

# 6 The views of Vivendi and BSkyB

## Contents

	<i>Page</i>
Introduction .....	119
Vivendi .....	119
Vivendi's general submission.....	119
The question of material influence .....	123
The relevant markets .....	128
The effect of any merger situation on competition for the acquisition of sports and film rights in the UK.....	131
The implications of any such merger situation for conditional access technology.....	132
Hypothetical remedies .....	133
Further representations .....	133
BSkyB .....	141
BSkyB's general submission.....	141
The question of material influence .....	143
The relevant markets .....	153
The effect of any merger situation on competition for the acquisition of sports and film rights in the UK.....	159
The implications of any such merger situation for conditional access technology.....	161
Hypothetical remedies .....	162
Further representations .....	163

## Introduction

6.1. This chapter summarizes the views of Vivendi and BSkyB, the main parties to this inquiry, which were presented in written submissions and at hearings.

## Vivendi

### Vivendi's general submission

6.2. In its initial submission to us Vivendi set out the reasons why it considered that it had no material influence over BSkyB and why no merger situation qualifying for investigation had arisen; explained the background to its acquisition of a stake in BSkyB; and submitted that that acquisition would not be detrimental to competition or operate against the public interest.

6.3. On the question of material influence, Vivendi considered that it had not acquired the ability materially to influence the policy of BSkyB and that therefore no merger situation qualifying for investigation had arisen. Vivendi believed that this became clear when full account was taken of News International's shareholding in BSkyB, BSkyB's board representation and the various contractual, personal and family links between BSkyB and the News Corporation Group.

6.4. At the shareholding level, News International held 39 per cent of the BSkyB shares. Apart from Vivendi's shareholding, the remainder of the shares in BSkyB were widely held. As a result of a deal announced by BSkyB on 6 December 1999, Kirch, the German pay-TV group, was to have a 4.3 per cent interest in BSkyB.

6.5. At the board level, News International had an entrenched right to appoint five of the fourteen BSkyB board members, one of whom (Rupert Murdoch) was installed as Chairman on the announcement of Vivendi's acquisition of a 24 per cent stake. Vivendi had a right to only one director, through its BSBH shareholding. The former right of Pathé to appoint two directors ceased when Pathé ceased to exist as a legal entity upon its merger with Vivendi. Kirch, with a 4.3 per cent holding, was also going to be entitled to a seat on the board under the agreement between BSkyB and Kirch.

6.6. At the contractual level, there were a number of important contractual arrangements between News Corporation group and BSkyB, including News Corporation's licensing to BSkyB of the conditional access technology used by BSkyB. At the personal level, Mr Murdoch held an immensely powerful position in the media world. Apart from being Chairman of BSkyB, he was also Chief Executive of News Corporation, a director of News International and a director of Fox Entertainment (a News Corporation group company). He was widely perceived as being able, unilaterally, to announce and determine BSkyB policy (confirmed, for example, by a press interview with Mr Murdoch in *Le Figaro*, 6 December 1999).

6.7. Although Vivendi might be able, in practice, to block the passing of a special resolution (requiring a majority of 75 per cent of votes cast), in reality only an extremely narrow range of matters required a special resolution by BSkyB shareholders and none of these would in any way inhibit the development or carrying out of BSkyB's business.

6.8. Vivendi was not informed about, and had not been consulted by BSkyB prior to, the recent announcement of the transaction with Kirch, nor had that transaction been discussed at the board meeting attended by Vivendi's director while he had been present. The BSkyB/Kirch transaction had been generally analysed as reinforcing the influence of Mr Murdoch and the News Corporation Group over BSkyB.

6.9. Even if the Commission were to conclude that Vivendi was able to exercise material influence, it would have to go on to consider whether that influence was sufficient to create a merger situation qualifying for investigation. The Commission was not required by the Fair Trading Act to reach this conclusion as the test was permissive and not mandatory. In the light of the various links between News Corporation and BSkyB, Vivendi believed 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.

6.10. Concerning the transactions, Vivendi had acquired its interest in BSkyB in two stages. Initially it had agreed to acquire a direct stake of just under 13 per cent in BSkyB and a one-third holding in BSBH as a result of a conditional agreement to merge with Pathé. Subsequently Vivendi had agreed to increase its stake through the acquisition of the outstanding interests in BSBH from Granada and Pearson. Vivendi's holding in BSkyB was approximately 24.44 per cent as at 30 November 1999. That would be diluted to below 24 per cent as a result of the proposed issue of shares to Kirch.

6.11. Vivendi's merger with Pathé had been a 'fusion-absorption' under French law, as a result of which only one party, Vivendi, continued to exist and held all the assets and liabilities of both parties. However, Pathé's right to two seats on the BSkyB board, which was set out in the BSkyB Articles, had ceased to exist when Pathé did and had not therefore been inherited by Vivendi.

6.12. Vivendi intended to be a long-term participant in European broadcasting, a sector which was undergoing significant and rapid consolidation, development and change. Vivendi considered BSkyB to be one of the most innovative and dynamic participants in the sector and a leading force in the evolution of European pay-TV, and wished to have an economic interest in it.

6.13. Following the breakdown of talks in early 1999 about a merger between Canal+ and BSkyB, these transactions offered Vivendi a way to achieve, at an attractive price, a strategic stake in BSkyB's development in the UK as well as strengthening Vivendi's position as a participant in the future pan-European consolidation of the sector. Moreover minority stakes, as part of a policy of international diversification and the spreading of risk, were very common in this sector.

6.14. Even if the Commission were to conclude that a merger situation qualifying for investigation had arisen, that merger situation would not operate and could not be expected to operate against the public interest. So far as the implications of Vivendi's acquisition of a stake in BSKyB from a competition standpoint were concerned, Vivendi did not itself undertake activities similar to those of BSKyB save in so far as it did so through its 49 per cent stake in Canal+.

6.15. Both Vivendi (through its 49 per cent stake in Canal+) and BSKyB appeared to be involved in the provision of TV services; the distribution of TV services; the acquisition of broadcasting rights for films and sports events; trading in international rights to broadcast sports events; the production of films and other broadcasting materials; and conditional access technology. Of these six areas, there was only one in which Canal+ and BSKyB were both active in the same product and geographic market and at the same level of distribution, namely the trading of rights for international sporting events (Canal+ considered that BSKyB had very limited activity in this market). In respect of conditional access, Canal+ and BSKyB operated at different levels of the market, Canal+ being the owner of such technology and BSKyB a user (it used the technology of its major shareholder, the News Corporation Group).

6.16. The markets for the acquisition of broadcasting rights for films and sports were national in character and therefore the activities of Vivendi and BSKyB did not overlap. Nor could Vivendi and BSKyB coordinate their business strategies to enhance buyer power because the nature of the product gave sellers considerable selling power; rights holders had an economic incentive to maintain fragmented national markets; and there was strong competition in national markets.

6.17. Canal+ competed on the market for trading in rights to broadcast international sporting events. However, it had a small share and faced strong competition from specialist traders in the market.

6.18. So far as conditional access software was concerned, Vivendi could not impose on SECA (Canal+'s 50:50 joint venture with Bertelsmann of Germany), which controlled its conditional access software, any behaviour inconsistent with the continued success of that software. SECA faced strong competition from a range of other suppliers in the worldwide market for conditional access systems.

6.19. Even if, as a matter of law, Vivendi did have material influence, it had no influence over BSKyB's commercial behaviour. To the extent that there was any possibility of an economic reason for coordination between Canal+ and BSKyB, that existed before the acquisition by Vivendi of its stake and had not been increased by Vivendi's acquisition. The apparent hostility of News International to Vivendi actually made co-operation now even less likely.

6.20. The relationship between BSKyB and Canal+ remained subject to, inter alia, the Competition Act 1998 and Articles 81 and 82 of the EC Treaty, which provided the appropriate means to deal with any hypothetical cooperation which might take place between BSKyB and Canal+ in future.

6.21. Vivendi told us that although it owned 49 per cent of Canal+, it had announced its desire to reduce its stake to 40 per cent.

6.22. At a hearing, Vivendi said that the European and worldwide environment had changed significantly since November 1999 when the case had been referred to the Commission. Every week the press announced new changes in the economic environment. The OFT had just announced a review of its analysis of BSKyB's position in the market for pay-TV in the UK.

6.23. Vivendi's current stake in BSKyB was 23.5 per cent (assuming completion of the Kirch transaction). It had reached this position as a result of a number of transactions. It had started by acquiring a minority stake in Pathé, a company listed in France, and had followed that with a merger between Vivendi and Pathé in order to protect the interests of CanalSatellite. As a result of the merger, Vivendi retained all of Pathé's audio-visual interests, including a 17 per cent stake in BSKyB, which was made up of approximately 14 per cent held directly and the remainder held by virtue of a one-third holding in BSBH. At that point Granada and Pearson shareholders had the remaining two-thirds of the capital of BSBH and held pre-emption rights. Whilst the legal position was uncertain, it was arguable that Granada and Pearson could have exercised these pre-emption rights in relation to the BSBH shares held by Pathé for less per share than the market value of the underlying BSKyB shares.

6.24. In order to protect itself against the risk of Granada and Pearson successfully exercising any pre-emption rights, Vivendi preferred to acquire their shares in BSBH. In this way, as a result of a two-fold defensive action, Vivendi had acquired a 24.44 per cent stake in BSKyB and the right to appoint one

director. Once the transaction with the Kirch group was completed, Vivendi would have a 23.5 per cent stake in BSkyB. In addition to this, on the announcement of the Vivendi/Pathé merger, Mr Murdoch assumed the function of Chairman of the BSkyB board of directors which had been previously held by M Seydoux, Chairman of Pathé. On its merger with Pathé, Vivendi did not acquire the rights to the Pathé seats on the board of BSkyB, as that had been the personal right of Pathé as a founder shareholder of BSkyB. We asked if Vivendi had the right to appoint an alternate director. Vivendi said that it did have this right but had not yet exercised it. Article 81 of BSkyB's Articles provided that the identity of an alternate director requires the approval of the BSkyB board unless the alternate director is an existing BSkyB director. Vivendi stated at the hearing that its director had as yet attended only one BSkyB board meeting. Subsequently Vivendi told us that its director had attended a second meeting.

6.25. Vivendi submitted that there had never been any question of a merger operation in economic terms. It considered that it had not acquired material influence in BSkyB, and it did not have any influence whatsoever on BSkyB's current activities or policy. BSkyB was a distinct economic entity from Vivendi which was itself distinct from Canal+. Any agreements between Vivendi, Canal+ and BSkyB that might have a potential effect on competition would be subject to the full rigour of Article 81 of the EC treaty and to the Chapter 1 prohibition in the Competition Act 1998.

6.26. Vivendi believed that significant financial benefits were to be gained from its stake in BSkyB, which was one of the most powerful pay-TV operators in Europe. The financial benefit to Vivendi was clear. Between 10 September 1999 and 16 February 2000 the market value of Vivendi's stake rose by more than £4.5 billion. Vivendi did not exclude the likelihood of its continuing to increase significantly.

6.27. Strategically speaking, it was important for Vivendi to be positioned in companies with activities that were related to its core businesses in order to follow the development and transformation in these sectors and potentially to participate in such developments. Examples of minority stakes had been Vivendi's 19 per cent interest in Audiofina (now sold); Pathé's 17 per cent stake in BSkyB (before being bought by Vivendi); Pathé's 20 per cent stake in CanalSatellite; and Disney Group's minority stake in Eurosport.

6.28. Concerning Vivendi's relationship with Canal+, Vivendi had been one of the original founders of Canal+ along with Havas, which had since merged with Vivendi. Canal+ had been a financial success for its shareholders and had become a major European media player. However, due to the fragmented and national nature of European media markets, the European media companies were not as powerful as their US counterparts. Vivendi's shareholding in Canal+ would not result in any change in the markets in which Canal+ operated, whether these were the markets for the acquisition of film rights, the purchase of sports rights, or for conditional access technology. Before Vivendi acquired its stake in BSkyB, nothing in law prevented Canal+ from signing certain agreements in these markets, and notifying them if necessary to the relevant competition authorities. This situation had not changed since Vivendi's acquisition of a stake in BSkyB.

6.29. Under French law, Vivendi could not own more than 49 per cent of a TV company, and Vivendi owned 49 per cent of Canal+ while the remaining 51 per cent interest was spread among a number of shareholders. Vivendi regarded its investment in Canal+ as long-term and intended to remain an important shareholder. Vivendi had indicated that it would be prepared to reduce its shareholding to 40 per cent, but so far an appropriate investor had not emerged.

6.30. The independence of Canal+ management with regard to all its shareholders, including Vivendi, was at the heart of Canal+ future dynamism and success. Vivendi had 100 per cent confidence in the management that was in place. Vivendi did not, and in any case could not, impose its will on Canal+. It had 6 seats out of 16 on the board, and, of all the board committees, was represented on the compensation committee. The Canal+ board also had representation from prestigious interests such as Richemont Group and Société Générale.

6.31. As far as its media interests were concerned, Vivendi's long-term aims were related to capitalizing on the convergence of technologies, particularly between mobile telephony and the Internet. This long-term strategy was at the heart of the recently announced joint venture between Vivendi and Vodafone to create a pan-European multi-access (TV, PCs, mobile and fixed handsets and personal data appliances) portal for web-based services. As to Canal+'s long-term aims, it would aim to expand its presence in the field of content, particularly film production, and to be a major player in the fields of conditional access and interactivity software and the Internet.

6.32. Concerning SECA, Canal+ had created a joint venture with Bertelsmann in 1995. It had not had any differences with Bertelsmann over SECA's strategy. [

*Details omitted. See note on page iv.*

] The strategy for SECA over the next five years was to open it up to the market and to make it independent from the Canal+ group. Opportunities might arise particularly in the UK market.

6.33. We asked if Vivendi had had any input into discussions between BSKyB and Canal+ about a possible merger. Vivendi said that it had not been involved in those discussions, which had taken place between Canal+ management and News International. [

*Details omitted. See note on page iv.*

]. The fact that Vivendi took its stake in BSKyB soon afterwards was due to Pathé's being for sale. Vivendi said that the possibility of BSKyB having influence over Vivendi as a result of Vivendi's investment in BSKyB was fanciful and non-existent.

### **The question of material influence**

6.34. Vivendi submitted 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. In particular, Vivendi considered that the level of influence over BSKyB exercised by News Corporation, which could not be gauged adequately on the basis of News International's 39 per cent shareholding, was such as to exclude any possibility of Vivendi being able materially to influence the policy of BSKyB. In addition to News International's very substantial minority stake, a number of other factors were relevant.

6.35. Vivendi stated that at the BSKyB board level, News International had the right (a right entrenched in the Articles of BSKyB) to appoint 5 of the 14 members of the board of BSKyB. These five were:

- (a) Rupert Murdoch, Chairman of BSKyB; he was also executive director and Chief Executive of News Corporation, a director of News International and a director of Fox Entertainment.
- (b) David DeVoe, who was also the Chief Financial Officer and Finance Director of News Corporation and senior executive Vice-President and Chief Financial Officer of Fox Entertainment.
- (c) Bruce McWilliams, who was General Counsel of News International until recently and was currently a director of a number of companies in the News Corporation Group.
- (d) Arthur Siskind, who was also senior executive Vice-President of News Corporation, executive and group General Counsel of News Corporation and a director of Fox Entertainment; and
- (e) Leslie Hinton, who was executive Chairman of News International and held a number of other directorships in the News Corporation group.

6.36. Vivendi added that Tony Ball, the Chief Executive and Managing Director of BSKyB, while not a News International-appointed director, was an ex-employee of News Corporation. John Thornton, a non-executive director who was not a News International-appointed director, was reported to have advised Star TV when News Corporation beat Pearson in bidding for the company and was generally credited with helping Mr Murdoch to acquire that company (*Sunday Telegraph*, 13 November 1994). The manner in which Mr Murdoch had been able to arrange his own appointment as Chairman when Vivendi announced that it was to acquire Pathé was indicative of his personal influence over the board.

6.37. News International's entrenched right to appoint five directors contrasted with Vivendi's right, through BSBH, to only one seat on the BSKyB board of 14 directors. That right had been exercised by the appointment of M Licoys to the board. At the hearing Vivendi told us that at the first BSKyB board meeting which M Licoys had attended, he was asked to leave for part of the meeting. M Licoys told us that the reason he was given when he was asked to leave related to a general potential conflict of interest

but he had subsequently been sent minutes of that meeting. It had transpired that the meeting had in his absence considered the acquisition by BSKyB of a 24 per cent stake in Kirch and Kirch's acquisition of a 4 per cent interest in BSKyB, with the appointment of one director.

6.38. Pathé's right to appoint two directors to the BSKyB board ceased to exist when Pathé ceased to exist at the time of its merger with Vivendi. That right did not pass to Vivendi. Accordingly, while Vivendi's direct stake in BSKyB was larger than was Pathé's, its board representation was smaller. There was no scope for one Vivendi director out of a board complement of 14 (15 once a Kirch director was appointed), five of whom were News International appointees (among them the Chairman of the company) and one of whom would be appointed by Kirch, to exercise any degree of influence over the affairs of BSKyB.

6.39. At shareholder level, Vivendi had 24.44 per cent, compared with News International's 39 per cent. Until Kirch took up its stakes, there were no other major shareholders in BSKyB. When Kirch did take up its interest, Vivendi's stake was likely to be reduced to below 24 per cent. Vivendi did not consult News International prior to taking its position in BSKyB and it perceived that News International considered its purchase of a stake as unwelcome.

6.40. Vivendi acknowledged that it was likely, at most shareholders' meetings, to account for more than 25 per cent of the votes present and thus to be able to block the passing of a special resolution, which required a majority of 75 per cent of votes cast. However, given the very narrow range of issues that required a special resolution under the constitution of BSKyB, coupled with the strong central management at board level, Vivendi considered that the ability to block a special resolution of BSKyB was insufficient to confer material influence over its policy. A special resolution of the shareholders of BSKyB was required, by law, only for the following: alteration of the Memorandum or Articles; change of the name of the company; reduction of the share capital of the company; a purchase by the company of its own shares; disapplication of shareholders' pre-emption rights; and a resolution for the voluntary winding-up of the company. This was a very narrow list of functions, some of which would never be performed in the lifetime of a company.

6.41. All other shareholders' resolutions could be passed by ordinary resolution, which required only a simple majority of votes cast. Vivendi considered that it would not be possible for it successfully to oppose an ordinary resolution proposed and supported by News International. Thus, for example, Vivendi could not successfully oppose an acquisition by BSKyB, however large; a diluting share issue, however large, unless on the basis of a non pre-emptive rights issue or cash placing; a disposal by BSKyB of any part of its business; a fundamental (or any other type of) change in its business or investment strategy; BSKyB entering into a strategic alliance or setting up a joint venture; or any other commercial operation of BSKyB. Nor could Vivendi influence in any way BSKyB's commercial behaviour.

6.42. Notwithstanding the lack of influence in BSKyB arising from Vivendi's stake in BSKyB, Vivendi considered that a stake at or near the 25 per cent level provided an important level of protection against dilution. A stake of that size was also likely to create an economic premium and a strategic negotiating position in any major reorganization or merger.

6.43. Board minutes supplied by Vivendi indicated that on 22 July 1999 the general strategy of Vivendi's investment in Canal+ and BSKyB had been discussed, and that this was presented as a double opportunity to strengthen Vivendi's position in the world of pay-TV. The statement was made that in terms of BSKyB, Vivendi's acquisition would provide an opportunity for the unhurried exploration of the possibility of joint projects with Canal+ in the fields of technology convergence, digital decoders and the Internet. The full text of relevant entries in the board minutes is in paragraph 3.160. Subsequently we saw a paper that had been put before the board, reproduced at Appendix 3.3. Vivendi's representations on this matter at a second hearing are recorded in paragraphs 6.126 to 6.131.

6.44. Vivendi told us that, notwithstanding Vivendi's stake in BSKyB and its seat on the board, neither Vivendi nor M Licoys was informed of, or consulted about, the recently announced transaction between BSKyB and KirchPayTV. The fact that Mr Murdoch and Mr Ball had chosen, so soon after Vivendi became a major shareholder, to enter into an agreement with another Continental European broadcaster without consulting Vivendi was indicative of News International's level of influence over BSKyB and Vivendi's lack of influence. In its announcement to the Stock Exchange about the Kirch transaction, BSKyB stated that Dr Hahn, the Vice-Chairman of KirchGruppe, was to become a non-executive director of BSKyB following the KirchPayTV deal. This would mean that Vivendi would have

the same board representation as a 4 per cent shareholder. Given the relationship between BSkyB and Kirch, including contractual links, Vivendi might have less influence on the board of BSkyB than the director appointed by a 4 per cent shareholder.

6.45. The level of influence over BSkyB which News International was capable of exercising through a combination of its board representation and shareholding was very considerable. It was enhanced by a number of other personal and contractual links. For example, although Vivendi did not have access to details of BSkyB's commercial arrangements, it believed that News International owned the conditional access system used by BSkyB. Furthermore, BSkyB did not own its own film catalogue, but made extensive use of film resources of the News Corporation Group, including Fox Studio. Mr Murdoch's daughter held the job of Director of Programming at BSkyB. Mr Murdoch had very publicly associated himself with BSkyB and its policies and was widely seen as being able to speak unilaterally on all matters concerning BSkyB and the way in which it conducted its policy. In its reports on British Airways/Sabena<sup>1</sup> (Cm 31, 1986) and on P&O/European Ferries Group<sup>2</sup> (Cm 1155, 1990), the Commission had recognized the possibility that the personalities appointed to the board of a company could affect the nature of material influence in the policy of that company.

6.46. The concept of material influence was not an absolute one but a relative one, assessed in the light of the circumstances. A shareholding of 24.44 per cent in a listed company whose other shares were widely dispersed, together with a seat on the board, might normally be considered to confer material influence. However, the position in respect of BSkyB was very different, in the light of News International's 39 per cent stake; News International's entitlement to 5 out of the 14 directorships; the contractual arrangements between News International and BSkyB; the personal position and influence of Mr Murdoch; and the arrangements between BSkyB and Kirch, including the appointment of a Kirch director.

6.47. In Vivendi's view, the lack of material influence was not incompatible with its reasons for buying its stake in BSkyB, as set out in paragraph 6.50.

6.48. There was one further important legal point which should be noted on the issue of material influence. Under section 65(3) of the Fair Trading Act, a person able materially to influence the policy of a body corporate might be treated by the Commission as having control of it, thereby creating a merger situation qualifying for investigation. However, it was not required that the Commission treated such a person as having control; that is, the test was permissive, not mandatory. Accordingly, even if the Commission were to determine that Vivendi was able materially to influence the policy of BSkyB, it did not follow automatically as a matter of law that a merger situation qualifying for investigation had been created.

6.49. This was made clear in the Commission's report on the Mid Kent Holdings/General Utilities/SAUR case,<sup>3</sup> paragraph 2.40. In circumstances where (as in this case) there was a shareholder in the position of News International with the shareholding, board, personal and contractual links described in paragraph 6.45, it would be entirely appropriate for the Commission, even if it were to conclude that Vivendi had material influence, to go on to conclude that, in the circumstances, that did not amount to a merger situation qualifying for investigation.

6.50. Subsequently we asked Vivendi how the strategic and financial benefits which Vivendi considered would accrue to it from this transaction differed from the ability to exercise material influence. Vivendi submitted that its motives which led to its acquisition of a stake in BSkyB were threefold: first, a strategic defensive policy unconnected to BSkyB; second, a financial investment in a strategic sector for Vivendi; and third, the acquisition of a long-term strategic stake in a fast-moving market.

6.51. Concerning Vivendi's strategic defensive policy, Vivendi said that the first transactions in the chain which led it to acquiring its stake in BSkyB were those which resulted in Vivendi acquiring a stake in and then merging with Pathé. Pathé owned a stake of approximately 20 per cent in CanalSatellite. Canal+'s majority stake in CanalSatellite was considered by Vivendi to represent significant value to the Canal+ group. Early in 1999, Television Francaise (TF1), a shareholder in Télévision par Satellite (TPS)

---


<sup>1</sup>*British Airways plc and Sabena SA: a report on the merger situation*, HMSO, Cm 1155, July 1990.

<sup>2</sup>*The Peninsular and Oriental Steam Navigation Company and European Ferries Group PLC: a report on the merger situation*, HMSO, cm 31, December 1996.

<sup>3</sup>See footnote to paragraph 2.48.

and a major competitor to Canal+ in France, announced that it had acquired a 9 per cent stake in Pathé and that it was looking for ways in which it could move closer to Pathé. Shortly after that announcement Bolloré, which owned a stake of approximately 20 per cent in Pathé, approached Vivendi to say that that stake was for sale. Vivendi's concern that TF1 might acquire a significant stake in Pathé and thus indirectly in CanalSatellite was the primary motive for its initial acquisition of a stake in Pathé. The constitution of CanalSatellite at that time gave significant influence to the holder of a 20 per cent stake.

6.52. The subsequent full merger of Vivendi and Pathé took place 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. That merger allowed Vivendi to consolidate its hold over CanalSatellite.

