

2 Conclusions

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The reference

2.1. On 29 October 1998 the Secretary of State referred to us for investigation and report the proposed acquisition by BSkyB of Manchester United. Our terms of reference are given in Appendix 1.1.

2.2. It appeared to the Secretary of State that arrangements were in progress or in contemplation which, if carried into effect, would result in the creation of a merger situation qualifying for investigation, as defined in section 64(8) of the Fair Trading Act 1973 (FTA), in that:

- (a) enterprises carried on by or under the control of BSkyB (a body corporate incorporated in the UK) would cease to be distinct from enterprises carried on by or under the control of Manchester United; and
- (b) the value of the assets to be taken over exceeded £70 million.

2.3. The first question we must answer is whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a merger situation qualifying for investigation. Both BSkyB and Manchester United agreed that the arrangements referred to in paragraph 2.2 were in progress or in contemplation. The gross assets of Manchester United at 31 July 1998 were £140 million (see Table 3.10). We conclude that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a merger situation qualifying for investigation.

2.4. Our next task is to consider whether the creation of this merger situation may be expected to operate against the public interest. We return to this question in paragraph 2.80 after we have examined the relevant markets.

The markets

Structure of the broadcasting industry

2.5. The TV broadcasting industry can appropriately be considered as a vertical chain consisting of four main markets:

- (a) the supply of rights for TV broadcasting purposes, for example for sports events or musical performances; the owners of rights do not usually participate in other levels of the industry;
- (b) the supply of programmes; the makers of programmes may need to buy rights to produce certain types of programmes, in particular films and sport; suppliers of programmes may or may not participate at other levels;
- (c) the supply of channels at the wholesale level; channel providers package programmes into channels; they may distribute and retail their own channels or supply them wholesale to other pay TV retailers or both; and
- (d) the distribution and retailing of channels to subscribers; following the introduction of digital TV, there are currently five separate distribution platforms: analogue terrestrial, digital terrestrial (DTT), analogue satellite, digital satellite and analogue cable; digital cable services are expected shortly.

2.6. TV channels may be provided to consumers either for a charge (pay TV) or free-to-air. Pay TV channels may be delivered via any or all distribution platforms except analogue terrestrial and are divided into basic and premium channels. The former are available to all

subscribers who pay the basic subscription charge; the latter are subject to an additional charge or are provided free as bonus channels when other premium channels are purchased. Some pay TV channels offer programmes on a pay-per-view basis. Free-to-air channels are financed either through advertising or, in the case of the British Broadcasting Corporation (BBC)'s channels, by a licence fee and are carried primarily on the analogue terrestrial platform.

2.7. BSkyB, like the BBC and the ITV companies, is a vertically integrated broadcaster: it buys TV rights, makes some of its own programmes, packages programmes from a range of sources into various channels, and distributes and retails these channels to its subscribers using its direct-to-home (DTH) satellite platform as well as selling them to other retailers using different platforms. Some other TV companies operate only or primarily at one of the four levels. For example, UKTV (a joint venture between BBC Worldwide Limited and Flextech Television Limited (Flextech)) is a channel provider whose channels are distributed and retailed by others, including BSkyB. Conversely, the cable companies and ONdigital plc (ONdigital), which uses the DTT platform, are primarily distributors and retailers which buy most of the channels they distribute from others, including BSkyB.

2.8. Manchester United's football-related activities include the supply of rights to broadcast its matches. Such rights may be sold collectively by the body organizing the competition (as is currently the case for Premier League matches) and the proceeds distributed to individual clubs or, less commonly, rights may be sold individually by the home side. The Premier League's rule, which effectively obliges its member clubs to agree to the Premier League selling TV rights collectively on their behalf, and the sale of these rights on an exclusive basis are currently being challenged in the RPC by the Director General of Fair Trading (DGFT) (see Appendix 2.1).

2.9. The sale of TV rights by sporting organizations is the main link between the market for football and the broadcasting markets. The proposed merger between BSkyB and Manchester United would involve, for the first time in the UK, the vertical integration of a major supplier of sports rights and a broadcaster. As part of our consideration of the public interest implications of the merger, we consider its effects on the sale of Premier League TV rights in paragraphs 2.81 to 2.171.

The companies

2.10. BSkyB was formed in November 1990 by the merger of Sky Television plc and British Satellite Broadcasting Holdings Limited. Its turnover in the year ended 30 June 1998 was £1,434 million and its operating profits £341 million. As we have said, BSkyB operates in all four markets of the broadcasting supply chain. As a channel provider it wholly owns six basic channels, six premium channels (two of them bonus channels) and a pay-per-view channel. It also has a share in 11 joint venture channels. In the year ended June 1998 BSkyB's wholly-owned channels had a 5.2 per cent share of viewing in all UK TV homes and its joint ventures a further 1.2 per cent. As a pay TV retailer, BSkyB had some 3.3 million subscribers in September 1998, 54 per cent of all subscribers to pay TV.

2.11. BSkyB is some 40 per cent owned by News International plc (News International). It agreed that News International had the ability materially to influence it.

2.12. Manchester United is the parent company of Manchester United Football Club PLC which was established (under a different name) in 1878. In the year ended 31 July 1998 it had a turnover of £88 million and an operating profit of £27 million. Manchester United is much the most financially successful English football club: in 1998 its turnover was 78 per cent higher than the next English club. It is also regarded as one of the most commercially

successful football clubs in the world. In addition to football, Manchester United is engaged in merchandising, and catering and hospitality.

2.13. Manchester United's footballing performance in this century has been second only to Liverpool's in terms of trophies. Since the creation of the Premier League in 1992 it has been strikingly more successful than any other club, having won the Premiership four times and been the runner-up twice. It has by far the largest home attendances of any Premier League club (over 50,000) and is estimated to have over 3 million supporters spread throughout the UK. When we refer in the remainder of this chapter to Manchester United's strength, we have in mind a combination of its financial performance, the size of its supporter base and its recent sporting success.

Market definition

2.14. In order to assess the public interest effects of the merger it is necessary for us to define the markets in which Manchester United and BSkyB operate. We take the view that the definition of a market should be determined primarily by substitutability: if products (goods or services) are readily substitutable for each other, either by consumers or by suppliers, then these products belong to the same market; where substitutability is low, the products concerned belong to different markets. In assessing the extent of substitutability we have sought to apply the test commonly used by competition authorities, that is whether a supplier which supplied 100 per cent of a particular product would be able to maintain prices at 5 to 10 per cent above competitive levels.¹ If we believe it could, it is reasonable to conclude that there are no ready substitutes for the product.

2.15. There is no established consensus as to how best to define either the markets served by Manchester United as a supplier of football matches or the broadcasting markets in which BSkyB operates. We look at football and broadcasting in turn.

Football markets

2.16. Manchester United operates in several markets: the supply of football matches, TV rights to football matches, advertising and sponsorship, the retailing of merchandise, and various services such as catering and hospitality associated with its Old Trafford stadium. But Manchester United's activities in most of these markets is dependent on its involvement in football. We start by asking whether the supply of football matches constitutes the relevant market or whether some wider or narrower definition would be more appropriate for our purpose. A wider market might be leisure services; a narrower market could be, for example, Premier League football or Manchester United's own matches.

2.17. BSkyB suggested to us that Manchester United was in the leisure services market. We considered whether other leisure activities, such as going shopping or to the cinema, were sufficiently close substitutes for watching football that they would prevent a monopoly supplier of the latter from charging prices 5 to 10 per cent above competitive levels. We also considered whether the availability of other sports to watch would have this effect. We asked several parties who attended hearings, including those who frequently watched football, whether they thought that a 5 to 10 per cent rise in prices would cause sufficient numbers of football viewers to turn to other sports or pursue other activities. The general view was that this was implausible and that the market was, therefore, probably no wider than football (some thought it much narrower—see next paragraph). This accords with our own judgment.

¹This is known as the hypothetical monopoly test: see footnote to paragraph 4.52.

We are not persuaded that a monopoly supplier of football would be tightly constrained in its pricing by the existence of other leisure activities, or even of other sports to watch.

2.18. Turning to the narrower definitions, several third parties argued strongly that for most supporters of a football club there was no substitute for watching the matches of that club, and that if these matches were for some reason not available to them or become unaffordable, they would give up watching football rather than switch their allegiance to another club. For such supporters, their own team is a de facto monopoly supplier of its own home games.

2.19. Whether Manchester United's home matches can be said to constitute a separate market depends on whether supporter loyalty gives Manchester United the ability to set prices above competitive levels. Manchester United told us that when setting its prices it took into account the need to maintain the long-term loyalty of its existing supporters and to attract new supporters. The fact that its ticket prices have increased substantially in recent years (see Table 4.29) and the continued existence of excess demand for tickets suggest that price-setting is not particularly constrained. But ticket prices have risen at all Premier League clubs and this does not necessarily indicate that each club is exercising local monopoly power.

2.20. We explored in hearings the suggestion that each football club was a separate market, and we asked whether it would apply even to quite small clubs with only a few thousand supporters. Some parties thought so but in our view there must be limits on how far down this road it is sensible to go.

2.21. We considered what alternatives to attending a match might be available to football supporters who wanted to watch their own team. In some cases matches will be shown on TV, either live, recorded or as highlights. It was put to us that watching a football match live, whether on TV or at the ground, was a different experience from watching recorded matches or highlights, and that supporters would not see either of the latter as adequate substitutes for watching live matches. We agree with this assessment. To the extent that there is a substitute for attending a match, it is most likely to be watching the same match live on TV. We think therefore that there is at least an arguable case for treating the live matches of Manchester United, whether watched at the ground or on TV, as a separate market. However, none of our analysis critically depends on this and we do not see it as necessary to adopt such a narrow market definition for the purpose of this inquiry.

2.22. There is convincing evidence (summarized in paragraphs 4.96 to 4.121) to suggest that the Premiership is the most popular football competition in Britain. For example, in response to an NOP survey in 1996, 71 per cent of Sky Sports subscribers who watched football said that Premier League football was very important to them. 68 per cent said the same of the Football Association (FA) Cup; no other competition, including internationals, received more than 50 per cent (see Table 4.12). In 1997/98 the average audience for Premier League matches on Sky was 1.39 million, as against 1.19 million for the FA Cup (the next most popular competition—see Table 4.18). Some competitions contain individual matches of great popularity (the FA Cup Final being the most prominent example), and others, for example Italian League football, are shown in volume. But the Premiership contains many more popular matches than other competitions: it has a unique combination of volume and popularity. Several of the submissions made to us suggested, in confirmation of the other evidence, that most consumers of football saw non-Premier League matches as a poor substitute for Premier League matches.

2.23. By contrast, BSkyB claimed that the Premier League was not the most popular football and showed us figures which suggested that European Champions' League matches

were more popular. We have some reservations about BSkyB's analysis (see Appendix 2.2) but even if it were correct it would not negate our assessment that the Premier League has a unique combination of volume and popularity, because only 13 Champions' League matches were shown on TV in the UK in 1997/98 (compared with 60 Premier League matches).

2.24. The evidence of consumer preference suggests that the Premier League may be the relevant football market for the purposes of considering the effects of the merger. The existence of other football matches involving Premier League clubs (the FA Cup, the Worthington Cup, the Champions' League and other European club competitions all include such matches) may put some constraint on the pricing decisions of a monopoly supplier of Premier League matches. We have not found it necessary or appropriate to choose between a definition of the relevant football market based on Premier League matches only or one based on all matches involving Premier League clubs, as even in the latter case the great majority of matches will be those of the Premier League. We do not, however, see grounds for a wider definition involving the whole of football as it does not seem credible to us that matches involving clubs drawn exclusively from divisions other than the Premier League would be acceptable substitutes for matches between leading teams.

Broadcasting markets

2.25. Definitions of broadcasting markets have been suggested in recent reports by other competition authorities (two of which are mentioned in the next paragraph). We have examined these definitions alongside others proposed by parties to this inquiry, in particular by BSkyB, and we have considered what definition would be appropriate for our task. We have focused on the market for channels at the wholesale level as we see this level as the key one, determining the framework for competition both upstream for rights and programme making and downstream for channel distribution and retailing.

2.26. For the purposes of his 1996 review of BSkyB's position in the wholesale pay TV market, the DGFT concluded that the relevant market was that for pay TV in the UK and that, within this overall market, there were distinct separable markets for sports and movie premium channels.¹ In an article published by the European Commission which considered the possible application of European competition law to the broadcasting of sports events, it was suggested that the market was probably as narrow as football broadcasting (though its comments were not specifically about the UK and it recognized that there may be differences among member states).² The Independent Television Commission (ITC) and broadcasters other than BSkyB who commented to us on the question of market definition agreed with the DGFT's conclusions.

2.27. The DGFT concluded that free-to-air TV was unlikely to provide sustained and effective competition to pay TV in relation to sports programming for the following two main reasons:

- (a) free-to-air TV was capacity-constrained and could only make limited time available for sports programmes whereas dedicated sports channels offered subscribers the option to watch sport at any time; and

¹Office of Fair Trading: *The Director General's review of BSkyB's position in the wholesale pay TV market*, December 1996, paragraphs 2.3 and 2.6.

²The European Commission: *Broadcasting of sports events and competition law*, Competition Policy Newsletter 1998, 2 June.

- (b) the ability to levy subscription charges made many sports events potentially far more valuable to a pay TV broadcaster than to a free-to-air broadcaster, giving the former the ability to pay more for the broadcasting rights.

2.28. BSkyB rejected these arguments. It said that free-to-air TV and all forms of pay TV were part of the same market because all broadcasters competed for programming rights, viewers and advertising revenue. More specifically, it argued that the key question was whether the programming offered by free-to-air broadcasters would constrain the price set by a single pay TV broadcaster (protected from competitive entry) broadly to the competitive level.

2.29. BSkyB suggested that this question could best be answered by what it termed a 'simple thought experiment' in which a single pay TV supplier (assumed to be BSkyB itself) faced entry by a new pay TV supplier which had acquired a portfolio of rights previously controlled by free-to-air broadcasters. If BSkyB would drop its prices in these circumstances, that would indicate the existence of a pay TV market because the entry of a new pay TV operator would represent a higher degree of pricing constraint than the same programming on free TV. But BSkyB said that it would not drop its prices because it would have no reason to do so. The relevant change in the market was that certain programming that was hitherto available free to all TV homes had become available only to those homes with the necessary reception equipment and those with that equipment were now required to pay for programming that they had previously obtained free. BSkyB said that in economic terms this change represented an increase in the price of a substitute good which would suggest that BSkyB's most likely response would be to increase its own prices.

2.30. BSkyB also did not accept either of the DGFT's reasons for concluding that there was a separate pay TV market for sports programming. It denied that capacity constraints seriously inhibited the ability of free-to-air broadcasters to compete and it challenged the proposition that pay TV broadcasters were able to pay more for broadcasting rights than free-to-air broadcasters. Specifically in relation to football, it said that free-to-air broadcasters had sufficient capacity to show 60 live Premier League matches a year (the number shown on Sky channels) as they had, collectively, shown 140 top-quality football matches in the 1997/98 season. It also gave us examples of sports rights for which it had been outbid by free-to-air broadcasters and pointed out that in terms of price per match the ITV purchase of the rights to the Union des Associations Européennes de Football (UEFA) Champions' League was comparable to BSkyB's purchase of Premier League rights.

2.31. We were not persuaded by BSkyB's thought experiment. If a new pay TV company were to enter the market with the rights of programmes previously shown on free-to-air TV, it would have to ensure that its channels were such that viewers were willing to pay for them. Viewers would then be faced with various options. Those who were already subscribers to BSkyB would have the choice between no longer seeing the programmes that were formerly free, increasing their expenditure on pay TV by subscribing both to BSkyB and the new pay channel or switching from BSkyB to the new channel. It is likely that at least some viewers will choose the third option, putting additional pressure on BSkyB's prices.

2.32. Those who were not already subscribers to pay TV would have two main choices. First, they could choose between no longer seeing the programmes that were formerly free and subscribing to the new channel. The effect on BSkyB's prices in these circumstances would probably be negligible. Secondly, they might wish to compare the new channel with other pay TV channels before deciding whether to become a pay TV subscriber and, if so, which channels to take. In this case these consumers would have become potential pay TV subscribers and hence the demand for as well as the supply of pay TV in general could

increase. While it is conceivable that this could lead to upward pressure on BSkyB's prices, we doubt whether this would offset the effect discussed in paragraph 2.31.

