Neutral citation [2008] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Cases: 1095/4/8/08
1096/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

29 September 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

-v-

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Respondents

VIRGIN MEDIA, INC.

Applicant

-v-

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Respondents

Heard at Victoria House on 3-5 June 2008

JUDGMENT (Non-Confidential Version)

Note: Excisions in this judgment marked "[…][**C**]" relate to passages provisionally excluded having regard to Schedule 4, paragraph 1 to the Enterprise Act 2002

CONTENTS

I. INTRODUCTION 1

II. BACKGROUND AND STATUTORY FRAMEWORK 2

III. PROCEDURAL STEPS 9

IV. SKY'S APPLICATION 11

V. VIRGIN'S APPLICATION 53

VI. SKY'S AND VIRGIN'S CHALLENGES TO THE REMEDIES 78

SKY'S CHALLENGE TO THE REMEDY 82

VIRGIN'S CHALLENGE TO THE REMEDY 91

VII. THE TRIBUNAL'S CONCLUSIONS 99

APPEARANCES

Mr Michael Beloff QC, Mr James Flynn QC and Mr Aidan Robertson (instructed by Allen & Overy LLP) appeared for British Sky Broadcasting Group plc.

Mr Richard Gordon QC and Miss Marie Demetriou (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Mr John Swift QC, Mr Daniel Beard and Mr Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Mr Rupert Anderson QC and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform.

I. INTRODUCTION

1. By notices of application dated 22 February 2008 and 25 February 2008 respectively British Sky Broadcasting Group plc ("Sky"), and Virgin Media, Inc. ("Virgin"), apply pursuant to section 120 of the Enterprise Act 2002 ("the Act") for a review of the decision of the Competition Commission ("the Commission"), contained in a Report entitled "Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc" ("the Report") and a related decision by the Secretary of State for Business, Enterprise and Regulatory Reform of 29 January 2008 ("the Secretary of State" and "the Decision"). In an application for review under section 120 the Tribunal is required by subsection 120(4) to apply the same principles as would be applied by a court on an application for judicial review.

2. The Report contained the Commission's findings as to the effects of Sky's purchase, in November 2006, of 696 million shares in one of its main competitors, ITV plc ("ITV"), amounting to 17.9% of ITV's issued share capital ("the Acquisition"). After an investigation extending over nearly 6 months the Commission found that the Acquisition had created a "relevant merger situation" ("RMS") for the purposes of subsection 47(1) of the Act, and that the creation of that situation was expected to result in a substantial lessening of competition ("SLC") which was expected to operate against the public interest. The Commission also found that if it had had regard *only* to the media public interest consideration, which had been referred to it for investigation, it would not have expected the Acquisition to operate against the public interest. In order to remedy the SLC and consequent adverse effects on the public interest, the Commission recommended *inter alia* that partial divestiture of the shares, to a level below 7.5%, should be required within a specified period. By the Decision the Secretary of State, in effect, adopted the recommendation and findings of the Commission and imposed the remedy which it had recommended.

3. Sky's and Virgin's applications for review under section 120, between them, challenge almost every element in the Report. Sky challenges the validity of the Commission's findings of RMS and SLC on a number of grounds as well as contending that the recommended remedy is disproportionate and irrational. Virgin contends that the

Commission and Secretary of State misdirected themselves as to the correct approach to the legislation which provides for the relevant media public interest consideration, with the result that they took account of irrelevant considerations and reached an irrational conclusion; accordingly the finding that there was no adverse effect on the public interest in that regard cannot stand and must be set aside. In addition Virgin mounts an attack on the remedy imposed on Sky which is a mirror image of Sky's challenge: Virgin argues that here too the Commission and Secretary of State misapplied the relevant statutory provisions, and that a correct application of them would have led to the imposition of total or a significantly greater divestiture of the shares which Sky had purchased in ITV.

4. Sky and Virgin each seek orders for consequential relief corresponding to their respective challenges, including orders that the relevant findings in the Report and the relevant aspects of the Decision be set aside, and that the issues in question be referred back to the Commission and/or the Secretary of State for re-consideration in accordance with the Tribunal's judgment.

5. Sky and Virgin have each intervened in the other's application for review.

6. In view of the inter-relationship between the two applications, they were heard together by the Tribunal, although not formally joined or consolidated. For the same reason the Tribunal considers it appropriate to decide both applications in a single judgment. This, together with the root and branch nature of Sky's challenge to the Report, account for the length of this judgment.

7. Before dealing with Sky and Virgin's contentions in more detail, it is necessary to describe the factual background and statutory framework.

II. BACKGROUND AND STATUTORY FRAMEWORK

8. Descriptions of Sky and ITV are set out at paragraphs 2.34-2.46 of the Report. In summary Sky is a leading broadcaster of sports, films, news and other entertainment programmes. It acquires programmes to broadcast on its own channels and supplies channels wholesale to other retailers. Three of its channels are made available free-to-

air, but almost three quarters of Sky's revenue is earned through subscriptions to its pay TV offering, the remainder coming from advertising. ITV (in various manifestations) has been the UK's largest commercial TV broadcaster for more than half a century. It also produces content through ITV Productions, and broadcasts free-to-air programmes via analogue terrestrial, digital terrestrial and digital satellite television platforms. It has a 40% stake in Independent Television News Limited ("ITN"). Three quarters of its revenue is derived from advertising.

9. The Commission found, and this was not challenged by Sky in these proceedings, that the free-to-air services provided by ITV, BBC, Channel 4 and Five, represent a constraint upon Sky's pay TV prices. The key elements of this constraint are ITV and BBC. Thus ITV constitutes a significant competitor to Sky in the all-TV market in the UK. (See Report paragraphs 14 to 16 and 4.62 to 4.88.)

10. Following the purchase by Sky of 17.9% of the shares in ITV on 17 November 2006 at a total price of £940 million, making Sky by far the largest shareholder in ITV, the Office of Fair Trading ("OFT") received complaints from third parties regarding the Acquisition. In early December 2006, the OFT requested a merger submission from Sky.

11. On 26 February 2007, the Secretary of State issued a notice to the OFT, pursuant to section 42 of the Act (the "Intervention Notice"), stating that he believed it was or may have been the case that an RMS had been created and that the public interest consideration contained in subsection 58(2C)(a) of the Act was relevant to a consideration of the merger situation. That public interest consideration was: "the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience."

12. The Secretary of State requested the Office of Communications ("OFCOM") to prepare a report pursuant to section 44A of the Act as to the effect of the Acquisition on the identified public interest consideration. The OFT was required, under section 44 of the Act, to give a report containing its advice on the considerations relevant to the making

of a reference under section 22 which should bear upon the Secretary of State's decision as to whether to make a reference to the Commission under section 45.

13. Having received reports from the OFT and OFCOM pursuant to sections 44 and 44A of the Act respectively, the Secretary of State, on 24 May 2007, referred the Acquisition to the Commission under subsection 45(2) for investigation and report. This was the first reference to be made under Chapter 2 of Part 3 of the Act (Public Interest Cases).

14. With effect from 26 June 2007 the Secretary of State accepted statutory undertakings from Sky to ensure that no action would be taken pending final determination of the reference which might prejudice the reference or impede the taking of any actions following its conclusion. These undertakings can be accessed via the Commission's website.

15. In connection with a reference under subsection 45(2) of the Act, the Commission's duties are defined by section 47 of the Act which provides, in so far as material:

> "**47 Questions to be decided on references under section 45**
>
> (1) The Commission shall, on a reference under section 45(2) or (3), decide whether a relevant merger situation has been created.
>
> (2) If the Commission decides that such a situation has been created, it shall, on a reference under section 45(2), decide the following additional questions—
>
> (a) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and
>
> (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest."

16. As to the RMS question, sections 23 and 26 of the Act, so far as relevant, provide as follows:

> "**23 Relevant merger situations**
>
> (1) For the purposes of this Part, a relevant merger situation has been created if—
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

(b) the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million.

…

26 Enterprises ceasing to be distinct enterprises

(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).

…

(3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it.

(4) For the purposes of subsection (1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—

(a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or

(b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy."

17. Section 50(1) of the Act provides that the Commission shall prepare a report on a reference under section 45 and give it to the Secretary of State within the period permitted by section 51. Subsection 51(1) of the Act allowed the Commission 24 weeks to prepare the Report and to provide it to the Secretary of State. On 17 September 2007 the Commission extended the deadline for the submission of the Report by eight weeks pursuant to subsection 51(3).

18. As regards the contents of the Report, subsection 50(2) provides:

"(2) The report shall, in particular, contain—

(a) the decisions of the Commission on the questions which it is required to answer by virtue of section 47;

(b) its reasons for its decisions; and

(c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions."

19. On 14 December 2007 the Commission sent the Report to the Secretary of State. The non-confidential version of the Report was notified to Sky on 19 December 2007. The Secretary of State published the Report on 20 December 2007.

20. The Commission concluded that Sky's acquisition of a 17.9% stake in ITV had resulted in an RMS being created but, having regard only to the media public interest consideration specified in subsection 58(2C)(a) of the Act, would not be expected to operate against the public interest. However, the Commission found that the Acquisition was likely to result in an SLC with resulting adverse effects on the public interest based on an assessment of the competitive effects of the Acquisition.

21. In the light of its adverse public interest finding, the Commission was required by subsection 47(7) of the Act to decide the following additional questions:

> "(a) whether action should be taken by the Secretary of State under section 55 for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation;
>
> (b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

22. Subsection 47(9) provides that, in deciding the questions mentioned in subsection (7), the Commission:

> "shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to—
>
> (a) the adverse effects to the public interest; or
>
> (b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it."

23. Under subsection 47(10) the Commission may also have regard to the effect of any action on any relevant customer benefits "in relation to the creation of the relevant merger situation concerned".

24. In consequence of the Commission's adverse public interest finding in respect of an SLC, the Commission considered three remedy options, namely divestiture of the whole of Sky's shareholding in ITV, divestiture of such part of Sky's shareholding in ITV that it would cease to have material influence over ITV, and behavioural remedies to accompany partial divestiture remedies. In addition, the Commission assessed the suitability of two remedies proposed by Sky: these were placing the entirety of Sky's voting rights in ITV in a voting trust and an undertaking by Sky not to exercise any of its voting rights in ITV. The Commission examined each of these remedies and considered whether they would address the SLC it had identified and/or the adverse effects on the public interest. The Commission ultimately concluded that remedial action should be taken by the Secretary of State to require Sky partially to divest its shareholding in ITV down to a level below 7.5%.

25. Under subsection 54(5) of the Act the Secretary of State had 30 business days from the date of receipt of the Commission's Report in which to make and publish a decision pursuant to subsection 54(2).

26. Subsection 54(2) provides that:

> "The Secretary of State shall decide whether to make an adverse public interest finding in relation to a relevant merger situation and whether to make no finding at all in the matter".

27. In deciding whether to make an adverse public interest finding the Secretary of State was required by virtue of subsection 54(7) of the Act to accept the Commission's findings that an RMS had been created and that it had resulted in an SLC within the UK market for all television services. By virtue of subsection 45(6) of the Act that anti-competitive outcome was deemed to be adverse to the public interest unless justified by one or more relevant public interest considerations.

28. Subsection 54(3) required the Secretary of State to make an adverse public interest finding if he found that the merger may be expected to operate against the public

interest on the basis of an anti-competitive outcome and/or on the basis of the relevant public interest consideration.

29. As the Secretary of State decided to make an adverse public interest finding in relation to the Acquisition on the basis of the Commission's finding of an SLC, he was empowered under subsection 55(2) to:

> "take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned".

30. The Secretary of State could only make no finding at all if he decided that the public interest consideration was irrelevant to an assessment of the merger. In the Decision the Secretary of State considered that the question of the relevance of the public interest consideration must be addressed before, and separately from, reaching any substantive conclusion as to whether or not the merger may actually have a detrimental effect on the public interest.

31. The Secretary of State decided on the basis of the Report that the public interest consideration could not reasonably be regarded as irrelevant to an assessment of the RMS and that, as a result, he could not decide to make no finding at all in the case. In particular, the Commission undertook a qualitative assessment of the likelihood of the Acquisition having an impact on the sufficiency of plurality of persons with control of the media enterprises serving the UK audiences for television news and for cross media news. In reaching its conclusions the Commission examined the extent to which Sky may be able to exert influence over ITV, the impact of applicable regulatory mechanisms relating to ensuring high standards and quality in news programming and the culture prevalent within television news production.

32. The Secretary of State decided to make an adverse public interest finding only on the basis of an anti-competitive outcome, having decided that the Acquisition did not have an adverse public interest effect so far as the identified public interest consideration was concerned. Further, he decided to accept the measures recommended by the Commission in order to remedy, mitigate or prevent the effects adverse to the public interest.

33. In reaching the Decision, the Secretary of State took into account the Report and its appendices and the representations made to him including in particular those made by Virgin, ITV and the Campaign for Press and Broadcasting Freedom, together with representations made both in writing and orally by Sky following publication of the Report.

34. So far as remedies are concerned, the Secretary of State was required to have regard in particular to the Report, by virtue of subsection 55(3) of the Act. The Secretary of State decided to impose the remedies recommended by the Commission, specifically, partial divestiture of Sky's shares in ITV down to a level below 7.5% and associated undertakings from Sky, including undertakings which require it not to dispose of the shares to an associated person, not to seek or accept representation on the Board of ITV and not to reacquire shares in ITV.

35. The Commission recommended a period within which divestiture was to take place. In the Decision the Secretary of State accepted that recommendation having regard to representations made to him by the relevant parties, and accepted Sky's request that the details of the divestiture period not be disclosed. The period within which divestiture is to take place will begin from the date that suitable divestiture undertakings are finalised.

III. PROCEDURAL STEPS

36. By a reasoned order of 9 January 2008, [2008] CAT 1, the President extended the time within which any application was to be made pursuant to section 120 of the Act in relation to the Report so as to be coterminous with the expiry of the time for making any application pursuant to section 120 in relation to the Decision, which was not made until 29 January 2008.

37. Sky filed its application for review with the Tribunal Registry on 22 February 2008. The notice of application annexed various supporting documents, including five reports prepared by the corporate advisory firm Lintstock Ltd ("Lintstock"), to which we refer in more detail below.

38. Virgin filed its application for review on 25 February 2008, which was supported by various documents including Virgin's submissions to the OFT, OFCOM, the Commission and the Secretary of State.

39. Both Sky's and Virgin's applications are brought under section 120 of the Act. Section 120, so far as material, provides:

> "(1) Any person aggrieved by a decision of … the Secretary of State or the Commission … in connection with a reference … in relation to a relevant merger situation … may apply to the Competition Appeal Tribunal for a review of that decision.
>
> …
>
> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may -
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal…"

40. It is not in dispute that Sky and Virgin are "persons aggrieved" for the purposes of subsection 120(1).

41. At a case management conference held on 11 March 2008 Virgin was granted permission to intervene in the Sky proceedings and Sky was granted permission to intervene in the Virgin proceedings. There were no other requests for permission to intervene. In particular ITV did not apply to intervene in either application. However, ITV did make written observations to the Tribunal in respect of the disclosure to Sky and Virgin of confidential evidence and other material provided by ITV and its advisers to the Commission in the course of the investigation.

42. On 31 March 2008, a confidentiality ring was set up by the Tribunal to ensure that information that the parties considered confidential was kept within the circle of the parties' legal advisers. On 9 April 2008, an application was made by Sky for disclosure

within the confidentiality ring of the evidence and material supplied to the Commission by ITV and its advisers. After hearing the parties, on 17 April 2008 the President ruled that the material requested by Sky was necessary for dealing fairly with its grounds of review, and ordered all documents submitted by or on behalf of ITV on which the Commission had relied in reaching certain findings in its Report to be disclosed within the confidentiality ring: [2008] CAT 7. On 7 May 2008, the President rejected an application by Sky for the confidentiality ring to be extended to include two external financial advisers (instructed by Sky) so that they could review two documents submitted by ITV to the Commission. In reaching his decision, the President noted that the documents in question were and are highly sensitive and that their disclosure to non-legal advisers was not necessary to enable Sky to mount its challenge to the rationality of the Commission's findings: [2008] CAT 9.

43. The oral hearing of the applications took place over three days from 3 to 5 June 2008.

44. In preparing the present judgment, the Tribunal has had regard to the fact that some aspects of its decision are only comprehensible if information and documents, said to be confidential to ITV which ITV had provided to the Commission and on which the Commission had either relied in the Report or in its Defences to the applications, are referred to. The Tribunal has redacted from this version of the judgment certain information the disclosure of which might significantly harm the legitimate business interests of the undertakings to which the information relates: see paragraphs 1(2)(b) and (3) of Schedule 4 to the Act. The Tribunal will consider any representations which interested parties may make as to the provisional excisions and intends to publish a further version of the judgment which includes information redacted in this version.

IV. SKY'S APPLICATION

Preliminary observations

45. Sky maintains that the decisions of the Commission and the Secretary of State are vitiated on various grounds. Much of Sky's application for review is concerned with its arguments that certain key findings of the Commission are irrational or perverse or based upon inadequate evidence. In relation to those arguments it is necessary to consider the relevant material which was before the Commission. However, there are a

number of other points made by Sky which, although they are not necessarily in the nature of preliminary issues, can nevertheless be conveniently examined at the outset.

The Tribunal's approach to applications under section 120

46. The first such point relates to the approach which the Tribunal should adopt when dealing with an application for review under section 120. In particular it concerns the intensity of review which the Tribunal, as a specialist judicial body, should undertake in such an application.

47. Subsection 120(4) of the Act requires the Tribunal in determining an application under that section to "apply the same principles as would be applied by a court on an application for judicial review".

48. It is Sky's case that, whereas under subsection 120(4) of the Act the Tribunal is obliged to apply the same principles as would be applied by a court on an application for judicial review, the Tribunal is not obliged by statute or otherwise to apply them in the same way. At the hearing Mr Beloff QC, who appeared on behalf of Sky in relation to this point, argued that Parliament has by design chosen to allocate the power of review to the Tribunal, a specialist body, as opposed to a generalist court, and must be taken to have anticipated the particular consequences for the intensity of review that would follow from that choice. According to Sky, the Commission's and Secretary of State's approach restricts the Tribunal's role to a minimalist form of judicial supervision which is in principle inapt in the context of applications under section 120.

49. In support of his arguments in this respect Mr Beloff drew our attention to a number of materials. These included certain extracts from Hansard containing statements by the minister responsible for the Enterprise Bill, which referred to the intention that in respect of what is now section 120 the Tribunal would offer a "faster and less expensive route to justice" in view of its expertise in competition law and practice than would be available through the courts. At the same time however the minister emphasised that the jurisdiction will "mirror the principles applied to judicial review by the courts" (see Hansard (HC Debates), 1 May 2002, cols 415 to 416).

50. Mr Beloff also took us to dicta from the well-known case *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, including the following passage from the speech of Lord Wilberforce, which was cited by the Vice-Chancellor (as he then was) in *Office of Fair Trading v IBA Health Limited* [2004] EWCA Civ 142 at paragraphs [45] and [66] of his judgment:

> "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account."

51. He also referred to *Interbrew SA v Competition Commission* [2001] EWHC Admin 367 where leading counsel is recorded by Moses J (as he then was) arguing as follows:

> "The reasoning contains, submits Mr. Sumption QC, a series of contradictions and non-sequiturs combined with assumptions not based on the evidence and contrary to the probabilities." (Paragraph [32])

52. Moses J had said in the previous paragraph:

> "In the instant case it does not seem to me that my ruling depends upon the extent to which I think those reasons lack cogency. If the reasons make no sense and are without foundation then I should so rule." (Paragraph [31])

53. Thus the learned judge appeared to be applying a test of whether the reasons made "no sense and are without foundation" and, as Mr Beloff suggested, to be equating reasons "lacking cogency" with perversity and irrationality. In any event in dealing with the issues before him the learned judge used language indicating an entirely orthodox approach in the context of a judicial review; for example:

> "There was accordingly an evidential basis for the fear that Interbrew would not direct competition with the same vigour…" (Paragraph [51])
>
> "The Commission was entitled to take the view that…" (Paragraph [56])
>
> "Whether Whitbread would be a viable business and a strong competitor was a matter upon which more than one view could be held." (Paragraph [56])

54. Finally, in relation to the general judicial review position, Mr Beloff referred us to Administrative Law (9th edition) edited by Sir William Wade and Christopher Forsyth,

under the heading "No evidence rule", at page 272 where the following passage appears:

> "…the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
>
> 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on the evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires." (footnotes omitted)

55. We were next referred to the case-law directly pertinent to the jurisdiction of the Tribunal under section 120 of the Act, including the decision of the Court of Appeal in *IBA* (above), and a number of decisions of the Tribunal which followed that case, namely *Somerfield plc v Competition Commission* [2006] CAT 4, *Unichem Ltd v Office of Fair Trading* [2005] CAT 8, *Celesio AG v Office of Fair Trading* [2006] CAT 9, *Stericycle International LLC v Competition Commission* [2006] CAT 21 and *Co-operative Group (CWS) Ltd v Office of Fair Trading* [2007] CAT 24.

56. The *IBA* decision concerned an application by IBA Healthcare Ltd challenging a decision by the OFT not to refer an anticipated merger between two of its competitors, iSoft Group plc and Torex plc, to the Commission for further investigation. Mr Beloff reminded us of the familiar passages in the judgment of Carnwath LJ at paragraphs [88]-[100]. From these a number of principles emerge:

    (a) Subsection 120(4) on its face contains a clear indication that, notwithstanding the Tribunal's specialist composition, a review under section 120 is not an appeal on the merits but a judicial review as applied by the Administrative Court (paragraph [88]).

