

Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc dated 29 January 2008.

PARTIES

1. **British Sky Broadcasting Group plc** (BSkyB) is a holding company for subsidiaries whose principal activities relate to television broadcasting and retailing in the UK and Ireland. BSkyB operates the direct-to-home satellite platform and other digital subscriber line networks and mobile networks. BSkyB also distributes a number of its channels on a wholesale basis to cable (and other) operators who act as retailers to its UK and Irish customers.
2. News Corporation (News Corp) holds 39.14% of the shares in BSkyB (through its subsidiary News UK Nominees Limited). Of the thirteen directors on the Board of BSkyB, three are also directors of News Corp.
3. **ITV plc** (ITV) was formed in 2004 by the merger of Carlton Communications plc and Granada plc and it is active in a number of sectors primarily related to television production and broadcasting. ITV's in-house content arm (Granada Productions, renamed ITV Productions) principally produces a range of light entertainment and drama TV programming with mainstream audience appeal in the UK.
4. ITV distributes its own third party content via a wide range of wholly owned free to air television channels broadcast on a range of platforms, and sells advertising on behalf of all 15 Channel 3 regional licencees in the UK, 11 of which it controls. ITV also holds a controlling 75 per cent share in GMTV, (which holds the national Channel 3 licence for breakfast television); a 40% stake in the news provider Independent Television News (ITN) and interests in two of the six digital terrestrial television multiplex platforms.
5. ITV's reported annual turnover was close to £2.2 billion in each of the calendar years 2005 and 2006.

TRANSACTION

6. On 17 November 2006, BSkyB announced that it had acquired 696 million shares in ITV plc representing 17.9% of ITV plc shares at a cost of £940 million ("the merger situation"). In its statement BSkyB stated that it wanted to "explore options to create value in the interests of both BSkyB's and ITV's shareholders.

BSkyB believes that ITV's content arm is one of Europe's premier broadcasting assets and production businesses, and holds substantial potential for long-term value creation".

INTERVENTION DECISION

7. On 26 February 2007, the Secretary of State issued a notice ("the intervention notice") to the Office of Fair Trading ("OFT"), pursuant to section 42 of the Enterprise Act 2002 ("the Act"), stating that he believed it was or may have been the case that the public interest consideration contained in section 58(2C)(a) of the Act was relevant to a consideration of the merger situation. On the same date the Secretary of State requested the Office of Communications ("OFCOM") to prepare an initial report pursuant to section 44A of the Act on the effect of the merger situation on the identified public interest consideration.

REFERENCE DECISION

8. Having received reports from the OFT and OFCOM pursuant to section 44 and section 44A respectively of the Act, the Secretary of State announced on 24 May 2007 his decision to refer the transaction to the Competition Commission under section 45(2) of the Act in view of (i) the OFT's decision that it is or may be the case that a relevant merger situation had been created that had resulted, or may be expected to result, in a substantial lessening of competition and (ii) his conclusion that it was or may be the case that the public interest consideration set out in section 58(2C)(a) of the Act (that being the need, in relation to every different audience in the United Kingdom (UK), for there to be a sufficient plurality of persons with control of the media enterprises serving that audience) was relevant to a consideration of the merger.

JURISDICTION

9. The Secretary of State received the final report of the Competition Commission, prepared in accordance with section 50 of the Act, on 14 December 2007 ("the Competition Commission Report"). This was published on 20 December 2007. The Secretary of State must now take the following decision or decisions in accordance with sections 54 and 55 of the Act –

(a) whether to make no finding at all in the case on the basis that the public interest consideration specified in the intervention notice is not relevant to a consideration of the merger situation concerned; or

(b) whether to make an adverse public interest finding (noting that section 45(6) of the Act provides that any anti-competitive outcome shall be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant); and

(c) what action he considers reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the relevant merger situation.

