

5 Views of third parties

Contents

	<i>Page</i>
Introduction	101
Views of regulatory bodies.....	101
Independent Television Commission	101
Office of Telecommunications	103
Views of broadcasters	103
British Broadcasting Corporation.....	103
Carlton Communications Plc.....	108
Channel Four Television	109
ONdigital plc	109
Telewest Communications plc	112
United Broadcasting & Entertainment Limited.....	113
Views of telecommunication companies.....	114
British Telecommunications plc.....	114
Views of trade associations	117
Professional Footballers' Association	117
UEFA	117
Other views	117
Media commentators	117

Introduction

5.1. This chapter 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: seven parties were concerned about the effect on acquisition of broadcasting rights and four its effect on supply of conditional access technology. Other concerns included the effect on sports.

Views of regulatory bodies

Independent Television Commission

5.2. The ITC told us that, with regard to competition issues, its role was to ensure fair and effective competition in the provision of TV and related services. In practice it saw this as protection of the viewers' interest. In the context of the move from analogue to digital transmission the ITC wished to see effective competition between the three main digital platforms, that is satellite, cable and terrestrial, and to encourage the development of other emerging technologies such as ADSL which could further increase viewer choice. It was, however, in its view essential to have competition for programme rights as well as between platforms, in order to provide as wide a choice as possible for viewers.

5.3. The ITC said that Vivendi and BSkyB were both very substantial providers of pay-TV services in Europe, although they operated in separate national markets with no current overlap in the UK. It believed that, even if Vivendi could not influence BSkyB in the short term, the situation could change significantly over two or three years. Although it would be possible for BSkyB and Vivendi to collaborate without a merger it would be much easier to do so on the basis of a relationship built up in board meetings.

Broadcasting rights

5.4. With regard to the acquisition of broadcasting rights, the ITC believed the key drivers of pay-TV in the UK were sports (particularly football) and first-run feature films. In its view, BSkyB currently had market power in the provision of these premium services, because of its position in the supply of programme rights. The ITC was therefore anxious to see the development of greater competition in the market for acquiring relevant broadcasting rights, and would be concerned if the merger were to make this less likely. The market had begun to open up, with, for example, ONdigital and the ITV network successfully bidding for rights for the European League. Pressure on the suppliers of rights to put rights on the market in more than one package would also benefit competition. On the other hand there had been many reports of consolidation between media companies across Europe, which the ITC believed should be examined.

5.5. The ITC said that if the merger were approved then the power of the combined companies would be greater than most of those competing for the acquisition of exclusive rights.

5.6. The market was made up of both national and European sporting rights. On the basis of the information in Appendix 4.5 of the Commission's 1999 report into the proposed merger of BSkyB and Manchester United (reproduced at Appendix 4.7 to this report), the ITC believed that over half of rights for main sports events to be renewed over the next three years involved more than one country. The ITC believed that the merger would therefore lead to the parties gaining advantages in the European market. But even in relation to more nationally-based sporting rights, and in relation to films, there was the possibility of one of the parties acquiring exclusive rights in their respective home territories in a way which linked or tied the transaction to the acquisition by the other party to rights in its territory so as to produce enhanced mutual benefit.

Conditional access systems

5.7. The ITC said that pay-TV was crucially dependent on conditional access systems of which there were never likely to be a large number operating in any one market place. The ITC believed that presently there were four across Europe, and there were currently only two in the UK. All pay-TV services and nearly all free-to-air services transmitted by satellite must use a conditional access system. There was therefore potential for conditional access systems to confer a gatekeeping role if competition between suppliers was lost.

5.8. The ITC believed that the merger would establish some linkage, and possible conflict of interest, between the two systems currently used in the UK.

5.9. The ITC pointed out that Vivendi owned 49 per cent of Canal+ which was a partner in SECA, a 50:50 joint venture company with Bertelsmann. SECA licensed its Mediaguard conditional access system to ONdigital. News International, which had a 39 per cent stake in BSkyB, owned NDS which licensed its VideoGuard conditional access system to BSkyB. This raised two concerns.

5.10. First, there was the possibility of leakage of confidential information about ONdigital to BSkyB via the Mediaguard conditional access system. Secondly, there was the possibility that the Mediaguard system would not be supported or maintained over the longer term. The ITC would regret any reduction of choice in this area. Additionally, there would be very real technical and cost difficulties for any broadcaster, such as ONdigital which had established its service on the basis of one conditional access system switching at a later date to another. A limitation of Vivendi's shareholding in BSkyB to the current 24 per cent and undertakings to preserve the integrity of the ONdigital system might be appropriate.

Office of Telecommunications

5.11. OFTEL told us that it regulated those organizations which supplied conditional access services, for example encryption. Operators of such services (including BSkyB and ONdigital) who offered them to third parties had to do so on fair, reasonable and non-discriminatory terms. It did not regulate the supply of the underlying technology from the intellectual property holders to the people who operated the services; there was no regulation of commercial arrangements between, for example, BSkyB or ONdigital and their technology suppliers.

5.12. OFTEL said that in principle, while it was possible that Vivendi could seek to damage ONdigital (as a rival to BSkyB) by terminating the supply of conditional access technology before or at the end of the 12-year contract, this would appear a remote prospect. ONdigital would have opportunities to search for an alternative technology before the expiry of its current licence, although at the time it was deciding on which technology to use only the NDS and SECA systems had the necessary functionality or track record of cooperating with their clients. The remaining shareholders in SECA could oppose any strategy that involved the sacrifice of revenue, given that the market for such systems was currently limited.

Views of broadcasters

British Broadcasting Corporation

5.13. The BBC told us that it was involved in a wide range of broadcasting activities. In addition to its function of developing programmes, it was a channel operator at four different levels. First, the BBC's primary traditional broadcasting role was as an analogue terrestrial broadcaster of the BBC1 and BBC2 public service TV channels and radio services. Secondly, with rapid changes in technology in recent years the BBC had commenced broadcasting additional digital TV channels and digital radio services and operating a comprehensive public service web site; these were aimed at the UK market. Thirdly, BBC Worldwide, via joint venture arrangements with Flextech Television Ltd (UK) and Discovery Communications Incorporated (international), supplied a number of basic pay channels to the UK and international pay-TV markets, distributing on Digital Satellite, Digital Terrestrial and cable. Fourthly, the BBC, through BBC Worldwide, distributed wholly-owned BBC channels around the world.