6.53. The merger with Pathé gave Vivendi a direct holding in BSkyB of approximately 12.66 per cent (as at 30 November 1999) and a 33 per cent stake in BSBH, which in turn owned a further 11.78 per cent in BSkyB. However, the BSBH [  ] and Articles of Association 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.* ]. Partly as a result of fundamental differences between English and French law (such as the absence of the concept of a true merger in English law) the application of these provisions to the merger between Vivendi and Pathé gave rise to considerable legal uncertainties and could have had a significant impact on the value of Pathé's stake in BSBH to Vivendi and uncertainty as to whether Vivendi would be able to guarantee acquiring Pathé's stake in BSBH. Vivendi was aware that the Pearson and Granada stakes in BSBH were for sale and saw the acquisition of those stakes as the best solution to those uncertainties.

6.54. Concerning Vivendi's financial investment, the manner in which Vivendi was able to acquire its stake in BSkyB was such that the aggregate price paid by Vivendi was below the then prevailing market price for BSkyB shares. BSkyB shares had performed strongly since Vivendi acquired its stake. Although the nature of Vivendi's merger with Pathé made it difficult to determine a price for the acquisition of the BSkyB shares held by Pathé, by any measure the value of Vivendi's stake in BSkyB had nearly tripled since it had been acquired. The transactions had been more than justified on financial grounds alone.

6.55. Concerning Vivendi's acquisition of a long-term strategic stake, the broadcasting sector in Europe was developing and changing at an unprecedented pace. It had changed significantly since the matter had been referred to the Commission in November. Vivendi believed that it would undergo significant and rapid further consolidation, development and change. There were many reasons for this rate of change, including technological developments and convergence and the deployment of new marketing strategies.

6.56. Vivendi intended to be a long-term participant in European broadcasting markets but was no more able to predict future developments in the broadcasting sector than any other participant. Vivendi considered that BSkyB was 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 in different companies in different geographic markets and different technological sectors, in order to diversify risk, was not an unusual strategy in this sector. This was a widespread practice in sectors allied to broadcasting, such as telecommunications, and one which lay behind Vivendi's position in BSkyB. Given the strengths of BSkyB, Vivendi considered that its stake in it represented a robust strategy in the face of these future uncertainties.

6.57. Because of the financial performance of Vivendi's stake in BSkyB, Vivendi was able to take a long view of its position. The stake was of sufficient size that any transaction with a third party including a merger or other business combination with BSkyB into or as part of a larger corporate group would need to take Vivendi's position into consideration. It was in that event, and only in that event, that Vivendi would be likely to seek to attach to its stake an economic premium (see paragraph 6.66).

6.58. Vivendi considered that its motives for acquiring a stake in BSkyB were fundamentally different from the concept of material influence. Its reasons for acquiring and maintaining a position in BSkyB did not require the acquisition of any influence over the policy of BSkyB. It was the strength of the existing management and policy of BSkyB which made Vivendi's stake such a robust response to uncertainty. That robustness could be adversely affected by any perception that management's position was weakened.

6.59. At a hearing, Vivendi made some further points about the particular situation of BSkyB. It said that BSkyB had not talked to Vivendi before Vivendi bought a stake. Vivendi did not make BSkyB bid-proof; BSkyB was already bid-proof. BSkyB already had access to capital markets and so it did not seem to Vivendi that the board of BSkyB could see Vivendi as bringing to it anything which it did not have already. Furthermore, the ability to block a special resolution was an isolated right and there was no other feature of Vivendi's relationship with BSkyB which could be pointed to as influencing policy. Policy was made by executive directors and executive committees from day to day. By the time questions were put to shareholders, as a special resolution if necessary, policy had long been settled.

6.60. Vivendi said that company law limited the subject matter of special resolutions to a small range of matters. This was not extended by BSkyB's Articles. The special resolutions of BSkyB over the last five years had essentially been of a routine nature. In those circumstances, the ability to block a special resolution did not amount to material influence. Alteration of the Articles occurred from time to time, but this did not amount to policy. It would be strange if Vivendi, which had invested in BSkyB, wished to prevent normal changes in the Articles.

6.61. We asked Vivendi if it could defeat News International on an ordinary resolution (see also paragraph 6.41), provided it could win over the votes of a relatively small number of shareholders, for example Kirch and some institutional investors. Vivendi said that it found this scenario theoretical. It had no knowledge as to how Kirch would exercise its rights, but it had no expectation other than that Kirch would support News International. It had not discussed with any other shareholder in BSkyB the exercise of voting rights at the shareholders' meetings of BSkyB. It would be very likely that if there were to be a confrontation at a shareholders' meeting for which Vivendi felt it necessary to gather votes that Mr Murdoch would feel the same way. The general perception in the market was that BSkyB was a well-managed company. It would be difficult to persuade institutional shareholders, who had been well served by BSkyB, to vote against a resolution supported by News International. It should be added that Canal+ had no sustained commercial relationship with Kirch, although Multithématiques did provide two theme channels to Première World (the German pay-TV platform controlled by KirchPayTV).

6.62. Vivendi emphasized that Canal+, Kirch and BSkyB were all independent entities. To the extent that there were benefits to be had from the collaboration between any of them, it seemed likely that those benefits would have been perceived and sought irrespective of purchase by Vivendi of a shareholding in BSkyB. Any collaboration between them could be scrutinized under Article 81 of the EC Treaty and any abuse of a dominant position would be regulated under Article 82 of the EC Treaty. Nothing had changed as a result of Vivendi's acquisition of its stake in BSkyB. Even if the Commission were to find that Vivendi had material influence over BSkyB, in reality Vivendi did not have any influence which would lead to anti-competitive behaviour.

6.63. We asked about Vivendi's strategy in the context of future pan-European consolidation of the media sector. Vivendi said that there would be a great deal of change in this industry in the future. When the opportunity came of acquiring a stake in BSkyB, the board of Vivendi accepted a minority investment. Whilst this would not normally have been its policy, it was a usual commercial strategy in the broadcasting sector. With the exception of Canal+ where Vivendi was precluded by French law from owning more than 49 per cent, it liked to have a strong position and preferably a majority of 100 per cent. Havas had been a typical case where there had been a 100 per cent acquisition. It was necessary for Vivendi to look to the future, beyond the time when Mr Murdoch was Chairman of BSkyB, and when it would be advantageous for investors to realize that Vivendi was a serious shareholder. The quality of BSkyB's channels was excellent and the potential for its development into services such as the Internet had to be borne in mind. Essentially Vivendi took a passive attitude but its Chairman was relatively young and it had to be alert to all possibilities in the future.

6.64. We asked if Vivendi could envisage circumstances in which News International shareholders might be debarred from voting. Vivendi said that there was provision in the Stock Exchange listing rules for shareholders to be debarred from voting on matters in which they had an interest, but in fact the problem had not arisen.

6.65. We asked Vivendi to comment on the possibility for joint projects between BSkyB and Canal+, as mentioned in the board minutes of 22 July (see paragraph 6.43). Vivendi mentioned that it was involved in a joint venture called @viso with a Japanese company called Softbank. The purpose of this joint venture was to invest in new Internet businesses in Continental Europe. News Corporation was a party to similar joint ventures with Softbank in relation to the UK and Australia. Subsequently Vivendi

provided a paper which had been referred to in the minutes of its board meeting on 22 July. In that paper it referred to possible forms of co-operation between Canal+ and BSKyB as including convergence of the two competing technologies developed by SECA and News Corporation, and the fact that the purchasing power of the two groups should enable them to strengthen their position vis-à-vis the US programme suppliers. Vivendi's further representations on that matter are recorded in paragraphs 6.126 to 6.131 and 6.136 to 6.147.

6.66. Summing up on the difference between a strategic negotiating position and material influence, Vivendi said that the strategic negotiating position it saw was not one with BSKyB or its shareholders. The point was rather that because Vivendi had a stake in the capital of BSKyB, if an outsider were to wish to try to initiate a process involving that capital, he might wish to negotiate with Vivendi. The economic premium referred simply to the size of the stake.

6.67. Concerning the exercise of the Commission's discretion, Vivendi submitted that Parliament had clearly created on the face of the statute a discretion which could be exercised. The Commission should examine whether in these very specific circumstances, which were unusual, it was not a good opportunity to exercise that discretion. It was not helpful to postulate entirely hypothetical situations.

6.68. We asked about a press report in October 1999 to the effect that Canal+ and BSKyB were likely to cooperate on content and technology, and might bid jointly for sports and film rights. Vivendi and Canal+ said that this report contained a number of inaccuracies and was speculative; the source of the comments was in charge of the Internet rather than relations between Canal+ and BSKyB. It was not clear that Vivendi could bring very much to BSKyB.

6.69. Subsequent to the hearing, we noted from press reports that Vivendi had called on News Corporation to reopen talks on how the two companies might work together in the wake of the AOL-Time Warner merger. It was reported that the Chairman of Vivendi had said that following this merger, BSKyB and Canal+ risked having difficulties accessing content which would be more and more rare and more and more expensive (*Le Monde*, 31 January 2000). Vivendi's comments on these reports are summarized in paragraph 6.132.

6.70. We asked if Canal+ directors received information concerning SECA. Canal+ said that it was only involved if its board needed to take decisions on major strategic developments and was not involved in day-to-day business. Actual contracts were negotiated by SECA's management. Subsequently we established that documentation concerning the licence arrangements between SECA and ONdigital was required to be copied to the legal department of Canal+ under extremely strict terms of confidentiality.

6.71. M Licoys, the Vivendi representative who is on the boards of both BSKyB and Canal+, added that he appreciated the issues that might arise from his presence on both boards and was aware of the operation and importance of 'Chinese walls' which he felt addressed the issue. The fiduciary duties imposed on the director of an English company had direct parallels in France. We asked M Licoys if he would be on any of BSKyB's committees. He said he was not on any of these committees, although one Vivendi director sat on the Canal+ compensation committee.

## **The relevant markets**

6.72. Vivendi submitted, in relation to market definition, that both Canal+ and BSKyB were active in the provision of TV services; the distribution of TV services; the acquisition of broadcasting rights for films and sports events; trading in the international rights to broadcast sports events; the production of films and audio-visual works; and conditional access technology. Most of the markets in question were national in nature and involved no overlap between Canal+ and BSKyB. In those markets where their activities did overlap, their market shares were not significant.

6.73. Concerning the product market, the provision of TV services consisted of the selection and scheduling of programming to produce TV channels. Originally, channels used to be general interest channels broadcast free to air, such as BBC1 in the UK and TF1 in France, or targeted channels (ie channels such as Channel 4 in the UK which aim to attract a particular audience). In the early 1980s, premium pay-TV channels were launched in Europe: Canal+ in France (1984), BSKyB in the UK (1990) and Première in Germany (1991). Premium pay-TV channels had a programming concept based primarily on (a) films shown in so-called pay-TV windows, that is, after cinema release and before being broadcast on free TV, and (b) major live sports programmes or events.

6.74. In parallel to the development of cable and satellite distribution infrastructures, theme channels were launched by TV operators. Theme channels showed programmes tailored to the interests of specific viewer groups. Typical themes included children's programmes, sports programmes, documentaries, young adults programmes, film, music and news. In the UK, some of the sport and cinema theme channels of BSkyB were considered to be premium theme channels in view of the nature of their programmes.

6.75. The European Commission had taken the view, in its analysis of the TV broadcasting industry carried out in the framework of the EC merger regulation, that the supply of pay-TV channels constituted a separate product market from free-to-air TV. This approach was based primarily on the premise that the contractual relationship in pay-TV was between the programme supplier and the subscriber, while the contractual relationship in free-to-air TV was between the programme supplier and advertisers. The Competition Commission in its report on BSkyB/Manchester United had taken the view that it was appropriate to treat pay-TV as a separate product market from free-to-air TV.

6.76. Vivendi was of the view that free-to-air TV and pay-TV formed part of one and the same market for operation of TV services. However, the precise definition of the relevant product market was not decisive in this case because, irrespective of the precise product market definition, Canal+ and BSkyB were not active in the same geographic markets. As far as pay-TV and free-to-air TV were concerned, even the European Commission had conceded that there was a relationship between pay-TV and free-to-air TV from the point of view of substitutability. The distinction between the two services became blurred where there were pay-TV channels that were financed by a combination of sources or as a result of the increasing digitalization of programmes. At present, a number of European pay-TV channels were already partly financed by advertising revenues. In countries where cable penetration was high and where cable was the predominant means of delivery, the reality was that many apparently 'free' TV channels were in effect 'pay' TV channels because the consumer had to pay an access fee to the cable operator for the channels to be carried on that network.

6.77. Pay-TV and commercial and public free-to-air TV services competed for the same viewers and therefore for revenues. Whether the channel was characterized as a public, commercial or pay-TV channel, the broadcaster had to put together an attractive schedule of programming in order to obtain the audience share that was critical to the channel's success. There was a direct relationship between the amount of commercial success of pay-TV services and the number of competing free-to-air TV channels. For example, in Germany, where around 30 channels were distributed via cable, Première's commercial performance during its first eight years of operation proved relatively poor.

6.78. A pay-TV service was reliant on rights to show highly popular programming. For the service to be attractive to potential subscribers, interesting programming (films, sports and special events) had to be shown by the pay-TV operator on an exclusive basis. If non-pay channels secured the rights to a range of popular, interesting programming, then the penetration of a pay-TV channel was likely to be affected. As a result, free-to-air TV and pay-TV operators competed vigorously for exclusive rights to attractive programming.

6.79. In addition to the distinction between pay-TV and free-to-air TV, the Competition Commission had in the past expressed the view that basic channels and premium channels constituted separate markets. In the Commission's report on BSkyB/Manchester United, it had concluded that premium sports channels (in particular, Sky Sports) were in a different market to basic sports channels, such as Eurosport. Vivendi submitted that the market was for the supplying of all channels. However, even if a distinction were drawn between premium and basic channels, there was no overlap at all between Canal+ and BSkyB as the only channel transmitted in the UK in which Canal+ had an interest, albeit a non-controlling one, was British Eurosport. British Eurosport was a basic channel whereas BSkyB's sports channels were premium channels.

6.80. In the past, the Commission had also distinguished between the market for premium sports channels and the market for premium film channels. However, this distinction was difficult to draw in the present case as Canal+ was a premium channel which provided a mixture of sports and films as well as other types of programme.

6.81. In summary, therefore, Vivendi submitted that the relevant product market for the purpose of this inquiry comprised both free-to-air TV and pay-TV, but that the precise definition of the relevant product market was not in any event determinative, since the parties were not active in the same geographic markets.

6.82. Concerning the geographic market, the European Commission had held that despite technical advances which had significantly contributed to a gradual process of internationalization, TV broadcasting markets remained mainly national or regional (language-based). In the Bertelsmann/CLT case, the European Commission noted that although in certain niche markets there were already programmes broadcast throughout Europe, TV broadcasting still generally took place in national markets, and that this was mainly due to different regulatory regimes, existing language barriers and cultural factors and other different conditions of competition prevailing in the various markets, for example the structure of the market for cable networks.<sup>1</sup> Vivendi agreed with this analysis. For example, according to French quota regulations, 60 per cent of the films broadcast by Canal+ must be of European origin and 40 per cent of the films broadcast must be original French language films. In addition, no pay-TV broadcaster was permitted to broadcast films in France during specific periods (parts of Wednesday, Saturday and Sunday) in order to encourage the cinema attendance.

6.83. In its report on the BSkyB/Manchester United merger, the Competition Commission had noted the finding of the OFT that the relevant geographic market for pay-TV was the UK. Canal+'s experience was that consumer tastes and culture were indeed different in each country and that programmes broadcast in one country were not necessarily popular in other countries. This was certainly true for the major general entertainment channels, which accounted for a significant share of viewing time in each of the countries concerned. It was also true for locally produced programmes and for many sports programmes. International events were followed most when national teams were successful.

6.84. Therefore Vivendi submitted that the relevant geographic markets for the provision of TV services were national or at most regional (language-based). The parties were not in any event active in the same geographic markets. Canal+ was not active in the UK TV broadcasting market, and BSkyB did not have a presence in Continental Europe, except that SkyNews was distributed on the CanalDigital platform in Scandinavia by satellite and could be received in the area of the Astra footprint as it was unencrypted on the Astra satellite.

6.85. Concerning the distribution of TV services, this comprised the selection of channels in the form of bundles and the broadcasting of such channels, in either analogue or digital format, either by cable, DTH satellite or DTT. It also comprised the marketing of pay-TV subscriptions and the managing of the relationship with the subscriber. The markets for the distribution of bundles of TV channels were national and the parties were not active in the same geographic markets. For the sake of completeness it should be mentioned that News Corporation had a non-controlling (35 per cent) interest in the capital of Stream, one of the two Italian competing digital platforms.

6.86. Concerning the acquisition of film rights, only US films gave rise to an opportunity for multi-territory acquisitions but such acquisitions did not represent any significant volumes. Canal+ had entered into certain five-year exclusive output deals with five US studios. Each subsidiary of the Canal+ group purchased the film rights corresponding to the needs and expectations of their viewers in each particular country.

6.87. As to the acquisition of sports rights, Vivendi submitted that there was one market for the acquisition of sports rights by free-to-air TV channel suppliers and pay-TV suppliers. Every channel needed to have access to a wide range of sports events and indeed they all broadcast many different sports events. Canal+'s total sports hours were lower than the total sports hours across the free-to-air broadcasting spectrum. Free TV channels and pay-TV channels often competed for or purchased jointly the rights over the same sporting events. The reasons were twofold: (a) the rising costs of sports rights and (b) the volume of air time that sports events required was often not available on one single channel.

6.88. The role of free-to-air broadcasters was further increased by their membership of the EBU, which allowed them to pool their buying power for the acquisition of certain sports events.

---

<sup>1</sup>EC decision *Bertelsmann CLT* (IV/M.779), 7 October 1996, OJ C 364/3, para 20.

6.89. Concerning the geographic market for the acquisition of film rights, the European Commission had noted that film broadcasting rights were usually granted for a given language version and broadcasting area. Accordingly, Vivendi submitted that the market for the acquisition of broadcasting rights was essentially national in scope. The sellers of rights generally had an economic incentive to perpetuate the fragmentation of these markets into national markets so as to maximize their revenues. The value of a film differed from territory to territory.

6.90. As to the geographic market for the acquisition of sports rights, Vivendi submitted that this was also essentially national in scope. For viewers, national championships were by far the most attractive events, and represented a very substantial cost to the channel provider. Rights to broadcast international sports events were also acquired on a national basis.

6.91. Canal+ traded in both film and sports rights, but its film sales to BSKyB were small and BSKyB itself was not active in the area of trading film rights. As for trading in the rights to broadcast sporting events, this could be considered as a relevant market upstream of wholesale markets for national rights. This trading consisted of purchasing broadcasting rights in order to resell them to TV broadcasters. The market was to a large extent international.

6.92. Canal+ was active in the area of film production. BSKyB also produced some films, but these were sold only to its own channels.

6.93. Concerning the market for conditional access technology, Vivendi submitted that this was a distinct market from that for digital interactive software. Canal+ was active in both these technologies, but BSKyB was present only in the market for conditional access software, to the extent that it used News Corporation's NDS (VideoGuard) system. Canal+ owned 50 per cent of SECA, which was owned as to 50 per cent by Bertelsmann, the German audio-visual group, and which marketed Mediaguard, a technology used in digital set-top boxes. We asked if Bertelsmann had a long-term interest in SECA. As recorded in paragraph 6.32, [

*Details omitted. See note on page iv.*

]. The geographic market for conditional access software was a global market as the software was sold on a worldwide basis. The market was dynamic and highly competitive.

6.94. At a hearing, we asked Vivendi and Canal+ further about the awarding of sports rights with international appeal. Canal+ said that rights were sold on a country by country basis, either directly by the rights owners or through intermediaries. A distinction should be made between an international event itself and the way it was sold and distributed. Some quite important events such as the UEFA Champions' League had been sold to consortia of pay-TV and free-to-air broadcasters. Furthermore, a European directive did not permit exclusivity to pay-TV broadcasters for certain important events. That said, the number of sports events which roused 'blockbuster' interest was relatively limited.

6.95. We asked Vivendi if in its view the transaction with regard to BSKyB would strengthen BSKyB's market power. Vivendi said that the transaction was neutral in that respect.

6.96. We asked about the possibility of BSKyB and Canal+ making joint bids for sports rights. Vivendi and Canal+ said that everything would depend on the circumstances. If in formulating any bid a dominant position was abused or there was any other breach of EC or national competition law, the European or national regulatory authorities would be able to take action on the matter.

6.97. We asked Vivendi about alleged dangers of the concentration of ownership of football clubs. Vivendi and Canal+ said that these dangers were entirely theoretical. As to the suggestion that they might seek to influence the outcome of a match, that would surely be impossible for a company which valued its integrity and long-term credibility and would probably amount to criminal conduct.

## **The effect of any merger situation on competition for the acquisition of sports and film rights in the UK**

6.98. Vivendi submitted that no competition issues arose in any of the relevant markets. There was no scope for Canal+ and BSKyB to coordinate their business strategies as the markets were national or regional.

6.99. Concerning the acquisition of film rights, Vivendi did not believe that Canal+ and BSkyB could coordinate their business strategies to achieve enhanced buyer power. Sellers had considerable selling power and it was in the interests of film studios to deal with each geographic market distinctly, in order to retain strong and growing competition in the national markets. Canal+ and other film buyers had been forced to lock themselves into total output deals with US film studios in order to obtain access to the best films. Furthermore, negotiations for different geographic markets had to be adapted to the particular regulatory and economic environment.

6.100. Concerning the acquisition of sports rights, Vivendi stated that the bidding power of Canal+ was relatively weak in this market. Furthermore, the proposed merger between Carlton and United News & Media would create the largest British commercial channel supplier, with considerable power in the market for the acquisition of sports rights. The interest in national league football across national borders was minimal and Canal+ and BSkyB would not be in a position to strengthen each other's negotiating position. Evidence of the owners' selling power could be found in the way the French national football league decided in May 1999 to renegotiate the rights to broadcast the Nationwide Division 1 championship with the French broadcasters. Canal+ was forced to abandon its exclusive rights to the championship and had to pay more for non-exclusive rights than it had previously paid for exclusive rights.

6.101. As to international sporting events, the European Television Without Frontiers directive provided that each member state might draw up a list of important listed events which should be broadcast unencrypted. Therefore a hypothetical alliance between Canal+ and BSkyB would not in any event be able to purchase exclusive rights to these important sporting events. This left only a limited number of international sports events in which BSkyB and Canal+ were interested and for which pay-TV channels could acquire exclusive rights. Rights holders were used to selling on national markets and it was in their interest to continue to do so. Moreover, they were increasingly sophisticated in the sale of rights to the competitions for which they were responsible and such rights were frequently sold by sports rights agencies.

6.102. On the trading market, both Canal+ and BSkyB were small players. Canal+ had a specialist trading subsidiary, Sport+. Sport+ held the non-UK rights to the English FA Premier League, controlled jointly with Trans World International which marketed them in Asia and the Middle East. The UK domestic rights were sold separately. In 1998, Canal+ had purchased from BSkyB the rights to broadcast certain rugby competitions while Sport+ had sold to BSkyB the broadcasting rights relating to Spanish football for 1998 to 2000. There were no significant barriers to entry, as evidenced by the existence of numerous competitors.

### **The implications of any such merger situation for conditional access technology**

6.103. Vivendi stated there was no horizontal relationship between Canal+ and BSkyB in respect of conditional access technology, that is, they were not competitors. The acquisition by Vivendi of its stake in BSkyB would neither affect competition in the conditional access and interactive technologies market nor in any way result in any change in competition in any other market as a result of Vivendi's links with Canal+'s technology businesses.

6.104. At a hearing, Canal+ stated that the suggestion that a company in which it had an interest, namely SECA, might not abide by its commitments vis-à-vis its clients who might be competitors to BSkyB was totally unacceptable. Discussions on the technical conditions under which the different conditional access systems might be interoperable were still taking place. Canal+ would have no interest in hampering technological development nor in breaking its contracts with clients. The suggestion that BSkyB would in any way influence Canal+ was theoretical, and SECA had always fulfilled all its obligations with regard to its clients in conditions of strict confidentiality. The conditional access suppliers' market was worldwide and competing systems existed and were being developed.

6.105. We asked whether it was possible that, as a result of Vivendi's stake in BSkyB, Vivendi might encourage BSkyB to adopt a common conditional access technology (either Mediaguard or VideoGuard). Vivendi said that, if this possibility were permitted, it would make quite a lot of sense. Systems could be set up with relatively small investment, but the decoders were costly. Work was proceeding at European level towards harmonizing systems.

6.106. We asked Canal+ whether it had considered entry into the UK pay-TV market. Canal+ said that this had not been part of its plans. For the past three years, it had dedicated most of its forces to pursuing its development in those European countries where it was already present. The UK market was highly competitive and relatively crowded and therefore would require enormous investment which was just not feasible for the moment.

## **Hypothetical remedies**

6.107. Concerning hypothetical remedies, we asked Vivendi to comment on possible behavioural remedies, to the effect that BSkyB and Vivendi agreed not to collaborate on bidding for rights, or exchange or use information acquired from the supply of conditional access technology. Vivendi and Canal+ stated that this again was a highly theoretical question. It seemed to be going too far to ask them and BSkyB to systematically refrain from doing together things that would not be questionable. Vivendi stated that it was not its role to bring about cooperation between Canal+ and BSkyB.