2.33. On BSkyB's arguments about the extent of competition between free-to-air and pay TV broadcasters for broadcasting rights, we agree that there are some sports rights for which such competition occurs. But this does not mean that sports programmes on free-to-air TV are ready substitutes for those on pay TV. The latter involve the purchase of attractive and exclusive live rights for which free-to-air TV could not compete. This is particularly so for Premier League rights. It is significant that in the 1996 sale of Premier League live rights all three bidders were planning to broadcast the matches on a pay TV channel (or as pay-per-view) despite the fact that two of them, Mirror Group plc (Mirror Group)/Carlton Communications plc (Carlton), and United News & Media plc (UNM), did not at that time operate any such channels. No free-to-air channel was a contender. The advantage of pay TV channels is likely to be even greater in the 2000 sale of Premier League live rights, if there is one, as the value of these rights is generally expected to be considerably higher than in 1996. The Premier League told us that in its view only pay TV broadcasters would be able to compete and the BBC and ITV Network confirmed that they did not expect to submit bids for live rights if current selling arrangements continued.

2.34. The fact that the price per match paid by ITV for the Champions' League rights was broadly similar to the price per match paid by BSkyB for Premier League rights is not particularly relevant. Because there are fewer Champions' League matches than Premier League matches shown on TV, the total cost of the former is much lower. Premier League rights are particularly expensive: their annualized cost to BSkyB is £167.5 million, five times as much as the equivalent figure for FA Cup rights, BSkyB's second most expensive sporting rights (see Table 4.17).

2.35. On the question of the time available on free-to-air channels for Premier League football, it is not appropriate to add together the live football shown on all free-to-air channels as no single broadcaster has the capacity to show all these matches. The free-to-air broadcaster which had the most live football in 1997/98, ITV, showed 51 live matches (as against 249 on BSkyB) and that was in a World Cup year when more football than usual was broadcast free-to-air (see Table 4.11). Excluding World Cup matches, ITV showed only about 20 matches in 1997/98 and Channel Four Television Corporation (Channel 4) (the leading free-to-air broadcaster of non-World Cup football) about 30 matches. As broadcasters are interested in showing matches from a range of competitions, finding programming time for 60 Premier League matches could be difficult without at least one dedicated sports channel. But if a broadcaster showed fewer matches, then, in order to make a competitive bid for Premier League rights, the price per match it would have to pay would be higher than for a competitor with a sports channel.

2.36. The evidence in the preceding paragraphs seems to us to be consistent with the DGFT's conclusion that pay TV and free-to-air TV are separate markets. However, we are not persuaded that arguments concerning capacity constraints and the cost of rights are by themselves conclusive. In coming to our own judgment on market definition we looked first at demand side considerations in order to establish what market was most credible in terms of substitution by consumers, and then brought in supply side considerations.

2.37. In applying this approach, we first considered the argument that pay TV was a complement to rather than a substitute for free-to-air TV.¹ Before consumers subscribe to pay TV they must first purchase TV sets and licences, which automatically give them access to free-to-air channels. No one is in a position of having to choose pay TV to the exclusion of

¹The standard textbook approach is to start with the narrowest possible market but in the light of the arguments and information presented to us, we considered some broader substitution possibilities first.

free-to-air TV. This means that the normal concept of substitutability is not readily applicable.

2.38. BSkyB pointed out that this lack of direct substitutability did not mean that pay TV broadcasters were able to set prices in isolation from free-to-air TV. The very fact that the latter was free placed a severe constraint on price setting by pay TV operators. We agree that there is a degree of price constraint—people have to be persuaded that pay TV is worth buying at all—but we do not think that this is central to the question of market definition. We would expect consumers to choose whether or not to subscribe to pay TV in terms of a broad assessment of its benefits, in particular the very different types of choice of TV viewing that it offers them, and its costs. If they decide that they want it then it is likely to be because they want a service that is different from and additional to free-to-air TV, rather than seeing pay TV as a substitute for free-to-air TV for which they will nonetheless pay. Notwithstanding BSkyB's thought experiment, it seems improbable to us that a monopoly supplier of all pay TV channels (basic and premium) would be prevented from sustaining prices 5 to 10 per cent above competitive levels by the existence of free-to-air TV.

2.39. We conclude that there is a separate market for pay TV, while recognizing that the existence of free-to-air broadcasters will place some upper limit on the prices of pay TV broadcasters.

2.40. The next question is whether it would be appropriate to define the market more narrowly than pay TV. There are many possibilities including sports channels, premium channels, sports premium channels, football on pay TV, and some sub-set of that such as Premier League football on pay TV. In its evidence to us BSkyB criticized what it called market definition by adjectives. We agree that the ability to describe a broadcasting service that is narrower than pay TV does not mean that this service necessarily constitutes a market. The extent of substitutability is the relevant criterion.

2.41. There are currently two basic sports channels, Sky Sports News and Eurosport, and five premium or bonus channels, Sky Sports 1, Sky Sports 2, Sky Sports 3 (a bonus channel available free to subscribers to Sky Sports 1 or Sky Sports 2), Manchester United's TV channel—MUTV Limited (MUTV), and The Racing Channel. The boundary between basic and premium sports channels is a fluid one. Sky Sports started life as a basic channel and later became a premium channel (subsequently being split into several channels) when BSkyB managed to obtain a sufficiently attractive package of sports rights.

2.42. It was put to us that sports programmes are quite different from non-sports programmes, will not be seen as ready substitutes one for the other and are not therefore part of one market. In assessing this claim it would normally be relevant to consider the impact of the price of one on demand for the other, but this is difficult to measure directly, partly because the prices of both types of programme and the trend in their prices are similar, and also because the pricing of BSkyB's packages means that the prices for viewing each type of programme are to some extent interdependent. But we do not consider that prices 5 to 10 per cent above competitive level for one would be likely to generate significant extra demand for the other. As there are few sports programmes on pay TV other than that on sports channels, such channels are likely to constitute a separate market.

2.43. Some indirect support is available from survey data. In an NOP survey of pay TV subscribers conducted in January 1996, 40 per cent of respondents said that one of their main reasons for subscribing to pay TV was sport of one sort or another (see paragraph 4.81). A survey carried out by Research Services Ltd (RSL) of BSkyB subscribers in April 1997 found that 52 per cent of respondents said that their main reason for subscribing to BSkyB was for greater coverage of sport (see paragraph 4.82). These figures suggest that for a sizeable proportion of pay TV subscribers, non-sports programmes are unlikely to provide

any acceptable substitute for sports programmes. Indeed in the NOP survey almost one-third said that they would be fairly or very unlikely to continue to subscribe to pay TV at all if sports coverage was not available (see Table 4.8), suggesting that for this group non-sports programmes provided minimal attraction. Such survey results are indicative rather than conclusive, but are consistent with our view that non-sports programmes will not exercise any direct or powerful constraint on the price of sports programmes.

2.44. Sports can be seen on both basic and premium channels. We need to consider whether they are separate markets. Because BSkyB's sports premium channels have been successful, there must be consumers who are willing to pay the additional price of one or more premium channels in order to be able to see the types of sport shown on those channels. In September 1998, 3.76 million subscribers purchased pay TV packages which included at least one sports premium channel (see Table 4.9). In considering whether it is appropriate to see sports premium channels as constituting a separate market, the argument that we accepted when assessing whether pay TV was a separate market from free-to-air TV is relevant. Viewers who wish to subscribe to a sports premium channel must first subscribe to a basic package which may include a sports channel. Thus sports premium channels may be more of a complement to rather than a substitute for a basic channel. The content of a sports premium channel would have to be sufficiently attractive to persuade subscribers to pay significantly more, which they would be unlikely to do if the sport on a basic channel was readily substitutable. A monopoly provider of sports premium channels (which BSkyB is close to being) would not be tightly constrained in its pricing by sports basic channels. Thus demand side considerations lead us to conclude that there is a sports premium channel market.

2.45. As for supply side factors, we do not consider that creating a new premium sports channel is a step that can be taken easily and rapidly. What distinguishes a sports basic channel from a sports premium channel is the packaging of highly popular live sports events which predominate on the premium channels. Such channels are available precisely because the purchase price for exclusive, live, popular sporting events costs the channel provider such a high price that it can only be recovered profitably through a premium-priced channel. We discuss the possibility of new channels primarily in the context of market entry, but we also return to supply side factors (in paragraph 2.48) to consider the effects of entry conditions on the behaviour of BSkyB as the main pay TV broadcaster.

2.46. A case can be made for defining the market even more narrowly in terms of football or some sub-set of football on pay TV. There is evidence to suggest that football, and Premier League football in particular, plays an important part in persuading consumers to purchase sports channels. For example, in the NOP survey 51 per cent of subscribers to Sky Sports said that live Premier League football was very important to their household, whereas only 21 per cent said that football other than Premier League was very important (see Table 4.13). In the same survey 82 per cent of Sky Sports subscribers said that they regularly watched football and 47 per cent said that it was their 'single most favourite' sport (no other sport was named by more than 12 per cent of respondents—see Table 4.10).

2.47. Because the only existing channel devoted to football (MUTV) offers a niche product, consumers are not currently able to choose between a pure football channel and a channel offering other sports. In the absence of this choice we do not believe that it is critical to the issues raised by this merger whether or not there is a narrower football premium channel market as such. But the evidence in the previous paragraph suggests that football, and within it Premier League football, are likely to be particularly significant contributors to the success of sports premium channels.

2.48. Turning to supply side considerations, a monopoly sports premium channel provider could be constrained in its pricing by the ability of competing broadcasters to enter the market, for example by upgrading from a basic channel to a premium channel. BSkyB argued that there were a great many different sports rights, various combinations of which could provide the basis for a sports channel, and that these rights came on to the market on a frequent basis as existing contracts came to an end.

2.49. We agree that there are a fair number of sports rights available but only a few of them are, in our view, sufficiently attractive to viewers that they would form a basis for a channel that could be charged monthly at a premium rate. We note that Sky Sports only became a premium channel when BSkyB obtained the Premier League rights. It would at the very least now take some considerable time and investment to build up a collection of sufficiently attractive sports rights to provide effective competition for existing sports premium channels.

2.50. We think that an increased use of pay-per-view as a basis for charging for sports programmes in the future could start to blur the distinction between different types of sports channels. But as matters stand, the very limited availability of pay-per-view sports programmes and their relatively high cost mean that they have not yet had a major impact on the market.

2.51. To summarize, we conclude that the relevant broadcasting market for our purposes is the market for pay TV sports premium channels. We see this market as being one level in a hierarchy of broadcasting markets.

Entry to the sports premium channel market

2.52. Currently BSkyB owns the only sports premium channels (apart from MUTV) which show live football, or indeed which show a range of other live sports. Actual competition within the sports premium channel market is therefore negligible. Potential competition depends upon the extent to which entry is possible.

2.53. One way in which entry into the sports premium channel market could be facilitated is by the expansion of the rights market. By this means an additional pool of sports rights could become available to sports channel providers. Developments in the rights market could involve the entry of a new team into an existing sporting competition, the selling of TV rights to a sporting competition previously not broadcast, or the creation of an entirely new sporting competition. The first of these alternatives is unlikely to have much overall impact on supply. It is probably fair to say that before BSkyB created the sports premium channel market there was a large pool of sports rights available that were not being used by the free-to-air broadcasters. That pool of unused rights is now considerably smaller. It remains possible to create new competitions, although this is not easy as Media Partners found with their proposed European Super League.

2.54. Entry into the sports premium channel market by a channel provider depends critically on two points:

- (a) the ability of the channel provider to obtain sports rights at a price which enables the sport to be broadcast profitably; and
- (b) the ability of the channel provider to distribute its channels (or pay-per-view services) to viewers.

2.55. We have already mentioned BSkyB's argument that there are a great many different sports rights that provide the basis for a sports channel and that rights come on to the market frequently as existing contracts come to an end. BSkyB pointed out that it had itself successfully entered the market in the early 1990s against competition from the large free-to-air broadcasters which had hitherto dominated sports programming in the UK. It claimed that it had no first mover advantages and that if any other channel operator wanted to produce a sports channel it could put together an attractive package of sports rights relatively easily.

2.56. We do not believe that entry is now as easy as BSkyB claims. It effectively created the sports premium channel market in the UK and in doing so radically changed the conditions of supply of sports rights. We mentioned in paragraph 2.53 our view that there are now fewer unused rights available. In addition many of the rights available are for sports of minority interest. We think it is unlikely that there are enough commercially valuable rights to popular sports to sustain many sports premium channels, and BSkyB now has three such channels (including its bonus channel, Sky Sports 3).

2.57. When the BBC and the ITV companies were the only sports broadcasters, the price paid for sports rights was low. Since BSkyB entered the market, rights prices have increased substantially. This is clearly illustrated by the price paid for the live rights of the former First Division and current Premier League which increased from £44 million over four years in 1988 to £192 million over five years in 1992 and to £670 million over four years in 1996 (see Table 4.23). The higher cost of live rights increases the risk to potential new entrants of failing to attract sufficient subscribers. When Sky entered it had to compete with free-to-air broadcasters which could devote only a limited amount of broadcasting time to sports. A new entrant today would have to compete with BSkyB itself with its broad range of high-quality sports programming.

2.58. Market entry by new channel providers may be restricted by the way in which some rights are sold. In his RPC case against the Premier League's collective selling rules, the DGFT has alleged that the current selling arrangements have the effect of restricting the number of matches available for broadcasting.

2.59. We think it significant that there has in practice been very little entry since the introduction of Sky Sport. Apart from the small niche channels (The Racing Channel and MUTV), the only sports channel not owned by BSkyB is Eurosport, of which a British version has recently been launched. Eurosport had its origins outside the UK and is a basic sports channel; it is hence not part of the sports premium channel market. Its share of viewing in multichannel homes in the year ended June 1998 was 0.83 per cent, well below that of Sky Sports 1 (2.61 per cent) and Sky Sports 2 (1.82 per cent) despite being available as part of a basic package. Towards the end of our inquiry we heard that ONdigital, in partnership with ITV, had purchased the UK rights for Champions' League matches.

2.60. An attempt to set up a new sports channel was made by a consortium of cable companies in 1995/96. It was abandoned after BSkyB offered two members of the consortium, Telewest Communications plc (Telewest) and NYNEX CableComms (Nynex), a better deal on the purchase of its own channels in exchange for their agreement not to acquire specified sports rights over an extended period.

2.61. BSkyB also argued that no channel operator would be prevented from entering the market by an inability to get its channel distributed. Before the introduction of digital broadcasting, channel operators had two distribution options: analogue DTH and analogue cable.

BSkyB told us that the cable companies had complete control over access to the cable network but that DTH was an 'open platform' to which BSKyB did not control access. However, the ITC told us that BSKyB had de facto control over Astra Satellite transponders allocated for UK analogue use and that BSKyB's substantial subscriber base made entry to the DTH market difficult for a subscription-financed channel provider unless it became part of the BSKyB retail offer.

2.62. The introduction of digital broadcasting has increased distribution opportunities. In addition to the increased capacity now available or planned on the DTH platform (see paragraphs 4.17 and 4.19) and shortly to become available on cable, there is an entirely new platform, DTT, which channel providers can use. We were told by the ITC that DTT multiplex operators, such as ONdigital, could not discriminate against or in favour of particular channel providers. It seems to us probable that, with the availability of this additional capacity, the balance of power will shift from distributors to those providing programming, and that entry by new channel providers will become progressively less constrained by distribution factors.

2.63. There has been a lengthy and continuing dispute between BSKyB as a wholesale channel supplier and the cable companies as pay TV retailers over BSKyB's wholesale pricing. This led to the report by the DGFT that we have already mentioned (see footnote to paragraph 2.26) and voluntary undertakings being given by BSKyB about its terms for cable operators. Notwithstanding these undertakings, cable companies continue to express dissatisfaction about aspects of BSKyB's wholesale pricing.

2.64. The details of many of the cable companies' objections to BSKyB's pricing are not relevant to the question of market entry. One, however, may be. We were told by the cable companies that BSKyB's practice of selling second and subsequent premium channels (sports and film) at a large discount to the price of the first premium channel made entry by competing premium channel operators more difficult. Viewers who subscribed to one of Sky's premium channels would find it financially more attractive to take one or more further channels from Sky than to take them from a competitor. It is quite possible that, as it claims, BSKyB's pricing structure is a fair reflection of its costs and is not anti-competitive in intent. The question is a complex one which the ITC is currently investigating in discussion with the Office of Fair Trading (OFT). It told us that it had not yet reached a conclusion. It would be inappropriate for us to take a view while that work is still proceeding but, even if it is found that BSKyB is not acting anti-competitively, it is likely that the pricing structure of its premium channels makes entry more difficult for other providers of sports premium channels.

2.65. In principle retail supply and distribution services could be provided by separate companies, but in practice this does not happen at all on the cable and DTT platforms (a source of grievance to BSKyB which would like to retail its own premium channels direct to cable customers) and is not common on DTH. Entry as a distributor is controlled by the licensing regime for the platform concerned (see Appendix 4.1) and is further constrained by the need to obtain the necessary technical facilities. Entry as a retailer is dependent upon obtaining channels to retail, securing a customer base and the availability of conditional access services (access to decoders for broadcasters sending encrypted signals). We believe that a sports premium channel provider with an attractive package of rights (and, in particular, Premier League rights) would be able to get its channel distributed on one or more platforms, and possibly on all platforms. So far as DTH distribution is concerned, BSKyB has given undertakings to the DGFT about making its analogue conditional access system available to other TV retailers; the availability of its digital conditional access system is a condition of its licence. We doubt therefore that entry barriers at the retail/distribution level will have a material impact on competition between channel providers.