The possible existence of a merger situation

5.14. BSkyB was a UK publicly traded company whose major shareholders were News Corporation (39.75 per cent), Vivendi (24.5 per cent, increased by 7.5 per cent from 17 per cent following its acquisition of shares from Granada and Pearson), Legal & General and Schroders, who each had between 1 and 3 per cent, as well as a 'free float' of institutional and individual shareholders each accounting for less than 1 per cent. Given the size of the proposed shareholding and the fact that this would make Vivendi the second largest shareholder in BSkyB, the BBC submitted that Vivendi would be able to influence materially the policy of BSkyB. Vivendi, with its 24.5 per cent shareholding, would need to attract support only from a further 25.5 percentage points of the 35 per cent of shareholders independent of Vivendi and News Corporation to have a majority, although News Corporation would require only 10 per cent out of that 35 per cent to have a majority. As such, Vivendi might have material influence on BSkyB: indeed that was the stated policy of Vivendi, according to press statements. Canal+ was a publicly traded company in France with Vivendi holding 48.9 per cent following its recent acquisition of 15 per cent from Richemont, and with no other shareholder holding as large a stake. Thus, it could be seen that Vivendi now owned 49 per cent of Canal+ and has taken a 25 per cent stake in BSkyB.

A framework for analysing broadcasting markets

5.15. In order to provide a framework for assessing competition issues in this case, the BBC said that it was helpful to consider the vertical supply chain of production in the broadcasting industry of:

- (a) content;

- (b) channels;
- (c) delivery;
- (d) encryption; and
- (e) viewers.

Content

5.16. The key forms of content in pay-TV markets were recent release films and live sport. Of the two, the BBC considered that ownership of rights to major sporting events conveyed greater strategic advantage than ownership of rights to films. Both popular films and sport, particularly football, were recognized as key drivers of dish sales.

5.17. A further reason for the focus on sports rights was the ‘lumpy’ nature of the contracts and their critical status in platform wars and their subsequent impacts on consumer take-up of digital services. Specifically, ONdigital used its platform exclusive coverage of (Tuesday) UEFA Champions’ League football matches to promote its platform, whilst it was well accepted that the FA Premier League rights played a key role in the growth of BSkyB’s customer base.

Channels

5.18. There was a wide range of channels available on pay-TV in the UK. Of these, it was primarily the channels with the premium content that had market power against end-consumers in terms of pricing, hence where their owners had market power in the wholesale market against their distributors. These issues had been considered by the OFT and the Commission on previous occasions, and the BBC believed that the conclusion that BSkyB had significant power in the market for pay-TV premium sports had generally been accepted.

Delivery

5.19. Assessing market power in delivery was less simple. In particular, the market power of a delivery method might be dependent on the nature of the content in question. Specifically, in the case of ‘perishable’ content, such as sporting events, the greater part of its value vanished in the instant. Accordingly, owners of perishable rights would have an incentive to offer the rights to the distributor that could secure the highest total income (which in practice equated to some combination maximizing the revenue from paying audience, sponsorship revenues and gate receipts). The fact that BSkyB had more dishes installed than there were cable TV subscribers at the time of the last FA Premier League auction might have given BSkyB a very strong advantage in the bidding war for rights. In addition, the shortage of spare transponder capacity on the Astra satellites accessible by the dishes sold for analogue BSkyB reception created a strong barrier to entry. Although since the last auction for FA Premier League TV rights cable penetration had grown to 3 million subscribers (12.5 per cent of UK households), and digital terrestrial TV had been adopted by 30 September 1999 by 411,000 subscribers (about 2 per cent of UK households), BSkyB’s analogue and digital satellite delivery combined was still the largest UK pay-TV delivery platform reaching 3.5 million households (15 per cent).

Conditional access and related services

5.20. In the UK there was no ‘free’ TV as distinct from free-to-air TV. There were three methods of financing service provision: the sale of airtime to advertisers (ITV, Channel 4 and, to a lesser extent, BSkyB and the cable operators), the licence fee (the BBC) and subscription (BSkyB, ONdigital and cable). In addition, there were also revenue opportunities from sponsorship, direct Government payments (in the case of S4C), programme sales and merchandising.

5.21. Potential entrants to the satellite TV market had two options. Assuming that it was able to obtain transponder capacity (and had the content rights for the relevant satellite footprint or spotbeam), a programme provider could transmit its signal in the clear, as a free-to-air service, and principally rely on the sale of advertising as a source of finance, or the service could be encoded (encrypted) in such a way that the signal was rendered unintelligible without the use of specialist decoding equipment (decryption). Bound up with conditional access were other ‘set-top box’ issues, such as electronic programme guide (EPG) and applications program interface (API) issues. The EPG provided schedule listings and (potentially) links to online services, while the API provided the essential link between the low level operating system and the user application.

The European pay-TV market

5.22. In one respect it could be argued that the acquisition of a stake in BSKyB by Vivendi, and the potential for coordination of BSKyB and Canal+, gave rise to no competition issue. On account of the development of country-based pay-TV platforms, because licences for rights were largely acquired on a member state by member state basis, and given cultural and linguistic differences, the market for broadcasting, both free-to-air and pay, was essentially a series of distinct national markets. In particular, whilst there was admittedly some limited cross-border spill-over in the case of terrestrial channels to adjacent countries that spoke the same language or in the case of channels relayed by satellite that could be picked up anywhere in the relevant satellite’s footprint, the characterization of the market as a series of national geographic relevant markets was broadly accurate. Accordingly, even if it were accepted that BSKyB had market power in the UK and that Canal+ had market power in France, since these were entirely separate geographic markets it was not obvious how any cooperation or merger between them could enhance any market power they already possessed in relation to the broadcast market.

5.23. The BBC said that one argument that must be considered was the role of BSKyB and Canal+ as potential entrants into each other’s markets: that is for the purposes of the present inquiry, whether Canal+ was likely to enter the UK pay-TV market. The BBC considered that the prospects of ‘greenfield’ entry of Canal+ as a stand-alone platform operator were low, given that there were already three competing pay-TV platforms in the UK. Thus, the most plausible entry route into the UK market for Canal+ would be via a joint venture or an acquisition of a stake in one of the existing platforms, or as a channel supplier. But even if Canal+ were contemplating an investment in cable, or in digital terrestrial through ONdigital, it was not clear that it would bring significant strategic assets (as opposed to finance) to the deal. Consequently, the BBC considered that the loss of Canal+ as a full-scale potential competitor to BSKyB in the UK did not appear to raise overwhelming competition issues.

5.24. However, critical issues in modern pay-TV broadcasting markets were the access to key rights for broadcasters and the availability of effective distribution of rights for rights holders. Accordingly, the BBC considered that the effect of any cooperation or merger between BSKyB and Canal+ would, in the first instance, be most likely to be felt in the upstream market for rights acquisition. To the extent that cooperation in the rights market did indeed confer some advantage on BSKyB and Canal+, a strengthened position in the acquisition of rights would in due course, given the critical role of sports and film rights in pay-TV competition, impact upon competition at the retail level in the supply of pay-TV.

5.25. The BBC noted the web of cross-ownership of pay-TV platforms across Europe, whereby each of the key platform operators was typically controlled by parties that also had significant financial stakes in other platforms in other member states: it might be said that a series of trusts were evolving in the market for pay-TV in the EC. The acquisition by Vivendi of approximately 25 per cent of BSKyB further complicated this ownership structure and the economic incentives of the parent where it had an interest in potentially competitive subsidiaries.