    (b) The Tribunal is not permitted to apply a different concept of "reasonableness" from that established by the case-law applicable to judicial review (paragraph [90]).

(c) However, in judicial review there is a spectrum of intensity of review ranging from low intensity, where issues under review depend, essentially, on political judgment, to higher intensity as, for example, in cases involving fundamental rights; in the latter category the court asks the question whether a reasonable decision-maker, on the material before him, could reasonably conclude that the interference with the fundamental right in question was justifiable (paragraph [91]).

(d) Intensity of review can also be affected by whether the matter is properly within the province of the court, which is not equipped to decide issues depending on administrative or political judgment (paragraph [92]).

(e) In a case such as *IBA*, where the issue for the OFT was one of factual judgment, the court is entitled to inquire whether there was adequate material to support the conclusion reached (paragraph [93]).

(f) In relation to inferences to be drawn from primary facts, the court's duty "is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado." (The latter being a passage from the speech of Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14) (paragraphs [94] to [96]).

(g) The judicial review principles exemplified in the case-law are flexible enough to accommodate a specialist tribunal and to adapt to the specific statutory context. Although such a tribunal may be better able to deal with cases expeditiously and with a full understanding of the technological background, the test it should apply is the same as that applied by a court (paragraph [100]).

57. In taking us also to the five decisions of the Tribunal (see paragraph [55] above) in which, in a number of different contexts, the judicial review principles elucidated by the Court of Appeal in *IBA* were applied, Mr Beloff sought to make the following point: that the principles have moved on from what he called "the immature days of judicial review" when perversity or irrationality were next door to mental illness; the latter concepts were now a more sophisticated and intrusive mode of challenge.

58. Finally Mr Beloff submitted that the judicial review principles applied in the cases are similar to those applied in the European Community ("EC") context by the Court of First Instance ("CFI") in a review of a merger decision of the EC Commission. In this regard he cited the judgment of the European Court of Justice ("ECJ") in Case C-12/03, *Commission v Tetra Laval* [2005] ECR I-987.

59. Mr Beloff's submissions on this issue amounted to the proposition that the Tribunal, whilst applying the same principles as the Administrative Court would apply, should do so with a greater intensity of review because it is a specialist judicial body.

60. It is of course correct that the Tribunal is a specialist body to which Parliament has entrusted applications to review decisions of the OFT (and other regulators), the Commission, and the Secretary of State in the context of the complex statutory merger regime in the Act. Such cases often concern consideration of concepts and issues with which the Tribunal is also required to grapple on a day to day basis in its other jurisdictions, and in particular in its appellate capacities under the Competition Act 1998 and the Communications Act 2003. This is the reason that the Tribunal's composition is required by statute to contain competition expertise, and its members are selected for their relevant knowledge and experience.

61. It is therefore to be expected that in its consideration of the cases which come before it, including applications under section 120, the Tribunal will enjoy a degree of familiarity with the statutory regime, the relevant case-law and some of the legal and economic concepts which arise. As far as it is able the Tribunal brings these attributes to bear in all such matters. It is also possible that in so doing the Tribunal is in a position on occasions to offer a "faster and less expensive route to justice" (see paragraph [49] above), and that its familiarity with some of the issues and concepts as well as the relevant expertise at its disposal, may render the Tribunal a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review the decision of a specialist regulator.

62. However, in our view none of this means that the Tribunal is applying judicial review principles in a different way or is exercising a higher intensity of review than would be the case if the matter were before the Administrative Court. Further, by no means all of

the findings which may be the subject of a section 120 challenge are such as would necessarily call for expertise in competition law and practice. For example, in the present case there is a challenge to a finding by the Commission that, by reason of (in particular) the size of its shareholding, Sky is likely to be able to exercise material influence over the policy of ITV through its ability to block a special resolution or a scheme of arrangement. In assessing the adequacy of the factual basis for this finding the Tribunal can, of course, bring to bear the business knowledge and experience of its panel members, but has no other intrinsic advantage that might not be found in the Administrative Court.

63. If Mr Beloff's submission amounts to no more than that the Tribunal should use its specialist expertise wherever possible when assessing the validity of findings and the lawfulness of decisions in the context of section 120 reviews, then such submission can hardly be disputed. However this would not in our view be applying the principles of judicial review in a different way from the Administrative Court. If his submission amounts to more than this then it seems to us that it is not supported by the authorities to which he has drawn our attention, and is inconsistent with *IBA* and with subsection 120(4) itself. We consider that the principles we should apply in this application are those which are helpfully set out and discussed in, in particular, *Tameside* and *IBA*, and which were applied in the Tribunal decisions cited to us. As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged findings. It is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible in a review under section 120.

64. According to the Commission, the Tribunal is not entitled to review a finding of fact unless it is "manifestly and egregiously wrong". The submission is based on the Court of Appeal's decision in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49. The issue in that case related to the circumstances in which a mistake of fact giving rise to unfairness may constitute an error of law for the purposes of a statutory

appeal on a point of law. Notwithstanding that the case did not involve judicial review as such, the Court of Appeal took it to be "a generally safe working rule that the substantive grounds for intervention are identical" (paragraph [42]). Having reviewed the contrasting views as to whether a mistake of fact of that type could represent such a ground, Carnwath LJ, giving the judgment of the Court of Appeal, specified four criteria for identifying a mistake of fact by a public body that causes unfairness such as to render the final decision of that body challengeable by way of an appeal on a point of law (or by judicial review):

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without laying down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the Criminal Injuries Compensation Board case. First, there must have been a mistake as to existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

65. Those principles are now well-established in some areas subject to judicial review, notably in asylum cases.

66. It seems to us that in its submissions on this point the Commission is conflating this ground of review with a separate ground which relates to the adequacy of the material available to the decision-maker as a basis for a particular finding (closely allied with the concepts of irrationality and perversity). A tribunal conducting a judicial review can, as we have already seen from *IBA*, review the available factual material to see whether the decision-maker was entitled to make the finding in question. If the material is such that no reasonable decision-maker could reach that conclusion then the latter is unsustainable in law. (See also the "no evidence" principle to which we have referred above.)

67. These two grounds of review are distinct albeit closely related: for example a decision based on a material mistake of fact which results in unfairness may well be irrational. However, in so far as Sky has challenged findings of fact by the Commission it has relied upon the irrationality/perversity/inadequacy of evidence. In its case against the

Report and the Decision Sky has not developed to any extent an argument based upon a specific mistake or mistakes of fact in the sense in which that concept is understood in the light of *E v Secretary of State for the Home Department*, notwithstanding the references to that case in the pleadings. This is not surprising, as the first and second requirements for the application of this ground set out in the judgment of Carnwath LJ (above) have not been established here.

Standard of proof

68. A contention which underlies many of Sky's criticisms of the Report is to the effect that the Commission failed properly to direct itself as to the standard of proof required in order to be entitled to conclude, in particular, that Sky has material influence over the policy of ITV for the purposes of subsection 26(3) of the Act and that an SLC may thereby be expected within a relevant market in the United Kingdom.

69. In considering the nature of the assessment which is required to be undertaken by the Commission, and the degree of likelihood which must be attained before certain sorts of decision can be reached under Part 3 of the Act, it is necessary to consider the relevant legal framework. So far as concerns the RMS test (including the "material influence" test), the relevant provisions are found in sections 23, 26(3) and 47(1) of the Act set out at paragraphs [15]-[16] above. Essentially, by virtue of section 47 the Commission must "decide whether a relevant merger situation has been created", and if so whether it "has resulted, or may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

70. It is common ground that, in applying the statutory tests, the Commission must satisfy itself as to the relevant criteria in accordance with the normal civil standard of proof, i.e. on the balance of probabilities. In other words the Commission must conclude that on the evidence the occurrence of the events referred to in the statutory test was, or will be, more likely than not. The applicability of the balance of probabilities test is recognised in the Commission's CC2 (Merger References: Competition Commission Guidelines), published in June 2003 (the "CC Guidelines"). See also *IBA Health v OFT* [2003] CAT 27 at paragraph [182], and *IBA* (in the Court of Appeal) per the Vice-Chancellor at paragraph [46].

71. It is said by Sky that there is a need for analytical rigour because the Commission's decision is based substantially upon a form of prospective analysis. Merger cases typically require competition authorities to peer into the future and assess the likelihood that a particular event or chain of events will occur. As the European Court of Justice has noted in *Tetra Laval* (above at paragraph [58]), to which we were referred by Sky, this is an inherently imprecise exercise. The ECJ referred to the need to carry out such prospective analysis with great care on the basis of convincing evidence given that, in that case, the European Commission had made findings of likely anti-competitive conglomerate effects of a merger. (See paragraphs [39] to [44] of the judgment.)

72. Sky argues that the Commission misdirected itself as to the correct standard of proof to be applied in relation to the relevant statutory questions. Its essential argument in this regard, which is deployed against a number of findings of the Commission, is as follows. So far as RMS is concerned the Commission has purported to conclude on the balance of probabilities that the Acquisition has given Sky material influence over ITV's policy by reason of *inter alia* Sky's ability to block a special resolution of ITV's general meeting, in circumstances where it is likely that in the following two to three years ITV will wish to make a strategic investment for which funding requiring a special resolution will be needed. Such a finding does not comply with the standard of proof required of the Commission: the Commission ought: (1) to have taken each specific example of a potential strategic investment which the Commission considers ITV might wish to make within the period under consideration, and (2) to have satisfied itself on the balance of probabilities that the particular investment was more likely than not to become a reality, and (3) to have satisfied itself on the balance of probabilities that funding requiring a special resolution would be needed for that particular investment, and (4) in each case to have identified the evidence relied upon in order to establish each such element. (See for example paragraphs [50] to [59] and [70] to [73] of the Notice of Application, where this point is made alongside other points.)

73. Similarly, Sky submits that there are three elements to the SLC assessment under subsection 47(2)(a) of the Act:

> "First, the Commission must decide whether a particular event or course of events has occurred or may be expected to occur.

> Secondly, having made that finding, the Commission must decide whether that event or course of events has resulted in a lessening of competition, or may be expected to result in a lessening of competition, within any market or markets in the United Kingdom for goods or services.
>
> Thirdly, the Commission must decide whether any such lessening of competition is substantial."
>
> (See paragraph [104] of Sky's Notice of Application.)

74. According to Sky, each of these elements, too, must be established separately on the balance of probabilities in respect of each future investment relied upon, and by reference to all relevant evidence, which must be identified, with an explanation as to why that particular investment is more likely than not to occur. While not disputing that the Acquisition would give Sky the incentive to influence ITV's policy, Sky argues that the Commission erred in refusing to specify the likelihood of the circumstances arising in which such influence could successfully be exercised. According to Sky, this is a failure to satisfy the statutory test and the Commission's finding of SLC is liable to be set aside on this ground alone. (See for example paragraphs [102] to [112] of the Notice of Application.)

75. We do not consider that Sky's approach to the statutory tests is correct. As far as SLC is concerned (and similar reasoning applies to the RMS issue) we agree with the Commission that the appropriate question for the Commission to ask itself is whether Sky may be expected (i.e. on the balance of probabilities) to have the opportunity to exercise its material influence so as to give rise to an SLC in a relevant market. This is not the same as asking whether it is more likely than not that a specific investment opportunity will materialise. We agree with the Commission that where there is a range of ways in which competition in a market might be lessened substantially, the Commission is not required in respect of each potential transaction identified by the Commission to establish that it is more likely than not to occur. In our view Sky's suggested approach (see paragraph [73] above) would not only be more than is required in law, but it would also be wholly unrealistic, and would probably emasculate the merger regime.

76. The range of potential investments over a two to three year period is very wide for a major player such as ITV which is operating in a market (the all-TV market) which is dynamic and fast-moving, not least because of the ever-increasing sophistication and

fluidity of the applicable technologies and platforms. In our view the approach which the Commission has taken, of identifying what it considers to be plausible examples of the kind of investment opportunities which may well present themselves within the period in question, and over which the Commission expects Sky to be able to exercise material influence, is appropriate. A "sense check" of this kind is appropriate, even in circumstances such as these where a major competitor has become the largest shareholder by far in a rival and has done so, as the Commission has found, not purely as an investment vehicle but to preserve its own options as to the future of ITV.

77. As the Commission said in its Defence (paragraph [65]):

> "Making an assessment as to whether an SLC may be expected to arise is not an exercise in assessing the probabilities of whether a die will come up with a number or set of numbers. If the question posed to the Commission was, for example, simply whether a die would come up with numbers 1-4, Sky's approach might make some sense: the Commission could ask itself what the chances of each number coming up on the next roll were and then sum them. But where the range of possible outcomes is unbounded and the assessment of the likelihood of possible outcomes is not a matter of calculation but a prognostication upon the possible actions of others given their interests, powers and incentives…".

78. There is support for the Commission's approach in the case-law. Sky's insistence on the Commission establishing particular future events or courses of events on the balance of probabilities is unrealistic and, to paraphrase the words of Lord Mustill, seeks to introduce a spurious degree of precision into the statutory tests (see *R v Monopolies and Mergers Commission Ex p. South Yorkshire Transport Ltd* [1993] 1 W.L.R. 23, at 29). This is a question which arises in a number of different legal contexts. The point was articulated by Lord Hoffmann in the context of an assessment of future national security risk in *Secretary of State for the Home Department v Rehman* [2003] 1 A.C. 153, at 194:

> "I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof."

(See also Richards LJ in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2006] 2 WLR 850, at p. 884, paragraph [98], citing *Rehman*).

79. Similarly, in an asylum case *Karanakaran v Secretary of State for the Home Department* [2000] 3 All E.R. 449, Sedley LJ expressed the same idea at page 477d:

> "The civil standard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones. It is true that in general legal process partitions its material so as to segregate past events and apply the civil standard of proof to them: so that liability for negligence will depend on a probabilistic conclusion as to what happened. But this is by no means the whole process of reasoning. In a negligence case, for example, the question will arise whether what happened was reasonably foreseeable. There is no rational means of determining this on a balance of probabilities: the court will consider the evidence, including its findings as to past facts, and answer the question as posed. More importantly, and more relevantly, a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence: he or she will reach a conclusion on the probable factuality of an alleged event by evaluating all the evidence about it for what it is worth. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end-point that, for want of a better yardstick, a probabilistic test is applied."

80. So, in the context of an assessment as to whether there is likely to be an SLC in the future, the Commission must give full and proper consideration to the evidence which it has gathered, and apply the "probabilistic test" at the end-point. In other words it must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the RMS, but the Commission is not under an obligation to make findings of fact (whether on a balance of probabilities or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential investment is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC.

81. The Commission's use of examples of potential strategic investments does not mean, as Sky contends has occurred in this case, that the Commission is entitled to dispense with the need for evidence in support of its finding of likely SLC. The Commission's analysis of a merger producing anti-competitive effects must, of course, be based upon a theory of competitive harm, supported by evidence.

82. The Commission found that Sky had the combination of ability, incentive and opportunity substantially to reduce the competitive constraint imposed on it by ITV, one of Sky's main competitors in the all-TV market. In its approach to this issue it did not in our view circumvent the standard of proof. The finding reflected inferences which the Commission considered should be drawn from the available evidence: the Commission did not reverse the burden of proof or presume competitive effects in the absence of compelling evidence from Sky, as suggested. Of course, whether the Commission's findings in the present case are adequately supported by the evidence is a separate matter and will be considered later in this judgment.

83. Nor was the Commission bound, in relation to the issue of SLC, to consider *separately* whether any lessening of competition was "substantial" in nature, as Sky suggests. Provided the Commission directed its mind to the need for this condition to be satisfied, as it did, it was entitled to assess this question as part and parcel of its evaluation of any SLC. This point is similar to a separate argument made by Sky in connection with the requirement for the influence over ITV's policy to be "material". Our conclusions and reasons in that regard apply equally here (see paragraphs [93]-[96] below).

Consistency with the counterfactual

84. Another relatively self-contained argument of Sky which it is convenient to address at this stage relates to the "counterfactual" used by the Commission in the Report for the purposes of assessing the likely competitive effects of the merger which had been found to exist.

85. The SLC test in the Act requires an assessment of the effects of a merger on the state of competition in a relevant market. In assessing the likely effects of a merger on competition, the Commission, as in the present case, typically compares the situation that may be expected to arise following the merger with that which would have prevailed without the merger (see paragraph 1.22 of the CC Guidelines). The market situation without the merger is often referred to as the "counterfactual". The counterfactual provides a useful benchmark against which the existence or otherwise of SLC can be judged.

86. The Commission indicated that in order to consider the effect of the Acquisition on competition and plurality it compared:

> "the situation that we expect to arise following the acquisition to that which would be expected to prevail had the acquisition not occurred (the counterfactual)."
>
> (Paragraph 3.20 of the Report; footnotes omitted.)

87. The Commission then proceeded to examine two possible counterfactuals, (namely, ITV remains independent or another buyer (for example Virgin) acquires all of ITV) before concluding at paragraph 3.28 of the Report that an independent ITV was the most likely counterfactual. In choosing the counterfactual the Commission has not excluded the possibility of ITV pursuing strategic alliances with other parties (including acquiring or being acquired by other parties). (See paragraph 3.24 of the Report and paragraph [71] of the Defence.)

88. Sky contends that the Commission has evaluated the statutory test for SLC inconsistently with its chosen counterfactual, and that this vitiates its conclusions. In particular Sky refers to one of the Commission's examples of a possible future transaction in respect of which Sky could bring to bear its material influence over ITV's policy so as to weaken the constraint that free-to-air television services would otherwise provide to Sky's pay TV services and thereby create an SLC. This example, discussed by the Commission in paragraph 4.117 of the Report, relates to the possibility that an acquisition of ITV might occur in the future. Consideration of such a scenario is said to be directly contrary to the chosen counterfactual of an independent ITV, and thus irrational. Sky argues that because the Commission identified an independent ITV as being the most likely counterfactual to the Acquisition, the Commission is, in effect, barred from considering any future potential changes in the market which might affect ITV's independence when considering, in particular, the SLC test. Future transactions of this kind, argues Sky, are speculative: they were not sufficiently likely for the purposes of the counterfactual against which the Acquisition fell to be assessed. Sky also relies in that regard on paragraph 3.27 of the Report which states that the Commission did not receive any evidence to suggest that a plausible alternative bid for ITV (i.e. alternative to the bid which was made by Virgin) was likely to be made in the foreseeable future.

89. The same point is relied upon by Sky in relation to the issue of RMS. In its finding that the Acquisition gave Sky material influence over ITV's policy the Commission relied upon Sky's ability to use its shareholding in ITV to block a scheme of arrangement as well as a special resolution. The relevance of this is that a scheme of arrangement is one way in which a merger or strategic alliance could be achieved by ITV. Sky argues that the Commission's counterfactual precluded it from treating as relevant to material influence any ability of Sky to block a scheme of arrangement because the use of such a mechanism would be inconsistent with an independent ITV.

90. The Commission observes that, whilst it was unable to conclude that the most likely counterfactual was that ITV would be acquired by another buyer, this finding should not preclude it from considering whether an independent ITV might have pursued strategic alliances with other parties (including acquiring or being acquired by other parties). Indeed, given that the Acquisition had occurred barely a week after Virgin had put forward a proposal to acquire ITV the Commission had had to consider an argument that the most likely counterfactual was that ITV would be acquired by someone. Had the Commission failed to consider such possibilities it would have erred in its assessment as to whether an SLC may be expected.

91. We do not agree with Sky's arguments. The identification of a counterfactual does not mean that possible changes in the market cannot be considered in the assessment of SLC. The identification of the counterfactual does not ossify the SLC analysis. Indeed, Mr Flynn QC who also appeared for Sky rightly accepted that the counterfactual could not be "pinned to a board like a butterfly at an early part of the Commission's assessment, it actually remains alive, vibrant and important throughout" the substantive analysis. As already noted, the purpose of the counterfactual is to assist in assessing the effects of the merger. However, it must be kept in mind that the counterfactual is not a statutory test: it is an analytical tool used to assist in answering the question posed by section 47 of the Act, namely whether the creation of an RMS may be expected to result in an SLC within any market or markets in the United Kingdom for goods or services. Competitive conditions can and do change over time, and it is important to take into account the potential for change in the market in order to consider as fully as possible the level and intensity of competition without the merger.

92. In our view the Commission was entitled to compare the competitive effects of the Acquisition with those of what it regarded as the most likely counterfactual of an independent ITV, but at the same time to take into account in its assessment of SLC plausible situations or strategies which might result in the postulated independent ITV ceasing to be so. Similarly, in considering the ways in which Sky's ability materially to influence ITV's policy may be expected to give rise to an SLC, the Commission was correct to consider the effect such influence could have on potential ITV acquisitions or on ITV being acquired. We consider that the Commission would have been vulnerable to criticism had the possible occurrence of these situations or transactions been left out of account.

Sky's influence must be "material"

93. In addition to the arguments examined above, and to its main substantive arguments challenging the Commission's finding of material influence, Sky raises two other points. Both are relevant to the RMS finding.

94. In relation to the first of these points Mr Flynn, referring to paragraph [62] of Sky's skeleton argument, draws our attention to the passages in the Report where the issue of material influence is analysed (paragraphs 3.31 to 3.67). His argument is a simple one: nowhere in those paragraphs does the Commission address the degree of influence in order to see whether it is mere influence or material influence that is being obtained by Sky. The question is not whether there is an ability to exercise *any* influence over a company's policy, but whether the degree of influence over policy would be sufficiently significant to justify the application of the merger control provisions.

