COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No: 1095/4/8/08

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) ("the Rules"), the Registrar of the Competition Appeal Tribunal ("the Tribunal") gives notice of the receipt of a notice of application, on 22 February 2008, under section 120 of the Enterprise Act 2002 ("the Act"), by British Sky Broadcasting Group plc ("Sky") of Grant Way, Isleworth, Middlesex, TW7 5QD, challenging a report ("the Report") by the Competition Commission ("the CC"), notified to Sky on 19 December 2007 and published on 20 December 2007, entitled "Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc"[1] and a decision by the Secretary of State for Business, Enterprise & Regulatory Reform ("the Secretary of State") contained in a document entitled "Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc dated 29 January 2008"[2].

The Report found that the acquisition ("the Acquisition") by Sky of 17.9 per cent of the shares in ITV plc ("ITV") gave it the ability materially to influence the policy of ITV thus creating a relevant merger situation for the purposes of the Act. In the Report the CC also concluded that the Acquisition may not be expected to operate against the public interest having regard to the media public interest consideration (see section 58(2C)(a) of the Act) but was likely to result in a substantial lessening of competition ("SLC") arising from a loss of rivalry between ITV and Sky in the UK market for all television (which included both pay-TV and free to air services). The CC thus concluded that, overall, the Acquisition may be expected to operate against the public interest.

Having made an adverse public interest finding of SLC, the CC concluded that remedial action should be taken by Sky to divest its shareholding in ITV down to a level below 7.5 per cent and that Sky should undertake that it would neither seek nor accept ITV Board representation.

The Secretary of State accepted (as he was bound by the Act to do so) the CC's decisions that a relevant merger situation had been created and that the Acquisition may be expected to result in an SLC in the UK market for all-television. The Secretary of State also accepted the CC's conclusion with regard to the media public interest consideration.

The Secretary of State found that, in accordance with the CC's recommendations, the following remedies should be imposed ("the Decision"): partial divestment of Sky's shares in ITV down to a level below 7.5 per cent, combined with undertakings from Sky not to seek or accept representation on ITV's Board, not to dispose of the shares to an associated person, and not to reacquire shares in ITV.

In summary, the principal grounds of review on which Sky relies are that:

1. In the Report the CC variously committed errors of law, material errors of fact, failed to take relevant evidence and considerations into account, took irrelevant considerations into account, acted inconsistently, acted unfairly and acted irrationally in reaching its conclusions that:

[1] The Report may be found at: http://www.competition-commission.org.uk/rep_pub/reports/2007/fulltext/535.pdf.
[2] The document may be found at:
http://www.competition-commission.org.uk/inquiries/ref2007/itv/pdf/sky_berr_decision.pdf

(a) The Acquisition had created a relevant merger situation for the purposes of section 47(1) of the Act. Sky submits that the CC had thus wrongly asserted jurisdiction under the Act. The CC concluded that Sky and ITV had ceased to be distinct enterprises based upon the lowest level of control provided for by section 26(3) of the Act, namely Sky's alleged ability "materially to influence the policy" of ITV. Sky further submits that the CC's findings in this regard are liable to be quashed because the CC failed to make findings to the requisite standard of proof on the evidence before it and had erred in fact and law in finding that Sky had acquired an ability to influence the policy of ITV;

(b) The Acquisition is likely to result in an SLC arising from a loss of rivalry between ITV and Sky in the all-TV market. Sky submits that the CC's findings upon which it reached that conclusion are liable to be quashed because the CC failed to make findings to the requisite standard of proof on the evidence before it and erred in fact and law in finding that an SLC has resulted or may be expected to result;

(c) Remedial action should be taken by Sky to divest its shareholding in ITV down to a level below 7.5 per cent.

2. The Secretary of State's Decision suffers from the same defects as the CC's conclusions on remedial action and should be set aside for essentially the same reasons. Sky submits that the CC and the Secretary of State have misdirected themselves as to the scope and exercise of their respective discretion to recommend and impose remedial action. As a consequence they have wrongly rejected Sky's offers of alternative remedies, notably in relation to the exercise of voting rights.

Sky seeks the following relief from the Tribunal:

1. an order quashing, in whole or in part, the Report and the CC's summary, findings and decisions contained in the Report;

2. an order quashing, in whole or in part, the Secretary of State's Decision;

3. an order referring the matter back to the CC with a direction that it reconsider and make a new report to the Secretary of State in accordance with the ruling of the Tribunal;

4. such other order or relief as the Tribunal may consider appropriate;

5. an order that the CC and/or the Secretary of State (together "the respondents") and/or any intervener in support of the respondents should pay Sky's costs of and incidental to its application.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received **no later than 5pm on 7 March 2008**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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