

Material influence: ability to block resolutions

Introduction

1. This appendix sets out the evidence and arguments which we have received on BSkyB's ability to block shareholder resolutions arising from its acquisition of 17.9 per cent of ITV shares. Following the acquisition, BSkyB is now the largest shareholder in ITV (see Annex 2 for the shareholders of ITV).

2. The appendix is based on the evidence we have received from ITV, BSkyB, Virgin Media and other third parties, including reports they have commissioned. BSkyB commissioned three reports on shareholder voting patterns from Lintstock:
 - (a) the first Lintstock report (dated 30 January 2007), which considered historical voting levels at ITV and the correlation between voting turnout and share ownership;
 - (b) the second Lintstock report (dated 16 March 2007) which considered instances of high shareholder turnout and the frequency of large shareholders having seats on the board; and
 - (c) the third Lintstock report (8 June 2007) which followed the 2007 AGM and continued the analysis to cover the five general meetings held since the formation of ITV.

3. In addition, we have received information from current and former ITV shareholders about their approach to ITV and patterns of voting.

Ability to block resolutions

4. The following sections cover the various arguments we have received regarding the rights that BSkyB has obtained through its 17.9 per cent shareholding. We also

consider what power BSkyB would gain through adding 2 per cent to increase its actual shareholding level to 20 per cent (the highest permitted by CA 2003) in paragraph 22.

Resolutions

5. Special resolutions need to be passed by at least 75 per cent of the members who vote on the motion, in person or by proxy at a general meeting, and so the ability to control more than 25 per cent of the votes cast would give a shareholder the ability to block such a resolution. Special resolutions typically cover a number of significant issues, including, but not being limited to, approval to do the following:
 - (a) issue shares on a non-pre-emptive basis;
 - (b) make market purchases of its own shares;
 - (c) sanction schemes of arrangement; and
 - (d) alter the memorandum or articles of association.

6. Ordinary resolutions cover most other resolutions passed in general meetings. They require a simple majority of the votes cast and cover the usual day-to-day business of a company.

Situations in which a shareholding of 17.9 per cent would equate to 25 per cent of votes

7. For a public company such as ITV it is inconceivable that all the shareholders' votes would be cast at any general meeting: in general the large shareholders will vote, but the long tail of small individual shareholders tends not to. Set out in the following paragraphs are the different approaches used to consider the actual power of 17.9 per cent of voting rights. As an example, if less than 71 per cent of shareholders voted, a shareholding of 17.9 per cent would deliver at least 25 per cent of the votes cast.

8. In the third Lintstock report it is stated that the top 50 shareholders in ITV after BSKyB account for another 62 per cent of ITV's shareholders. If all of these, in addition to BSKyB, turned out for a general meeting, then the turnout would be over 80 per cent, so that a 17.9 per cent stake would deliver 22.4 per cent of the votes cast.¹

Analysis of historical voting patterns of ITV shareholders

9. The principal piece of evidence we have is the historical voting patterns of ITV shareholders. The average voting patterns at the five general meetings since the formation of ITV are set out in Table 1.

TABLE 1 **ITV shareholder voting patterns in last five meetings**

<i>Date</i>	<i>Meeting</i>	<i>Actual turnout %</i>
19 Apr 2004	AGM	62.62
7 Feb 2005	EGM	66.12
26 May 2005	AGM	70.05
10 May 2006	AGM	66.07
17 May 2007	AGM	71.90

Source: ITV.

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10. In order to calculate the likely impact of BSKyB's 17.9 per cent shareholding, we need to estimate the likely turnout at future ITV general meetings, and the likely voting weight of BSKyB's vote. The different interested parties have suggested a number of ways of analysing this data: these are considered in the following sections. It should be noted that it is impossible to estimate future turnout and voting patterns precisely as the composition of ITV's shareholder base varies, and future meetings are unlikely to replicate past behaviour exactly.

¹The third Lintstock report was produced on 8 June 2007. The principal shareholders in ITV as at 31 August 2007 are set out in Annex 2.

If all shareholders who sold had been active

11. Set out in Table 2 are the effective weights that a 17.9 per cent shareholding would have delivered if the change in ownership had not affected the shareholder turnout, ie if all sellers to BSKyB had previously been active voters.

TABLE 2 **ITV: all sellers had been active**

<i>Date</i>	<i>Meeting</i>	<i>Actual turnout %</i>	<i>Effective weight of 17.9%</i>
19 Apr 2004	AGM	62.62	28.6
7 Feb 2005	EGM	66.12	27.1
26 May 2005	AGM	70.05	25.6
10 May 2006	AGM	66.07	27.1
17 May 2007	AGM	71.90	24.9

Source: CC analysis.

12. The last AGM had the highest turnout, and based on this analysis was the only one at which a 17.9 per cent vote would not have carried 25 per cent of the votes cast.

