Case Nos: C1 2008/3053 and 3066

Neutral Citation Number: [2010] EWCA Civ 2

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(MR JUSTICE BARLING, PROF. PETER GRINYER AND MR PETER CLAYTON)
[2008] CAT 25

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2010

Before:

LORD JUSTICE RIX
LORD JUSTICE LLOYD
and
MR JUSTICE MACKAY

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BRITISH SKY BROADCASTING GROUP PLC	**Appellant (3066) Respondent (3053)**
VIRGIN MEDIA INC	**Appellant (3053) Respondent (3066)**
THE COMPETITION COMMISSION	**Respondent**
THE SECRETARY OF STATE FOR BUSINESS ENTERPRISE AND REGULATORY REFORM	**Respondent**

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(Transcript of the Handed Down Judgment of
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Michael Beloff Q.C., James Flynn Q.C. and Aidan Robertson Q.C. (instructed by **Allen & Overy LLP**) for **British Sky Broadcasting Group plc**
Richard Gordon Q.C. and Marie Demetriou
(instructed by **Ashurst LLP**) for **Virgin Media Inc**
John Swift Q.C., Daniel Beard and Rob Williams
(instructed by the **Treasury Solicitor**) for the **Competition Commission**
Paul Lasok Q.C. and Elisa Holmes (instructed by the **Treasury Solicitor**) for the **Secretary of State (now, for Business Innovation and Skills)**

Hearing dates: 29-30 October 2009

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Judgment

Lord Justice Lloyd:

Introduction

1. This is the judgment of the court. On or shortly before 17 November 2006 British Sky Broadcasting Group plc ("Sky", though "BSkyB" in quotations from the Competition Commission) acquired 696 million shares in ITV plc ("ITV"), which was about 17.9% of ITV's issued share capital. These appeals, against decisions of the Competition Appeal Tribunal, arise from that event, which we will call the Acquisition. Sky and ITV were and are active and major participants and competitors in what the Competition Commission referred to as the all-TV market in the UK. Shortly before the Acquisition, Virgin Media Inc ("Virgin") had announced an offer for the shares in ITV, which was to proceed by way of a scheme of arrangement, requiring acceptance by the holders of 75% of the shares in ITV. That offer, in cash or paper, was worth about 122p per share. Sky's Acquisition was at 135p per share, a premium of 17% over the share price on the day. At the end of the previous month ITV's shares had been quoted at 99.1p.

2. The Competition Commission investigated the Acquisition under Part 3 of the Enterprise Act 2002 ("the Act"), following a reference by the Secretary of State under Chapter 2 of Part 3, which deals with public interest cases. This was the first reference under those provisions. The Commission found that the Acquisition had created a relevant merger situation ("RMS"), and that this was expected to result in a substantial lessening of competition ("SLC") which was expected to operate against the public interest. It did not find that the Acquisition would have operated against the public interest if it had only had regard to a specific public interest consideration which was the particular reason for the reference by the Secretary of State, namely a material adverse effect on the sufficiency of the plurality of persons with control of media enterprises serving relevant UK audiences. This came to be known as the media plurality issue. In order to remedy the adverse effect of the SLC on the public interest, the Commission recommended that Sky be required to divest itself of enough shares to reduce its holding to below 7.5%. The Secretary of State accepted that recommendation and the findings of the Commission, and imposed that remedy.

3. Sky applied for the Commission's findings and the Secretary of State's direction to be reviewed by the Tribunal under section 120 of the Act. Virgin also applied for a review of the decision on the media plurality point, and of the decision as to remedy. The Tribunal is required to apply the same principles, on such a review, as would be applied by a court on an application for judicial review: section 120(4). The Tribunal rejected Sky's application for review. It held that the Commission had been wrong in law on the media plurality point, but it held that the Secretary of State's decision as to remedy was unaffected by the finding as to error of law. Therefore, the remedy imposed by the Secretary of State stood despite what was said to have been the Commission's error. It also rejected Virgin's application for review as regards remedy.

4. With permission granted by Carnwath LJ, Sky appeals against the Tribunal's decision to uphold the findings as to RMS, SLC and the remedy and to quash the findings as to media plurality, and Virgin appeals (contingently) on the Tribunal's decision as to remedy. Virgin's appeal on remedy is stated not to arise unless Sky's appeal is allowed as regards either the substantive decision on SLC or the decision as to

remedy. Sky's appeal on media plurality would not affect the outcome unless the SLC finding is set aside. However, the point of law which arises on that appeal is of more general importance, and by Respondent's Notices both the Competition Commission and the Secretary of State have asked the court to set aside the decision by the Tribunal that the Commission was wrong on the point of law.

5. The Commission described the all-television market in the UK and the position of Sky and ITV in section 2 of its Report. Sky is a leading broadcaster of programmes, mainly on a subscription basis, so in the pay TV sector, while ITV, as the UK's largest commercial broadcaster, operates in the free-to-air sector. Free-to-air services are a constraint on Sky's pay TV prices. As a key element in this constraint, ITV is a significant competitor to Sky. If Sky had the ability to influence ITV's policy on strategic issues relevant to the effectiveness of that competition, it would certainly have the incentive to do so.

6. Some of the material seen and discussed by the Commission, and in turn by the Tribunal and by this court, including material provided by ITV, is commercially confidential, and was protected from general disclosure by orders at each stage. Part of the hearing was held in private, for this reason. In the full version of this judgment it has been necessary to refer to some of that material. This is an edited non-confidential version which is available generally.

The issues on the appeals

7. Sky contends that the Tribunal erred in law in several respects. The first is as to the content of the obligation to apply judicial review principles. Sky argues that this requires the Tribunal, as a body with specialist expertise, to apply a greater intensity of review than would be applied on a normal judicial review application. That underlies three other points taken by Sky, which are that the Tribunal should have set aside the Competition Commission's decision because it applied the relevant standard of proof wrongly, and because it applied the necessary counterfactual analysis wrongly, and that the Commission's decision to reject alternative remedies proposed by Sky was incorrect in law.

8. Sky also contends that the Commission was correct on the media plurality issue, and that the Tribunal was wrong to set aside that part of the decision. The Secretary of State and the Commission make common cause with Sky on that point. Virgin, on the other hand, argues that the Tribunal was correct on this point.

The legislation

9. The legislative regime which has to be considered is in the Act, as amended by the Communications Act 2003. As regards merger control generally, there is a European Community law context, but this is not the case as regards the particular provisions with which we are concerned. The legislation relevant to the case is complex. In general, we will not refer to provisions which are not relevant to the present case.

10. In cases which do not raise special public interest considerations, the OFT is to refer to the Competition Commission cases of completed mergers (section 22) or anticipated mergers (section 33) if it considers that an RMS has been, or would be,

created. Section 23 defines an RMS. It is sufficient for present purposes to quote subsection (1):

> "(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."

11. We do not need to refer to section 24, but section 26 sets out the cases in which any two enterprises cease to be distinct. This occurs if they are brought under common ownership or common control. In particular, a person or group of persons able directly or indirectly to control the policy of a body corporate, or materially to influence that policy, may be treated as having control of it for these purposes: see section 26(3). The most relevant provisions of the section are worth quoting in terms:

> "26(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).
>
> (2) Enterprises shall, in particular, be treated as being under common control if they are—
>
> (a) enterprises of interconnected bodies corporate;
>
> (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
>
> (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
>
> (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."

12. Thus, there are three relevant types of control: ownership, ability to control policy, and ability materially to influence policy.

13. If a reference is made to the Competition Commission under section 22, the duty of the Commission is to decide whether an RMS has been created, and if so whether the creation of that situation has resulted, or may be expected to result, in an SLC within

any market or markets in the UK for goods or services. If it concludes that there is an anti-competitive outcome (defined in section 35(2) in a way which does not require separate quotation) it is also to decide whether it should take action in order to remedy mitigate or prevent the SLC or any adverse effect from the SLC, or should recommend that others should take action for that purpose, and if so what that action should be. In deciding what if any action should be taken, the Commission is required to have regard, in particular, "to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it": section 35(4).

14. Section 38 sets out the Commission's duty to prepare and publish a report on a reference under section 22 within a given period. Section 41 requires the Commission to take such action as it considers reasonable and practicable under the enforcement provisions of the Act to deal with the SLC and any adverse effects of it.