The supply of conditional access services in European pay-TV

5.26. The essence of pay-TV was the ability to exclude those who did not pay from receiving the signal. It was conditional access technology that enabled service providers to exclude non-subscribers. Each conditional access system provided encryption coverage for distinct geographic markets (with minor exceptions), effectively placing each of the technology providers in a gatekeeper position, with third party access to the installed base of suitable decoders only possible with the agreement of the encryption service provider. The European market for the provision of conditional access services was

characterized by two major suppliers with significant subscriber bases and three smaller service providers whose subscriber bases were considerably smaller and more locally defined markets. Between them, SECA, owned by Canal+ and Bertelsmann, and NDS, owned by News Corporation (owner of approximately 40 per cent of BSkyB), controlled access to approximately 18.5 million households within the EC (Mediaguard having an estimated 57 per cent market share, and NDS a further 29 per cent); both also had significant subscriber bases outside the EC. While SECA typically provided conditional access services to Canal+ and its affiliated companies, NDS supplied its services to a number of other companies, including NTL and BT in the UK. Significantly, SECA was the contract supplier of Mediaguard to ONdigital—SECA's only non-Canal+ customer that the BBC was aware of. The only other significant European pay-TV operator, Kirch, used both Irdeto (digital) and Nagravision (analogue) for its pay services in Germany.

5.27. The Vivendi stake in BSkyB clearly raised the prospect of increasing concentration in the control of the European market for the provision of conditional access services. The BBC was concerned that closer collaboration between BSkyB and Canal+ could have significant adverse implications for competition in the provision of conditional access. Closer ties between SECA and NDS would greatly strengthen their gatekeeper positions within their respective markets, reducing the potential for competition between them and raising the barriers to potential third party entry by requiring a greater scale of investment for entry. This increased the bargaining strength of the platform operators. The vertical integration of platform operators and suppliers of conditional access further strengthened the gatekeeper position. Clearly, such gatekeepers were in powerful market positions, which they might abuse in a number of ways:

- (a) Services that were viewed as potentially competitive with the service provider's own offerings might be flatly denied access.
- (b) There was a fear that gatekeepers might exert undue pressure on entrants to join the service provider's own 'bouquet' of channels.
- (c) Gatekeepers might allow access only on unfavourable terms to dissuade potential competitors.
- (d) Even with a strictly enforced rule requiring non-discriminatory pricing, the gatekeeper might simply charge all users an excessive monopoly price.
- (e) There might be pressure on the entrant to accept subscriber management services and conditional access services on a bundled basis.
- (f) There might be contractual restrictions on flexibility, preventing entrants from switching to rival packages.

5.28. Concerns such as those listed above were the drivers behind the 1995 Advanced Television Services Directive, which required that third party access to proprietary conditional access services was provided on 'fair, reasonable and non-discriminatory' terms. Responsibility for ensuring that this was the case in the UK lay with OFTEL. However, the BBC believed there remained extensive potential for abuse, as recognized by the recent EC proposals to update and extend the scope of the 1995 Directive. Vertical integration in the operation of the API and EPG caused further opportunities for foreclosure. Technical details, necessary for third party access to the API, could be withheld, or there might be a flat refusal to permit the downloading of software to the box or unduly onerous terms imposed on those downloading such applications. The BBC was also concerned that the operating scale of both NDS and SECA, coupled with their vertical relations with platform operators, made third party entry non-credible. A key role of the conditional access service provider was that of policing infringements of copyright and ensuring that piracy of encrypted services was kept to a minimum. Integration with a platform operator and channel provider (often whose rights were being infringed by piracy) made it unlikely that a third party could enter this market, as the integrated nature of the relationship increased the incentive to eliminate piracy.

5.29. However, once a pay-broadcaster had adopted a particular encryption system and this was built into decoders and set-top boxes, the costs of switching to a rival system were high, as all the boxes might need to be replaced if the legacy problem was to be avoided. Thus, even if there was competition *ex ante*, allowing a broadcaster to avoid using a conditional access system controlled by a pay-TV rival in that territory, once the system had been chosen, made a broadcaster vulnerable if effective control of its

encryption system fell into the hands of a pay-TV rival. In addition, conditional access and related technical systems were periodically upgraded to encompass technological and consumer developments (for example, greater potential for interactivity) and required constant technical (after-sales) support, often of a highly complex nature. Whilst it was not suggested that an *ex post* price hike would occur following a change of control, since this could be proscribed by the original contract, it was nonetheless virtually impossible to write and enforce contracts relating to the support of the technical development of a system and the provision of after-sales support. In a fast-moving market, with intense competition between digital platforms, the inability of one platform to offer the full range of functionality could have serious commercial consequences and deny it access to revenue streams that were readily tapped by other platforms.

5.30. Specifically, the BBC considered that ONdigital (and DTT more generally) might be vulnerable to Vivendi's interests in BSkyB. In particular, Vivendi controlled Canal+, and Canal+ was a 50 per cent shareholder with Bertelsmann in SECA, the conditional access company that supplies the Mediaguard encryption system and Mediahighway API (digital receiver operating system) to ONdigital.

5.31. The post-stake acquisition incentives of Vivendi were subject to question. Vivendi would have to balance its interest in maximizing the value of its 25 per cent stake in the long-run revenue stream of BSkyB against the revenue from supplying and maintaining encryption and digital receiver technology to ONdigital, added to its 25 per cent share of the wholesale revenue from each Sky subscriber on ONdigital. However, the traditional business model for Canal+ was that of a vertically integrated pay-TV service provider and the primary role of SECA was to provide conditional access services and digital receiver software to Canal+ services across Europe. The contract supply of SECA's services was most atypical and did not fit with Canal+'s core business model. The stake in BSkyB enabled Vivendi to exercise some strategic influence over the activities of BSkyB, while the supply of SECA's services to ONdigital had little or no strategic value to Vivendi. It therefore seemed likely that Vivendi's strategic interests would be best served by maximizing the value of its 25 per cent stake in BSkyB and that collaboration of BSkyB and Canal+ might be used by Vivendi to maximize this value by making the terrestrial platform a relatively (to satellite) unattractive consumer proposition.

5.32. Even under the present situation, it was very striking that SECA had failed to make the Mediahighway API compliant with MHEG 5 which had severely delayed the introduction of interactivity on the ONdigital platform. This had already had serious consequences for the BBC, since it meant that its digital text and other interactive services that had been broadcast on DTT for some months were not available to a large number of ONdigital viewers. It also made ONdigital less attractive than either BSkyB or cable, both of which were already offering interactive services. The BBC's fear was that it seemed likely that the current technical difficulties suffered by ONdigital would deteriorate as a result of any merger, with serious consequences for the universal availability of the BBC's developing interactive services and for the future of ONdigital's ability to tap into interactive and enhanced TV revenues. Since developing and maintaining these new applications depended on the work of a relatively small pool of software engineers who were already very stretched, even a minor change in priorities by SECA could have a very serious impact on ONdigital.