95. Implicit in this argument is a suggestion that the Commission must approach the exercise in two stages: first, examine whether influence exists and, if it does, consider whether it is material.

96. In our view this point is misconceived. It would no doubt have been perfectly proper for the Commission to have adopted a two stage inquiry of the kind implicitly suggested; but it was in our view also entitled, if it thought fit, to "cut to the chase" and consider the matter in one stage. There can be no question of the Commission not being aware, or losing sight, of the need for the influence to be "material"; indeed, it

reminded itself of this requirement in virtually every other paragraph between paragraphs 3.30 and 3.66 of the Report.

A discretion in subsection 26(3) of the Act

97. The second point relates to the word "may" in subsection 26(3) of the Act. The provision provides:

> "(3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it."

98. Sky submits that the word "may" indicates that there is a discretion as to whether a finding of material influence should lead to the person with that influence being treated as having control, and that the Commission did not appreciate that it had such a discretion and/or failed to exercise it.

99. It is submitted that this represents a failure to address its mind to relevant considerations, and is a significant misdirection in law given that the Commission had discounted any possibility of Sky obtaining a seat on the ITV board or of increasing its shareholding beyond 17.9% up to the maximum of 20% prescribed by section 350 and Schedule 14 to the Communications Act 2003.

100. In the Report the Commission stated at paragraph 3.67:

> "Based on the evidence set out in paragraphs 3.39 to 3.65, we conclude that, as a result of the acquisition, BSkyB has acquired the ability materially to influence the policy of ITV. This ability gives rise to common control for the purposes of section 26 of the Act."

101. The existence of the discretion in question was the subject of debate between Sky and the Commission during the investigation stage. Thus, the Commission said at paragraph 9 of its "Material Influence Working Paper" ("MIWP"):

> "Although the definition in s.26(3) quoted above states that material influence 'may', not 'shall' be so treated, in practice the 'may' has consistently been interpreted as requiring the Competition Commission to find a merger situation if there is material influence."

102. In its written commentary on the MIWP dated 12 July 2007 Sky said that however the Commission may have interpreted the provision in the past:

> "... there is in fact a discretion on the clear words of the statute."
>
> (See item 2 of the table at p.1 of Sky's written commentary.)

103. In the light of the above it is quite clear that the Commission was well aware of the issue and that a finding of material influence did not automatically as a matter of law give rise to common control for this purpose. Their approach in the MIWP appears to be that "in practice" a finding of material influence would have this effect.

104. That approach seems to us to accord with good sense. Once it has been found that there is material influence over a company's policy there will be little scope for the exercise of a discretion to decline to treat that influence as giving rise to "common control". Most of the factors which might inform that discretion would have already been examined and weighed in relation to the finding of material influence. Sky did not identify any additional factor of which the Commission should have taken account in regard to this discretion. This is not to say that a case could not conceivably arise where it would be appropriate not to treat material influence as giving rise to common control, but no such case was elaborated in the written or oral pleadings, and we would expect it to be very exceptional.

105. For these reasons neither the absence of any discussion of the discretion in the Report, nor the way the conclusions are phrased in paragraph 3.67, give rise to any ground for a successful challenge under section 120.

Sky's submissions that specific findings of the Commission are perverse or irrational, or are based upon inadequate evidence or are otherwise liable to be set aside

106. We now turn to consider Sky's contentions that certain specific findings of the Commission are irrational or perverse or impermissible in the light of the evidence or liable to be set aside for other reasons such as breach of the duty of fairness.

107. As we have already indicated, it is not in doubt that in an application for judicial review, and therefore also in an application under section 120 of the Act, a challenge to a decision may be based upon an allegation that the decision in question, or a key

finding, was irrational or was perverse, or was a decision or finding which the decision-maker was not entitled to make in the light of the evidence. These characterisations are to a very considerable extent interchangeable and they all describe the absence of a minimum relationship between a decision and the evidence relating to it which was available to the decision-maker. In a judicial review it is legitimate for the court or tribunal to examine whether that relationship is present. If it is not, the finding is liable to be quashed. This exercise is to be contrasted with the approach required of the decision-maker itself, and also of a court hearing an appeal "on the merits" where the court is entitled to substitute its own views for those of the decision-maker; in the latter case the decision-maker/appeal court makes its own decision, giving such weight to the evidence as it considers appropriate.

108. Some of the specific findings challenged by Sky go to both RMS and SLC issues. For example, the alleged ability of Sky to use its 17.9% shareholding to block a special resolution proposed by the ITV board is an important element in relation to the Commission's findings of RMS, being the mechanism, or one of the mechanisms, by which Sky is said to be able to exercise material influence; but it is also relevant to the finding of SLC to the extent that blocking a special resolution aimed at raising the funding for a strategic initiative by ITV is said to be one way in which SLC would arise.

109. On the whole, the parties in their pleadings and skeleton arguments have tended to deal with the issue of Sky's ability to block a special resolution and related issues in the sections relating to "material influence", and with the issue of ITV's need for funding in the sections on SLC, whilst cross-referring as necessary.

Sky's ability to block a special resolution

110. The finding that Sky's shareholding gave it the ability to block a special resolution proposed by ITV's management is an important element in the Commission's conclusion that the Acquisition gave Sky the ability to exercise material influence over the policy of ITV. (See the Report at, for example, paragraphs 11, 12, 17, 3.34(a), 3.40, 3.41, 3.45 to 3.57 and 3.66.) It is not the only factor upon which the Commission relies for its conclusion that Sky had acquired "material influence": the Commission also

relied upon Sky's knowledge and standing in the industry, combined with the size of its shareholding, as giving it additional influence. Nevertheless the issue is a central one: if the finding of an ability to block a special resolution were to be quashed as perverse or irrational then the Commission's conclusion as to "material influence" could not stand, at least not without re-assessment.

111. It is not in dispute that in order to carry a special resolution at least 75% of the shares voted, in person or by proxy, at a general meeting must be in favour; it follows that the ability to defeat a special resolution depends on having the ability to vote more than 25% of the votes cast.

112. The Commission's finding that Sky has the ability to block a special resolution on its own was based on two factors: the size of the shareholding (17.9%) and the levels of turnout which would be expected at a general meeting of ITV's shareholders. In relation to the latter factor the Commission considered the record of historical turnout at such meetings. Thus at paragraph 3.45 of the Report the Commission said:

> "We analysed evidence of past voting behaviour at ITV general meetings, the behaviour of shareholders which BSkyB replaced and the share of votes which BSkyB would have represented based on voting records of ITV (see Appendix D). This analysis indicates that BSkyB alone would have been able to block a special resolution at all but one of the five general meetings held since the creation of ITV and would have been able to block a special resolution by voting with the other shareholders who voted against a special resolution at the remaining meeting. In addition the analysis indicates that since BSkyB replaced shareholders who typically exercised their voting rights, its voting power in future general meetings is likely to be similar to the historical pattern."

113. In the Report the Commission also relied upon […][**C**] (See paragraph 3.53 of the Report.) […][**C**] It is not in dispute that a scheme of arrangement also requires approval of at least 75% of the shares voted at a meeting convened for that purpose, and that such a scheme is one way of giving effect to a merger.

114. In its submissions to the Commission Sky disputed that its shareholding would enable it to block a special resolution, and contended that past voting patterns were not the most reliable guide to what would happen in the future. In support of these arguments Sky adduced material from a corporate advisory firm, Lintstock, in the form of four reports to which were added two more following the Report and the commencement of these

proceedings. The Commission considered this material (so far as it was then available) in some detail in Appendix D to the Report, along with evidence from other sources. The Commission summarised the main thrust of the first four Lintstock Reports as follows:

> "3.48 ...in [Lintstock's] view, historical voting patterns should be adjusted to allow for an increase in turnout. The reasons for these adjustments as set out in the Lintstock Reports are:
>
> (a) a trend towards increasing concentration of ownership in listed companies;
>
> (b) a gradual upward trend in voting levels across FTSE 100 companies generally, derived in part from the increasing concentration in ownership; and
>
> (c) the fact that issues which are contentious tend to elicit higher voting levels.
>
> 3.49 The Lintstock Report suggests that a 7.3 per cent increase in turnout should be assumed across all FTSE companies. BSkyB noted that, at the one general meeting held since the acquisition, its shares represented less than 25 per cent (in fact 24.9 per cent) of the shares voted at the meeting. This, in its view, demonstrated the trend towards increasing turnout identified by Lintstock."

115. The Commission then referred to evidence received from certain ITV shareholders about their voting record and their involvement as shareholders in ITV, before concluding:

> "3.52 We thought that the most directly relevant evidence to turnout and likely future voting patterns was the record of historical turnout at ITV general meetings. Despite the evidence provided in the Lintstock Reports, we could not form an expectation that the trends noted, either in terms of increasing turnout or higher turnouts for contentious issues, would give rise to a significant rise in voting patterns. Nor did we think that we should base any conclusion about material influence on the results of voting at a single general meeting."

116. The Commission went on to cite […][**C**] to which we have already referred, in support of its conclusion that Sky did have the ability to block a special resolution, and thereby materially to influence ITV's policy where implementation required such a resolution.

117. Sky alleges that the Commission's finding that Sky's 17.9% shareholding provided Sky with the ability to block a special resolution proposed by ITV's management is "irrational, perverse and against the weight of the evidence". Such a finding was not "open to the Commission to reach on the evidence" (Sky's skeleton argument, paragraph [52]).

118. These contentions are elaborated upon at paragraphs [74] to [80] of the Notice of Application and paragraphs [72] to [78] of Sky's skeleton argument. In essence Sky submits that:

(a) assessing the ability to block a special resolution with only 17.9% of the share capital involves a prediction about future events which are uncertain and should therefore be based on robust evidence;

(b) the Commission was wrong to reject the evidence advanced in the four Lintstock Reports as to there being an upward trend both in concentration of ownership of listed companies and in voting levels across FTSE 100 companies, and as to there tending to be higher voting levels on contentious issues;

(c) the Commission ought to have treated the voting outcome of the only post-acquisition general meeting as "the best evidence" of how those shareholders will act in future, since that is the only general meeting at which Sky was present;

(d) it was perverse of the Commission to have regard instead to evidence of the voting outcomes prior to Sky's acquisition. In any event the Commission ought not to have rejected the adjustments to those outcomes suggested by Lintstock in its reports, and in so doing failed to have regard to relevant considerations or to give "good reasons" for not following this evidence;

(e) the Commission wrongly directed itself that a "significant change in voting patterns" would be needed in order to remove Sky's ability to block a special resolution (see the Report at paragraph 3.52). A small rather than a large change in patterns would in Sky's submission be sufficient.

119. In assessing the evidence it was for the Commission to decide what weight to place upon different aspects of it. The Commission's assessment in this regard can only be questioned in an application of this kind in very limited circumstances. In our view it is not possible to characterise as "perverse" or "irrational" the Commission's preference for the voting outcomes of ITV's several general meetings which took place prior to the Acquisition over the outcome of the single general meeting which took place after the

Acquisition, when considering likely future voting patterns. Moreover, even the outcome of the single post-Acquisition meeting showed Sky's 17.9% as representing very nearly 25% of the votes cast. Similarly the Commission was entitled to rely upon the unadjusted voting outcomes of those pre-acquisition meetings of ITV in preference to the Lintstock evidence of trends in concentration of ownership and voting patterns across FTSE 100 companies. It is clear from the Report and Appendix D thereto that the Commission gave full and proper consideration to the Lintstock Reports, and indeed to all the evidence before it on this issue. There is no substance in the suggestion that in regard to the Lintstock Reports the Commission failed to have regard to relevant considerations or disregarded the points urged by Sky. As far as we can judge the Commission carried out precisely the exercise which an investigating and reporting body such as this ought to carry out. In doing so the Commission took into account all the evidence before it, including […][**C**] as to Sky's ability to block a scheme of arrangement (see paragraphs [128] to [130] of the Commission's Defence). In our view it was entitled to take this into account.

120. Sky's argument that the Commission misdirected itself on the implications of the evidence about the extent of the change in voting patterns needed to remove Sky's ability to block a special resolution is also misconceived. At paragraph [80] of its Notice of Application Sky submits that the Commission wrongly directed itself at paragraph 3.52 of the Report by saying that trends in shareholder voting levels would have to "give rise to a significant change in voting patterns". Sky states that:

> "Even a small change in voting patterns would be sufficient to negate an alleged ability on the part of Sky to block a special resolution which was extrapolated from the historical evidence relied upon by the Commission and therefore the Commission was wrong to require that there needed to be evidence of a large change."

121. However, in our view Sky's interpretation of the paragraph is not justified. The Commission did not say that there needed to be evidence of a "large" change. The words used in paragraph 3.52 of the Report are "significant change in voting patterns". A small change can be "significant". It is clear from the paragraph, read as a whole, and in the context of the Report, that the Commission considered the evidence submitted by Sky was not sufficient to change the conclusions reached by the Commission.

122. Although these points are made under labels such as "perversity" and "irrationality", in our view they fall well short of establishing any such ground of challenge. We consider that on the material before it the Commission was entitled to conclude that Sky's acquisition of the shareholding in question enabled Sky to block a special resolution. The arguments to the contrary made by Sky are in essence the kind of arguments which are appropriate for an appeal on the merits where a tribunal is able to re-hear the case, assess the evidence and make up its own mind. This is not the position in an application under section 120 for the reasons already discussed. Nor do we consider that the Commission took account of irrelevant considerations or ignored material factors, or otherwise misdirected itself in relation to this issue.

Scheme of arrangement

123. The Commission found that Sky was also able to block a scheme of arrangement recommended by the ITV board as part of its strategy for its business (see paragraph 3.57 of the Report). As already mentioned, such an arrangement also required at least 75% of the votes cast. Sky makes a number of separate points in respect of this finding.

124. We have already dealt with Sky's argument that the Commission's reliance upon this finding is inconsistent with the counterfactual which it employed (see paragraph [91] above).

125. In addition it is argued that neither the ability to block such a scheme nor its relevance to the issue of material influence was put to Sky contrary to the Commission's duty of fairness (see paragraph [82] of the Notice of Application and paragraph [149] of Sky's skeleton argument). In our view there is nothing in this contention as the point was in fact clearly set out in paragraph 3.49 of the Commission's provisional findings report dated 4 October 2007 (the "Provisional Findings Report"). This was sufficient to put Sky on notice in order to enable it to make its case. Consequently it is difficult to see what prejudice could have been suffered by Sky.

126. The grounds for the further point made at paragraph [149] of Sky's skeleton, to the effect that the Commission had no evidential basis for concluding that Sky had the ability to block a scheme of arrangement, is not understood. The evidential basis is the same as that for Sky's ability to block a special resolution, since both require a 75%

majority of shares voted at a general meeting. The Commission made their reliance upon this equivalence clear at paragraph 3.42 of the Report.

127. Sky also argues (see paragraphs [57] and [83] of the Notice of Application and paragraphs [77] and [152] of its skeleton argument) that in relation to a proposed scheme of arrangement in implementation of a takeover or merger of ITV, the views of the ITV board as expressed to shareholders do not amount to "policy" for the purposes of subsection 26(3) of the Act. Therefore any ability of Sky to block such a scheme could not be relevant to the issue of "material influence".

128. The Commission set out at paragraph 3.33 of the Report its understanding of what is meant by "policy" in this context:

> "We took the view that in assessing material influence in the context of the Act we should be concerned with the ability materially to influence policy relevant to the behaviour of ITV in the market place. The policy of a company in this context means the management of its business, in particular in relation to its competitive conduct, and thus includes the strategic direction of a company and its ability to define and achieve its objectives."

129. Sky does not disagree with that statement and argues that advice given to shareholders by the board of a company as to a proposed takeover or merger is not a matter relating to the "strategic direction" of the company but rather an attempt by the company to influence the individual decisions of shareholders as to their share dealings (paragraph [57] of the Notice of Application).

130. However these alternative characterisations do not seem to us to be mutually exclusive. Advice by the board to shareholders as to how they should vote or dispose of their shares in the context of a proposed takeover or merger is in our view essentially a strategic matter. If and to the extent that a person is able to influence, directly or indirectly, the board's advice on such matters to a company's shareholders, then we consider that that person is able to influence the "policy" of the company for the purposes of subsection 26(3).

Indirect influence

131. In addition to its challenge to the Commission's findings as to Sky's ability to block a special resolution and a scheme of arrangement through its direct influence, Sky contends that the Commission's findings of indirect influence are unsustainable and liable to be set aside.

132. On this issue the Commission first noted, at paragraph 3.39 of the Report, that:

> "BSkyB's holding makes it the largest shareholder in ITV by some margin. As at the end of October 2007 BSkyB's holding was more than twice that of the next largest shareholder Brandes. Brandes had more than 5 per cent and three other shareholders had shareholdings of more than 3 per cent".

133. The Commission then stated at paragraph 3.58:

> "BSkyB is a highly successful player in the audio visual services sector and has pioneered many important innovations. In previous decisions the MMC and CC have identified the additional weight which a shareholder active in the same market can carry. We considered whether BSkyB's standing as an industry player was likely to contribute to the weight which its views would carry among other shareholders." (Footnotes omitted.)

134. At paragraph 3.59 the Commission then referred by way of example to the innovative role Sky had played in high-definition television ("HDTV"), and stated that it would expect Sky's views on such matters to be of particular interest to other shareholders.

135. At paragraphs 3.60 and 3.61 the Commission discussed certain evidence from ITV and Virgin. ITV had urged that in addition to other factors Sky would have influence through its ability to act as a disruptive shareholder. The Commission indicated that it discounted this factor. Virgin warned that on the basis of the Provisional Findings Report the Commission was in danger of underestimating the ability of Sky to use its importance and stature as an industry player, together with its position as the largest shareholder, to influence the strategy and commercial direction of ITV.

136. At paragraph 3.62 the Commission recorded its conclusion as follows:

> "In summary, we found that BSkyB's industry knowledge and standing together with its position as the largest shareholder, would be likely to increase its ability to influence other shareholders, enabling it to block a special resolution with others."

137. Sky makes a number of points with regard to this conclusion. Essentially its complaint is that the finding of indirect influence is speculative and based upon nothing other than the "self-serving" evidence of ITV and Virgin. The Commission is said to have disregarded Sky's evidence, now supported by Lintstock's sixth report, to the effect that it was unable to exert indirect influence through other shareholders, given in particular the statutory limit of 20% on its shareholding and the experienced nature of the other principal shareholders. The suggestion of indirect influence was not put to other ITV shareholders and is irrational in that it assumes that shareholders who are experienced financial investors would somehow be persuaded by Sky to act against their own interests and contrary to the advice of the ITV board. (See for example paragraphs [84] to [90] of the Notice of Application and paragraphs [79] to [84] of Sky's skeleton argument.)

138. We do not see how it can sensibly be argued that it is irrational or perverse for the Commission to conclude that Sky's pre-eminent experience and standing in the audio-visual industry, together with its having by far the largest holding in the shares of ITV, would be likely to add to the weight which its views would carry with other shareholders in regard to matters requiring a special resolution. In our view the Commission was entitled to reach that conclusion. Nor is it correct that the only material before the Commission were the submissions of ITV and Virgin. As the Commission has argued in its Defence, the members of the Commission also had available their own experience and knowledge of business and management. They are entitled indeed required to employ these attributes when drawing inferences and reaching conclusions of this kind. This is particularly so when the conclusions required to be reached relate at least in part to matters in the future. Moreover, the Commission does not appear to have simply accepted the "self-serving" evidence at face value, but rather to have examined it critically and indeed discounted it to some extent as we have already indicated. Nor is it fair to characterise the Commission's findings as dependent upon the other experienced investor shareholders being "somehow mesmerised by Sky" into acting against their own best interests and in favour of Sky's interests. (Notice of Application paragraph [87]). The Commission's finding was based on Sky's virtually unrivalled expertise and standing as well as its large shareholding going some way to persuading those shareholders that a particular course of action was in their own best interests. In this regard, the Commission was entirely alive to the fact that ITV's

shareholders included “sophisticated investors with in-house experience in the media sector” (see paragraph 3.59 of the Report).

139. Further, in seeking certain evidence from ITV’s shareholders as part of its investigation the Commission was not bound to include any particular question in the questionnaire which it sent to them. In any event, it is far from clear that a question of the kind suggested by Sky at paragraph [86] of the Notice of Application asking whether Sky had any potential to influence other shareholders would have been likely to elicit answers of any real value.

140. Nor is there any foundation for the contention that the Commission chose to “disregard” Sky’s arguments as to the effect of the statutory limit of 20% on its shareholding in ITV. This point was expressly considered at paragraph 3.63 of the Report. The Commission concluded that this and other countervailing factors were of insufficient weight to offset Sky’s material influence. Sky’s real complaint is that the Commission placed insufficient weight upon the matters urged by Sky. Such a complaint is not one which forms a ground for judicial review, unless the conclusion is irrational or perverse.

141. Sky challenges a further element of the Commission’s findings in connection with its conclusions on RMS.

142. The Commission also considered that there could be an indirect influence on policy in the following way. Where ITV’s management perceived Sky as being likely to command 25% of the votes, the board would tend to take account of any anticipated opposition from Sky both when formulating any policy requiring a special resolution and when deciding whether to implement it (paragraphs 3.46 to 3.47). In other words, if the ITV board believed that Sky might well be able to block a special resolution this could stymie or otherwise materially influence its policy before such a resolution was put to general meeting of ITV’s shareholders.