6.108. Vivendi submitted that any hypothetical remedy had to counter adverse effects caused by Vivendi's acquisition of shares in BSkyB and it would be necessary to show that such effects resulted from this acquisition and would not have occurred in any event. There were already clear competition rules governing what companies such as Vivendi, Canal+ and BSkyB were able to do and not to do. Any remedy which moved the line between what was acceptable behaviour and what was unacceptable behaviour was disproportionate.

6.109. It was important to distinguish between Canal+ and Vivendi. A remedy that might be imposed on Vivendi was a very different matter from a remedy that might be imposed on Canal+.

6.110. We asked about the possibility that divestment of Vivendi's shareholding in BSkyB be required. Vivendi said that it was not looking for divestiture of a position. The transaction had not been a manoeuvre to replace a possible merger between BSkyB and Canal+.

6.111. We asked about the possibility of requiring Canal+ to divest itself of its shareholding in SECA. Canal+ said that SECA was definitely one of its sources of added value and it was not at all convinced that its stake in SECA caused a problem. It was questionable whether section 90 of the Fair Trading Act would enable the Secretary of State to make any order requiring Canal+ to divest its shares in SECA. An order requiring Canal+ to divest its shares in SECA would need to be made under section 73 of the Act. Canal+ held its shares in SECA outside the UK. Under section 90(3) of the Act, nothing in an order made under section 73 of the Act should have effect so as to apply to any person in relation to his conduct outside the UK unless that person was of a type described in section 90(3) of the Act. As Canal+ was neither a citizen of the UK and colonies, nor a body corporate incorporated under UK law, it would only be of a type described in section 90(3) of the Act if it carried on business in the UK. Canal+'s related UK activities were limited to the licensing of certain intellectual property rights for use in the UK; it was far from clear that Canal+ did carry on business in the UK and therefore that the Secretary of State could make an order in relation to Canal+'s shares in SECA.

6.112. In any event, if Vivendi were to be obliged to withdraw from BSkyB, the power of News International would be enhanced.

## **Further representations**

6.113. Subsequently, we put a number of questions to Vivendi which Vivendi responded to in writing and at a second hearing. These questions and Vivendi's responses are set out below.

6.114. We told Vivendi that we understood that directors of BSkyB appointed by News International were precluded from voting on resolutions regarding matters in which News International had an interest, and asked Vivendi to comment on how this might affect its ability to exercise influence over the affairs of BSkyB. Vivendi submitted that Article 100(8) of BSkyB's Articles provided that no director appointed by a principal shareholder (which included both News International/News Corporation and BSBH/Vivendi) should vote, or be counted in the quorum present, at any meeting of the directors (or a meeting of a committee of the directors) on any resolution concerning any material matter in which that shareholder had, directly or indirectly, an interest. Vivendi considered that this had no significant effect

on its ability to exercise material influence over BSKyB. Whilst Vivendi had only limited knowledge of how the internal management of BSKyB worked, it would be surprised if the board considered resolutions in which a principal shareholder was interested other than very rarely.

6.115. So far as the constitution of the board was concerned, even without the votes of the News International directors, Vivendi would account for only one vote out of nine. Those nine would include Mr Ball, the Chief Executive, who could be expected to support any resolution brought forward to the board, including one in relation to News International. Furthermore, the nine non-News International directors would increase to ten once the Kirch director was appointed. Vivendi said that it would expect the Kirch director to vote in favour of a resolution which related to News International.

6.116. Although Article 100(8) required the News International directors to declare an interest and not to vote on any resolutions in which News International was interested, it did not require those directors to withdraw from the meeting during discussion of such a resolution. In fact the directors were free to regulate their board meetings as they saw fit. Perhaps more significantly Mr Murdoch was not required by the Articles to give up the chair of the meeting when a resolution in which News International was interested was being discussed.

6.117. Vivendi also drew our attention to the nature of resolutions when they were brought to the board. Before a transaction with News International was considered by the BSKyB board, it would have been discussed, negotiated and finalized between News International, or its sister company, and the BSKyB management and the group executive committee. It would come to the board with a recommendation from the BSKyB management. In those circumstances, any director, including both News International and BSBH/Vivendi appointed directors, must act in accordance with legal duties in relation to BSKyB and was faced with a simple choice of voting in favour, voting against or abstaining. Vivendi considered it inconceivable that the management would bring forward such a resolution without a strong case in its favour. For all these reasons, Vivendi considered that the requirement for News International directors not to vote on resolutions in which News International was interested made no material difference to its ability materially to influence the policy of BSKyB.

6.118. We asked Vivendi, if Vivendi were to oppose News International over an ordinary resolution of BSKyB, for example regarding the appointment of directors or the approval of accounts, what Vivendi would expect to be the outcome of voting; whether there were any shareholders with holdings of 1 per cent or more of total votes whom Vivendi might expect to side with it; and if it had any expectations about the way in which Kirch would exercise its voting rights. Vivendi said it expected that, in every such case, the resolution would be passed, notwithstanding Vivendi's opposition. Whilst News International held only 39 per cent of the voting rights in BSKyB shares, Vivendi did not expect 100 per cent of voting rights to be represented at any meeting and News International was therefore likely to hold nearer to 50 per cent of votes present than the size of its shareholding would suggest. Furthermore, it was not unusual for shareholders who did not attend shareholders' meetings to give a proxy vote to the chairman of the meeting. The notice of such meetings usually invited them to do so. The Chairman, Mr Murdoch, was likely to cast those votes in support of News International's position.

6.119. Vivendi had no expectation about the voting of any other shareholder in BSKyB. It assumed that, given that Kirch had entered into an agreement with BSKyB, Kirch would exercise its voting rights in support of News International's position. Vivendi therefore considered that it would be unable to oppose News International over an ordinary resolution. It was entirely theoretical to suggest that Vivendi would be able to defeat an ordinary resolution supported by News International by successfully winning over Kirch and also six institutional shareholders. Vivendi had not discussed BSKyB with any institutional shareholder. Given the performance of the BSKyB share price, Vivendi would expect institutional shareholders to support the current BSKyB management and therefore News International.

6.120. Concerning the issue of transactions with related parties, under Chapter 11 of the London Stock Exchange's listing rules, if a listed company such as BSKyB proposed to enter into a transaction, other than a transaction of a revenue nature in the ordinary course of business, with a related party shareholder then that company must make a public announcement concerning the transaction and convene an extraordinary general meeting to seek the approval of shareholders for the transaction. The related party was required to refrain from voting on a resolution to approve the transaction with it. The range of transactions which required approval under Chapter 11 was much narrower than those on which directors appointed by principal shareholders were required to abstain. Not only were the Chapter 11 provisions subject to a *de minimis* threshold, but also they did not apply to transactions of a revenue nature in the

ordinary course of business. So far as Vivendi was aware, there were no agreements in existence between the News Corporation Group and BSkyB which would have needed shareholder approval under Chapter 11; those of which Vivendi was aware were all of a revenue nature. The circumstances in which that approval would be required were very narrow.

6.121. Even if such a vote were required, Vivendi would not, on its own, be able to block it. Vivendi considered that any such resolution would inevitably be so significant for the future of the business as to command a high level of shareholder voting and support. Given that News International was closely associated with the current success of BSkyB, Vivendi considered that such a resolution could be expected to enjoy a significant degree of support among shareholders. As a result, Vivendi did not consider that the theoretical possibility that it might be able to defeat a resolution under Chapter 11 relating to a capital transaction between BSkyB and News International amounted to material influence.

6.122. Vivendi stated that it did not have any agreements with other BSkyB shareholders which could affect the exercise of their voting rights.

6.123. We asked Vivendi further about the Kirch deal. We told Vivendi that it had been the view of the Commission on previous references under section 64 that the conclusion as to the creation of a merger situation should not be affected by developments subsequent to the date of the reference (for example, KIO/BP<sup>1</sup>). We asked whether the Commission should apply that principle in the current investigation. We noted that the agreement between BSkyB and KirchPayTV, whereby Kirch would acquire 4.3 per cent of the enlarged equity share capital of BSkyB and the right to a non-executive directorship, was entered into in early December 1999, after the reference was made to the Commission on 12 November. We asked if Vivendi considered that the Commission should take that agreement into account; and, if not, whether Vivendi considered that, if the negotiations for the agreement had been sufficiently advanced at the date of the reference, the Commission could take that into account in determining what expectations would have been held about the prospect of Kirch acquiring the stake. We also asked Vivendi about its present expectation as to whether the BSkyB-Kirch deal would be approved by the European Commission.

6.124. In response to the queries in paragraph 6.123, Vivendi noted that the Commission had, in previous cases, accepted that its conclusion as to whether a merger situation had been created should not be affected by developments subsequent to the date of the reference. Vivendi considered that it did not have, and had never had, material influence over the policy of BSkyB. Whilst completion of the Kirch transaction would move Vivendi further away from such influence, it was not a key determinant of the point. Rather, the manner of the Kirch deal demonstrated that, at the time of the reference, Vivendi did not have material influence. Vivendi had no information about the Kirch deal other than that which was publicly available. Accordingly, Vivendi was not able to comment on the state of negotiations at the time of the reference. Nor was it able to comment on whether the transaction would be approved by the European Commission.

6.125. If the Commission, without taking account of the Kirch deal, were to decide that Vivendi had material influence over the policy of BSkyB, then Vivendi considered that the Commission should subsequently take account of that transaction for two reasons. First, the Commission should take account of that transaction in considering whether it should exercise its discretion under section 65(3) of the Fair Trading Act; and second, if appropriate, in considering what, if any, remedies should be specified in the Commission's report. Whatever time limitations might apply to the Commission's consideration of material influence, Vivendi said that it would be most concerned if the Commission were unable to take account of significant international and global developments since the reference in considering any issues of public interest.

6.126. We asked Vivendi a number of questions about the paper circulated to the Vivendi board and mentioned in the board minutes of 22 July (see paragraph 6.43 and Appendix 3.3). These questions related to the level of management of Canal+ or Vivendi at which the paper had been seen before it went to the Vivendi board; the level at which it was expressly approved; whether it reflected the reasons for the merger, as the board minutes showed; whether the board minutes were ratified; whether Vivendi agreed with the benefits articulated in the paper; whether Canal+ had seen a similar paper; and whether this paper suggested inconsistencies with the views expressed at the first hearing with Vivendi.

---

<sup>1</sup>*The Government of Kuwait and The British Petroleum Company plc: a report on the merger situation*, HMSO, Cm 477, October 1988.

6.127. Vivendi replied to the points in paragraph 6.126 that the paper had been prepared by an employee who worked on financial matters within Vivendi. It had been an informal working paper prepared in order to assist board members in understanding the subject and was primarily about financial matters. The comments on which the Commission's attention was focused appeared only in an annex to the paper. The individual who had prepared the paper had made the remarks in the annex without reference to anyone with knowledge or expertise in those issues and the comments reflected merely his own uninformed and speculative ideas.

6.128. Under French law, papers which were approved by the board, and represented the basis on which its decisions were made, must be annexed and referred to as such in the board minutes. That paper had not been annexed because it had never been approved or discussed by the board. Vivendi accepted that there might be a contrast between the status of that paper and those considered by the boards of UK listed companies which the Commission usually saw. French corporate culture did not attach great weight to such pre-discussion papers, which should not be taken as representative of the views of the board.

6.129. The paper did not reflect the reasons for the board's decision to proceed with the acquisition. That was consistent with the board minutes which recorded only that 'a paper had been sent to each member prior to the meeting' (see paragraph 3.160). The paper was not formally referred to in the minutes as being determinant. The issues in Annex 3 of the paper, the financial/strategic analysis of BSKyB (see Appendix 3.3), had not been discussed. Those minutes had been ratified at the next meeting of the Vivendi board.

6.130. Vivendi's reasons for investing in BSKyB had been set out in the minutes of the board meeting of 22 July 1999 and subsequently explained in Vivendi's submissions to the Commission. To the extent that the paper contained discussion of issues which were not reflected in those sources or was at variance with those sources, it did not reflect Vivendi's reasons for investing in BSKyB. That paper had never been seen or considered by either the board or the management of Canal+. Canal+'s views on these issues had been conveyed to the Commission at the first hearing. Given that it was Canal+ which operated in the product markets which were being reviewed, Vivendi submitted that the Commission should give significant weight to those views.

6.131. Vivendi was extremely concerned that the Commission was going to draw conclusions as to Vivendi's motives from an informal and hastily produced discussion document. To do so would be to demonstrate a misunderstanding of the way in which Vivendi and other French companies made decisions. To suggest that that paper in any way called into question any of the evidence or submissions that Vivendi had made to the Commission was to escalate it to an importance and weight entirely disproportionate to its purpose.

6.132. We asked Vivendi further about a press report of discussions between Vivendi and News Corporation (see paragraph 6.69). Vivendi said that M Messier, Vivendi's Chairman and Chief Executive, was being interviewed on the very recent announcement of an alliance between Vivendi and Vodafone related to the development of access to the Internet through next generation technology. M Messier was taking this opportunity to communicate his long-term vision of a media world in full flux and of his desire for the Vivendi group to play a part in the new media industry of the 21<sup>st</sup> century. At the end of the interview, the journalist had raised the question of Vivendi's relationship with BSKyB, and M Messier had answered that he was open to discussions and exchanges of views with Mr Murdoch on the global evolution of the industry, in particular following the AOL/Time Warner announced merger. Vivendi intended to be a player in the global market, as the Vivendi/Vodafone alliance clearly indicated, and was open to discussion with all international players, including Mr Murdoch.

6.133. At a second hearing, Vivendi reiterated some of the above points. It told us that the paper mentioned in the board minutes of 22 July was primarily a financial paper. It had not been discussed or referred to at the board meeting. The fact that the paper was not appended to the minutes meant that it did not legally form part of the board's decision. To draw any conclusions about Vivendi's motives from that document would be to misunderstand the nature of the document and the manner in which Vivendi, as a large and typically French company, was managed.

6.134. Vivendi continued its preliminary remarks at the second hearing by turning to the questions of remedies. It said it firmly believed that its investment in BSKyB gave rise neither to a merger situation qualifying for investigation nor to any public interest detriment, and therefore no need for remedies. The

circumstances of Vivendi's investment in BSkyB were such as to make the identification of possible remedies less than straightforward. Vivendi asked the Commission, if it found itself considering the question of remedies in earnest, to consider the current state of the market place. If BSkyB and Canal+ were to consider any form of cooperation, then they would be obliged to ensure that they stayed within the permitted limits of competition law. In considering any behavioural remedy, the Commission would need to consider very carefully whether any additional constraints were needed above the existing rules of competition law.

6.135. Vivendi submitted that, if the Commission considered that competition law provided suitable safeguards against any public interest detriment that it perceived, it might well be able to conclude that Vivendi's investment in BSkyB was not against the public interest. Bearing in mind the extraordinarily fast rate of change currently under way in this industry, Vivendi was extremely cautious of anything that might place it at a competitive disadvantage by limiting its ability to respond to as yet unforeseen and unforeseeable developments in a way open to its competitors.

6.136. We asked Vivendi further at the hearing about the status of the paper referred to in the 22 July board minutes. Vivendi said that it had been prepared by a financial analyst who worked in Vivendi's finance department under the supervision of Vivendi's Finance Director. The Finance Director had requested that the paper be prepared for the board at the time of the merger between Vivendi and Pathé. The paper had not been discussed with Canal+ management, who had not been involved in the merger between Vivendi and Pathé, and had been intended as a synopsis of the views of the financial market about the evolution of the TV market at the time. The paper had been prepared for use within the finance department, and the author did not know that the paper had been sent to board members and referred to in the minutes of the board meeting.

6.137. The Finance Director was not a member of the board and therefore to say that the paper was blessed by the Finance Director was in itself not a blessing by one of the executives involved in the decision-making process. The Finance Director did attend board meetings although not as a board member. The paper had nevertheless been circulated to members of the board prior to the meeting, as background financial information.

6.138. Vivendi stated that legally this paper had not been part of the board's thinking. Subsequently Vivendi confirmed that there were no other documents which had been circulated to Vivendi's directors. The management of Canal+ had not seen the paper.

6.139. We asked Vivendi about the possibility of joint projects between BSkyB and Canal+ mentioned in the paper. Vivendi said that any investment would be approved in the light of a number of possibilities, but those possibilities would not necessarily come to pass. [

*Details omitted. See note on page iv.* ]

The investment did not take place because it was thought that co-operation would occur, although Vivendi had to satisfy itself that cooperation would be possible. The collapse of merger talks between BSkyB and Canal+ indicated strongly that cooperation between them was not the reason for the investment. As had been stated at the first hearing, Vivendi's investment in BSkyB had been very rewarding financially.

6.140. We asked further about the detail of the statements in the paper (see Appendix 3.3) and with which parts the Vivendi board agreed.

6.141. Vivendi drew our attention to the statement in the paper that the acquisition of further shares in BSkyB and Canal+ so as to increase the Vivendi share in Canal+ to 49 per cent and in BSkyB to 24.48 per cent would put Vivendi in a position to establish an integrated European group, capable of providing European consumers with a multi-service interactive product line comparable to the initiatives already effected by BSkyB. Vivendi said that that was a key point which had been reinforced when Vivendi had announced a deal with Vodafone recently on Internet services, the day after Mr Murdoch had announced that he had increased his collaboration with BT and after the BSkyB board had said that it had £250 million to invest in BSkyB in interactive TV.

6.142. Vivendi pointed out that the paper, in Annex 3 under the heading 'Possible forms of co-operation between Canal+ and BSkyB', stated 'Without going into any discussion of merger possibilities, Vivendi's position as the biggest shareholder in Canal+ and the second biggest shareholder in BSkyB (with a blocking minority and representation on the board) will permit the encouragement of certain forms of cooperation between Canal+ and BSkyB.' Vivendi stated that it must be recognized that

the idea was not to merge the two companies. The words in the paper had been drafted carefully and simply represented ideas about certain forms of cooperation. The paper went on to say, under the heading 'Decoders', that the two competing technologies developed by SECA and News Corporation should converge so as to permit joint developments for the next generation of decoders. Vivendi confirmed that such developments would be in the interests of the industry.

6.143. The paper continued with the words, 'Programmes: The purchasing power of the two groups should enable them to strengthen their position vis-à-vis the American programme suppliers'. The sense of this idea was simply that, in the light of the very few and powerful large US programme suppliers, the buyers were inevitably in competition and discussions between them with a view to coordinating policy might make sense. The next sentence in the paper read, 'Finally, the position of European football (France, Spain, Italy, Great Britain) might allow for the emergence of new competitions'. Vivendi said that the writer of the paper had been influenced by the thought that providers of football events were in powerful positions due to the fact that there was only one FA Premier League in the UK, one National Championship in France, and a similar situation in Italy. Accordingly the writer had speculated that new events might be created. Vivendi added that the minutes of the board meeting on 22 July did not in fact refer to these speculations. In any event the paper as a whole and in particular its Annex 3 had not been considered during the board meeting. Vivendi again drew the Commission's attention to French law relating to board minutes, which was to the effect that minutes and exhibits, if any, wherever they were mentioned as forming an integral part of the minutes were the only documents as a matter of French law deemed to reflect the opinion of a Société Anonyme corporate governing body. Canal+ added that it did not agree with the approach suggested in the paper about sporting events.

6.144. We put it to Vivendi and Canal+ that the paper did indicate that Vivendi was envisaging active co-operation between Canal+ and BSkyB in a number of fields rather than simply being a passive investor for financial return only. Vivendi said that its board had approved the investment in BSkyB because it was a good investment and a strategic one in the long term. In addition, there could not possibly be any objection to legal cooperation between BSkyB and Canal+. The minutes of the 22 July meeting stated: 'In terms of BSkyB, it [the investment] would provide an opportunity for the unhurried exploration of the possibility of joint projects with Canal+ in the fields of technology convergence, digital decoders, Internet.' That language suggested remote possibilities rather than the likelihood of immediate influence over the policies of BSkyB.

6.145. We asked Vivendi to what extent it thought that intelligent commercial cooperation was in fact likely between BSkyB and Canal+. Vivendi stated that it had no more to add to what it had said, namely that the paper was expressing intelligent ideas. We asked if UK consumers were likely to benefit. Canal+ said that it found this question difficult because it had not to date cooperated with BSkyB. It might be that, in the field of the acquisition of terminals, cost savings would be achievable if common standards were reached by European operators. Work was proceeding on introducing common standards at European level. As to the acquisition of programming rights, consumers might benefit if these could be bought more cheaply, but it was difficult to see if that outcome would occur, for example in a situation where pay-TV broadcasters might be competing against the EBU.

6.146. Vivendi added that cooperation might well be possible in Internet services and new products and that to some extent it was desirable to think in terms of Europe's interests generally, especially when having regard to US developments.

6.147. We put it to Vivendi that our particular concern was over joint purchasing of rights. Vivendi said that any such joint purchasing would be subject to the full force of competition law. The rights market was highly competitive and those who were offering the rights were in a stronger position than the buyers. It was highly improbable that Canal+ could possibly be of any assistance to BSkyB in the acquisition of sports or film rights in the UK.

6.148. We asked Vivendi about a reference in the board minutes to Mr Murdoch not accepting pre-conditions put forward by Canal+ as a basis for a possible merger with BSkyB. Canal+ reiterated that discussions had not taken place with BSkyB but with Mr Murdoch, who was a shareholder and also the Chairman of News Corporation. The questions that had been discussed with Mr Murdoch were threefold. The first one had to do with the management of the company, namely, if there were a merger, who would actually manage the company. The second question concerned the value that would be given to the group itself, to the two entities within the group and the consequences for the shareholders of the future company. The third point was concerned with the implementation of French law which prohibited any non-EC member holding more than 20 per cent of the capital in a broadcasting company.

6.149. We asked Vivendi about references we had seen to Mr Murdoch's plans to consolidate his satellite TV interests in a new company, and whether this in any way affected Vivendi's plans vis-à-vis its stake in BSkyB. Vivendi said that its attitude would depend on what was offered; no doubt Mr Murdoch would discuss his ideas with BSkyB's shareholders. If the ideas made sense, Vivendi would look on them favourably. Details were not yet available, but when they were, Vivendi would consider them from the point of view of a financial investor.

6.150. We asked Vivendi further about the acquisition of film rights. Vivendi and Canal+ said that power lay with the US film studios. Canal+ needed to be able to show about a dozen blockbusters from Hollywood because that was expected by viewers. It was not in a strong position in acquiring rights to those films. It would be impossible for Canal+ to negotiate on condition that BSkyB obtained the rights to broadcast in the UK. If Canal+ were to try to do this, it would run the risk that rights might be sold to its competitor TPS, which had significant purchasing power granted to it by its own shareholders, ie free-to-air TV, which represented 90 per cent of the French TV audience and were important buyers of film rights for the French market and had long-standing relationships with rights sellers. TPS in 1997 had managed to sign sufficient contracts so as to hold 50 per cent of the Hollywood film rights from the major studios in France.

6.151. Concerning the relationship between Canal+ and Twentieth Century Fox (Fox), Canal+ said that there was no privileged relationship any more than there was between Disney and Canal+. Fox was only one of the six major Hollywood studios and would not always be the most successful. It was most unlikely that Vivendi's stake in BSkyB would have the result of Canal+ being in a favourable position with regard to re-negotiations with Fox. It was even more unlikely that the studios would wish to sell to joint bidders since they could escalate prices by putting the buyers into competition with each other.

6.152. Concerning bidding for sports rights, Canal+ said that Sport+ was a broker which had to survive in an extremely competitive market. It purchased rights and resold them in competition with, for example, the EBU, which purchased rights jointly largely for free-to-air channels. We asked whether BSkyB and Vivendi or Canal+ could put in a higher bid for UK sports rights than any competitors in the UK because they would be able to broadcast throughout Europe. Vivendi and Canal+ said that that suggestion was unrealistic. The value of domestic rights (for national competitions) was ten times greater than the value of the rights to the same competitions outside the country of the competition (non-domestic rights). Canal+ might have an interest in purchasing the non-UK rights to the FA Premier League, but this would not have any bearing on the negotiations for the UK rights.

6.153. We asked about events of international interest such as Six Nations Rugby Championships. Canal+ said that in this area competition existed between free-to-air and pay-TV. To properly assess the level of competition in this market, one needed to take account of the competitive strengths of both free-to-air and pay-TV operators. The fact that sometimes sports rights for the same events were shared between free-to-air and pay-TV operators was clear evidence of the competitive relationship that exists between such operators. We put it to Vivendi and Canal+ that the UK free-to-air channels were not able to devote resources to bidding for such sports events because of their public interest responsibility. Canal+ said that in reality if free-to-air channels were interested in sports rights they would have to pay the appropriate price; in fact, a situation was evolving in each country where, due to their high price, rights were shared between free-to-air and pay-TV.

6.154. We asked about the hypothetical situation in which Sport+, which held Italian and Spanish football rights, might not be prepared to supply rights to UK operators other than BSkyB. Canal+ said that this could not conceivably be the case. Sport+ would sell the rights to the highest bidder so as to look after its own financial interests.

6.155. We told Vivendi and Canal+ that it had been suggested to us that British Eurosport, in which Vivendi had an interest, could offer potential competition to the BSkyB channels, but would have less incentive to do so given Vivendi's interest in BSkyB. Vivendi said that it was not Canal+ that managed Eurosport International but TF1, which was the first private free-to-air channel in France.