5.33. The BBC believed that the contractual complexity of the relationship between Vivendi, SECA and ONdigital made behavioural undertakings that might reduce concerns both difficult to draft and extremely onerous to monitor. The core of the problem lay with the incentives faced by Vivendi, as stakeholder in BSkyB and in SECA. One potential remedy would be to recommend the divestiture of Vivendi's stake in SECA, as this would remove the concerns about conflicting incentives.

Possible impact on the market for live sports rights

5.34. The BBC considered that this was a critical juncture in the development of digital TV services across Europe and it was important that concerns about implications of the increasing concentration of control of key rights were properly examined. In particular, contracts for the rights to key sports events (for example, the FIFA World Cup 2002 and English FA Premier League) were currently being negotiated (or were likely to be negotiated shortly) and it was important to ensure that these negotiations were conducted in a competitive environment. The BBC had serious concerns that a number of interrelated developments in the European pay-TV market, including the recent deal in which BSkyB had taken a 25 per cent equity stake in Kirch, might lead to foreclosure of access to key sporting rights to broadcasters other than BSkyB, Kirch, Canal+ and their affiliated companies.

5.35. The BBC were concerned that:

- (a) If BSkyB and Canal+ bid in a coordinated fashion for sports rights they would be likely to increase the number of sports rights that they win.
- (b) Competition between sports channels was characterized by critical mass or network externality effects. An initial high share of sports rights would tend to attract more viewers, thus enabling the channel to bid higher fees for future sports rights, and to deliver higher audiences to advertisers and sponsors, thereby increasing their prospects of winning additional sports rights.
- (c) As the ownership of rights to broadcast live sports programmes became more concentrated, this might lead to greater concentration in the supply of delayed highlights. This increased concentration could, on standard economic principles, be expected to lead to an increase in their price and a reduction in their supply. The BBC was particularly concerned at the prospect of highlights being suppressed in order to reduce competition to the primary rights, to the detriment of consumers and of the channels that rely on highlights.

Carlton Communications Plc

5.36. Carlton said that BSkyB was already in its own right a formidable competitor in the market for programming rights. Not only did BSkyB compete with the ITV companies including Carlton, it also competed directly with ONdigital, the digital terrestrial platform in which Carlton had a 50 per cent interest.

5.37. Carlton said that ITV was constrained in the competition for rights buying when compared with BSkyB. Currently the total revenues of all ITV channels were roughly equal to the total revenues generated by pay-TV channels in the UK. But these revenues were almost wholly from advertising which was a mature market, whereas BSkyB's subscription revenues were expected to grow rapidly. In addition, given that ITV's share of viewing was declining to the advantage, in particular, of satellite and cable channels, ITV's share of revenue was expected to fall substantially over the next five years. It was generally accepted that ITV's audience share and share of TV advertising revenue in the UK were in long-term decline.

5.38. In contrast, not only would BSkyB be advantaged by its access to greater and fast-growing subscription revenues in the competition for rights, it would also be advantaged by its structural links and alliances with major groups including BT, HSBC (the global bank) and Matsushita, a Japanese electronics group, which had all agreed to inject large amounts of capital into BSkyB's digital platform 'BiB' (now known as Open). In recent years ITV had lost out to BSkyB in a number of competitive battles for rights including coverage of major football and boxing events, and the first TV screening of major films.

5.39. Carlton's affiliate ONdigital was a new entrant in the pay-TV sector in the UK. [

Details omitted. See note on page iv.

] Major rights acquisitions were decisions that were taken within ITV on the basis of a consensus and in practice required the support of three or more ITV companies.

5.40. BSkyB was clearly dominant as a buyer in the market for pay-TV rights in the UK. Power in this upstream market was created by and was the reflection of BSkyB's position in the market for pay-TV broadcasting. BSkyB's dominant position had to be assessed not only by reference to the BSkyB DTH subscribers but also to the cable and digital terrestrial subscribers who subscribed to BSkyB-owned channels. All these DTH, cable and digital terrestrial subscribers paid subscription revenues to BSkyB directly or indirectly and enabled BSkyB to generate substantial and growing advertising revenues. It was these revenues and the ability to deliver so many subscribers that made BSkyB an important counter-party for most rights owners wishing to generate pay-TV revenues in the UK.

Strategic link with Vivendi

5.41. Carlton was concerned that BSkyB had the aim, through its shareholding links with Vivendi and Première, the German pay-TV company, to develop a coordinated pan-European strategy on major rights acquisitions. BSkyB, Première and Vivendi together would have huge financial resources and an enormous subscriber base that could be used to bid for major programme rights both for their pay-TV operations and for other platforms whose operations would then be reliant on them for access.

5.42. Vivendi clearly had a material influence if not control over Canal+. Canal+ owned, controlled or had material influence over pay-TV broadcasters in France, Spain, the Benelux countries, Scandinavia and Italy. It was therefore by far the largest pay-TV operator in Europe.

5.43. Première was the monopoly pay-TV operator in Germany. The European Commission had made it clear in two previous in-depth investigations into the German pay-TV industry that the Kirch group had an entrenched position in German pay-TV through its ownership of an extensive library of German language programme rights built up over many years. The Kirch group also controlled or had material influence over Pro 7 and Sat 1, two leading commercial broadcasters in Germany.

Remedies

5.44. If Vivendi was allowed to retain its shareholding in BSkyB, an undertaking should be extracted from Vivendi and Canal+ to the effect that Canal+ would not, and would procure that all channels in which they have a material interest would not, coordinate their activities in the market for programme acquisitions (including the right to broadcast sporting events) with BSkyB and in particular they would not jointly buy such rights. A similar undertaking would need to be extracted from BSkyB. In addition, it was important to ensure that there was no communication of confidential information between the Canal+ channels and BSkyB in terms of rights buying. Detailed undertakings would need to be established in order to erect clear Chinese walls between these companies in relation to their rights buying activities as a whole.

Channel Four Television

5.45. Channel 4 was concerned that the BSkyB platform provided open access to content providers at reasonable cost. This should extend to the carriage of new TV channels, the ability of a TV channel to carry out interactive commerce on the BSkyB platform and access to data and information regarding a channel's viewers or consumers.

ONdigital plc

5.46. ONdigital operates three of the six multiplexes (multiplexes B, C and D) for DTT in the UK. It told us that its concerns in relation to the present transaction focused on two issues:

- (a) the possible effects on the conditional access system on which ONdigital depended as it competed with BSkyB; and
- (b) more generally, the potential for BSkyB to reinforce its dominance in the acquisition of key programming rights in the UK, especially sports rights, through joint purchasing with Canal+ (and possibly Kirch) at a European level.