15. So much for a case in which the public interest is no more than the general interest in favour of competition. Section 42 gives the Secretary of State power to give a notice (called an intervention notice) to the OFT if he thinks that an RMS has been created or may come into existence and he believes that one, or more than one, specific public interest consideration is relevant to the RMS. For present purposes it is sufficient to take public interest considerations as being those specified in section 58 (as to which see paragraph [24] below). If an intervention notice is given, the OFT is to report to the Secretary of State in relation to the case, the content of the report being prescribed by section 44(3) to (6). If the intervention notice mentions any media public interest consideration the Secretary of State is to require OFCOM to report on factors relevant to that public interest consideration: section 44A.

16. Having given an intervention notice, and having received a report from OFT and, if relevant, from OFCOM, the Secretary of State may make a reference to the Commission under section 45(2):

> "(2) The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created;
>
> (b) 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;
>
> (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
>
> (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest."

17. Any anti-competitive outcome is to be taken as adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant: section 45(6).

18. The Commission then has to decide whether an RMS has been created. If it so decides, section 47(2) applies:

> "(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."

19. If it decides that there is an RMS and that it does, or may be expected to, operate against the public interest, the following additional questions arise under section 47(7):

> "(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."

20. Section 47(9) is also relevant:

> "(9) In deciding the questions mentioned in subsections (7) and (8) 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."

21. Section 50 prescribes the content of the Commission's report, along the same lines as section 38.

22. When the Secretary of State has received the Commission's report in relation to an RMS, he has to decide whether to make an adverse public interest finding in relation to the RMS, or whether to make no finding at all. It is only open to him to make no such finding if he decides that there is no public interest consideration which is relevant to a consideration of the RMS. In relation to this decision, section 54(7) is important:

> "(7) In deciding whether to make an adverse public interest finding under subsection (2), the Secretary of State shall accept—
>
> (a) in connection with a reference to the Commission under section 45(2) or (4), the decision of the report of the Commission under section 50 as to whether there is an anti-competitive outcome; and
>
> (b) in connection with a reference to the Commission under section 45(3) or (5)—
>
> (i) the decision of the report of the Commission under section 50 as to whether a relevant merger situation has been created or (as the case may be) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
>
> (ii) the decision of the report of the OFT under section 44 as to the absence of a substantial lessening of competition."

23. Enforcement by the Secretary of State is governed by section 55. If he has decided (within the period required) to make an adverse public interest finding in relation to a relevant merger situation and has published his decision within the period so required, then he may take such action, under specified other provisions of the Act, 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, and in making his decision he must have regard to the Commission's report.

24. Section 58 sets out public interest considerations which the Secretary of State may take into account. The provision relevant to this case is subsection (2C)(a), but I will set out all of subsections (2A) to (2C). These, and section 58A, were introduced into the Act by amendment by the Communications Act 2003.

> "(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."

25. Section 58A contains provisions for the construction of the public interest considerations specified in section 58(2C). Omitting subsection (9), it is 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.

(2) In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in section 58(2C)(a) or this section to media enterprises include references to newspaper enterprises.

(3) In this Part "newspaper enterprise" means an enterprise consisting in or involving the supply of newspapers.

(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.

(6) A reference in section 58 or this section to an audience shall be construed in relation to a media enterprise in whichever of the following ways the decision-making authority considers appropriate—

(a) as a reference to any one of the audiences served by that enterprise, taking them separately;

(b) as a reference to all the audiences served by that enterprise, taking them together;

(c) as a reference to a number of those audiences taken together in such group as the decision-making authority considers appropriate; or

(d) as a reference to a part of anything that could be taken to be an audience under any of paragraphs (a) to (c) above.

(7) The criteria for deciding who can be treated for the purposes of this section as comprised in an audience, or as comprised in an audience served by a particular service—

(a) shall be such as the decision-making authority considers appropriate in the circumstances of the case; and

(b) may allow for persons to be treated as members of an audience if they are only potentially members of it.

(8) In this section "audience" includes readership."

26. That is a sufficient survey of the primary legislative provisions relevant to the case. Section 120 provides for a review of decisions taken under Part 3 of the Act. Omitting subsections (7) and (8), it is as follows:

"(1) Any person aggrieved by a decision of the OFT, OFCOM, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.

(2) For this purpose "decision"—

(a) does not include a decision to impose a penalty under section 110(1) or (3); but

(b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.

(3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.

(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.

(6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court."

The judicial review grounds of appeal

27. As mentioned, Sky took four points under this heading, of which the first underlies the others. We will deal with them in turn.

Intensity of review

28. The question here is whether the Tribunal applied "the same principles as would be applied by a court on an application for judicial review". The purpose of this provision is to define the approach of the Tribunal to its task under the section. Under other legislation, such as the Competition Act 1998, its jurisdiction is quite different, namely an appeal on the merits, which requires a full hearing at which evidence may be adduced before it and it has to make findings of fact as well as to deal with issues of law.

29. So far as we know and Counsel were able to tell us, section 120 of the Act is the only context in which a tribunal has the duty of applying judicial review principles, leaving aside the powers of the Upper Tribunal under the Tribunals Courts and Enforcement Act 2007. Normally such principles are applied in the Administrative Court and, directly or indirectly, by other courts in some circumstances. Sky's argument is that the Tribunal is obliged to apply judicial review principles with a greater intensity of review because it is a specialist judicial body, and that the Tribunal erred in law because it rejected that proposition. Mr Beloff Q.C. addressed us on behalf of Sky on this point.

30. It is well established that courts apply judicial review principles in different ways according to the subject matter under consideration, and that there are some cases in which courts apply a greater intensity of review than in others. The main examples of this approach are cases concerned with fundamental human rights under the ECHR.

31. Mr Beloff's submission is that the Tribunal's review jurisdiction under section 120 is another such case, principally because of the specialist nature of the enquiry and of the Tribunal.

32. The Tribunal rejected Mr Beloff's argument, and so do we. The essence of the Tribunal's reasoning on this point is in their paragraph 63, as follows:

> "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."

33. The IBA case referred to in that passage is *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142. This was a review under section 120 of the refusal of the OFT to make a reference under section 33 of the Act. The Tribunal quashed the OFT's decision not to refer, and this court dismissed an appeal. Sir Andrew Morritt V-C, Mance LJ and Carnwath LJ agreed on the factors arising from the particular case. Carnwath LJ added comments on the principles of judicial review with which Mance LJ specifically agreed.

34. Carnwath LJ observed at paragraph 90 that the Tribunal had been "right to observe that its approach should reflect the "specific context" in which it had been created as a specialised tribunal", but said that the section required the application of the normal principles of review, not of something special and specific to the Tribunal. He referred to the spectrum of approaches on judicial review principles: at one end of the spectrum, a "low intensity" of review, applied to cases involving issues "depending essentially on political judgment", such as matters of national economic policy, where the court would not intervene outside of "the extremes of bad faith, improper motive

or manifest absurdity" and, at the other end of the spectrum, decisions infringing fundamental rights where unreasonableness is not equated with "absurdity" or "perversity", and a "lower" threshold of unreasonableness is used, namely whether a reasonable decision-maker, on the material before it, could conclude that the relevant interference was justifiable.

35. At paragraph 92 he said this, on which Mr Beloff relied:

> "A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not "equipped by training or experience or furnished with the requisite knowledge or advice" to decide issues depending on administrative or political judgment (see *Brind* [1991] 1 AC at 767, per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene."

36. Concluding this part of his judgment, he said this at paragraph 100:

> "100. I have referred to these cases in some detail, because they show that the Tribunal did not need to rely on some special dispensation from the ordinary principles of judicial review. Those principles, whether applied by a court or a specialised tribunal, are flexible enough to be adapted to the particular statutory context. No doubt the existence of such a special jurisdiction will help to ensure consistency from case to case; and the expertise of the Tribunal will better fit it to deal with such cases expeditiously and with a full understanding of the technical background. However, the essential question was no different from that which would have faced a court dealing with the same subject-matter. That question was whether the material relied on by the OFT could reasonably be regarded as dispelling the uncertainties highlighted by the issues letter. That question was wholly suitable for evaluation by a court. It involved no policy or political judgment, such as would be regarded as inappropriate for review by the Administrative Court."

