from 1993 to 1998, but there had also been an increase in the market share of pay-TV in that period.

2.56. The Commission acknowledged in that report that there were some sports rights in which free-to-air and pay-TV broadcasters had competed. But this did not mean that sports programmes on free-to-air TV were ready substitutes for those on pay-TV. The latter involved the purchase on an exclusive basis of much sought-after rights, in particular FA Premier League rights for which free-to-air TV could not justify the cost. In the 1996 sale of FA Premier League live rights, all three bidders were planning to broadcast the matches on pay-TV, and no free-to-air channel was a contender. The FA Premier League was also reported as having the view that only pay-TV broadcasters would be able to compete, and the BBC and ITV Network confirmed that they did not expect to submit bids for live rights if the current selling arrangements continued.

2.57. The Commission also took into account demand-side and supply-side considerations. The normal concept of substitutability was not applicable, since before consumers subscribed to pay-TV they must first purchase TV sets and licences, which automatically gave them access to free-to-air channels. While it agreed that there was a degree of price constraint, in that people had to be persuaded that pay-TV was worth buying, it did not think this was central to the question of market definition. Consumers were likely to choose whether or not to subscribe to pay-TV in terms of a broad assessment of its benefits, in particular the very different types of choice of TV viewing that were offered them and its costs. If they decided that they wanted

¹*British Sky Broadcasting Group plc and Manchester United PLC: a report on the proposed merger*, The Stationery Office, Cm 4305, April 1999.

pay-TV, then it was likely to be because they wanted a service that was different from and additional to free-to-air TV, rather than because pay-TV was seen as a substitute for free-to-air TV (for which they would nonetheless have to pay through the licence fee). It therefore seemed improbable that a monopoly supplier of all pay-TV channels (basic and premium) would be prevented from sustaining prices 5 to 10 per cent above competitive levels by the existence of free-to-air TV (this being a criterion widely used in evaluating the extent of the market for competition purposes).

2.58. The Commission therefore concluded there was a separate market for pay-TV while recognizing that the existence of free-to-air broadcasters would place some limit on the prices of pay-TV broadcasters. The Commission went on further to conclude that it was appropriate to distinguish between premium and non-premium channels and between premium sports and film channels, and found the relevant broadcasting market for the purposes of that inquiry to be the market for pay-TV sports premium channels.

2.59. During the current inquiry, BSkyB argued that it was not appropriate to identify a narrowly defined pay-TV market:

- (a) First, it argued that the supply of TV channels in the UK was characterized by intense competition for audiences among all channel providers, including commercial channels and the BBC.
- (b) Secondly, it argued that analogue terrestrial free-to-air channels provided a very effective constraint on the subscription prices that pay-TV broadcasters could charge, and also gave access to virtually every household in the UK able to deliver large audiences to advertisers.
- (c) Thirdly, BSkyB believed differentiation of channel content to be an important factor of competition among channel suppliers, and that the use of exclusive programme rights was a means by which pay-TV channels could differentiate themselves.

Hence, BSkyB did not believe the differences in prices or types of programming implied that channels were in different markets. BSkyB also argued that the Restrictive Practices Court (in its judgment in July 1999 on the agreement between the FA Premier League, BSkyB and the BBC concerning the broadcasting of FA Premier League games) commented that free-to-air TV was a powerful part of the competition faced by pay-TV channels, but we note that the Court made no comment on market definition as such. BSkyB further believed that market definitions would vary depending on the competition problem under investigation and the nature of the particular arrangements or practices whose potential to restrict or distort competition was being addressed, with the further possibility that TV channels may also compete with other kinds of entertainment.

2.60. BSkyB also commented to us on the reasoning used in the Commission's report on the inquiry into the proposed acquisition of Manchester United by BSkyB, in particular arguing that:

- (a) there was no simple, hard and fast distinction between basic channels and premium channels;
- (b) there were no hard and fast distinctions between the prices associated with the basic channel or package of channels and the premium channels;

- (c) although films and certain sport events have been exploited on a pay-TV window, that does not mean that they could not, or could never, be exploited on a basic or free-to-air channel;
- (d) the attempt to draw hard and fast distinctions between premium and basic programming was rendered more difficult by the fact the programmes were not generally sold to consumers individually, but as part of a package of channels;
- (e) there was no reason to believe that the chance of buying rights to premium sports or film material was essentially limited to channel providers who already had a suitable premium channel; and
- (f) with the advent of ONdigital and its strong links with existing Channel 3 broadcasters there was increasing scope for buying consortia to buy rights which could profitably be used on free-to-air and pay-TV channels.

Hence BskyB considered that the Commission was wrong to conclude that the premium channels and basic channels form separate markets or that premium sports and film channels form separate markets within the premium category. The Commission was also wrong to suggest that the mere fact that the substantial number of subscribers were willing to pay extra to watch Sky Sports indicated that it formed a separate market.

2.61. Vivendi was also of the view that free-to-air TV and pay-TV services form part of one and the same market. It noted first that there was a relationship between pay-TV and free-to-air TV from a point of view of substitutability, and the distinction between the two services became blurred when there were pay-TV channels financed by a combination of sources or as a result of the increase in digitalization of programmes. Secondly, pay-TV and commercial and public free-to-air TV services competed for viewers and revenues. Thirdly, pay-TV services were reliant on rights to show highly popular programming, with vigorous competition between free-to-air TV and pay-TV for such rights. Nor did Vivendi regard any distinction between premium and basic channels as valid.