If the largest shareholder who sold had been active

13. The first Lintstock report concluded that of the five general meetings that have been held since the formation of ITV, the only meeting where a shareholder with the equivalent of BSKyB's 17.9 per cent stake could have exercised more than 25 per cent of the votes cast was the very first meeting in 2004.
14. The OFT (prior to the 2007 AGM) queried this conclusion on the basis that Fidelity (11.4 per cent shareholding) was also a large shareholder and voted all of its shares. The OFT therefore proceeded on the basis that the turnout might increase by the amount that BSKyB replaces Fidelity. To recalculate this, we have:
- (a) applied the voting turnout to 93.5 per cent (100 per cent less BSKyB's stake plus Fidelity's);
 - (b) then applied a 100 per cent weight to the remaining 6.5 per cent and added this to the result from (a) above to get an increased turnout figure (as we assume

that the shares that B SkyB bought from those other than Fidelity were previously voted in line with the average but are now voted 100 per cent); and
(c) the result is that B SkyB's share of the vote would be as shown in Table 3.

TABLE 3 **ITV: Fidelity had been active**

<i>Date</i>	<i>Meeting</i>	<i>Actual turnout %</i>	<i>Effective weight of 17.9% %</i>
19 Apr 2004	AGM	62.62	26.8
7 Feb 2005	EGM	66.12	25.4
26 May 2005	AGM	70.05	24.0
10 May 2006	AGM	66.07	25.4
17 May 2007	AGM	71.90	23.4

Source: CC analysis.

15. The result of this calculation is that B SkyB would have controlled less than 25 per cent of the votes in the 2005 and 2007 AGMs and on average over the period it would have controlled exactly 25 per cent.
16. The second Lintstock report rejected this method on the grounds that turnout at FTSE companies' meetings will increase generally, especially when contentious issues are at stake. These issues are covered further later.

If the B SkyB stake replaces shareholders who would have voted in line with average

17. The third Lintstock report considers that previous turnouts should be reconsidered if we are to compare B SkyB's shareholding with them, on the grounds that if B SkyB had held its 17.9 per cent stake at the time of these earlier general meetings, the total turnout would have been higher. To calculate this figure we have reduced the total turnout by 17.9 per cent and then added 17.9 percentage points.

$$\text{ie } 17.9\% / ((\text{actual turnout} \times 82.1\%) + (17.9\%))$$

TABLE 4 **ITV: BSKyB replaces the average**

<i>Date</i>	<i>Meeting</i>	<i>Actual turnout %</i>	<i>Effective weight of 17.9% %</i>
19 Apr 2004	AGM	62.62	25.8
7 Feb 2005	EGM	66.12	24.8
26 May 2005	AGM	70.05	23.7
10 May 2006	AGM	66.07	24.8
17 May 2007	AGM	71.90	23.3

Source: CC analysis.

18. Using this methodology, with BSKyB replacing shareholders who had voted in line with the average, the result is that BSKyB would have only had 25 per cent effective voting weight in the 2004 AGM, and not in any later general meetings.

If the acquisition changes behaviour so that turnout increases

19. BSKyB (through the second Lintstock report) suggested that we should assume that turnout increases each year, as it has been doing for other FTSE100 companies.
20. In addition, in the first Lintstock report BSKyB put forward that for contentious issues, turnout at shareholder meetings tends to increase by five to seven percentage points (based on the FTSE 100 average in 2005 and 2006).
21. The result of an increasing turnout is to reduce the power of BSKyB's stake.

BSkyB has the ability to increase its stake to 20 per cent

22. It should be noted throughout that BSKyB is capable of increasing its stake by another 2 per cent (while keeping its overall shareholding below the CA 2003 20 per cent threshold). This would clearly increase its voting power by at least 2 per cent (as turnout will always be below 100 per cent).

Historical voting against motions at ITV

23. We should also note that the calculations described so far in this appendix have assumed that all the other (non-BSkyB) shareholders that vote do so in favour of all resolutions. In fact this is not the case, and invariably a small percentage of shareholders vote against.
24. The actual voting record of the last AGM is set out in Annex 1, showing that up to 4.9 per cent of votes were cast against resolutions (votes against were usually a lower figure with only one, regarding dividends, receiving zero votes against).

Other shareholders may vote in line with BSkyB

25. Virgin Media compared the top 25 shareholders of ITV, BSkyB and News Corporation in its submission dated 15 June 2007. It stated that shareholders holding 28 per cent of the shares in ITV were also shareholders in BSkyB or News Corporation. It believed that of this 28 per cent, shareholders holding some 12 per cent were index funds.
26. Nevertheless Virgin Media submitted that we should consider the possibility that the remaining shareholders (representing 16 per cent of the shares in ITV) that were also shareholders in BSkyB or News Corporation may be likely to vote with BSkyB due to their common interest.
27. If true, the result of this would be that BSkyB would control approximately 33.9 per cent (rising to 45.9 per cent if index funds are included), and:
 - (a) if we assume a turnout of 71.9 per cent (the highest in the last five years), a share of 33.9 per cent of the votes gives a weight of over 47 per cent (33.9 / 71.9); in addition

(b) if we assume that BSkyB takes its shareholding up to 20 per cent, and that the same shareholders act in concert, BSkyB would have a voting weight of 49.9 per cent (35.9 / 71.9).

