[GB] Court of Appeal Upholds Decision to Force BSkyB to Sell Shares in ITV

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The Court of Appeal has upheld the decision of the Competition Commission and the Secretary of State for Business and Enterprise requiring BSkyB to reduce its 17.9% holding in ITV plc to below 7.5%, in rejection of an appeal of the decision of the Competition Appeal Tribunal (for earlier discussions of this long-running saga, see IRIS 2007-10: 14/23, IRIS 2008-3: 13/19 and IRIS 2008- 10: 12/18).

The basis for the decision to require divestment was that the acquisition of the shares had created a “relevant merger situation” which resulted in a “substantial lessening of competition” under the Enterprise Act 2002. BSkyB argued that the Competition Appeal Tribunal had misinterpreted its own powers. Under the statute it is required to apply the same principles as those used by the courts in judicial review, rather than conducting a full appeal on the merits. Nevertheless, according to BSkyB, it should have subjected the decision to the greater intensity of review used by the courts in human rights cases. This submission was rejected by the Court of Appeal, which considered that the normal principles of judicial review should apply. BSkyB also claimed that the authorities had wrongly taken into account the fact that the holding permitted it to block a special resolution proposed by ITV management, for example in relation to a merger. The Court of Appeal held that in doing so, they had shown no misdirection in law and the decision was not unreasonable; the tribunal had also correctly understood the standard of proof, which did not require separate consideration of each stage in the authorities’ reasoning process. Thus, its decision was upheld. The court also considered that the authorities had not been irrational in rejecting BSkyB’s offer of alternative remedies of placing its shares in a non-voting trust and undertaking not to exercise the entirety of its voting rights.

As the decision was based on competition grounds, this was enough to dispose of BSkyB’s challenge. The court also considered, however, the issue of media plurality, which had not been used as a basis for requiring reduction of the shareholding. This involved difficult questions of interpretation of the Enterprise Act about whether the authorities should take into account only the number of persons with control of the media or also ‘internal plurality’, the range of information and views made available by enterprises under common control. The tribunal had adopted the first interpretation that each enterprise had to be treated as a single person and that ‘internal plurality’ is not relevant. However,

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this was overturned by the Court of Appeal (without affecting the outcome of the case), which decided that the actual extent of control exercisable over one enterprise by another had to be taken into account.

The court refused leave for a further appeal to the UK Supreme Court and BSkyB quickly reduced its shareholding in ITV to below 7.5%.

British Sky Broadcasting Group plc v The Competition Commission [2010] EWCA Civ 2

http://www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm

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