Conditional access

5.47. ONdigital told us that pay-TV services—whether analogue or digital, and whether delivered by terrestrial transmission, satellite or cable—were crucially dependent on conditional access systems, which facilitated the encryption of the services to ensure that they were available only to subscribers who had paid for them. The number of providers of conditional access systems was always likely to be relatively limited because of the cost and inconvenience of operating a wide variety of potentially

incompatible systems. As the ITC had stated in its published response to the Commission's invitation to make representations in relation to the present transaction, 'there is therefore the potential for conditional access systems to confer a gate-keeping role'. Indeed, in its recent detailed report on digital TV (*The Development of the Market for Digital Television in the European Union*, section 3.3), the European Commission referred to conditional access as the 'primary bottleneck' that could potentially hinder the development of new TV services, justifying the detailed regulation described below.

5.48. Because of their key role in the provision of pay-TV services, the provision of conditional access systems was subject to regulation derived from the EC Advanced Television Standards Directive (95/47). This was implemented in the UK both through the Advanced TV Services Regulation 1996 (SI 1996 No 3151), and through a general authorization to provide conditional access services under the Telecommunications Act 1984 pursuant to the Class Licence for Conditional Access Services. By means of the conditional access Class Licence, OFTEL had powers to seek to ensure that conditional access operators offered conditional access services on a 'fair, reasonable and non-discriminatory' basis.

5.49. The main conditional access system in use for satellite digital pay-TV services in the UK was VideoGuard, which was proprietary to NDS. NDS was a subsidiary of News International, which had the largest single shareholding (around 39 per cent) in BSkyB. The only realistic competitor in the UK to NDS's conditional access system was now the Mediaguard system, which was operated by SECA, a joint venture company in which Canal+ had a 50 per cent interest. Vivendi was by far the largest shareholder in Canal+, with an interest of around 49 per cent. SECA's position as a UK competitor was established only as a result of its selection (in competition with NDS) by ONdigital.

5.50. Notwithstanding OFTEL's power outlined above, the importance of conditional access systems to the development of pay-TV was such that it had in ONdigital's view been of significant, and perhaps to some extent unexpected, benefit that in the digital age there were currently two competing conditional access systems for pay-TV in the UK. This benefit to ONdigital directly benefited consumers by ensuring that ONdigital could rely on a third party conditional access provider rather than a conditional access provider affiliated to ONdigital's strongest competitor, BSkyB, and could therefore compete more effectively. ONdigital did not believe that this outcome was considered likely at the time that the current regulation was prepared.

5.51. ONdigital licensed the Mediaguard conditional access system from SECA as ONdigital's sole conditional access system. This licence was for an extendable period and was intended to last for the duration of ONdigital's Multiplex Licences (a period of 12 years, renewable for a further 12). ONdigital's choice of SECA in 1998 was the result of a selection process which inevitably took place in the shadow of BSkyB's exclusion from the ONdigital consortium the previous year. The process included detailed discussions and negotiations with both conditional access providers. Ultimately, one of the deciding factors was ONdigital's belief that the absence of conflicting UK interests meant that Canal+/SECA would be determined to create competition in the UK market for conditional access services, and would therefore provide the best ongoing service to ONdigital after launch. This strategy had to date proved successful, as ONdigital did not believe that NDS would have provided the same level and quality of support in the critical months after ONdigital's launch.

5.52. Apart from the obvious function of a conditional access provider in providing the technical services necessary to support the licensed system, the relationship between a pay-TV distributor and its conditional access provider was also critical for development of all new services, which had to be integrated by the conditional access provider and included in other parts of the pay-TV service. These developments were subject to tight deadlines and important for the ongoing success of ONdigital's business. Many of them had interdependent critical paths, so that even a minor delay in one of them had the potential to cause serious disruption to other projects. Even a few days' slippage could affect a month's sales which would in turn have a long-term financial effect on the business.

5.53. Canal+/SECA also supplied similar types of services to other pay-TV providers (although none in the UK). It was therefore inevitable that there was rivalry between those pay-TV providers for the prioritization of the technical services provided. ONdigital's ongoing development could be disrupted simply by pushing ONdigital to the back of the queue. The fact that this was happening would be difficult to prove, but could have a significant adverse impact on ONdigital's business.

5.54. To date, ONdigital's relationship with Canal+/SECA had been positive. Canal+/SECA had taken considerable care to support ONdigital's business, and in particular was crucial to the swift launch

of the DTT platform over a year ago. Indeed, a determining factor for ONdigital in selecting Canal+/SECA as ONdigital's conditional access provider was that it would be entering the UK market as a competitor to the incumbent conditional access provider, NDS.

5.55. ONdigital had considered that, if it had selected NDS as its conditional access provider, there would have been a real possibility that the considerable pre-launch development necessary for ONdigital's success would not have been completed in time for the launch. Given NDS's close relationship with BSkyB (ONdigital's major competitor), ONdigital had a genuine concern that influence could be brought to bear on NDS by its parent company News International. The interests of News International would clearly lie in NDS minimizing cooperation with ONdigital in order to disrupt its launch or to slow down key technical developments to the advantage of the near-simultaneous launch by News International affiliate BSkyB of its digital satellite pay-TV service.

5.56. In relation to the proposed acquisition by Vivendi of a material interest in BSkyB, ONdigital's natural concern was therefore that the significance of BSkyB as the dominant pay-TV provider in the UK might be such that the interests of the Vivendi group would lie in favouring BSkyB at the expense of ONdigital. To change the conditional access technology systems used, however, would require replacement of all set-top boxes and significant expenditure, possibly in the order of hundreds of millions of pounds.

5.57. Although there was no evidence that Vivendi intended to behave in this way, blatantly discriminatory conduct by Canal+/SECA was not likely to be such a significant risk as more subtle types of conduct such as:

- (a) a degradation of or reduced priority in the services provided by Canal+/SECA to ONdigital which favoured BSkyB, even if only indirectly; and
- (b) commercially confidential information passing between mutual directors or affiliates including information about strategy and marketing activities such as promotions. Ultimately, the issue related to one of control rather than purely financial interests. It was therefore clearly of critical importance should there be an outright merger of BSkyB and Canal+/SECA, but was also a concern, albeit of lesser degree, in relation to more limited control.

5.58. In summary, it was necessary to consider the transaction's potential adverse effects on the provision of conditional access services in the UK, and any resulting reduction in competition in the UK pay-TV market.

Consolidation of rights-buying interests

5.59. ONdigital said that one effect of the proposed transaction might be to bring the programme rights-buying activities of Canal+ and BSkyB more into line. From a UK public interest perspective, this was a concern because BSkyB already controlled on an exclusive basis in the UK the key pay-TV rights for sports and for Hollywood studios' films. ONdigital thought it possible that BSkyB would continue to control these rights for some time to come.

5.60. Sports and film rights were central to the success of any pay-TV service. As a result of its control in the analogue pay-TV market, BSkyB had become dominant in the market for acquiring rights to and supplying at wholesale level premium sports and films. [

Details omitted. See note on page iv.