37. It seems to us that these passages are fatal to Mr Beloff's submissions on this point. They show that the Tribunal is to apply the normal principles of judicial review, in dealing with a question which is not different from that which would face a court dealing with the same subject-matter. It will apply its own specialised knowledge and experience, which enables it to perform its task with a better understanding, and more efficiently. The possession of that knowledge and experience does not in any way alter the nature of the task. Undeterred by this, however, Mr Beloff asserted in Sky's skeleton argument that "as a specialist tribunal dealing with issues calling for expertise in competition matters, the Tribunal is required to exercise a higher intensity of review than would be the case if the matter were before the Administrative Court". In particular he used Carnwath LJ's reference to the need for self-restraint on the part of a court without special expertise as the basis for an argument that, conversely, in the case of a tribunal with, as he put it, hyper-competence because of the specialised qualifications of its members, not only could the tribunal feel free from such self-restraint, but it was obliged to do so.

38. Mr Beloff also cited to us *T-Mobile (UK) Ltd v Ofcom* [2008] EWCA Civ 1373, where the adequacy of judicial review as a remedy was assessed in relation to article 4 of the Framework Directive 202/01/EC "on a common regulatory framework for electronic communications networks and services", which required that "effective mechanisms ... under which any user … has a right of appeal be provided by Member States". *IBA Healthcare* was cited in that case, among a number of other judicial review cases, in particular the second sentence of paragraph 100, quoted above. It does not seem to us that this takes the matter any further.

39. In his oral submissions for the first time Mr Beloff took a point not mentioned in Sky's grounds of appeal. He invoked article 1 of the First Protocol to the ECHR, by reference to the effect on Sky's property of a requirement to divest itself of part of its shareholding in ITV. Mr Swift QC for the Competition Commission objected to this new argument, on the basis that this point should have been taken before the Tribunal if it was to be relied on at all, and pointing out that there would be ample material on which any interference could be shown to be justified on public interest grounds. It does not seem to us that it is open to Sky to argue that the Tribunal's determination is vitiated by a failure to consider, and if appropriate give effect to, a ground which was not argued before it, even if the point had been taken in the grounds of appeal, and all the more so since it was not.

40. Mr Beloff's argument that the Tribunal, as a hyper-competent specialised tribunal, is bound to apply a greater intensity of review than the court itself would apply in a comparable situation seems to us to fly in the face of the words of section 120(4). We cannot accept this proposition.

41. For the reasons given by the Tribunal at its paragraph 63, quoted at paragraph [32] above, we consider that the decision was correct on this point, and this ground of appeal should be rejected.

Standard of proof and counterfactual analysis

42. Moving from the general to the particular, Mr Flynn Q.C. took up the argument on Sky's behalf on the other judicial review points. He argued that the Competition Commission failed to direct itself correctly as regards standard of proof. It is common ground that the standard of proof is the balance of probability. His point is that the Commission did not apply this correctly, and that it should have been applied separately to each element in the proposition on which findings of RMS and SLC depended. In oral submissions he covered both this point and his arguments on the counterfactual analysis together. We too will discuss both of these points at this stage.

43. A counterfactual is the hypothesis as regards the facts by reference to which an alleged effect on competition is to be tested. In essence, it involves considering what would have happened in other circumstances, in the present case if the Acquisition had not taken place. The Competition Commission concluded that the appropriate counterfactual in the present case was that ITV would have remained independent, that is to say not acquired by another party (such as Virgin) and, presumably (though the Commission does not say so in terms), not subject to material influence on the part of any other enterprise. At paragraph 3.27, in the section dealing with the counterfactual (paragraphs 3.20 to 3.28), the Commission said: "Nor did we receive

any evidence to suggest that a plausible alternative bid for ITV was likely to be made in the foreseeable future".

44. The Commission found that, as a result of the Acquisition, Sky was able materially to influence the policy of ITV. Sky's shareholding, at 17.9%, is not enough by itself to ensure that it can block a special resolution in relation to ITV in all circumstances, but it is by a long way the largest shareholding in ITV. Because of the ownership of major national newspapers in the Sky group, Sky could not hold more than 20% of the shares in a Channel 3 licensee such as ITV: see Communications Act 2003 section 350 and Schedule 14. Sky does not have a director on the board of ITV, and the Commission proceeded on the basis that it would not have one.

45. The Commission addressed the question in relation to material influence over policy in relation to ITV's behaviour in the marketplace: the management of its business, in particular in relation to its competitive conduct, including the strategic direction of the company and its ability to define and achieve its objectives: paragraph 3.33.

46. An analysis of the record of voting at past meetings of ITV led the Commission to conclude that Sky would in practice probably be able to block a special resolution of ITV on its own, and all the more so in alliance with some other shareholders, despite the adverse votes being those of holders of less than 25% of the whole issued share capital: paragraph 3.55. In addition, in practice Sky's large shareholding would be likely to influence ITV's policy and planning even without the matter being put to the vote, if the attitude that it would or might take became known to ITV through meetings with shareholders. The report went on from that point as follows:

> "3.46 … Further we thought that ITV's appetite for pursuing certain strategies at all would be reduced if it was aware that these strategies were likely to cause conflict with BSkyB.
>
> 3.47 If ITV perceived BSkyB to be likely to have 25 per cent of the vote, we would expect ITV to take into account any expected opposition from BSkyB in formulating its policy and in deciding whether to bring it forward. In these circumstances, BSkyB's ability to influence policy might not turn on the precise percentage of the vote held."

47. It also concluded that Sky'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. It did not, on the other hand, attach weight to the possibility that Sky might act as a disruptive shareholder generally. (Both of these points are made in paragraph 3.62.)

48. In this context, particular importance was attached to a possible need for raising cash by a share issue which did not respect the pre-emption rights given to shareholders under the articles (referred to as NPE funding). As is common form for many companies, ITV has standard authorisations which are renewed by special resolution each year. These allow the issue of up to 5% of the company's issued share capital for cash, and to make market purchases of its own shares up to 10% of the issued share capital, in each case without regard to the pre-emption rights of existing shareholders. At the time of the investigation by the Commission, it was estimated

that an ad hoc special resolution would be needed in order to issue for cash more than about 194 million shares, then valued at about £215 million. It would also be possible for the company to raise cash by a general rights issue, but the evidence suggested that this would be expensive, cumbersome, time-consuming and in some respects uncertain, to an extent that would make it an unattractive course of action for ITV to finance a new strategic venture.

49. Mr Flynn divided into three categories the situations to which Sky's supposed ability to block a special resolution might be relevant. The first is a case where the resolution is required so as to authorise NPE fund-raising going beyond the limits of any exercise permitted by the common form waivers. The second is where it would renew the normal authorisations to the board which waive the pre-emption provisions of the articles, subject to limits. The third is schemes of arrangement, which might be relevant to certain mergers or acquisitions (for example, Virgin's abortive bid for ITV, already mentioned). In paragraph 3.42 the Commission said that it treated a special resolution as including a resolution required to approve a scheme of arrangement, but it did make reference to a merger at paragraphs 3.56 and 3.57:

> "3.56 We also considered whether BSkyB's ability to block a contested or 'hostile' takeover of ITV would give it the ability to affect ITV's strategy. We did not think that this would be the case, since such a takeover would not form part of ITV's strategy. However, we thought that the ability to block a takeover (whether hostile or friendly) could increase BSkyB's ability to influence other shareholders (see paragraphs 3.58 to 3.62).
>
> 3.57 We noted that BSkyB would also have the ability to block a merger recommended by the ITV Board as part of its strategy for the business, for example through blocking a squeeze out (see paragraph 3.53) or a scheme of arrangement (see paragraph 3.42)."