143. Sky challenges this finding on a number of grounds set out in paragraphs [91] to [95] of the Notice of Application. It is said to be a finding which is speculative and made without reference to the evidence; no account should have been taken of the

"subjective" perception of ITV; finally, the point was not put to Sky during the investigation in breach of the Commission's duty of fairness.

144. Again, it is not correct that this finding was made without reference to the evidence. There was evidence before the Commission that Sky's shareholding of 17.9% could in certain circumstances represent, putting it very broadly, about 25% of the votes cast at a general meeting i.e. sufficient to defeat a special resolution/scheme of arrangement. On that basis (together with other relevant background evidence and their own knowledge, experience and expertise) the Commission members concluded that (i) such a situation would be likely to give rise to a perception on the part of ITV's board that Sky might well have the power to block certain initiatives put to general meeting and requiring a special resolution/scheme of arrangement; and (ii) such perception would be likely to lead ITV's board to take into account Sky's reaction when formulating such policy initiatives and also later when deciding whether to implement them. In our view the Commission was manifestly entitled to reach that view on the material before it. Further, Sky's argument about the "subjective" nature of ITV's perception is misplaced. The question is not whether the perception is objective or subjective (all perceptions are subjective), but whether it would be likely to exist. Given the circumstances it is not at all surprising that the Commission concluded that such a perception would exist. Nor is there any substance in the submission that the point was not put to Sky during the investigation. It was clearly identified at paragraph 3.55 of the Provisional Findings Report.

145. Finally we note here that at paragraph [83] of its skeleton argument Sky attributes to the Commission a concession which the Commission does not make. Sky states that at paragraph [148] of the Defence "the Commission concedes...that it was not to be expected that Sky could influence the board of ITV itself." At paragraph [148] the Defence states:

> "It is through Sky's ability to exercise direct and indirect influence on others that it was expected to influence the board, not through the application of direct pressure to the board using its industry standing."

Commission's findings on ITV's need for funding

146. The question of ITV's need for funding, and in particular the kind of funding for which a special resolution is required (i.e. non-pre-emptive issue of shares) overlaps RMS and SLC issues. As to the relevance of funding to the RMS finding, the Commission considers that the ability to block a special resolution is the main means by which Sky can exert "material influence" over ITV's policy. The reason that this ability is said to lead to material influence is because in the Commission's opinion a special resolution is likely to be required by ITV in the reasonably near future in order to obtain funding for major strategic options. Without the need for such funding Sky's ability to block a special resolution would not give rise to the same degree of influence (although the influence said to arise from the ability to block a scheme of arrangement and from Sky's large shareholding and industry standing would still be present as this is not related to the need for funding). The relevance of funding to the issue of SLC is because the funding which the Commission considers can be blocked by Sky relates to strategic projects which would affect ITV's competitive position in the market.

147. This dual relevance of the need for non-pre-emptive equity funding is reflected in the Report. Pertinent passages appear in both the RMS section of the Report (for example, paragraphs 3.41 and 3.43 to 3.44) and in the SLC section (see for example paragraphs 4.100 to 4.116) as well as in Appendix C. The overlap is also reflected in the Notice of Application (see for example paragraphs [68] to [73], and paragraphs [99] to [144]), and in Sky's skeleton argument (see paragraphs [51] to [71] and [95] to [146]). In paragraph [95] of its skeleton argument Sky contends that both the RMS and SLC findings are based on the theory that Sky would be able to affect ITV's operations in the all-TV market by denying ITV certain types of equity fund-raising for strategic investments by blocking the necessary special resolution.

148. We have already dealt with Sky's arguments that the Commission adopted an impermissible approach in that it was incumbent upon the Commission to take each specific example of possible strategic investments identified by the Commission and establish that it was likely to occur and that non-pre-emptive equity funding was likely to be required for that particular investment – in each case identifying the evidence relied upon to establish those matters (see paragraph [75] *et seq.* above). We now

examine Sky's argument that the evidence available to the Commission did not entitle it to draw the conclusion (which the Commission did draw) that Sky would be likely to have an opportunity to exercise its power materially to influence ITV's strategy by blocking the necessary funding. In this regard Sky contends that the evidence before the Commission did not support the likelihood of non-pre-emptive equity funding being required for any strategic initiative in the following two to three years, given the alternative sources of funding which Sky contends were available to ITV, and that the Commission's finding is irrational and/or perverse (see for example Sky's skeleton argument at paragraphs [99] and [130]). Insofar as the Commission has identified examples of potential investments, Sky contends that these examples compound the Commission's errors in that no specific consideration has been given to the ways in which such investments might be financed (see for example Sky's skeleton at paragraph [131]).

149. In order to address these arguments it is necessary to refer to the relevant findings of the Commission and to some of the material that was available to it.

150. The Commission referred to the question of funding of strategic investments at paragraph 17 of the Report:

> "We looked at the impact of the acquisition on current competition. ITV's strategy update published on 12th September 2007 focused on a three to five year plan for content-led growth funded through gains in efficiency and the disposal of remaining non-core assets. Nevertheless, given the dynamic environment in which ITV operates we found it likely that the Board would need to make major investments requiring external funding over the next two to three years. A non-pre-emptive rights issue would be the only feasible or efficient funding mechanism for some investments. BSkyB's ability to block a special resolution would limit ITV's ability to raise funds, ruling out some strategic options and affecting its ability to compete in the market for all-TV."

151. Later, at paragraph 3.43 the Commission said:

> "We looked at whether, should ITV need to raise funds, it would be likely to look for equity funding. ITV's credit ratings are currently at the lower bounds of investment grade for both Standard & Poor's and Moody's. In July 2007 Standard & Poor's said that:
>
>> '[ITV's] flexibility to make significant and continued investments in programming or selected debt-financed acquisitions will be severely limited ... unless it can significantly improve its operating performance.'

> ITV has consistently stated that it wishes to maintain its investment grade rating. We therefore reached the view that despite the possible sources of funds outlined in BSkyB's evidence (see Appendix C, paragraph 17), and ITV's ability to raise funds through improved efficiency or the sale of non-core assets, ITV would be likely to need equity funding in order to pursue certain major strategic options in the next two to three years."

152. At paragraph 3.44 the Commission referred to the evidence provided by Sky to the effect that on the previous occasions on which ITV and its predecessors had raised debt or equity, it had not been for the express purpose of investment in content, and went on:

> "We considered this evidence but it did not alter our view of ITV's likely need for equity funding in the future."

153. The Commission returned to its consideration of the question of funding in the section of the Report dealing with SLC. At paragraph 4.100 the Commission summarised the position as follows, referring to paragraph 3.43:

> "We found that ITV's financial position is such that in order to raise substantial funding for a major strategic move, it would be likely to need equity funding (see paragraph 3.43)."

154. Then the Commission continued, at paragraph 4.101:

> "We considered whether circumstances were likely to arise in the foreseeable future in which ITV would need to raise such funding."

155. Then, in sections which are subject to substantial redaction on confidentiality grounds, the Report refers to available material, including […][**C**].

156. In paragraphs 11 to 14 of Appendix C to the Report, in passages which are also heavily redacted for reasons of confidentiality, the Commission records […][**C**].

157. At paragraphs 15 to 19 of Appendix C (also subject to redaction) the Commission discusses the evidence as to ITV's ability to raise additional debt. This evidence includes material from ITV, from the credit rating agencies Standard & Poor's and Moody's, from Sky, from ITV's financial advisers and from Merrill Lynch (engaged by Sky). This material, to which it will be necessary to refer again in more detail, was expressly considered by the Commission in reaching the conclusion set out in the last sentence of paragraph 3.43 of the Report (above).

158. Thus, the Commission found that it was likely that ITV would need to make major investments over the following two to three years and would need to raise equity funding through a non-pre-emptive offering for some of those investments.

159. Although the complaints are formulated in various different ways in several sections of the Notice of Application and Sky's skeleton argument, Sky challenges the Commission's findings in respect of ITV's likely funding requirements on essentially the following basis:

(a) ITV would not need to raise funds by way of non-pre-emptive equity (requiring a special resolution) because ITV had adequate alternative sources of funding for any strategic investment it might wish to make, namely, cash, raising additional debt, and using the existing standing authorisations for resort to non-pre-emptive equity and a rights issue, up to certain thresholds.

(b) It followed that the situation envisaged by the Commission of a substantial investment being ideally funded by non-pre-emptive equity requiring a special resolution which could be blocked by Sky, was so unreal as to render irrational or perverse any conclusion based upon such a situation, which was described as a "chimera" at paragraph [121] of Sky's skeleton argument.

160. As to cash, Sky appears to accept that this means of funding is only suitable for small transactions, and refers to paragraph 4.105 of the Report where the Commission stated that in its view such transactions were not such as would be expected to require shareholder approval (see paragraph [105] of its skeleton argument).

161. The two main alternative sources of funding upon which Sky relies are: debt and equity funding obtained by means of the standing authorisations for non-pre-emptive and pre-emptive equity.

Debt

162. As to raising additional debt, Sky refers to the evidence which was provided by its expert Merrill Lynch as to ITV's ability to raise additional debt on alternative assumptions of (i) retaining, or (ii) lowering its credit rating. […][**C**]

163. ITV's financial advisers, on the other hand, having had discussions with the credit rating agencies, […][**C**]

164. Sky submits that the Commission has not dealt with this issue appropriately in the Report. It argues that the Commission neither rejects nor gives any reason for disagreeing with the Merrill Lynch view, nor does it say or imply that it is preferring the views of ITV's financial advisers; […][**C**] All this went to demonstrate the irrationality of the Commission's conclusions. (See generally paragraphs [106] to [111] of Sky's skeleton argument).

165. We do not consider that these complaints provide grounds for a successful challenge to the validity of the Commission's findings in this regard.

166. In our view it is obvious on a reading of the relevant paragraphs of the Report and in particular paragraphs 3.43, 4.100, and Appendix C paragraphs 15 to 19, […][**C**].

167. We therefore see no basis for the Tribunal to conclude that the Commission's approach to additional debt capacity or its conclusions in relation to the relevant evidence were irrational or perverse.

Standing authorisations

168. The other main alternative source of funding upon which Sky relies is the standing authorisations both for non-pre-emptive issues of shares and pre-emptive rights issues. Such authorisations for non-pre-emptive issues are said typically to allow issues of up to […][**C**]% of the share capital in order to support any investment initiative and up to […][**C**]% for corporate acquisitions by "vendor placings" and "cash box placings", and are put in place annually at a company's annual general meeting. As with *ad hoc* non-

pre-emptive offerings to fund specific investments, the standing authorisations require special resolutions of the company.

169. It is not in dispute that at all material times ITV had such authorisations in place, and that at the time of the Commission's investigation the authorisations could have been used to raise about £[…][**C**] for any investment, or about £[…][**C**] in the case of a specific corporate acquisition using "vendor placing", or "cash box placing" mechanisms.

170. At paragraph [117] of its skeleton argument, apparently in the context of the discussion of non-pre-emptive offerings, Sky states:

> "ITV was able to raise a total of over £[…][**C**] under the standing authorities through equity funding...".

171. However it is clear, as Mr Flynn explained in the course of the hearing, that the sum of over £[…][**C**] mentioned there includes not just the £[…][**C**] under the standing authorisation for non-pre-emptive offerings, but also a further sum of £[…][**C**] which could be raised under the separate authorisation for implementing a rights issue for up to […][**C**]% of existing issued share capital i.e. pre-emptive equity rather than non-pre-emptive equity.

172. Sky contends that the Commission has entirely disregarded this evidence, and indeed that it does not really seem to have appreciated that the standard authorisations referred to actually existed. Sky refers to the fact that the Report does not specifically mention the standing authorisations and contends that the Commission has therefore failed to consider relevant issues, which vitiates the conclusions it has reached. (See in particular paragraph [118] of the Notice of Application and paragraphs [115] to [118] of Sky's skeleton argument; this point was also reiterated in oral submissions at the hearing.)

173. This contention is without substance. Although it is accurate to say that the Report does not expressly mention the standing authorisations, it is clear that the Commission was well aware of them, and of their effect, and that the Commission took them into account in reaching its conclusions.

174. Paragraph 17 of Appendix C to the Report states:

> "BSkyB provided us with an analysis prepared by Merrill Lynch for BSkyB of ITV's ability to fund acquisitions up to the end of 2009. The conclusions of this paper were that ITV had the ability to raise substantial sums through debt, pre-emptive rights issues and non-pre-emptive equity placings, especially if it lowered its credit rating requirements. We considered this analysis and received comments on it from ITV's financial advisers."

175. The analysis by Merrill Lynch referred to in that passage discusses […][**C**] The Commission's reference in paragraph 17 of Appendix C to the Report to the raising of "substantial sums through ... pre-emptive issues and non-pre-emptive equity placings" is a direct reference to […][**C**] Further, the last sentence of paragraph 17 expressly confirms that the Commission considered the Merrill Lynch paper and received comments upon it from ITV's financial advisers.

176. The written report of ITV's financial advisers to which reference has been made contains […][**C**]. Again, paragraph 17 of Appendix C makes clear that the Commission considered these comments.

177. […][**C**]

178. […][**C**]

179. […][**C**]

180. In relation to the standing authorisations for non-pre-emptive offerings of […][**C**]% of existing share value and, in certain circumstances, […][**C**]%, we have already referred to the amounts of funding represented by those percentages at the material times. There was evidence before the Commission that the mechanisms such as "vendor placing" and "cash box placing" which would be used in relation to the […][**C**]% offering, […][**C**].

181. We also note that Sky appears to have misunderstood […][**C**].

182. In addition, in its skeleton argument at paragraphs [122] to [128] Sky anticipates an argument by the Commission that as the standing authorisations for non-pre-emptive

offerings themselves require an annual special resolution of the company, Sky would have the same power to block this source of funding as it would have in relation to an *ad hoc* special resolution proposed for the funding of a specific investment. Sky seeks to meet this argument by contending that it is inconsistent with the Commission's unwillingness to place weight on the suggestion that Sky might act as a disruptive shareholder: to deny ITV this standard facility would be a very hostile act for a shareholder; moreover, it would not represent the blocking of a specific transaction which Sky regarded as contrary to its interests, which was the only basis upon which the Commission contemplated that Sky would be likely to use its blocking power; in any event, the fact remained that the standard authorisations were in place.

183. In response, the Commission submits that there is no inconsistency between the Commission's findings and Sky's ability to block the annual standing authorisation for non-pre-emptive funding. The Commission's finding as to Sky's ability to block special resolutions includes special resolutions in respect of the standing authorisations. The Commission considers that Sky would have an incentive to use this ability in circumstances where there was an opportunity to reduce the competitive constraint represented by ITV. The Commission's conclusion not to place weight upon the ability of Sky to act as a disruptive shareholder was not referring to the ability to block a special resolution.

184. We note in this regard that at paragraph 3.60 of the Report the Commission records:

> "ITV told us that, in addition to the ability to block special resolutions, it anticipated that BSkyB would have material influence as a result of its ability to act as a 'disruptive shareholder'.... ITV told us that *in addition to blocking special resolutions*, whether or not related to the funding of a particular strategic action, a shareholder with a holding of the size of BSkyB's could cause considerable disruption to the management of a company's affairs by using its voting power to vote against ordinary resolutions opposing the declared strategy of the ITV board" (emphasis added).

185. In respect of this submission of ITV, at paragraph 3.62 of the Report the Commission said:

> "In summary we found that BSkyB's industry knowledge and standing together with its position as the largest shareholder would be likely to increase its ability to influence other shareholders enabling it to block a special resolution with others. Although we recognise the argument that BSkyB would also be in a position *to act as a disruptive shareholder more generally*, we did not attach weight to this in

> reaching our conclusion. We could not form an expectation that BSkyB could expect to be able to exert sufficient influence to force through an ordinary resolution." (emphasis added)

186. Thus, the Commission appears to be correct in stating that it was distinguishing between the blocking of a special resolution and acting disruptively in other respects, and that it discounted only the latter.

187. In relation to the standing authorisation for a rights issue (i.e. pre-emptive equity) there was evidence […][**C**]. Mr Flynn for Sky, although not expressly accepting these disadvantages, did not seriously challenge them. In any event, there was clearly material upon which the Commission was entitled to discount the desirability of a pre-emptive rights issue, including one based upon the standing authorisation, as a fund-raising mechanism which ITV would be likely to wish to use in preference to a non-pre-emptive offering, at least for certain types of strategic investment.

Examples of potential strategic investments

188. As already mentioned, the Commission set out in the Report some examples of the types of strategic investments which Sky would have the opportunity to influence in order to minimise the competitive constraint represented by ITV and thereby cause an SLC. (See for example paragraph 18 of the Report.) As part and parcel of this exercise the Commission considered the scale of the sums which ITV would have to raise in order to pursue such investments. […][**C**]

189. Much of Sky's criticism of these examples is directed to its argument that the Commission has misdirected itself as to the correct approach to the issues of RMS and SLC generally, and that the Commission ought to have considered each example separately and considered whether, on the balance of probabilities, such an investment was likely to be made, and if so whether it would be likely to be funded in a manner which Sky would be able to influence adversely, and whether the failure to make the investment in question would lead to an SLC in the relevant market (see for example paragraphs [96] and [133] of Sky's skeleton argument).

190. We have dealt with this ground of challenge to the Commission's approach (see paragraphs [68] *et seq.* above). For the reasons discussed there we do not consider that

in regard to each of the specific examples the Commission was required to conclude on the balance of probabilities that the particular investment proposal would materialise, that ITV would wish to use *ad hoc* non-pre-emptive equity to fund it, and that Sky would use its influence to defeat or adversely affect the proposed investment resulting in SLC. On the other hand it was in our view entirely appropriate and desirable that the Commission should identify and consider credible examples of strategic investment initiatives which might occur within the time frame under consideration, and that it should consider the scale of funding which might well be required for them.

191. Although Sky contends that the Commission's actual findings in regard to the examples in question are speculative or against the weight of the evidence (for example, Notice of Application paragraph [113]), and that the findings are unsupported by any adequate evidence (for example, Notice of Application paragraph [134]), almost all the points it makes are in fact based upon Sky's central contention as to the approach which it says should be followed generally by the Commission.

192. However, in relation to spectrum for HDTV Sky makes a separate point. Sky alleges that events taking place during the investigation had reinforced the argument which Sky had been making all along to the effect that investment by ITV in HDTV capacity was not a credible strategy (see Sky's skeleton argument, paragraph [138]). In this regard Sky refers to the fact that on 20 November 2007 the public service broadcasters signed the so-called Memorandum of Understanding to which reference is made in paragraphs 4.112 to 4.113 of the Report. The consequence of this development is that ITV may well obtain an allocation of terrestrial spectrum sufficient for the broadcasting of one HDTV channel. Sky argues that this development changed the complexion of ITV's evidence to the Commission: up to that point ITV had been pressing the view that it would probably have to make a substantial investment by way of participation in an auction for HDTV spectrum for its flagship channel ITV1. Sky contends that the Commission has failed to reappraise […][**C**] and dismissed evidence to the contrary without adequate explanation, thereby failing to address its mind to a relevant consideration (see paragraphs [139] to [143] of Sky's skeleton argument).

193. Again, these arguments really go to the Commission's assessment of the evidence before it and to the weight to be placed upon different aspects of that evidence, rather

than to any ground which can form the basis for a challenge under section 120 of the Act. Further, they do not seem to us to be justified in any event. As for the alleged failure of the Commission to "reappraise" the position in the light of the Memorandum of Understanding, the Commission clearly did so. It is clear from the Report at paragraphs 4.112 to 4.116 that […][**C**]. Sky's opposing evidence was expressly considered by the Commission and was discussed in the Report (see paragraphs 4.114 and 4.115). We consider that the Commission was entitled on the evidence before it to form the view that OFCOM's proposals which culminated in the Memorandum of Understanding did not rule out […][**C**]. We note that in this regard the Commission also referred in the Report to ITV's public announcement in September 2007 that it intended to be "at the forefront of the HD revolution for our viewers and advertisers" (see footnote 124 to the Report).

Examples of possible future transactions involving ITV

194. In addition to the examples of strategic investments the Commission also put forward two other areas of potential influence by Sky both of which would weaken the competitive constraint free-to-air services place on Sky and which would not necessarily require significant funding by ITV. These areas are described at paragraph 4.117 of the Report and consist, essentially, of a possible agreed merger which might form part of ITV's competitive strategy, or a situation where Sky is able to encourage the acquisition of ITV by another buyer […][**C**].

195. The first example contemplates an agreed takeover or merger which might well proceed by a scheme of arrangement which Sky would, as the Commission has found, be likely to be able to block. Sky challenges the Commission's reliance on this example on a number of grounds with which we have already dealt. In addition it should be noted that there is nothing far fetched about this scenario: at the time of the acquisition of ITV's shares by Sky, Virgin's bid was in fact proceeding by way of a scheme of arrangement. […][**C**]

196. In addition to the points also made with respect to the first example, the second example is challenged on the ground that, although this scenario is not dependent upon Sky's ability to block a special resolution or scheme of arrangement and is therefore

dependent on a separate mechanism of wielding influence, the Commission does not demonstrate what that mechanism would be or how it would result in SLC (see paragraphs [159] to [160] of the Notice of Application).