6.156. We put it to Vivendi that there was a danger that powerful pay-TV operators throughout Europe might be able to secure most of the rights for major European sports events to the detriment of other UK platforms, whether they were cable or free-to-air. Vivendi and Canal+ said that they disagreed with this analysis. The rise in the prices to be paid for sports rights was a problem for all TV broadcasters. Sometimes the prices demanded were so high that broadcasters would not purchase the rights.

Alternatively, pay-TV broadcasters chose to share rights with free-to-air TV broadcasters. It was not the case that consumers were prepared to pay any price to see a sports event and pay-TV companies had to recover their costs.

6.157. We put it to Vivendi and Canal+ that, in the future, it would be unlikely that BSkyB, Canal+ and Kirch would compete against each other for sports rights. Vivendi said that it was important not to confuse the two levels of trading for rights. As far as the buying of rights was concerned, in each country there was strong competition. Taking the example of the Champions' League, rights were sold territory by territory by UEFA. In the event, the rights had been shared by Canal+ and TF1 in France, by ONdigital and ITV in the UK and by RTL and Première in Germany. In any event, Vivendi's investment in BSkyB surely did not have any impact on astute commercial co-operation which might occur in any event. Such cooperation was occurring between free-to-air and pay-TV but competition was evolving in such a way that prices kept increasing and the result of this was that broadcasters had to restrict their purchases, in other words the number of events shown. Canal+ would next year be paying twice the sum it used to pay for French football and it had also lost exclusivity. Competition had led to higher prices because there was a lack of balance between those who offered the rights and those who needed to buy them.

6.158. Moving to conditional access technology, we told Vivendi that we had noted that the paper suggested possible convergence of the NDS and SECA systems, and asked if this would lead to the disappearance of these systems in their present form. Canal+ said that at the present time, NDS and SECA had installed different decoders or set-top boxes and that these would need to continue to be serviced. No discussions had taken place between NDS and SECA about the possibility of designing common set-top boxes. The present set-top boxes could not be upgraded, although new set-top boxes could be designed. Generally speaking, there was no sort of collaboration in the future that could be ruled out, although a merger between NDS and SECA was absolutely not remotely envisaged to date. It should be remembered that NDS was owned by the News Corporation Group rather than by BSkyB and therefore the consequences that might flow from Vivendi's investment in BSkyB so far as NDS was concerned were even more remote than any other co-operation that might be envisaged.

6.159. Furthermore, Vivendi added that both NDS and SECA had long-term service contracts which they would want to fulfil. Income from subscriber contracts must not be underestimated and there were a great many terminals to be serviced and a great number of customers whose interests needed to be considered. SECA had other clients as well as ONdigital.

6.160. Returning to remedies, we asked Vivendi whether, if remedies were required on a hypothetical basis, it would be possible to devise behavioural undertakings that did not require constant regulatory intervention. Vivendi reiterated that any competition concerns should be adequately dealt with by the existing rules. These set out the extent to which co-operation could take place, investment or no investment.

6.161. We asked Vivendi about the possibility of notifying joint bids for rights. Vivendi replied that if these were likely to be required to be notified under existing EC and national competition law, they would be notified to the appropriate authorities. Canal+ was not likely to be prepared to give undertakings which went further than the existing competition rules. It was operating in a competitive market in which its competitors were allowed to make joint bids; Canal+ therefore ought to be allowed to join in bidding where appropriate. For the same reason, Canal+ was unenthusiastic about any undertaking not to collaborate on bidding for rights. Furthermore, Canal+ did not carry on business within the UK and therefore the Secretary of State could not seek undertakings from it.

6.162. We asked about the possibility of Vivendi's divesting its stake in BSkyB. Vivendi said that it thought this would be a very curious remedy to deal with some aspect of possible behaviour by Canal+. The European competition authorities were likely to pay a great deal of attention to companies such as BSkyB and Canal+ and it would not therefore be reasonable for those companies to take any risks when considering the permissible limits of cooperation between them.

6.163. We asked if it would be practicable to put an obligation on Vivendi, acting on behalf of Canal+ which oversaw SECA's legal affairs, to maintain a conditional access system separate from NDS's system for, say, five to ten years. Vivendi said that, as a matter of law, it considered that that would not be practicable because the Fair Trading Act did not give the Secretary of State power to impose orders on Vivendi in relation to its minority stake in a UK company.

6.164. We asked if the SECA and NDS systems should remain separate at least until the development of Simulcrypt systems. Vivendi said that this was not a sensible suggestion as Simulcrypt had to all intents and purposes been developed and SECA would be ready to introduce it at any time.

6.165. We asked more generally about Vivendi's attitude to possible divestment of its shares in BSKyB and the removal of its representation on the BSKyB board. Vivendi said that this would be unacceptable, bearing in mind that it was a minority shareholder with no influence. If such a remedy were put in place by the Secretary of State, Vivendi would be likely to appeal against it. If Vivendi were forced to sell its shares, that did not mean that cooperation might not occur. The Commission should bear in mind that if any such remedy were to be contemplated, it should aim to deal only with what was necessary to deal with Vivendi's material influence. Every share sold down would increase the grip of Mr Murdoch over BSKyB because the gap between the largest shareholder and the second largest shareholder would be increased.

## **BSkyB**

### **BSkyB's general submission**

6.166. At a hearing, BSKyB told us that it saw its position in respect of this inquiry as being a little unusual. Vivendi's acquisition of its current shareholding in BSKyB had arisen without reference to or discussion with the company itself. BSKyB had not therefore actively participated in any way in Vivendi's acquisition of the stake. BSKyB, as a company listed on the London Stock Exchange and a FTSE 100 company, did not pick and choose its shareholders. In practice, the company's position was essentially one of neutrality towards the identity of its shareholders, while the board members owed fiduciary duties to, and must act in the general interest of, all the shareholders. Vivendi had not explained to BSKyB its intentions as to how it would operate as a shareholder, and it was not BSKyB's place to speculate about this.

6.167. We asked whether, when Vivendi made the acquisition, there were directors on the BSKyB board who would have been aware of the acquisition because they were representatives of the selling companies. BSKyB said that that was the case, but that the acquisition had never been discussed in a board meeting, although it was common knowledge, following the announcement of the deal on 7 June 1999, that Vivendi was acquiring Pathé. Vivendi was a different entity from Pathé and had not explained to BSKyB how it intended to operate as a shareholder going forward. BSKyB sought to adhere to the principle that it would act in the interests of its shareholders as a whole. It was not therefore appropriate for BSKyB as a company either to support or object to the Vivendi stake being taken. However, BSKyB would be concerned if the investment by Vivendi were either to fetter its freedom of action or prejudice the interests of the other shareholders. We asked when BSKyB first became aware of Vivendi's acquisition of shares. BSKyB said that it had been notified by Pathé just before Pathé issued a joint press release with Vivendi announcing the deal on 7 June 1999. It had received a Companies Act notice on 18 June notifying it that Vivendi had acquired the shares. The two Pathé directors would have had duties of confidentiality to Pathé and no duties to give BSKyB information that was confidential to another party. At the time that Vivendi had made offers to Granada and Pearson to buy their stakes in BSBH, there was not a BSBH director on the BSKyB board.

6.168. BSKyB said that the transactions which had taken place had resulted in Vivendi having a stake which would in effect enable it to block special resolutions in practice. Vivendi also, through its ownership of BSBH, had one director on BSKyB's board. BSKyB had been advised that there was precedent for such arrangements being deemed to result in Vivendi having the ability materially to influence the policy of BSKyB. Despite this, BSKyB noted that the majority of the issues which had been raised with it appeared to be directed towards how BSKyB might influence Vivendi in relation to businesses over which Vivendi already had control or influence, particularly Canal+ and its technology joint venture, SECA. In the circumstances BSKyB had had some difficulty, when considering the enquiries put to it and the issues identified by the Commission as arising in the case. In particular, given BSKyB's passive role in the arrangements, BSKyB had had difficulty with the perception that this transaction formed part of a strategy of cooperation between BSKyB on the one hand and Vivendi and its associated companies on the other. That perception appeared to BSKyB to be without foundation.

6.169. We asked BSKyB about its general strategy. BSKyB said that it had launched a digital platform, and its strategy going forward was focused on making that platform and investment in it a success.

That involved a focus on attracting new subscribers and also transitioning the existing analogue subscriber base over to digital as quickly as possible. To that end, BSkyB had adopted a free set-top box strategy to try and grow the base of subscribers and provide an incentive to analogue subscribers to make the transition to digital reception. At the same time, BSkyB was trying to develop new services to exploit the digital technology that it had put in place, including interactive services, enhanced programming services, NVOD, and making use of increased bandwidths available, while continuing to seek wide distribution of its channels on the other existing platforms and any other platforms as they might develop in the future.

6.170. We asked BSkyB about its general strategy over the next five years on the provision of channels. BSkyB said that the overwhelming focus of the company was on the satellite (or DTH) platform. That was where BSkyB had put its money. [

*Details omitted. See note on page iv.*

] However, consideration was being given as to how the digital infrastructure could be used to enhance the programming services that currently existed. BSkyB operated a number of channels and each had its own strategy for development, directed at increasing its appeal in a cost-effective way. BSkyB kept under review the possibility for potential development of new channels if demand were perceived to exist.

6.171. Sports and films were the premium channels but they were not BSkyB's only focus. Sky One was the most watched channel in the multi-channel universe. It was very successful and an important part of BSkyB's portfolio. Sky News and joint venture investments were also very important. In the future, more services would need to be produced to appeal to different parts of the population. We asked BSkyB for examples of these. It said that it was not in a position to predict which areas were going to be most successful over the next five years. It thought there might be a great increase in the number of channels, and other genres would be exploited more than they had been in the past.

6.172. We asked BSkyB about its contemplation of a merger with Canal+ in 1999. BSkyB said that at the beginning of 1999, BSkyB and Canal+ had had some exploratory discussions with a view to seeing whether a merger of any sort would be to their mutual benefit. The discussions lasted a couple of months and were preliminary in nature. They largely centred around how technically such a merger could be structured and whether it was at all possible to even have a structure which merged the two entities. Canal+ needed to be based in France and therefore the merged entity would have been required to be based in France. There had also been a number of tax issues. The talks had foundered fairly early on the basis of Canal+ wanting management control, which had not been any part of BSkyB's idea. Discussions did not proceed to any formal documentation.

6.173. We asked about the contention that Vivendi's acquisition of an interest in BSkyB was in effect an alternative to a merger between BSkyB and Canal+. BSkyB said that a view on this matter depended on what effect the original planned merger was thought to have. At the time, some Vivendi representatives had made comments in the press to the effect that the proposed merger would bring benefits from a rights-buying and technology point of view. This had not been the view of the BSkyB representatives. BSkyB had never thought that those benefits that were being suggested by Vivendi actually had any substance. One of BSkyB's internal problems with the proposed merger had been that it was unsure what benefits would accrue to it in practice.

6.174. We asked BSkyB about its recent agreement with Kirch. BSkyB said that the European Commission was examining the Kirch deal and had raised the possibility that this deal was the tip of the iceberg, in the sense that a global strategy was possibly being developed between BSkyB, Canal+ and Kirch. Such a strategy was not in fact being developed. Nor was the deal with Kirch influenced by the fact that the merger talks with Canal+ had come to nothing. The opportunity to take a stake in Kirch, which was suffering in relation to its financial position on its pay-TV platform, had come up towards the end of 1999 and those talks had been successful.

6.175. Noting that about one-third of UK households took pay-TV, we asked how that compared with Europe. BSkyB produced public data which suggested that in France the situation was similar. We asked if there was a growing market in Europe. BSkyB said that different markets exhibited different patterns. Demand for pay-TV in a particular country was to some extent a function of the quality and quantity of programming that was available on the free-to-air services. In Germany, some 30 free-to-air channels were available to most German households and that was probably a very significant factor in the fact that pay-TV penetration in Germany was, BSkyB thought, lower than in the UK. Another

generally relevant factor which would vary from country to country was the extent to which the state had historically been involved in putting in place infrastructure for the distribution of pay-TV. Some of the state-owned European telecommunications companies were previously owners of joint telecommunications and cable network infrastructure. This probably led, other things being equal, to higher levels of penetration in some countries than others.

6.176. As to the USA, BSKyB said that one of the main drivers in the penetration of cable TV was the fact that the reception of the terrestrial channels was very poor in many areas, and cable retransmission was a means of improving TV reception. Once the infrastructure was in place and cable boxes were in homes, households could be easily attracted to take pay-TV services. Consequently, the penetration of pay-TV in the USA was very high.

6.177. We asked BSKyB about its recent strategic alliance with Leeds United football club. BSKyB said that fairly recently football clubs had started to appoint media agents to advise them on exploitation of their rights. That had first publicly surfaced in the summer of 1999 with the appointment by Liverpool football club of Granada as a media agent. Since then, NTL had entered into a media agency arrangement with Newcastle United and BSKyB's arrangement with Leeds United was similar. BSKyB was the agent appointed by Leeds United to advise it on the way it exploited a number of rights with regard to matters such as broadcasting, sponsorship and advertising. However, the media agency agreement expressly excluded advice to the football club on the rights which were collectively sold. For example, the rights of the FA Premier League would be outside the scope of the media agency agreement. Coupled with the media agency agreement there was a small shareholding; in BSKyB's case, this amounted to a shareholding of under 10 per cent in Leeds United. From BSKyB's point of view, this was a very interesting new opportunity. Notwithstanding the fact that certain rights, which were generally perceived to be very valuable, were outside the scope of the arrangement, BSKyB saw great potential in terms of new media rights and development of new distribution platforms. BSKyB thought there was great potential to increase the earnings of the clubs, and this was an opportunity for BSKyB to bring its core business skills to bear on that and to share in that opportunity. This had been recognized by many of BSKyB's competitors; Granada and NTL were doing the same things. BSKyB's understanding was that Granada and NTL were not stopping with one club but were talking to other clubs and might announce further developments shortly. Subsequently, BSKyB told us that its understanding had been proved to be correct. NTL had since acquired an interest in Aston Villa and had been linked in the press with Arsenal and Middlesbrough.

## **The question of material influence**

6.178. We asked BSKyB to elaborate on its submission regarding material influence. BSKyB said that it had been advised that there was precedent to suggest that Vivendi, because of its stake being close to a stake which could block a special resolution, coupled with the fact that it had a director on the BSKyB board, did have the ability materially to influence BSKyB, under the Fair Trading Act. Legal advice was to the effect that, looking at the jurisdictional test, it seemed to be well accepted that a company which could block a special resolution had material influence. Although Vivendi's shareholding was not quite 25 per cent, in practice it was sufficient to block a special resolution, because 30 per cent of the company was quite widely held and some of those shareholders might not vote or might vote with Vivendi if Vivendi were seeking to block a resolution.

6.179. BSKyB provided a paper detailing the shareholdings in the BSKyB group and the relationship between it and its major shareholders. It stated that, at 18 November 1999, News International Television Limited (a subsidiary of News International plc, which in turn was a subsidiary of News Corporation) held 39.72 per cent of the shares, Vivendi held 24.45 per cent, and institutional and private investors held 35.83 per cent. At a shareholder level, an interest of just under 25 per cent was likely in practice to enable Vivendi to block special resolutions of BSKyB, which required a 75 per cent majority of shareholders voting, and any resolutions on which News International was barred from voting.

6.180. We asked in what circumstances might special resolutions occur and in what circumstances might News International be barred from voting. BSKyB said that, with regard to when special resolutions could occur, it had basically followed the standard situation under the Companies Act 1985 and there was nothing of detail in its Articles which added further special resolutions that were required. The type of special resolutions that would require a 75 per cent vote of the shareholders were matters such as a change of name of the company, change of the Articles, reduction in the share capital, authority to

repurchase from the market some of the company's share capital, and authority to issue new shares for cash without pre-emption rights applying. (5 per cent of the company's capital could be issued in this way without the consent of the shareholders according to the pre-emption guidelines issued by the Association of British Insurers and the National Association of Pension Funds.) As a matter of course, some special resolutions were required at the company's AGM each year, in particular giving authority to issue new shares for cash on a non-pre-emptive basis. BSKyB also required a special resolution of shareholders to give the board the right to issue shares up to the authorized share capital because it felt that this matter should not be dissociated from the question of disapplication of pre-emption rights under section 95 of the Companies Act 1985, although in fact the Companies Act section 80 enabled the right to issue shares to be approved by ordinary resolution.

6.181. In terms of whether News International could be barred from voting on any special resolution, the fact was that it basically could not be. It was a basic rule of English company law that shareholders were entitled to vote in their interests and there was nothing that disbarred them from voting in the way that, for example, BSKyB's Articles might disbar a director from voting if he had an interest in a matter which was discussed at the board level. That said, the situations where a party might be barred from voting at the shareholder level related to instances where a related party transaction might exist between the company and that shareholder if that shareholder had over 10 per cent of the company, and if the transaction was one which was not in the ordinary course of business and not of a revenue nature and met certain thresholds which were set out as percentage ratios in the Stock Exchange listing rules. In those circumstances, if certain percentages were met, ultimately an ordinary resolution might be needed and the related party shareholder could not vote on the ordinary resolution. BSKyB could not think of circumstances where a shareholder would be barred from voting on a special resolution.

6.182. We asked BSKyB how likely it was, in the circumstances of the company, that it was going to need special resolutions. BSKyB said that it was likely that at the next AGM it would put forward its customary special resolution, namely the authority to purchase company shares by issuing new shares on a non-pre-emptive basis up to 5 per cent. It was possible also that BSKyB would seek authority under section 80 of the Companies Act by means of a special resolution. From time to time also the Articles of Association needed changing.

6.183. We asked whether, if News International was not able to vote as a shareholder on an ordinary resolution, Vivendi's 24.5 per cent holding would have an impact. BSKyB said that in those circumstances Vivendi would clearly have a high percentage of the remaining shareholding (it would have 25 shares in every 60), and therefore would be capable of having a considerable influence on the outcome.

6.184. We asked about the influence of the institutional shareholders, none of whom held more than 2 per cent, and whether it would be possible for them to form a bloc on a matter on which they might feel strongly, for example a resolution to disapply pre-emption rights. BSKyB said that this would depend on the circumstances of a particular case, whether they had a natural instinct to vote in a particular way, whether they were lobbied to vote in a particular way, whether they were interested in voting in a particular way, or whether they just took an individual ad hoc view. This was very much a matter of fact and something on which it was very difficult to speculate. There were obviously certain areas where institutions would tend to have a common view about where their interest lay and, without any formal combination, might be expected to vote a particular way. However, the company itself might not be aware of how institutional shareholders had voted.

6.185. BSKyB told us, concerning its directors, that News International appointed five directors and had the right to send alternate directors to board meetings. Vivendi had the right to appoint one director. Two of the directors were executive directors (the Chief Executive Officer and the Chief Financial Officer) and the remaining seven were non-executive directors who were not appointed by shareholders. BSKyB stated that its Articles provided that the majority of the directors present at any meeting of the board must be independent.<sup>1</sup> BSKyB also stated that a director appointed by a principal shareholder might not vote on a matter in which the principal shareholder had an interest but that the directors had not had occasion to consider the criteria by which they would determine that a shareholder had an interest. We asked why there had not been an occasion to determine these criteria. BSKyB said that the relevant provision in its Articles read: 'No director appointed by a principal shareholder shall vote or be counted in

---

<sup>1</sup>The relevant provision of BSKyB's Articles of Association (Article 117) provides that no business may be transacted at any board meeting unless a majority of the directors present are neither directors appointed by a 'controlling shareholder' (ie with a shareholding on 30 per cent of more) nor directors holding an executive office.

the quorum present at a meeting of the directors on any resolution concerning any material matter in which that principal shareholder has, directly or indirectly, an interest.’ The Articles went on to say: ‘For the purposes of this article, the directors not appointed by any principal shareholder shall agree from time to time the criteria for determining whether a matter is a material matter, and the opinion of the non principal shareholder directors as to whether a matter is a material matter and whether a principal shareholder’s director can therefore vote is final and conclusive’. BSKyB said that the criteria were not about how to identify a matter in which a principal shareholder was interested. At the time that a material matter came up for discussion, the directors were required to determine whether a principal shareholder had an interest. This was a matter of fact and a matter which a principal shareholder was also obliged by that Article to disclose.

6.186. Summing up on this point, BSKyB said that the directors had to decide whether a particular topic was material or not. The reason why the issue had never really arisen was because it was always patently obvious whether a matter was material or not. Discussion had never arisen because, if there was a matter which concerned the company and a shareholder, it was always considered by the board in any event. In that type of situation, the directors concerned had excused themselves. It had not been necessary to have some criteria to judge whether or not a director should excuse himself because the director had excused himself in any event. [

*Details omitted. See note on page iv.*

]

6.187. We asked if all directors were entitled to receive all papers relating to BSKyB affairs. BSKyB said that an exception to this was the situation where the board had determined that the giving of particular information to a director would not be in the interests of the company or would prejudice the company. [

*Details omitted. See note on page iv.*

] However, directors could request any information about the company’s business, subject to the proviso mentioned above.

6.188. BSKyB added that the board had never disagreed on the matter of whether in any particular situation a director had an interest in the topic under discussion. The Articles put an obligation on the shareholder who was interested to disclose the extent and nature of the interest to the board. It followed that when a shareholder was interested in a matter, the board heard about it. The issue then came as to whether the board needed to set criteria as to whether that was material for the purposes of excluding the principal shareholder’s director from voting. The question of setting criteria had in fact never come up.

6.189. In view of the fact that Vivendi’s representative on the BSKyB board was also a director of Canal+, we asked if Canal+ would be in a position to be aware of all BSKyB papers. BSKyB said that it was obviously a matter of common law that a director was obliged to use information which he received from the company only for the company’s business. It was a slight variation from that to actually ask a director to leave the meeting when sensitive matters were being discussed, but BSKyB had had some experience of doing that because it had had a representative of Granada on the board at the time when Granada and Carlton were launching ONdigital in competition with BSKyB. When directors were discussing matters at the board, they were very conscious of whether they were saying anything which, if it got into the wrong hands, could be problematic. BSKyB had never had any sort of dispute or debate with any of the directors who might have had other interests in terms of their not receiving information. All directors faced this situation and had to be relied on to exercise their duties as directors. [

*Details omitted. See note on page iv.*

] In the hypothetical situation that a director at a board meeting disagreed with a decision not to send papers to a particular director or to exclude him from the meeting, the matter would be discussed by the directors who would if need be take a vote.

6.190. We asked BSKyB in what areas directors were required to make decisions in relation to policy and in particular whether bidding for sports rights was a matter approved by the board. BSKyB said that bidding for major sports rights might be approved by the board, depending on the value involved. [

*Details omitted. See note on page iv*

] The Chief Executive’s current board approval limit was £[ 30 ] million; any proposed expenditure over that value needed board approval. We put it to BSKyB that there were certain sports rights for which it could conceivably be bidding more than £[ 30 ] million, and therefore it was possible that the Vivendi representative on the BSKyB board, who was also a director of Canal+, would be aware of the level at which BSKyB was planning to bid for sports rights. BSKyB said it was not sure that this would be a

conflict for the Vivendi director, as BSkyB would be bidding for the UK and Irish rights to a particular sports event.

6.191. We asked about bidding for international sports rights, where Canal+ might be just as interested as BSkyB, and the possibility of Canal+ and BSkyB bidding for rights jointly. BSkyB said that it had been asked the same questions by the European Commission in relation to the Kirch agreement. BSkyB could not see that an acquisition by Vivendi of a stake in BSkyB actually created any advantage for BSkyB or Canal+ in jointly bidding for rights. If an opportunity for bidding for rights jointly were to arise, then it could arise independently of Vivendi's having taken a stake in BSkyB. It could arise now between BSkyB and Canal+ or between BSkyB and Kirch or between BSkyB and any other operator. It was not necessary for one company to take a stake in another to make those opportunities possible.

6.192. It might be asked whether, because Vivendi had taken a stake in BSkyB, such joint bidding for rights was more likely. The evidence showed that this was not the case. News Corporation had nearly a 40 per cent stake in BSkyB and also had stakes in a number of platforms around the world, namely in Latin America, Asia, Japan and Australia. Yet there were no examples of BSkyB and News Corporation bidding jointly for programming rights. There were a few cases where News Corporation had bought multinational rights, which it had then sub-licensed to BSkyB for the UK and Ireland; rugby deals were an example of this. On the whole, there was little evidence of joint bidding for rights between shareholders, people with interests in companies and the company itself, or for that matter between BSkyB and completely unconnected broadcasters.

6.193. It was useful to consider separately the situation regarding films and the situation regarding sport. In Europe, rights holders effectively chose to sell their rights on a territory by territory basis, which was often limited by language. The UK and Ireland used English language. The Kirch territory was Germany, Austria and German speaking parts of northern Italy. On the sports side, the cultural preferences of TV viewers around Europe varied from country to country. Some events did have appeal in a number of different territories, but the majority of sports events did not. The English FA Cup, for example, was not of any interest to Italians and therefore the rights were of limited value in Italy but of much greater value in England. Effectively, domestic rights were sold for whatever price could be achieved, and the exploitation of those rights in territories where viewers were less interested was seen as an ancillary business.