Market power of the main parties

BSkyB

2.66. By market power we mean the ability to set prices above (if a seller) or below (if a buyer) the level that would be found in a fully competitive market. We have considered whether BSkyB might already have market power as a wholesale supplier of channels and whether it might be able to reinforce that market power through its purchases in the rights market and to transmit its market power downstream into retailing and distribution.

2.67. As a wholesale supplier of sports premium channels offering a broad range of sports, BSkyB has no competitors. This suggests that unless entry costs are low it will have a degree of independence in setting its prices. Actual price trends are difficult to track because of the introduction of new channels and new packages of channels but BSkyB told us that over the period from January 1994 to October 1998 the wholesale cost of its more popular packages had increased by between 26 and 28 per cent in real terms, an annualized real increase of approximately 5 to 6 per cent (see paragraph 4.62). It is not easy to assess empirically whether this provides evidence of market power. On the one hand, it represents a substantial real increase in price. On the other hand, BSkyB argued that this price increase reflected the fact that there had been a material improvement in the quality of the product over the period and that its operating margin had not increased since 1994. We accept that there has not been a trend towards an increased operating margin. However, BSkyB's operating profits did increase significantly between 1994 and 1997 despite a large increase in costs, only dipping in 1998 when the drop in profit from 1997 (£33 million) was far exceeded by an increase in advertising and marketing costs of £93 million (see Table 3.1 and paragraph 3.55).

2.68. We have already indicated (see paragraphs 2.56 and 2.57) that in our view the limited availability of sports rights constitutes a barrier to entry by new sports premium channel providers. We also note that the DGFT was sufficiently concerned by BSkyB's market power as a wholesale supplier of channels in that he sought undertakings from BSkyB on its terms for cable operators. These various facts lead us to conclude that BSkyB has market power as a provider of sports premium channels.

2.69. In principle, market power in the sports premium channel market might be expected to give BSkyB power upstream as a purchaser of sports rights. At present it faces only limited competition in this market from other pay TV broadcasters because in order to provide sports premium channels they need a block of rights. Pay-per-view arrangements are likely to lead to greater competition. Free-to-air broadcasters provide some competition and have managed to obtain the rights to some important sporting events. For example, the BBC has the live rights to the home international Rugby Union matches of Scotland, Ireland and Wales, and the British Open and US Masters golf tournaments; ITV has Formula One motor racing and the European Champions' League; and Channel 4 has home test cricket matches. On the other hand, free-to-air channels were not in contention for the Premier League rights in 1996 and are unlikely to be so in 2000 (see paragraph 2.33). We think that BSkyB's market power as a sports premium channel provider is likely to give it an advantage as a bidder for high-volume, large-value packages of rights.

2.70. Whether BSkyB has market power as a retailer of sports premium channels is questionable. It is certainly the leading retailer of these channels by a large margin: [80] per cent of subscribers to pay TV packages which included a sports premium channel were buying their packages from BSkyB in June 1998 (down from [80] per cent in June 1994—see Table 4.9). Cable TV is not available everywhere in the country. If we consider only those areas where it is available, then BSkyB's retail share falls to about [80] per cent. These figures reflect the position before the introduction of DTT. ONdigital is also a retailer of Sky

Sports channels and we would expect BSKyB's share of the retail market to fall further as ONdigital builds up its subscriber base.

2.71. The complaints by cable companies about BSKyB's pricing appear to relate mainly to the way in which the cable companies believe that BSKyB uses its power at the wholesale level to give itself advantage as a retailer. Whatever the validity of these claims, which are strongly denied by BSKyB, it seems to us that if BSKyB had no market power as a wholesaler, its market power in the retail market would be confined to those areas of the country where cable TV is not available and would be under pressure everywhere.

Manchester United

2.72. Manchester United's financial performance, strong supporter base and excellent sporting achievements in recent years make it much the most successful English football club. We have considered to what extent, if at all, this gives it the ability to set prices above competitive levels.

2.73. We have noted already that all clubs have considerable independence in setting the ticket prices of their home games because many of their supporters have no substitute for these games. All football clubs with a strong supporter base will therefore have a degree of market power. Because it is particularly well supported, Manchester United's power is greater than that of most other clubs. It was put to us that Manchester United and Liverpool were the only two English clubs that had a national following. This suggests that these clubs would have more power than others over the pricing of their merchandise. Nevertheless the evidence we have seen suggests that Manchester United's pricing of its tickets and merchandise is not out of line with that of other major clubs.

2.74. Turning to the current position in the TV rights market, we note that because of the Premier League's arrangements for the collective selling of broadcasting rights, Manchester United has no power of independent action over the pricing of its rights. We consider in a later section (see paragraphs 2.87 to 2.98) whether Manchester United has greater influence than the general run of Premier League clubs over the sale of collective rights. However, were collective selling to cease, Manchester United would be one of the teams whose matches broadcasters would most wish to televise. In these circumstances Manchester United's market power would be enhanced.

The merger

2.75. BSKyB told us that the acquisition of a football club would be a good strategic fit for BSKyB, bearing in mind its ability to add value by assisting with brand development and new business opportunities, and that this was a major reason for the proposed merger. Manchester United was considered by BSKyB to be the best option, primarily because of the strength of its management team, the quality of its revenue streams and the breadth of its supporter franchise. More generally, the acquisition of Manchester United would represent a significant step in BSKyB's strategic development into content ownership. BSKyB also agreed that its acquisition of Manchester United would be in part a defensive move, in the event of the existing collective selling arrangements for Premier League rights being replaced by individual selling.

2.76. BSkyB showed us the internal documents that had been prepared in the lead-up to its offer for Manchester United. These documents gave us a more detailed insight into its thinking at the time. BSkyB executives made the following points in these documents:

- (a) Sport was an accepted part of BSkyB's (and its competitors') brand-building strategies.
- (b) Football was the leading sport in the European TV rights market by a considerable distance.
- (c) Sports were not necessarily the end-game in and of themselves; they were purchased to build the value of TV networks and/or distribution.
- (d) Manchester United would provide BSkyB with a solid UK base around which a compelling soccer package could be built in almost all conceivable scenarios.
- (e) Acquisition of a football club would be buying a seat at the UK table. Although this could be done more cheaply by acquiring another club, Manchester United (along with Liverpool and possibly Arsenal) provided the additional, and perhaps crucial, opportunity to get a seat at the table of a potential European Super League.
- (f) The possibility of a European Super League might be counter-productive for BSkyB, given its UK business base, but an acquisition of Manchester United might allow it better to control/influence events, as ownership of 20th Century Fox had done in movie negotiations.

2.77. BSkyB emphasized at hearings that, in the later stages of its consideration of the proposed merger, the positive reasons for proceeding (see paragraph 2.75) had been more important than the defensive ones.

2.78. Manchester United told us that its board had recommended acceptance of BSkyB's offer because it wanted the club to be part of a group with greater financial and other resources and thought that a merger with a media company would represent a natural extension of Manchester United's business.

2.79. The financial details of BSkyB's offer are set out in paragraphs 3.97 to 3.120. The financial model used by BSkyB to value Manchester United made some bold forecasts (for example, that Manchester United's on-field success of recent years would continue) but was, in our view, nonetheless credible.

Public interest issues

2.80. The public interest issues raised by the proposed merger fall into two broad groups: those concerning its possible effects on competition among broadcasters and those concerning its possible effects on consumers and football generally. We examine these in turn.

Effects of the merger on competition for TV rights

2.81. With the exception of MUTV (considered in paragraph 2.182), the direct effects of the proposed merger are on vertical relationships. By acquiring Manchester United, BSkyB would become the controller of the TV rights to its matches. In so far as the merger has any

consequences for competition among broadcasters, it will arise in the first instance from its effects on competition for TV rights. This in turn could have consequences for downstream competition.

2.82. We have noted already (see paragraph 2.68) that BSkyB has market power in the sports premium channel market. It also has advantages (described in paragraph 2.143) from being the incumbent broadcaster of Premier League football. Both these factors will put it in a strong position in any future competition to obtain Premier League TV rights. The issue we have to address is whether the proposed merger would give BSkyB further significant advantages in the competition for rights.

2.83. Currently, there is uncertainty as to the form the selling arrangements for the rights to televise Premier League matches might take following the conclusion of the RPC proceedings. This uncertainty makes our task of assessing the effects of the merger one that is far from straightforward. In the light of this uncertainty, we have found it necessary to examine the likely effects of the merger on competition for Premier League rights first in the context of the present selling arrangements and then in the context of possible new selling arrangements.

2.84. Another area of uncertainty is whether the merger is likely to precipitate other mergers between broadcasters and Premier League football clubs. So we have conducted our analysis of the effects of the merger, under both existing and new selling arrangements, first on the basis that the merger is the only merger between a broadcaster and Premier League football club and second on the basis that the merger precipitates other mergers between broadcasters and Premier League football clubs. Thus we examine four scenarios.

2.85. Finally we consider the possibility that the Premier League will decide to set up its own TV channel.

Existing selling arrangements/single merger

2.86. If the TV rights for Premier League matches continued to be sold collectively as at present and the BSkyB/Manchester United merger were to be the only merger between a broadcaster and a Premier League club, there are a number of ways BSkyB might, in principle, gain an advantage through its ownership of Manchester United. We discuss these under the headings of Manchester United's influence on the way the rights are sold and on the final decision; information advantages for BSkyB; so-called toehold effects; and BSkyB's fall-back options.

Manchester United's influence

2.87. It has been put to us by several parties that, because of its financial strength, the size of its supporter base and recent sporting success, Manchester United has greater influence within the Premier League than any other club and that, in the event of the merger, it would use this influence to persuade other members of the Premier League to support the sale of rights to BSkyB. Many parties felt that it would be objectionable if BSkyB, or indeed any other broadcaster, bought any Premier League club, because it would give it a seat on both sides of the table when rights sales were being negotiated. For BSkyB, the incumbent broadcaster of Premier League football, to acquire the most influential club was widely seen as particularly detrimental.

2.88. Both BSkyB and Manchester United denied that the latter was particularly influential within the Premier League or that the former would gain influence as a result of the merger. They put forward the following arguments:

- (a) Manchester United had 1 vote out of 20; a decision by the Premier League to sell its rights to BSkyB would require a two-thirds majority (14 votes out of 20).
- (b) Premier League clubs were independent and would vote according to their own interests. There was no way they could be persuaded to do otherwise by Manchester United. Indeed, if Manchester United were owned by BSkyB it would probably be viewed with greater suspicion by other clubs and be less influential than it otherwise might be.
- (c) It was not uncommon for Manchester United to find itself on the losing side in important Premier League decisions. For example, it had supported the ITV bid in the 1992 sale of TV rights and it had agreed, with reluctance, to the Premier League's demand that it ceased to have direct contact with Media Partners over their proposal for a European Super League.
- (d) The Premier League had designed its rights-selling procedures in such a way as to prevent any individual club having undue influence over the outcome. In particular individual clubs were excluded from the negotiations with broadcasters over the sale of rights which were handled by the Premier League executive. In the 1996 sale, clubs were only given information on competing bids on the day in which the decision was made. It would be in the interests of the Premier League and the majority of clubs to ensure that these arrangements were followed and, if necessary, strengthened in future sales of rights.
- (e) Anything that BSkyB could do to persuade the majority of clubs to support its bid, it could do without owning Manchester United.

2.89. It did not seem to us likely that BSkyB and Manchester United together would be able to persuade other members of the Premier League to act in ways that they did not perceive as being in their interests. But influence can occur in other ways. For example, although the clubs might be excluded from the actual negotiations with broadcasters over the sale of rights, as they were in 1992 and 1996, the Premier League's negotiators will need to have some idea of the kind of deal that would appeal to clubs and will therefore need to talk to them before negotiations begin. The then Chief Executive of the Premier League (Rick Parry) had discussions in 1992 with representatives of the clubs about the form of the contract for the sale of rights in that year. The current Chief Executive (Peter Leaver) told us that he expected to begin similar discussions this summer about the next sale of rights.

2.90. There appear to be plenty of opportunities for exercising influence before the start of formal negotiations with broadcasters. BSkyB told us that there were regular contacts between broadcasters and club chairmen and that everyone had the opportunity to get their point of view across. It denied that the merger would give it any advantage in this process. By contrast, NTL Group Limited (NTL) told us that one of its reasons for wanting to acquire Newcastle United (see paragraph 2.159) was in order to have a direct influence on the lead-up to the formal negotiations about rights. It believed that the only way to get its voice fully heard was to use Newcastle United to make its case in meetings between club chairmen.

2.91. There are many issues on which Premier League negotiators might want the views of clubs before they approach broadcasters. For example, the number of matches to be broadcast and their allocation among clubs, the extent to which matches might be offered on a pay-per-view basis, whether highlights should be offered separately from live rights to free-

to-air broadcasters only, and whether all live rights should be sold to a single broadcaster. Broadcasters will have an interest in these matters and may try to influence clubs at an early stage. While there is nothing to prevent broadcasters from contacting clubs with which they have no ownership links, a broadcaster which owned a club would be able to ensure that its views were clearly put to Premier League officials and in discussions among clubs.

2.92. Following their initial consultations with clubs, Premier League officials begin formal negotiations with broadcasters. The clubs are supposed to be excluded from this process but we are doubtful whether it will be possible to observe this rule strictly in the negotiations in 1999/2000. Given the complexity of issues involved, it would not be surprising if officials felt the need to consult clubs on certain points during the negotiations. However, even if clubs are totally excluded from these formal negotiations, they have to be brought in at the final stage to decide which of the bids, if any, to accept. If all the bids were the same in all respects except price, this choice would be a simple matter. But this was far from being the case in the 1996 sale when the three bids had markedly different features. Rick Parry told us that it had been difficult to compare bids made on different bases but in his view requiring bidders to meet a specification was not the way to optimize revenues.

2.93. Given the range of possible options, for example the term of the contract, extent of pay-per-view and whether all live matches should be shown exclusively by a single broadcaster, we think it more likely than not that future rights sales will give bidders the opportunity to make offers which are not tightly constrained by a precise specification, if only to give broadcasters the opportunity to make innovative offers which might benefit Premier League clubs (as in 1996).

2.94. In sales in which much more than price is at issue, the choice among bids is likely to be a complex one and it is frequently the case that there is not an obviously best offer. For example, in the 1996 sale of Premier League rights, the total revenue from both the losing bidders appeared at first sight to exceed the value of BSkyB's bid but BSkyB nevertheless won the contract on the basis of other factors. In such circumstances there is scope for those making the decision to be influenced by the course of the discussion about the bids. Of course, as BSkyB and Manchester United pointed out to us, if in a discussion of bids for Premier League rights Manchester United were to take up the BSkyB bid, all the other clubs would know exactly what was going on and would make the necessary allowances. Nevertheless, all bids are likely to have strengths and weaknesses to which clubs might not give full weight unless they are drawn persistently to their attention. Following the merger, Manchester United would be likely to ensure that the strengths of BSkyB's bid and the weaknesses of other bids were not overlooked during involved discussions of complex and dissimilar offers. No other broadcaster would have this advantage.

2.95. More generally, it is often the case that people are influenced in their judgments by discussion, even when they are fully aware that those who are trying to persuade them are doing so in their own interests. We doubt whether club chairmen will be any different from anyone else in this respect. Even if broadcasters which did not own clubs were able to secure the support of some club chairmen before the decision on the sale of rights, they could not have the same assurance as the owner of a club that their case would be pressed with unwavering commitment. The advantage to be gained from buying a seat at the table was one of the reasons for the merger mentioned in BSkyB's internal documentation (see paragraph 2.76). NTL also told us that it believed that a seat at the table (through ownership of Newcastle United) would give it a significant advantage. We find this a credible view. It is frequently the case that organizations which could influence a process from the outside nevertheless choose to secure, by legitimate means, inside influence in addition.

2.96. The argument that Manchester United is only 1 vote out of 20, though plainly true of itself, seems to us to underestimate the importance of a committed vote. When no Premier League club is owned by a broadcaster, all bidders for the Premier League rights contract have the opportunity to secure each of the 20 votes. When one club is owned, 5 per cent of the votes are in the pocket of one bidder and only 95 per cent can be competed for. This introduces a bias in the process which benefits the bidder with the secure vote. In the case of the Premier League rights contract, 14 votes are required to win and 7 to exercise a veto, so a bidder which owns a club starts with 7 per cent of the votes it needs to win or 14 per cent of those it needs for a veto, whereas its competitors start with none in either case.