]

5.61. BSkyB had also shown that it would not hesitate to manipulate its control of key pay-TV rights to ensure its continued dominance. An example of this was BSkyB's recent decision to move the Ryder Cup golf tournament from Sky Sports 1 (a channel carried by ONdigital) to a channel (Sky Box Office) which ONdigital subscribers could not access. Moreover, BSkyB could and did exercise its significant

control over independent providers of other channels to prevent them from seeking carriage on competing pay-TV platforms.

5.62. In ONdigital's view, it was clear that combining BSkyB's rights-buying power with the power of Canal+ across a number of European markets would enhance the position of BSkyB individually within the UK. This was partly because the combined financial muscle of BSkyB and Canal+ would give them a material advantage over the smaller UK pay-TV services. Just as importantly, however, the numbers of viewers of BSkyB and Canal+ services across Europe would heavily outweigh UK competitors such as ONdigital. Guaranteed direct access to more subscribers (as opposed to having to rely, for example, on indirect cable distribution) would significantly enhance the position of BSkyB and Canal+ with rights owners at the negotiating table. BSkyB's position was likely to be still further enhanced by its acquisition of a 24 per cent interest in KirchPayTV (the leading German pay-TV operator), which had been announced on 6 December 1999. Indeed this latest move now made these issues pan-European issues.

5.63. There was, therefore, a risk that BSkyB and Canal+ would, once affiliated, tend to act in concert in procuring key programme rights. These could be rights that were intrinsically of pan-European or even global interest. More commonly, they could be rights that could be bought on an international basis, with BSkyB and Canal+ (and Kirch, if it was also included) retaining rights for the territories in which they had their own pay-TV services, and sublicensing to favoured service providers in other territories. Prisma Kirch, a Kirch group company, had, for example, acquired the worldwide rights to the FIFA World Cup 2002, and it would be sublicensing the football tournament in those countries in which the Kirch group had no TV interests. An increasing number of rights were currently being awarded on a pan-European basis.

5.64. ONdigital was aware that commentators had pointed out that BSkyB and Canal+ could achieve this position of strength in rights-buying through cooperation agreements without any structural merger taking place. For example, it had been reported that Vivendi proposed a 'cooperation pact' with BSkyB in the light of failed merger talks earlier this year. Although theoretically the same objectives could be achieved through cooperation alone, ONdigital believed that both BSkyB and Canal+ would be particularly aware of competition law rules which were likely to hinder them in behaving in such a way, both at a national and an EC level. A purely cooperative link between Canal+ and SkyB (and Kirch) would also provide significant opportunities to rights owners with whom they would be negotiating to use competition law in order to exercise leverage at various points in the negotiation. ONdigital believed that one of the reasons that cooperation had not occurred in the past was that both Canal+ and BSkyB would consider that the gains they would make through joining forces would be outweighed by the increased exposure they would have to certain significant rights holders, such as football leagues and Hollywood film studios. Although to date it had never occurred, ONdigital would not in future preclude the possibility that, for example, a foreign pay-TV company could acquire national rights in its own territory and rights for a different territory such as the UK that it would then license, either to BSkyB or to any other pay-TV provider.

5.65. In the event that BSkyB's interests were structurally aligned with those of Canal+, the major rights holders would have much less opportunity to use such tactics. There would therefore be significantly less prospect of rights holders being able to leverage interest as a result of the threat of cartel legislation, so that Canal+ and BSkyB would dominate the rights supply chain. This would reduce competition.

5.66. ONdigital suggested that regulation at the wholesale supply level, to ensure that BSkyB did not abuse its dominant position, could itself act as a disincentive to unfair pro-European buying activities.

Telewest Communications plc

5.67. Telewest said that BSkyB already had a significant competitive advantage over all its pay-TV retail rivals, including Telewest. These included its ability to market its service nationally and create a strong national brand, compared with cable companies' patchwork of franchise areas. BSkyB also obtained a considerable 'first mover advantage' that had given it a larger subscriber base than any other retailer.

5.68. However, BSkyB's principal advantage over its competitors in the retail pay-TV market was that it was also dominant in the wholesale supply of premium pay-TV channels to pay-TV distributors, including both its own DTH satellite service as well as via cable companies such as Telewest. This dominance in the provision of premium content to pay-TV platforms was based on its exclusive rights to key content such as the FA Premier League and the pay-TV window for Hollywood films. Both of these contracts were up for renewal in the next two years, but in the meantime BSkyB had a stranglehold over its retail competitors.

5.69. Given BSkyB's dominant position in the pay-TV market, it had been obliged to supply its premium sports and film channels to other retailers such as Telewest. The terms of supply were dictated by the rate card, which was established in 1995 by the OFT, following complaints by a number of cable companies regarding BSkyB's terms of supply for premium content. Each year changes to the rate card made by BSkyB were reviewed by the OFT. Although the cable industry was consulted on the changes, its view had not had the desired impact on the process. In particular, the OFT did not interfere with BSkyB's pricing, as it merely regulated the structure of the discount mechanisms offered.

5.70. The OFT had been reviewing the most recent rate card proposals from BSkyB for the last 12 months. The current version of the rate card (16 December 1999) further undermined cable companies' ability to use Sky premium content on a viable basis. Telewest had stated to the OFT that it did not accept the current draft of the rate card and that Telewest did not have sufficient confidence that the rate card had passed robust tests for accounting separation and price discrimination. Telewest believed it was contributing to BSkyB's subsidization of digital set-top boxes through the increased wholesale prices it was paying for BSkyB's premium content.

5.71. The deficiencies in the rate card process were exacerbated when combined with the 'must-have' status and the exclusive nature of the rights which BSkyB had obtained for key content such as the FA Premier League rights and the film rights obtained under the arrangements for the 'pay-TV window' with Hollywood film studios.

5.72. BSkyB's proposed deals with KirchPayTV and Vivendi, which, through its ownership of Canal+, was also a wholesaler of content for premium pay-TV channels, could only strengthen BSkyB's dominant position in the UK by further widening the financial gap between BSkyB and competing bidders for crucial rights and by enabling BSkyB, Kirch and Canal+ potentially to offer rights sellers a single point of contact for the whole of Europe. There was a risk therefore that BSkyB, Kirch and Canal+ would favour their own retail platforms throughout Europe and either exclude rival platforms from that content totally or control the price and format in which such content was sold and impose anti-competitive terms of supply. An increasing number of the most valuable sports rights were, in Telewest's view, European or global, for example the FIFA World Cup, the Olympic Games and the UEFA Champions' League. In addition many Hollywood films were sold to numerous countries.

5.73. The OFT rate card process had proved incapable of delivering fair non-discriminatory prices for Sky's premium content. Telewest said it would appear likely that this would be magnified with the proposed financial linkage between Vivendi, BSkyB and Kirch, for example for content which was sourced collectively by the Vivendi group and BSkyB including, potentially, large international sports events such as the FIFA World Cup and the Olympics and world golf and tennis rights.