6.194. As for films, Hollywood studios had chosen to sell them on a territory by territory and on a language basis. They also sold in sequential distribution patterns, which consisted of cinema, then video, then a PPV window, then pay-TV and finally free-to-air TV. The same order was observed roughly throughout Europe, although the timing of the 'windows' was slightly different in each territory.

6.195. BSkyB therefore submitted that if two operators in different countries were to consider co-ordinating their activities to purchase film rights jointly, they would have some significant hurdles to overcome, most of which were practical, such as the fact that in Europe there existed a network of established fixed term contracts. The Hollywood studios had licensed various companies for the supply of their films and these arrangements were found in long-term fixed deals. These deals did not all expire at the same time, as that would be a business risk, but were staggered. If, for example, BSkyB were going to negotiate with Canal+, it would be very surprising to find that BSkyB's output deal with Warner happened to expire at roughly the same time as Canal+'s output deal with Warner. It was also difficult to see what benefits would be derived from joint rights buying. In each territory, there would be competition for those rights. Neither party would want to risk losing the rights for its own territory as a result of a condition imposed on the licensor to also license to another territory. The effect would be that it would be very hard to finally close deals. The actual results might depend on whether there was only one buyer in each territory, but that was unlikely to occur.

6.196. We asked whether, hypothetically, BSkyB might be more interested in gaining control of European rights than winning them in individual markets. BSkyB said that what it was concerned about was protecting its core business in the UK and Ireland. [

*Details omitted. See note on page iv.*

]

6.197. BSKyB added that the film studios were quite capable of negotiating directly with channel providers, although to date they had tended to license large organizations to sell on the rights. In the last few years, there had been a change in the way films were sold. Because the PPV window had now opened up, the standard for licensing PPV and VOD throughout the world was on a non-exclusive basis. Therefore, the benefits of joint bidding largely disappeared, as other people in the same territory could acquire the same rights for the same films for the same window of time. So joint bidding would not achieve any savings or competitive advantage. PPV films were shown earlier than the pay-TV window and therefore were potentially more valuable to a broadcaster.

6.198. Concerning sport, BSKyB submitted that the appeal of a particular sporting event varied according to the tastes of the viewing public in particular territories. Therefore the potential for making (say) a joint French and English bid which could beat other bids was limited, because there was in reality little scope for the two bidders to make a good return on their bid by showing the sporting events of one country in another country. Joint bids did not in fact give huge leverage. Very few sports rights really lent themselves to being sold on a pan-European basis. Those which did were by and large already licensed to the EBU, which bought rights on behalf of major broadcasters across Europe. The EBU held rights, for example, to the European Cup Euro 2000 football championships. The UEFA Champions' League could potentially be sold on a European basis, but in fact the UK rights were held by ITV and ONdigital. The EBU also held the rights to the Olympic Games, the skiing world championships and European golf. In addition, a large portion of the sports events which had international appeal and were sold on a pan-European basis were listed in respect of the UK in which case their appeal to a UK pay-TV operator was diminished.

6.199. In summary, BSKyB did not see why Vivendi's taking a stake created an opportunity that was not possibly already there. However, it did not think that there was much of an opportunity already there, over and above those that might already exist in relation to deals between broadcasters that were unconnected with each other.

6.200. Concerning the constitution of BSKyB's board, we asked whether there had ever been deadlocked issues. BSKyB said that it had not in fact ever had a deadlock. The Chairman did not have a casting vote at board meetings; his role was merely to guide the meeting and take everybody through the agenda items. The Articles gave a casting vote in shareholder meetings in the extremely unlikely event that the number of shares voted were exactly the same on a particular resolution. We asked whether the Articles specifically excluded the casting vote of a Chairman and put it to BSKyB that implicitly the rules of chairmanship suggested that the Chairman would have a casting vote. BSKyB did not respond on this point, but said that the company had always operated on the basis that the Chairman's role was nothing more than a figurehead and that no additional rights attached to him.

6.201. We asked BSKyB about the conditional access system that it used which was developed by NDS, a subsidiary of News International. BSKyB said that the VideoCrypt system was used for analogue programming. That had been developed for BSKyB by News Datacom, which later became NDS and was a wholly-owned subsidiary of News International. At the time that BSKyB had first looked for an analogue system it had also been a wholly-owned subsidiary of News International and VideoCrypt had been one of the few satisfactory encryption systems. Later, BSKyB needed to choose a digital conditional access system. A strong working relationship had grown up between Sky's engineering department and the research department of News Datacom and this was why the NDS system had been chosen.

6.202. We asked about BSKyB's extensive use of the film resources of News Corporation, that is to say, Fox. BSKyB said that it did not have access to Fox's film resources. It had a specific output deal for Fox product. It also had a couple of smaller licences for series such as 'The Simpsons'. The main film rights were under a single output deal and that deal had gone to the board for approval. The minutes of the relevant board meeting had recorded that that deal was on an arm's length basis and substantially similar to other deals which BSKyB had with other Hollywood major studios. The deal was exclusive for the pay-TV window, as were the other deals that BSKyB had for pay-TV with the Hollywood studios. The PPV deals were all non-exclusive. We asked if BSKyB had had to bid for the exclusive deal with Fox. BSKyB said that it had not had to bid, as the deal had been completed a long time ago. The original deal had been completed when BSKyB had been a wholly-owned subsidiary of News International before the merger with BSBH. It had been renewed in 1998 but there had not been other bidders.

6.203. We asked how it was that Mr Murdoch had become Chairman of BSKyB following Vivendi's acquisition of its stake. BSKyB said that since its float in 1994 there had basically been an unwritten rule that the chairmanship would rotate between the principal shareholders. At the time of the flotation, the

Chairman had been from Pearson. When Pearson sold out to BSkyB, the Granada representative had taken over as Chairman. When Granada sold out, a Pathé representative had become Chairman and when Pathé ceased to exist, the obvious source of a Chairman was News International, which was the only principal shareholder that had not had its turn of providing a Chairman. We asked what the likely situation would be in three years' time, and whether it might be the turn of the Vivendi representative to be Chairman, bearing in mind that BSBH had been a founder shareholder; BSkyB acknowledged that this was an interesting point.

6.204. We asked if Vivendi could press for an EGM of shareholders, and could propose any resolutions and solicit any support from shareholders. BSkyB said that any shareholder which had more than 10 per cent of the shares could convene an EGM and propose whatever resolutions it chose, and all shareholders could vote on those.

6.205. We asked in what circumstances the Vivendi director could be removed from the board, bearing in mind that this director was a BSBH appointee. BSkyB said that BSBH had a right under the Articles to appoint a director and therefore even if an individual were removed for a technical reason, Vivendi would immediately be entitled to appoint another person as a representative.

6.206. We asked BSkyB about its attitude to joint ventures. BSkyB said that if it were going into a particular business, it might look around for partners, as it had done in the case of Open. We asked BSkyB about the areas of technology convergence, digital decoders and the Internet, and whether, if it were interested in joint ventures with Canal+ in relation to those areas, the Vivendi shareholding made those joint ventures more likely. BSkyB said that as far as digital decoders were concerned, the technology used by BSkyB was owned not by it but by NDS, and therefore it would be for NDS, which in turn was owned by News International, to enter into any developmental discussions. BSkyB was a user of the technology and did not plan to undertake the research necessary to produce its own technology. However, it did license technology rights for use in the UK. In the context of Simulcrypt discussions between BSkyB and ONdigital in the UK, BSkyB's conditional access technology provider, NDS, and ONdigital's conditional access technology provider, SECA, had had some discussions about their respective conditional access systems during the last 12 months.

6.207. We asked if the Vivendi shareholding would make it easier for Vivendi to bring pressure to bear on BSkyB to enter into the type of joint venture discussed above, and generally what BSkyB's attitude would be to joint ventures with Canal+. BSkyB said that this question was impossible to answer in the abstract. However, it had provided information to the European Commission in November 1999 to the effect that it had had discussions with Canal+ about the possibility of co-producing films. BSkyB added that it had had comparable discussions with effectively every broadcaster in Europe. The European Commission had raised queries following reports in the media to the effect that Mr Murdoch had said that there would not be a merger between BSkyB and Canal+ although there could be some joint film production projects with sharing of costs. BSkyB considered that these press reports should be regarded as no more than passing comment and did not reflect any proposed initiatives. Minor discussions took place over cooperation in the ordinary course of business at an operational level but had not recently been escalated. During October 1999 Canal+ had approached BSkyB about the possibility of jointly bidding for the rights to the FIFA World Cup finals. In practice, no such joint bid was submitted and the rights were acquired by the EBU. In the UK, the rights to this championship were acquired from the EBU by the BBC, one of the UK members of the EBU.

6.208. BSkyB and Canal+ did occasionally sell rights to each other in the ordinary course of business. BSkyB had recently agreed to buy the rights to broadcast Spanish league football in the UK for three years from the 2000/01 season. These rights were acquired from Sport+, a subsidiary of Canal+, and were offered in a competitive bidding process. In addition, in April 1997, BSkyB sub-licensed to Canal+ the right to broadcast English rugby union club matches until June 2000 in France, Mauritius and Switzerland. Similarly, in December 1997 BSkyB sub-licensed to Canal+ the right to broadcast in these territories rugby union matches played in England until September 2001. A similar sub-licensing agreement was entered into in March 1998 in respect of certain rugby union matches played in the southern hemisphere between March 2000 and December 2002. In each of these cases BSkyB, as the sub-licensor, was seeking to maximize its revenues from the distribution of these rights.

6.209. We told BSkyB that we needed to consider not only whether Vivendi had an ability to materially influence BSkyB but also whether there was any likelihood of its trying to do so. BSkyB said that it was not possible to make any predictions at present. Vivendi had not yet approached BSkyB with its views on any matter concerning BSkyB's business.

6.210. Following the hearing, BSKyB set out answers to a number of questions from us in more detail. We asked BSKyB to confirm our understanding that the directors of News International had never been precluded from voting on any matters. BSKyB said that the News International directors had declared their interest in a number of contracts out before the board for approval, for example the contract with Fox for output and library films. They had not participated in discussion of such contracts. They had not formally been excluded from voting, because none of these contracts had given rise to any dissension among the board. Accordingly, there had been no question of the votes of the News International directors being material to the outcome of any vote. If dissension were to arise, then the board could be advised and discuss whether News International directors should be precluded from voting on the issue. The same had applied to other founder shareholders, for example Pathé in relation to its contract for output films, which was put to the board in May 1999. It should be noted that the quorum arrangements ensured that the majority of directors present at any board meeting must be neither directors appointed by a controlling shareholder (ie a shareholder with over 30 per cent of the equity share capital) or executive directors. For example, if five News International directors and two executive directors were present, then eight other directors must be present for the meeting to be quorate. If there were no dissension among the eight other directors, then the result would be the same, whether or not News International directors were formally excluded from voting. In addition, under the rules on corporate governance, contracts with related parties were scrutinized by the audit committee before being voted on by the board.

6.211. We asked for examples of the matters on which it was possible that News International directors might be precluded from voting, and whether it was expected that any such matters might arise within the next two years. BSKyB said that matters on which News International directors might be precluded from voting at BSKyB board meetings included contracts with companies in the News Corporation Group or in which a member of that group had a substantial stake. For example, the film output and library contract with Twentieth Century Fox had been put to the board in May 1999. Similar contracts for programming, for example the right to show a series of ‘The Simpsons’ made by Fox Television, did not require board approval. BSKyB found it difficult to predict what transactions with the News Corporation Group might arise in the next two years, but one such transaction might arise which would require audit committee scrutiny and board approval.

6.212. We asked on what matters had special resolutions of BSKyB been required over the past five years, and on what matters might special resolutions be required over the next two years and how likely such a requirement was. BSKyB said that the following special resolutions had been passed in the last five years:

- 1999 AGM: (i) Section 95 authority to disapply pre-emption rights;
- (ii) amendment to the company’s Articles of Association to provide for (a) directors, other than founder shareholder appointees, to offer themselves for re-election at least once in every three years in accordance with current best practice, and (b) the Chief Executive to be subject to retirement by rotation.
- 1998 AGM: (i) Section 80 (allotment of securities) and section 95 (disapplication of pre-emption rights) authority;
- (ii) authority for the company to make market purchases of its own shares.
- 1997 AGM: (i) Section 80 (allotment of securities) and section 95 (disapplication of pre-emption rights) authority;
- (ii) authority for the company to make market purchases of its own shares.
- 1996 AGM: (i) Section 80 (allotment of securities) and section 95 (disapplication of pre-emption rights) authority;
- (ii) authority for the company to make market purchases of its own shares;
- (iii) amendment to the company’s Articles of Association to provide for Pathé to have two appointed directors following the demerger of Chargeurs, the previous founder shareholder.
- 1995 AGM: There were no special resolutions put forward for approval.

BSkyB said that it was anticipated that over the next two years special resolutions would be sought for similar items as described above, although no proposals had been made to BSKyB that a resolution should be put forward to amend the Articles to give Vivendi the rights to appoint directors previously enjoyed by Pathé.

6.213. We asked BSKyB what had been the level of turnout of holders of voting shares on ordinary resolutions of BSKyB over the last five years. BSKyB said that it was important to note that no vote at a BSKyB AGM had ever gone to a poll. Where larger shareholders had been represented at the meeting, rather than sending in a proxy, their representatives had exercised a single vote on a show of hands. All resolutions had commanded the requisite majority of those present and voting on a show of hands. It had not, therefore, been necessary even to count proxies in order to ensure the passage of resolutions, but records had been kept. BSKyB provided the following details recording voting intentions of shareholders who sent in proxies and identifying those major shareholders voting by corporate representative.

### **1999 AGM**

6.214. Forty-two shareholders, with small shareholdings, attended. Proxies were received in respect of ordinary resolutions as follows:

<i>Resolution</i>	<i>For</i>	<i>%</i>	<i>Against</i>	<i>%</i>
1. Report & Accounts	1,005,147,800	99	8,159,640	1
2. Elect Tony Ball as director	974,382,431	97	24,291,753	3
3. Elect Mort Topfer as director	1,004,820,627	99	3,299,690	1
4. Re-elect Dame Anne Mueller as director	1,009,905,620	99	8,395,094	1
5. Re-elect Lord St John of Fawsley as director	1,003,992,272	99	8,395,094	1
6. Re-appoint auditors	1,004,768,157	99	8,255,289	1
7. Section 80	1,012,597,510	100	709,152	0

Source: BSKyB.

---

Proxies as a percentage of issued share capital were: 58 per cent.

6.215. News International committed its 686,021,700 shares by proxy in favour of all resolutions. Vivendi committed its 218,669,417 shares by proxy in favour of all resolutions. BSBH sent a corporate representative, who voted on the show of hands in favour of all resolutions.

### **1998 AGM**

6.216. Fifty-seven shareholders, including a representative of News International, attended. BSBH did not attend by representative or send in a proxy. Proxies, including Pathé's, were received in respect of ordinary resolutions as follows:

<i>Resolution</i>	<i>For</i>	<i>%</i>	<i>Against</i>	<i>%</i>
1. Report & accounts	261,367,365	99	3,418,744	1
2. Declare dividend	264,784,106	100	2,007	0
3. Elect Mark Booth as director	261,333,070	99	3,453,041	1
4. Elect Martin Stewart as director	264,746,774	100	39,337	0
5. Re-elect Philip Bowman as director	261,328,014	99	3,498,097	1
6. Re-elect David Chance as director	261,328,054	99	3,498,057	1
7. Re-appoint auditors	261,343,660	99	3,442,451	1

Source: BSKyB.

---

Proxies as a percentage of issued share capital were: 15 per cent.

## 1997 AGM

6.217. Fifty-one shareholders, including a representative of News International, attended. BSBH did not attend by representative or send in a proxy. Proxies, including Pathé's and Granada's, were received in respect of ordinary resolutions as follows:

<i>Resolution</i>	<i>For</i>	<i>%</i>	<i>Against</i>	<i>%</i>
1. Report & accounts	449,603,878	98	7,383,811	2
2. Declare dividend	456,892,674	100	6,295	0
3. Re-elect Dennis Stevenson as director	442,322,204	99	3,242,243	1
4. Re-elect John Thornton as director	449,769,026	98	7,285,263	2
5. Re-appoint auditors	446,596,144	98	11,118,745	2

Source: BSkyB.

---

Proxies as a percentage of issued share capital were: 26.5 per cent.

## 1996 AGM

6.218. Sixty-five shareholders, including representatives of News International and Pathé and BSBH, attended. Proxies, including Granada's, were received in respect of ordinary resolutions as follows:

<i>Resolution</i>	<i>For</i>	<i>%</i>	<i>Against</i>	<i>%</i>
1. Report & accounts	177,214,729	100	3,802	0
2. Dividend	177,207,987	100	10,544	0
3. Re-elect Michel Crepon as director	152,368,873	97	5,263,667	3
4. Re-elect Jerome Seydoux as director	152,357,764	96	5,643,855	4
5. Re-elect Lord St John of Fawsley as director	176,932,058	100	105,497	0
6. Re-appoint auditors	172,635,187	97	4,583,344	3

Source: BSkyB.

---

Proxies as a percentage of issued share capital were: 10.3 per cent.

## 1995 AGM

6.219. Eighty-five shareholders attended the meeting. All of News International, Granada, Pathé and BSBH attended by corporate representatives.

<i>Resolution</i>	<i>For</i>	<i>%</i>	<i>Against</i>	<i>%</i>
1. Report & accounts	8,086,631	100	4,388	0
2. Dividend	8,085,170	100	5,849	0
3. Elect Geoffrey Bible as director	8,046,615	99	43,428	1
4. Elect Philip Bowman as director	8,056,015	99	43,428	1
5. Elect Richard Brooke as director	8,065,015	100	28,933	0
6. Elect David Chance as director	8,061,110	100	28,933	0
7. Elect Sir John Collins as director	8,041,755	99	40,233	1
8. Elect Dennis Stevenson as director	8,049,810	99	40,233	1
9. Elect John Thornton as director	8,052,737	99	37,306	1
10. Re-elect Dame Anne Mueller	8,035,647	99	54,396	1
11. Re-appoint auditors	7,622,831	94	468,383	6

Source: BSkyB.

---

Proxies as a percentage of issued share capital were: 0.48 per cent.

6.220. We asked BSkyB, if Vivendi were to oppose News International over an ordinary resolution (for example, regarding the appointment of directors or the approval of BSkyB's accounts), what it

would expect to be the outcome of voting, and whether there were other shareholders with a block of 1 per cent or more of total votes whom BSKyB would expect usually to side with News International. BSKyB said that ordinary resolutions might be required for other purposes, including in relation to certain major decisions for BSKyB, such as Class 1 and related party transactions for the purposes of the Stock Exchange listing rules. These would include major acquisitions or disposals measured by various tests which compared the size of the transaction with the size of the group headed by the quoted company prior to the transaction taking place (Class 1) and large transactions with related parties (notably the major shareholders, News International, its group and associated companies, or Vivendi, its group and associated companies). News International or Vivendi, as the case might be, would not be able to vote on a related party transaction relating to it. Such major transactions were carried out by many quoted companies each year. BSKyB had not yet carried out a transaction of this sort where it had been required to obtain shareholder approval [ *Details omitted. See note on page iv.* ]

6.221. Ordinary resolutions might also be required for the purposes of section 80 of the Companies Act 1985, which authorized the directors to allot equity shares, whether for a cash or non-cash consideration. Such a resolution could normally cover up to 30 per cent of BSKyB's pre-existing issued share capital, this limit being set by the guidelines issued by the Investor Protection Committees of the ABI and NAPF, which were generally observed by companies listed on the London Stock Exchange.

6.222. BSKyB could not predict the outcome of voting on an ordinary resolution if Vivendi opposed News International. The outcome would depend upon the nature of the resolution, whether News International could vote its shares and the attitude of institutional investors. The following points would be relevant:

- (a) In the event that both News International and Vivendi were voting, News International (with 39.72 per cent of the issued share capital) would need shareholders representing some 10.29 per cent of BSKyB's issued share capital to vote with it in order to be sure of carrying or defeating the resolution.
- (b) Vivendi (with 24.45 per cent of the issued share capital) would need shareholders representing some 25.56 per cent of BSKyB's issued share capital to vote with it to be sure of carrying or defeating the resolution.
- (c) There was a pool of approximately 35.8 per cent of the issued share capital in the hands of institutions and individuals.
- (d) Although numerically the task of wooing support from other shareholders looked easier for News International, this must depend upon the nature of the resolution and the views of uncommitted shareholders. For example, in the notable case of *Molins*, the UK tobacco machinery manufacturer, in 1991 its major shareholder, Leucadia International, holding shares carrying 48.45 per cent of the votes, was defeated in its attempt to take control of the board by appointing directors of its choice. Virtually all the other shareholders, large and small, combined to vote against its proposal. (*Financial Times*, 2 October 1991.)
- (e) On an ordinary resolution where News International could not vote, Vivendi would have some 40.56 per cent of the votes. If it opposed the transaction, it would have to persuade shareholders with some 9.45 per cent of the votes (5.7 per cent of the issued share capital) to support it.

6.223. BSKyB was not aware of any significant shareholder (1 per cent or more) likely to vote with News International. There were no significant holdings of shares by directors. News International would be bound by the City Code on takeovers and mergers to make an offer for the whole of the issued share capital of BSKyB if it increased its interest to a higher percentage share.

6.224. Institutional investors might be likely to vote on certain matters in accordance with Investor Protection Committee guidelines (for example, authorization of issue of shares). Where a substantial business transaction required approval they were, however, likely to take an individual judgment, just as they did on a takeover offer.

6.225. We asked BSKyB what, if any, expectations it had about the way in which Kirch would exercise its voting rights. BSKyB said that if its proposed investment in KirchPayTV were approved by the

European Commission, Kirch would upon completion subscribe for new ordinary shares representing approximately 4.3 per cent of the enlarged issued share capital of BSkyB. This would dilute other shareholdings unless these were made up by purchase. Kirch had no obligations to vote in favour of the interests of any particular shareholder. The voting of these shares was not a matter over which BSkyB had any control. It followed that the shares could be voted in accordance with the wishes of the general partner in KirchPayTV, which was a member of KirchGruppe. BSkyB had no expectation, if KirchPayTV were to become a shareholder, that it would vote on any matter save as it saw fit at the time.

6.226. BSkyB's board in approving the Kirch deal had bound itself, if KirchPayTV became a shareholder, to co-opt its nominee on to the board of BSkyB. The nominee would count for quorum and voting purposes as part of the majority of directors who were neither News International nor executives. The same rules as applied to other directors in terms of eligibility to vote on matters brought before the board would apply to such a nominee.

## **The relevant markets**

6.227. BSkyB submitted that it would be inappropriate to approach the question of how firms competed in the overall TV market, and how separate product markets might be defined and segmented, as if they had not already been the subject of recent examination by the Commission (in the BSkyB/Manchester Utd report) and the Restrictive Practices Court (RPC) (judgment of 28 July 1999). In BSkyB's view, the RPC finding entirely undermined the Commission's conclusions on the definition of the market in which BSkyB competed, and the Commission's assessment of BSkyB's existing market power.

6.228. In BSkyB's view, it was not appropriate to identify a narrowly defined pay-TV market when considering the operation of competition. As regards competition for audience share, 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. Commercial channels had to attract audiences to generate advertising or subscription revenue. The BBC had to attract audiences to win approval for its continued levying of the licence fee. As regards price competition, the analogue terrestrial free-to-air channels (BBC1, BBC2, Channel 3, Channel 4 and Channel 5) had access to virtually every household in the UK and, once a household had paid its annual licence fee, there was no additional cost to the viewer associated with watching these channels. Analogue terrestrial free-to-air channels therefore provided a very effective constraint on the subscription prices that pay-TV broadcasters could charge. The commercial analogue terrestrial channels also delivered large, ready-made audiences to advertisers. Free-to-air TV channels remained the dominant form of TV in the UK, and were the benchmark against which viewers evaluated other channels. The ITC's audience share figures for the year ended September 1999 indicated that the free-to-air analogue terrestrial channels had a total audience share of over 80 per cent.

6.229. In setting subscription prices, pay-TV operators were constrained by the availability of free-to-air channels. It was an essential condition of a pay-TV provider's survival that it should be able to offer to consumers programming which had a sufficient appeal, relative to the price of the pay service, to persuade consumers to subscribe to that service rather than merely watch the free-to-air channels. Differentiation of channel content was also an important factor of competition among channel suppliers. The RPC had heard evidence to the effect that a pay-TV channel could differentiate itself in a number of different respects, one of which was by using exclusive programming rights.

6.230. Lessons should be learned from the RPC proceedings on market definition. The fact that competition occurred by reference not only to price but also through product differentiation had certain important implications for any market analysis, namely:

- (a) Differences in the prices charged for different channels did not imply that those channels were in different markets. Free-to-air channels, although free, constituted a constraint on pay-TV suppliers. Different subscription charges for pay-TV channels simply reflected the content of those channels.
- (b) Differences in the types of programming shown on different channels did not imply that those channels were in different markets.
- (c) In a market like TV services where competition occurred between differentiated products rather than homogenous ones, products that would be regarded as substitutes in the eyes of consumers

could differ in terms of both characteristics and price. This was because consumers would differ in their preferences for particular channels and in the strength of their preferences for different types of content. So the fact that no one else had yet entered the market by providing a premium sports channel similar to those offered by BSkyB did not signify that BSkyB faced no constraint in setting its subscription charges. It was not a sign that there were barriers to entry, or that BSkyB was acting to exclude new entrants. It reflected the fact that entrants had instead chosen to offer different types of channels and had tried to satisfy consumer demand for a broad range of different genres of programming.

