

[GB] Competition Appeal Tribunal Rejects BSkyB Appeal Against Requirement to Sell Shares in ITV, but Grants Rival Appeal on Plurality

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The UK Competition Commission found earlier this year that BSkyB's 17.9% holding in ITV plc constituted a merger situation and had resulted in a substantial lessening of competition within the UK market for all television services, though it was not unlawful for reducing media plurality. As a result, the Secretary of State for Business and Enterprise ordered the shareholding to be reduced to a level below 7.5% (see IRIS 2008-3: 13). BSkyB appealed to the Competition Appeal Tribunal, the UK competition court, which has now rejected its appeal, but upheld an appeal from a rival bidder on plurality grounds.

BSkyB had argued that key findings of the Competition Commission were irrational, perverse or based upon inadequate evidence; it had also not applied the correct standard of proof in reaching its decision. It should be noted that merger appeals to the Tribunal have to be decided not "on the merits" by assessing whether the decision was right or wrong, but on principles similar to those used in judicial review, which permit only a more limited assessment of the illegality or irrationality of the decision. On the key finding by the Commission that the holding permitted BSkyB to block a special resolution proposed by ITV management, the Tribunal concluded that this was a conclusion which the Commission was perfectly entitled to reach and which was not irrational or perverse. In none of the findings under challenge had BSkyB succeeded in establishing that they were perverse, irrational, unsupported by evidence or influenced by irrelevant considerations.

The Tribunal also heard an appeal by Virgin Media, whose merger with ITV had been blocked by the BSkyB shareholding. Virgin argued that the Commission and the Secretary of State had misunderstood the relevant statutory provisions relating to plurality of media ownership in determining that the BSkyB holding would not affect media plurality, but only reduce competition in the marketplace. They had taken into account not just the number of persons with control of the media, but also "internal plurality"; the range of information and views made available by enterprises under common control. The Virgin argument was upheld by the Tribunal, which considered that the relevant legal provisions required that each enterprise had to be treated as wholly controlled by a single person and that "internal plurality" was not relevant. Thus the Commission had taken into account irrelevant considerations in reaching its decision; as a result, the decision was

held to be partly invalid. A further hearing will be held to determine the appropriate remedy.

Competition Appeal Tribunal, British Sky Broadcasting plc v The Competition Commission, [2008] CAT 25

http://www.catribunal.org.uk/documents/Judg_BSkyB_1095_Virgin_Inc_1096_290908.pdf