5.74. Telewest therefore considered that the transaction was likely adversely to affect competition as it would entrench BSkyB's dominant position in the UK pay-TV market. The addition of KirchPayTV to the axis was of further concern to individual platform owners such as Telewest, whose competitive position would be further weakened and whose margins would be further squeezed by BSkyB.

United Broadcasting & Entertainment Limited

5.75. United Broadcasting & Entertainment Limited (United) told us that it believed Vivendi's investment raised prima facie concerns, both as regards the acquisition by BSkyB of premium programming rights and in respect of conditional access technology, although it believed these concerns were capable of being addressed by behavioural undertakings.

Premium content rights

5.76. United said that BSkyB's success over the past five years in developing multi-channel pay-TV had resulted in a major shift in the balance of power within the TV industry. In particular, subscription revenue generated by BSkyB had dramatically altered the profile of TV funding, as a result of which the price of buying programme rights, in particular sports and film rights, had spiralled putting many such rights beyond the reach of terrestrial broadcasters. A vicious circle was created: the stronger BSkyB was, the more it was able to pay for rights; and the fewer premium rights that terrestrial TV was able to acquire, the less it would generate in advertising revenue because viewers would increasingly switch to channels offering the premier programming.

5.77. Premium sports and film rights had been central to the continued growth of pay-TV through enabling pay platforms to attract more subscribers. Control of these rights might also enable one pay platform to gain undue advantage over other pay-TV platforms. When rights were held exclusively by one pay platform, that platform might be able to influence the development of its competing pay-TV rivals. The UK cable industry had argued this to be the case with BSkyB premium channels for some time through the use of deep discounting and bundling.

5.78. United said it was therefore essential that the acquisition would not further strengthen BSkyB through leading to a merger or any form of closer cooperation between BSkyB and Canal+, the French broadcaster in which Vivendi indirectly also had a shareholding interest. Any form of merger or cooperation between these two parties would seriously adversely affect competition for pay-TV rights both across Europe as a whole and within the territories in which the two companies currently operate.

Conditional access technology

5.79. United said that a merger or closer cooperation between BSkyB and Canal+ would also be likely to lead to the effective emergence of single proprietary standards in both conditional access technology and in access protocols. Currently the two were in vigorous competition in both these areas, which was of great benefit to broadcasters such as United when they sought to contract for the supply of such services and it would be seriously damaging to the interests of such third party broadcasters if that competition were to diminish.

Remedies

5.80. United therefore considered that Vivendi's retention of its shareholding in BSkyB should be made conditional on the parties ensuring that BSkyB and Canal+, whether directly or through Vivendi's shareholding and board representation, or access to information as a result of its shareholding, did not enter into any form of cooperation or information sharing arrangement.

Views of telecommunication companies

British Telecommunications plc

5.81. BT told us that in its view the reference raised complex competition law issues relating to competition for the supply of conditional access technology in the UK, in particular:

- (a) What was the relevant market which includes the supply of conditional access technology in the UK?
- (b) In what circumstances should competition law intervene to regulate the supply of conditional access technology?

5.82. The issues raised in this reference were also relevant to the Government's review of e-commerce. One of the recommendations of the September 1999 report of the Performance & Innovation Unit of the Cabinet Office, entitled 'e-commerce@its.best.UK' (the 'PIU Report') was that

OFTEL and the OFT should jointly carry out a detailed market analysis, by the end of March 2000, reviewing the structure and conditions of competition in UK markets relating to e-commerce and identifying any emerging barriers to competition. BT noted that there were currently five alternative routes by which communication services, including broadcast messages, might be transmitted to residential customers. These were:

- (a) satellite (point-to-multipoint broadcasting using DTH satellites and dish receivers);
- (b) cable networks (typically providing cable TV as well as telephony, Internet and data transmission services);
- (c) copper pair (traditional telephony, fax and slower-speed data services use copper pairs);
- (d) fixed radio systems/traditional terrestrial TV network (fixed radio provides analogue and digital broadcast messages); and
- (e) mobile radio (cellular radio, as currently used for mobile telephony, data and Internet access).

5.83. Each of the above represented a route by which messages could be provided to, and in some cases received from or among, customers. As bandwidth increased and technology advanced the range of services that could be offered over each of these routes, the routes were increasingly overlapping and competing to an extent not seen in the past. The conditional access regime currently applying to certain media for broadcast messages assumed a single or limited market for delivery systems by which broadcast messages were received by customers. However, BT believed it was necessary to consider all alternative delivery systems when examining the impact of the present transaction on the market.

The relevant market

5.84. Guidance on what was meant by 'conditional access technology' was provided by the Advanced Television Standards Directive ('Directive 95/47') and the Advanced Television Services Regulations 1996, which implemented Directive 95/47 in the UK. Directive 95/47 applied to the provision of conditional access services to broadcasters for digital TV services (it did not cover technical conditional access services for other purposes). In a May 1999 statement on digital TV and interactive services, the Director General of Telecommunications stated that, in general, conditional access services included:

- (a) encryption and decryption of audio and video signals;
- (b) services which restrict or control access to broadcast data services, such as digital teletext; and
- (c) services which restrict or control access to interactive applications embedded within TV programmes.

5.85. A separate regulatory regime applied to the provision of access control services. Conditional access services were a subset of access control services. Access control services were telecommunication services, other than conditional access services, which controlled the supply of other digital telecommunications services to end-users (for example, online services via TV or PC; digital radio). Access control services included services enabling the viewer to send and/or receive messages via a modem and 'signing' (ie the granting of an authorization to run) of interactive applications not associated with TV programmes.

5.86. In the present case, an important issue in determining the relevant market and in addressing the public interest issues was whether the assessment should be limited to conditional access and access control services for TV, or whether it should also take into account access control services for PCs and, possibly, mobile phones. In this regard, it was clear that the communications industry was highly dynamic. Two features of note which were rapidly changing the nature of competition in this industry and, therefore, affecting the issue of market definition were technological convergence and the Internet. The convergence of telecommunications, broadcasting and IT technologies to provide similar content and services over different networks (notably the PC and TV) was a present reality which was serving to alter patterns of consumer demand and conditions of competition. By July 2001, for example, BT and its

competitors would be able to provide a multitude of services (for example, VOD), using access control services, via PCs and TVs through BT's ADSL. Also, the roll-out of cable modems would have a significant impact on demand for high-speed services (including content which was currently normally provided via TVs). Similarly, once UMTS was introduced in the UK (in 2002), consumers would be able to obtain high-speed access to such services via their mobile phone.

5.87. Also, Internet take-up in the UK was booming. The PIU Report, referred to above, noted that whilst UK e-commerce transactions were expected to be worth £2.8 billion in 1999, they had the potential to grow tenfold over the next three years, reaching around 4 per cent of UK gross domestic product by 2002. This development highlighted the increasing significance of interactive applications via the Internet.