Assessment

2.62. As we note in paragraph 4.30, TV in the UK is comprised of a hierarchy of broadcasting markets: first, the acquisition of rights and the making of programmes (although in the context of the current inquiry it is appropriate to regard these as two distinct stages); second, the wholesale market (in which channels are supplied to retailers); and third, the retail markets (ie the supply by the individual platforms to the viewers). Broadcasting rights to sports and films are of particular relevance to the current inquiry, and it is also useful at the first stage of the supply chain to distinguish separate markets for the acquisition of sports rights and the acquisition of film rights. Although some of the main issues in the current inquiry relate to the acquisition of such rights, the market for the acquisition of rights has to be seen in the context of the wider retail market. We therefore consider in the following paragraphs whether it is valid to regard pay-TV, or a wider market including free-to-air TV, as appropriate for that purpose.

2.63. In our view, the focus of pay-TV, with its particular emphasis on film and sport, is significantly different to that of free-to-air TV; it is financed differently, since finance comes primarily from subscriptions; the costs it charges customers for all but some very limited groups of programmes are significantly higher and have increased over time; and its subscriber basis and the absence of a public interest obligation put it in a considerably stronger position than free-to-air TV to bid for the most attractive rights on offer. Only a pay-TV channel has the channel capacity to broadcast sport, films and other specialist channels so extensively or is realistically at present in a position to finance the acquisition of the most expensive sport and

film rights. Although, for example, individual events on the ITV networks can be financed by advertising income, advertising income alone is likely to be inadequate to finance the extensive coverage of FA Premier League football provided by BSkyB, nor would there be the channel capacity to provide such coverage given the other obligations on the range of programmes to be shown. Hence we believe pay-TV can be regarded as a retail market separate from that of free-to-air TV. However, we acknowledge that there are interactions with free-to-air TV: the demand for pay-TV is to some extent affected by the programmes shown on free-to-air TV, and there is some competition between pay-TV operators and free-to-air TV in bidding for some, but not all, programme rights. There is also on occasion a degree of collaboration between the two in the acquisition of rights (for example, between ONdigital and ITV for the UEFA Champions' League). We also believe that the market can be regarded as mainly national, the bulk of programmes having primarily national appeal, and with rights still negotiated primarily on a national basis: however, international aspects of the market are considered further below. In addition, there would appear to be separate markets for different types or categories of TV channels (see paragraph 4.41).

2.64. We considered whether pay-TV could increasingly be regarded as part of a wider market, which had now come to include telephony and interactive services: a point emphasized by the media commentators to whom we spoke. An increasingly important feature of the cable industry is the ability that cable technology provides to offer a multiplicity of services over the single cable network, including pay-TV, telephony and interactive services, and this ability is heightened by the increase in number of channels which is made possible by digital technology. Open in which BSkyB has a significant shareholding also offers, through the digital decoders supplied free to users of satellite services, interactive services using a combination of satellite reception and telephone connections. With the introduction of new ADSL technology, some current pay-TV services, such as films, could themselves become available over the telephone network. Despite such convergence of technologies, most of the parties from whom we heard suggested that customers still see pay-TV, telephony and other services as separate. We also take the view that pay-TV and telephony services can still be identified as separate markets, albeit with an increasing degree of interaction between them. Digital interactive services have not yet developed as a separate market but interactive services supplied in association with pay-TV are likely to compete increasingly with similar services available via the Internet and accessed from PCs. As technology develops, separate markets for e-commerce, interactive games, video on demand or e-mail may emerge in which TV-based uses compete with access to the Internet from PCs using a modem.

2.65. The merger situation we have identified also has implications for aspects of TV delivery systems. In this context we regard it as appropriate to distinguish a separate market for conditional access technology, which, as we discuss in paragraph 2.100 et seq, is essential to the operation of pay-TV systems. This is a particular application of digital technology that has become increasingly sophisticated and the development resources and time needed for introducing a new system suggest that it is preferable to treat the supply of conditional access services as a separate market from other applications of digital technology, for example access control.

The UK retail market for pay-TV

2.66. Pay-TV services in the UK are currently provided by satellite transmission (sometimes referred to as 'direct-to-home' or DTH), of which the main operator is BSkyB; by cable operators; and by digital terrestrial transmission (sometimes abbreviated as DTT), of which the main operator is ONdigital. A number of parties told us that the UK was unusual in having competition between three different platforms. Table 2.1 summarizes the estimated market shares of pay-TV subscribers and revenues (including advertising) in the UK at September 1999.

TABLE 2.1 Share of pay-TV subscribers in the UK, September 1999

Company	per cent	
	Subscribers	Revenues (incl advertising)
BSkyB	50.4	64.0
<i>Cable operators</i>		
NTL	14.9	8.6
CWC	12.2	11.8
Telewest Communications	15.8	12.8
Other cable operators	<u>0.9</u>	<u>0.8</u>
Total cable operators	43.8	34.1
ONdigital	<u>5.8</u>	<u>1.9</u>
Total	100.0	100.0

Source: Commission study.

Note: Numbers in this table and elsewhere in this report may not sum because of rounding.

2.67. BSkyB's share of total pay-TV subscribers has declined from 62 per cent in 1997 to 50 per cent due to the increase in cable and DTT. ONdigital's share of subscribers has also grown rapidly since its introduction toward the end of 1998. BSkyB remains, however, the major provider of pay-TV services in the UK, with about one-half of subscribers, but a higher share of pay-TV retail revenue, about 64 per cent, since more premium content is purchased by BSkyB subscribers than is purchased by subscribers to cable. Excluding advertising revenue (which could be regarded as deriving from BSkyB's activities as a content provider rather than its activities as a platform operator), its share would be about 60 per cent. The figures in Table 2.1, however, exclude BSkyB's revenues from cable operators and ONdigital (some £265 million a year out of the subscription income of cable operators and ONdigital of £740 million a year: see Table 4.5) in order to obtain programme content from BSkyB.