197. Whilst it is correct that this example is not directly dependent upon the blocking of a scheme of arrangement or special resolution, the Commission has found that that ability to block, together with Sky's very large shareholding in ITV and its pre-eminent industry experience and stature, provides Sky with material influence over ITV's policy. It is implicit in that finding that such influence would have scope for operation in the postulated situation, for ITV's management and its other shareholders would be aware of Sky's ability to block a scheme of arrangement for the implementation of a merger of which it did not approve. This could affect policy in relation to less welcome takeovers (which Sky might favour) and could also mean, as the Commission points out at paragraph [46] of its skeleton argument, that ITV was less likely to achieve any merger which would have increased the competitive pressure which ITV exercised on Sky and/or which would have reduced the opportunity for […][**C**]. It is true that the Commission does not, in paragraph 4.117 of the Report, mention the mechanism by which Sky, by virtue of its attributes described above, would be in a position to encourage a takeover bid unwelcome to ITV. This is possibly because the value of the support of such a knowledgeable and large shareholder to a potential bidder for ITV is self-evident. It is similarly self-evident that […][**C**] could be such as to weaken considerably its competitive offering, thereby reducing the competitive constraint ITV places upon Sky. […][**C**] Accordingly we do not consider that Sky's complaint in this regard is well-founded.

The Tribunal's conclusions

198. It follows that, so far as the RMS and SLC issues are concerned, Sky has identified no defect in the Commission's approach to the material before it or in the adequacy of that material which is such as to render any of the relevant findings of the Commission perverse or irrational or unsupported by the evidence. Similarly Sky has not, in our view, shown the Commission to have failed to take account of any relevant consideration or to have taken account of any irrelevant consideration in reaching its findings.

V. VIRGIN'S APPLICATION

Introduction

199. Virgin filed its application for a review of the decisions of the Commission and Secretary of State on 25 February 2008. In its application, Virgin specified five separate grounds of review. The first four grounds concern the public interest provisions of the Act and allege that in applying the provisions and assessing the specified public interest consideration the Commission and the Secretary of State misdirected themselves as to the relevant legal questions, took into account irrelevant considerations, failed to have regard to relevant considerations, and reached a conclusion which was irrational, namely that the Acquisition may not be expected to operate against the public interest having regard only to the specified media public interest consideration. The fifth ground alleges that the Commission and the Secretary of State acted unreasonably and made manifest errors in determining the appropriate action to be taken to remedy the identified adverse effects and, in particular, failed to have regard to relevant considerations.

200. The first four grounds are interrelated. At the heart of each of them is one main issue concerning the meaning and effect of subsection 58(2C)(a) of the Act read together with subsections 58A(4) and (5), and whether the Commission's approach to the assessment in subsection 58(2C)(a) was consistent with those provisions. This is an important question, which has not come before the courts until now. Mr Gordon QC, who represented Virgin at the hearing, did not put the argument before us in all the various permutations in which it appeared in Virgin's Notice of Application, but concentrated on the essential issues. We propose to do the same and to address Virgin's grounds 1 to 4 collectively. We will then examine Virgin's fifth ground along with Sky's mirror image submissions on remedies in the following section of this judgment.

201. The procedural background to Virgin's application is set out in section II above.

202. Subsections (2) and (3) of section 42 provide as follows:

> "(2) The Secretary of State may give a notice to the OFT (in this Part "an intervention notice") if he believes that it is or may be the case that one or more

than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.

(3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified."

203. In so far as material, section 58 provides as follows:

"**58 Specified considerations**

(1) The interests of national security are specified in this section.

(2) In subsection (1) "national security" includes public security; and in this subsection "public security" has the same meaning as in article 21(4) of the EC Merger Regulation.

(2A) The need for—

(a) accurate presentation of news; and

(b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section—

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

…"

204. Section 58A is headed "Construction of consideration specified in section 58(2C)". In so far as material, it provides as follows:

> "(1) For the purposes of section 58 and this section an enterprise is a media enterprise if it consists in or involves broadcasting.
>
> …
>
> (4) Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.
>
> (5) For the purposes of section 58, where two or more media enterprises—
>
> (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or
>
> (b) are otherwise in the same ownership or under the same control,
>
> they shall be treated (subject to subsection (4)) as all under the control of only one person.
>
> …"

205. The Secretary of State issued the Intervention Notice to the OFT pursuant to section 42 of the Act on 26 February 2007. It stated:

> "Whereas the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation, as defined in section 23 of the Enterprise Act 2002 ("the Act"), has been created in that:
>
> (a) enterprises carried on by or under the control of British Sky Broadcasting Group plc ceased to be distinct from enterprises carried on by or under control of ITV plc on 17th November 2006; and
>
> (b) the value of the turnover in the United Kingdom of the enterprise taken over exceeds £70 million;
>
> Whereas the Secretary of State believes that it is or may be case that the media public interest consideration specified in section 58(2C)(a) of the Act may be relevant to a consideration of the relevant merger situation concerned;
>
> Now, therefore, the Secretary of State in exercise of his powers under section 42(2) of the Act, hereby gives this intervention notice to the Office of Fair Trading and requires it to investigate and report in accordance with section 44 of the Act within the period ending on 27 April 2007."

206. Similarly, in the terms of reference for the Commission, the Secretary of State specified the public interest consideration set out in subsection 58(2C)(a) of the Act as relevant to the case. The Commission was required under subsection 47(2)(b) of the Act to consider, taking account of the specified public interest consideration, whether the Acquisition operates or may be expected to operate against the public interest.

207. There is no definition of plurality to be found in section 58 or elsewhere in the Act, and the Commission states at paragraph 5.7 of the Report that it took the concept of plurality of persons with control of media enterprises to refer both to the range of and the number of persons with control of the media enterprises. The Commission goes on to explain at paragraph 5.11 of the Report:

> "In considering the range of information and views that might be expressed by media enterprises, we also thought that it was appropriate to distinguish between the range of information and views that are provided across separate independent media groups ('external plurality') and the range that are provided within individual media groups ('internal plurality')."

208. The Commission noted that there is also no statutory guidance as to what constitutes "sufficient plurality of persons with control of the media enterprises". In this regard the Commission examined the explanatory notes to section 375 of the Communications Act 2003 by which the public interest provisions were inserted into the Act ("the Explanatory Notes"), the guidance document published by the former Department of Trade and Industry in May 2004 entitled "Enterprise Act 2002: Public Interest Intervention in Media Mergers - Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers" (the "DTI Guidance"), and what it regarded as Parliament's intentions. At paragraph 5.15 of the Report the Commission stated:

> "Whilst recognizing that it would not be sufficient for plurality purposes to rely on a single provider (for example, the BBC), we do not consider it necessary to take a view on precisely how many owners would constitute a 'sufficient' level of plurality of persons. Rather, we have looked qualitatively at sufficiency. We have considered sufficiency by reference to the current levels of plurality, having regard to any change in plurality that arises as a result of the acquisition. Moreover, in considering the sufficiency of persons with control of media enterprises, we have regard to the implications of the level of control exercised for the range of information and views available. We considered this in relation to both internal and external plurality."

209. As for the implications of subsections 58A(4) and (5), the Commission concluded that no matter which of the various alternative interpretations of these subsections were correct neither provision had any significant effect upon the Commission's assessment of sufficiency of plurality in the present case. (See paragraphs 5.21 and 5.26 of the Report.)

210. In terms of the relevant audience the Commission looked at both the audience for national TV news and for cross-media news, i.e. news obtained via TV, radio, newspapers, magazines and the Internet (see paragraph 5.34). No objection has been taken by Virgin, or any other party, to the identity of the audience.

211. The Commission concluded that given the extent of the influence conferred on Sky by the Acquisition, the regulatory mechanisms combined with a strong culture of editorial independence within television news production were likely to be effective in preventing any prejudice to the independence of ITV news. Consequently, the Commission did not expect Sky's ability materially to influence ITV to have an adverse effect on the plurality of news relative to the position absent the Acquisition. The Commission accordingly concluded that the Acquisition would not materially affect the sufficiency of plurality of persons with control of the media enterprises serving audiences for news (see paragraph 5.75). In those circumstances the Acquisition would not, in the Commission's view, operate against the public interest having regard only to the specified public interest consideration.

212. The Secretary of State said that he was satisfied that the Commission's approach to this matter was correct (paragraph 17 of the Decision) and that he saw no sufficient reason to reach a different conclusion on this matter (paragraph 20 of the Decision).

Summary of the parties' submissions

213. The central proposition in Virgin's case is that the Commission and the Secretary of State misdirected themselves in law in their interpretation of the media plurality provisions of the Act, namely sections 58(2C)(a), 58A(4) and 58(5).

214. Mr Gordon, appearing for Virgin, submitted that in order to determine whether there was sufficient plurality of persons with control of the media enterprises serving a particular audience, the Commission had to answer two central questions: (i) at the relevant time for analysis, that is to say post-merger, how many and which persons were in control of how many and which relevant enterprises? (ii) Was that a sufficient or an insufficient number of persons with control? It is Virgin's case that for the purposes of considering those questions under subsection 58(2C)(a), the Commission was required by subsection 58A(5) to treat Sky and ITV as being under the control of a

single person. The deeming effect of the subsection meant that the degree of control cannot be relevant to a plurality assessment under subsection 58(2C)(a). The restriction imposed by subsection 58A(5) on the scope of the assessment was justified by the fragility and importance of the media public interest consideration in question. It followed that the Commission had erred in law by taking 'internal plurality' into account.

215. For the Commission, Mr Swift QC's submissions focussed on the underlying reasons why the plurality of persons with control of media enterprises is the subject of a public interest consideration in section 58 of the Act. Plurality of persons with control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences. The concern was that power might be concentrated in too few hands such that there was a risk to the democratic process. That, it was submitted, is ultimately a question of fact. Different degrees of control exist, and it would be a fiction to ignore them.

216. Mr Anderson QC, for the Secretary of State, agreed with Mr Swift that regard must be had to the underlying purpose of the provisions. In Mr Anderson's submission, the scheme envisages a detailed inquiry by the Commission into the issues and an exploration of the true effect of the merger on the sufficiency of plurality of persons in control of media enterprises. Legal fictions should not compel the authorities to reach a different conclusion.

217. Mr Beloff QC appeared for Sky on the media plurality issue. He supported Mr Swift and Mr Anderson on this aspect of the case.

218. We were referred in both written and oral argument to *inter alia* the following:

    (a) the Explanatory Notes;

    (b) certain extracts from Hansard;

    (c) the DTI Guidance;

    (d) OFCOM's Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002; and

    (e) further advice provided by OFCOM to the Secretary of State.

The issues

219. The main question for the Tribunal is whether the Commission was entitled to take what it called 'internal plurality' into account in its assessment of the sufficiency of plurality of persons with control of the media enterprises under subsection 58(2C)(a), or whether the effect of subsection 58A(4) and/or (5) is such that the degree and nature of control that Sky would be able to exercise over ITV is not a relevant consideration in relation to that issue and should not be taken into account in circumstances where Sky and ITV would be treated as under common control for the purposes of section 26.

220. That main question is influenced by two subsidiary issues concerning the interpretation of subsections (4) and (5) of section 58A. It is convenient to consider these issues before returning to the central question.

Subsection 58A(4)

221. Subsection 58A(4) provides:

> "(4) Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards."

222. At paragraph 5.19 of the Report the Commission drew attention to the distinction between subsection 58(2C)(a) being concerned with the *sufficiency of plurality of persons in control* of media enterprises and subsection 58A(4) being concerned with the *number of media enterprises,* and concluded (at paragraph 5.20) that subsection 58A(4) does not deem a reduction in plurality in place of a substantive assessment of the impact of the Acquisition. At paragraph 5.21 of the Report, the Commission said:

> "Moreover, although section 58A(4) may be interpreted as deeming a reduction in the number of media enterprises serving a relevant audience, such a reduction would not necessarily cause a reduction in the range of information and views available to that audience. We therefore thought that the outcome of our assessment of plurality would not depend on which interpretation of section 58A(4) we adopted."

223. Virgin's argument is that subsection 58A(4) requires an assumption that the merging enterprises are a single enterprise after the merger and this, in Virgin's submission, has obvious consequences for the application of subsection 58(2C)(a).

224. The Commission and the Secretary of State argue that Virgin's approach, if adopted, would reduce the exercise under subsection 58(2C)(a) to no more than a head-counting exercise, and they rely upon the distinction between the two provisions referred to at paragraph 5.19 of the Report as supporting their argument.

225. In this regard we were referred to the Explanatory Notes. In so far as they cast light on the objective setting or contextual scene of a statute or the mischief at which it is aimed, such notes are admissible (per Lord Steyn in *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956). However, care must be taken not to treat the wishes and desires of the Government as reflecting the will of Parliament since the aims of the Government in respect of the meaning of the clauses as revealed in the Explanatory Notes cannot be attributed to Parliament.

226. The Explanatory Notes state at paragraph 804:

> "New section 58A(4) makes clear that where a merger situation (i.e. a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience, then there is deemed to be a reduction in the number of such media enterprises for the purposes of the plurality assessment in subsection (2C)(a). This means that all such mergers, including those involving an increase in levels of control of such media enterprises, may be scrutinised for the purposes of subsection (2C)(a), even though the number of enterprises may in fact be unchanged."

227. We were also taken to the DTI Guidance which states that it "seeks to explain the media public interest considerations and provide an indication of how the Secretary of State expects the provisions to operate in relation to mergers involving newspapers or broadcast media enterprises, and to cross-media mergers involving both broadcast media enterprises and newspaper enterprises." The scope of the broadcasting and cross-media public interest considerations and the Secretary of State's policy on intervention in broadcasting and cross-media public interest cases are contained in sections 7 and 8 of the DTI Guidance.

228. The DTI Guidance states in relation to subsection 58A(4):

> "When assessing plurality, where a merger situation (i.e. a relevant merger situation or a special merger situation) involves two media enterprises serving the same audience as defined by the Secretary of State, then there is deemed to be a reduction in the number of media enterprises serving that audience for the purposes of the plurality assessment in subsection (2C). All such mergers, including those

> involving an increase in levels of control of such media enterprises, may be examined for the purposes of subsection (2C). This means that the Secretary of State can assess whether, as a result of the merger, there will still be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged."

229. In our view subsection 58A(4) seems to be more than a mere anti-avoidance mechanism designed to ensure that mergers involving a change in the level of control are captured. Indeed, the Commission and the Secretary of State appeared to accept that the provision was not limited to such circumstances. Nor does it reduce the assessment under subsection 58(2C)(a) to a mere head-counting exercise. While the subsection creates an assumption that the number of media enterprises serving the relevant audience has been reduced post-merger, this does not lead to an automatic assumption that the plurality of persons in control of those media enterprises has reduced, still less that the plurality is insufficient. A separate assessment of the sufficiency of that plurality must be carried out. The key question, therefore, remains whether the degree and nature of control exercised over the media enterprises in question can, consistently with the legislation, be taken into account when conducting that assessment so as to open the door to a consideration of 'internal plurality'. The meaning and effect of subsection 58A(5) is important in resolving that question. We therefore turn to look at that subsection.

Subsection 58A(5)

230. Subsection 58A(5) provides as follows:

> "(5) For the purposes of section 58, where two or more media enterprises—
>
> (a) would fall to be treated as under common ownership or common control for the purposes of section 26, or
>
> (b) are otherwise in the same ownership or under the same control,
>
> they shall be treated (subject to subsection (4)) as all under the control of only one person."

231. The Explanatory Notes comment as follows on this provision:

> "805. New section 58A(5) ensures that the authorities can look at the substance of who controls media enterprises when carrying out a plurality assessment.

> 806. New section 58A(5)(a) provides that, for the purposes of section 58, where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 of the EA 2002, they are treated as being controlled by one person. This is because, in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the decision-making authorities need to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole. Apart from the merging media enterprises, in order to get an accurate picture of who has control of the remaining media enterprises, it is important to be able to look not just at the owners of those entities, but at the persons with ultimate control of those entities.
>
> 807. New section 58A(5)(b) provides that where a number of media enterprises are otherwise under the same ownership or control, they are treated as being controlled by one person. This is intended to cover any situation where the other media players may have never been "brought" under common ownership or control at any point in the section 26 EA 2002 sense."

232. The meaning of subsection 58A(5) was considered in paragraphs 5.22 to 5.26 of the Report. The Commission referred to paragraph 7.14 of the DTI Guidance, which states as follows (footnotes omitted):

> "Where a number of media enterprises would fall to be treated as under common ownership or common control for the purposes of section 26 of the Act, they are treated as being controlled by one person for the purpose of determining whether there is sufficient plurality of control of media enterprises. This is because in assessing the effect of a merger on the sufficiency of plurality of persons with control of media enterprises, the Secretary of State needs to assess the total number of persons with control of media enterprises and what effect the merger will have on the plurality of media as a whole. Apart from the merging media enterprises, when looking across the spectrum to assess who has control of the remaining media enterprises, it is important to be able to look not just at the owners of those entities, but the controllers of those entities to get an accurate picture in relation to plurality in order to carry out the assessment relating to sufficiency of plurality."

233. Having drawn attention to the words "Apart from the merging media enterprises" in that passage, which also appear in the Explanatory Notes (above), the Commission stated at paragraph 5.24 of the Report that the "better" interpretation of subsection (5) was that it is applicable "not to the merging media enterprises but to other enterprises serving that audience." The Commission considered that the use of the word "would" in paragraph (a) of subsection 58A(5) cannot easily be applied to two enterprises which *have in fact* been treated as under common ownership or control.

234. However, the Commission recognised that there was an alternative interpretation, advanced then (as now) by Virgin, to the effect that subsection 58A(5) requires also the

merging parties to be treated as under the control of only one person. The Commission considered this alternative approach and concluded at paragraph 5.26 of the Report that:

> "Even if section 58A(5) requires ITV to be treated as under the control of only one person, we could see nothing in section 58A(5) to suggest that the degree of control exercised by that person should be treated as equivalent to full control or ownership if that is not in fact the case. That is particularly so since section 26 of the Act covers a range of different degrees of control. We therefore conclude that the nature of the assessment we should carry out for the purposes of section 58(2C)(a) does not depend substantially on our interpretation of section 58A(5)." (footnote omitted)

235. Thus the Commission was reluctant to attribute a meaning and effect to subsection (5) which would prevent it from taking account of a factor (degree of control) which the Commission regarded as relevant to the plurality assessment it was required to carry out. On Virgin's interpretation of the statutory provisions that factor was an impermissible consideration in relation to the assessment of the sufficiency of plurality of persons with control, under subsection 58(2C)(a). In our view the construction of subsection (5) is central to the main issue before us, and we now turn to consider the respective arguments on that issue in a little more detail.

"Sufficient plurality of persons with control of media enterprises" – is the degree of control or 'internal plurality' relevant?

236. Virgin's case is that the public interest consideration specified in subsection 58(2C)(a), read in conjunction with subsections (4) and (5) of section 58A, requires the decision-maker first to determine the *number* of persons with control of the media enterprises serving the relevant audience. It must carry out this exercise treating the merging media enterprises of Sky and ITV as all under the control of only one person. It follows that there can be no degrees of control for this purpose: if there must be assumed to be only one controller it would defeat the spirit and letter of the provisions to carry out the plurality assessment on the basis that the degree of control was in fact low. The legislation does not permit the decision-maker to determine the overall number of controllers by reference to the range of information and views made available to audiences from *within* media enterprises under common control (i.e. what the Commission called 'internal plurality'). Virgin submits that this follows from (i) the plain and ordinary meaning of "plurality", (ii) subsection 58A(4) which requires that the number of relevant media enterprises shall be fewer following a merger and (iii)

subsection 58A(5) which provides that two or more media enterprises under common ownership or control shall be treated as under the control of only one person. Having determined the number of persons with control of the media enterprises serving the relevant audience the decision-maker must, in Virgin's submission, carry out an assessment of whether there is *sufficient* plurality remaining following the Acquisition. Here, too, regard to 'internal plurality' is excluded. If it were to be treated as relevant at this point, as the Commission and Secretary of State contend, then subsection (5) would be rendered meaningless: for even if the number of "persons with control" was reduced to one, plurality could still be considered "sufficient" by reason of 'internal plurality'.

237. The Commission, supported by the Secretary of State and Sky, contends that Virgin's submissions are misconceived. In considering the application of the public interest consideration the Commission examined not only the number of persons controlling media enterprises following the merger but also what the likely impact of the merger was upon the range of information and views available to the public. In doing so it treated the range of information and views available from within ITV as separate from and additional to those available from within Sky in view, in particular, of the editorial independence of ITV's news providers, ITN. In the Commission's submission this qualitative assessment was necessary to reach a judgment as to whether the merger affected the "sufficiency" of plurality of persons in control of media enterprises.

238. In support of the Commission's argument that it was right to take the degree and nature of control and therefore 'internal plurality' into account in its assessment of the public interest consideration, Mr Swift referred us to the DTI Guidance and statements made in the House of Lords when the House was debating the Communications Bill. Those statements are referred to in the Report at paragraphs 5.9-5.10 (footnotes omitted):

> "5.9 We recognized the link between media plurality and the democratic process. This is consistent with the views of Parliament when introducing the plurality provisions as part of the Act. For example, Lord McIntosh of Haringey (Parliamentary Under-Secretary, DCMS) stated that 'media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda'. Similarly, Lord Puttnam said, in moving the amendment which later became section 58, 'in Committee, in another place, Dr Howells summed it up quite neatly: "our key aim

is to ensure that there is a range of competing voices available to citizens so that they are free to form their own opinions"'.