2.97. It was put to us by BSkyB and Manchester United that if Manchester United were owned by BSkyB other clubs would be more reluctant to vote for BSkyB because they would not want to support the owner of one of their rivals. We doubt whether that would be a very important factor in determining voting behaviour because we think that clubs will vote for whatever deal they can be persuaded is in their best commercial interests. Indeed they would arguably be obliged to do so, as a result of the fiduciary duty of a company director to act in the interests of the company. There is, in any case, no reason to believe that other clubs would necessarily oppose Manchester United if it were owned by BSkyB. Several leading Premier League clubs told us that they had no objection to the merger. If BSkyB had a real fear that antipathy to Manchester United would sway the Premier League's decision on its rights contract, we would have expected this issue to have featured in BSkyB's internal discussions preceding its offer for Manchester United. None of the documents from this period that BSkyB showed us mentioned the issue.

2.98. The kind of influence we have been discussing so far has been subtle though not in our view insubstantial. Several parties put it to us that Manchester United could exert a more overt kind of influence by indicating a lack of willingness to co-operate fully with the Premier League if BSkyB were not awarded the rights contract. This could take a variety of forms from relatively minor ones such as lack of co-operation on the scheduling of its matches to suit the winning broadcaster, to refusing to abide by the decision on the collective sale of rights and retaining its rights for BSkyB on an individual basis, even if this caused a risk of expulsion from the Premier League. We heard conflicting views on whether Manchester United could realistically stand out against a threat of expulsion, which we examine in paragraphs 2.125 to 2.128.

Information advantages

2.99. It was put to us that if BSkyB owned Manchester United it would obtain information about the rights selling process that was not available to competing bidders and that such information would help it in preparing its own bid. BSkyB and Manchester United denied that the merger would give BSkyB any information advantages. They said that the Premier League already had in place a bidding process which precluded the leaking of information by clubs to broadcasters. In 1996 no club had known the details of the three bids until the day on which the winning bid was chosen. It was in the interests of the Premier League to ensure that a level playing field was maintained in future sales of rights in order to maximize the value of these rights. BSkyB further said that it was in its own interests to have a fair selling process as information leaks might work to its disadvantage.

2.100. This argument relates to the formal bidding stage. As we said when discussing Manchester United's possible influence, we expect there to be informal discussions between Premier League officials and clubs before negotiations with broadcasters begin. It would be useful to a broadcaster to know what was said in these discussions whether or not it was able to influence the outcome. Although there is nothing to stop a club without ownership ties to a broadcaster from leaking information about these discussions, if BSkyB owned Manchester

United it would have a greater assurance of finding out what was being said than a competitor with more informal links with Premier League clubs.

2.101. BSkyB could also place much more reliance on the information it received. Manchester United would be bound to give its parent company an accurate account of what had been said. Broadcasters receiving information from clubs they did not own would have less assurance about its reliability.

2.102. There is also the final stage of the rights-selling process to consider. The Premier League pointed out that it was inevitable that the clubs would obtain information about competing bids at this stage as they had to decide which bid to accept. Even if Premier League officials were entirely successful in preventing any information reaching clubs until the day of the decision, Manchester United would still learn about the bids made by BSkyB's competitors before a decision had been made. We consider what use BSkyB could make of this information in paragraphs 2.129 and 2.130.

2.103. BSkyB and Manchester United said that the Premier League had rules to prevent the leakage of information and it had both the ability and the incentive to strengthen these rules as necessary. We are sceptical about the part that rules can play in preventing BSkyB from getting advantages its competitors would not have if the merger went ahead. There is evidence that the Premier League's collective selling rules are not always effective. For example, although they are intended to prevent clubs from having contact with broadcasters when officials are negotiating about the terms of bids, the Premier League told us that there was some informal contact between at least some of the broadcasters and some of the clubs on the two previous occasions when rights were sold (1992 and 1996). The FA and the Football League told us that they saw no way to guard against the risk of 'corridor gossip'.

2.104. As we said in paragraph 2.100, clubs may leak information to broadcasters without being owned by them. But ownership makes the exchange of information more likely and perhaps even inevitable. Manchester United's management made it quite clear to us that they would not want to subvert the Premier League's selling rules and we do not doubt their sincerity; in the absence of an ownership tie such a commitment to the rules would inhibit them from leaking information. But we felt that they had not fully appreciated where their primary loyalty would necessarily lie if Manchester United were acquired by BSkyB. In our view they could not in practice refuse to pass on information to their parent company if required to do so.

2.105. In these circumstances we do not think that Premier League rules against the passing of information to broadcasters would be particularly effective. It would be very difficult to prove that a rule had been broken and little in the way of an effective sanction that could be applied if it had, given that expulsion from the League for an offence of this type would probably be regarded as disproportionate and would require the agreement of 15 clubs. Nor do we think that BSkyB's view that it would be in its own interests to have a fair auction is a convincing argument. If BSkyB had the opportunity to obtain relevant information not available to its competitors, it would be in its commercial interests to ensure that it got this information.

Toehold effects

2.106. Economic arguments based on auction theory were put to us. Auction theory predicts that when a bidder in an auction has an ownership stake in the asset being sold, even if only a relatively small one (a toehold), it will be more likely to win the auction than competitors without a toehold (see paragraphs 4.140 to 4.147 and Appendix 4.6 for further

details). There are two reasons for this effect. The first arises, it is argued, because part of the value of any bid will return to the bidder with the ownership stake. For example, if a bidder owns 5 per cent of an asset and bids £100 million for that asset, it will receive its share of the bid price as an owner (£5 million) so that the net cost of its bid would be only £95 million.

2.107. The second reason is that this small initial advantage may be multiplied by the operation of the 'winner's curse'. This occurs when there is uncertainty about the value of an asset. Bidders then face the risk of paying too much for it. In an auction in which one bidder has an ownership stake in the asset, all the other bidders will know that it can afford to pay a little more for the asset than they can. Therefore if a bidder without an ownership stake wins the auction, it may find that it has paid more for the asset than it is worth to it.

2.108. The theory suggests that the existence of the winner's curse will make bidders without an ownership stake more cautious in their bidding, with the result that the bidder with the ownership stake is more likely to win the auction than any other bidder and the price paid for the asset is likely to be lower than it would have been in the absence of a bidder with an ownership stake. The winner's curse operates particularly strongly in an ascending price (English) auction when each bidder can observe the behaviour of others in the auction process.

2.109. It was put to us that the toehold effect would have consequences for any future collective sale of Premier League rights if the merger went ahead. The argument is based on the fact that Manchester United receives between 5 and 8 per cent of the revenue that the Premier League obtains from the sale of TV rights (Manchester United's share is, on average, more than that of any other Premier League club). Thus, if BSkyB acquired Manchester United, 5 to 8 per cent of whatever it paid to obtain the Premier League rights would flow back to it.

2.110. Other parties suggested that we should not assume that Manchester United would get only 5 to 8 per cent of the revenues from Premier League rights in future. It was argued that pay-per-view was bound to be introduced for at least some Premier League matches in the not too distant future. Because Manchester United was by far the most popular club, and matches involving Manchester United accounted for more than 25 per cent of the viewers for Premier League games, the introduction of pay-per-view would substantially enhance Manchester United's share of TV revenues. We recognize that many Premier League matches may be shown on a pay-per-view basis in due course and, if so, that this will probably be to the financial advantage of Manchester United.

2.111. BSkyB and Manchester United argued that the toehold effect would have no appreciable consequences for future auctions of Premier League rights, mainly for the following reasons:

- (a) When opportunity costs are taken into account, the bidding advantage to BSkyB of the flow-back of TV revenue earned by Manchester United would be minimal.
- (b) The strength of the toehold effect depended critically on the type of auction. In particular, the role of the winner's curse in exacerbating any toehold advantage was negligible in a sealed bid auction (as opposed to an ascending price auction). It would be open to the Premier League to design an auction which minimized the toehold effect and it would be in their interest to do so. Indeed in 1996 they used just such an auction process.

- (c) If other broadcasters felt that the toehold effect gave B Sky B a significant advantage then they could respond by purchasing Premier League clubs themselves in order that they also had toeholds.

2.112. We consider the first two of these arguments in turn. As the third one takes us outside the scenario we are currently considering, namely that the merger between B Sky B and Manchester United is the only broadcaster/Premier League club merger, we consider it later. The point about opportunity costs arises because a bidder with a toehold will, if it wins the auction, have to forgo the share of the proceeds of the auction it would have received had another bidder won. So, to use an example put to us by Manchester United, if bidder A had a toehold of 5 per cent, then a bid by A of £100 million would produce a flow-back of revenue to A of £5 million. But if a competing bidder B made a bid of £95 million then the revenue forgone by A as a result of the failure of B's bid would be £4.75 million. Thus A's advantage over B as a result of its toehold would be only £0.25 million (£5 million minus £4.75 million).

2.113. We agree that the opportunity cost of winning for a bidder with a toehold ought to be recognized and that it substantially reduces the size of the direct advantage of having a toehold. However, even allowing for opportunity costs, there remains some bidding advantage to a company with a toehold. This is because any given bid, in the event that it does not win the auction, would have generated a higher bid and hence a higher income for the company with the toehold. This gives a bigger incentive to the bidder with a toehold to make a further bid than its competitors without toeholds. Moreover, we are not entirely convinced that opportunity costs are always treated on a par with actual costs by bidders. Even if a bidder with a toehold took account of opportunity costs, the toehold advantage would only be negated if other bidders believed that it had done so.

2.114. Although even quite a small toehold advantage could have a significant effect on the outcome of an auction if it were magnified by the effect of the winner's curse, Professor George Yarrow, on behalf of Manchester United, argued that an appropriately designed auction could eliminate biases created by ownership stakes, and that it would be in the interests of the Premier League to ensure that the optimal design of auction was used.

2.115. We accept that a well-designed auction can improve the situation. In particular a sealed bid auction can in principle remove much of the problem associated with toehold stakes. However, there are some qualifications. The evidence from the two previous sales of Premier League rights suggests that the practicalities of the bidding process are not likely to follow a theoretically optimum model. Although the sale of Premier League rights in 1996 (but not in 1992) had the appearance of a sealed bid auction, the reality was rather different in several ways. First, prior to the final bids being submitted, Premier League officials were negotiating with the bidders and indicating to them, in broad terms, the level of bid that would have a chance of success. Second, the three final bidders all offered contracts the terms of which differed from each other in significant ways, so that the process was not strictly an auction at all. For the reasons we have given (see paragraph 2.93), we do not expect the rights-selling arrangements in 2000 to be less complex. Third, the decision as to which bid to accept was taken by a number of parties (the Premier League clubs) and not by one single party. In these circumstances it is difficult to apply auction theory or to be confident that a requirement to provide sealed bids at the final stage of the bidding process will negate any toehold effect.

2.116. More generally, whatever design of auction is adopted by the Premier League for the sale of its rights in future, an ownership stake is in our view likely to have at least some influence over bidding behaviour. B Sky B can be expected to be better informed than other bidders as a result of the merger, for the reasons given in paragraphs 2.99 to 2.105, and this benefit will enhance its advantages as the incumbent broadcaster of Premier League football.

Competing bidders will be aware of this (third party broadcasters told us that they believed the merger would benefit BSKyB in any future sale of Premier League rights) and their perception can be expected to influence the way they bid. It is reasonable to suppose that potential bidders who think they are at a disadvantage will bid more cautiously.

2.117. Taking all these arguments into account, we do not believe that the toehold effects which arise as the result of the merger would give BSKyB the major advantage over its competitors that some have claimed auction theory predicts, but we would expect it to gain some benefit in the overall rights-selling process from its financial stake in the revenues received by Premier League clubs.

BskyB's fall-back options

2.118. BSKyB told us that it did not see Premier League football as 'must have' programming for Sky Sports. It supported the collective selling of Premier League rights and would not wish to undermine it. If it did not win the rights next time round, it would find other sporting events, including other football, to replace Premier League matches and would try to win back the Premier League's rights at a subsequent auction. It could also acquire retail rights to the new channel showing Premier League football, so that it could include it in its DTH retail offering.

2.119. This apparently relaxed attitude towards the loss of Premier League rights surprised us given the importance of the Premiership to BSKyB's current offering. The three Sky sports channels together contributed about a third of BSKyB's share of viewing in the year ended June 1998, and Premier League matches are regularly among the most popular Sky programmes (see Table 4.16). Premier League football is widely seen in the industry as one of the best ways of attracting pay TV subscribers. NTL told us that it was a 'key driver'; it has taken several steps, including making an offer for Newcastle United and supporting the DGFT in his RPC case against collective selling, to try to ensure that it obtains some Premier League rights. It may also be relevant that ONdigital is offering 'free Premier League football' for six months (that is, a free subscription to Sky Sports 1) as a marketing initiative.

2.120. Even if BSKyB were able to acquire the retail rights to the new channel showing Premier League football and so include it in its DTH retail offering, it would still be likely to suffer financially. Many subscribers could be expected to prefer the new channel showing Premier League football to Sky Sports 1 (which would no longer have these matches). In the 1996 NOP survey 31 per cent of those who had satellite TV said that they would be very interested in a sports channel which had exclusive rights to live Premier League games (with other sports) but would not require them to subscribe to other channels. A further 31 per cent said that they would be fairly interested (see Table 4.15). The question made no reference to the price of channels. To the extent that subscribers switched to the new channel, BSKyB would retain a retail margin but would lose its larger wholesale margin from these subscribers.

2.121. We looked at the impact on BSKyB's profits of losing Premier League rights (see Appendix 2.3). We assumed that BSKyB purchased the retail rights to the new channel showing Premier League football and provided it to existing Sky Sports 1 subscribers for the same price as they are currently paying for that channel. We found that if BSKyB had to purchase the new channel for the same price as it currently charges cable operators for one of its sports channels (£10.51 per subscriber per month), the effect would be to reduce its profit by an amount equal to [38] per cent of its 1998 profit after tax. BSKyB argued that it would be able to obtain the new channel at a price much less than £10.51. We think that the actual price would depend on several factors including the relative market power of BSKyB and the operator of the new channel, and whether this channel had attractive sports content in

addition to Premier League matches. However, we note that unless the new channel could be bought by BSkyB for less than half the price at which it sells its sports channels to cable operators, its profits would be significantly damaged by loss of Premier League rights.

2.122. We looked in addition at what would happen if BSkyB did not attempt to purchase the retail rights to the new channel and hence ceased to include Premier League football in its offering to its subscribers. BSkyB argued that if this happened it would be no worse off than at present, and hence the estimate of reduction of profit given in paragraph 2.121 could be ignored. On the assumptions given in Appendix 2.3, BSkyB would indeed suffer virtually no reduction of profit if it did not show Premier League football. However, BSkyB challenged certain of these assumptions, notably those on the nature and rate of churn. Accepting BSkyB's arguments would lead to the conclusion that BSkyB would be more profitable without Premier League rights than with them. We do not regard this as very credible. It seems very unlikely that any company would bid the sums of money involved in the past, nor envisage further huge rises unless it expected the acquisition of the rights to be profitable.

2.123. Even if the price paid was such as to remove most of the potential profit from acquisition of the rights, we view with some scepticism the idea that the absence of Premier League football would make no difference to BSkyB's business. If that were so, BSkyB would be indifferent as to whether it bid for or obtained Premier League rights. We think that Premier League football has been an effective means of assisting BSkyB to develop and penetrate the sports premium channel market, and an important factor in its competition with other broadcasters. We note that subscriptions to cable TV have been growing at a faster rate than subscriptions to BSkyB (see Table 4.4) and we would be surprised if BSkyB would willingly risk further loss of market share by not offering Premier League football. Thus in our view the effect on BSkyB's profits of losing Premier League rights, considered in paragraph 2.121, cannot be ignored.

2.124. BSkyB might be unable to acquire the retail rights to the new channel showing Premier League football if this channel were owned by a competitor which thought that its commercial interests would be best served by refusing to sell to BSkyB. BSkyB said that this would be most unlikely as its competitor would need to use BSkyB's DTH platform to distribute its channels in order to recover the cost of its bid. We recognize the force of this argument but we do not think that the possibility of a competitor taking short-term losses for the sake of longer-term strategic gains can be ruled out. If that happened, BSkyB could ask the ITC to intervene on competition grounds (the ITC told us that it probably would conduct an inquiry in these circumstances) but BSkyB could not be certain of the outcome. Even if it were favourable, the time taken to reach a decision could be such that BSkyB's position was significantly damaged. For these reasons we think that, if BSkyB believed that there was a real threat to its ability to obtain the Premier League rights, its commercial interests would dictate that it did everything possible to counter this threat.