50. The central point in the Commission's conclusions as regards RMS is that Sky would be able to exercise material influence by blocking a special resolution which might be required to disapply the pre-emption rights under the articles in order to secure NPE funding. It found that ITV would be likely to need equity funding in order to pursue certain major strategic options in the next two or three years (paragraph 3.43). Mr Flynn submitted that there was no basis for the Commission's conclusion that ITV might need a special resolution for this purpose, within the relevant timeframe, such that Sky would have the opportunity to block ITV's plans. He also submitted that there was no basis for the conclusion (if the Commission had reached it) that Sky would use any ability it had to block a special resolution so as to veto the annual renewal of the normal limited waivers of pre-emption rights, or that it would be able to block a special resolution to approve a scheme of arrangement. There are therefore three separate points here. The first, as regards NPE funding, is that ITV could not be expected to need it. The second is that Sky could not be expected to vote against the normal annual special resolution on common form waivers. The third is that the pattern of voting on a special resolution to approve a scheme of arrangement would be different from that applying to other special resolutions, and Sky would not be able to block such a resolution.

51. The essence of Mr Flynn's point on the standard of proof is that each element in the sequence of hypothetical events which leads to a conclusion that there is an ability to exercise material influence has to be established separately on the balance of probability, and the same applies to the analysis on which a finding of SLC is based. Inevitably there is a degree of uncertainty as regards hypothetical future events, and he did not submit that specific examples have to be identified and subjected one by one to the burden of proof, but he did argue that it was necessary to be satisfied on the balance of probability as to each of two matters: first that ITV would need to make a strategic investment of the kind under consideration within the relevant timescale, and also separately that it would wish, and (apart from the question of Sky's influence) be able, to finance it by NPE funding. He argued that, even if there was material on which the first could be held proved, there was no material on which a conclusion adverse to Sky as regards the latter could be reached.

52. The Tribunal rejected this argument on Mr Flynn's part in its paragraphs 75, 80 and 82:

> "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 … would not only be more than is required in law, but it would also be wholly unrealistic, and would probably emasculate the merger regime."
>
> "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."
>
> "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."

53. Mr Flynn's argument based on the counterfactual analysis is that in considering whether Sky had material influence, so that an RMS existed, and also whether an SLC would result from the Acquisition, the Competition Commission did not apply its chosen counterfactual consistently. In particular, as to material influence it considered the possibility that Sky might block a scheme of arrangement, at paragraph 3.57, which Mr Flynn argued would contradict the chosen counterfactual. As to SLC he pointed to paragraph 4.117 of the Report as follows (redacted at the points marked [X] to exclude confidential material):

> "There are other areas which may not require significant investment but which BSkyB may, nevertheless, be in a position to influence through its 17.9 per cent shareholding in ITV. For example, BSkyB could attempt to influence the course of any future transactions involving ITV to weaken the constraint that FTA services would otherwise provide, for example by disrupting an acquisition of ITV that might otherwise strengthen ITV's competitive position, or by attempting to encourage the acquisition of ITV by another buyer who might act in BSkyB's interests, for example by [X]. With regard to the first of these examples, [X] certain acquisitions would create a stronger threat from ITV: [X]. The second scenario would cause substantial disruption to ITV's current business model, and would be likely to weaken its contribution to the appeal of FTA services. [X]"

54. The Tribunal rejected this argument of Mr Flynn at its paragraphs 91 and 92:

> "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 the 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."

55. It seems to us that this is correct. In particular we note that the Commission ignored, in relation to RMS, Sky's possible ability to block a hostile takeover of ITV, which would not be part of the strategy of the company (paragraph 3.56), but it did not ignore the ability of Sky to block a merger recommended by the board of ITV as part of its strategy (paragraph 3.57). It seems to us that the Tribunal was correct in its view that it was open to the Commission, and not inconsistent with its counterfactual, to consider the possibility of a merger or alliance proposed by the board of ITV as part of its strategy, for the reasons given by the Tribunal.

56. Coming back to the question of NPE funding, we must now consider submissions based in part on confidential material. The points at which passages have been redacted in the following text are shown by the marking "[X]". In support of his submissions Mr Flynn showed us [X] a paper prepared by Merrill Lynch for Sky, and [X]. On this basis ITV stated that Sky's ability to block a special resolution could allow it to restrict ITV's access to an important source of funding, and thereby deter it from pursuing a range of strategic initiatives, or lead to it to accord such initiatives a lower degree of priority as compared with others which may not depend on a special resolution being passed.

57. Mr Flynn also pointed to a number of public statements by or on behalf of ITV, for example to analysts, made in very general terms which did not suggest that any major investment was contemplated for which NPE funding was to be used. It does not seem to us that these carry particular weight, as compared with ITV's confidential material.

58. It is not necessary to consider Merrill Lynch's paper, since that was based only on publicly available material. [X]

59. The Commission also had the benefit of a hearing with ITV at which it was able to question (among others) Mr Tibbitts, company secretary of ITV, on this point.

60. On the basis of that material Mr Flynn argued that the Commission had no proper basis for accepting that ITV would, in the short to medium term, wish to spend well upwards of £200 million on an investment of a strategic nature, and above all that there was no evidence that, if it did want to do so, it would or could use ad hoc NPE funding.

61. It seems to us that this submission must fail. [X]

62. So much for NPE funding, on which we would not accept Mr Flynn's submission as regards the effect of the evidence. He made a different point, noted at paragraph [50] above, about Sky's position in relation to blocking the renewal of the standard waivers. The Commission did not refer to this type of special resolution in terms. Mr Flynn's argument was that to block a normal, standard resolution such as this would be seen as seriously hostile conduct on the part of a shareholder. It would be very different from voting against a resolution for an ad hoc waiver of pre-emption rights. At paragraph 3.62, albeit on a different point, the Commission said that they did not attach weight to the possibility that Sky might act as a disruptive shareholder generally. The Tribunal discussed the prospect that Sky might use its voting power to block the renewal of the standard waivers at paragraphs 182 to 186 of its judgment. It said that the Commission had based its decision on the prospect that Sky would block a special resolution, and that it had discounted the prospect that Sky would act in a disruptive manner generally. Mr Flynn submitted that the Commission had failed to deal with the issue of how Sky would behave in relation to the renewal of the standard waivers, which was a materially different question, on the facts, from whether it would block a special resolution for ad hoc NPE funding, and that the Tribunal had also failed to deal with this. There is no sign that the point played any part in the Commission's reasoning. It seems to us that the Commission's decision should not be taken to have been based on a finding, which would have been made silently, that Sky would be likely to block the renewal of the standard waivers. Accordingly we do not accept that their failure to deal with this point expressly was a flaw in the Commission's decision which rendered it liable to be quashed by the Tribunal as a matter of judicial review.

63. In relation to schemes of arrangement, Mr Flynn's point on standard of proof is not that these would necessarily be irrelevant, but that the pattern of voting might well not be the same as on the types of special resolution which we have been considering up to now. If the point of the resolution is to authorise a take-over, merger or other form of corporate alliance, which would or might have a direct effect on shareholdings, he contended that there might be expected to be a higher turn-out than on another kind of special resolution, however important, relating to the policy of the company.

64. It is fair to say that, when considering patterns of voting, the Commission did not distinguish between this and other kinds of special resolution. Although we understand that Sky did address the distinction in its documents before the Tribunal, we do not know how the point was presented. It does not seem to have been brought home to the Tribunal as an important factor in the case.

65. In relation to the arguments about standard of proof, a number of cases in other areas of law were cited to us, as they had been to the Tribunal. They show how the courts have approached other issues where it is necessary to evaluate the prospects of things of different kinds happening in the future. They support the Tribunal's approach, but it seems to us that none of them was concerned with a task sufficiently close to that which faced the Tribunal for it to be necessary or appropriate to devote any part of this judgment to a discussion of the cases cited.

66. Sky also cited the judgment of the European Court of Justice in *Commission v Tetra-Laval BV* Case C-12/03 [2005] ECR I-987. This was an appeal by the Commission against an order of the Court of First Instance setting aside a decision of the Commission in relation to a merger of a conglomerate nature, that is to say one in

which the merging parties were not in a competitive relationship with each other, either vertical or horizontal, so that there could be no presumption of an anti-competitive effect. At paragraphs 41 to 44 the ECJ referred to the need for a careful prospective analysis of the likely consequences of the merger: "a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted". It noted that in a conglomerate-type merger, the period in the future which would need to be examined is lengthy, and that the chains of cause and effect are "dimly discernible, uncertain and difficult to establish", and that therefore the quality of the evidence relied on by the Commission to establish the need to adopt the decision in question is "particularly important" since it needs to support the conclusion that, in the absence of such a decision, the anti-competitive economic development envisaged would be plausible.