5.10 We concluded that a plurality of control within the media is a matter of public interest because it may affect the range of information and views provided to different audiences. In our provisional findings, we defined plurality in these terms. In response to comments on our provisional findings, we thought it important to draw a distinction between the plurality of persons with control of media enterprises and the implications of that plurality for the range of information and views made available to audiences."

239. In Mr Swift's submission this section of the Report is emphasising that it is ultimately a question of fact whether there is control of the media. At no stage, either in the Joint Committee or in the debates, is there a suggestion that media mergers should be treated differently from other types of mergers in respect of a critical assessment of their likely effects. The Commission would, he argued, not be complying with its duties if it were to reach a conclusion which it knew was contrary to the facts. The Commission in its Defence adopted certain comments of Lord Puttnam during a debate in the House of Lords on the proposed legislation. He described a reference to the Commission as an "analytical, fact-based" and "evidence-based approach". Also cited to us by Mr Swift were the following remarks of Lord McIntosh of Haringey (at the time, Parliamentary Under-Secretary, Department for Culture, Media and Sport) which, so it was submitted, supported the Commission's conclusion at paragraph 5.10 of the Report:

"I have already mentioned the rule which prevents a national newspaper with more than 20 per cent of the market, or a body in which such a paper has more than a 20 per cent interest, from holding a Channel 3 licence – sometimes referred to as the 20:20 rule. This rule has served us well, but it has a "cliff-edge", all or nothing, element to it. The rule is therefore somewhat arbitrary in its effect. A plurality test would, in principle, allow the Secretary of State to make a judgment on media mergers, based on the particular circumstances of the case." And

"…it is inherent in the nature of a test that one cannot predict the outcome in advance in any individual case. It will be necessary to analyse and consider all the relevant circumstances at the time on a case-by-case basis."

(Hansard (HL Debates), 2 July 2003, cols 914-915.)

240. On these points the Commission was strongly supported by the Secretary of State. Mr Anderson's submissions focussed in large measure on the so-called deeming provisions, subsections 58A(4) and (5). Mr Anderson submitted that the concept of *sufficiency* of plurality clearly concerns far more that just a head-counting exercise. Having regard to the underlying purpose of the provisions, the scheme of the Act

envisages a detailed inquiry by the Commission into the issues and an exploration of the true effect of the merger on the sufficiency of plurality of persons in control of media enterprises, that is to say the impact of the merger on the range and number of sources of information and opinion available through the media in our democratic society. Mr Anderson argued that the Commission was right not to lose sight of this objective in conducting its analysis and submits that the Tribunal should also not lose sight of it. The question whether the merger situation has an adverse effect on the range of information, opinions and ideas that are available within a society to enable its citizens to form their own opinions is, in his submission, at the heart of any sufficiency of plurality exercise. He argued that Virgin's case effectively nullifies the need for the Commission to undertake any inquiry into the nature of the control at issue. This, he submits, defies common sense. Given that the Commission found on the facts that the Acquisition, and the degree of Sky's influence arising out of it, had no impact on the range of competing voices available to citizens or the views and opinions available to citizens, it cannot be right that legal fictions, or deeming provisions, should compel the authorities to reach a different conclusion. As far as the meaning and effect of subsection 58A(5), Mr Anderson submitted that the purpose of that provision was to enable the Commission to cut through concepts such as family ownership and complicated ownership structures of groups of companies, and allow the Commission to look at the actual control in those circumstances not just count how many people are actually controllers of media enterprises.

241. Mr Beloff for Sky drew our attention to the use of the word "plurality" in subsection 58(2C)(a) in contrast to the word "number" which is used in subsection 58A(4). Mr Beloff suggested that as a matter of ordinary interpretation the fact that two different concepts have been employed implies that they must have been intended to convey something different to one another. Further, the fact that in subsection 58(2C)(a) the noun "plurality" is qualified by the adjective "sufficient" means indisputably that there must be a qualitative assessment. It is not enough to say that there are fewer persons in control of the media for a particular audience after the merger than there were before, therefore there is insufficient plurality. He submitted that the Commission must look into the consequences of that diminution in number of persons in control, and that necessarily engages amongst other factors the degree of control, the potential for its exercise and the likelihood of its exercise. Mr Beloff also

submitted that it would make no sense for the legislature to have given the Commission a blunt instrument of assessing a degree of control which was contrary to the facts.

242. We were referred to paragraphs 797 *et seq.* of the Explanatory Notes. Paragraphs 800 and 801 comment upon subsection 58(2B), which concerns the need for a sufficient plurality of views in newspapers. Paragraph 802 concerns subsection 58(2C). It states:

> "802. New subsection (2C) has three elements: (a) the need in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience; (b) the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in the Communications Act 2003. The first limb of this subsection is concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons. The second and third limbs of the test look at the content of the media enterprises involved and the extent to which media owners demonstrate a genuine commitment to complying with the standards objectives - i.e. complying with the spirit and not just the letter of the objectives."

243. This case is of course concerned only with the first of the three elements contained in subsection (2C), i.e. "the need in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience". Only this was referred to the Commission for investigation. The Commission was therefore concerned solely with the question whether by virtue of the Acquisition (to borrow the words of the Explanatory Notes) ownership of media enterprises was overly concentrated in the hands of a limited number of persons. This case is not concerned with the second and third elements in the subsection.

244. It is also worth noting the distinction in the use of language employed in subsections (2B) and (2C) respectively. In subsection (2B), which applies to newspapers, the relevant consideration is whether there is a "sufficient plurality of views" whereas in subsection (2C), which applies to media enterprises, the relevant consideration is whether there is "a sufficient plurality of persons in control" of those enterprises. The focus of the test applicable in this case is therefore on the controllers of the media enterprises, rather than the nature of their output.

245. We were shown the DTI Guidance, which states:

> "**Plurality of persons with control of media enterprises**
>
> 7.7 The first of the broadcasting and cross-media public interest considerations set out in section 58(2C) refers to the need for a sufficient plurality of persons with control of media enterprises serving the same audience in any given area of the UK. This public interest consideration is concerned primarily with ensuring that control of media enterprises is not overly concentrated in the hands of a limited number of persons. It would be a concern for any one person to control too much of the media because of their ability to influence opinions and control the agenda. This broadcasting and cross-media public interest consideration, therefore, is intended to prevent unacceptable levels of media and cross-media dominance and ensure a minimum level of plurality.
>
> 7.8 In considering the impact of a merger on this consideration, the Secretary of State may assess the effect of the merger on a range of factors.
>
> 7.9 First and foremost, the Secretary of State may consider the impact of the merger on the number of persons controlling media enterprises serving the relevant audiences in any given area of the UK, with the object of securing that control of media enterprises continues to be spread across a sufficient number of persons. When assessing the number of persons controlling media enterprises post-merger, it would be relevant to take into account the number of other players serving that audience. This would include BBC and the Welsh Authority, where relevant, as well as owners of broadcasters established abroad and broadcasting into the UK under European Union licences.
>
> 7.10 However, bare numbers may not tell the whole story. It might be relevant to consider the audience shares of the media enterprises brought under common control by the merger and the audience shares of other media enterprises. This is because the Secretary of State considers that what constitutes a sufficient number of owners controlling media enterprises in a given case may be affected by the relative audience shares that these enterprises hold. Audience shares can be assessed in relation to every different audience in the UK or locality of the UK served by these media enterprises. In assessing audience shares, it might also be relevant to consider the audience shares of other players serving the same audience.
>
> 7.11 Thus, the Secretary of State considers that sufficient plurality in this context refers to the number of persons controlling media enterprises, taking into account as appropriate relative audience shares. The Secretary of State will assess whether there is likely to be a significant reduction in plurality in relation to any relevant audience as a result of the merger."

246. The above throws little further light on the specific issues with which we are concerned although it may be said that by looking initially and primarily at the number of persons controlling media enterprises post-merger it adopts an approach to the exercise which is closer to that advocated by Virgin.

247. We were taken to OFCOM's initial report and its further advice to the Secretary of State. In its report, OFCOM set out how it had approached the concept of sufficient plurality of persons with control of media enterprises. Again, the specific issues with which we are concerned are not directly addressed by OFCOM:

> **"Sufficient plurality of persons with control of media enterprises serving those audiences**
>
> 1.11 We have considered whether there is a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news. We have assessed this by identifying the persons with control of the media enterprises serving those audiences, and then by considering whether the control of media enterprises continues to be spread across a sufficient number of persons, taking account of the share of the audiences being served by those enterprises (see further section 4)…
>
> 1.13 In identifying the persons with control of the media enterprises serving the relevant audiences, we have treated all media enterprises under the same ownership or the same control as being controlled by one person.
>
> 1.14 For these purposes we have assumed that Sky is or may be controlled by News Corporation (39.1% shareholding held through a number of News Corporation subsidiaries). We have therefore considered newspapers in our report.
>
> 1.15 The Act requires that, where a relevant merger situation has been created, Ofcom should carry out the public interest test on the presumption that there has been a reduction of one in the number of enterprises serving the relevant audience(s). The purpose of this provision is so it can be assessed whether, as a result of the relevant merger situation, there will still be a sufficient plurality even though the number of enterprises may be unchanged.
>
> 1.16 Ofcom recognises that Sky's shareholding in ITV is 17.9% and that Sky does not currently have any representation on ITV's Board. However, for the reasons set out below and in detail in section 4, Ofcom continues to be concerned that Sky's acquisition of shares in ITV gives rise to plurality considerations…
>
> …
>
> 4.4 In identifying the persons with control of the media enterprises serving the UK cross-media audience for news and the UK TV audience for news we have looked at the ownership structure of those media enterprises. For these purposes, we have treated all media enterprises under the same ownership or the same control as being controlled by one person.
>
> …
>
> **Sufficient plurality of persons with control of media enterprises**
>
> 4.8 We have assessed the number of persons with control of media enterprises serving the relevant audiences with the object of securing that control of media enterprises continues to be spread across a sufficient number of persons.

4.9 In making this assessment in relation to the relevant merger situation, there is deemed under the Act to be a reduction in the number of media enterprises for the purposes of this assessment. The purpose of this provision is so that it can be assessed whether, as a result of the merger, there will still be a sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged.

…

4.19 The relevant merger situation reduces from five to four the number of TV news providers with an audience share of more than one per cent of TV news. It brings together the second and third largest providers of news on television with a combined audience share of 30.6%.

…

4.26 As noted above, Sky has submitted that it has no ability to influence ITV's editorial policy. In contrast, a number of third parties have made representations that a prudent management of ITV will, in formulating policy, have regard to the interests of the companies major shareholder and that Sky has the ability to influence ITV. We also note that ITV does not argue in its representations that Sky does not have influence over its policy decision-making. Ofcom notes the contrasting representations made as to the likely future ability of Sky to influence ITV. In addition, Ofcom notes the purpose behind the public interest consideration which is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda. In light of this, taking into account the level of the shareholding, Ofcom continues to be concerned that Sky's acquisition of shares in ITV gives rise to plurality considerations.

…

Conclusion

4.45 For the reasons set out above, Ofcom is concerned that there may not be a sufficient plurality of persons with control of the media enterprises serving the UK cross-media audiences for news and the UK TV audience for news."

248. Finally, we were taken to OFCOM's responses to specific questions asked by the Secretary of State prior to referring the Acquisition to the Commission. Question 2 is tantalisingly pertinent to the issues before us, but the answer given by OFCOM does not take the matter much further:

"Question 1

Does the application of section 58A(4) EA 2002 remove the need for there to be an assessment at this stage of the regulatory process of the level and degree of control that BSkyB may exercise over ITV? If so, on what basis? If not, what is the relevance of the level or degree of control and what conclusions has Ofcom drawn or does Ofcom draw in this case? (see paras 3.18- 3.26 of BSkyB's submissions of 2.5.07 to the Secretary of State)

1. In considering the effect of Sky's acquisition of shares in ITV in relation to plurality issues in its report, Ofcom covered both the application of section 58A(4) and the level of Sky's acquisition of shares in ITV.

2. Ofcom's view, taking into account the level of Sky's shareholding was that, at this first stage the issue of whether Sky has the ability to influence ITV's editorial policy warranted a further second stage investigation. In reaching this view, Ofcom took account of the purpose behind the public interest consideration which is to avoid any one person controlling too much of the media through an ability to influence opinions and control the agenda. It also took account of the fact that there were very differing representations made on Sky's ability to influence ITV's editorial policy, as between Sky and all other third parties. Ofcom was also aware of the fact that the OFT had made a provisional finding that Sky may have material influence over ITV and was reporting its decision on the level of Sky's influence to the Secretary of State and that such decision would involve the OFT in a full consideration of the extent of influence that Sky may have on ITV.

Question 2

What is the relevance of section 58A(5) to an assessment of the relevance of the public interest issues? Your report refers to that provision in the context of identifying that News International may control Sky (paras 4.4 and 4.5), but not in relation to Sky's shareholding in ITV. Why is that so?

3. As you recognise, Ofcom has considered the application of section 58A(5) in respect of the relationship between News International and Sky (see paragraph 4.4 and 4.5 of our report). The application of section 58A(5) to the relationship between Sky and ITV would in our view not change the analysis in our report.

…"

The Tribunal's conclusions

249. Although the interrelationship of the statutory provisions governing the plurality assessment is by no means straightforward, we have come to the conclusion that Mr Gordon's submissions as to the meaning and effect of the provisions in question, including in particular subsection 58A(5), are correct, and therefore that the Commission misdirected itself in law on the plurality issue.

250. The purpose of subsection 58A, as its title states, is to condition the operation of section 58. Subsection 58A(5) itself begins with the words "For the purposes of section 58…". The subsection unequivocally imposes an assumption upon the Commission in relation to the plurality assessment: "…they *shall* be treated…as all under the control of only one person" (emphasis added). This imposed assumption may sometimes amount to a

legal fiction, as it is probable that in many affected cases there will be more than one person controlling the enterprises in question.

251. As discussed earlier, the Commission and the parties supporting it argue with varying degrees of enthusiasm that this subsection does not apply to the merging parties, but only to other relevant media enterprises. We do not agree. In our judgment, the most natural interpretation of subsection 58A(5) is that it applies to all media enterprises serving the relevant audience including the merging entities.

252. The Commission seeks support from the use of the word "would" in paragraph (a) of subsection 58A(5), arguing that it cannot be said that Sky and ITV "would" fall to be treated as under common ownership or common control for the purposes of section 26 as the word "would" implies a forward-looking proposition whereas so far as the Commission is concerned, Sky and ITV have already in fact been treated as coming under common control. We are unconvinced by this argument which places an undue weight on the usage in question. It seems to us that if it had been intended to draw such an important distinction between the merging parties and other enterprises falling within the plurality assessment then nothing would have been easier for the draftsmen to do in plain words. We find it inconceivable that the distinction would have been drawn instead by a virtually coded use of the word "would".

253. Furthermore, it is not immediately obvious why the assumption in subsection (5) should be applied to some enterprises but not the merging ones. If degrees of control and 'internal plurality' were to have been relevant and permissible considerations in relation to the overall plurality assessment then the natural course would have been to have subjected all media enterprises to the same analysis. It would be curious to apply one rule to the merging parties and another to their competitors in the absence of a clear reason for the difference in treatment. We note in particular the Secretary of State's view that it was not necessary to exclude the merging entities from the analysis (see the Secretary of State's Defence at paragraph [63] and skeleton argument at paragraph [97]).

254. There is nothing in the provision itself which supports the Commission's view. The Commission prays in aid paragraph 7.14 of the DTI Guidance and paragraph 806 of the

Explanatory Notes (see earlier) which use the wording "Apart from the merging media enterprises…". However, as Mr Gordon commented at the oral hearing, while those words in isolation might indicate that a distinction is being drawn between the merging media enterprises and other media enterprises, in the context of the paragraph read as a whole they can just as easily be given an inclusive meaning: in other words they could mean "in addition to the merging media enterprises…" rather than "except for".

255. We therefore consider that subsection 58A(5) applies to the merging media enterprises.

256. However, as noted above, the Commission in its Report recognised that that was an alternative interpretation of subsection 58A(5) but came to the conclusion that the nature of its assessment did not depend substantially on which interpretation of the subsection was correct. If the Commission is right it begs the question: what then is the purpose of subsection 58A(5)? If the degree and nature of control exercised over media enterprises can be taken into account when conducting an analysis of the sufficiency of plurality of ownership under subsection 58(2C)(a) then what, if any, purpose does subsection 58A(5) serve?

257. The reason which the Commission gave for concluding that the interpretation of subsection (5) did not affect its analysis was set out at paragraph 5.26 of the Report as follows:

> "Even if section 58A(5) requires ITV to be treated as under the control of only one person, we could see nothing in section 58A(5) to suggest that the degree of control exercised by that person should be treated as equivalent to full control or ownership if that is not in fact the case. That is particularly so since section 26 of the Act covers a range of different degrees of control." (footnote omitted)

258. There is a problem with that reasoning. If (as the Commission assumed for this purpose, and as we consider to be the case) the statute requires ITV and Sky to be treated as under the control of only one person, what scope does the statute leave for an analysis which attributes less than total control to that person? It seems to us that where subsection (5) applies to two or more media enterprises a detailed consideration of the degree and nature of control exercised over such enterprises would be irreconcilable with the statutory requirement that the companies in question should be treated as under

the sole control of a single person. The interpretation espoused by the Commission and Secretary of State would render the provision otiose.

259. It follows that in conducting its plurality assessment under subsection 58(2C)(a) the Commission is precluded from treating ITV's (assumed) single controller as having less than total control. How does this affect the overall plurality assessment? This is basically a two stage process. First the Commission must identify, in an initial "headcount", the number of controllers (of relevant media enterprises) remaining after the merger. In doing so the Commission must apply the statutory provisions, and in particular subsection 58A(5). This stage is the logical prelude to the second stage of the exercise, which asks whether there is a sufficient plurality of owners controlling media enterprises in a given case (a sufficiency assessment). We have considered whether the effect of subsection 58A(5) might be limited to the initial "headcount", leaving it open to the Commission to take account of degrees of control when they come to assess sufficiency of plurality. However we can see no justification for restricting the effect of the provision in this way. There is no support for such a distinction in the provision itself, and it would still render the subsection otiose. The result is that the Commission's reliance upon 'internal plurality' is inconsistent with the statutory provisions, for the concept of 'internal plurality' is dependent upon the Commission being able to take account of *degrees* of control over the merged entities. The Commission ought to have treated Sky and ITV as *wholly* controlled by only one person and treated the fact that in practice Sky shares control over ITV with others as irrelevant for the purpose of the plurality assessment.

260. Although there is always a danger in placing too much weight upon a *reductio ad absurdum* argument, there is some force in the point made by Mr Gordon that the logical consequence of treating 'internal plurality' as a relevant consideration at any stage of the plurality assessment is that there could still be sufficient plurality for the purposes of the statutory test with only one single controller of all relevant media enterprises, provided there remained sufficient 'internal plurality' because of, for example, the editorial independence of different news providers within those enterprises.

261. Thus, whilst we understand the reluctance of the Commission and the Secretary of State to be placed in what they regard as a statutory straitjacket, we have come to the conclusion that the legislation does have a limiting effect. On the interpretation which the Tribunal finds to be correct Parliament has adopted a precautionary measure for the plurality assessment under subsection 58(2C)(a) by providing for a statutory assumption of sole control of the merging enterprises, even in a case where the lowest form of common control for the purposes of section 26 of the Act applies, i.e. material influence.

262. We consider that the aspects of the legislation which impose a constraint upon the plurality assessment are explicable in the light of the importance and sensitivity of ensuring structural media plurality. First, the nature of media plurality – what Mr Gordon referred to as its "fragility" – is such that once lost, it may be very difficult or indeed impossible to restore. Second, as is common ground, media plurality is important for our society. The matter was put well by Lord McIntosh of Haringey in another section of his speech during the passage of the Communications Bill through Parliament:

> "Media plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any one person to control too much of the media because of his or her ability to influence opinions and set the political agenda. It is therefore essential to set limits on concentrations of ownership. Competition law will do that to some degree and may, in fact, be all that is needed in many cases. But there is no guarantee that that will always be so.
>
> That is particularly true in the case of cross-media concentrations, where the competition authorities may well take the view that the markets are separate and that consequently there is no effect on competition. That is a completely proper conclusion as regards competition but it may not be sufficient to safeguard the appropriate level of plurality. That is why we have specific restrictions on media ownership which are additional to competition rules.
>
> Plurality is a very subjective notion. It is not susceptible to the same kind of economic analysis as competition issues. It is very much a matter of judgment of what "feels" right. For this Bill, our approach has been to examine each media audience, including cross-media audiences, and to judge the level of plurality that we consider necessary. It is important to recognise that setting artificial limits on markets can make them economically less efficient. But we need to protect plurality and recognise that there is a minimum level of plurality below which we must never go."
>
> (Hansard (HL Debates), 2 Jul 2003, Cols 912-913)

263. Third, though an increase in the level of control from one type of control to another (for instance, from material influence over policy to *de facto* control) may be caught by the merger control provisions and subject to a further assessment, not all increases in shareholding and not all increases in the level of control or influence generally would necessarily be so caught. The degree of control exercised over media enterprises may change after the Commission's assessment without triggering a new investigation. This may justify a precautionary approach to the assessment of the sufficiency of plurality of ownership of media enterprises, which is more concerned with the structure of the market and of ownership of the relevant media enterprises rather than the precise level and degree of control capable of being exercised at any given point in time. There may be a creeping increase in influence over time. To take a factor which was decisive for the Commission in the present case, editorial independence may well be susceptible to change. It would hardly be surprising if Parliament, desiring to ensure more than short-term protection, took an approach to sufficiency of plurality of media ownership which discounted possibly ephemeral concepts such as 'internal plurality' which may be dependent upon the degree of control remaining static. This is not to say that editorial independence is necessarily at risk whether within ITV, ITN or anywhere else, but simply that a plurality sufficiency test which has the effect of excluding reliance upon it is perfectly understandable.