REPORT OF THE COMPETITION COMMISSION AND OTHER REPRESENTATIONS

10. The Competition Commission Report contains its decisions on the questions it is required to answer under section 47 of the Act relating to:
- a) whether a relevant merger situation has been created;
 - b) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market of the United Kingdom;
 - c) whether, taking account only of any substantial lessening of competition and any admissible public interest consideration, that situation operates, or may be expected to operate, against the public interest.
11. In reaching his decision under section 54 of the Act, the Secretary of State is required, under section 54(7)(a) of the Act, to accept the decision of the Competition Commission as to whether there is an anti-competitive outcome. In reaching his decision under section 55 of the Act on remedies, the Secretary of State is required, under section 55(3) of the Act, in particular, to have regard to the Competition Commission Report.
12. In coming to his decisions, the Secretary of State has taken into account the report and appendices provided to him by the Competition Commission which includes summaries and consideration of representations made by the principle parties and other interested third parties. The Competition Commission provided OFCOM with a copy of their report, in accordance with section 50(2A) of the Act and OFCOM confirmed to the Secretary of State that they did not intend to provide any further advice in the light of that report. The Secretary of State has also considered the representations to him made in writing by Virgin Media, ITV plc, Rapture Television, the Campaign for Press and Broadcasting Freedom and by Mr David Hammond and both in writing and orally by BSkyB, following publication of the Competition Commission's final report.

DECISIONS UNDER SECTION 54 (ADVERSE PUBLIC INTEREST FINDING)

13. The Secretary of State must accept the decisions of the Competition Commission that a relevant merger situation has been created and that it has resulted in a substantial lessening of competition within the UK market for all television services (which includes both free to air and pay television services). The Act provides that such an outcome shall be treated as being adverse to the public interest unless justified by one or more public interest consideration which is relevant.
14. The Secretary of State has decided that the public interest consideration set out in section 58(2C)(a) of the Act is relevant to a consideration of this case and that, accordingly, he may not decide to make no finding at all in this case. It appears from the legislation that the question of the relevance of the consideration must be addressed before and separately from reaching any substantive conclusions as to whether or not the merger may actually have a detrimental effect on the

public interest. In this case, the Competition Commission has undertaken a qualitative assessment of the likelihood of the transaction having an impact on the sufficiency of plurality of persons with control of the media enterprises serving the UK audiences for television news and for cross media news. In reaching conclusions about this matter, the Competition Commission examined the extent to which BSkyB may be able to exert influence over ITV, considered the impact of applicable regulatory mechanisms relating to ensuring high standards and quality in news programming and also took account of the culture prevalent within television news production. The need to base conclusions on an examination of such substantive points suggests that the specified public interest consideration may not reasonably be regarded as irrelevant to a consideration of this merger situation.

15. The Secretary of State has decided that the merger does not have an adverse public interest effect so far as concerns the identified public interest consideration set out in section 58(2C)(a) of the Act.
16. In examining questions relating to the sufficiency of plurality, the Competition Commission has considered carefully the nature of the assessment it should undertake and considered in particular, the implications of sections 58A(4) and 58A(5) of the Act. Virgin Media put forward arguments to the effect that the Competition Commission was required by these sections of the Act to examine the sufficiency of plurality on the basis that BSkyB and ITV were a single entity effectively under full common control and ownership. The Competition Commission considered this argument but concluded that this interpretation should not be adopted. They considered that it was necessary for them to examine the qualitative nature of the control BSkyB may actually be considered to exert over ITV as a result of its 17.9% shareholding and to reach conclusions about whether the range of information and views available to an audience would, in fact, be reduced as a result of that shareholding.
17. The Secretary of State is satisfied that the Competition Commission's approach in this matter is correct. In making a reference to the Competition Commission on the basis of section 58(2C)(a) of the Act, the Secretary of State is asking the Commission to undertake a qualitative assessment of the actual position as it relates to the continued sufficiency of plurality following the relevant merger situation concerned. This purpose would not appear to be served effectively if the Competition Commission were to consider only whether the number of persons now controlling media enterprises was sufficient on the basis that BSkyB may be deemed under section 58A(5) to have full control of ITV. The purpose of asking the Competition Commission to examine the matter appears to be to enable a full qualitative consideration to be carried out of the actual level of control BSkyB may exert over ITV in order to consider the impact of the merger on the need for there to be a sufficient plurality of persons with control of media enterprises.
18. Accordingly, the Competition Commission has examined the various ways in which the transaction might impact on the sufficiency of plurality of persons with control of the media enterprises serving the UK audiences for television news and for cross media news. It notes that BSkyB has not attained full control of ITV, and that any influence BSkyB might exert over decisions taken by ITV would