28. Virgin Media stated that 'if BSkyB and shareholders in ITV (including index funds) that also hold a stake in BSkyB and/or News Corp were to align their behaviour they would be able to pass any ordinary resolution by a substantial margin'.

29. We considered this line of argument carefully but did not place reliance on it in reaching our conclusions as we believed it was speculative.

Final voting figures in ITV 2007 AGM

Annual General Meeting—Thursday 17 May 2007

Final voting figures

No: Description	For (including Discretion)	% For (including Discretion) (1)	Against	% Against (1)	Withheld	Total Votes Received
1 Report and Accounts	2,791,978,920	99.94%	1,638,009	0.06%	2,586,429	2,796,203,358
2 Remuneration Report	2,559,981,047	96.70%	87,360,006	3.30%	148,846,606	2,796,187,659
3 Dividend	2,794,275,657	100.00%	73,710	0.00%	1,874,479	2,796,223,846
4 Elect Michael Grade	2,763,917,646	99.04%	26,711,118	0.96%	5,599,239	2,796,228,003
5 Re-elect Sir Brian Pitman	2,732,053,351	97.71%	63,979,062	2.29%	195,586	2,796,227,999
6 Re-elect Sir George Russell	2,716,592,263	97.26%	76,527,854	2.74%	3,107,105	2,796,227,222
7 Re-appoint KPMG	2,725,473,627	97.47%	70,616,909	2.53%	137,260	2,796,227,796
8 Auditors' remuneration	2,759,657,521	98.70%	36,383,053	1.30%	176,137	2,796,215,711
9 Authority to allot shares	2,793,976,567	99.93%	1,899,180	0.07%	350,964	2,796,226,711
10 Allot shares for cash (2)	2,795,280,536	99.98%	592,771	0.02%	257,656	2,796,130,963
11 Donations and expenditure	2,630,643,743	95.10%	135,677,785	4.90%	29,902,677	2,796,224,205
12 Purchase of own shares (2)	2,795,665,717	99.99%	350,139	0.01%	207,163	2,796,223,019
13 Cancellation of shares (2)	2,789,025,720	99.99%	204,734	0.01%	6,995,683	2,796,226,137
14 New Articles (2)	2,788,163,319	99.90%	2,849,298	0.10%	5,207,857	2,796,220,474
15 Turnaround Plan	2,731,052,330	98.16%	51,315,166	1.84%	13,858,978	2,796,226,474

(1) Votes as a percentage of the total For, Discretion and Against

(2) Special Resolution requires at least 75% of votes in favour

Issued ordinary shares **3,889,129,751**

Source: ITV.

Shareholders in ITV

The Shareholder Register for ITV recorded the following material (>1 per cent) shareholdings as at 31 August 2007.

Leading shareholders in ITV

<i>Shareholding manager</i>	<i>% of issued share capital</i>
BSkyB	17.90
Brandes Investment Partners	6.12
Legal & General Investment M'gmt Ltd	4.40
Morley Fund Management	3.71
AllianceBernstein LP	3.31
Barclays Global Investors	3.19
Silchester International Investors	2.74
M&G Investment Management Ltd	2.58
Insight Investment Management	2.34
Fidelity Investment Services Ltd	2.14
Lazard Asset Management	1.72
Majedie Investments plc	1.54
UBS Global Asset Management	1.53
State Street Global Advisors	1.43
Global Asset Management	1.43
Threadneedle Investments	1.42
Credit Suisse Asset Management Ltd	1.32
ING Investment Management	1.31
California Public Employees' Retirement	1.26
Alliance Capital	1.16
AXA Investment Managers	1.16

Source: ITV.

Shareholder responses

Introduction

1. We sent a short questionnaire to shareholders who either currently hold a significant number of shares in ITV or who had previously held shares and had sold to BSKyB (there is overlap between these two groups: for example, a company that rebought shares after selling shares to BSKyB).
2. A number of the larger shareholders are fund managers who do not actually own the shares but do control the majority of the voting rights of the shares which they manage.

Summary

3. Overall the responses provided the following evidence:
 - (a) most shareholders routinely vote the shares over which they control the voting rights;
 - (b) most shareholders occasionally vote against, or abstain from voting for, specific motions;
 - (c) most shareholders have frequent and regular meetings with management; and
 - (d) some shareholders, in particular the larger ones, discuss significant issues (including ITV's strategy) with each other.
4. From the individual responses which we received (both from those that sold shares and from those that did not), we can draw the following provisional conclusions:
 - (a) BSKyB's stake would have replaced shareholders who voted actively;
 - (b) BSKyB may be expected to have frequent meetings with management (if it is treated no differently from the other shareholders); and

(c) BSkyB is likely to have opportunities to discuss significant issues, and the general strategic direction of ITV, with the other major shareholders.