67. By contrast, in the present case Sky and ITV were already significant competitors, the timescale under consideration was not very lengthy, and it was not difficult to identify possible circumstances in which, if at all, Sky's Acquisition would give it the opportunity to exercise material influence over ITV's policy. Accordingly, it seems to us that the passages relied on by Sky from *Tetra-Laval* do not assist in the present case.

68. We have hitherto dealt in this context with factors relevant to the question whether Sky could exercise material influence over ITV. Mr Flynn put forward a similar argument as to SLC. He submitted that the Commission had wrongly failed to address separately whether, on the balance of probability, any lessening of competition would be substantial.

69. Standing back from the detail, the issue is and remains whether the Tribunal should have set aside this aspect of the Commission's decision on judicial review grounds. The Tribunal was not conducting a general review of the facts, and Sky had to show either a misdirection in law on the part of the Commission or that its decision was unreasonable on *Wednesbury* grounds. It seems to us that there was no error of law on the part of the Tribunal as regards the application of the standard of proof. It is not necessary for the Commission to isolate each step in the analytical process and to apply the balance of probability separately at each stage. The standard of proof applies to the Commission's conclusion on the points which it has to decide, namely first whether the Acquisition gave Sky the ability materially to influence the policy of ITV, and then whether this would cause an SLC. It does not have to be applied separately to each element in the analysis which is used to reach a conclusion on each of these points.

70. We add that, even if the standard of proof did have to be applied separately, for example both to the question whether ITV would be likely, in the relevant future period, to wish to raise substantial sums, in excess of those covered by the existing waivers, and also to the question whether, if it did want to do so, it could and would adopt the NPE method of funding, we consider that there was enough material available to the Commission for them to conclude that each element was adequately proved.

71. In essence, this is not really a point of law, but an attempt to re-assess the evidence and to produce a different conclusion. We therefore reject these grounds of appeal.

Rejection of Sky's alternative remedies

72. This is a different kind of point. The Commission considered what forms of remedy to recommend to the Secretary of State. It had sought views on possible remedies as follows: complete divestiture by Sky, partial divestiture, sufficient to reduce Sky's holding below the level at which it could exercise material influence, and behavioural remedies to accompany partial divestiture remedies. Sky proposed two further options: placing the whole of Sky's voting rights in a voting trust, and an undertaking by Sky not to exercise the entirety of its voting rights. As already mentioned, the Commission recommended partial divestiture, so that Sky should hold less than 7.5% of ITV's issued shares, and it also recommended some undertakings to back that up. The Secretary of State accepted that advice.

73. The Commission rejected total divestiture on the basis that it was a more drastic remedy than was needed in order to eliminate the RMS and SLC. Having regard to section 47(9) of the Act, this would have been a comprehensive solution, but they took the view that it was more comprehensive than was necessary, and therefore that partial divestiture would satisfy the statutory requirement that the remedy should provide as comprehensive a solution as is reasonable and practicable to the SLC and the resulting adverse effects on the public interest.

74. It also rejected Sky's proposal of a voting trust, even if subject to monitoring arrangements, as presenting risks, despite the impartiality and professionalism of the proposed trustee. It appeared to be a novel solution, and one which was inherently inappropriate as being not sufficiently effective or reliable, as compared with divestiture. The Commission made the following additional points in this context at paragraphs 6.49-50:

> "6.49 Secondly, we note that a partial divestiture would result in BSkyB relinquishing both its economic interest in, and its voting control over, the shares divested. The voting trust mechanism proposed by BSkyB, on the other hand, whilst taking some or all of ITV shares out of BSkyB's voting control, would leave the economic interest of the whole of its 17.9 per cent stake in ITV with BSkyB.
>
> 6.50 BSkyB would therefore remain much the largest owner of shares in ITV. Even if BSkyB did not retain any voting rights, other shareholders could still attach additional weight to BSkyB's views on ITV's strategy, as a result of its substantial economic interest in ITV. Further, as set out in paragraph 4.117, by retaining its economic rights relating to a 17.9 per cent shareholding, BSkyB could have the opportunity to influence the course of any future transaction involving ITV, since it would, for example, still be able to choose whether to sell its shares to a third party."

75. An undertaking not to vote Sky's shares would be much simpler to police. The Commission was concerned that it might require ongoing monitoring and enforcement. This should not be difficult while Sky retained its shares, because any breach of the undertaking would be immediately apparent, and would become clear sufficiently in advance of the relevant meeting (by the date for lodging proxies) so that, if there were any breach, even if inadvertent, there would be time before the

meeting in which to ensure that it was rectified or dealt with. However, the Commission also mentioned monitoring any conditions that might relate to a subsequent sale of the shares or any part of them, for example not to dispose of them to an associated person. They also said this, at paragraph 6.56:

> "Moreover, as set out in paragraph 6.50, BSkyB could also have the opportunity to influence the course of any future transactions involving ITV as a result of retaining its economic interest and hence remaining much the largest owner of shares in ITV."

76. The Commission had also made the point that to eliminate the votes of 17.9% of the shares would have a distorting effect as regards the remaining shareholders. Of course, as between those shareholders, their respective voting power would be the same as it otherwise would be, but it seems to us correct to say that the elimination of the voting power attached to this large block of shares could create distortions in the operation of ITV's corporate governance, as the Commission said at paragraph 6.55.

77. Sky submitted to the Tribunal that the rejection of the alternative remedies was irrational, in particular because monitoring would present no real problems. The Tribunal rejected Sky's criticism of the Commission's position as regards a non-voting undertaking in its paragraph 303. It seems to us that, even if one were to discount any suggested difficulties as regards monitoring such an undertaking while Sky retained its shares, there would be other monitoring issues, and we agree that the Commission was entitled to have regard to those, and to the possibility of continuing indirect influence on the part of the largest shareholder, even though without voting rights while its shares continued to be held by itself. The voting trust was more complex in its nature, it would require active monitoring, and its effectiveness was questionable. Accordingly, we agree with the Tribunal that the Commission was not irrational in rejecting Sky's alternative remedies.

Media plurality

78. On the basis that Sky's appeal on the competition points fails, for the reasons already given, the argument about media plurality does not affect the outcome of the present case. The Tribunal concluded that, despite its having taken a different view on this point from the Commission, this could not affect the appropriate remedy, since the partial divestiture ordered would eliminate the RMS and the SLC and at the same time remove any possible concerns as regards plurality.

79. On that basis, it would be possible to leave this point to be argued on another occasion. When refusing permission to appeal on this point, the Tribunal recognised that the point was both novel and potentially important, but said that the point could make no practical difference on the facts of this case, and that it would be better for the point to be resolved in the context of a case where it would make a difference to the outcome. Clearly it is a point which is capable of being important. The Commission and the Tribunal have expressed differing views on it, and the Secretary of State advocates the view overruled by the Tribunal in its judgment. It seems likely, therefore, that sooner or later the point will have to be resolved by the Court of Appeal. All parties urged us to decide the point, whatever the outcome on the other issues. Because permission to appeal was given on this point, as on the others, by Carnwath LJ, and it has been fully argued, it seems to us that we should not decline to

decide it. We therefore turn to this issue, which is of a quite different nature from those with which we have been concerned up to now in this judgment.

80. The question turns on the correct view of the interaction between section 58(2C) and section 58A(5) of the Act, and in particular on the meaning of the phrase, not defined in the Act, "sufficient plurality of persons with control of … media enterprises" in section 58(2C)(a). The Commission held that what was required was not just an exercise of counting heads, and that it was proper and necessary to have regard to the actual degree of control exercised by one enterprise over another. If the control was less than complete, and if in practice it would not enable the controlling enterprise to dominate the policy and the output of the controlled enterprise, that was something that should be taken into account. It referred to this situation as "internal plurality", as compared with the effect of counting the number of controlling enterprises, and ignoring the limits on the control exercised by any of them, which it referred to as external plurality. The Tribunal considered that this approach was wrong in law, being excluded by section 58A(5).