6.231. BSkyB further submitted that market definitions were not unique and could 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 assessed. This had been set out in OFT guidelines on market definition in March 1999. There was the further possibility that TV channels might be competing with other kinds of entertainment. However, BSkyB provided some general comments on the possibility of identifying separate markets by reference to such distinctions as those between free-to-air and pay channels, or premium and basic channels. As to a distinction between free-to-air and pay channels, BSkyB noted that for most consumers the decision was not whether to buy a particular channel instead of the free-to-air channel, but whether to buy it in addition to the free-to-air channel. The free-to-air channels were the benchmark against which the pay-TV channel provider must justify a subscription charge. Other pay channels might impose equally tight constraints on pricing. Moreover, when a consumer had decided to take a pay-TV channel, the providers of the different kinds of channels continued to compete for the consumer's viewing time.

6.232. As to price differences between basic and premium channels, the Commission in the BSkyB/Manchester United report had concluded that sports premium TV channels were to be regarded as a separate market from basic channels, and that they were both separate markets from free-to-air channels. BSkyB considered that the Commission's reasoning in that inquiry had been flawed, for the following reasons:

- (a) There was no simple, hard and fast distinction between basic channels and premium channels. These terms were used to distinguish between channels that were offered as part of a package for a single subscription fee, and channels for which a channel-specific price was charged. It was not the case that all premium channels were available only in addition to all basic channels. For example, BSkyB now offered subscribers the option of taking a small basic package, chosen from a selection of basic packages, and then adding subscriptions to premium channels. A similar pricing structure was offered by the cable operators and by ONdigital.
- (b) Moreover, there were no hard and fast distinctions between the price associated with a basic channel, or package of channels, and a premium channel. A package of basic channels could be marketed at a price equal to, or exceeding, that attaching to a so-called premium channel.
- (c) The Commission had envisaged the possibility of identifying a category of programming which would always be most profitably exploited on a premium channel. Although films and certain sports events had been exploited on a pay-TV window, that did not mean that they could not, or would never be, exploited on a basic or free-to-air channel. The nature of the channel on which a particular programme would be exploited would depend on the objectives of the purchaser of the rights and of the rights holder.
- (d) The attempt to draw hard and fast distinctions between premium and basic programming was rendered yet more difficult by the fact that programmes (except PPV) were not generally sold to consumers individually, but were sold as part of a channel or 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.
- (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 be profitably used on free-to-air and pay-TV channels, and to spread the rights among their different channels to optimize their exploitation. For example, rights to televise the UEFA Champions' League were presently shared between ONdigital and Channel 3 in order to achieve the optimal combination of coverage.

6.233. For all these reasons, BSkyB considered that the Commission was wrong to conclude that the premium channels and basic channels formed separate markets, or that premium sports and film channels formed separate markets within the premium category. Moreover, the Commission was wrong to suggest that the mere fact that a substantial number of subscribers were willing to pay extra to watch Sky Sports indicated that it formed a separate market.

6.234. In summary, BSkyB considered that free-to-air channels, basic channels and premium channels all competed with each other in a single TV market. There were no firm distinctions between the different kinds of channel, and a number of firms participated in all sectors of the market. There was also the further possibility that TV channels might compete with other kinds of entertainment, such as the rental or purchase of films on video.

6.235. Concerning PPV services, BSkyB stated that these were in an early stage of development in the UK and their future was not yet clear. BSkyB said that it had not therefore attempted to analyse the extent to which PPV services competed with free-to-air and pay-TV services or were likely to do so in the future.

6.236. Concerning interactive services, BSkyB stated that these were in their infancy in the UK and it was difficult to predict how they would compete with other kinds of service in the future. Interactive services were not merely a form of televised entertainment, but allowed consumers to shop and to transact business through the TV or Internet, and such services were therefore likely, in due course, to compete to some extent with other more traditional methods of shopping and transacting business. BSkyB considered that the market in which its joint venture Open operated was best regarded as part of a broad retailing market, in which suppliers competed via a variety of means to supply goods and services to consumers.

6.237. BSkyB elaborated on these points at a hearing. It reiterated that the appropriate market definition for an inquiry depended on the question that was being asked, or in other words the mischief that was being investigated. The OFT guidelines on the matter stated: 'In practice even within the same area at the same time the market definition is not unique and can vary depending on the competition problem under investigation'. BSkyB said that it was concerned not so much about whether the Commission would simply 'parrot' what had been said in the BSkyB/Manchester United report as about the fact that the question to be focused on in the current inquiry was different from that considered in the previous inquiry. In the previous inquiry, the Commission had considered the selling of pay-TV programming to consumers. In the present inquiry, the focus was more on the acquisition of rights. That was a very different question and had the potential to lead to very different conclusions about the market. It was not possible to answer a question about the relevant markets in the abstract. In order to answer that question in any meaningful way, it was necessary to understand the fundamental questions to which the inquiry was addressing itself so as to appreciate how a market definition could throw light on the inquiry's concerns.

6.238. The principal focus in the current inquiry seemed to be on issues concerning the acquisition of rights, particularly sports and film rights. In the context of the acquisition of rights, it would not seem appropriate to consider the relevant market as the pay-TV market. Whether or not one believed that pay-TV competed with free-to-air TV when selling services to consumers, there could be no doubt that when BSkyB acquired rights to sports events it was competing with companies such as the BBC, ITV and Channel 4. It was very clear that there was a broad market for the acquisition of TV rights.

6.239. In the context of bidding for sports rights, a holder of the rights had a number of objectives. One objective might be the amount of money that could be extracted directly from a broadcaster. Another might be the public exposure of the event. A large part of the revenue stream might be related to sponsorship which was likely to be driven by the width of the exposure. Rights holders might choose to sell exclusively to a pay-TV broadcaster or to a free-to-air broadcaster. There were plenty of examples of events being at one stage or another on free TV and at another stage being on pay-TV and they had moved from one to the other. For example, in test match cricket, BSkyB had obtained the rights for the Lord's test match for England home matches while the other test matches had gone to Channel 4. It would be very hard to say that the Lord's test match was a pay-TV event and the Edgbaston test match was a free TV event. A similar example was the UEFA Champions' League. It was hard to say that Manchester United playing on a Wednesday night was a free TV event because it was on ITV and Arsenal playing on a Tuesday night was a pay-TV event because it was on ONdigital. The general point was that the broadcasters competed for these sports rights against each other and they all saw value in having exclusivity.

6.240. The remarks in paragraph 6.239 applied to live matches. If a rights holder chose to license a pay-TV broadcaster exclusively for the live coverage, it might in addition choose to license highlights' rights either to a free-to-air broadcaster or to a pay-TV broadcaster. In the example given in paragraph 6.239, Channel 4 and BSkyB had live rights to different test matches. BSkyB would have liked to have acquired the rights to more test matches, but Channel 4 had outbid it. Another example of competition had been the acquiring by Channel 4 of rights to 'Friends' which had previously been shown on Sky One. At the same time, BSkyB had entered into a distribution deal with Channel 4 for Film Four.

6.241. On the subject of films, there had historically been rigid windowing of film exploitation, in that the showing of films started with cinema release and then moved to video, PPV, pay-TV and free TV, in that order. However, it still remained open to any broadcaster to buy out multiple windows; for example, ITV had recently bought out all TV windows to the James Bond films. Although ITV was only going to show the Bond films on free TV, it had also bought out the pay-TV window. This showed that there was competition between free TV broadcasters and pay-TV broadcasters.

6.242. There were cases of cooperation between free TV and pay-TV; for example, there was considerable competition at the present time between ITV and ONdigital. Such cooperation might well increase and be consolidated. The idea that free-to-air TV could not take the sports rights because it did not have time was a somewhat historic view. For example, the BBC had recently acquired the rights to the FIFA World Cup finals, which had been shown on BBC1 and BBC Choice. Rugby World Cup coverage had been shared between ITV and ITV2, thus allowing the ITV companies to broadcast every match. With the advent of digital capacity, constraints would be largely removed.

6.243. We put it to BSkyB that from the consumer's point of view, the pay-TV market looked separate from the free-to-air market because it was differentiated by the supply of live sport and films. BSkyB said that before the point of supply to consumers was reached, there had been vigorous competition for rights between pay-TV broadcasters and free-to-air broadcasters and that this was the competition with which the current inquiry appeared to be concerned. The financial resources of the shareholders in the TV platforms which competed with the satellite platform showed that they had equal ability to bid for rights (as, for example, evident from the figures quoted in paragraph 6.270).

6.244. We asked about the extent to which the market for sports rights should be perceived as being international and to what extent sports rights were of international appeal. BSkyB said it considered that fundamentally sports were a national interest. The FA Premier League, for example, was of less interest to viewers outside the UK. As for those events which did have international appeal such as the FIFA World Cup finals and the Olympic Games, many of these were the subject of listed events legislation in national territories, and therefore less attractive to BSkyB. We put it to BSkyB that, in the ITC's view (see paragraph 5.6), about half of the sports rights to be re-awarded over the next four years would have international appeal. BSkyB did not comment on this. It confirmed that the rights to broadcast sporting events were effectively acquired by broadcasters on a territory by territory basis and that no imminent change was likely to this approach.

6.245. We asked BSkyB whether it was appropriate to see interactive TV services as a separate market. BSkyB said that it doubted if these services should be seen as a separate market. Like pay-TV, these services were competing for viewers and it was hard to draw a distinction between Sky Sports Extra, which allowed viewers to choose camera angles, and other Sky sports channels. We asked BSkyB if it took this view about interactive shopping services, and its own Open venture. BSkyB said that it was hard to define separate markets in the abstract. Market definition was a tool of economic theory. The right approach when one had a particular purpose in mind was to approach the real world and segment into markets which appeared relevant to one's purpose. BSkyB considered that it needed to understand any concern about interactive services before it could comment further on market definition.

6.246. We asked BSkyB if it regarded its investment in the interactive services area as profitable in its own right, or rather as part of a package to strengthen its position against the cable operators. BSkyB said that it did not think its investment in Open could be used to strengthen its position as against the cable operators. [

*Details omitted. See note on page iv.*

] When BSkyB had invested in Open, it had thought that ultimately it would be profitable. In 1995, there had been something of a momentum to create imaginative applications which would be carried on digital channels, and BSkyB, together with its partners in Open, had considered that the right approach was to share the risk among parties who could contribute to the venture.

6.247. [

*Details omitted. See note on page iv.*

]

6.248. In the future, interactive applications would be seen on programming channels. For example, BSkyB had developed interactive applications of FA Premier League footage for which it had bought the rights. However, it was hard to see bidding for interactive rights as being different from bidding for programme rights.

6.249. We asked further about the difference between Open and the analogous offerings from the cable companies. BSkyB said that Open had been first in the field and was in about 2 million homes. Cable had an advantage of speed in that the return channel from the home back to the supplier of the service was at high speed, whereas the equivalent service in the context of Open had to go via a traditional telecommunications line. Open did not currently offer access to the Internet. Some cable operators were said to believe that access to the Internet would be very important.

6.250. We asked BSkyB if the market for providing channels would be affected by the merger situation, bearing in mind that BSkyB and Canal+, in which Vivendi had a 49 per cent stake, both provided content, whereas the cable companies in the UK provided relatively little content. BSkyB said that the cable companies were starting to move much more clearly into provision of content, for example with NTL and Telewest's provision of FrontRow and NTL's involvement in British Eurosport. BSkyB went on to say that it supplied its channels to every platform to the extent that it could. Several of its channels were not carried by other platforms. BSkyB failed to see how Vivendi's taking a stake in BSkyB was going to change that situation. BSkyB had always supplied all its key programming to all platforms and was required by the OFT to provide its premium channels on rate-card terms.

6.251. As to the widely-held view that BSkyB had market power in both its wholesale and retail activities, BSkyB said that its market share in its retail activities had been diminishing fairly consistently over a number of years. BSkyB's current national market share by subscriber numbers was around 50 per cent. However, within the markets where the cable operators were active BSkyB's share [*Details omitted. See note on page iv.*] (BSkyB said that cable-active areas were areas in which cable operators had built and operated networks and that its figures had first been produced in June 1998, and used by OFTEL and the ITC in their consultation document on the bundling of TV and telephony.) This market share was not consistent with BSkyB's having a dominant position. Cable operators had the dominant share at the retail level of pay-TV homes. In 1996, the OFT had found BSkyB to have market power at the wholesale level but not at the retail level.

6.252. As to the wholesale level, BSkyB was of the view that it did not enjoy market power in the wholesaling channels either. BSkyB believed that there was a broad TV market in which viewers wanted sports and films and general entertainment. Given the constraints on BSkyB's activities provided by the free-to-air channels, it could not really be said that BSkyB had dominant wholesale strength. The OFT had disagreed with BSkyB on this in 1996 but it had recently announced that it was going to review BSkyB's undertakings on which the rate card was based and it proposed to take note of all the developments in the industry over the last few years. BSkyB hoped that the OFT would reach a different conclusion that reflected the current facts at the end of its review.

6.253. We asked BSkyB how it came to set the price level of £32 for the top level monthly subscription, and what competition existed to drive that price down. BSkyB said that, like most companies, it set the price that it felt the market could bear with the intention of maximizing its long-run profits. The provision of pay-TV services was complicated because the subscription price was relevant to providing a large number of services, but a pay-TV provider was also trying to persuade viewers to take its service in addition to the free TV service. Furthermore, viewers had to pay for the reception equipment which enabled them to take pay-TV. The £32 price could not be considered in isolation but BSkyB's pricing structure and its level had evolved through time. BSkyB tried to set a price and judge what value viewers attributed to the services offered. Over the last couple of years, the number of subscribers had levelled off to around 3.5 million [

*Details omitted See note on page iv.*

]. More recently, the satellite platform had started to grow again, as a result of BSkyB's holding the £32 price steady and offering free set-top boxes. At the same time, more focus had been placed on sport in the free-TV environment, and BSkyB tended to be undercut by the cable operators. This undercutting was complicated by cable's joint provision of TV and telephony; consumers were encouraged to compare the cost of cable provision with the combined cost of Sky-TV and BT line rental.

6.254. We put it to BSkyB that, as a great deal of pay-TV content was supplied by it, competition with the cable companies had to be seen in the light of what BSkyB could charge for content. BSkyB said that cable companies were launching digital platforms on which there would be hundreds of services. BSkyB supplied in the region of eight to ten channels. BSkyB supplied the premium channels, but recent figures from BSkyB's billing system indicated that [ 30 ] per cent of cable homes took only basic channels. The cable industry had about [ 30 ] million homes that were not interested in BSkyB's premium channels, and took a variety of basic packages which could vary from 4 or 5 channels to 30 or 40 channels. BSkyB provided Sky One and Sky News, [ *Details omitted. See note on page iv.*

]. Among all TV households, BSkyB's share of viewing was 5.2 per cent. Clearly there was plenty of viewing of channels other than BSkyB's.

6.255. We asked about the OFT rate card and whether the monitoring of the discount structure served any purpose if the price level itself was not regulated. BSkyB said that the OFT did not have a direct role in approving the price level on the rate card. The undertakings had a further component, namely that BSkyB was required to submit to the OFT twice a year notionally separated accounts. The purpose of those was that a notional satellite distributor of pay-TV services was required to buy services from BSkyB on rate-card terms, and demonstrate that it was able to make a profit on those terms. By this means the OFT exerted indirect control on the price level.

6.256. We noted that in its evidence BSkyB stated that the accounting separation for the purposes of the rate card did not in fact reflect its business. BSkyB said that it did not think of itself as being vertically separated between two entities. However, that was not to say that the rate-card test was meaningless. The test was a fairly standard test to check that prices were not unreasonable. It was a test that was applied by the European Commission in other contexts and was straightforward. If a notional efficient distributor of a product was able to earn a profit, then those prices must be reasonable. If a distributor could not make a profit at those prices, that distributor might not be an efficient operator.

6.257. We noted that BSkyB did not split its accounts and asked to what extent the accounting separation for the purposes of the rate card had to be conjectural. BSkyB said that the principles of the accounting separation were reasonably clear and were discussed with the OFT when necessary. The allocation of costs was done in conjunction with the OFT and did not present too many difficulties.

6.258. We asked BSkyB whether it would be right to regard conditional access services as a separate market, in view of the concerns that had been put to us. BSkyB said that conditional access services covered a great number of technical services, including not just encryption but also application signing, which enabled software applications to be run on set-top boxes so that interactive services could function.

6.259. BSkyB added that the cable operators ran conditional access systems [ *Details omitted. See note on page iv.* ]. It was therefore misleading to suggest that the NDS and SECA systems were the only two systems easily available in the UK. As to those systems, BSkyB had been encouraged by the ITC and the European Commission to develop Simulcrypt arrangements with other conditional access service providers in the UK and had put significant efforts into doing so. Such efforts seemed to be in the consumer interest.

6.260. However, the thrust towards interoperability had lost its momentum when both BSkyB and ONdigital had embarked on offering free set-top boxes, at which point the economic barrier to switching between platforms was effectively taken away. BSkyB had undertaken work on developing a prototype of a so-called 'sidecar' for the ONdigital set-top box in order to enable it to receive satellite services. This arrangement had been approved by the ITC. Meanwhile ONdigital was supposed to undertake the development of a terrestrial sidecar which would make the BSkyB set-top boxes capable of receiving terrestrial signals. In fact BSkyB had developed that prototype also. BSkyB had reported these technical developments to the ITC but the matter had not been taken any further.

6.261. In any event, even if it were the case that only one conditional access system were available in the UK, that would not prevent potential new entrants from considering conditional access systems available in other parts of the world.

6.262. BSkyB said that SECA was a joint venture between Canal+ and Bertelsmann in which News International and BSkyB had no interest. In practice Vivendi was unlikely to want to run down the SECA conditional access system because that would put Canal+ out of business. The SECA conditional access

technology was used in Canal+'s businesses throughout Europe. Similar US companies had also recently been floated and there were great opportunities for companies developing this kind of technology to expand their services. NDS itself had been floated recently demonstrating that the owners of technology companies currently had an opportunity to realize the significant value tied up in them.

6.263. We asked BSkyB whether two conditional access providers might cut costs by creating a common system. BSkyB said that if such cooperation were possible between NDS and SECA, this could occur irrespective of the Vivendi transaction. In any event, as the provision of conditional access services to broadcasters was effectively cost-related and regulated by OFTEL, any costs saved to that effect would just flow through to the broadcasters who were paying for access to the platform, because OFTEL would ensure that charges were reduced.

6.264. BSkyB added that it was not in its interests to destroy ONdigital by seeking to damage its conditional access technology. BSkyB had an interest in distributing its product as widely as possible. It did compete with ONdigital as a retailer, but it also saw ONdigital as opening up new opportunities to deliver services to homes which preferred DTT delivery of services rather than satellite delivery.

6.265. In this context, BSkyB said that it had a problem at present in that key programming was being withheld by terrestrial broadcasters from the satellite platform with a view to distorting competition in favour of DTT. An example of this was the allocation of the UEFA Champions' League matches to ITV and ONdigital. This matter would be pursued with the OFT. Because BSkyB was being damaged in the way described, it decided to put the Ryder Cup on a channel which was not available to ONdigital. This course of conduct had been entered into reluctantly but the OFT and the ITC had concluded that there were not competition concerns.

## **The effect of any merger situation on competition for the acquisition of sports and film rights in the UK**

6.266. We asked BSkyB whether one of the reasons for BSkyB and Canal+ considering a merger in early 1999 was the possibility of cooperating on bidding for sports and film rights. BSkyB said that it had never discussed collaboration in terms of rights buying nor had it discussed collaboration over technology, although it was aware that a Vivendi representative had made statements to that effect to the press. Collaboration in terms of rights buying could take place without a merger. As already stated, rights that had a propensity to be dealt with on a pan-European basis tended to be bought by the EBU, which was representing all the major state broadcasters and others across Europe, with the approval of the European Commission. So in fact the possibilities for joint bidding were limited and the investment by Vivendi in BSkyB did not change the situation. BSkyB had recently been asked by the European Commission about the extent to which it collaborated with Canal+, and the answer was that it did not collaborate at all. Canal+ had suggested in late 1999 a joint bid for the world football club championships, but BSkyB was not interested in that as a company. The rights to the championship were won by the EBU. Canal+'s approach came directly from Canal+ and was not coordinated through Vivendi.

6.267. Cross-ownership stakes were not necessary for two companies to cooperate in bidding for rights. NTL and the BBC had bid together recently for the European rugby cup rights.

6.268. As to possible cooperation with Kirch, BSkyB's motive for that acquisition was that it was a good business opportunity in its own right.

6.269. We put to BSkyB that Canal+ and BSkyB, if they cooperated in bidding for rights, would have combined economic power and therefore the ability to acquire a greater share of the market because of their financial buying power. BSkyB said it did not think that Vivendi, although it was a shareholder in BSkyB, was likely to put money into BSkyB. [ *Details omitted. See note on page iv.*

] As to whether Canal+ and BSkyB might be able jointly to pool their resources to outbid others, that type of allegation was completely without foundation. Other competitors had buying power to match. If BSkyB and Canal+ were hypothetically combined, the entity would have a market capitalization of about £30 billion and turnover of about £3 billion, but only £28 million in profit, based on the last set of results. By contrast, the consolidation of the ITV network would give a market capitalization of about £21 billion, assuming joint buying between United News & Media, Carlton and Granada, whose joint company was called ITV Networks. Combined turnover would be £8 billion, and combined profit after tax would be £1.2 billion.

6.270. BSkyB added that the combined market capitalization of News Corporation and Vivendi would be £51 billion with profit after tax of about £1.7 billion. That could be contrasted with the combined market capitalization of the NTL main shareholders, which was £500 billion, with profit after tax of £9 billion. It followed that a grouping of BSkyB and Canal+ was not big by comparison with other groupings of companies in this industry.

6.271. We asked BSkyB about the effect on consumers if BSkyB's bidding power were to be enhanced and whether, for example, BBC viewers might see fewer highlights. BSkyB said that it was up to the rights holder to decide whether it wanted to license highlights rights. Taking the Premier League as an example, it decided in 1996 to sell a package of live rights, which it sold to BSkyB, and it also offered an option for a package of highlights rights, which were sold to the BBC. Rights holders for sports events tended to see some value in there being a highlights package because, if the main live rights were being exploited on a pay-TV platform, the highlights provided a general level of exposure of the event and reminded the public that the event had been televised. From BSkyB's point of view, highlights on the BBC acted as a showcase for the product and enticed viewers to subscribe to BSkyB in order to see more. In the context of highlights, BSkyB did not have any incentive to deny access to another broadcaster and in any event it was for the rights holder to decide how much to license by way of highlights bearing in mind the need to maintain the value of the exclusive live rights. If events were treated as listed, there was a requirement for highlights to be shown on a free-to-air channel.

6.272. When BSkyB had acquired rights to the Ryder Cup in 1999, it had not at that time been treated as a listed event, but BSkyB had in fact sold a highlights package to the BBC because it wished to maximize its return on them and it believed that the highlights would act as a taster as far as the viewing public was concerned. BSkyB had a list of about 20 or 30 sports rights where it had chosen to sub-license highlights to a terrestrial broadcaster. Examples were the FA Cup where highlights were shown on ITV; the Scottish FA Cup where highlights were shown on BBC Scotland; and 'Match of the Day' where highlights were shown on BBC Sport.

6.273. In any event, BSkyB reiterated that it did not believe that other broadcasters did not have the ability to outbid it when negotiating with rights holders. BSkyB did not have a policy of bidding more than it thought the rights were worth just because some shareholders might have the resources to support the bid. Rights holders were primarily interested in selling domestic rights and saw international rights, which attracted less revenue, as ancillary exploitation. If, hypothetically, BSkyB bid for rights and Canal+ joined in with a bid for those rights in France, the value of the French rights was not likely to be so great as to outbid other contenders.

6.274. We asked about instances of rights being sold by brokers. BSkyB said that this had happened with the German Bundesliga, which had limited value outside Germany, and US Open Golf, where the international rights were handled by the International Management Group. Competition between brokers to acquire international rights was quite intense.

6.275. We put to BSkyB the concern that the effect of the merger situation might be that broadcasting interests would gain more control over European football games, in view of the stakes in football clubs of both BSkyB and Canal+. BSkyB said that it had under 10 per cent of both Leeds United and Manchester United. It was allowed to own those stakes under the rules of the FA Premier League. Those stakes were certainly not considered to confer influence over those clubs in such a way as BSkyB could try to influence the outcome of matches between them. BSkyB believed that UEFA rules prevented the participation in tournaments of two clubs controlled or owned by the same company. Generally, taking the FA Premier League again as an example, it was up to the rights holder to sell rights to broadcasters and if the rights holder were concerned about undue influence of the broadcasters it would have to consider appropriate action; even if BSkyB controlled one or more of the FA Premier League clubs, which in fact it did not, these clubs were in a minority and it was the 20 FA Premier League clubs which decided on the way to exploit the rights. Whether or not BSkyB bid in conjunction with Canal+ was irrelevant.