2.68. BSkyB's channels (including joint ventures with other content providers shown in Table 4.2) account for about one-half of viewing of pay-TV channels, but with the BSkyB premium channels regarded as of particular value to users. Its channels also remain important to the ability of other platform operators to compete. It is required to supply premium channels to other operators according to a published rate card. The DGFT is empowered to approve the structure of discounts offered within the rate card, but not the level of individual prices. BSkyB has some discretion to determine the latter. Other operators believe its wholesale prices are insufficient to allow them to earn an adequate margin on BSkyB's premium channels. BSkyB's activities as a supplier of content to other pay-TV retailers, including the requirement to publish a rate card, are currently being reviewed by the DGFT.

2.69. The choice of pay-TV programmes offered by the different platforms varies, and the introduction of digital technology will significantly increase the range of such choice. The DTH platform has a capacity of some 200 channels in digital transmissions introduced at the end of 1998, which could increase further when more satellite capacity becomes available. By October 1999 some 1.5 million BSkyB subscribers (out of 3.6 million total BSkyB subscribers) had started using its digital services and this is known to be increasing rapidly. Cable operators can generally provide some 50 channels in analogue transmission; with the introduction of digital technology (which CWC and Telewest Communications plc (Telewest) have only recently commenced), they would be capable of offering some 150 channels before the customer base had fully converted from analogue equipment, and ultimately, when the customer base was fully converted to digital equipment some 500 channels. In practice, however, both BSkyB and the cable operators have reserved a significant proportion of channel capacity for 'near video on demand' (meaning the dedication of several channels starting the same film at very frequent intervals) and, in the case of satellite, sports channels with a degree of interactivity. ONdigital offers some 30 channels.

2.70. Cable provides both telephone and TV service, generally with no additional rental charge for telephone connection. Digital cable services will allow Internet access and interactive services such as home shopping and games. Cable services have, however, required a substantial capital investment, and (on the figures we have seen to date) have yet to earn a post-interest profit. The proposed merger between NTL and the cable interests of CWC has been the subject of a parallel inquiry by the Commission. Cable operators currently provide their own selection of channels, and bill all subscribers themselves, whereas satellite is an open system in which other operators can sell direct to customers.

2.71. Although the cable networks are generally regarded as having a technological advantage in delivering digital pay-TV and other services, in particular through being able to offer a bi-directional service for use in interactive services, BSkyB has gained significant advantage in being the first platform to introduce both digital pay-TV and interactive services. A joint venture between BSkyB and BT (also involving HSBC and Matsushita), whose parent company is called British Interactive Broadcasting (BiB) and is known as Open (see paragraph 2.46), uses satellite transmission in combination with the telephone network.

2.72. ONdigital (itself owned by Carlton Communications Plc and Granada) has recently entered the market using terrestrial broadcasting, without a requirement for a satellite dish or expensive fixed link, though the range of choice is currently more limited: it has also in part relied on access to BSkyB channels, while acquiring some additional exclusive sports rights.

2.73. Vivendi currently has only a limited interest in pay-TV services in the UK. As noted in paragraph 3.152, Canal+ has a 33 per cent share of the ownership of Eurosport International, of which there is a UK version, called British Eurosport. The Eurosport channels are available without extra charge on cable and satellite. As apparent in Table 4.2, however, they currently account for less than 3 per cent of the share of pay-TV audiences in the UK.

2.74. We agree with most of the parties from whom we heard that BSkyB remains in a strong position in the market, due to the strength of its portfolio of rights particularly as regards rights for its premium films and sport channels, and the large number of its subscribers. We recognize that this position had been earned through BSkyB's willingness to innovate and make substantial investment and to take significant risks in the earlier stages of development of the industry and by the effectiveness of its programme content and marketing. As put to us at a meeting with media commentators, BSkyB had in effect been the creator of the pay-TV industry in the UK.

2.75. In addition to the three existing pay-TV platforms, there is a prospect of further competition from new entry using new technology, in particular using ADSL technology, but also, in the slightly longer term, microwave radio and the new mobile phone technology. However, the impact of such technology is uncertain. As noted in paragraph 4.26, the capacity of ADSL technology depends crucially on the length of line between local telephone exchanges and the premises using the service, and much of BT's network is such that, although highly suitable for high-speed Internet access, it could not for the most part provide the necessary capacity for other than a restricted TV service. The ADSL service may initially be expensive to service providers or users, although costs may be reduced as competitors are allowed access to BT's local loop from 2001. The existing operators, such as NTL and BSkyB, may themselves make use of DSL technology, as in the joint venture between Kingston Communications and BSkyB announced during our inquiry, as well as competing with it. There is also the prospect of Internet services, possibly using mobile phones, including video pictures, for example of goals in football matches. In the USA the proposed merger between AOL and Time Warner has shown the potential for competition between the Internet and pay-TV and the value of content and control of the Internet portal in future Internet developments. Together with the eventual substitution of digital for analogue terrestrial transmission, the pay-TV market may change fundamentally over the next ten years. This may have a significant effect on BSkyB's position in the market.

Third party views

2.76. Chapter 5 summarizes views of third parties. Some 9 of the 11 parties from whom we heard expressed concern about aspects of Vivendi's acquisition of its shareholding in BSkyB. There were two predominant issues of concern: the effect on acquisition of broadcasting rights and the effect on supply of conditional access technology. The issues statement at Appendix 2.1 and the issues letter sent to BSkyB and Vivendi were to a large extent based on those concerns. We also summarize in Chapter 5 the views of a number of media commentators about their perception of the market.