be indirect in nature. The Competition Commission gave particular consideration to whether BSkyB's major shareholding in ITV could result in ITV editorial staff seeking to take account of the views and interests of BSkyB when considering issues of editorial policy. They concluded that in practice, the strong culture of editorial independence within ITV makes this unlikely. In addition, the Competition Commission notes that ITV commissions its news content from ITN which is a separate enterprise with its own board, thereby placing control over the content of news programmes broadcast by ITV at a further remove from any influence that BSkyB might possibly exert as a result of its shareholding in ITV. They also recognise that news provision is subject to separate regulatory mechanisms that impose specific standards relating to the quality of news provision and consider this relevant to an analysis of whether the range of information and views available to an audience may be adversely affected.

19. In view of this, the Competition Commission concludes that there is insufficient evidence to suggest that BSkyB's 17.9% shareholding in ITV would give BSkyB or its parent companies (e.g. News Corporation) the ability or incentive to exert editorial influence over ITV's news output. They conclude that this, combined with the existence of separate regulatory mechanisms governing the provision of news, is likely to mean there is no prejudice to the independence of ITV news and no adverse effect on the range of information and views available to the relevant audiences and, therefore, that it does not operate against the public interest as it relates to the sufficiency of plurality of persons with control of media enterprises. The Secretary of State sees no sufficient reason to reach a different conclusion on this matter.
20. Accordingly, the Secretary of State has decided to make an adverse public interest finding on the basis that the transaction operates against the public interest taking account only of the substantial lessening of competition within the UK market for all television. It may be noted that even if Virgin Media's construction of the implications of sections 58A(4) and (5) of the Act were correct and this were to result in a different conclusion about the impact of the transaction on the sufficiency of plurality, the remedy the Secretary of State has concluded is necessary in order to address the substantial lessening of competition (see below) is likely also to be an appropriate remedy to address any such adverse effect on media plurality, given that once effect has been given to the remedy, there will be no change in the number of persons with control of media enterprises arising out of BSkyB's shareholding. However, this has had no bearing on the Secretary of State's decisions on remedies, which relate entirely to addressing the substantial lessening of competition that arises in this case.

DECISIONS UNDER SECTION 55 (REMEDIES) AND BSKYB'S PROPOSED ALTERNATIVES

21. The Competition Commission is required to include in its report to the Secretary of State recommendations on appropriate remedies. In reaching decisions on this matter, the Secretary of State is required under section 55(3) of the Act to have particular regard to the Competition Commission's Report. The Competition Commission has concluded that two remedies would be effective in addressing the substantial lessening of competition arising from this merger. These are: (i) full divestment of the whole of BSkyB's shareholding and (ii) partial

divestment with BSkyB being required to divest its shares down to a level below 7.5% combined with undertakings not to seek or accept representation on ITV's Board and not to re-acquire shares in ITV. The Competition Commission has recommended the second of these on the grounds that partial divestment is less intrusive than full divestment and is, therefore, a more proportionate remedy.