2.125. We considered what options BSkyB might have if it lost or thought it would lose the Premier League rights to another broadcaster. One option would be for Manchester United to withdraw from the Premier League's collective selling arrangements and for its home matches to be shown on Sky instead. BSkyB told us that it had no intention of withdrawing Manchester United from the collective selling arrangements and said that it would be willing to give a voluntary assurance that if the Premier League contracted with another broadcaster for the collective sale of rights, it would not unilaterally seek to exploit, on an individual basis, those rights of Manchester United which were the subject of the collective agreements. Manchester United told us that withdrawal from collective selling would be a violation of the Premier League rules which would lead to its expulsion. Because about 75 per cent of its profits came from Premier League matches, leaving the League was not a realistic option. On the other hand, the losses by other Premier League clubs if Manchester United left would be marginal, so expulsion was a credible threat for the Premier League.

Manchester United also told us that if it withdrew from the Premier League's collective selling arrangements a further sanction that the Premier League could apply would be to sue for damages.

2.126. Manchester United argued that if it left the Premier League it would have nowhere else to go because access to European club competitions was generally through success in domestic ones. Even the proposed European Super League had been intended as a supplement for national leagues, not a replacement. BSkyB said that a withdrawal by Manchester United from the Premier League would be a public relations disaster which as a consumer business it could not contemplate; it was willing to give a voluntary assurance that it would not initiate discussions about withdrawal.

2.127. Many other parties who gave us evidence took a different view about the options open to BSkyB and Manchester United in the event of the merger. The Premier League told us that Manchester United could credibly threaten to leave the League because it would be better placed than most clubs to secure participation in alternative leagues or championships, particularly with the backing of BSkyB. The FA and Football League (in a joint submission), the BBC, and several organizations representing fans also thought that a threat by Manchester United to leave the Premier League was credible. NTL and Telewest (in a joint submission) said that they believed there was a significant danger of Manchester United selling its rights individually to BSkyB if BSkyB were not to win the Premier League rights in 2000.

2.128. In view of the arguments put to us by BSkyB and Manchester United, we do not believe it is likely that BSkyB would voluntarily withdraw Manchester United from the Premier League unless there was an alternative league for it to join. No such alternative is available at present. We also accept that BSkyB would try to avoid a situation which would result in Manchester United being expelled from the Premier League. But if such an expulsion occurred we very much doubt whether it would be more than temporary. Expelling Manchester United from the League would only come about in circumstances which would be seen as a crisis for English football. It is likely that there would be intense negotiations leading, probably sooner rather than later, to some kind of compromise involving the readmission of Manchester United.

2.129. Another fall-back option for BSkyB, if it looked as if its bid for Premier League rights was not going to be successful, would be to take action before the rights contract was awarded to any other broadcaster. Manchester United could come to the meeting of the Premier League at which final rights bids from broadcasters were due to be considered armed with authority from BSkyB to make an improved bid on BSkyB's behalf. Even if the introduction of an improved bid at the meeting were against the Premier League's bidding rules, we see no practical way in which it could be prevented.

2.130. Faced with an improved offer from BSkyB, Premier League clubs would be in a dilemma. Accepting the offer would bring them immediate financial gain but it would risk alienating other broadcasters which might then be less willing to bid in future auctions. However, whilst it would take 13 clubs (plus Manchester United) to support BSkyB's revised offer in order for it to be accepted on the day, it would only take six clubs (plus Manchester United) either to support this offer or to favour a further round of bidding to prevent any other bidder from winning on the day. We think that it would not be too difficult to obtain this blocking minority. BSkyB could, if necessary, design its improved bid in such a way that it was particularly attractive to six clubs. If BSkyB succeeded only in forcing the rights auction to go to another round, it could not be assured of winning in that round, but by converting a sealed bid auction into an ascending price one it would gain an additional advantage from the toehold effect (see paragraphs 2.106 to 2.117).

2.131. A further fall-back option for BSkyB would be to seek to organize a blocking minority of seven clubs not so much with the purpose of forcing the auction to another round but rather in order to prevent any other bidder from ever achieving the necessary 14 votes. We looked at the commercial feasibility of this option. The existing collective selling arrangements have the effect of helping the smaller clubs: 50 per cent of the revenue from the sale is distributed equally between all clubs and every club has at least three of its matches broadcast each season. The effect is that the top clubs receive at most about 8 per cent each of the revenue from the sale of rights. If their share were proportional to their share of viewers for Premier League matches shown on TV (see Table 4.19), they would receive considerably more. Matches in 1997/98 involving Manchester United, Arsenal or Liverpool accounted for 58 per cent of total viewers of Premier League matches on TV.

2.132. BSkyB could therefore offer to broadcast more of the home matches of Manchester United, Arsenal and Liverpool (and four other clubs) than are currently broadcast and could pay these clubs more than they would obtain from the collective selling arrangements. If the clubs accepted this offer they would be in breach of the Premier League's rule on collective selling but expelling them from the League would not be feasible because, quite apart from practical considerations, expulsion requires the agreement of 15 clubs. Since this would be a legitimate use of the Premier League's voting rules it is difficult to see how any action for damages could arise.

2.133. This spoiling tactic would in principle be open to any other broadcaster which failed to win the collective rights auction. However, in the ensuing struggle to sign up individual clubs, BSkyB would have an advantage over other broadcasters in that it alone could obtain Manchester United's rights. We explain in paragraphs 2.150 to 2.155 (where we consider the individual selling of rights) why we think this advantage is likely to be substantial.

2.134. There remains the argument that BSkyB would not permit Manchester United to leave the Premier League because of the public relations consequences. Critics of the merger frequently drew our attention to the connection between BSkyB and Rupert Murdoch, who is the Chairman and a major shareholder of The News Corporation Limited (News Corporation), News International's parent company, and a non-executive director of BSkyB. We were told that News Limited (News), News Corporation's Australian subsidiary, had in 1994 proposed to the Australian Rugby League and Channel 9 (a commercial TV channel which had the broadcasting rights for Australian Rugby League matches) the formation of a Super League. Part of the proposal involved a broadcasting rights deal whereby some of the live Australian Rugby League matches would be shown on Foxtel, a pay TV broadcaster 50 per cent owned by News. This proposal was rejected. News subsequently signed up enough players and coaches from clubs in the Australian Rugby League (and from UK rugby league clubs) to form a Super League of a dozen clubs. The quality of the Australian Rugby League was affected by the migration of these players. Although these events are rather different from the fall-back options we have been considering, they lead us to view with some scepticism BSkyB's claim that it would be inhibited from pursuing its commercial aims merely by public relations considerations.

2.135. BSkyB told us very firmly that it was not its intention or desire to end the Premier League's collective selling arrangements or to damage the League in any way. We recognize that the three fall-back options we have described are not attractive courses of action for BSkyB and ones it would not be likely to undertake in normal circumstances. However, the second of these options in our view represents a credible strategy by BSkyB and we would not entirely rule out the possibility of the other two. Other potential bidders can be expected to perceive these options as credible. We have noted already (see paragraph 2.127) that even the first and most radical of them is perceived as a credible threat by many parties. We think

it is likely that the bidding behaviour of BSkyB's competitors would be inhibited to some extent by these perceptions.

Ownership of football clubs by broadcasters in other countries

2.136. It was put to us by Manchester United that football clubs were owned by broadcasters in other countries (in particular Paris St Germain was owned by Canal+ and AC Milan by Mediaset SpA (Mediaset)), but that this had not given rise to concerns by the competition authorities in those countries. We wrote to the European Commission, the competition authorities in France and Italy and UEFA.

2.137. We were told by the French competition authority that Canal+ , a pay TV broadcaster, had the exclusive rights to most live TV broadcasts of league football matches in France. The exceptions were certain matches considered to be of national importance which had to be shown on free-to-air services. [

Details omitted. See note on page iv.

] The French authorities had not examined the acquisition of Paris St Germain by Canal+ . While this evidence does not show that Canal+ 's competitive position in the football rights market has been strengthened by its acquisition of Paris St Germain (it was already strong before the acquisition), neither does it give us any reason to believe that we need have no fears about the ownership of a football club by a TV company.

2.138. The Italian competition authority confirmed that Mediaset (a company controlled by Silvio Berlusconi) owned AC Milan and told us that another leading Italian football club, Fiorentina, was owned by another broadcasting company, Cecchi Gori Communications SpA (Cecchi Gori). This company and RTI SpA (a wholly-owned subsidiary of Mediaset) had both bid for the live rights to the Serie A competition (the Italian equivalent to Premier League) in 1996 but had not been successful. The winning bidder had been a pay TV company. As neither Mediaset nor Cecchi Gori owned any pay TV channels, their similarity with BSkyB is not close. The Italian competition authority also told us that it had not investigated the effect on competition of the ownership of a football club by a broadcaster because the relevant acquisitions had preceded the present Italian anti-trust law.

2.139. UEFA subsequently told us that the four largest clubs in Italy, including AC Milan, had recently broken away from the collective selling arrangements of the Italian league. We have also seen newspaper reports indicating that the Italian Government has decided to put a ceiling on the ownership of Serie A TV rights by any one broadcaster, thus ending exclusivity. The situation in Italy is clearly different from the UK. It therefore does not provide a useful basis for conclusions about what is likely to happen here if the merger were to proceed. However, we note that the Italian Government has concerns about the broadcasting of football.

Conclusions on existing selling arrangements/single merger

2.140. In the event of the merger, the effects on the collective sale of Premier League rights of Manchester United's influence, BSkyB's access to information, toehold effects and BSkyB's fall-back options would not, taken individually, give BSkyB a decisive advantage over competing broadcasters. But taken together we think that they may be expected significantly to improve BSkyB's chances of securing the Premier League's rights. This advantage is a real one, that is it may be expected to improve BSkyB's chances of winning whatever the response of its competitors.

2.141. The perception of these competitors that BSkyB, which already has market power as the only major sports premium channel provider, would be in a stronger position as a result of the merger is also of some significance because it would be likely to influence their bidding behaviour. In our view this perception may be expected to result in other broadcasters bidding more cautiously than would otherwise be the case and, in some cases, even deciding not to bid at all. Bidding has costs. We were told by UNM that its 1996 bid cost about £350,000. Carlton estimated that its bid (with the Mirror Group) cost about £500,000. On the other hand, BSkyB said that the cost of its bid in 1996 was very modest. This perhaps reflects the advantages of being the incumbent. Rick Parry, the former Chief Executive of the Premier League, told us that one of the main problems with selling TV rights was keeping rival bidders in the ring. He said that if broadcasters suspected they were not going to win, they would pull out of the negotiations.

2.142. This bidding advantage would be likely to reinforce the advantages that BSkyB has as a consequence of its market power, as the incumbent broadcaster of live Premier League matches, and as the company which first broadcast these matches on pay TV. BSkyB denied that it had any first mover advantages. It pointed out that when it first won the Premier League rights (in 1992) it had defeated ITV despite the fact that ITV was the incumbent broadcaster and BSkyB then had no track record.

2.143. We cannot agree that incumbency advantages are of no importance. BSkyB has a reputation for the high quality of its football broadcasting. At the next sale of Premier League rights, clubs are bound to take into account the fact that if they award the contract to BSkyB they can be confident that they will get a high-quality product whereas with any competing broadcaster they are taking a risk. In addition, BSkyB has a much larger installed customer base than any other pay TV retailer, its own successful distribution platform, an established presence on other platforms, a well-trying production infrastructure and a widely-known brand name. BSkyB has already made a commercial success of broadcasting large numbers of Premier League matches. For any other broadcaster this would be a new venture and hence, inevitably, more of a risk. The fact that BSkyB has these advantages is a tribute to its success and not in itself a cause for concern (on the contrary). However, it does mean that its competitors for Premier League rights have a difficult task, even without the merger. In the next competition for the Premier League TV rights, whatever innovations might be proposed by competitors, it is inevitable that in terms of contract administration, broadcasting quality and audience reach, BSkyB, as the well-regarded incumbent, will be seen by clubs, at the very least, as the safe option.

2.144. We conclude that the advantages the merger would give BSkyB in the bidding process, added to its market power and its advantages as the incumbent broadcaster of Premier League matches, mean that, where the Premier League rights continue to be sold collectively and no other broadcaster/Premier League club mergers take place, BSkyB may be expected, as a result of the merger, significantly to improve its chances of retaining the Premier League rights for the foreseeable future. It may further be expected that these advantages would be observed by competing broadcasters, reducing the number who were willing to bid and making those who did bid more cautious. As a result there is likely to be less competition for Premier League rights leading to less choice for the Premier League of alternative broadcasting packages and less scope for innovation in the broadcasting of Premier League football, any or all of which may be expected to be detrimental to the public interest. There are also likely to be consequences for downstream competition, which we consider in paragraphs 2.172 to 2.177.

New selling arrangements/single merger

2.145. As we mentioned in paragraph 2.8, the DGFT is challenging in the RPC the rule under which the Premier League effectively obliges its member clubs to agree to the Premier League selling TV rights collectively on their behalf. If the DGFT wins this case and the rule is declared contrary to the public interest it would be for the Premier League to decide whether to appeal. Should it do so, it would also be open to it to apply for the RPC's order against it to be stayed so that its existing selling arrangements could continue until the appeal had been heard. How quickly that could happen is unclear but it is possible that pending the final determination of the proceedings, the present selling arrangements would still be in force when the rights came to be resold by the Premier League (a process which the Premier League told us it expected to be completed by summer 2000), whatever the outcome of the RPC case at first instance. The effects of the merger would then be those described in the previous section.

2.146. The RPC case is not the only threat to the continuation of collective selling in its existing form. We have seen an analysis produced by Spectrum Strategy Consultants (Spectrum) for Manchester United (for the purposes of establishing its value in the context of a possible acquisition by BSkyB) which suggested that Manchester United would be considerably better off selling its rights individually than selling them collectively, particularly if Premier League matches were broadcast on a pay-per-view basis. Manchester United told us that the Spectrum analysis did not represent its own views and that it remained firmly committed to collective selling. Nevertheless, if pay-per-view becomes established several top clubs might conclude that they would be better off if they sold their rights individually. This situation would put a strain on the existing selling arrangements. However, Premier League clubs rejected a proposal on pay-per-view put to them by BSkyB in 1998 and the Premier League told us that pay-per-view raised some difficult issues, such as its effect on match attendance. So the timing of the potential threat to existing selling arrangements from pay-per-view is difficult to predict. We note that pilot pay-per-view matches for the Nationwide League have now begun.

2.147. The consequences of a breakdown in the existing selling arrangements are inevitably speculative. If changes come as a result of the outcome of the RPC case, they may not necessarily be all that great. The OFT told us that, even if the Court finds that the Premier League rule that effectively obliges clubs to agree to the Premier League organizing the collective sale of rights is against the public interest, it may nevertheless be open to all Premier League clubs voluntarily to decide to continue to sell their rights collectively. If that occurs then all the arguments about collective selling in paragraphs 2.86 to 2.143 remain relevant and our conclusion about the likely adverse effects of the merger in paragraph 2.144 stands. Indeed, in the absence of a Premier League rule enforcing collective selling, a threat by Manchester United to withdraw from collective selling arrangements would be far more credible because a threat by the Premier League to expel clubs for not adhering to collective selling arrangements could not be made.

2.148. A more radical transformation of existing selling arrangements could occur in two different ways:

- (a) Rights could cease to be sold collectively by the Premier League as a whole. For convenience, we refer to this possibility as 'individual selling' though in practice it might not involve every single club striking a separate deal with broadcasters; subject to compliance with competition law, groups of clubs might be formed to sell the rights of the group members collectively.

- (b) Collective selling might continue but the current arrangement under which the rights to broadcast live Premier League matches are sold exclusively to a single broadcaster might be changed.

2.149. With individual selling, many of the effects of the merger that we have thought likely in the context of the existing selling arrangements would not arise. For example, any influence that Manchester United might have over the Premier League's collective decision-making processes ceases to be relevant. Nevertheless, it was put to us that the merger would be at least as harmful to competition with individual selling arrangements as it would be with collective selling. Whereas with collective selling the Premier League has an incentive to conduct a fair auction and retain a measure of control over the process, with individual selling these benefits would be absent. Instead there would be a free-for-all between broadcasters wishing to televise Premier League matches in which each tried to get hold of the rights of as many clubs as possible. In this situation any broadcaster which was assured of the rights of one club, because it owned it, would have an advantage in the competition for rights.

2.150. BSkyB put it to us that in the event of individual selling other broadcasters would buttress their negotiating position by buying Premier League clubs of their own. We come back to this point in paragraph 2.158 but, keeping in this section to the hypothesis that BSkyB's acquisition of Manchester United is the only broadcaster/Premier League club merger, we think that BSkyB would, as a result of the merger, be likely to have a clear advantage over competitors for the following reasons:

- (a) It is likely that the value of the live rights of all Premier League matches, taken together and sold exclusively to one broadcaster, is greater than the sum of the values of individual rights or groups of rights. BSkyB and the Premier League told us that this was the case and the Premier League's decision in 1996 to sell the rights in this way supports the proposition. So a broadcaster which could obtain the live rights of all Premier League clubs would be likely to pay more for them than competitors which could not.
- (b) BSkyB would be able to put together a package which included the rights of all Premier League clubs. No other broadcaster could put together such a package because no other broadcaster would be able to obtain the rights of Manchester United. So BSkyB would be able to pay more for the rights of other Premier League clubs than competitors and hence could outbid them.