5.88. In its recent BiB decision, the European Commission had concluded that interactive services available via TVs and via computers were in different relevant product markets. Given the rapidly-changing nature of the market in the UK, this issue might need to be closely considered.

The circumstances for competition law to intervene

5.89. Under the class licence for conditional access, providers of conditional access services were required, inter alia, to provide these services to third parties on fair, reasonable and non-discriminatory terms. Also, under the Class Licence for Access Control, providers of access control services which were deemed by the Director General of Telecommunications to have market influence or market dominance were subject to similar and other requirements.

5.90. BT questioned the need for such *ex ante* regulatory controls on the provision of access control/conditional access, given the dynamic nature of competition for the supply of these services and the range of networks, outlined above, over which these services could be provided. In any event, one of the questions to be addressed in the present case was whether these existing regulatory requirements were sufficient to address any concern arising from the acquisition by Vivendi of a material interest in BSkyB affecting conditional access markets in the UK. In BT's view, these regulatory requirements were more than sufficient and actually went beyond what was necessary to ensure competitive markets.

5.91. In BT's view, the above regulatory requirements would not be sufficient if, as a result of the transaction, the parties would have an effective stranglehold in the market for the supply of conditional access/access control services in the UK, in circumstances where barriers to market entry were particularly high and the market was not dynamic. But these circumstances did not arise in the present case, nor did they arise in the UK generally.

5.92. In this regard, it was worth noting OFTEL's November 1999 notice on whether SSSL, a BSkyB company, should be deemed to be a Regulated Supplier for the purposes of the Class Licence for Access Control (and, therefore, that the conditions applicable to access control suppliers deemed to be in a dominant market position applied to it). Whilst OFTEL concluded that SSSL was dominant in the relevant access control market, it stated that:

It is clear that SSSL's high market share is likely to diminish over time as other platforms begin to develop and offer digital interactive TV services. In the next few years cable operators, Kingston, BT and service providers using BT's network are likely to be in a position to offer similar services to those currently offered over the digital satellite platform. They may also have an important advantage over the digital satellite platform in that they may be able to offer fast always on Internet access as part of a package of digital TV and interactive services. If so, this is likely to make such packages attractive to end-users and, hence, make these platforms attractive to digital interactive TV service providers.

5.93. OFTEL's view in relation to the access control market in the UK (OFTEL concluded that this was a separate relevant market) was also very relevant in the context of competition for the supply of conditional access services in the UK.

5.94. In conclusion, BT was of the view that the acquisition by Vivendi of a material interest in BSkyB did not create a situation which operated, or may be expected to operate, against the public interest.

Views of trade associations

Professional Footballers' Association

5.95. The Professional Footballers' Association (PFA), which represents 4,000 professional footballers in England and Wales, was concerned by the increasing domination of football by the TV companies. The PFA said that BSkyB was looking to achieve media domination and further to its present 10 per cent stake in Manchester United it would be looking to penetrate football club ownership and by so doing seeking to secure itself a controlling position for TV rights. It was the PFA's view that this would only benefit the TV company itself.

5.96. Vivendi owned 49 per cent of Canal+, which had considerable power and influence among the leading European football clubs. Canal+ had a significant PPV sports rights business. A sharing of power was being planned to continue the grip which BSkyB already had in England with the control of Vivendi/Canal+ in Europe. If such control were permitted, the situation could arise where TV companies might decide what might be the most lucrative match at the later stages of a competition, and might be perceived by the public to be influencing the progress of two teams against others over which they exercised influence. Added to this was the power of TV companies to build up the profile of individual matches, and increase the cost of PPV. Given also that they were exercising media consultancy control over the clubs they were associated with, this would increase their ability to charge higher prices to the detriment of the viewing public.

UEFA

5.97. UEFA was concerned about the possible concentration of buying power among broadcasters. It believed that a full merger between Canal+ and BSkyB would lead to a very dominant force in the European pay-TV market. UEFA also pointed out that a fusion between large media groups could indirectly result in a concentration of ownership of football clubs.

Other views

Media commentators

5.98. We also held, together with the Group inquiring into the NTL/CWC merger, a hearing with a number of media commentators and analysts.¹ Among the points made were the following:

- (a) As regards the definition of the market, it was appropriate to consider a market wider than the market for pay-TV, and to include interactive services. There was also an interaction between pay-TV and free-to-air TV, in that they were competing for audiences, advertising and programme rights, although free-to-air TV had not had the resources to compete head-to-head for live sports rights often. Pay-TV, however, had a separate sort of revenue, namely subscribers, which had had the further benefit of putting viewers in the position of customers, buying services because they wanted to view them. It was also suggested that pay-TV should be seen in the context of intellectual property rights in all their forms, the importance of which had led to an increasing degree of vertical integration in the industry, and a process of large integrated companies frequently cooperating with each other with or without the exchange of equity.
- (b) It was also useful to distinguish between distribution platforms and the provision of content, BSkyB having the overwhelming advantage of being the only significant UK pay-TV operator which had a large amount of valuable content. This arose because BSkyB had taken the risk at considerable cost of acquiring football rights at an early stage, which gave it the demand which had made the platform widely taken. Cable had in the past been very fragmented so no single cable company had seen it worthwhile taking such a risk. BSkyB's position also resulted from its

¹Mr R Snoddy, *The Times* (who declared an interest); Mrs M Brown, *The Guardian*; Mr P T Larsen, *Financial Times*; Mrs E Duncan, *The Economist*; Mr N Higham, BBC; Mr P Richards, WestLB Panmure Limited.

success in developing customer management systems, and the competence of its management, and the fact that the holders of sports rights liked BSkyB's presentation of programmes, in particular sport. The position of BSkyB was not, however, necessarily threatening, since it was an efficiently run company which had added a vital strand to the modern media scene, and, while powerful, this influence was neither overwhelming nor negative.

- (c) There was scepticism that Vivendi could influence BSkyB against the wishes of the Chairman of News International, and whether, despite the previous merger talks between BSkyB and Canal+, it could be assumed that cooperation would take place, or to a degree that would not have occurred without the merger.
- (d) Broadcasting rights remained mainly national, although there might potentially be a European market for sports rights where rights were sometimes bought for the whole of the event and sold on: that, however, was partly counterbalanced by the influence of the EBU, which had won the rights for the next European cup, and by the listing by governments of events to be shown on terrestrial free-to-air TV. BSkyB was already in a strong position that was unlikely to be affected by the merger. Consumers, moreover, may not benefit from different events being shown on different platforms.
- (e) The effect on conditional access technology merited investigation, but as long as dominance was not being employed to use the technology as an exclusion device, the public interest might even be served by a single common system. It was part of government policy that there should be some system of interoperability, but that had not happened partly because of ONdigital's rush to market: ONdigital chose the SECA system because it was one that was already developed, and a further consideration was that it was not aligned with News Corporation. It was stretching the point to say that Vivendi taking a 23 per cent stake in BSkyB would lead to Canal+ abandoning SECA as a separate conditional access technology.