6.276. We told BSkyB that the concern expressed in paragraph 6.275 related particularly to PPV rights. BSkyB said that the rights holders would need to consider, when the time was right, whether the rights would be exploited on a PPV basis. If rights holders were fearful that the integrity of the game might be compromised by PPV broadcasting, then they had the option of not offering these rights to broadcasters. In France, PPV exploitation of sports events occurred already and the question was whether this would occur in the UK. These decisions were made territory by territory and were quite unconnected with any possible cooperation between BSkyB and Canal+.

6.277. Concerning film rights, we asked if Front Row was a serious competitor to Sky Box Office. BSKyB said that Front Row was clearly a competitor, as were a number of others, including the terrestrial broadcasters and also u>direct which offered a service on the satellite platform. The cable operators regarded Front Row as a direct substitute for Sky Box Office and ONdigital had announced that it would be launching a PPV service with SDN. PPV competed closely with the pay film service, especially as the PPV window came before the pay-TV film window. PPV rights were sold on a non-exclusive basis and therefore no broadcaster could acquire exclusive rights to films with the aim of showing them first.

6.278. We asked whether increased bidding power could result in increased prices to consumers. BSKyB said that it priced what it thought the market could bear and therefore the relevant issue was what value customers placed on what BSKyB had to offer. This situation was unchanged by Vivendi's acquisition of a stake in BSKyB. If BSKyB managed to acquire more product to offer subscribers, it could show many more sports events, and that might result in higher prices because more was being delivered to customers.

6.279. We asked BSKyB about its general pricing strategy and whether it was seeking to increase the number of subscribers. BSKyB said that its focus was currently on trying to re-establish growth in the satellite platform and in the subscribers to BSKyB services generally on all platforms. We put to BSKyB that contention that it was possibly more concerned to maximize subscription revenues from existing subscribers. BSKyB said that there had not been much of an increase in subscribers over the last few years, for a number of reasons (between 1996/97 and 1998/99, the number of DTH subscribers had been broadly constant at about 3.5 million). The pay-TV offering of terrestrial TV had made it harder for BSKyB to attract subscribers and [

*Details omitted. See note on page iv.*

]. More recently, BSKyB's subscriber numbers had started to grow again. There had been significant growth since the launch of the free set-top box offer which was to all intents and purposes a price cut. In effect, therefore, BSKyB was growing because it had cut prices.

## **The implications of any such merger situation for conditional access technology**

6.280. We put to BSKyB the contention that a result of Vivendi's stake in BSKyB might be that development in the conditional access technology used by BSKyB's competitors could be slowed. BSKyB said that it believed this contention amounted to a suggestion that Vivendi had an incentive to benefit BSKyB and disbenefit ONdigital. It thought that this suggestion was without foundation. The conditional access system used by ONdigital, Mediaguard, was used by Canal+ throughout Europe. It seemed unlikely that Vivendi would see an incentive in inhibiting the development of that system. Furthermore, BSKyB would be surprised if ONdigital did not have robust contractual arrangements with its technology suppliers.

6.281. We asked BSKyB why, in its opinion, ONdigital had decided to use the Mediaguard conditional access technology rather than the NDS technology, VideoGuard, used by BSKyB. BSKyB said that NDS had been invited by ONdigital to bid for the contract and saw it as a valid business opportunity. NDS did not win the contract, but ONdigital had not suggested that NDS technology was ruled out in principle. BSKyB thought that the NDS technology was more sophisticated in terms of functionality and therefore more expensive.

6.282. We put to BSKyB the possibility that Vivendi, through its control of Canal+ and Canal+'s stake in SECA, had in fact a strong influence on SECA. BSKyB said it understood that SECA was a 50:50 joint venture between Canal+ and Bertelsmann. BSKyB did not know what the arrangements were among the shareholders nor whether the composition of the board was such that deadlock was possible.

6.283. We asked BSKyB whether the result of the merger situation could be that information acquired from involvement in conditional access technology about strategy or performance of other platforms could be made available to BSKyB and used to the disadvantage of its competitors. BSKyB said that such a scenario assumed that SECA, Canal+ and Vivendi directors would all be guilty of breaches of fiduciary duty. This was an unrealistic assumption. In any event, as platforms developed the platform operator had every incentive to make information public as quickly as possible. ONdigital had announced in January 2000 forthcoming developments in the field of interactive services which had not yet been brought into operation. Potentially these developments involved the input of ONdigital's technology providers. ONdigital needed to announce these changes in advance in order to attract customers

and boost the respective share prices of Carlton and Granada, the owners of ONdigital. It was therefore unrealistic to suggest that BSkyB would find out about such developments through early leaks rather than through public announcements.

6.284. We put to BSkyB the concern that potentially the result of the merger situation could be that SECA would be influenced by Vivendi and so the development of SECA's conditional access technology for rivals to BSkyB might become slower than it otherwise would be. BSkyB said that ONdigital had a contract with SECA, and would be able to enforce it to ensure that SECA did not hold up technical developments.

6.285. We put to BSkyB the suggestion that, bearing in mind its share of the pay-TV market, the concerns of a competitor using alternative conditional access technology supplied by a company which was 50 per cent owned by Canal+ had to be taken seriously. BSkyB said that the provider of the conditional access technology did not find out about its client company's customer base. NDS did not have information about BSkyB's subscribers.

6.286. We put to BSkyB an alternative scenario, namely that as a result of Vivendi's stake in BSkyB, BSkyB might itself eventually switch from the NDS conditional access technology to the SECA conditional access technology. BSkyB said that that would be a very significant undertaking. It would have to replace all existing reception equipment. The logistical considerations would be similar to those involved in the transition from analogue to digital broadcasting. The scenario envisaged the situation of Vivendi materially influencing BSkyB on technology decisions. However, that switch would be so costly that it would hardly benefit Vivendi as a shareholder in BSkyB.

6.287. We put it to BSkyB that it could theoretically be argued that conditional access systems of necessity depended on secrecy and in any case were so technical that the chances of the secrecy being breached were extremely slight. BSkyB reiterated that the technology provider was at a distance to the operation of the business and did not have information about matters such as customer bases. We asked BSkyB specifically about the individual Vivendi representative who was both a director of BSkyB and also a director of Canal+ and whether, if that individual saw SECA's strategic plans, there was a danger of confidential information about SECA getting through to BSkyB. BSkyB said that it doubted very much if there was any information of a nature which could be used by it against a competitor, and in any case it would not expect a director to breach his fiduciary duty. The scenario being suggested was unrealistic as it imagined information being put to the SECA board which a Canal+ appointee on that board would disclose to Canal+, thus breaching a director's fiduciary duty. Subsequently, a Canal+ director would need to breach his duties by disclosing the information to Vivendi. Finally, a Vivendi director would need to breach his duties by disclosing the information to BSkyB. Three breaches of fiduciary duty would be involved and the imagined chain of events was not at all likely to occur.

6.288. We asked BSkyB whether, if hypothetically the supply of conditional access systems were affected, prices to consumers could be increased, or the choice of channels or pay-TV platforms be reduced. BSkyB said that if, hypothetically, ONdigital were required to change all its set-top boxes, that would be a serious setback but the company would not necessarily be destroyed. In any event, ONdigital might well be protected by its long-term contract with SECA.

6.289. We asked BSkyB whether, if Vivendi had not acquired its stake, Canal+ might have sought to enter the pay-TV market as a direct competitor. BSkyB said that even if Canal+ were a potential entrant to the UK, Vivendi's investment in BSkyB would not reduce the possibility of further entry. There were many other companies around the world which had comparable expertise to Canal+ and which might wish to enter the UK market.

## **Hypothetical remedies**

6.290. We asked BSkyB, hypothetically, about its views on behavioural undertakings, should a merger situation be found and should such a situation be considered to be against the public interest. These possible behavioural undertakings were that BSkyB and Vivendi might agree not to collaborate in rights, or exchange or use information acquired from the supply of conditional access technology. BSkyB said that any possible undertaking would need to be put to its board and it would be very concerned to give undertakings that might fetter BSkyB's existing freedoms simply as a result of problems that had arisen over one shareholder. BSkyB had to serve the interests of all its shareholders. As to con-

ditional access technology, it seemed absurd to suggest that there could not be an exchange of information between BSKyB and ONdigital for the purpose of Simulcrypt arrangements. Simulcrypt was effectively a form of interoperability and BSKyB could not restrict its ability to get information on other conditional access systems and share its own information, because it had given an undertaking to the European Commission, as a condition of being allowed to operate Open, that it would use all reasonable endeavours to procure that Simulcrypt arrangements with another conditional access service provider in the UK were operational within 12 months of the relevant request or such other timescale as was agreed between the parties. BSKyB was actually required to exchange information in the context of working towards Simulcrypt arrangements.

6.291. We asked BSKyB whether hypothetically it could be required not to exchange or use any information acquired from the supply of conditional access technology save that which was necessary to bring about Simulcrypt. BSKyB said that it would need to see the terms of such a remedy before it could comment. Any remedy needed to be addressed to specific adverse effects.

6.292. We asked BSKyB about the hypothetical remedy of Vivendi's divesting its shareholding in BSKyB. BSKyB noted that such a remedy would not be one on which the Commission would be seeking its consent.

6.293. We asked BSKyB about the hypothetical remedy of requiring Vivendi to bring its influence to bear on Canal+ in such a way that Canal+ divested itself of SECA. BSKyB said that it could not comment on this remedy which would not have any impact on it. It had yet to be convinced that there were any problems which should be addressed by remedies.

## **Further representations**

6.294. Subsequently we put further questions to BSKyB to which it responded in writing and at a second hearing.

6.295. We put it to BSKyB that the Commission had stated in past reports, when considering the question of material influence, that the effect of any particular shareholding was to be considered in the light of the circumstances surrounding it and that, as 'material influence' was not defined in the Fair Trading Act, the particular circumstances of each case where it might arise had to be considered. BSKyB reiterated that it had been advised that there was precedent that a stake, which would enable a shareholder to block a special resolution, together with a director on the board of the company concerned, had been considered to give the shareholder the ability materially to influence the policy of the company. BSKyB did not disagree with the view that the effect of any particular shareholding was to be considered in the light of the circumstances surrounding it and each case would turn on its facts.

6.296. We told BSKyB that one factor which the Commission would wish to take into account would be the views of the senior management of BSKyB about Vivendi's influence. Accordingly, we asked BSKyB if it was to be expected that the board and senior management of BSKyB would have regard to the interests and wishes of Vivendi before finalizing some, if not all, of its major decisions. BSKyB responded that M Licoys had only attended two board meetings and Vivendi had not explained to the BSKyB board its intentions as to how it would deal with its voting rights. The senior management at BSKyB did not, therefore, have any information to give the Commission as to how Vivendi would use the rights that it had in relation to the policies of the company. In the circumstances it was not yet clear whether and if so how any working relationship might develop between the senior management at BSKyB and Vivendi.

6.297. After News International and Vivendi, the next 12 largest shareholdings in BSKyB at the end of October 1999 amounted in aggregate to 14.8 per cent, varying between 0.7 and 2.2 per cent, all owned by institutions, the six largest of which amounted to 10 per cent. BSKyB subsequently provided up-to-date information on shareholders in BSKyB with 1 per cent or more of the voting capital. These were, at 28 January 2000, as follows: Barclays Global Investors (2.27 per cent), Legal & General Assurance Society (2.22 per cent), Schroder Investment Management Ltd (2.19 per cent), Standard Life Assurance Company (1.78 per cent), Morley Fund Management (1.31 per cent), Scudder Threadneedle Investment Managers Limited (1.04 per cent), News International Limited (39.7 per cent), BSBH (11.78 per cent), and Vivendi (12.66 per cent). BSKyB stated that it was not aware of any links which these shareholders had (for example, as a pension fund, bank or adviser) with BSKyB. It was unaware of the relationship

which any of its shareholders might have with News International; BSkyB management had no significant shareholdings.

6.298. We asked BSkyB about the likely voting behaviour of the Kirch holding of 4.3 per cent, in view of BSkyB's 24 per cent holding in Kirch. BSkyB stated that at present it did not have any holding in any Kirch company. It had contracted to purchase a 24 per cent shareholding in KirchPayTV, subject to regulatory approvals and other conditions. The proposed acquisition was under examination by the European Commission. In the event that the transaction proceeded, KirchPayTV would own approximately 4.3 per cent of the issued share capital of BSkyB. The way in which the votes would be exercised was not a matter on which BSkyB would have any veto rights or other control under the terms of the joint venture arrangements with KirchGruppe. It therefore seemed that the shares would be voted in accordance with the wishes of KirchGruppe exercised through KirchPayTV. There could be no expectation that those wishes would coincide with those of BSkyB or of News International or any other member of the News Corporation group.

6.299. Concerning the Kirch transaction, we told BSkyB that it had been the view of the Commission on previous references under section 64 of the Fair Trading Act that the conclusion as to the creation of a merger situation should not be affected by developments subsequent to the date of the reference. The agreement between BSkyB and KirchPayTV was entered into in early December 1999, after the reference was made to the Commission on 12 November. We asked BSkyB if the Commission should take that agreement into account; and if not, whether BSkyB considered that, if the negotiations for the agreement were sufficiently advanced at the date of the reference, the Commission could take that into account in determining what expectations would have been held about the prospect of Kirch acquiring the stake. BSkyB observed that the date of 12 November was not relevant to the Commission's inquiry. The Commission was required, pursuant to section 69(1)(a) of the Fair Trading Act, to report on whether a merger situation qualifying for investigation had been created. A merger situation was created at the time when two or more enterprises were deemed to have ceased to be distinct enterprises in accordance with section 66 of the Act, ie a date in 1999 pre-dating the reference. If the Commission concluded that a merger situation had been created, then BSkyB believed that the relevant date was either when Vivendi acquired shares in BSBH and the ability to appoint a director, which was 22 July 1999 (when Vivendi gave notice to BSkyB that it had acquired a notifiable interest) assuming that its relevant interest was then either owned or subject to an unconditional contract (see section 66(4) and (5) of the Act); or alternatively the relevant date was such later date on which the Pathé and BSBH deals became unconditional. If the deals became unconditional on different dates, the relevant date was the date on which the later deal became unconditional. These dates were all some time before the commencement of the reference, which did not appear to be a relevant date for the purpose of section 66. The 12 November date was merely a function of the length of time, during a period of four months after any possible merger situation was created, which the OFT took in order to come to a conclusion as to whether it intended to make a recommendation that the matter be referred.

6.300. BSkyB further submitted that the question of whether the Commission should or should not follow precedent and take account of subsequent developments was not relevant. It would not be appropriate to take into account a transaction which was subject to regulatory clearance and would still be subject to regulatory clearance at the date on which the Commission's report was due. The Kirch transaction had been approved in principle by the board of BSkyB on 15 October 1999, but final approval of the purchase contract by the board committee appointed to negotiate occurred only just before the transaction was announced in early December. The contract was conditional on a large number of matters, including regulatory approval, and was presently under consideration by the European Commission. It would be inappropriate to consider the implications of such an arrangement in reaching the Commission's conclusion, particularly when the Commission's conclusions would then be at risk of being based on unsubstantiated facts in the event that the Kirch transaction was subsequently blocked or was cleared on the giving of conditions which removed the concerns which the Commission might have identified.

6.301. We asked BSkyB what was its present expectation as to whether the arrangement between BSkyB and Kirch would be approved by the European Commission. BSkyB responded that it would be premature to form any expectation as to the outcome of the European Commission's investigation.

6.302. We put to BSkyB a summary of Vivendi's general arguments to the effect that it had not acquired the ability materially to influence the policy of BSkyB and therefore no merger situation qualifying for investigation existed (see paragraphs 6.34 to 6.36). In reply, BSkyB made the following comments.

6.303. BSkyB observed that the alleged ability of one party to exercise material influence over a company did not preclude the possibility that one or more other parties might also do so. Five members of the board of BSkyB were appointed by News International. Although there were currently 14 board members, this was due to a number of retirements over the last year or so. BSkyB was in the process of recruiting at least another three independent directors to its board. BSkyB said that there was little significance in this point, as no business could actually be conducted at BSkyB board meetings unless there was present and voting a majority of directors who were independent of both News International and management. Accordingly, News International could never have a majority on the board.

6.304. BSkyB's memorandum on corporate governance, adopted by the board on 23 November 1994, provided that the remuneration committee of the company would have the duty to approve and recommend to the board the hiring and remuneration and any changes thereto of any of the Chief Executive, the Deputy Managing Director, and Chief Financial Officer or equivalent. Furthermore, the memorandum on corporate governance provided for a number of matters to be reserved for the board for decision or approval, and one of those matters was the appointment of executive directors and the appointment and removal of independent non-executive directors or the Company Secretary. Accordingly, the appointments of the Chief Executive and the Chief Financial Officer, both to their executive positions and their position as board directors, were approved by the board as a whole, which must consist in the majority of independent directors. The current Chief Executive stood for election at the last BSkyB AGM, and as far as BSkyB was aware, Vivendi had voted in favour of the resolution to appoint him. The Chief Executive Officer, who was an executive director of BSkyB, was a former employee of certain companies in the Fox group which at the time were part of a joint venture between News International and Tele-Communications Inc. Prior to these appointments, he had been an employee of BSkyB itself.

6.305. Concerning Mr John Thornton's advice to Star TV (see paragraph 6. 36), BSkyB commented that Mr Thornton appeared to have played a role in advising Star TV in November 1994 prior to its acquisition by News Corporation. BSkyB's flotation had occurred in December 1994 and prior to flotation Mr Thornton had not been a director of BSkyB.

6.306. BSkyB added that the Deputy Chief Executive of KirchGruppe was not yet a director of BSkyB, and that his appointment would not occur unless and until the transaction became unconditional, which depended upon regulatory clearance. It was not appropriate for the Commission to take this potential appointment into account. The Commission ought not to be influenced by press reports, particularly those of newspaper groups which were rivals of News International, as to the role of BSkyB's Chairman.

6.307. Concerning the conditional access system used by BSkyB (see paragraph 6.45), BSkyB said that this had been the subject of a transaction which had been reviewed in detail by the audit committee and put to the full BSkyB board for ratification. The board, including Vivendi's representative M Licoys, had unanimously ratified the agreement.

6.308. BSkyB said that, contrary to Vivendi's allegations (see paragraph 6.45), it did not make extensive use of the film resources of the News Corporation Group. BSkyB had a film output agreement with Twentieth Century Fox, which had been put to the full BSkyB board and approved unanimously, the board noting that the agreement was on terms which were substantially similar to the terms upon which BSkyB had contracted for similar product with other major Hollywood studios. It should be noted that BSkyB also had a film output deal with Pathé which had similarly been put to the full board for approval.

6.309. [

*Details omitted. See note on page iv.*

]

6.310. Prior to attending a second hearing, BSkyB made further written representations, which responded to concerns raised by us. On the issue of cooperation on the acquisition of broadcasting rights, BSkyB reiterated that, as a consequence of the way rights were sold, there was little joint rights buying by broadcasters operating in different territories. Where there had been joint rights buying in the past, competition issues had not been raised. Even if there were opportunities for joint rights buying, such activity did not become more likely because Vivendi held a stake in BSkyB. The Commission had not

identified any benefits from joint bidding which would cause BSkyB to commence such activity and had not identified how a joint bid from BSkyB and Canal+ would exceed other bids. It would not be appropriate for the Commission to deal with joint rights buying at the present time because this did not result from any merger and any joint rights buying could be addressed by the relevant competition authority at the time it took place. BSkyB did not understand why there was a problem with Canal+ and BSkyB jointly bidding for rights when other organizations jointly made bids for rights (for example, recent successful bids by the EBU, ITV/ONdigital, the BBC/NTL and Channel 4/NTL).

6.311. On the issue of the alleged cooperation between the Vivendi/Canal+ and BSkyB on the convergence of conditional access technology systems, BSkyB did not see how that could be a likely result of the merger situation when BSkyB did not own the rights to any conditional access technology system and did not have an interest in any company which owned such rights. In any event, BSkyB noted that the Commission itself had suggested that consumers might, in fact, benefit from the convergence of conditional access technology systems.

6.312. BSkyB did not consider that there were many examples of sports rights with international appeal where there would be scope for joint bidding or bidding by BSkyB and Canal+. The ability of BSkyB to bid for rights to sports events that could be of interest to viewers in a number of different territories was restricted either by legislation on listed events or by the desire of the rights owner to maximize sponsorship revenues by ensuring the widest possible exposure for the event through free-to-air coverage.

6.313. As to the FA Premier League rights, the facts were that in 1992 and 1996 the FA Premier League sold the Premier League rights for the UK and the Republic of Ireland separately from the rights for the rest of the world. BSkyB had bid for and competed against other UK broadcasters for the rights in respect of the UK and the Republic of Ireland. The FA Premier League decided to award the rights to BSkyB by comparing its bid against the other bids that had been made in respect of rights for those territories. In 1996 the foreign rights were separately awarded to Sport+ based on the amount that it was willing to bid relative to the amount that other rights brokers had offered for the foreign rights.

6.314. When assessing bids, the FA Premier League would necessarily compare the value of any joint bid for worldwide rights with the total remuneration it could obtain from selling all those rights to other bidders and not just the remuneration it could obtain from selling the UK and Republic of Ireland rights to another bidder. Thus if BSkyB and Sport+ jointly bid for the domestic and foreign rights combined, then the FA Premier League would seek to compare their joint bid both with any other joint bids and with the sum of the highest amount offered solely in respect of the rights for the UK and Republic of Ireland and the highest amount offered solely in respect of the foreign rights. BSkyB did not understand why it could be expected that BSkyB and Sport+ would be in a position that the parties would not enjoy in the absence of Vivendi's stake in BSkyB to secure the domestic and foreign rights.

6.315. BSkyB anticipated that when the next FA Premier League contracts were negotiated there would be competition for both the domestic rights and the foreign rights. It was therefore not clear what advantage BSkyB or Sport+ would obtain by bidding jointly (ie seeking to make each of their bids conditional on the other also being awarded the rights). In fact the reverse was likely to be true. For example, if a rival bidder such as CSI (which had been awarded the foreign Premier League rights in 1992) bid more for the foreign rights than the amount which BSkyB and Sport+ had incorporated into their joint bid to reflect the value of the foreign rights, BSkyB might lose the domestic rights. This could occur even though BSkyB might have placed a higher value on those rights than any of its rivals which bid specifically for the UK rights.

6.316. As to the question of whether BSkyB and Canal+ could jointly bid more than their competitors, BSkyB's competitors had sufficient financial resources available to them to be able to match any joint bid from BSkyB and Canal+. Whereas the joint market capitalization of BSkyB and Canal+ was £29 billion in January 2000, that of News Corporation and Vivendi was £51 billion; of NTL and CWC £21 billion; and of the ITV companies £21 billion. The combined shareholders of NTL were worth £500 billion (see paragraph 6.270).

6.317. Concerning the Champions' League, UEFA had already sold the rights to the Champions' League until the end of the 2002/03 football season. Therefore the prospect of joint bidding for Champions' League rights, if it existed at all, did not arise for at least three years. BSkyB considered that it would be inappropriate for the Commission to give any weight to potential effects that were so far into the future.

6.318. Moreover, it was highly unlikely that a joint bid by pay-TV broadcasters would be successful. In each of the major European TV markets—UK, France, Spain, Germany, Italy—the primary rights holder for the UEFA Champions’ League was a free-to-air broadcaster. UEFA, which was advised by the rights agency Team, had sold rights to free-to-air broadcasters in order to ensure that the event had wide exposure and that sponsorship revenues were maximized. Thus, if any joint bid were likely to be successful, it would be in the nature of a combined free-to-air/pay-TV bid (such as between ITV and ONdigital) within a territory.

6.319. In addition, although the UEFA Champions’ League had international appeal and was attractive to viewers in a number of different territories, it was not sold on a pan-European basis. In order to maximize the revenue which it obtained from the sale of rights, UEFA sold the rights, at least in respect of the five main TV markets, territory by territory. There could be no advantage to BSKyB and Canal+ jointly bidding for such rights and the rights holder had insisted that the primary broadcaster of those rights in each territory was a free-to-air broadcaster.

6.320. Turning to the World Cup, TV rights to the World Cup were owned by FIFA. FIFA had already sold the rights in respect of the 2002 and 2006 tournaments. Therefore the prospect of BSKyB and Canal+ jointly bidding to acquire European rights to the World Cup from FIFA did not arise until the rights to the 2010 World Cup were sold. This was at least eight years away. It would be inappropriate for the Commission to speculate as to how Vivendi’s stake in BSKyB might affect the sale of rights to the 2010 World Cup.

6.321. The European rights for the 2002 and 2006 World Cups were sold to Prisma. Prisma was in the process of selling those rights to broadcasters territory by territory. In Spain the rights had already been awarded to Via Digital, a rival to CanalSatellite Digital in which Canal+ had a stake. In France, several broadcasters including TF1, France Television and Canal+ were thought to be interested. BSKyB asked the Commission to note that, because the World Cup was an A-list event (see Appendix 4.6) in the UK, BSKyB could not broadcast any World Cup matches live in the UK unless they were also broadcast live on either BBC1, BBC2, ITV or Channel 4, thereby substantially diminishing any value such rights might have to BSKyB. Any concern about joint bidding by BSKyB and Canal+ for World Cup rights was therefore unfounded.