2.151. This argument would give BSkyB an advantage over its competitors whatever club it owned (provided no other broadcaster owned one). In practical terms owning Manchester United would be much more significant than owning a small Premier League club. Manchester United was described in BSkyB's internal documents as providing a UK base around which a compelling soccer package could be built in almost all conceivable scenarios (see paragraph 2.76). Acquiring rights on an individual basis would involve a series of bilateral negotiations. If BSkyB began these negotiations with the rights of the strongest club already in its possession, its advantage would be manifest and this would be likely to help it secure more readily the rights of other leading clubs, thus creating the nucleus of a package to which all clubs would gravitate.

2.152. Manchester United challenged both of the arguments in paragraph 2.150. It said that there was no reason to believe that Premier League rights were more valuable as a single block than if split among different broadcasters reaching different audiences, and it claimed that it was unreasonable to assume that BSkyB would never sell the rights of Manchester United to another broadcaster.

2.153. We are not persuaded by Manchester United's arguments. As we have seen, both the Premier League and BSkyB believed that Premier League rights would be more valuable as a single block rather than in fragmented form; and other TV companies such as NTL and the free-to-air broadcasters which expressed a preference for some degree of fragmentation did so primarily because it would allow them to bid for a less expensive block of rights suitable to their respective needs and budgets, rather than on the view that this would increase the overall value of rights. We cannot preclude the possibility that there will be some means of splitting rights across a number of broadcasters or platforms which could increase the total value of Premier League rights particularly if the Premier League embraces pay-per-view; but all the evidence to date points the other way. Even if a situation arose in which selling fragmented packages of rights to different broadcasters or platforms would be more profitable, the range of possible strategies would still be likely to be constrained by the fact that Manchester United's rights would rest with BSkyB as a result of the merger.

2.154. Manchester United's assertion that BSkyB might be willing to sell Manchester United's TV rights to others (under individual selling arrangements) was contradicted by what BSkyB told us. Besides, we see no grounds to suppose that Manchester United's rights would be more valuable to another broadcaster than they would be to BSkyB.

2.155. It was also put to us by Manchester United that if it were owned by BSkyB, other leading Premier League clubs would be reluctant to sell their rights to BSkyB because they would fear that they would be treated less favourably than Manchester United. While such fears are indeed a possibility, it is questionable whether they would influence the behaviour of other clubs. As BSkyB would, as a result of the merger (under the assumptions of this scenario), be the only broadcaster in a position to obtain exclusive rights to all Premier League matches (because no other broadcaster could obtain Manchester United's rights), it would always be in a position to offer more than its competitors. Commercial self-interest may therefore be expected to drive other leading clubs to sell their rights to BSkyB even if they feared that Manchester United would get a bigger advantage than they would.

2.156. The other way in which current selling arrangements could be radically changed would be for the Premier League to continue to organize collective selling but to cease to sell the live rights for all its matches exclusively to one broadcaster. So, for example, the rights to all Sunday matches could be sold to one broadcaster and the rights to Monday matches to another. Such an arrangement would increase downstream competition between broadcasters, as no one channel would be the only source of all Premier League football, but it would be likely to reduce the aggregate value of the rights as no broadcaster would be paying for the right to be the monopoly provider of Premier League football on TV. BSkyB emphasized the value to it of having all Premier League football on Sky Sports channels. The Premier League had rejected the idea of non-exclusive arrangements in 1996. It told us that non-exclusive arrangements were likely to be worth less but that it had not yet reached a view about the sale of rights in 2000. Because we believe that it will not be in the commercial interests of the majority of clubs or of all the clubs taken together to sell collectively to more than one broadcaster (or group of broadcasters acting together), we do not think that it is a likely outcome.

2.157. We conclude that with new selling arrangements and the BSkyB/Manchester United merger as the only merger between a broadcaster and a Premier League club, the merger may be expected to give BSkyB an advantage over other broadcasters that it would not enjoy otherwise. That advantage may be expected to give rise to the adverse effect that there would be reduced competition for the rights of Premier League clubs and the consequential detriments of less innovation and reduced choice.

2.158. We noted in paragraph 2.150 BSkyB's view that the breakdown of collective selling would lead to other broadcasters seeking to acquire Premier League clubs. We agree that this is very possible. If collective selling ends, broadcasters which want to show Premier League football may well conclude that their best chance of doing so is to acquire a club themselves. They could then seek to use the broadcasting rights of the club they have acquired either as a nucleus for a wider package of rights or as a bargaining counter to use in negotiations with another broadcaster which has put together its own package of rights.

2.159. One reason put forward by BSkyB for its bid for Manchester United was to ensure that it was not left in a weak position in the event of collective selling breaking down. It is likely that other broadcasters will have made similar calculations. We know that one of them, the cable company NTL, has acquired a 6 per cent stake in Newcastle United and an option over a controlling interest in the club exercisable within an agreed period following the announcement of the findings of our inquiry. There have been press reports about other broadcasters showing an interest in buying Premier League clubs.

2.160. We discuss the competition implications of multiple mergers and individual selling in paragraphs 2.166 to 2.170.

Existing selling arrangements/multiple mergers

2.161. If existing selling arrangements continue, it was put to us that a merger between BSkyB and Manchester United would precipitate other mergers between broadcasters and Premier League clubs because these other broadcasters would wish to have the influence, information advantages, and toeholds that we have discussed in paragraphs 2.87 to 2.117. Should several such mergers occur, collective selling by the Premier League could come under severe pressure for the reasons given in paragraph 2.164. However, a single further merger would be less likely to have this result.

2.162. If such a merger were to occur (the proposed NTL/Newcastle United merger is the obvious example), there would be one of two outcomes. First, the other broadcaster which acquired a club might decide to put in its own bid for Premier League rights. If that happened then competitors to BSkyB and this other broadcaster would be faced with two bidders for Premier League rights each having the advantages we have discussed in paragraphs 2.87 to 2.117. We have concluded that faced with one bidder (BSkyB) with these advantages, competing broadcasters would bid more cautiously than would otherwise be the case, and in some cases decide not to bid at all (see paragraph 2.144). This effect would be stronger if two bidders had these advantages. Therefore a further broadcaster/Premier League club merger precipitated by the BSkyB/Manchester United merger might also be expected to lead to a reduction in competition for Premier League rights with the adverse effects we identified in paragraph 2.144. The alternative outcome would be a decision, for whatever reason, by the other broadcaster which acquired a Premier League club not to bid. If that happened, the effect on competition of the BSkyB/Manchester United merger may be expected to be very similar to that identified in paragraph 2.144 and would have the same detriments.

2.163. Competitors to BSkyB and the other broadcaster which had acquired a Premier League club would be aware that the two mergers had weakened their own position in bidding for rights. It would not be surprising if at least some of them responded by seeking to acquire Premier League clubs of their own. If collective selling were to continue in these circumstances, then either all but one of the broadcasters which owned clubs would see the rights of these clubs being sold to a rival or they would have to agree to share the rights, to the extent that they could do so without infringing the Competition Act 1998.

2.164. We do not believe they would be prepared to contemplate the former outcome as it would negate one of their major reasons for the acquisition of a club. Given the number of broadcasters, it seems probable that the number of clubs bought by broadcasters would be less than the 14 that are formally required to change the Premier League's collective selling rules. However, the Premier League would not in our view be able to enforce this rule in the face of opposition from a number of broadcasters (including BSkyB), each owning a Premier League club, which were determined to retain the rights of their respective clubs, particularly if the fall-back options considered in paragraphs 2.125 to 2.133 were exacerbated by a number of clubs acting in the manner described. The outcome may therefore be expected to be the ending of existing selling arrangements. We consider the effects of this in the next section.

2.165. Broadcasters which owned clubs might seek to agree to share the rights of Premier League clubs. Such an agreement by broadcasters not to compete with each other for Premier League rights may be expected on our analyses to have at least as damaging an impact on competition for these rights as the first scenario we examined and consequently to have the adverse effects specified in paragraph 2.144. We recognize that such an agreement might in due course fall to be investigated under the Competition Act 1998.

New selling arrangements/multiple mergers

2.166. If the Premier League's existing rights-selling arrangements are replaced by new ones, particularly if that involves a move to individual selling by Premier League clubs, a merger between BSkyB and Manchester United could precipitate further mergers between broadcasters and Premier League clubs. This is because other broadcasters would perceive the advantages that BSkyB would gain from acquiring Manchester United (see paragraph 2.150) and might decide that the best way to improve their own position would be also to acquire a club.

2.167. Should such further mergers occur, one possible outcome would be that BSkyB would remain the dominant purchaser of Premier League rights as a result of its existing strengths (its advantages as the incumbent broadcaster and its market power) and because it owned the strongest club. BSkyB could therefore end up with a significantly better package of rights than any of its competitors. Faced with this outcome other broadcasters which owned clubs would have several options. For example, they could broadcast the home matches of their clubs on a pay-per-view basis; they could try to reach agreement with BSkyB to exchange some of the matches of their clubs for some other Premier League matches; or they could trade the rights of their clubs in exchange for favourable terms for Sky Sports channels. None of these options would be likely seriously to affect BSkyB's position as the pre-eminent broadcaster of Premier League football.

2.168. On the other hand, BSkyB might be unable to achieve a dominant position as a rights purchaser, perhaps because some of the other broadcasters which bought Premier League clubs formed alliances against it (as BSkyB suggested to us would happen). In that event, no broadcaster (or alliance of broadcasters) might find itself able to put together a satisfactory package of Premier League rights and broadcasters which owned football clubs might try to reach a collective agreement about the purchase or use of the rights. If so, our comments in paragraph 2.165 apply.

2.169. The other possibility under this scenario is that there would be genuine competition for rights among several more or less evenly matched broadcasters. In our view the competitive situation would still be likely to be less satisfactory than it would in the absence of such mergers between broadcasters and Premier League clubs precipitated by the BSkyB/Manchester United merger. In the absence of mergers, all broadcasters which wished

to obtain Premier League rights could compete with each other for the rights of every club. If mergers took place, the rights of the clubs which were owned by broadcasters would be likely to cease to be available to others and competition would be focused on a smaller group of rights. The scope for any one broadcaster to build up a portfolio of individual club rights would be reduced and the allocation of rights would tend to reflect club ownership rather than most efficient use.

2.170. In summary, we think that if rights are sold on an individual basis, and the BSkyB/Manchester United merger precipitated other mergers between broadcasters and Premier League clubs, this may be expected to reduce competition, compared with the position with no such mergers, whether or not BSkyB was the dominant purchaser of rights. The adverse effects which may be expected to arise from such a reduction of competition are less innovation and reduced choice.

Possible Premier League channel

2.171. Our discussion so far has assumed that the rights to broadcast Premier League matches will be sold to broadcasters in some form or other after the expiry of the current contract. It is possible that this will not happen. The Premier League told us that it was considering the possibility of setting up its own channel instead. We do not think that in the present circumstances we can regard this as a likely background scenario against which to judge the effects of the proposed merger. We also think that if the merger goes ahead the likelihood of a Premier League channel being created would be much reduced as we do not believe that BSkyB, or any other broadcaster that acquired a Premier League club, would be willing to give up the rights of the club it had acquired to the Premier League channel, given the importance to broadcasters of owning content.

Effects of the merger on competition among channel providers

Sports premium channel market

2.172. Paragraphs 2.81 to 2.170 have examined in some detail the effects of the merger on competition between broadcasters to obtain the TV rights to Premier League matches. We turn now to consider how the merger's effects on the sale of rights would impact on competition among sports channel providers, including entry of new providers into the market.

2.173. For this purpose it is useful to recap on the conclusions we have reached that are relevant to downstream competition. In the context of the existing selling arrangements for Premier League rights we have concluded that, if the acquisition of Manchester United by BSkyB were to be the only merger between a broadcaster and a Premier League club (our first scenario), it is likely that the merger would give BSkyB a clear advantage over any other broadcaster seeking to acquire Premier League rights (see paragraph 2.144). The consequence of this is that BSkyB would be likely to be the holder of the rights for the foreseeable future. We have also concluded that a similar outcome is likely if there were new selling arrangements and the BSkyB/Manchester United merger were the only merger between a broadcaster and a Premier League club, if the existing selling arrangements continued and there were a further merger between a broadcaster and a Premier League club, and if there were new selling arrangements and several broadcaster/Premier League club mergers but BSkyB were nevertheless the dominant purchaser of rights as a result of its acquisition of Manchester United.

2.174. We considered how effective control by BSkyB of Premier League rights for the foreseeable future would affect competition among sports premium channel providers. Entry by a sports premium channel or the upgrading of a basic channel to a premium channel requires the channel to have enough sufficiently attractive sports content to persuade subscribers to pay the premium price. Top-quality football is one of a limited number of sports that can provide this edge. With Premier League football, the most popular football competition, less easy to obtain by a potential new entrant (or to a basic sports channel wishing to upgrade), entry by a new sports premium channel would appear to be substantially more difficult.

2.175. BSkyB put it to us that there were many sports rights from which an attractive sports premium channel could be created and that it itself had a successful sports premium channel (Sky Sports 2) which showed no Premier League football. We think that the facts about BSkyB's own sports channels tend to support the conclusion that Premier League football is critical. BSkyB's annualized expenditure on all sports rights in 1997/98 was £318 million, of which £167.5 million (53 per cent) was used for the purchase of Premier League rights (see Table 4.17). Such a large proportion of the rights budget would not be used in this way if BSkyB did not attach very great importance to showing Premier League football. About four times as many subscribers to a single Sky sports channel subscribed to Sky Sports 1 as to Sky Sports 2 in 1997/98 (see Table 4.21). While it is true that 98 per cent of subscribers to Sky Sports channels in 1997/98 took both Sky Sports 1 and Sky Sports 2, the way in which Sky prices its premium channels (see paragraph 4.72 and Table 4.5) means that a second sports channel can be taken relatively cheaply. Thus Sky Sports 2 benefits from being packaged with Sky Sports 1, an advantage which a competing sports premium channel provider without the rights to Premier League football could not provide.

2.176. We have already expressed doubts about the ease with which a new channel provider could enter the sports channel market (see paragraphs 2.55 to 2.59). In those circumstances (see paragraph 2.173) where we have concluded that the merger may be expected to reduce the chances of anyone other than BSkyB winning the Premier League rights in the foreseeable future, the barriers to entry to the sports channel market may be expected to be even greater as a result of the merger. BSkyB told us that its prices were constrained by the threat of entry. Because this threat would be reduced by the merger, it follows that the prices for the Sky sports channels may be expected to increase by more than would otherwise be the case. In particular, any reduction in the price that BSkyB paid for Premier League rights as a result of its bidding advantages would be unlikely to be passed on to consumers.

2.177. Reduced opportunities for entry would also mean that consumers were less likely to be given a choice between different sports packages. NTL told us about its ideas for using Premier League rights, were it able to purchase any, which involved, among other things, showing some live Premier League games on Eurosport (a basic sports channel). We do not know whether NTL's ideas are viable or would be attractive to consumers but we think it very probable that foreclosure of entry to the sports premium channel market would have the additional adverse effect of reducing the pressure to innovate and to offer new choices to consumers.

Wider pay TV market

2.178. In those circumstances where there were reduced opportunities for entry into the sports premium channel market as a result of the merger, there may be wider consequences for competition among pay TV broadcasters. We asked BSkyB whether a broadcaster which did not have a sports premium channel would be at a competitive disadvantage. It denied that this would be the case and pointed to other companies, such as Viacom UK Limited

(Viacom) and Flextech, which were successful channel providers despite not having a sports channel.

2.179. We recognize that sport is not a necessary part of a channel provider's offering but we think that a good-quality sports channel will be an important element in any multichannel pay TV package. BSkyB's wholly-owned channels have a 42 per cent share of viewing of all pay TV, its sports channels alone accounting for 14 per cent. The wholly-owned channels of its nearest rival, Flextech, have only a 12 per cent share of pay TV viewing. This suggests to us that a channel provider is unlikely to become a market leader without offering sport. As we have already noted (see paragraph 2.76), BSkyB's internal documentation described sport as being an accepted part of BSkyB's (and its competitors') brand-building strategies.

2.180. The importance of sports channels for the wider pay TV market is illustrated by the way in which BSkyB packages its premium channels. Subscribers who choose to purchase one of the Sky Sports channels are able to get Sky Movie premium channels at a discounted rate (and vice versa) (see paragraph 4.72). Thus sport provides a way of attracting customers to other parts of the market.