Issues

2.77. There is currently negligible direct competition between BSkyB and the Vivendi group that would be adversely affected by the merger situation. As noted in paragraph 2.73, the Eurosport channels, in which Canal+ has a shareholding, currently account for less than 3 per cent of pay-TV viewing. No concerns were expressed to us about the effect of the merger situation on Eurosport. Nor did we find any evidence that Vivendi or Canal+ could be regarded as a significant potential competitor as platform operator or content provider in the UK market at least in the short term. Nonetheless, the concerns raised by third parties suggested that the merger situation could impact on competition by affecting the acquisition of broadcasting rights, and through the supply of conditional access technology. Some of those concerns were reinforced by BSkyB's intention to acquire a 24 per cent shareholding in KirchPayTV.

Effect on acquisition of rights

2.78. We considered whether the merger situation we have identified could, through Vivendi's interest in Canal+, affect competition for the acquisition of sports rights and film rights for use in the UK, including, for example, enhancing the bidding power of BSkyB in collaboration with Vivendi or Canal+ for acquisition of such rights, with effects on the UK market, or result in the acquisition of rights in the UK being tied to the acquisition of rights in other national markets. The availability of programme rights, particularly for sports and film, is of great importance to the ability of different systems and channel providers to compete.

Sports rights

2.79. Sports rights are currently defined on a territorial, often a national, basis, since it is in the interests of the sellers of these rights to exploit the differences in demand between countries. Hence the rights are not substitutable between different countries; a purchaser of sports rights for use in the UK is effectively in a monopoly position, and can exploit these rights at the retail pay-TV level, irrespective of who holds these rights in other countries. To a substantial degree, therefore, the UK market for sports rights is separate. This does not, of course, prevent packages of rights being offered on a wider territorial basis. Participants in the markets for sports rights are, on the supply side, organizers of sporting events and, on the demand side, both pay-TV and (for some rights) free-to-air broadcasters, as well as intermediaries usually known as 'brokers'. We received little expression of concern from rights holders as to the effect of Vivendi's share acquisition: we expect that this may have been because rights holders for those sporting events with the most popular appeal among viewers and least substitutable with other events are themselves in a strong market position and able to restructure their tendering arrangements if they thought they were being disadvantaged by any joint bidding.

2.80. As discussed in paragraphs 4.60 to 4.88, the sports rights that BSkyB has acquired give it a strong position in the retail pay-TV market in the UK. Payments to sports organizers for rights tend to reflect the value of the rights to broadcasters and the value of the sports events

to viewers, certain sports events clearly having a considerably higher value than others. The rights that are most lucrative for BSkyB, accounting for about one-half of its expenditure on sports rights, are those for the FA Premier League and its other main football rights are also national. Virtually all BSkyB's sports rights are on an exclusive basis and generally confined to the UK, though in some cases rights holders have required it to sub-license some elements of the rights. Canal+ has many main sports rights in France and various other EC countries, and its subsidiary Sport+ also buys rights, often secondary rights outside the country of origin, on a worldwide exclusive basis: but the strength of the position of Canal+ is in different national markets to that of BSkyB.

2.81. Although both companies denied that they were likely to collaborate in the acquisition of such rights, we noted in paragraph 2.13 press reports in November 1999 that a senior Canal+ executive referred to cooperation on content and the possibility of joint bidding for sports rights. Vivendi told us that the press reports were speculative. It said that it had no intention to collaborate on any scale in the acquisition of existing sports rights as a result of the share acquisition, and we note that there was no explicit mention of collaboration in the acquisition of sports rights in the board minutes or the board paper to which we referred in paragraphs 2.13 and 2.14. BSkyB argued that if it was in their interests to collaborate they would do so anyway, without the share acquisition we are considering, and noted that at present such collaboration was generally carried out by companies with no ownership links. Both companies were unwilling to commit themselves not to collaborate in future, given the extent to which other companies, including public service broadcasters, did so.

2.82. As we have noted in paragraph 2.29, we expect it to be in the interests of BSkyB and Vivendi/Canal+ as a result of Vivendi's material influence to collaborate to some degree in areas such as the acquisition of sports rights where it is feasible to do so and if it is in their interests to do so. We have noted the arguments of both companies that, if it was in their interests to collaborate, they would do so irrespective of the share acquisition: but in our view Vivendi's major shareholding in BSkyB and its participation on the BSkyB board is likely to lead to more interest in BSkyB's business and to a wider range of commercial contacts with the company. Collaboration is therefore likely to be enhanced by Vivendi's material influence on BSkyB. We also note in paragraph 4.82 that there is likely to be at least some scope for joint bidding; and in paragraph 4.86 that we thought BSkyB's strengths might be enhanced to some extent as a result: we have, therefore, to consider the likely extent of such collaboration, and its effect on the UK market.

2.83. It has been argued to us that one important reason why collaboration between Vivendi and BSkyB would have a significant effect on the market is that the increased scope for bidding on an international basis would enable the two companies to increase their share of sports rights. However, in our view BSkyB is already in a strong position particularly in acquisition of rights to sports primarily of national appeal within the UK, and the highest value rights such as the FA Premier League. Acquisition of such national rights is unlikely to benefit from joint bidding, or the tying of bids, between BSkyB and Vivendi/Canal+ since the value of these rights in other markets is limited. Similarly, although Canal+ has a range of secondary rights for events mainly of national appeal in other European countries (for example, the Italian Premier League), the disposal of these rights in the UK is unlikely materially to affect competition in the pay-TV market in the UK.