264. We have carefully considered the counter arguments put forward by the Commission, the Secretary of State and Sky. At the hearing Mr Anderson submitted that applying the legislation in this way would effectively nullify the need for the Commission to undertake any inquiry into the nature of the control issue, and that it was odd at the very least that deeming provisions or "legal fictions" should be construed so as to compel the authorities to reach a conclusion different from that which they would have found on the facts. However, we are of the view that the plain meaning of the words in the statutory provisions, and in particular subsection 58A(5), does condition the exercise which is to be carried out under subsection 58(2C)(a). Subsections 58A(4) and (5) are in the nature of deeming provisions. Moreover, as we have indicated, the effect of those deeming provisions is consistent with Parliament's desire to ensure a high level of protection for an important public interest.

265. Nor do we accept the argument that the view of the legislation which we have reached reduces the Commission's exercise to a mere "headcount" and removes its ability to carry out a detailed inquiry into the issues and to explore the true effect of the merger on the sufficiency of plurality of persons in control of media enterprises. A qualitative assessment of the sufficiency of the plurality of persons in control of media enterprises following the merger is still required; but it must be carried out within a framework which treats the merged companies (and any other media enterprises to which subsection 58A(5) applies) as subject to a single controller. Although that framework does in our view preclude account being taken of 'internal plurality', it still leaves room for a detailed and wide-ranging qualitative assessment on the basis of which the Commission will judge whether the 'external plurality' of the remaining controllers is "sufficient".

266. It follows that the Commission misdirected itself as to the meaning and effect of the legislation in question and in particular subsection 58A(5) of the Act. The Commission wrongly considered that subsection 58A(5) either did not apply to the merged enterprises, Sky and ITV, or even if it did apply to them it made no real difference to the exercise required of the Commission under subsection 58(2C)(a) to assess whether following the Acquisition there remained sufficient plurality of persons with control of the media enterprises serving the relevant audience. As a result, in carrying out that exercise the Commission took into account irrelevant considerations, namely the degree of control which Sky was in fact able to exercise over ITV, together with what the Commission has called the 'internal plurality' or range of information and views provided from within the merged enterprises. Had the Commission properly directed itself as to the effect of the legislation it would have treated the relevant media enterprises of Sky and ITV as under the control of only one person for the purpose of the plurality assessment it was carrying out, and would have regarded 'internal plurality' as irrelevant to the assessment.

267. Moreover, the irrelevant considerations appear to have been material to the conclusions reached by the Commission both in relation to the sufficiency of the plurality of controllers under subsection 58(2C)(a), and in relation to the related question whether the Acquisition may be expected to operate against the public interest having regard to that media public interest consideration, under section 47 of the Act. Nor in our view is

it possible to say with any confidence what the Commission's conclusions on those questions would have been had it directed itself in accordance with what we have found to be the correct interpretation of the legislation.

268. It follows from the above that the Commission's conclusions (1) that the Acquisition would not materially affect the sufficiency of persons with control of media enterprises servicing the relevant audiences for news, and (2) that the Acquisition may therefore not be expected to operate against the public interest having regard only to the specified public interest consideration, and (3) the corresponding decisions of the Secretary of State cannot be sustained and must be set aside. We return to the question of what if any further relief should be granted as a result of our conclusions, at paragraph [329] *et seq.* below.

VI. SKY'S AND VIRGIN'S CHALLENGES TO THE REMEDIES

Introduction

269. Both the Sky and Virgin applications challenge the lawfulness of the Commission's decision to recommend, and the Secretary of State's decision to impose, partial divestiture of Sky's shareholding in ITV down to a level below 7.5%, together with certain behavioural undertakings. Sky contends that the Commission and the Secretary of State went too far, and should instead have imposed some lesser behavioural remedy, such as requiring Sky to give an undertaking not to exercise voting rights or to put the shares into a voting trust. Conversely, Virgin submits that the adopted remedy did not go far enough and that Sky should have been ordered effectively to divest itself of its entire shareholding in ITV.

270. Before dealing with the respective grounds of review advanced by the applicants we summarise the relevant aspects of the legal framework (which is set out more fully at section II above), the Report and the Decision. We use the phrase "remedy the SLC" as shorthand for the statutory language of "remedying, mitigating and preventing" the SLC.

271. In short, if the Commission finds that the creation of a relevant merger situation may be expected to operate against the public interest subsection 47(7) of the Act requires in

broad terms that the Commission decide whether the Secretary of State should take action under section 55 to remedy the adverse public interest effects of the merger. In so doing the Commission has an obligation, under subsection 47(9) of the Act, to "have regard to the need to achieve as comprehensive a solution as is reasonable and practicable" to the SLC and the adverse effects resulting from it. In public interest cases such as this the Commission delivers its report to the Secretary of State who is the ultimate decision-maker on the public interest and remedial action.

272. If the Secretary of State decides under subsections 54(2) and (3) to make an adverse public interest finding (whether in the light of the SLC finding by which he is bound and/or in the light of the relevant public interest consideration), he is empowered under subsection 55(2) of the Act to take such action as he considers reasonable and practicable to remedy, mitigate or prevent the adverse public interest effects of the merger. In reaching his decision on remedies, the Secretary of State, in accordance with subsection 55(3) of the Act, must have regard to but is not bound by the Report. The Secretary of State is also responsible for implementing any remedies.

The Report

273. The Commission addressed the issue of remedies in section 6 of the Report. In the present case the adverse effects on the public interest were derived from the Commission's conclusion that Sky's acquisition of a 17.9% stake in ITV had resulted in an SLC. No adverse effects finding was made in relation to the relevant public interest consideration, and hence the recommended remedy was designed to address only the adverse effects of the SLC.

274. The Commission considered a range of remedies including complete and partial divestiture and behavioural remedies, either alone as proposed by Sky or together with partial divestiture. The Commission found that divestiture of the whole of Sky's shareholding in ITV would be effective in remedying the SLC and the consequent adverse effects on the public interest as it would remove all possible sources of Sky's influence over ITV. The Commission went on to consider whether partial divestiture could also be an effective remedy. As regards the extent of partial divestiture that would be required to remove any realistic prospect that Sky could exercise material

influence, the Commission took into account both the level of shareholding which might enable Sky to block a special resolution and Sky's ability to influence other shareholders to vote against such a resolution by reason of the size of that shareholding and Sky's industry expertise and standing. The Commission looked at data on voting in general meetings of ITV, including "effective turnout" (i.e. actual turnout less abstentions); it then applied certain "conservative" assumptions as to the effective turnout to be expected at a general meeting of ITV (60%) and as to the number of *other* shareholders (i.e. in addition to Sky) who might realistically be expected to vote against the ITV board (7.5%). On this basis the Commission concluded that Sky would only be able to block a special resolution if it retained a shareholding of 7.5% or more. Below 7.5% Sky would not have that ability, nor would the ITV board realistically expect it to be able to do so. (The calculations, which have not been questioned, are set out at Appendix D to the Report.) Expressing the view that this assessment was not solely a matter of quantitative analysis, but was also a matter of judgment, the Commission concluded that a divestiture of shares to a level below 7.5% would be effective in remedying the SLC and the consequent adverse effects on the public interest, as it was confident that below that level there would be no realistic prospect of material influence of the kind identified by the Commission (see paragraph 6.38 of the Report).

275. In response to the Commission's Notice of possible remedies, Sky initially offered to cede some or all of its voting rights in 3% of its shares (down to a level of 14.9%) to an independent voting trust ("the voting trust"), whilst retaining the economic rights in the relevant shares. Subsequently Sky offered to place its entire voting rights in its shares in ITV into the voting trust or, alternatively to undertake not to exercise any of its voting rights in ITV ("the undertaking not to vote").

276. The voting trust proposal was rejected by the Commission. The Commission regarded Sky's proposal as a novel one which, so far as the members who conducted the inquiry were aware, had not been used "as a permanent and complete solution to an adverse finding on a merger inquiry". In relation to the effectiveness of the voting trust, the Commission considered the impact of monitoring and enforcement risks, and stated at paragraph 6.46 of the Report that:

> "…we see risks in a long-term remedy which places complete reliance on a third party in this way, and have significant concerns that it would not be appropriate to

> adopt a remedy [such as the voting trust] which would be completely or substantially incapable of the necessary effective monitoring".

277. The Commission was also concerned that if the voting trust were to be instructed to vote in a certain way in order to facilitate monitoring, or to vote in proportion to all the other votes cast, these courses would create potential distortions. Further there were other implications for effective monitoring and enforcement as a result of the remedy being dependent upon a contract between Sky and a third party. For example there was a risk that the contract might collapse or of contractual disputes. The voting trust remedy would also enable Sky to retain influence over the views of others through the retention of an economic interest in all the shares in addition to the influence it would retain through its ability to sell its shareholding. On this basis the Commission concluded that this remedy was not likely to be effective in addressing the SLC compared with divestiture in that, in particular, it entailed oversight and enforcement problems.

278. As regards the undertaking not to vote, the Commission noted that any such arrangement would be inherently distorting to ITV's corporate governance, since it would give greater weight to the votes of the remaining shareholders. The Commission also pointed out that it would create the need for ongoing monitoring and enforcement, with attendant risks for ITV and in contrast to a structural solution. As with the voting trust the Commission found that Sky would retain influence through retention of the economic interest in its shares and its position as by far the largest shareholder in ITV. For these reasons, the Commission concluded that this remedy would not effectively address the SLC and the consequent adverse effects on the public interest that it had identified.

279. In accordance with the CC Guidelines, the Commission had regard to the principle of proportionality in considering the two remedy options which it regarded as effective. Having concluded that partial divestiture to a shareholding below 7.5% together with certain behavioural undertakings would remove any realistic prospect that Sky would be able materially to influence ITV's policy, the Commission therefore found that such a remedy would be effective in addressing the SLC it had found in the all-television market, and that it would be more proportionate than the more intrusive remedy of full divestiture. Accordingly, the Commission took the view that the partial divestiture

remedy to a level below 7.5%, together with accompanying undertakings that Sky would not seek or accept board representation, was as comprehensive a solution as was reasonable and practicable to the SLC and any resulting adverse effects on the public interest. The Commission recommended that the Secretary of State should take action to implement that remedy within a specified period of undertakings being agreed.

The Decision

280. The Secretary of State, who is not bound by the Commission's views on remedial action, decided to accept the reasoning of the Commission on remedies and saw no good reason to depart from its recommendations. The Secretary of State indicated that he had taken into account the Report and its appendices and the representations made to him including in particular those made by Virgin, ITV and the Campaign for Press and Broadcasting Freedom, together with representations made both in writing and orally by Sky following publication of the Report. He also relied on the fact that under subsection 47(9) of the Act the Commission was required to have regard to the need to achieve as comprehensive a solution to the SLC and any adverse effects resulting therefrom as was reasonable and practicable. The Secretary of State's reasons for rejecting Sky's alternative remedies are set out in paragraphs 23 to 25 of the Decision. The Secretary of State decided to impose the remedies recommended by the Commission.

Sky's challenge to the remedy

Did the Commission misdirect itself as to the correct approach to remedial action?

281. Sky's first contention is that the Commission misdirected itself when considering Sky's proposed remedies. By considering the most extreme remedy of full divestiture first and concluding that it was effective, the Commission led itself wrongly to reject Sky's proposed remedies on the ground that they were not as effective as full divestiture. Sky contends that instead the Commission should have considered each remedy on its own merits, with a view to determining whether it remedied the SLC. The only adverse public interest found in the present case related to the SLC, and therefore under subsections 47(7) and (9) the Commission was required to decide whether action should be taken to remedy that SLC. The SLC should have been the starting point. The effect

of the Commission's approach was to ignore these statutory requirements and to focus instead on dealing with the RMS.

282. The Respondents reply, in essence, is that there was no good reason why the Commission should not have used complete divestiture as a starting point for analysis. In that regard, the Secretary of State refers in particular to the principles set out in the Tribunal's decisions in *Somerfield* at paragraphs [98]-[100] and *Co-operative*, paragraphs [149]-[150] to the effect that restoring the *status quo ante* is a legitimate starting point in relation to remedies. Further, in the present case the "starting point" of total divestiture had not been adopted as the "finishing point" as was the case in relation to the conclusion of the OFT in the *Co-operative* case. The Respondents consider that Sky is drawing a false distinction between adopting a particular starting point for its consideration of remedial action and examining each remedy on its merits. Having first found that full divestiture would clearly and comprehensively remedy the SLC, the Commission then considered all of the alternative remedies proposed on their merits, and asked whether they were effective and proportionate. Virgin, too, disputes Sky's contention.

283. In our view there is no substance in Sky's complaint.

284. It is not in dispute that the Commission and the Secretary of State have a margin of assessment with regard to appropriate action for remedying the SLC created by a merger (see, to that effect, *Somerfield* (above) at paragraph [88]).

285. In deciding what remedy to recommend to the Secretary of State the Commission is required by subsection 47(9) of the Act in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and consequent adverse effects on the public interest.

286. The CC Guidelines state that the Commission's starting point will normally be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of an RMS (paragraph 4.23). The CC Guidelines further state that remedies that aim to restore all or part of the market

structure prior to a merger are likely to be a direct way of addressing the adverse effects (*ibid*).

287. In *Somerfield*, in the context of the selection of a remedy for SLC under subsections 35(3) and 35(4) of the Act (which are expressed in very similar terms to subsections 47(7), (8) and (9)), the Tribunal said:

> "…. in our view, it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question." (paragraphs [98]-[99]).

288. In referring to *Somerfield* in its Defence the Commission did not state that full divestiture should be the starting point in every case, as Sky implies in its skeleton argument (paragraph [168]). The Commission was asserting no more than an *entitlement* to take it as the starting point (see paragraph [218] of the Defence). In our view it was perfectly appropriate, and consistent with the statutory provisions, with above dicta, and with its own Guidelines for the Commission to consider full divestiture first. There is no basis for the contention that doing so led the Commission to make inappropriate comparisons or to fail to examine each alternative remedy on its merits. The Commission went on to consider the effectiveness of the alternatives, including those proposed by Sky, on their own merits, taking into account the parties' views. This exercise led the Commission to the conclusion that two measures (full or partial divestiture) would be equally effective to remedy the SLC and related adverse effects, and that the other remedies proposed would not. The comparisons in paragraphs 6.42, 6.52 and 6.56 of the Report relied upon by Sky at the hearing were simply part of the reasoning leading to that conclusion. Nor do we consider that the Commission directed its attention to the wrong target: the Commission was clearly focusing on the need for the remedy to deal with the SLC: see for example paragraphs 6.5, 6.9, 6.11, 6.12, 6.17 and 6.18 of the Report.

289. Accordingly there is no substance in the allegation that the Commission misdirected itself as to the requirements of the statutory provisions in question, or that it misapplied them.

Did the Commission act irrationally in selecting the divestiture level of 7.5%?

290. The parties are agreed that the correct approach to partial divestiture was for Sky's voting rights to be reduced to a level at which there would no longer be an SLC (see Sky's skeleton argument, paragraphs [172] to [173], and paragraph [223] of the Defence). Sky asserts that as the only source of SLC found by the Commission was as a result of Sky's ability to exercise material influence over ITV, there can be no justification for any divestiture beyond that which is required to remove that material influence. Sky argues that the appropriate level for divestiture can be identified with some precision in the present case. In that regard it refers to the fact that the SLC in question is predicated on Sky having the ability to use its shareholding to block a special resolution. In Sky's submission, the Commission acted irrationally in selecting the divestiture level of 7.5%. In support of its claims Sky submits that the Commission:

    (a) does not enjoy a wide margin of appreciation in assessing how shares would be voted at general meetings of ITV and the level of voting rights required to block a special resolution;

    (b) wrongly took into account the level of abstentions in previous meetings. Abstentions, just as much as votes cast, indicate the presence of shareholders able and willing to vote on a special resolution;

    (c) ignored the point in the 4th Lintstock Report that any attempt by Sky to block a special resolution relating to a matter of ITV's strategy, against the advice of ITV management, would be extremely contentious, thereby galvanizing shareholder turnout; and

    (d) wrongly considered the voting rights of other shareholders, and effectively attributed those votes to Sky, and, in any event, perversely ascribed to Sky an excessive amount of votes of other shareholders (7.5%), for which it had no compelling evidence.

291. Sky contends that these matters led the Commission to assume a 60% effective shareholder turnout whereas the minimum it was entitled to adopt on the evidence before it was 70%. As a result, the Commission erroneously overstated Sky's effective voting rights to a very significant degree. Sky submits that had the Commission correctly assessed the expected effective turnout, a divestiture to below 15% (or a

reduction of voting rights to that level) would have been adequate to provide an effective remedy for the SLC found by the Commission.

292. The Respondents and Virgin dispute the merits of Sky's assertions.

293. These arguments fall to be considered in the light of the Commission's statutory obligation to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to remedy the SLC and its adverse effects on the public interest. The Tribunal considers that in the light of this obligation the Commission was clearly entitled to consider whether and if so at what level a partial divestiture would ensure that there would be *no realistic prospect* of Sky being able to exercise material influence over ITV's strategy. We agree with the Commission that this is not simply a matter of calculation, but includes a significant element of judgment on the part of the Commission.

294. Sky's ability to block a special resolution depends on the level of turnout at the general meeting. Predicting how low that turnout might realistically be (and therefore how significant Sky's voting power) is not an exact science. The Commission was entitled to adopt a cautious, conservative approach to future turnout. The Commission based its assumption of 60% effective turnout upon evidence that at the five previous ITV general meetings turnout had been between 63% and 72%, with between 0% and 7% of votes withheld. In our view the Commission was entitled, in adopting a conservative approach, to take account of possible abstentions, as these would impact upon Sky's ability to muster 25% of the votes cast in order to defeat a special resolution. It is not correct that the Commission ignored the 4th Lintstock Report: it is referred to in paragraphs 3.52 (and footnote 66), 6.26 and 6.27 of the Report, and is specifically recorded as part of the evidence received and considered by the Commission on this issue (see paragraph 2(d) of Appendix D to the Report).

295. Similarly the Commission was entitled to take account of a realistic possibility that other shareholders might vote against a special resolution, thereby increasing the potential impact of Sky's own voting rights. To take this into account was not to attribute those other shareholders' voting rights to Sky, but simply to acknowledge what the Commission considered to be a real possibility. As the Commission argues in

its Defence, that possibility could also legitimately be regarded as reinforced by Sky's ability to exercise influence over other shareholders and thereby indirectly over the policy of ITV. The Commission was entitled to take this into account in determining the appropriate remedy in compliance with its obligations under section 47.

296. As to the contention that the Commission arbitrarily ascribed an excessive amount of votes to other shareholders voting against a special resolution (7.5%), for which it had no compelling evidence, that assessment was based partly on previous experience of the levels of shareholders voting against specific resolutions (as set out in Appendix D to the Report) and partly on the Commission's judgment also taking into account Sky's ability to influence other shareholders (see paragraph 6.33 of the Report). The 7.5% figure was the Commission's assessment of the highest realistic percentage of votes against a special resolution of ITV, not including those cast by Sky. Given that an assumption was necessary and that the Commission was entitled to make an assumption which was conservative, we do not consider that 7.5% can be said to be unreasonable or excessive in the light of the material which was before the Commission.

297. It follows that the Commission did not act irrationally or otherwise unlawfully in concluding that the appropriate divestiture level was below 7.5%

Was the Commission entitled to reject the alternative remedies proposed by Sky?

298. Sky submits that the Commission wrongly rejected Sky's proposed behavioural remedies, namely to place its voting rights in ITV into the voting trust or to undertake not to exercise those voting rights. Sky argues that both non-divestiture remedies would directly remedy the SLC identified by the Commission, namely Sky's ability to block a special resolution through exercise of its voting rights attached to its shareholding. Accordingly it was irrational for the Commission to reject Sky's remedial offers.

299. A key plank of Sky's submission was that the Commission's concerns about monitoring and enforcement were unfounded. Referring to the Contract Rights Renewal undertaking accepted in *Carlton Communications Plc/Granada plc* (Cm 5952, 2003) and the undertaking not to seek board representation in this case, Sky contends that ongoing monitoring is no bar to the adoption of an otherwise effective remedy. It

argues that there was no evidence to support the Commission's concerns about Sky's proposal to appoint a long-established and reputable capital markets trustee. The monitoring risks identified by the Commission were purely theoretical. In any event, those risks could not arise in relation to an undertaking not to vote which would be self-monitoring through its transparency to ITV, and would place no additional burden on the OFT. Sky goes on to submit that, by rejecting the undertaking not to vote the shares, the Commission acted irrationally.

300. A further issue relates to the Commission's concern that the retention by Sky of an economic interest in ITV under either behavioural remedy (including its ability to sell its shares to a third party) would enable it to influence other shareholders and therefore retain indirect influence over ITV's policy. Sky challenges this finding on the basis that there is no evidence for it, and that it is irrational and inconsistent with the counterfactual used by the Commission. It points out that under neither of its proposed remedies would there be a power to block a special resolution and so Sky could not influence any future transaction involving ITV. It was irrational to conclude that Sky could influence other shareholders by its decision to sell its shares when it had no voting rights in those shares.