2.181. This evidence leads us to conclude that reduced entry in the sports premium channel market as a result of the merger may be expected to feed through to some extent into reduced competition in the wider pay TV market.

MUTV

2.182. MUTV is jointly owned and controlled by BSkyB, Granada Group PLC (Granada) and Manchester United, each of which has a one-third stake. If the merger were to proceed, BSkyB would own two-thirds of MUTV but Granada would still have the power to block developments with which it did not agree. Granada expressed no concern to us about the ownership of MUTV. We see no reason to conclude that the merger would have any adverse effects in this area.

Effects on football

2.183. So far we have been considering the effects of the merger on the broadcasting market. The great majority of third parties who sent us their views, many of them individual members of the public, were much more concerned about the merger's consequences for football.

2.184. Many of the points put to us went well beyond the competition and consumer concerns that normally arise in merger inquiries. However, in considering this merger we are directed by section 84 of the FTA to take into account when assessing the public interest 'all matters which appear to [us] to be relevant'. We have therefore looked at these wider football issues and we discuss them under three headings: the effects on consumers, on competition between football clubs, and on the organization of football.

Effects on consumers

2.185. People interested in football may be categorized in two different ways:

- (a) committed supporters of a particular club as against those with a more general interest in football. This distinction is a matter of degree: probably everyone interested in

football has a preference for one or more teams but not all will have a passionate and single-minded commitment to their team; and

(b) regular attenders of matches as distinct from those who rarely if ever attend.

2.186. Regular match attenders will normally be committed supporters and, although the two groups are not identical (Manchester United, for example, has supporters in Asia), for convenience we will use the term 'fan' for supporters who are in both groups.

2.187. It was put to us that the proposed merger could affect consumers through its effect on prices or on the availability of (or access to) matches. Many fans were concerned that ticket prices would increase as a result of the merger. Two reasons were given for this fear:

(a) It was suggested that although Manchester United generally operated in a commercial fashion, it remained a company with strong links to the local community and its pricing policy was constrained by these links; BSkyB would feel no such constraint.

(b) Some parties argued that watching Manchester United live on TV was a partial substitute for attending its matches. If the prices of both services were controlled by the same company, there was no possibility of one putting any competitive constraint on the other.

2.188. BSkyB and Manchester United denied that the merger would have any effect on ticket prices. BSkyB said that the existing management of Manchester United had developed a very successful commercial formula and it was BSkyB's intention to leave the setting of ticket prices in the hands of the Manchester United board following the merger. It would not be in BSkyB's interest to force Manchester United to increase its prices as the negative consequences of bad publicity would far outweigh any gains that BSkyB could reasonably expect.

2.189. Manchester United said that its ticket pricing policy was a commercial one. Although it probably had scope to increase prices further, in that there was unmet demand for tickets, it had deliberately chosen not to do so for two reasons. First, by not pushing ticket prices to the limit, fans had more money to spend on Manchester United merchandise and on food and drink at the stadium. Sales of these items was one of the reasons for Manchester United's financial success. Second, Manchester United wanted to retain the long-term loyalty of its existing fans and to attract new ones.

2.190. It was put to us by Shareholders United Against Murdoch (SUAM) that Manchester United's justification of its ticket prices was unconvincing. If commercial considerations were the only determinant of these prices, it was not rational to forgo the certain gain of a higher ticket price for less certain gains from the sale of merchandise etc, particularly as additional revenue from ticket sales was pure profit, whereas Manchester United only gained its margin from sales of merchandise. Furthermore, higher ticket prices would lead to a bigger proportion of tickets being bought by wealthier fans, who would be more likely to spend more on merchandise.

2.191. We have no reason to doubt that Manchester United is pursuing a rational commercial strategy at present, nor that Manchester United could be considered just as likely as BSkyB to exploit local monopoly powers. Under the current collective selling arrangements for TV rights, the price of watching Manchester United matches on TV is controlled by a party other than Manchester United, namely BSkyB, and there is no direct link between ticket prices and TV-viewing prices. If BSkyB owned Manchester United, control of prices for both forms of viewing would pass to one party and it would be possible for BSkyB to optimize both sources of revenue to maximize local monopoly rent. In the absence of pay-per-view this would be of limited feasibility. Under individual selling

arrangements, Manchester United could obtain the same monopoly advantages irrespective of the merger.

2.192. We therefore believe that the merger is likely to make little difference to the optimization of ticket and TV-viewing prices except when pay-per-view becomes established, rights are sold collectively and these rights are controlled by BSkyB. In the absence of these factors any effect of the merger on ticket prices is likely to be marginal. Although BSkyB currently holds the rights to show Premier League matches on a pay-per-view basis, the Premier League has yet to agree to any pay-per-view broadcasting. It remains to be seen how the Premier League will handle pay-per-view issues in its next rights contract (if there is one). In the circumstances we cannot form an expectation of an adverse effect.

2.193. Another widely expressed concern of fans was that the merger would result in the starting times of Manchester United matches being fixed to suit BSkyB's broadcasting interests rather than the interests of fans. We were told that most fans had a strong preference for the traditional 3.00 pm Saturday afternoon kick-off. As it was forbidden under UEFA rules to televise matches live at that time, the broadcasting of Premier League football had already led to many matches being played at other times, mainly Sunday afternoon and Monday evening. Some of these times were very awkward for fans, particularly when away games were being played. The merger would reinforce this tendency to time matches to suit BSkyB. Some fans, noting Manchester United's popularity in Asia and Rupert Murdoch's Asian broadcasting interests, feared that some games would be timed to suit Asian audiences.

2.194. BSkyB accepted that broadcasting had had an effect on the scheduling of games but pointed out that this had occurred with the active support of the Premier League and its constituent clubs who wanted to be able to sell their TV rights. BSkyB denied that the merger would have any additional impact on starting times for the following reasons:

- (a) A well-attended match made a much better TV spectacle. It was therefore in BSkyB's interests for all matches to be played at times when fans could and would attend.
- (b) The scheduling of Premier League matches was a complicated business involving 20 clubs, the accommodation of other competitions (for example, the FA Cup and European cup competitions) and the concerns of the police. BSkyB would gain little additional influence over this process merely by acquiring Manchester United.

2.195. We were told of a few specific examples of matches being shown at unusual times, allegedly for broadcasting reasons. When we put these to BSkyB, we were told that the main reason for these unusual times was to accommodate the wishes of clubs or of the police. In our view some of the concerns about the timing of the matches were unsubstantiated. We have no doubt that broadcasters have had and will continue to have a significant influence on the scheduling of matches—given the amount of money they pay for TV rights, that is inevitable. But we doubt whether BSkyB's acquisition of Manchester United, if that were the only merger between a broadcaster and a Premier League club, would be likely to result in any material detriment to the public interest.

2.196. If as a result of the merger between BSkyB and Manchester United several Premier League clubs were bought by broadcasters, matters might be different. We can envisage circumstances in which broadcasting interests would diverge from those of fans. For example, further expansion of European club football can be expected to put pressure on the schedules of domestic competitions. We were told that English fans generally preferred matches between traditional English club rivals. Broadcasters would, in our view, give priority to those matches which attracted the biggest TV audiences and such matches (for example, European club matches) might not be those preferred by fans.

2.197. When games favoured by broadcasters are not those preferred by fans, there are likely to be at least some occasions when the scheduling preferences of the two do not coincide. In such cases it will clearly be detrimental to the interests of fans if broadcasters get their way. But a match which is scheduled to suit broadcasting interests will also suit large numbers of consumers wanting to view football on TV.

2.198. Where there is a clash between the interests of fans and those of broadcasters, a trade-off has to be made. We think that the football authorities are the right people to make this trade-off. We consider in paragraphs 2.207 to 2.210 whether the merger, together with any further mergers which it precipitated between broadcasters and football clubs, would strengthen the hand of broadcasters in their dealings with football authorities, and what effect this would have.

Effects on competition among football clubs

2.199. Most fans and organizations representing them who gave evidence to us were deeply concerned about the effect of the merger on competition among football clubs. This evidence frequently did not distinguish explicitly between the effect of the merger on economic competition and its effect on sporting competition. We infer from what was said that both were seen to be at risk but that fans, not surprisingly, were much more concerned about sporting competition.

2.200. Two opposite fears were put to us:

- (a) that Manchester United would be weakened or artificially held back by the merger; and
- (b) that the merger would make Manchester United too strong and virtually unbeatable by other clubs.

2.201. Some of those who said that Manchester United would be weakened feared that BSkyB would milk Manchester United for its profits and prevent it from retaining sufficient money to buy enough good new players. BSkyB commented that it would not be in its commercial interests to go to the expense of buying Manchester United only to run it down. We find BSkyB's argument persuasive. Manchester United's value to BSkyB as an exciting and successful football club would be too great for it to be allowed to deteriorate.

2.202. A more subtle variation on the same theme was that BSkyB's interests as a broadcaster was in an exciting Premiership. If Manchester United were to win most of the time, BSkyB might decide to hold it back, for example by ceasing to buy new players for a period. BSkyB told us that it had no intention of interfering in the running of Manchester United and that it would not risk damaging Manchester United by the kind of interference suggested. We think that BSkyB could face a potential conflict of interest between its wish to see Manchester United successful and to have an exciting Premier League contest. But if BSkyB were to decide to rein back on expenditure on new players by Manchester United, we doubt whether this could be said to operate against the public interest. The level of expenditure on new players is partly a commercial decision and if Manchester United were owned by BSkyB it would not be in a fundamentally different position than it is now, when it must take account of the interests of its shareholders.

2.203. The opposite fear, that Manchester United would become too strong if acquired by BSkyB, seems to us to have more substance. Manchester United told us that one of the reasons its board had recommended acceptance of the BSkyB offer was to make the club part of a group with greater financial and other resources as a means to achieve success in

European competitions. Similarly, BSkyB's financial analysis of the merger assumed that Manchester United would achieve a steady stream of TV revenue from participation in the European competitions. For an English club regularly to appear in European competitions, it would have to be among the top three or so Premier League clubs or win the FA or League Cups. Thus it appears that both Manchester United and BSkyB will try to keep Manchester United permanently among the four or five leading English clubs.

2.204. If the other clubs in this small group changed from year to year, the fact that Manchester United was permanently part of it might not greatly reduce the excitement of English football competitions. However, if several leading clubs were brought by broadcasters, all of them would have the incentive and the financial means to try to maintain themselves in the small group of clubs regularly participating in European competitions. This could substantially reduce the uncertainty and hence the excitement of English football but this particular outcome is in our view too uncertain to regard as a likely adverse effect.

2.205. Many of those who were concerned about Manchester United becoming too strong feared that this would worsen an already marked trend towards greater inequality of wealth between football clubs. We were told that most of the TV money that has flowed into British football in recent years has gone disproportionately to leading clubs and has had the effect of greatly inflating players' wages which in turn has pushed several smaller clubs to the brink of financial collapse. We were told that one of the glories of British football was the sheer number of clubs involved—92 in the Premier League and Football League alone—and that the possibility of a small club working its way to the top, as Wimbledon had done, contributed greatly to the 'dream factor' in football. Inequality of wealth threatened this structure.

2.206. We expect that the factors which are increasing the inequality between football clubs are likely to be accelerated by a merger between Manchester United and BSkyB, if only by a small amount. If the merger precipitates other mergers between broadcasters and Premier League clubs we would expect these trends to become substantially more marked. Fans and their representatives who gave us evidence were in no doubt that a breakdown of the traditional structure of British football as a result of increasing inequalities of wealth would be against the public interest. This raises issues which are more for the Football Task Force than for us. Nevertheless, given the wide definition of the public interest in the FTA (see paragraph 2.184), we accept that major structural changes to British football are matters within our terms of reference in so far as they are affected by the merger. In our view the increase in the inequality of wealth between clubs, arising from the merger, would be likely to have the consequences put to us, namely it would put at risk the ability of many clubs to compete and ultimately could hasten the demise of some smaller clubs. This may be expected to have the adverse effect of damaging the quality of British football.

Effects on the organization of football

2.207. A further concern put to us was that the merger would strengthen the hand of BSkyB in its dealings with football authorities. It was suggested that this would have several adverse effects on the organization of football including (among other examples):

- (a) the timing of matches (already discussed in paragraphs 2.193 to 2.198);
- (b) the development of new competitions. It was feared that BSkyB, probably in alliance with other broadcasters, would use its influence to promote developments (for example, more matches between leading European clubs) which would maximize TV audiences but not be popular with fans; and

- (c) Changes to, or refusal to abide by, rules which did not suit BSkyB (the Premier League rule on the ownership of clubs was a possible example) and successful challenges by BSkyB of decisions it did not like (for example, the suspension of one of Manchester United's star players for disciplinary reasons).

2.208. In order to address these issues we need to ask three questions:

- (a) Would the merger increase BSkyB's influence over the organization of football?
- (b) If so, would this lead to changes in the way football was run?
- (c) If so, would any such changes be against the public interest?

2.209. We have already concluded that, in each of the four possible scenarios we have considered in relation to competition for TV rights, the merger would give BSkyB additional influence, through Manchester United, over the selling of TV rights (see paragraphs 2.87 to 2.98). Arguments similar to the ones that led to that conclusion also lead us to believe that the merger would be likely to increase BSkyB's influence over other Premier League decisions. In our view, if the BSkyB/Manchester United merger were to precipitate other mergers between broadcasters and Premier League clubs, the influence over time of these broadcasters would be appreciable.

2.210. BSkyB told us that football was such an important part of its offering that it would not be in its commercial interests to act in ways that were detrimental to the game. We accept that BSkyB would not want to weaken those aspects of football that make it valuable to broadcasters, and that some of the fears expressed by fans about its influence may be unrealistic. Nevertheless, it seems inevitable to us that there will be occasions when the interests of a broadcaster are not the same as the interests of those whose primary concern is with the governance of football. While these divergences may not always involve matters of public interest, sometimes they will. When that happens we believe that decisions based on football authorities' perception of the long-term interests of the game are more likely to be in the public interest than decisions based on the commercial interests of broadcasters. By increasing BSkyB's influence over the Premier League's decisions, the merger may be expected to lead to some decisions which do not reflect the long-term interests of football, with the adverse effect that the quality of British football would be damaged.

Effects on competition among news media

2.211. We mentioned in paragraph 2.11 that BSkyB is some 40 per cent owned by News International and that this gives News International the ability materially to influence BSkyB. If the merger goes ahead News International will therefore gain the ability materially to influence Manchester United. It was put to us that News International would use Manchester United as a weapon in its circulation war against other newspaper companies by ensuring that its papers had preferential access to Manchester United stories and personnel. It was also suggested that Manchester United would be given greater publicity than other clubs in News International newspapers. This would help Manchester United to attract more fans than its rivals, leading to increased demand for tickets for its matches, higher audiences for its TV appearances and larger merchandise sales, to the detriment of other clubs. A further fear was that News International newspapers would campaign against Premier League or FA decisions that were not in Manchester United's interests.

2.212. BSkyB told us that it was not in Manchester United's interests, and hence not in BSkyB's interests if the merger went ahead, to limit publicity about the club to any one group of newspapers. Manchester United players were free to sign contracts with any newspaper

and that position would not be changed by the merger. BSkyB also questioned whether it would be in the interests of News International newspapers to give disproportionate coverage to Manchester United given that the majority of their readers would support other teams. In our view it is likely that News International newspapers would gain a commercial advantage from a link with Manchester United (and vice versa) and it would be unrealistic to assume that this advantage would not be exploited to the full. However, although the question of the ownership of content by newspapers is an important one, in terms of effects of the merger on the public interest we think that this is a marginal issue.

2.213. There were also fears about a distortion of competition among broadcast news services. Independent Television News Limited (ITN) told us of its concerns, if Manchester United were to be owned BSkyB, that Sky News would be consistently better treated than its rivals and that ITN might not be allowed to interview players and officials of Manchester United and be forced to rely on 'pooled' interviews conducted by Sky News and carrying its logo. ITN said that BSkyB had tried to prevent TV news organizations from reporting results of pay-per-view boxing matches until a considerable time after the event. It feared that BSkyB might use its ownership of Manchester United as a means of similarly limiting news reporting of the results of pay-per-view football matches.

2.214. BSkyB said that Sky News had never sought or received favourable treatment from the Premier League or any Premier League club notwithstanding the coverage of Premier League football on Sky Sports. If the merger went ahead, material developments concerning Manchester United would continue to be announced at press conferences. Were exclusion of other news broadcasters a viable way to proceed, Manchester United could have already adopted it, using MUTV. In reality such a course would have the adverse consequence of negative coverage by other news services which would greatly outweigh the benefits. Sky News could and would not be given more favourable treatment than its rivals in respect of Manchester United. BSkyB also denied that it had tried to prevent TV news organizations from reporting the results of pay-per-view boxing matches; its conduct had been in accordance with an industry code of practice.

