



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No: 1096/4/8/08

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (“the Rules”), the Registrar of the Competition Appeal Tribunal (“the Tribunal”) gives notice of the receipt of a notice of application, on 25 February 2008, under section 120 of the Enterprise Act 2002 (“the Act”), by Virgin Media, Inc. on behalf of itself and the Virgin Media Group of Companies (“the Applicant”) of Bartley Wood Business Park, Bartley Way, Hook, Hampshire, RG27 9UP, for review of the decisions of (i) the Competition Commission (“the Commission”) contained in its report (“the CC Report”) sent to the Secretary of State for Business, Enterprise & Regulatory Reform (“the SoS”) on 14 December 2007, and (ii) the SoS of 29 January 2008 (“the SoS Decision”) in respect of the acquisition by British Sky Broadcasting Group plc (“BSkyB”) of 17.9 per cent of the shares in ITV plc (“ITV”) (“the Acquisition”).

In the CC Report, the Commission concluded that BSkyB had acquired the ability materially to influence the policy of ITV (and that a relevant merger situation had therefore been created), that the Acquisition was likely to result in a substantial lessening of competition (“SLC”) arising from a loss of rivalry between ITV and BSkyB in the all-TV market. However, the Commission concluded that the Acquisition may not be expected to operate against the public interest having regard to the relevant public interest consideration specified by the SoS in his reference to the Commission of 24 May 2007 (“*the need, in relation to every audience in the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience*” as set out in section 58(2C)(a) of the Act). The Commission then concluded that a divestment of shares “to below 7.5 per cent” would be effective in remedying the SLC.

The SoS Decision adopted the Commission’s findings in respect of each of the matters which the SoS was required to decide under the Act. The SoS is required, under section 54(7)(a) of the Act, to accept the decision of the Commission as to whether the relevant merger situation has resulted, or may be expected to result, in an SLC. The SoS Decision accepted the CC Report’s findings on this matter and concluded that, on the basis of the SLC finding, the Acquisition operates against the public interest. As regards the media public interest consideration, the SoS Decision confirmed that the public interest consideration specified in his intervention notice was relevant to a consideration of the Acquisition, but saw “no sufficient reason to reach a different conclusion on this matter” from the one reached by the Commission. Given that the SoS only found an adverse effect on the public interest as a result of the SLC finding, he did not conduct his own analysis on appropriate remedial action and adopted the conclusions on the CC Report that BSkyB should divest its shareholding in ITV to “below 7.5 per cent”.

The Applicant considers that the CC Report and the SoS Decision (“the Decisions”) are vitiated by a combination of manifest errors of appreciation, errors of law and related errors of assessment. The Applicant submits that the Decisions have failed through their flawed reasoning and interpretation of the relevant legal provisions to carry out the correct assessment in relation to the specified public interest consideration. As a consequence, the Applicant further submits, the Commission and the SoS have failed to identify adverse effects on plurality and accordingly have imposed no remedies in relation to media public interest concerns. In summary, the principal grounds of review on which the Applicant relies are that:

1. The Commission and SoS have made errors of law and have misdirected themselves as to the relevant legal questions in interpreting and applying the public interest provisions of the Act.
2. The Commission and SoS have taken into account irrelevant considerations in conducting their assessment of the specified public interest consideration.

3. The Commission and SoS have made manifest errors of appreciation, have applied inconsistent reasoning and have reached an irrational conclusion that the Acquisition may not be expected to operate against the specified media public interest consideration.
4. The Commission and SoS have failed to have regard to relevant considerations in conducting their assessment of the specified public interest consideration.
5. The Commission and SoS have acted unreasonably and have made manifest errors in determining the appropriate action to be taken to remedy the identified adverse effects and, in particular, have failed to have regard to relevant considerations.

The Applicant requests the Tribunal to:

1. set aside the Commission's decision and the SoS's decision in so far as they relate to the application of the public interest test specified in section 58(2C)(a) of the Act and remedies;
2. determine the correct interpretation of sections 58 and 58(A) of the Act and, in particular sections 58(2C)(a) and 58A(4) and (5);
3. remit the matter to the Commission and/or SoS as appropriate for proper consideration of the public interest test specified in section 58(2C)(a) of the Act and remedies;
4. award costs to the Applicant;
5. grant such other relief as is appropriate in all the circumstances.

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

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

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

Charles Dhanowa OBE
Registrar

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