81. The relevant provisions have been set out above, at paragraphs [24] and [25]. They need to be seen in their context. A crucial element is the possibility of three different degrees of control under section 26, as already noted at paragraphs [11] and [12] above. Even though the Commission concluded that Sky had control over ITV for the purposes of the Act, because Sky could exercise material influence over ITV's policy, it recognised that in practice such control was confined to limited circumstances, important in terms of competition but not necessarily bearing on the issue of plurality.

82. The puzzle presented by the two sections is this. On the one hand, section 58(2C)(a) requires an assessment of whether, following the merger, there is or would be sufficient plurality of persons in control of relevant media enterprises. This suggests that one should look at the actual position as regards the extent of control. On the other hand, section 58A(5) provides that where there is any degree of control over one such enterprise by another, both of them have to be treated as under the control of only one person. This seems to impose an overriding assumption of 100% control, regardless of the actual facts. The Competition Commission favoured the former view, and considered that section 58A(5) did not prevent it from having regard to the actual level of control. The Tribunal on the other hand felt unable to reconcile this reading with section 58A(5), and therefore held that the latter view was correct.

83. We were shown some material from Hansard relating to the issue of media plurality. None of this formed part of any debate about the particular provisions which we have to consider, and it seems that there was no such debate. Originally the Communications Bill contained nothing along the lines of section 58(2C) or section 58A. Lord Puttnam proposed two successive sets of amendments to introduce a media plurality consideration, as had been recommended by the Joint Committee on the draft Bill, which he had chaired. Each of them was withdrawn, but the Government introduced its own amendments, in the form of the provisions now in force, which were agreed to without debate in the House of Lords. In the circumstances, what was said in Hansard in the course of the debates on Lord Puttnam's amendments, however interesting it may be, does not appear to us to throw any relevant light on the proper interpretation of these provisions.

84. We were also shown passages from the Explanatory Notes to the 2003 Act, and DTI Guidance about the new provisions, which appear to have a common provenance. These offer some comments on the intention behind the sections, but they do not assist on the point which we have to consider.

85. On behalf of the Competition Commission, Mr Swift Q.C. having presented the arguments on the competition points, Mr Beard took over when it came to media plurality. Taking us through the relevant sections of the Act, he sought to emphasise the generality and breadth of the investigation which the Commission has to make on a reference, whether by the OFT under section 22 or by the Secretary of State under section 45. It must decide whether an RMS has been created and, if so, whether the creation of the situation has resulted or may be expected to result in an SLC. On a public interest reference it must also decide whether the RMS operates, or may be expected to operate, against the public interest having regard to the specified public interest consideration. A public interest reference will have been preceded by preliminary reports by the OFT and OFCOM. The point of the reference to the Competition Commission in a public interest case is to entrust to an independent body the task of investigating and reporting to the Secretary of State on the public interest issues, leaving the Secretary of State to take the decision.

86. Originally section 58 only specified interests of national security. As already described, the media related issues mentioned in section 58(2A) to (2C) were added by the Communications Act 2003. In relation to these factors, it is necessary to bear in mind that whereas broadcast media are separately regulated in a number of ways, for example as regards content and accuracy, there is no such regulation of newspapers. It was therefore appropriate to make different provision for newspapers in this context as compared with the provision for broadcast media. This accounts for section 58(2A) and (2B) which have no equivalent for broadcast media. Subsection (2B) contains the first use of the word plurality in these provisions.

87. Section 58(2C) deals with three different considerations. Apart from sufficient plurality of media controllers, it identifies the need for the availability of a wide range of broadcasting of high quality, calculated to appeal to a wide variety of tastes and interests, in (b), and the need for those carrying on media enterprises, and 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, at (c). Each of these, like (2A) and (2B), requires a qualitative assessment of the position resulting, or likely to result, from the particular RMS.

88. The same is true of (2C)(a), in that, on any view, it requires an assessment of the sufficiency of the plurality of media controllers. Even if plurality means no more than "number" in this context, there has to be an assessment of whether the remaining number is sufficient. The criterion of sufficiency, for this purpose, seems to be the need to avoid over-concentration of the market.

89. Mr Gordon's submission for Virgin was that plurality in this paragraph does mean no more than number. At paragraph 5.7 the Commission said that it referred to both range and number:

> "We took the concept of plurality of persons with control of media enterprises to refer both to the range and the number of persons with control of media enterprises."

90. We agree with the Commission on this and would reject Mr Gordon's argument. The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well. Certainly it has that meaning in subsection (2B). We consider that it does so in subsection (2C)(a) as well.

91. These considerations favour the submission made on behalf of the Competition Commission, which was supported by the Secretary of State and Sky, that section 58(2C)(a) appears on its face to require a broad assessment of the real or likely effect of the RMS on the relevant market, namely media enterprises serving relevant audiences in the UK or in particular parts or areas within it.

92. However, undoubtedly the provision has to be read with section 58A which sets out definitions and other guidance for the interpretation of section 58. Subsections (1), (3) and (8) are straightforward definition provisions. Subsection (2), which applies specifically for section 58(2C)(a), extends the definition of media enterprise in a given situation. It shows that there is a particular concern about a case in which the RMS involves enterprises active in each of newspapers and broadcasting. Subsections (6) and (7) are not simple definition provisions, but even so they do perform an equivalent function, by setting out the criteria which may be applied in deciding what any relevant audience is.

93. Section 58A(4) is a particular provision which is needed because of the oddity, already noticed, that the three different levels of control may mean that an enterprise, A, which already has the lowest level of control over another enterprise, B, so that they have ceased to be distinct, may gain an increased level of control. In that event B is again treated as being brought under the control of A and they cease to be distinct for a second time under section 26(1). Section 58A(4) precludes an argument that, because B is already under the control of A at the start, the added level of control makes no difference, and the number of enterprises serving the relevant audience is the same before and after the RMS.

94. Subsection (5) poses the more difficult question of interpretation. For convenience we set it out here again:

> "(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."

95. One question about the scope of this is whether the use of the phrase "would fall to be treated" means that it does not apply to the merged enterprises which *are* so treated. If it does not apply to them, it only applies when considering other enterprises active in the market. This would be a very odd and narrow reading of the provision. It seems to us that to draw this distinction places far too much weight on the word "would", for no apparent purpose. If the investigation were to take place before the merger has been completed, as is possible under section 45(4) and (5) and section 47(4), then "would fall to be treated" would be a correct phrase in relation to the prospectively merged enterprises. We agree with the Tribunal that the merging or merged enterprises are within this subsection. The Competition Commission preferred the other reading, but applied both in the alternative, coming to the same overall conclusion. The Tribunal said at paragraph 253:

> "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 draftsman 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"."

96. We agree.

97. So then we come to the question: what is the effect of the mandatory treatment of the relevant enterprises as being "all under the control of only one person"? Under section 26, as already noted, this situation can come about in a number of different ways. In the present case the RMS fell within the terms of section 26(2)(c): one enterprise carried on by a body corporate (ITV) and another carried on by a person (Sky) having control of that body corporate, the level of control being the lowest of those provided for by section 26(3). That situation having arisen as a result of the Acquisition, section 26(2) shows that the two enterprises are to be treated as under common control. Under section 26(1) they thereupon ceased to be distinct enterprises for the purposes of the relevant provisions. In turn, section 58A(5) provides that both of the relevant enterprises are to be treated as under the control of only one person.

98. One contention as to the purpose and effect of this provision was that it was directed at ensuring that if the control was exercised by a group of people, they were all to be counted as one in the headcount that is at all events one of the elements of section 58(2C)(a). In section 26(2) each of paragraphs (b) and (c) refers specifically to control by a person "or group of persons", so this possibility was expressly contemplated. However, Mr Gordon pointed out that section 127 of the Act deals with associated persons, and treats them as being one person, including (in terms) for the purposes of section 58(2C). Since associated persons include not only relatives and persons carrying on business in partnership but also persons acting together to secure or exercise control of any enterprise, under section 127(4), and thus covers a situation in which control is exercised by a group of persons, it does not seem that subsection (5) can properly be regarded as having been intended to cover this point.