2.215. In our view the issues raised by ITN are unlikely to be affected to any significant degree by the merger.

Benefits of the merger

2.216. BSkyB told us that the merger would have the following benefits for the public interest:

- (a) It would increase the value of other football clubs, making them better able to raise finance for investment in improved stadiums and facilities, and for acquisition of the best players. These benefits would not be limited to football but would lead to increased confidence in the sports sector as a whole.
- (b) The ownership of Manchester United would pass from institutional shareholders to a broadcaster which had a greater stake in the success of football. As a broadcaster, BSkyB wanted to see a full stadium and an exciting sporting competition. Because of its consumer focus, BSkyB would be a sympathetic owner of Manchester United and would not make decisions based only on financial considerations.
- (c) Following the merger BSkyB would look at investing in the local community in order to try to put down roots in Manchester.

2.217. In our view the value of football clubs (or other sporting organizations for that matter) would only increase as a result of the merger to the extent that these clubs were seen as likely acquisition targets, probably by other broadcasters. If these acquisitions were to take place the result would be that several broadcasters would own football clubs, and we have already given our reasons (see paragraphs 2.169, 2.206 and 2.210) for concluding that this would have a number of detrimental effects on competition for TV rights and on football. If acquisitions do not take place we would expect that the effect on the value of football clubs of this merger would be only temporary. Indeed, there is a possibility that clubs which were not acquired by broadcasters would see their value decline, reflecting their reduced ability to compete with clubs owned by broadcasters.

2.218. We do not accept that broadcasters are better owners of football clubs than institutional shareholders as we would expect BSKyB's investment plans to be driven as much by commercial imperatives after the merger as they were before. In our view it is changes in management rather than in ownership that would affect the way Manchester United is run. BSKyB told us that it did not intend to interfere in the management of Manchester United following the merger. Were it to do so, we see no reason to suppose that this change would be of benefit to the public interest. In short, we are not convinced that the merger would have the public interest benefits claimed for it.

Conclusion on the public interest

2.219. Because our merger inquiry has overlapped with the hearing of the RPC case on the collective selling of Premier League rights, we have been faced with more than usual uncertainty about the future development of some of the critical features of the relevant markets. In these circumstances we concluded that it was necessary to judge the likely effects of the merger under scenarios involving either the existing or new selling arrangements for Premier League rights. In each case we examined the public interest effects that may be expected to result, first if the merger was the only merger between a broadcaster and a Premier League club, and second where the merger precipitated other such mergers.

2.220. In the context of the existing selling arrangements and the BSKyB/Manchester United merger being the only merger between a broadcaster and a Premier League club, we concluded that BSKyB is likely as a result of the merger to gain influence over and information about the Premier League's rights-selling arrangements that would not be available to its competitors. These factors, together with others—in particular the perception by other potential bidders of BSKyB's enhanced position—would give BSKyB an advantage in future sales of rights which in combination with its advantage as the incumbent broadcaster of Premier League football would mean that its chances of obtaining the rights would be substantially higher than they are at present and substantially higher than that of other broadcasters. This would have the adverse effect of reducing competition for rights leading to less choice for the Premier League of alternative broadcasting packages and less scope for innovation in the broadcasting of Premier League football.

2.221. If there were new selling arrangements (in particular, individual selling) and no other mergers between broadcasters and Premier League clubs, then BSKyB would, as a result of the merger, still have substantial advantages over other broadcasters competing for the rights of Premier League clubs. This would have the adverse effect of reducing competition for these rights and the consequential detriments of less innovation and reduced choice.

2.222. If existing selling arrangements continued and the merger precipitated one other broadcaster/Premier League club merger, it would still have adverse effects on competition broadly similar to those of the first scenario set out in paragraph 2.220.

2.223. If the merger precipitated several other mergers between broadcasters and Premier League clubs, then the only way in which the existing selling arrangements could survive would be if broadcasters agreed among themselves how to share the TV rights for Premier League matches. This outcome of the merger would have at least as adverse an effect on competition as the first scenario set out in paragraph 2.220.

2.224. If there were new selling arrangements (in particular individual selling) and the merger precipitated several mergers between broadcasters and Premier League clubs, there could be several different outcomes, but all of them would be less competitive than the situation in which rights were individually sold and no broadcaster/Premier League club mergers had occurred. Thus under this scenario the merger would have the adverse effect of reducing competition for the rights of Premier League clubs leading to less innovation and reduced choice.

2.225. In those circumstances where the merger may be expected to substantially enhance BSKyB's ability to secure Premier League rights in future (see paragraph 2.173) there would be further adverse effects. The merger would have the effect of restricting entry into the sports premium channel market by new premium channels. A reduced threat of entry would cause the prices of BSKyB's sports channels to be higher and choice and innovation less than they otherwise would be. Reduced entry into the sports premium channel market would feed through into reduced competition in the wider pay TV market.

2.226. We therefore conclude that:

- (a) whether the existing collective selling arrangements continue or are superseded by individual selling; and
- (b) whether in each case the merger is the only one between a broadcaster and a Premier League clubs or whether it precipitated further mergers,

the merger may be expected to reduce competition for Premier League rights with the consequential adverse effects we have identified in each case. Which of these scenarios might occur is difficult to judge, but if the merger goes ahead we think that one or other of them may be expected to occur.

2.227. We should emphasize that this conclusion does not depend on a view on whether, in the absence of the merger, the public interest consequences of individual selling as such are better or worse than those of collective selling.

2.228. Although we have based our conclusions mainly on the effects of the merger on competition, we have also looked at wider football issues. We have concluded that the merger would reinforce the trend towards greater inequality of wealth between clubs, weakening the smaller ones. We have also concluded that the merger would give BSKyB additional influence over Premier League decisions relating to the organization of football, leading to some decisions which would not reflect the long-term interests of football. On both counts the merger may be expected to have the adverse effect that the quality of English football would be damaged. This adverse effect would be more pronounced if the merger precipitated other mergers between broadcasters and Premier League clubs.

2.229. We were unable to identify any public interest benefits from the proposed merger.

2.230. We therefore conclude that the proposed merger between BSKyB and Manchester United may be expected to operate against the public interest with the adverse effects identified in paragraphs 2.220 to 2.225 and 2.228.

Recommendations

2.231. We have considered whether there were any undertakings that B SkyB and Manchester United might be asked to provide that would remedy the adverse effects we have identified. Because the core of our concern is the advantage that the merger would give B SkyB in the competition for Premier League rights, one possibility would be to remove Manchester United from the rights-selling process by requiring it to take no part in the decision and to receive no information about competing bids.

2.232. B SkyB and Manchester United said that this undertaking was unnecessary, for the reasons given in paragraphs 2.88 and 2.99. We have already considered and rejected those reasons in our discussion of the public interest issues. B SkyB and Manchester United further said that the proposed undertaking would be undemocratic and would unfairly discriminate against B SkyB in that other Premier League clubs which had links with other broadcasters (for example, Newcastle United and NTL) would not be similarly prevented from taking part in the rights-selling process. Any regulatory attention which singled out B SkyB for special treatment would have an adverse effect on its share price.

2.233. Under our terms of reference we have to investigate the proposed merger between B SkyB and Manchester United and our recommendations must relate to the adverse effects of this merger. However, we do have serious reservations about the proposed undertaking, the most important of which is that we do not believe that it would remedy the adverse effects we have identified, for the following reasons:

- (a) We do not believe that undertakings could ever prevent informal flows of information in an organization like the Premier League, especially when very substantial commercial incentives are involved.
- (b) Although the undertaking would prevent Manchester United from influencing other clubs on the day on which the Premier League's rights contract was awarded, our analysis of Manchester United's influence in paragraphs 2.87 to 2.98 identified other ways in which this influence could be exercised which would be unaffected by the undertaking.
- (c) As a result, it is unlikely that other bidders for Premier League rights would believe that the undertaking wholly removed any advantage B SkyB would gain from the merger. Their own bidding behaviour would therefore continue to be influenced by this perception.
- (d) If collective selling were to break down, the undertaking would be overtaken by events.

2.234. We have other doubts about this remedy: we think it would be undesirable to deprive Manchester United of any part in a decision of such importance for its future income; and the exclusion from this decision by a club of Manchester United's importance and commercial acumen would be disadvantageous to the Premier League.

2.235. Notwithstanding B SkyB's rejection of this remedy in the form that we suggested it and its strong view that any remedy along these lines was unnecessary, it told us that it was nevertheless prepared to offer two voluntary assurances which went part of the way to achieving the aim of our remedy. These assurances were

- (a) that Manchester United would bar itself from receiving any information from the Premier League about competing bids in advance of all final bids being received; and

- (b) that Manchester United would abstain from voting on the future collective sale of TV rights by the Premier League if BSkyB were to bid for those rights.

These assurances were subject to certain conditions designed to ensure that BSkyB was not put at an unfair disadvantage in the event of other Premier League clubs being bought by other broadcasters (see paragraphs 5.88 and 5.89).

2.236. These assurances are weaker than the remedy referred to in paragraph 2.231; for example, they would not prevent Manchester United from taking part in the discussion by the Premier League of the final bids for rights. As we have already concluded that our hypothetical remedy is too weak, this applies more strongly to the assurances offered by BSkyB.

2.237. Other parties suggested alternative ways of stopping Manchester United from sitting on both sides of the table during negotiations over the sale of rights, such as the erection of a Chinese wall between BSkyB and Manchester United. These alternatives appeared to us to be even less effective, because we are not convinced that a Chinese wall would work. We also think the arrangements proposed would be difficult to police and there would be no credible sanctions against a failure to comply.

2.238. Another possible remedy we considered was an undertaking by BSkyB that, if collective selling continued and it failed to gain the Premier League rights, it would not withdraw Manchester United from the Premier League or break the collective selling agreement by retaining Manchester United's rights for itself. BSkyB and Manchester United said that the remedy was unnecessary as the action it referred to was not feasible. However, BSkyB said that it would be prepared to give a voluntary assurance that it would not initiate discussions about the formation of a league to break away from the Premier League and would only become involved if invited by another interested party.

2.239. BSkyB explained that it had framed its undertaking in terms of initiating discussions about a breakaway league because it could not prevent clubs other than Manchester United from deciding to break away from the Premier League and if that happened Manchester United should not be forced to remain in the League. We quite understand why BSkyB wants to make this condition but, in our view, it undermines the effectiveness of the undertaking. In practice it would be very difficult to determine who initiated discussions about a breakaway from the Premier League with the consequence that the undertaking could not be monitored and enforced.

2.240. BSkyB subsequently elaborated its proposed assurance in order to try to tighten it up. In addition to not initiating discussions about the formation of a breakaway league it said that it would only become involved in such discussions if it were invited to do so by two other Premier League clubs and if the discussions had not been initiated by a shareholder in BSkyB which had a representative on the board of BSkyB. It further said that it would not induce a breach of any contract between the Premier League and another broadcaster concerning TV rights. It also offered another voluntary assurance to the effect that if the Premier League entered a valid contract with a broadcaster for the sale of rights on a collective basis, Manchester United would not unilaterally seek to exploit, on an individual basis, the rights to its Premier League matches which were the subject of the collective arrangements.

2.241. These further assurances clearly extend BSkyB's original proposal but they still do not go as far as the suggested remedy in paragraph 2.238. However, even in that stronger form, we do not think that the remedy deals with the adverse effects we have identified. In concluding that the merger would reduce competition for Premier League rights, we have put very little weight on the argument that BSkyB could credibly threaten to withdraw Manchester United from the Premier League or from the League's collective selling arrange-

ments, if they continue. As our conclusions do not depend upon the conduct which the remedy was designed to rectify, the remedy itself (which we put forward hypothetically at an early stage in our inquiry) would be of marginal value.

2.242. It was suggested to us that one way to ensure that BSkyB could not secure all live rights to Premier League games for the foreseeable future would be for the Premier League to cease to sell these rights exclusively to a single broadcaster. If the rights were divided into two or more different packages and no broadcaster were allowed to buy more than one package, competition between sports channel operators would be stimulated notwithstanding the merger.

2.243. We rejected this possible remedy for the following reasons:

- (a) It did not deal with what we see as the main adverse effect of the merger, namely the advantage it would give BSkyB over its competitors in bidding for Premier League rights.
- (b) Selling rights exclusively can be expected to maximize the revenue from the sale. We think it would not be reasonable to attempt to remedy the adverse effects of the merger by imposing on a third party (ie the Premier League) a remedy which would limit its freedom of action and work to its financial disadvantage.
- (c) Exclusive selling by the Premier League is one of the issues currently before the RPC. It would be inappropriate for us to propose remedies which prejudice the outcome of the RPC case.

2.244. We considered a more limited restriction on exclusive selling which would involve BSkyB giving undertakings not to purchase all of the Premier League's live rights. BSkyB and Manchester United said that this remedy would be inappropriate in view of the RPC case. They also argued that it would be detrimental to the Premier League to prevent BSkyB from bidding for exclusive rights, that it could shut BSkyB out of bidding for Premier League rights for an indefinite period which would be a material restriction on a major area of its business, and that it would distort competition.

2.245. We do not agree that we are prevented by the RPC case from proposing this undertaking: the RPC case involves exclusivity in general whereas our hypothetical remedy is about only one particular instance of it. However, we accept that the other arguments put by BSkyB and Manchester United have force. As other broadcasters would be able to bid for exclusive rights, they would always be able to outbid BSkyB. The effect of the undertaking, therefore, would be to distort the bidding process and reduce competition for Premier League rights. We do not want to prevent BSkyB from making competitive bids. This would be both undesirable in itself and would lead to the Premier League receiving less for its rights than would otherwise be the case.

2.246. The remedies that we have been discussing so far all relate to the collective selling of rights. We also considered some proposals relating to individual selling. These included an undertaking by BSkyB that Manchester United would sell its rights at arm's length (that is, with no preferential treatment for BSkyB) and an undertaking that BSkyB would not purchase the rights of more than a specified proportion of Premier League clubs. BSkyB and Manchester United made various objections to these proposals including, in Manchester United's case, the argument that it was inappropriate for the MMC to propose undertakings relating to circumstances which may not come about (namely the ending of collective selling as a result of the DGFT winning the RPC case). However, BSkyB did offer an alternative undertaking, which was to make available on reasonable commercial terms a highlights pack-

age featuring Manchester United's Premier League matches for televising on a public free-to-air channel distributed via all available UK delivery platforms.

2.247. Because the merger may be expected to have adverse effects in the context of the existing collective selling of rights, remedies relating only to any future individual selling of rights would not deal with these adverse effects. The proposed remedies are also unattractive in other ways:

- (a) The arm's length selling arrangement is subject to similar drawbacks as a Chinese wall between BSkyB and Manchester United which, as we have said already, could not be effectively monitored and enforced.
- (b) An undertaking by BSkyB not to purchase the rights of more than a proportion of clubs would mean that some clubs could not sell their rights to BSkyB. This would reduce competition, reduce the choice available to clubs and probably lead to them getting less for their rights than would otherwise be the case.
- (c) BSkyB's offer on a highlights package would not remedy the main adverse effect, which concerns the sale of live TV rights.

2.248. The BBC suggested to us that BSkyB should undertake not to buy the rights to highlights, recorded games or live radio broadcasts. We have the same objection to this as we do to BSkyB's offer on highlights, namely that it does not deal with competition for live TV rights.

2.249. Those parties whose primary concern was the impact of the merger on football believed that its adverse effects could not be dealt with by undertakings. The adverse effects we have identified, namely increased inequality between clubs and the influence of broadcasters on the organization of football, do not seem to us to be matters which could be rectified by undertakings from BSkyB. Effective remedies would involve a high degree of intervention by the Government in the administration of football. Whether such intervention is desirable on other grounds is not a matter for us. We do not think it could be justified as an appropriate and proportionate remedy for the adverse effects of the proposed merger.

2.250. In our view the only remedy which would deal with the full range of the adverse effects we have identified would be prohibition of the merger. It was put to us by BSkyB and Manchester United that prohibition of this merger would not prevent BSkyB or other broadcasters from acquiring Premier League clubs whose gross assets were insufficient to meet the test in the FTA for referral to the MMC. In our view, uncertainty about what future mergers might or might not be referred to us and the conclusions of the MMC about any such merger cannot prevent us from making recommendations about this merger.

2.251. BSkyB and Manchester United also argued that prohibition of the merger would be disproportionate. We do not agree. The adverse effects of the merger, in particular the reduction of competition for Premier League rights and the consequential reduction of competition in the sports premium channel market and the wider pay TV market, appear to us to be very serious. As it is our view that no undertakings would remove these adverse effects, we conclude that prohibiting the merger is both an appropriate and a proportionate remedy, and we recommend accordingly.