2.84. Rights to international events are also at present awarded mainly on a national basis. The ITC and others argued that sports of 'international' appeal—ie likely to be viewed in more than one country—are of growing importance: the ITC suggested that at least half of sports rights to be awarded over the next three years (as listed in Appendix 4.7) are of an 'international' nature. In our view, however, the amount that the companies would wish to pay for particular rights would still be primarily based on what they were worth in terms of sale at the relevant national retail level, and the merger would not bring about any change in the subscriber base of the two companies. There is therefore insufficient reason for us to expect that

the merger situation would materially impact on BSkyB's acquisition of rights to such international events if joint bidding occurred, or that it would materially affect other pay-TV operators in the UK.

2.85. BSkyB also pointed to the success of free-to-air channels and ONdigital in winning sports rights, sometimes themselves in collaboration, including ITV and ONdigital which own exclusive rights to the UEFA Champions' League and the European Broadcasting Union (EBU) (a consortium mainly of free-to-air national broadcasters) which won rights to the European Football championship. We accept that there is competition for a wide range of sports rights. Free-to-air broadcasters have competed effectively and often successfully for rights to many main international sporting events, some of which are also 'listed' by national authorities (ie required to be transmitted on free-to-air terrestrial TV). There is also competition from brokers particularly to acquire secondary rights to sell on to both free-to-air and pay-TV operators, often outside the country of origin. Such competition is shown by the continued increase in the price of many such rights. The existence of such competition does, in our view, further reduce the extent to which Vivendi and BSkyB could attempt to tie the purchase of rights between different territories.

2.86. We noted in paragraph 2.56 that free-to-air TV has not realistically been in a position as yet to compete for the most expensive rights, notably UK rights for the FA Premier League. However, NTL, one of the main cable operators, now intends to compete for such rights, and the increasing integration of the cable industry will strengthen their position, although their success is uncertain and their current activities are confined to participation in a contractual joint venture with British Eurosport (in which Vivendi has an interest). BSkyB pointed to the financial resources of the shareholders in other platforms as indicating that they have equal ability to bid for rights. We accept that the cable industry is in a stronger position to compete for rights, given its recent consolidation and the increased support by companies such as France Télécom SA and Microsoft, but whatever the financial support, such companies will need to derive value from such deals and are currently in a worse position to do so given their lower market share at the retail level than BSkyB. Nonetheless, the retail market is likely to develop rapidly with the prospect of increased competition to BSkyB and this is likely to strengthen the competition for sports rights: we have seen insufficient evidence that any collaboration between BSkyB and Vivendi would impact adversely on such developments.

2.87. Both companies also argued that, were they to collaborate, they would be subject to the same level of scrutiny from the competition authorities as if the share acquisition had not occurred. Indeed, in response to the press reports of the possibility of collaboration in acquisition of sport and film rights to which we referred in paragraph 2.13, the European Commission informed BSkyB that such cooperation and/or agreements resulting from that cooperation might constitute an infringement of Articles 81 or 82 of the EC Treaty. The possibility of intervention by the competition authorities in our view further reduces the prospect that collaboration in acquisition of sports rights would adversely affect competition from other bidders for such rights.

Assessment

2.88. It is understandable that there should be concern about collaboration in acquisition of sports rights, given the strength of BSkyB and Canal+ in the different territories in which they operate, and in the context of increasing collaboration and cross-shareholdings in EC media broadcasting companies. It is also understandable that there should be concern that, were the market power of BSkyB in the UK market for pay-TV to be further increased, the position of other channel providers, or suppliers of other pay-TV platforms, such as cable operators or DTT, would be adversely affected, to the disadvantage of consumer choice. There was a related concern over the effects on the supply of highlights of any greater concentration in ownership of rights to broadcast live sports.

2.89. However, there are a number of reasons which cumulatively make us consider that it is not to be expected that BSkyB would gain any significant advantage from the merger situation as a result of collaboration on bidding. First, BSkyB's position in acquisition of sports rights is already strong, given its strong financial resources (including that of News Corporation), the large number of its subscribers at the retail level, and its advantage from being the incumbent, with a good reputation for the quality of its programmes. Secondly, the key national rights are unlikely to be affected by collaboration and joint bidding may make little difference to bidding for international rights. Thirdly, there is the prospect that any such collaboration (which may to an extent occur irrespective of the merger situation) could give rise to intervention from the national or EC competition authorities and any anti-competitive effects could be penalized. We do not therefore see sufficient grounds for expecting that the merger situation will have a significant effect on acquisition of sports rights, or on competition between pay-TV operators in the UK. In the longer term, moreover, the market is itself likely to develop rapidly, with the possibility of new pay-TV platforms emerging, the enhanced strength of the cable industry following recent consolidation, and increased competition to BSkyB in acquiring sports rights; any collaboration between BSkyB and Vivendi is unlikely to affect such developments given the other factors we have outlined. For the same reasons, we do not expect the merger situation to affect the supply of highlights, the showing of which can also be of significant value to rights holders.

2.90. The development of the sports rights market, and the effect of the share acquisition we are considering, are, however, uncertain. Of equal concern to other pay-TV platform operators and to consumers is to ensure availability of premium sports coverage to a variety of platforms on reasonable terms, a concern that goes considerably beyond the effect of the merger situation we are considering. BSkyB's position in acquiring rights as the market continues rapidly to evolve, with or without the effects of the current merger situation, and the terms on which it supplies other platforms are issues more readily kept under scrutiny under the Competition Act 1998, the monopoly provisions of the Fair Trading Act, or by the European Commission. The effects of any collaboration may be more likely to arise elsewhere in the EC than in the UK, the merger situation we are examining being among a number of arrangements between European broadcasting companies which may merit wider examination in due course by the European competition authorities.