99. To treat enterprises A and B as under the control of one single person, in a situation in which A in fact can do no more than exercise material influence over the policy of B, might cause difficulty as regards the application of the provision. In the present case there is no other body apart from Sky that could be said to have any kind of control

over ITV. But this might not necessarily be the case. There could be two media enterprises, not associated with each other, each having a low level of control over a third media enterprise. For example, both A and C might hold 20% of the shares in B, in circumstances in which, having regard to the pattern of shareholdings as regards the balance of the shares, each of A and C could block a special resolution. Alternatively, if neither A nor C was subject to the 20/20 constraint to which Sky is subject (see paragraph [44] above), they might each hold just over 25%, in which case each could certainly block a special resolution. Either way, they might both have the lowest level of control provided for by section 26. On the acquisition by (say) A of its shares in B, or of enough shares to bring it up to the relevant level of shareholding, C already having all of its shares, there would be a change in control which would create an RMS. Would A and B be treated as together being under single sole control, despite C having the same level of control of B as A has for these purposes? On the Tribunal's reading of section 58A(5) that would be the case, whereas on the Commission's reading, even if A and B were to be treated as under single control, it would be relevant and necessary to have regard to the practical reality as regards the extent of control exercised or exercisable over B, by each of A and C, in considering the plurality of media controllers.

100. In relation to the reason why plurality is important, the Commission said at paragraph 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."

101. When discussing the relevance and effect of section 58A(4) they commented at paragraph 5.19 on the phrase in section 58(2C)(a) being plurality of persons with control of media enterprises, rather than plurality of media enterprises. In turn, as regards subsection (5), they said at paragraph 5.26 that even if the subsection requires ITV to be treated as under the control of only one person, nothing in the subsection suggested that the degree of control exercised by that person should be treated as equivalent to full control or ownership if that is not the case in fact. We have sympathy for that view, but it does not in terms take account of the fact that the subsection does not treat ITV as under the control of a single person (namely Sky) but rather it treats both ITV and Sky as being under the control of one single person. If the effect were to treat ITV as under the control of one single person, namely Sky, then, albeit that problems could still arise, as in our hypothetical example where A and C both have low level control of B (see paragraph [99] above), it might not be difficult on the present facts to say that one person has control of ITV, namely Sky, but that the facts have to be examined to see what degree of control it has. That is not so easy on the text of subsection (5) with its deeming of a single controller of both ITV and Sky: "*all* under the control of a single person" (our emphasis).

102. That was the main reason for the Tribunal taking the opposite view, namely that "a detailed consideration of the degree and nature of control exercised over [two or more

media 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": paragraph 258 (although we note that the word "sole" there is an interpolation, not present in the statute). They recognised that this would impose a constraint on the analysis of plurality of media controllers which required the current factual position to be ignored. At paragraph 259 they described the effect of their reading on 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 section 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 section 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."

103. They thought that the need to ignore the practical reality, in a case of limited control, was explicable for several reasons, including the sheer importance of such plurality. One factor relied on was the importance and sensitivity of ensuring structural media plurality, such plurality, if once lost, being very difficult or even impossible to restore: see paragraph 262. Another was that although an increase in control from one level to another would be caught by the merger control provisions, "not all increases in shareholding and not all increases in the level of control or influence generally would necessarily be so caught": paragraph 263.

104. We agree that it is right to read these provisions on the basis that Parliament attached considerable importance to the preservation of plurality of media controllers. It is also a fair comment that what the Commission called internal plurality could possibly be reduced in practice without an event occurring which triggered a change in the level of control or deemed control. Thus the practical situation might change, the degree of plurality being reduced, without it being possible to invoke the relevant powers of investigation and sanction at that stage. However, where the internal plurality exists despite the merger because one media enterprise has material influence over another, but no more, and the other is largely able to pursue its own independent policy and strategy as regards broadcasting style and content, it is not clear that there is a real risk of significant change in the degree of internal plurality short of an increase in the level of control which, in the present case, cannot happen because of the 20/20 rule (see paragraph [44] above).

105. The arguments addressed by the Commission, the Secretary of State and Sky emphasised the artificiality of the Tribunal's reading, and the sharp contrast with other provisions as regards merger investigations which require attention to the practical effect of the RMS, in particular in order to ascertain whether there has been or would be an SLC. It was submitted that there was no adequate reason to explain

why, in the context of media control plurality, it should be necessary to adopt an artificial and arbitrary approach, as opposed to one which focuses on the reality of the relevant market.

106. It is one thing to have deeming provisions which are aimed at avoiding a particular situation not being caught by the merger investigation regime when it ought to be so caught. Section 58A(4) seems to be a provision of that kind, and to be required because of the possibility of a merger situation arising on a change in the level of control as between two enterprises which are already deemed by section 26 not to be distinct. It is another thing altogether if the effect of a deeming provision is not, or not just, to eliminate a potential anomaly but also to require that the investigator should shut its eyes to reality.

107. It could not be suggested that section 58A(5) was drafted without having adequate regard to the possibility that the level of control in fact exercised might be at the lowest under section 26. First, the point of subsection (4) is to take account of the effects of changes between the levels of control under section 26 itself. That being so, the draftsman cannot have forgotten about the different degrees of control when he moved from one subsection to the next. Secondly, in any event, subsection (5) itself deals both with a situation of deemed ownership or control under section 26, in paragraph (a), and also with actual ownership or control, in paragraph (b). Clearly, whatever the subsection does, it was intended to apply in a situation in which no more than low level control exists, or would exist, under section 26 as a result of the RMS, as well as to a situation in which the reality is of single and complete ownership or control.

108. In support of his arguments on this point, Mr Beard pointed to the breadth of the questions posed for the investigation by section 35 and the generality of the powers available in support of the investigation under section 109 which, he argued, both required and made possible a wide ranging consideration of the actual and likely position in the market as it stands or would stand after the merger. Correspondingly, section 47 identifies the issues referred with notable generality and breadth. Coming to the public interest considerations themselves, he submitted that both of the other paragraphs of section 58(2C) require attention to the real situation, as do sections 58(2A) and (2B). It should therefore be regarded as unlikely that section 58(2C)(a) alone involves shutting one's eyes to the reality in any respect.

109. He contended that the use of the word "plurality" in section 58(2C)(a) is significant: it does not mean simply the number of such persons. It requires a qualitative assessment which, according to him, could not be achieved except by having regard to the real position in the market. It could not be supposed, he said, that such an assessment was to be made by an investigator in blinkers who had to treat, in the present case, ITV and Sky as under single sole and complete control, when they were not in fact under such control and, indeed, could not be so, because of the 20/20 constraint on Sky as regards ITV. According to his submission the point and effect of section 58A(5) is that, in counting the number of relevant media enterprise controllers, you have to treat ITV and Sky as controlled by one person, but that this does not mean that you are unable to have regard to the actual limits on the degree of control exercisable or exercised in relation to one or the other.

110. Mr Lasok Q.C., for the Secretary of State, supplemented the argument by pointing to the qualitative elements in the assessment: not just plurality (rather than number) of media controllers, but sufficiency of such plurality. He argued that this indicated clearly the statutory purpose, namely to avoid an excessive concentration in the market which could affect adversely the range of media content available to the particular audience.

111. Mr Beard also submitted that to construe an interpretation provision, such as section 58A clearly is, as subverting the reading which one would otherwise expect from the principal provision, here section 58, is to allow the tail to wag the dog. A definition section should always be subservient to the main provision which it supplements. We cannot accept that as a general proposition, but it is nevertheless fair to the extent that both provisions must be read in the context of the legislation as a whole, and one would not expect the definition section to produce a reading of the provision defined which is at odds with the context and the apparent overall purpose of the legislation.

112. For Sky, Mr Beloff again presented the oral argument on this point. He pointed to paragraph 265 of the Tribunal's judgment, in which he submitted that the Tribunal had got into deep water with the interaction between quantitative and qualitative assessment, having required that a critical factual element be ignored for the purposes of the qualitative assessment. He asked forensically why the Act should be treated as requiring not merely a reduction in the headcount but that a blind or blinkered eye be turned to the actual level of control which gave rise to the investigation in the first place or, for that matter, to any limitation on the degrees of control exercisable as between other media enterprises serving the same audience.

113. In its paragraph 265 the Tribunal said this:

> "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 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"."