6.322. Concerning the Six Nations Rugby tournament, these rights were not sold collectively. The Rugby Football Union sold rights to England’s home matches. Worldwide rights for those matches during the period 1997 to 2002 were sold to BSKyB. The Five Nations Committee negotiated the sale of rights to the home matches of Ireland, Scotland and Wales. The BBC currently held worldwide rights to these matches. The Rugby Federations of France and Italy sold rights to France and Italy’s home matches. France Television held the worldwide rights to France’s home games.

6.323. UK broadcasters had competed to acquire worldwide rights to the home matches of UK participants in the Six Nations Rugby tournament and had then sought to sub-license those rights to broadcasters operating in other territories. For example, BSKyB had previously sold French rights to England’s home matches with Scotland, Ireland, Wales and Italy to France Television. [

*Details omitted. See note on page iv.*

]

6.324. The current distribution of rights clearly indicated that UK broadcasters were perfectly able to bid independently for worldwide rights. Even though the rights were of some interest to viewers outside the UK, mainly in France and Italy, UK broadcasters had not found it necessary to bid for those rights jointly with broadcasters that could exploit those rights in France and Italy. If there had been any advantage in joint bidding for Six Nations Rugby, that could reasonably be expected already to have taken place.

6.325. Concerning the supply of rights by Canal+ and Sport+, BSKyB understood that Sport+ controlled the foreign rights to the Spanish League up until the end of the 2002/03 football season. BSKyB had, however, recently agreed to buy the rights to broadcast Spanish League football in the UK for the period ending 2002/03. Therefore the potential for Vivendi’s stake in BSKyB to influence the allocation of UK rights to Spanish football did not arise until the start of the 2003/04 football season. Moreover, even then, Sport+’s ability to favour BSKyB crucially depended on whether or not Sport+ was selected to sell foreign rights to Spanish football after its current contract expired. Given that Sport+ faced competition from other sports rights agencies such as IMG/TWI, Prisma and Ufa, it would be extremely speculative to assume that Sport+ would continue to control the sale of UK rights to Spanish League

football beyond the term of its current contract, particularly as the UK rights to Spanish League football were previously sold by Prisma Sports and Media AG.

6.326. Concerning Italian football, Sport+ did not represent all the football clubs in the Italian Serie A. Several clubs in that Italian league were represented not by Sport+ but by a public service broadcasting rights trader called Raitrade. The international rights to the Italian Serie A were sold by Sport+ and Raitrade collectively. Raitrade would have no incentive to favour BSKyB. Furthermore, the UK rights to Serie A had already been sold to Channel 4, whose contract expired at the end of the 2001/02 season, although it had an option to extend the contract for a further three years. Therefore, even if Sport+ were able to persuade Raitrade to favour BSKyB over other UK broadcasters, there would be no prospect of BSKyB obtaining rights to Serie A until the start of the 2005/06 football season. Moreover, Sport+'s contract to represent certain Italian football clubs in the sale of foreign rights would itself have expired at that point and it would be highly speculative for the Commission to assume that it would be renewed.

6.327. There was also no reason to believe that Sport+ would ever refuse to supply rights to other broadcasters. Sport+ had an incentive to obtain the maximum amount for the rights which it sold. Consequently it would only be in its interest to sell rights to BSKyB if BSKyB bid more than other UK-based broadcasters were willing to offer. If Sport+ awarded the rights to BSKyB in exchange for a rights fee that was lower than the amount Sport+ could have obtained by selling to one of BSKyB's rivals, it would suffer all of the shortfall while Vivendi would only obtain a portion of the benefit to BSKyB of obtaining rights at less than market value. BSKyB concluded that, in the circumstances, concern that Sport+ might not be prepared to supply such rights to operators other than BSKyB in the UK was unfounded.

6.328. Turning to conditional access, BSKyB reiterated that conditional access technology providers did not obtain commercial information about the identity of the customer bases of their licensees who were operating TV platforms. Information about developments to digital TV platforms was placed in the public domain by the platforms themselves at the earliest opportunity, well in advance of the development work being completed, and thus SECA would in practice not have in its possession information which would be of value to BSKyB. The seepage of information from SECA to BSKyB would require the breach of three fiduciary duties (see paragraph 6.287) and would, therefore, be implausible.

6.329. On remedies, BSKyB submitted that any remedy must be considered in the light of a particular public interest detriment. Concerning the possibility that Vivendi might be required to divest its shareholding in BSKyB or part of that shareholding, BSKyB commented that the effect of this would be to place around £6.5 billion worth of stock on the market. This, in and of itself, would place material downward pressure on BSKyB's share price. Currently, only 35 per cent of BSKyB stock was in free float (because of the holdings of News International and Vivendi). Requiring Vivendi to sell would add a further 25 per cent to this free float, resulting in a 70 per cent proportionate increase. In addition, Vivendi would be a forced seller. The overall effect could be potentially to decimate the share price. Furthermore the market would be likely to interpret Vivendi being required to divest as a message that no strategic investor in BSKyB would be allowed by the UK Government. With no realistic possibility of a buyer for the whole £6.5 billion stake, the share price could collapse. BSKyB was currently the eleventh ranked stock in the FTSE-100 index. As a result, a significant proportion of BSKyB's shareholders were investment (typically pension) funds that tracked the FTSE-100 index and which needed to maintain a holding in proportion to the index weight represented by BSKyB. If the share price started to fall, then those financial institutions would sell out of the stock as they sought to adjust the proportion of their funds allocated to BSKyB. This would add to the downward pressure on the stock and could lead to a self-reinforcing downward spiral.

6.330. At a second hearing, we asked BSKyB again about its view on whether Vivendi had material influence. BSKyB said that it had had legal advice to that effect. In terms of interest in collaborating, BSKyB had always suggested that if there was a rational commercial opportunity to collaborate with Canal+, that was something that BSKyB would certainly consider independently of the merger. To date, there had not been much opportunity to do that. So far as BSKyB was aware, it was not the case that a large number of rights were about to be sold on a multinational basis. Furthermore, BSKyB was well aware of the constraints put upon it by the competition authorities.

6.331. We asked whether the reports in the press to the effect that News Corporation was considering the consolidation of its worldwide satellite platforms would have an effect on Vivendi's interests in

BSkyB. BSKyB replied that it was unsure what was contemplated. If a worldwide consolidation of assets occurred, it was possible that Vivendi's stake might eventually be diluted. BSKyB noted that, as a general principle of company law, shareholders could not be diluted against their wishes.

6.332. We asked BSKyB about sports rights which were currently purchased on a multi-country basis, and whether increasing Europeanization could be said to be occurring. BSKyB said that this was not so. With regard to FA Premier League rights sold outside the UK, separate arrangements had always been made. Premier League rights would be exploited in respect of specific territories which were of most importance to them. At no stage had the Premier League indicated that it wished to sell pan-European rights including the UK and the Republic of Ireland. What the Premier League had always done, and as far as BSKyB knew intended to do on the next occasion, was to seek to invite bids in respect of the UK and the Republic of Ireland, and then potentially seek to invite bids in respect of much less significant territories, namely the rest of Europe. The Premier League did not have the ability or the time to go out and pick broadcasters and individually negotiate with them in each territory. It preferred to sell the rights to a rights broker who would exploit them in secondary territories. Spanish and Italian football were exploited on a territory by territory basis and their primary territories were clearly not the UK and Ireland.

6.333. The rights for secondary territories were of very much less value than those for primary territories. The European rights for the last Premier League had sold in 1996 for some £100 million, as contrasted with the £743 million total bid for the UK, which included BSKyB's right to broadcast live and the BBC's right to broadcast highlights.

6.334. We asked about the potential for co-operation between BSKyB and the Vivendi group in bidding jointly for the UK and international rights. BSKyB said that while there might be the potential for BSKyB and Canal+ to bid jointly, it did not believe that at present it would benefit from such joint bidding. There was massive competition for worldwide rights from the various rights brokers and, in the UK, from other interested parties. Assuming that the UK rights were worth £1 billion and the world rights were worth £100 million, BSKyB and Canal+ could not hypothetically achieve anything by putting in a joint bid worth £1.1 billion, because other bidders for both the UK and the world rights would put in similar offers. No advantage could accrue from a joint rights-buying strategy. There was a very active market in secondary rights even though their value was much less than the value of the primary rights. Rights traders tended to specialize in particular sports (ING in golf, UEFA in football, CSI in cricket), in the sense that those were the sports for which the traders had been successful in being appointed as traders.

6.335. We put it to BSKyB that, in theory, BSKyB and Canal+ could co-operate in bidding jointly for UK and international sports rights and foreclose the market, either by jointly offering the highest bid or by making other parties feel that there was no point in entering the bidding. BSKyB reiterated that the situation would not be any different if Vivendi did not have 24 per cent of BSKyB. If there were a winning strategy for bidding, BSKyB would employ it in any event. We put it to BSKyB that co-operation was easier if there was a shared directorship. BSKyB said it did not think that this was so. Joint bidding for rights to a number of territories in fact occurred between companies that did not have joint shareholdings, for example between the companies on whose behalf the EBU negotiated rights. The BBC and NTL had recently co-operated in joint bids, as had Channel 4 and NTL. Furthermore, although News Corporation had a substantial shareholding in BSKyB, BSKyB had not bid jointly with News Corporation for rights, despite the fact that News Corporation had platforms in other countries.

6.336. We asked BSKyB to what extent the number of subscribers to a TV platform was significant in bidding for rights. BSKyB said that essentially, rights owners would sell the rights to the highest bidder. BSKyB was at a disadvantage because it could enjoy its retail relationship on only one platform. If NTL were to bid, it could bid knowing that it enjoyed a retail relationship on at least two platforms and potentially three via its stake in SDN.

6.337. We asked generally about the importance of Sport+. BSKyB said that Sport+ traded in secondary rights, unlike rights traders such as Prisma, which dealt with the FIFA World Cup and Ufa which dealt with the European football championships.

6.338. We asked generally about investigations by other regulatory authorities, in particular about the decision of the European Commission on the EBU which is under appeal to the European Court of First Instance. BSKyB said it understood that the issue was not so much with the principle of joint buying of rights but with the closed membership of the EBU.

6.339. We asked about the position of British Eurosport, and whether Vivendi, which had an interest in it, might have less incentive to develop it because of its stake in BSkyB. BSkyB said that British Eurosport was not the only potential competitor to BSkyB as a premium sports channel. Even if British Eurosport were to vanish, other competitors would come upon the scene to take sports rights. ONdigital and NTL were also active in this area. In any event Vivendi surely had the option to dispose of its interest.

6.340. We asked whether Internet broadcasting might make the selling of rights more international. [ *Details omitted. See note on page iv.* ] but it was not yet clear whether rights holders would be prepared to sell Internet rights on a global basis. It might be that territorial restrictions would be introduced by means of conditional access technology. Such restrictions could maintain the value of content in particular territories.

6.341. We put it to BSkyB that, in the light of News Corporation's ownership of Fox Studios and Canal+'s joint venture with Warner Bros, there might be the potential for coordinated purchasing of film rights by BSkyB and the Vivendi group. BSkyB said it did not know that Canal+ had a joint venture with Warner Bros. As to BSkyB's output deal with Twentieth Century Fox, that deal was similar to the output deals that BSkyB had with any other studio. [

*Details omitted. See note on page iv.*

]

6.342. It was hard to see how Fox, having an output deal with BSkyB, lent BSkyB any greater weight at all in terms of BSkyB's ability to bid. BSkyB had a contract with each major Hollywood studio which ran for a very long time. In the foreseeable future that the Commission was looking at, it was hard to see what BSkyB could conceivably do to bid for rights using Fox, which would not help it (Fox was a competitor of Warner Bros and Universal).

6.343. BSkyB and Canal+ could not bid jointly for rights within the sort of time frame under consideration. They both had their deals tied up with studios. The studios dealt on a territory by territory basis because they were controlling the movement through the windows in each territory. They could have no opportunity to bid together in the near future and there would be no benefit to them of doing so. BSkyB would still have to pay the most that anybody in the UK was willing to pay for the UK rights and Canal+ would still have to pay the most that anybody in France was willing to pay for the French rights. The studios had all the leverage in these circumstances. Furthermore, the satellite platform was open in the UK. The studios could if they wished supply their films direct to customers without using BSkyB as a middleman.

6.344. We asked BSkyB if it wished to add any points on the conditional access issues. BSkyB said it had established that, if ONdigital or any client of a conditional access provider needed to change to another provider for any reason, it would not have to change all its set-top boxes. The establishment of Simulcrypt would enable it to receive other conditional access systems from existing boxes, until such time as a client wished to switch to the boxes of another provider.

6.345. We asked BSkyB about hypothetical remedies and the possibility of behavioural undertakings. BSkyB said that it would need to consider the total terms of any undertakings, with particular regard to the interests of shareholders. The context would also be important; if, for example, undertakings were an alternative to Vivendi's divesting itself of its stake in BSkyB, it might well be felt that undertakings would be preferable. As to notification of joint bids, these would in any event be required to be notified in certain circumstances under UK and European competition law. An undertaking not to collaborate on acquisition rights would be more problematic than an undertaking to notify joint bids. BSkyB would not want to deny itself the potential for participating in joint bidding if opportunities were to arise. Alternatively, if a rights holder were ever to decide that it would invite bids only on a joint basis covering (say) the UK and France, BSkyB would not want to be precluded from being able to make a joint bid with a partner in France.

6.346. BSkyB added that it found it difficult to see how divestment could address either of the two concerns that had been raised concerning joint bidding for rights or convergence of conditional access technology. If it were felt that the existence of a common directorship between Vivendi and BSkyB made adverse effects more likely, then a proportionate remedy would be to encourage Vivendi to remove its director from the board of BSkyB.

6.347. Subsequent to the second hearing, BSkyB made a number of further points. In response to a question from us as to whether we needed to take account of the rights-buying activity of Prisma in assessing the public interest, BSkyB stated that nothing in the Kirch transaction, should it proceed, would give BSkyB any interest or control whatsoever over Prisma. Prisma Sports and Media AG, established in Switzerland, was and would continue to be a subsidiary of KirchGruppe. The Kirch transaction related to KirchPayTV, of which Prisma formed no part.

6.348. With regard to an alleged vertical relationship between Warner Bros and Canal+, BSkyB stated that Time Warner, the parent company of Warner Bros, previously had an equity stake of 10 per cent in CanalSatellite, with approximately 66 per cent of the shares in CanalSatellite being held by Canal+; on 13 January 2000, Time Warner had sold this equity stake to Lagardere, which now held approximately 34 per cent of the shares in CanalSatellite. In the circumstances, there clearly could not be any concern from this terminated relationship.

6.349. BSkyB provided a written discussion of a joint bidding scenario, following on from discussion at the second hearing (see paragraph 6.334). In this scenario it was assumed that the UK rights were worth £1 billion and the international rights were worth £100 million but that Canal+ faced limited competition and knew that the next most serious bidder would bid only £50 million for the rights. In these circumstances, BSkyB and Canal+ could make a joint bid of £1.075 billion and would secure both the UK and international rights. The reason would be that the best alternative for the Football Association Premier League would be £1,050 million from a combination of a UK bidder (such as NTL) and one of the international bidders able to offer £50 million. BSkyB and Canal+ would have obtained all the rights for £1,075 billion, even though the maximum that they were willing to bid was £1.1 billion.

6.350. This scenario did result in BSkyB obtaining the UK rights where it otherwise might not have done so. However, the scenario was flawed in a number of respects.

6.351. First, Canal+ was not in the position of always being able to outbid other broadcasters or rights brokers for rights for exploitation outside the UK. Many rights brokers actively competed for such rights. In the major TV markets, the digital satellite platforms in which Canal+ had a stake faced competition from rival platforms both in terms of attracting subscribers and in the acquisition of rights.

6.352. Second, the scenario implicitly assumed perfect knowledge on the part of Canal+ as regards what its competitors were willing to pay for international rights. It was not clear why this would be an appropriate assumption. BSkyB's experience was that it faced uncertainty as to what its competitors were likely to bid and it would expect Canal+ to be in a similar position.

6.353. Third, it was not clear what incentive BSkyB and Canal+ would have to co-operate like this. From Canal+'s point of view, the position prior to any thoughts of joint bidding would be one of being able to pay slightly over £50 million for something worth £100 million. Thus by bidding for the international rights only, Canal+ would earn an economic profit of approximately £50 million. In the joint bidding example, the total economic profit had declined to £25 million (£1.1 billion less £1.075 billion). Even if all of this accrued to Canal+, Canal+ would be out of pocket by £25 million.

6.354. If the total rights cost of £1,075 billion were split such that BSkyB paid £1,025 billion for the UK rights and Canal+ paid £50 million for the international rights, Canal+ would be indifferent between joint bidding and bidding for the international rights only, as in each case it would enjoy an economic profit of £50 million. However, by now BSkyB would have paid £1,025 billion for rights that were worth only £1 billion. If BSkyB were willing to overpay for rights in this way, it could do so directly without cooperating with Canal+.

6.355. The question might be raised of whether rights were more valuable to BSkyB than to its competitors. BSkyB was not aware of any allegations to this effect.

6.356. BSkyB submitted further that there were a number of misconceptions in the argument that BSkyB might be willing to bid more for rights than its competitors because it might have a strong desire to maintain its alleged 'dominant' position. Rights would be worth an equal amount to any other party who would like to obtain that 'dominance'. Also it should not be assumed that BSkyB's alleged

dominance was caused by the fact that it had previously exploited the rights for which bidding was taking place. It seemed unlikely that the rights to Spanish football were so important that the loss of those rights would so fundamentally undermine BSkyB's position as to lead BSkyB to value those rights more than its competitors. If the Commission had in mind rights such as the FA Premier League, it would need to establish not only that BSkyB was dominant but also that the loss of FA Premier League rights would be so calamitous to BSkyB that BSkyB would structurally value those rights more than its competitors.

6.357. BSkyB did not believe that to be the case. It was important to understand that BSkyB was a very different company to what it was in 1992 when it first obtained the FA Premier League rights. BSkyB now had major revenue streams associated with many other sports contracts, films, PPV and interactive services (Open). If BSkyB were to lose the FA Premier League rights then it would certainly lose some revenue, but it would also save a great deal in costs and would have the opportunity to redirect those resources in other directions (such as own production for Sky One and the film services). It should also be noted that, were a third party to win the FA Premier League rights, BSkyB would expect FA Premier League programming to be distributed on the DTH platform. It would be very expensive for the successful bidder to forgo 4 to 5 million DTH-connected homes. [

*Details omitted. See note on page iv.*

]

6.358. In this context it was also worth noting that NTL and ITV/ONDigital clearly believed that they were in a position to compete with BSkyB to acquire those rights. ONDigital had recently announced (*The Independent*, 22 February 2000) that it had been involved in confidential talks with the Premier League and was seriously looking at bidding for FA Premier League rights either on its own or with ITV. Similarly NTL had also confirmed its intention to bid for the next FA Premier League contract.

6.359. A further problem with the argument was that it was fundamentally contradicted by the facts. It was clear that many other broadcasters did value rights as much as BSkyB because there were many valuable sports rights that were currently held by other broadcasters. For example, ITV broadcast Formula One, UEFA Champions' League and the Rugby World Cup; the BBC broadcast most matches played as part of the Six Nations Rugby Tournament, Wimbledon and most of the Olympic Games; Channel 4 broadcast most home test matches, Italian football and horse-racing events; and Channel 5 broadcast numerous football matches including England internationals. It was clear that, in respect of these rights, BSkyB did not value the rights more highly than other broadcasters. Even focusing on pay-TV broadcasters, it should be noted that ONDigital held rights to certain UEFA Champions' League matches and rights to the German Bundesliga. Rights to the European Rugby Cup and rights to certain major horse-racing events were held by NTL/Premium TV. British Eurosport broadcast extended coverage of many major international events such as the UEFA European Championships, Rugby World Cup and the Olympic Games. Again, it was clear that BSkyB did not value those rights more than other pay-TV broadcasters.

6.360. Both ONDigital and the cable operators operated closed networks. This meant that they were able to bid for rights secure in the knowledge of carriage on their own network and DTH (because the DTH platform was open). This placed them at an advantage vis-à-vis BSkyB, which could only be sure of obtaining carriage on DTH.

6.361. In addition, because cable networks were able to sell TV and telephony over the same infrastructure, cable operators had an ability to use TV programming to attract telephony customers, on which margins were very attractive (NTL had boasted of 75 per cent margins on calls). This meant that cable operators could extract more from programming rights than the simple TV value of those rights. Cable operators could bid an amount that reflected the expected TV revenue plus ancillary margin from telephone calls which flowed from having those TV rights available to its customers. BSkyB did not enjoy equivalent ancillary revenue streams.

6.362. BSkyB went on to say that a further reason that had been raised to support the claim that BSkyB and Canal+ might value programming more than their competitors was that BSkyB and Canal+ had access to more 'eyeballs'. The implication seemed to be that BSkyB and Canal+ had access to more

viewers and so would be able to extract greater revenue than competitors. This concern seemed to confuse the role of broadcasters, retailers and rights brokers.

6.363. BSkyB stated that, with regard to the UK, it bid for sports rights in the expectation that it would distribute that programming across all pay platforms (DTH, cable and DTT) and earn revenue in proportion to the total number of pay-TV 'eyeballs' in the country. When a third party bid for the same sports rights, it would have exactly the same opportunity to create a service that it would hope to be able to distribute to all UK pay-TV households via all three platforms (and/or an opportunity to distribute the service free-to-air and generate revenues from subscription and advertising). The fact that some of the households received services retailed by BSkyB afforded BSkyB no advantage whatsoever. BSkyB was keen to retail attractive services which were provided by third party broadcasters. BSkyB did this in respect of many services including channels such as Film Four, MTV and Discovery. Even if BSkyB were not interested in retailing the service, or more likely, if the third party broadcaster preferred to act as its own retailer, it would be free to do so because the DTH platform was open.

6.364. If there was any 'eyeballs' advantage in the UK, then it was enjoyed by ONdigital and the cable operators. Because those retailers operated closed platforms they were able, if they chose, to deny other broadcasters access to the DTT and cable 'eyeballs' or alternatively only to grant access on unreasonable terms. However, because the DTH platform was open, ONdigital and the cable operators were assured of access to the DTH 'eyeballs'.

6.365. With regard to Canal+ and international rights, the same principles applied. There were a large number of broadcasters in different countries which might be interested in sharing certain sports rights. Canal+'s role here was principally that of a broker of the rights. Canal+ would canvass the views of broadcasters and sell the rights to as many broadcasters and for as much money as possible. Any other broker bidding for international rights could do exactly the same thing, marketing the rights to exactly the same population of broadcasters around the world. The fact that Canal+ was also one of those broadcasters in a small subset of countries was immaterial. As a broadcaster it would still be interested in valuable programming even if it were being distributed by a competing broker. For example, European rights for the World Cup 2002 were sold by FIFA to Prisma. Although Prisma had not yet sold the rights for France, Canal+ was reported to be one of the broadcasters that was interested. Again, there was no sense in which Canal+ enjoyed an 'eyeballs' advantage over its competitors.

6.366. BSkyB submitted that, even if BSkyB did value rights more than its competitors, there would be no distortion of competition flowing from the alleged merger situation. This could be shown by modifying the basic example discussed at the second hearing (see paragraph 6.334). Assuming that BSkyB valued the FA Premier League domestic rights at £1.1 billion while all other bidders valued the rights at only £1 billion, and assuming that Canal+ faced a competitive market for the international rights and like other competing brokers valued the international rights at £100 million, in those circumstances BSkyB and Canal+ could place a joint bid of £1.2 billion and would obtain both the UK and the international rights, because the FA Premier League could not obtain £1.2 billion any other way.

6.367. In this scenario it was true that BSkyB and Canal+ together gained the UK and international rights. However, this was a largely meaningless example because joint bidding was not necessary to produce this outcome. The reason was that if BSkyB valued the domestic FA Premier League rights at £1.1 billion when its competitors could bid only £1 billion then BSkyB would win the rights on its own. It did not need help from Canal+. Cooperation with Canal+ in some form of elaborate joint bidding did not affect the likelihood that BSkyB would be successful in obtaining the UK rights. There was no distortion of competition in the UK market flowing from the merger.

6.368. If there were to be any impact on competition flowing from BSkyB valuing rights more than its competitors, then it would be felt in the international arena rather than the UK market.

6.369. BSkyB stated at the end of its submissions that it was still unclear as to the exact nature of the Commission's concern, and whether hypothetical examples assumed that BSkyB and Canal+ would pay more than rights were worth or less than rights were worth. There was no reason to believe that BSkyB and Canal+ would have any incentive to bid more for rights than they were worth. Nor should it be assumed that BSkyB and Canal+ would be in a position to observe all the other bids and to offer more than all the other bidders. There was no reason to believe that competitors did not have the resources to bid or would be intimidated by the resources of BSkyB and Canal+.

6.370. Summing up, BSkyB stated that it seemed to it that the Commission had still not formulated a coherent set of circumstances whereby the merger situation, by allegedly making joint bidding more likely, would distort competition and act against the interests of consumers.

D P B KINGSMILL (*Chairman*)

J BEATSON

J A REES

T S RICHMOND

P A BOYS (*Secretary*)

23 March 2000