Film rights

2.91. Similar considerations apply as regards the acquisition of film rights, which are discussed in paragraphs 4.89 to 4.109. As with sports rights, film rights are specific to particular countries, and not substitutable with respect to other countries, and it is in the interests of rights holders to maintain that position. The holder of these rights in the UK is effectively in a monopoly position irrespective of who holds them in other countries. Participants in the market for film rights are, on the supply side, film makers, notably the large Hollywood studios which are in a very strong position in the market, particularly for the most recent and popular releases, and, on the demand side, the broadcasters and the brokers.

2.92. The film rights that BSkyB has acquired give it a strong market position in the retail pay-TV market in the UK. It has, for example, acquired UK rights to all six major film studios for an exclusive pay-TV 'window' (in the UK only). News Corporation owns Twentieth Century Fox, one of the major Hollywood studios, and BSkyB has started to produce films on a small basis. We note in paragraph 4.102 an argument that the length of such rights adds to the difficulty of new entrants in assembling a substantial package of rights: but we accept the arguments of both BSkyB and Vivendi that entry on a more limited scale is feasible.

2.93. Whereas film rights for showing on pay-TV are generally exclusive, pay-per-view (PPV) rights are currently exclusive only with respect to DTH platforms used (ie not available

for other broadcasters by satellite transmission), but otherwise non-exclusive. The cable companies, in particular NTL, are therefore currently able to show films on a PPV basis, NTL and Telewest having set up a joint venture, Front Row, for this purpose. Front Row could be regarded as offering competition to Sky Box Office, BSkyB's PPV channels, although BSkyB has complained that it is now unable to secure distribution of Sky Box Office over the NTL and Telewest cable networks; Front Row could also be regarded as offering a competitive alternative to the BSkyB premium film channels. ONdigital also has a joint venture with NTL to develop a PPV channel on DTT. The cable companies intend, moreover, to compete more actively for rights and there is the further prospect of competition from new platforms, in particular using ADSL technology to which we referred in paragraph 2.75.

2.94. Vivendi also currently has a strong position. The European Commission estimated that Canal+ has rights to 86 per cent of recent Hollywood output in France, weighted by audiences, although Vivendi told us that Télévision par Satellite (a digital platform launched by the leading French TV channels) now had exclusive rights in France for particular pay-TV windows with three of the six Hollywood studios: Vivendi's position in the French market was therefore weaker than that of BSkyB in the UK. Canal+ acquires those rights for the French and other EC markets outside the UK, produces some French films, has a joint venture with Warner Bros (called Bel Air), and is also involved in the trading of film rights. As in the case of sports rights, however, the strong position of the Canal+ group is in different national markets to that of BSkyB.

2.95. We noted in paragraph 2.13 press reports in November 1999 that a senior Canal+ executive referred to cooperation on content and the possibility of BSkyB and Canal+ jointly bidding for rights to Hollywood films. We also noted in paragraph 2.14 the paper to the Vivendi board in July 1999 which referred to the purchasing power of the two groups enabling them to strengthen their position vis-à-vis US programme suppliers. We have noted that Vivendi told us the press reports were speculative, and nothing could be inferred from the paper circulated to the Vivendi board. But as in the case of sports rights, we believe BSkyB and Vivendi would collaborate in areas such as the acquisition of film rights if it was in their interests to do so and, for the reasons set out in paragraph 2.82, that the prospect of such collaboration would be increased as a result of the merger situation, as also implied by the paper to the Vivendi board. We note in paragraph 4.109 that there is likely to be some scope for such joint bidding and that BSkyB's strength may be enhanced to some extent as a result.

2.96. Although rights to Hollywood films are awarded on a national basis, the same films are currently provided to different countries and dubbed accordingly, suggesting that there is scope for the sale of rights on an international basis. It is also acknowledged that share of audience is key to the granting of many such rights. It is therefore again understandable that the ITC and others should be concerned that more rights would be awarded on an international basis to the advantage of BSkyB and of Vivendi and Canal+, given the strong position of BSkyB and Vivendi in acquisition of film rights in the separate national markets. It is also understandable that there should be concern that collaboration between BSkyB and Vivendi in the acquisition of film rights could disadvantage other pay-TV platforms, given the importance of film channels to pay-TV operators.

2.97. However, we believe that any advantage to BSkyB from collaboration with Canal+ in the acquisition of film rights will be only limited. BSkyB is currently in a strong position in acquiring film rights and that position is unlikely to be enhanced significantly by any association with Vivendi or Canal+. The merger situation does not make any difference in terms of the subscriber base, hence in justifying a higher bid if BSkyB and Vivendi bid together, the amount to be found would still be largely based on what the rights were worth in terms of sales at the retail level in each country separately. There is an increasing prospect of other operators competing successfully for film rights. Finally, collaboration could give rise to intervention from the national or EC competition authorities if it had anti-competitive effects.

2.98. Uncertainties in the development of the pay-TV market, however, apply particularly to the market for film rights given the developments in the industry generally such as the proposed merger between AOL and Time Warner. It is possible that any concentration in the industry in Europe may to some extent offset the effects of any concentration of the industry in the USA: cooperation between the main European companies may therefore also result irrespective of this merger.

2.99. As in the case of sports rights, therefore, we believe the effects of the merger situation we have to consider are uncertain and may be more likely to arise elsewhere in the EC than in the UK. Given also the prospect that any such collaboration would give rise to the intervention of the national or EC competition authorities, we do not see sufficient grounds for expecting that the merger situation would have an adverse effect on the acquisition of film rights or on competition between pay-TV operators in the UK. Concerns which relate to BSKyB's position irrespective of the merger situation we have to examine may again be more appropriately addressed under the Competition Act, the Fair Trading Act or by the EC.