301. Mr Swift, on behalf of the Commission, supported by the Secretary of State and Virgin, submitted that the Commission's analysis involved detailed consideration of the effectiveness of both behavioural remedies proposed by Sky. For the reasons set out in paragraphs 6.39 to 6.57 of the Report the Commission concluded that neither of Sky's proposals would address effectively the SLC identified by the Commission.

302. Whether a remedy, structural or behavioural, will provide as comprehensive a solution as is reasonable and practicable to address the SLC together with any adverse effects resulting from it, must be examined by the Commission on a case-by-case basis in the light of the available evidence and using the experience and knowledge of the members. The fact that behavioural remedies typically require ongoing monitoring and enforcement, and the associated risks, are relevant considerations for the Commission. Despite the general concerns about such remedies outlined in the CC Guidelines, the Commission did not dismiss the voting trust or undertaking not to vote out of hand but rather assessed them in the light of the facts of this case.

303. The Commission advanced four reasons why the proposed undertaking not to vote shares was not an effective remedy. First, it took the view that such an undertaking would result in a distortion of the weight of any remaining votes (Report, paragraph 6.55). Secondly, there would still be a need for monitoring of compliance with the undertakings for as long as Sky retained its shareholding (Report, paragraph 6.56). Thirdly, there may be a need for monitoring of any sale of the retained stake should Sky choose to sell. Fourthly the Commission considered that retention by Sky of its economic interest as the largest shareholder by far would enable Sky to influence future transactions. In our judgment none of these reasons is irrational, nor was the Commission acting irrationally in declining the remedy on these grounds. It was a matter of judgment as to whether Sky's proposed remedies would address effectively the SLC and any consequent adverse effects on the public interest. The Commission was in our view perfectly entitled to take the view that an undertaking not to vote the shares would give rise to monitoring and enforcement concerns, and would not remove the possibility of indirect influence over ITV through Sky's ability to sway other shareholders notwithstanding that Sky could not vote. It seems to us to be far from fanciful that a proposal by a very large shareholder to sell its shares could influence other shareholders. Nor is this factor contrary to the chosen counterfactual for the reasons given earlier in this judgment. It is consistent with the finding of an SLC based in part on indirect influence. In any event, whether this remedy would be effective was a matter upon which more than one view could legitimately be held.

304. The Commission recognised that, in principle, the voting trust would limit Sky's voting power (paragraph 6.42 of the Report). However, it went on to consider several other considerations which in its view could jeopardise the effectiveness of Sky's proposal. At paragraph 6.45 of the Report the Commission identified certain risks associated with monitoring the voting trust, and in particular an inability to ascertain whether the trustee was in fact acting independently, the risk of non-compliance, and an inability to correct a breach of the undertakings should that happen. These continuing risks would exist irrespective of the impartiality and professional status of Sky's proposed trustee (paragraph 6.46). Furthermore, the longer the voting trust would need to remain in force, the more likely the risks and costs posed by this remedy are likely to be (see, for example, paragraph 6.48 on monitoring the content of the contract between Sky and the third party trustee). In our view there was a rational basis upon which the Commission

could find that there would be material monitoring risks associated with the voting trust.

305. Contrary to Sky's submission we consider that the Commission was entitled to take into account the implications of the voting trust for ITV's corporate governance and the running of its business. Sky argued that if the trustee were required to vote its shares in a certain way to avoid distortion the weight of the remaining votes vis-à-vis one another would remain the same. However, as the Commission pointed out, the voting weight of other shareholders as an overall proportion of shares in ITV would not necessarily remain the same. Since the maximum turnout would be reduced by 17.9% (for as long as Sky held its shareholding) it would be significantly easier for another shareholder to block a special resolution. Furthermore, the existence of concerns as to the remedy's effectiveness may derive from several factors which, taken separately, are not necessarily determinative. In the present case, the Commission reasonably relied on a number of concerns – for example, difficulties of monitoring the voting trust, the risks of non-compliance, and the issues discussed above which arise from Sky's retention of the economic interest in its shareholding – in addition to the possible distortion of ITV's corporate governance.

Proportionality

306. The main thrust of Sky's challenge to the Commission's reasoning on this issue concerned the view (expressed at paragraph 6.69 of the Report) that the costs which Sky would incur if required to dispose part of its shareholding in ITV were irrelevant. At the hearing Sky referred to *Interbrew* (above) in which Moses J said:

> "…in the instant case, I do not think that a question of balance arose. There will be cases where it is necessary to consider whether a remedy is disproportionate in the sense that the advantages to be gained are outweighed by the detriment to the one against whom the measure is directed. But in this case no such issue required consideration. This was not a case where the Commission took the view that the divestment of Whitbread with Stella Artois would be an effective remedy but that the divestment of Bass Brewers would be more effective. Rather, the majority of the Commission took the view that the divestment of Whitbread with Stella Artois would not be an effective remedy for the reasons it gave at 2.214. In those circumstances it availed Interbrew nothing to contend that the remedy was disproportionate. No question of weighing the advantage of divestment of Whitbread with Stella Artois against the detriment to Interbrew of the divestment of Bass arose."

307. This authority provides no support for Sky's argument which in our view is misconceived. The Commission expressed its conclusions on proportionality at paragraphs 6.67 to 6.71 of the Report. It stated that when choosing between remedies which the Commission considers would be equally effective it would choose the remedy that imposed the least cost or that is least restrictive. In the present case the Commission took the view that the full or partial divestiture of Sky's shareholding in ITV would be an effective remedy. As between those remedies the Commission concluded that partial divestiture was the more proportionate because it was less intrusive in that it required Sky to divest a smaller proportion of its shareholding.

308. Having already concluded that neither of Sky's proposed remedies would be an effective remedy there was no need for the Commission to examine the proportionality of those remedies vis-à-vis the divestiture remedies or at all. In those circumstances it does not assist Sky to contend that the partial divestiture remedy was disproportionate when compared with its own proposals. As in *Interbrew*, no question arises of weighing the merits of either of the behavioural remedies against the cost to Sky of the partial divestiture of its shareholding in ITV. In any event, the Commission noted that Sky's proposals would themselves be likely to be far from cost-free in view of the monitoring and enforcement requirements and other implications set out in the Report.

Conclusion on Sky's challenge to the remedy

309. For the reasons given above, we dismiss Sky's challenge to the Commission's recommendation and the Secretary of State's decision in relation to remedy.

Virgin's challenge to the remedy

Should the Commission have required the complete divestiture of Sky's share in ITV?

310. Virgin submits that the Commission erred in law and acted irrationally in deciding that partial divestiture down to 7.5% is the appropriate remedy for the adverse effects on the public interest resulting from the SLC. The remedy should have been complete divestiture of Sky's 17.9% shareholding (or reduction to a *de minimis* shareholding of less than 3%). In support of this submission Virgin raised three main arguments which call for specific consideration.

311. First Virgin submits that the Commission misdirected itself in applying subsection 47(9) of the Act. The second argument is that the Commission failed without providing adequate reasons to follow the CC Guidelines, having purported to do so, and thereby acted irrationally. Third, Virgin argues that the Commission failed to have regard to a relevant consideration in its choice of remedy, namely the adverse effect on the public interest arising from the specified media public interest consideration.

Did the Commission misinterpret its duty in subsection 47(9) of the Act?

312. As we have already seen, in deciding whether remedial action should be taken by the Secretary of State under section 55 and, if so, what action should be taken and what is to be remedied, subsection 47(9) provides that:

> "…the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to—
>
> (a) the adverse effects to the public interest; or
>
> (b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it."

It is to be noted that the provision governing the Secretary of State's decision on remedies is worded differently: see subsection 55(2) (at paragraph [29] above).

313. Mr Gordon, for Virgin, argued that there was a statutory imperative of achieving a comprehensive remedy which he equated to a measure which the Commission can be confident will remedy all contingencies. Mr Gordon accepted in the course of the hearing that the principle of proportionality applies in relation to the choice of an appropriate remedy, and in this regard he acknowledged that if two remedies are equally "comprehensive" then that principle would require the selection of the less draconian of the two. He also accepted that if the only reasonable and practicable remedy was less comprehensive than another then the former remedy may be recommended by the Commission. However he contended that under the statute a remedy which is *not* comprehensive may not be recommended merely because it is less intrusive.

314. In Virgin's submission the Commission misdirected itself as to the requirements of the legislation in concluding that partial divestiture was more proportionate than full

divestiture. Virgin objects in particular to the Commission's consideration of the "intrusiveness" of the proposed remedies. Virgin contends that full divestiture satisfies the statutory test in so far as it is clearly the *most* comprehensive solution to the SLC and adverse effects identified by the Commission. As regards the principle of proportionality implicit in the requirements of reasonableness and practicability in subsection 47(9), Virgin refers to the three-stage test expounded by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69, where Lord Clyde observed, at p 80, that in determining whether a limitation on a fundamental right (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

315. According to Virgin, the full divestiture of Sky's 17.9% shareholding in ITV satisfies each of these tests as full divestiture: (i) has a legitimate legislative objective since it is the most comprehensive solution to the SLC and resulting adverse effects; (ii) is, self-evidently, rationally connected to remedying the SLC; and (iii) does not go beyond what is reasonably required to achieve the most comprehensive solution. In these circumstances it was not open to the Commission to select a less comprehensive remedy on the basis that it was less intrusive. That was to apply the proportionality principle in a way that was precluded by the statute. Although the Commission stated at paragraph 6.67 of the Report that the two divestiture remedies were equally effective, Virgin contends that that was not correct because the Commission had found that total divestiture "would be effective in remedying the SLC" (paragraph 6.18) whereas its finding in relation to partial divestiture was that it was "likely to be as effective a remedy as full divestiture, because it removes any realistic prospect that BSkyB would be able materially to influence ITV's strategy" (paragraph 6.74).

316. The Tribunal does not consider that the Commission misunderstood or misapplied the legislation in regard to the choice between partial or full divestiture in so far as it was determining the appropriate remedy for the SLC and its adverse effects. (We are not concerned at this stage with the question of any adverse effects on the public interest relating to the specified public interest consideration, to which we revert below.) Nor did the Commission misapply the proportionality principle.

317. Under the legislation the Commission was required to frame a remedy having regard to the need to provide "as comprehensive a solution as is reasonable and practicable" to the SLC. We agree with Mr Gordon that this implies that there are degrees of comprehensiveness, and that a less comprehensive solution may be chosen if a more comprehensive one would be unreasonable and/or impracticable. Where two solutions are equally comprehensive, proportionality will require the less restrictive or less costly one to be adopted. The requirements of proportionality are most naturally addressed when considering reasonableness, but they could also be relevant to practicability, as this could impact on whether the measure under consideration is effective to serve the objective in view, which is also part of proportionality.

318. The problem for Virgin is that the Commission expressly found partial and full divestiture to be equally effective in neutralising the material influence which was the basis for the finding of SLC. In the light of that finding the Commission then chose partial divestiture as it was clearly less intrusive than full divestiture. Assuming equal effectiveness that choice was obviously justified both in principle and in accordance with the CC Guidelines:

> "4.9 The CC must have regard to the reasonableness of any remedy and this will include consideration of the costs of any action it may decide is appropriate. The CC will aim to ensure that no remedy is disproportionate in relation to the SLC or other adverse effect. If the CC is choosing between two remedies which it considers would be equally effective, it will choose the remedy that imposes the least cost or that is least restrictive."

319. Faced with that problem Mr Gordon sought to question whether the Commission's finding of equal effectiveness was sustainable given the terms in which it was expressed by the Commission in the passages referred to above. He sought to draw a distinction between the Commission's "certainty" of effectiveness in relation to full divestiture, and the reference to partial divestiture being "likely to be as effective a remedy".

320. We do not consider that the difference in wording can bear the weight Mr Gordon seeks to place on it. The Commission's approach was to seek a solution which would restore competition to pre-merger levels, thereby comprehensively remedying the SLC. Whereas full divestiture would obviously require little if any analysis in order to conclude that it would remove the material influence which was the source of the SLC,

partial divestiture required careful consideration in order to determine whether and if so at what level it would be effective. A degree of calibration was needed for that purpose. The aim of the calibration was to identify, on the basis of cautious, conservative assumptions, how much divestiture would be needed in order to remove the material influence. The aim was not to achieve a less effective remedy than full divestiture but an equally effective (but more proportionate) one. That is what the Commission considered it had achieved. It said that the partial divestiture was likely to be as effective as full divestiture "*because it removes any realistic prospect*" of material influence. Given that the partial divestiture would still leave Sky, a major competitor, with the largest and a not insubstantial shareholding in ITV, we recognise that more than one view could reasonably be held about the equal effectiveness of such divestiture. Be that as it may, in our view the Commission and the Secretary of State as the decision-makers were entitled to reach the conclusion they reached. That conclusion cannot be regarded as irrational. The removal of any realistic prospect leaves only unrealistic prospects. (In this regard we also note the comments of the Commission at paragraphs [94] to [95] of its Defence to which we refer again below.) It would in our view be surprising if the statute required a significantly more draconian remedy to be imposed in order to provide against an unrealistic prospect. We do not consider that that is the effect of subsection 47(9), or indeed subsection 55(2) (which governs the Secretary of State's decision on this issue). The Commission decided, essentially, that partial divestiture would be *as comprehensive a solution as is reasonable and practicable* to address the SLC and the consequent adverse effects on the public interest. The reasons given for so deciding, and the Commission's approach to the issue including the application of the proportionality requirements are in our view consistent with the legislation. The same applies to the corresponding decision of the Secretary of State.

321. In so far as Virgin raises objections to the use by the Commission of the term "intrusive" these are purely semantic and nothing turns on this usage. The expressions "partial divestiture is the least intrusive" and "partial divestiture is the more proportionate" are clearly used interchangeably in the Report.

Did the Commission fail to apply the CC Guidelines?

322. Virgin submits that in determining that divestiture of Sky's shareholding in ITV to below 7.5% would effectively address the adverse effects on the public interest resulting from the SLC the Commission failed to apply its own guidelines, and that in so doing it acted unlawfully and irrationally given, in particular, that it was purporting to apply it. Virgin also submits that had it correctly applied the CC Guidelines the Commission would have been bound to recommend that Sky reduce its shareholding in ITV to a level at which there could be no possibility of it retaining material influence, which in Virgin's view would be either complete divestiture or as a maximum, a shareholding of less than 3%.

323. Paragraph 4.24 of the CC Guidelines provides:

> "4.24 With an anticipated merger, the most effective remedy will often be the prohibition of the merger. This is usually implemented by an undertaking from the parties not to proceed with the proposal. A complication may be that the potential acquirer has, in connection with the relevant merger situation, acquired a shareholding in the target company. This will usually need to be reduced to a specified maximum level below which the CC judges there could be *no possibility of material influence*, within a specified and reasonable time period. For mergers already completed, prohibition takes the form of divestment." (Emphasis added by Virgin)

324. Virgin submits that the test applied by the Commission, that there was "no real and material risk" that Sky might be able to block a special resolution with a 7.5% shareholding (see paragraph [95] of the Commission's Defence), is very different to the much more stringent test of "no possibility of material influence" set out in the CC Guidelines. The latter would have required total divestiture. Virgin also submits that the Commission failed to have regard to Sky's ability to influence transactions involving ITV, in particular the possibility of Sky combining its votes with those of other shareholders to enable Sky to block a "squeeze out" of minority shareholders whereby a purchaser which has obtained 90% acceptance of an offer can compel the sale of the remaining 10%.

325. Virgin's first point is largely covered by the Tribunal's conclusions on the previous issue. We do not agree that there is any inconsistency between the approach taken by the Commission and its Guidelines. The CC Guidelines must be read as a whole:

Virgin seeks to read paragraph 4.24 in isolation from paragraph 4.9 of those Guidelines (set out above at paragraph [318]) which is also relevant in a case such as this, and which requires the application of proportionality principles. Further for the reasons we have already stated we consider that here too Virgin is placing too much weight upon the differences in language. Under paragraph 4.24 of the CC Guidelines the Commission indicates that it expects to "judge" the maximum level at which there will be no possibility of material influence. At paragraphs [94] to [95] of its Defence, the Commission states as follows:

> "94. The approach in fact taken by the Commission was to consider at what level of shareholding there would no longer be a realistic prospect that Sky would be able to exercise material influence by blocking a special resolution. This approach reflected the Commission's duty to ensure that its chosen remedy represents as comprehensive a solution as is reasonable. This approach combined its duty to ensure a comprehensive remedy with the need for that remedy to be reasonable.
>
> 95. It is arithmetically correct, to say, as Virgin Media does, that Sky might be able to block a special resolution with a 7.5% shareholding "depending on the turnout and votes cast against a special resolution" (Notice § 5.124). However, the Commission's remedy was designed to address real and material risks, and not mere arithemetic possibilities. The Commission made an assessment of the "outer realistic limits" of the assumptions which bore upon its choice of remedy - effective turnout, and expected levels of other votes against - and made its decision accordingly. Its approach is summarised at Report §§6.34 and 6.38."

326. Just as it would be surprising to find that the legislation required a remedy to be imposed to guard against unrealistic possibilities, the same applies to the CC Guidelines, which should be interpreted sensibly as well as consistently with the statutory scheme.

327. As to Virgin's argument that the Commission failed to take into account the possibility of Sky remaining able to block a "squeeze out" of minority shareholders, it seems to us that the Commission's submissions are correct and that this is not relevant to the question of material influence over the "policy of a body corporate": viz. subsection 26(3) of the Act, in that a squeeze-out would occur in the context of a hostile takeover, which by definition would not form part of ITV's policy but would relate to the policy of the acquirer. In those circumstances the Commission was justified in deciding (at paragraph 6.36 of the Report) that the proposed remedy should not address any such possibilities.

328. For these reasons we do not share Virgin's view that the Commission has departed from the CC Guidelines in choosing the partial divestiture remedy rather than full divestiture. The Tribunal considers that the Commission's approach was a lawful one which was consistent with the CC Guidelines. In any event, the Commission's reasons for choosing a partial rather than a full divestiture were explored in detail in the Report, and all interested parties had an opportunity to express views on the remedy proposals. In those circumstances any departure from the CC Guidelines (which we do not find) would have been fully reasoned. None of the reasons provided are in our view irrational or otherwise invalid.

Did the Commission fail to have regard to a relevant consideration in its choice of remedy, namely the adverse effect on the public interest arising from the specified media public interest consideration?

329. Virgin's third main submission on remedies is that the Commission failed to have regard to the adverse effect on the public interest arising from the specified media public interest consideration. As Mr Gordon stated at the outset of his submissions this point is linked to Virgin's challenge to the plurality findings of the Commission and the Secretary of State. His submission was that if (as we have in fact found) the Commission and Secretary of State erred in law in their approach to the media public interest consideration then that unlawfulness will also have an impact on their conclusions as to the appropriate remedies.

330. The effect of our decision on the plurality issue is that the Commission and the Secretary of State misdirected themselves as to the meaning and effect of the statutory provisions in relation to that issue, with the result that their conclusions as to the sufficiency of plurality of persons with control of media enterprises servicing the relevant audiences in the United Kingdom cannot stand (see paragraph [268] above).

331. The Secretary of State, in the Decision at paragraph 20, stated:

> "Accordingly, the Secretary of State has decided to make an adverse public interest finding on the basis that the transaction operates against the public interest taking account only of the substantial lessening of competition within the UK market for all television. It may be noted that even if Virgin Media's construction of the implications of sections 58A(4) and (5) of the Act were correct and this were to result in a different conclusion about the impact of the transaction on the sufficiency of plurality, the remedy the Secretary of State has concluded is

> necessary in order to address the substantial lessening of competition (see below) is likely also to be an appropriate remedy to address any such adverse effect on media plurality, given that once effect has been given to the remedy, there will be no change in the number of persons with control of media enterprises arising out of BSkyB's shareholding. However, this has had no bearing on the Secretary of State's decisions on remedies, which relate entirely to addressing the substantial lessening of competition that arises in this case."

332. A number of questions therefore now arise. They include the following:

  (i) the effect (if any) of our decision on the existing remedy imposed in order to deal with SLC and resultant adverse effects on the public interest;

  (ii) whether the plurality issue should be remitted to the Commission and/or the Secretary of State for further investigation, or whether such a course would be otiose on the basis that (as the Secretary of State has said in the paragraph from the Decision quoted above) even if on a remittal the Commission were to find, and the Secretary of State were to accept, that there was an insufficient plurality, the existing remedy would be likely to be effective in removing any adverse effects on the public interest on that account in that once material influence (and therefore "control") have been removed, the plurality position would revert to the *status quo ante*.

333. We have heard no argument on these points and express no view one way or the other as to whether the Secretary of State is right. We consider that the parties should be given an opportunity to address us on the appropriate relief to be granted in respect of Virgin's application for review.

VII. THE TRIBUNAL'S CONCLUSIONS

334. For the reasons given above, the Tribunal unanimously decides as follows:

  (1) Sky's application is dismissed.

  (2) As to Virgin's application:

    (i) the Report and the Decision are quashed in part namely to the extent that they relate to the application of the public interest consideration specified in subsection 58(2C)(a) of the Enterprise Act 2002;

(ii) the Tribunal proposes to invite the parties' observations before deciding what (if any) further relief is appropriate.

The Honourable Mr Justice Barling Peter Clayton Peter Grinyer

Charles Dhanowa
Registrar

29 September 2008