114. Thus, the Tribunal did not support the proposition that plurality meant no more than "number". As we have said, we agree that it is not restricted to a mere headcount, and we do not accept Mr Gordon's submission for Virgin that this is all it comes down to. However, number is an important element, because clearly for the purposes of section 58(2C)(a) you have to know how many controllers there are of the relevant media enterprises before you consider whether, in terms of number and also of range and variety, those controllers satisfy the requirement of sufficient plurality. The Tribunal's observations at the end of the paragraph raise the question as to what can

legitimately come within the "detailed and wide-ranging qualitative assessment" which is not excluded by the Tribunal's interpretation. How much of the real world is excluded by the statutory deeming effect of section 58A(5)? In particular, does the phrase "all under the control of a single person" mean that all the relevant enterprises have all to be treated as under the complete control of that single person, or does it allow an examination of the actual degree of control exercised or exercisable, while excluding any other possible controller and requiring the overall number of controllers to be calculated on the basis that there is only one in relation to the relevant enterprises?

115. Section 58A(5) applies for the purposes of section 58, not just for section 58(2C)(a). It would therefore also be relevant if section 58A(2C)(c) were invoked and the commitment of controllers of media enterprises to broadcasting standards objectives had to be examined. In that context, it seems, the scrutiny would be of the commitment of the deemed single controller of the merged enterprises. That might perhaps present problems if there was not, in fact, one single controller. If that question were asked in relation to an RMS similar to the present, it would be necessary to work out to whom the test is to be applied. On the other hand, if that were difficult (as it might be), the problem would in practice be alleviated by the fact that it would also be necessary to consider the commitment of those carrying on each enterprise. While the relevance of subsection 58A(5) to this other provision in section 58 is to be noted, we do not think it adds significantly to the debate.

116. There could undoubtedly be difficulties in carrying out the assessment which is required by section 58(2C)(a) on the basis of a deemed single controller of any enterprises affected by section 58A(5). One kind of problem is that, if the Commission is to make a qualitative assessment of the range and variety of controllers, it needs to know who those controllers are. In many cases there will be no doubt as to that, but a deeming provision of this kind is at least capable of giving rise to difficulty in that respect.

117. Moreover, if the Commission were satisfied that the RMS does or would give rise to adverse effects as regards the public interest consideration, on the basis of a deemed single controller, so that it ought to recommend to the Secretary of State under section 47 that steps be taken to remedy or prevent that adverse effect, what should those steps be? Should they be directed at the situation of deemed single and complete control of both or all relevant media enterprises, or towards the actual position of (as it might be) limited low level control by one such enterprise over another? This may not be a real dilemma, in that steps sufficient to eliminate or alleviate the problem in practice would be likely to prevent the position arising in which there is a deemed single controller, or to ensure that if that situation has already arisen, it ceases to exist as a result of the steps to be taken. However, there is at least scope for confusion here.

118. One question arising is what is the purpose and effect of subsection (5) on the Commission's reading? The Secretary of State, Sky and the Commission submit, and we agree, that the Commission's task is not just to count the number of media enterprise controllers, but also to make a qualitative assessment of the position following from the RMS. One would expect that assessment to be made by reference to the real position as regards extent and level of control. If so, however, it could be asked what difference the deemed treatment required by subsection (5) makes in

relation to the Commission's task, to which it undoubtedly applies? One answer to this question is that, as regards the cases referred to in paragraph (b) of subsection 58A(5), namely actual common ownership and control, it does not appear to affect anything other than the headcount, and in that respect all it avoids is any risk of double counting. That being so, it can be argued that the purpose of the provision is limited to that aspect also in relation to the cases of deemed control, arising under paragraph (a) of the subsection.

119. The resolution of this issue is far from easy. On the one hand, one would expect a qualitative assessment of the sufficiency of the plurality of media enterprise controllers to be conducted by reference to the facts as they stand, without any part of that reality being overridden by a deeming provision, and therefore taking account of any limits on the nature and extent of the control of one media enterprise over another. On the other hand, section 58A(5) is clearly intended to have some effect in relation to this assessment, and cannot be ignored. It cannot be explained as dealing with groups of persons, because section 127 covers that point. It applies as regards the headcount, for it directly governs the question how many controllers there are: as regards the relevant enterprises subject to the merger there is only one (and likewise as regards any two or more other enterprises in the market in a similar position). This might produce an anomaly in the hypothetical situation which we have postulated at paragraph [99] above, where the number of controllers would be deemed to be one but the Commission would be faced with a difficulty because of the comparable position of each of A and C. (Whether such a situation is likely to occur in practice is difficult to anticipate.) If, however, it does only apply to the mere question of numbers, it seems to achieve little, if anything, of relevance. It seems, therefore, that the court is left with a stark choice. On the one hand, the Commission's view of the provisions might be preferred, although it leaves section 58A(5) with very little distinct effect, because the other meaning is seen as incompatible with the qualitative assessment required by section 58(2C)(a) which should be applied to the real facts. On the other hand, the Tribunal's reading could be adopted, which gives section 58A(5) a significant substantive effect in relation to the assessment which is required, albeit that it also causes what may seem to be a substantial distortion of the process of assessment, and might give rise to anomalies and difficulties of application.

120. As a matter of statutory construction the issue is finely balanced, and we have reviewed in the preceding paragraphs the arguments each way, which were powerfully advanced before us. On either reading there is a certain scope for anomaly, though the puzzle presented by the particular hypothetical case which we have postulated at paragraph [99] above may not be one which is very likely to arise in practice. We find the Tribunal's reading of the legislation to be counter-intuitive as regards the effect of a deeming provision on the broad qualitative assessment which the legislation otherwise indicates is required. It seems to us that a plain indication would need to be found in the legislation for it to be read as having that effect. The clear requirement for a detailed and realistic analysis which is inherent in the statute as a whole should not readily be overturned by a deeming provision which is not manifestly intended to have that effect. It seems to us that the best argument in favour of the Tribunal's reading is that the alternative leaves section 58A(5) with almost no practical effect. However, as regards the more common situation of actual common ownership or control, dealt with in paragraph (b) of the subsection, it is indeed limited to the headcount, and to a subsidiary function of avoiding any risk of double counting.

That being so, it does not seem to us that it requires to be read differently in a case within paragraph (a), where there is only a statutorily deemed control, rather than actual control.

121. On that basis, it seems to us that the Commission was correct to hold that, whereas in reckoning the number of controllers of media enterprises for the purposes of section 58(2C)(a) only one controller is to be counted in respect of both or all of the relevant enterprises (here Sky and ITV), nevertheless, when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control. It does not seem right to us to read the artificial effect of section 58A(5), in a case within paragraph (a), as extending farther than is necessary and clearly required by that provision. This reading of the subsection puts it in the same category as section 58A(4), being ancillary to the provisions of section 58. It applies to the calculation of the number of controllers, both as regards the merged or merging enterprises and as regards any others serving the relevant audience. On the other hand, it does not allow the provision to have an overriding effect, excluding a consideration of the limited extent (if it be the case) of any control actually exercised or exercisable by a controlling enterprise over another enterprise, in the course of the qualitative assessment which is required on an investigation by the Commission in relation to the particular public interest consideration identified in section 58(2C)(a).

122. In relation to the concern expressed by the Tribunal about the possibility of an increase in the level of control or influence without a new RMS arising, so that the merger control provisions would not apply (referred to at paragraph [103] above), on the one hand that possibility does not appear to exist in the present case because of the application to Sky of the 20/20 rule (see paragraph [44] above) and on the other hand, in a case in which that possibility does or might exist, the Commission would be entitled to take it into account when considering the sufficiency of the plurality of the controllers as matters stand following the RMS.

123. It seems to us unsatisfactory that the terms of the Act should have been open to the conflicting interpretations placed on it by the Commission and the Tribunal. If it were thought that to limit the deeming effect to one of number alone does not allow for sufficient protection of the sensitive interest of media plurality, it should not be difficult to amend the legislation accordingly, now that possible difficulties in applying the current legislation have been identified.

Disposition

124. For the reasons set out above, we dismiss Sky's appeal on the competition points, but we allow its appeal on the media plurality issue and also the Respondent's Notices of the Commission and the Secretary of State. Virgin's contingent appeal does not arise.