Conditional access technology

2.100. Thirdly, we considered whether the merger situation we have identified could, through Vivendi's interests in Canal+ and SECA, affect the supply of conditional access technology to pay-TV platforms that compete with BSKyB, or the maintenance and development of such technology.

2.101. We noted in paragraph 2.65 that it was appropriate to treat the supply of conditional access services as a separate market. Conditional access software allows a pay-TV operator to authorize or prohibit the unscrambling of programmes in order that only those subscribers with a set-top box and (in most systems) a smartcard and a valid subscription can watch the programmes transmitted. It is therefore an essential technology for the raising of subscription fees, PPV charges and other pay-TV revenues. It functions together with interactive and access control software, which allows the viewer to access interactive services. Although platform operators are required to make the conditional access technology they use available to independent broadcasters on fair, reasonable and non-discriminatory terms, there is no regulation of the terms on which the technology is licensed to platform operators.

2.102. BSKyB uses the VideoGuard system licensed from NDS; ONdigital the Mediaguard system licensed from SECA, a 50:50 joint venture between Canal+ and Bertelsmann AG. BSKyB is one of many users of the VideoGuard system within and beyond the News Corporation group, and Mediaguard is used widely within Canal+, and by other users. ONdigital told us that, when BSKyB had been part of the ONdigital consortium which applied for the DTT licence, it had actively promoted the NDS system for the DTT platform. When BSKyB had been required on competition grounds to leave the consortium, ONdigital considered other possible systems. Mediaguard had been chosen partly because ONdigital was concerned that, with the linkage between BSKyB and NDS, conflicts of interest might have arisen had it chosen VideoGuard; it felt SECA was likely in consequence to provide a higher level and quality of support. In addition, it believed that the SECA system offered certain technical and cost advantages over NDS.

2.103. There are reported to be three other manufacturers of conditional access technology in Europe, and six or seven in total in the world, although only NDS and SECA could satisfactorily meet ONdigital's requirements. NDS and SECA systems together account for more than 60 per cent of all pay-TV subscribers within the EC, and for a far higher proportion of non-cable subscribers.

2.104. The ITC is encouraging interoperability between set-top boxes used by ONdigital and BSKyB and promoting the installation of sockets which would allow TV sets readily to be

switched between alternative digital platforms. There would be benefits to consumers from common systems that would allow them to switch between different pay-TV platforms. As noted in Appendix 4.2, there is a requirement that digital TVs which contain integrated satellite, cable or digital terrestrial decoders must include a standardized socket which allows for connection to the decoder of conditional access and other elements of different digital TV systems. Progress toward interoperability has, however, been limited and we were told that it would be necessary to change existing set-top boxes before interoperability could be fully introduced: it is uncertain to what extent interoperability will ultimately be achieved.

2.105. The main concerns raised with us were first that SECA would not continue adequately to maintain and develop a system for a competitor to a company in which one of its main shareholders had a material interest; and secondly, that information available to SECA from its involvement in that system could be used by BSkyB to the detriment of ONdigital. Either outcome, it was said, would severely damage existing users, such as ONdigital, irrespective of whether alternative systems are available: to switch to another system would require all set-top boxes to be changed which would be prohibitively costly. Thirdly, however, there was a concern that in the longer term there would be a reduction in competition in the supply of conditional access technology.

2.106. It is again understandable that there should be such concerns given the position of NDS and SECA in the market, and NDS's ownership by News Corporation, and that there should be concern that an adverse effect on the supply of conditional access technology could adversely affect the ability of such pay-TV platforms to compete with BSkyB, and the choice of channels or pay-TV platforms available to consumers.

2.107. On the first of these concerns, the loss of support for existing systems, the evidence we received showed that conditional access technology is clearly of major importance to a platform operator both to be able to operate a pay-TV system at all, but also to incorporate adaptations necessary for ongoing commercial developments that are required to compete effectively with other platforms. Hence, loss of the prioritization of such developments could also have significant competitive consequences.

2.108. In relation to ONdigital, we also accept that there would be considerable cost, maybe in excess of £150 million (see paragraph 4.127), were it at present to change between suppliers, to the extent that this would not be seriously contemplated. Hence, following the choice of a particular technology there is little option but to stay with the supplier, even if the ownership of the supplier changes.

2.109. BSkyB pointed to the serious consideration given by ONdigital to the use of the NDS technology, suggesting that the detriments from doing so were not regarded as that great. NDS's involvement, however, reflects in part the original intention that BSkyB participate in ONdigital, although BSkyB's linkage with NDS was only one factor in ONdigital's choice of the alternative SECA system. BSkyB also queried whether it would be in a position to influence either NDS or SECA to disadvantage its competitors as a result of Vivendi's material influence in BSkyB, as opposed to BSkyB itself having a material influence over Vivendi. It also believed the introduction of interoperable systems would reduce the cost of switching between systems and the dependence on any individual systems.

2.110. Vivendi said that it would not be in its interest or that of SECA or Canal+ that ONdigital's use of SECA not be supported. Vivendi regarded the Mediaguard system, and ONdigital's use of it as the first external customer, as important to SECA [*Details omitted.* See note on page iv.]; to damage ONdigital could damage Mediaguard and SECA.