22. Arguments have been submitted disputing the Competition Commission's conclusion that partial divestiture would be equally effective as full divestiture in remedying the substantial lessening of competition in this case and thereby addressing the resultant adverse effects on the public interest. These arguments emphasise the status and importance of BSkyB as an industry player and its continued position as a large shareholder in ITV with a stake of 7.49%. Having carefully considered the Competition Commission's findings on this matter and reviewed the other submissions received from the parties and third parties, the Secretary of State sees no reason to depart from the Competition Commission's recommendations which are based on an analysis of the level at which, on cautious assumptions, BSkyB would not be able to block a special resolution presented to ITV shareholders. This is a matter on which it is reasonable to place weight on the judgement of the Competition Commission as the relevant expert body.
23. BSkyB has argued that it is not necessary to require either full or partial divestment of their shares in ITV. They have put forward a range of proposed alternative remedies. These include placing all BSkyB's shares in ITV in an independent voting trust which would have complete freedom over decisions on how to vote the shares, and/or undertaking not to vote their shareholding. BSkyB suggest that this would be equally effective in remedying any substantial lessening of competition that may be deemed to arise since it would remove the scope for them to block special resolutions of shareholders. They argue that this type of remedy should be adopted on the grounds that it represents the least intrusive measure that provides an effective remedy.
24. The Competition Commission recognised the potential for these remedies to reduce the scope for BSkyB to influence ITV's strategy although it also noted the risks inherent in a long term remedy that places complete reliance on the independence of a third party and the need for continued monitoring of actual performance and of the contract between BSkyB and the voting trust. Crucially, however, the Competition Commission also noted that the voting trust mechanism would not be effective in addressing the substantial lessening of competition that arises from BSkyB having an economic interest in ITV of 17.9%. Under the proposed remedy, BSkyB would still be in a position to influence future transactions involving ITV – for example by choosing whether or not to sell its shares to a third party – whereas a partial or full divestment removed that economic interest in respect of the shares that are divested.
25. In this case, remedies are being devised to address an adverse effect on the public interest arising only from a substantial lessening of competition in the market and not from an adverse effect on media plurality. In these circumstances, it is reasonable for the Secretary of State to place significant weight on the Competition Commission's analysis and conclusions on the appropriate remedies since they would normally be responsible for taking final

decisions on such matters. The Secretary of State is satisfied that there are no sufficient reasons for reaching different conclusions about the appropriateness of possible remedies to those that have been reached by the Competition Commission. Accordingly, the Secretary of State has decided to impose the remedies recommended by the Competition Commission: partial divestment of BSkyB's shares in ITV down to a level below 7.5% and behavioural undertakings from BSkyB, including undertakings which require them not to dispose of the shares to an associated person, not to seek or accept representation on the Board of ITV and not to reacquire shares in ITV. In addition certain short term behavioural undertakings will be required for the divestiture period.

THE PERIOD FOR DIVESTMENT OF SHARES

26. The Competition Commission's report, sent to the Secretary of State on 14 December 2007, contained a recommendation about the maximum time period within which BSkyB should be required to undertake the divestment of shares necessary to bring their shareholding in ITV down to a level below 7.5%. The Secretary of State has also received separate representations proposing that different maximum time periods for undertaking this divestment should be imposed. The Secretary of State has considered the representations made to him, together with the Competition Commission's recommendation, and has reached a decision on this matter consistent with the recommendation contained in the Competition Commission's report.
27. Separately, the Secretary of State received representations from BSkyB requesting that the details of any such divestment period should not be disclosed to any party beyond BSkyB. They argued that such disclosure of the divestment period was likely to cause damage to BSkyB's legitimate business interests and that in view of this potential for harm, it was appropriate and reasonable to withhold the information. The Secretary of State also received representations arguing conversely that there was no good reason to withhold the information on the grounds that disclosure would not be liable to cause commercial harm to BSkyB and also that there were positive reasons why public disclosure of the maximum time period for divestment was appropriate. The Secretary of State has considered these representations carefully and sought views on the matter from the Competition Commission, the Office of Fair Trading and the Financial Services Authority. He has decided, on balance, to accede to BSkyB's request not to disclose the divestment period to any party other than BSkyB.
28. The period within which divestment is to take place will begin from the date that suitable divestment undertakings are finalised.

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