2.111. We see insufficient reason to believe that Canal+ or SECA would cease to provide ONdigital with the necessary support, given the importance of that contract to them. As well as

the contractual relationship between SECA and ONdigital, to damage ONdigital could, in our view, damage Mediaguard and SECA. We have noted the argument that the value of Vivendi's stake in BSkyB would exceed that in SECA. However, Mediaguard technology is important to Canal+'s own operation, and it is uncertain whether any policy of disadvantaging ONdigital could increase the value of Vivendi's stake in BSkyB more than it would reduce the value of its stake in SECA. BSkyB also earns revenue from supplying content to ONdigital, with the likelihood that such revenues would be reduced if it or Vivendi sought to undermine ONdigital's position, particularly since DTH and DTT services to some extent serve a different part of the market.

2.112. On the second of the concerns raised in paragraph 2.105, that the merger situation could result in information, acquired from involvement in supply of conditional access technology, about the strategy or performance of other pay-TV platforms, being made available to BSkyB and used to the disadvantage of its competitors, BSkyB expressed scepticism that any such information was particularly valuable, and whether strategically or commercially important information would not already be known. ONdigital, however, pointed to the large number of competitive developments on which it has to work in close cooperation with SECA. Vivendi and Canal+ argued that there were strict contractual constraints on any such abuse of information, and that it was in the interests of both parties to observe them.

2.113. We believe it highly unlikely that information would flow from SECA or Canal+ through their involvement in the supply of conditional access technology to BSkyB given the contractual safeguards that are already in place and the interests of SECA, as well as of its customers in maintaining confidentiality. Even in the longer term, any convergence of the systems may not necessarily result in a merger between SECA and NDS, and we believe the risk of such an abuse of information is limited by the commercial interests of SECA and its contractual provisions, and of News Corporation's interests in preserving the reputation of NDS.

2.114. As regards the possibility of reduced competition between NDS and SECA, we have noted in paragraph 2.14 the references in Vivendi's board papers to the possibility of joint projects in the fields of technology, convergence and digital decoders. In the private paper circulated to the board there was a further statement that the two operating technologies developed by SECA and News Corporation should converge so as to permit joint developments for the next generation of decoders, and Vivendi acknowledged to us that convergence would be sensible. In our view, Canal+ and SECA as a result of the merger situation may consider the options for collaboration with BSkyB and News Corporation, the owner of the majority of shares in NDS, although this need not amount to a merger of NDS and SECA; a degree of collaboration may well prove to be in the interests of BSkyB and NDS, and of Canal+ and SECA, and of their leading shareholders, and may well occur. On the other hand, we expect that any potentially anti-competitive cooperation between the two companies would attract the attention of the EC competition authorities. The form and extent of collaboration or of any convergence of the systems that would result cannot therefore be established with any certainty.

2.115. We acknowledge that convergence of the NDS and SECA systems could reduce the number of potential suppliers of such technology and competition in the market in the longer term. However, convergence might also have advantages to users by promoting interoperability of systems, although this would depend on the cooperation of the platform owners as much as the availability of a common technology. Any impact of convergence on ONdigital will not occur for a number of years, as it has only recently installed its conditional access system subject to long-term contractual provisions, and other systems would have the opportunity to enter the market when the existing contract expires.

2.116. We have seen therefore insufficient evidence to expect that SECA would restrict support for ONdigital, or abuse the information to which they may have access: either practice could damage SECA, and possibly Canal+. The contractual arrangements between SECA and

ONdigital provide some further assurance, in combination with the other factors we have considered, that Vivendi, Canal+ or SECA would not act in the way feared; [

Details omitted. See note on page iv.

]. As regards convergence, it is far from certain what form collaboration between the Vivendi group and BSkyB might take, given in particular possible scrutiny of the competition authorities. There is also uncertainty as regards the effect on consumers: interoperability requires the cooperation of owners of platforms as well as technological convergence, and it is not clear how much progress may be made over the next several years in introducing interoperability without the merger situation we are investigating, and whether the merger situation may therefore accelerate interoperability to the benefit of consumers.

2.117. While therefore we believe it is understandable that concerns have been raised, there are insufficient grounds for us to expect there to be an adverse effect on the maintenance and development of the SECA system for ONdigital or on the abuse of information or on competition in supply of conditional access technology to result from the merger. Further convergence of the systems, or any full merger of NDS and SECA, would, however, be likely to result in further investigation by the competition authorities.

Other issues

2.118. Concern was also expressed to us that the merger situation could have adverse effects on UK sports markets given both companies' interests in football clubs, including a possible public perception that results could be influenced. BSkyB has interests of below 10 per cent in Manchester United and four other UK football clubs, and the Vivendi group has larger interests in Paris St Germain and Servette of Genève. If these holdings were to give rise to concerns, the competition or football authorities would have powers to intervene. In any event, we consider that this merger situation does not give rise to any increased risk that sports markets would thereby be harmed.

Conclusions

2.119. We have found that the concerns expressed about the effect of the merger situation on the acquisition of film rights and sports rights, and on conditional access technology, are understandable given the position of BSkyB and the Vivendi group in the market. In our view, however, there are insufficient grounds to expect the merger situation adversely to affect competition or consumers in the UK. Wider concerns about the pay-TV industry irrespective of the merger situation would merit continued scrutiny by the regulatory authorities as the market continues rapidly to evolve as a result of technological and other developments. We have therefore concluded that:

- (a) There is currently no material direct competition or potential competition between BSkyB and the Vivendi group that would be affected by the merger situation (paragraph 2.77).
- (b) There is insufficient ground to expect the merger situation adversely to affect competition in the UK pay-TV market by its effects on the acquisition of rights (paragraphs 2.89 and 2.99).
- (c) There is also insufficient ground to expect the merger situation adversely to affect competition by its effects on the supply of conditional access technology (paragraph 2.117).

We have concluded that the merger situation may be expected not to operate against the public interest.