IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1095/4/8/08
1096/4/8/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3rd June 2008

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)

PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP Plc

Applicant

- v -

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

AND

VIRGIN MEDIA, Inc

Applicant

- v-

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

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HEARING – DAY ONE

APPEARANCES

Mr. Michael Beloff QC and Mr. James Flynn QC and Mr. Aidan Robertson (instructed by Allen & Overy) appeared for Sky Group Plc.

Mr. Richard Gordon QC and Miss Marie Demetriou and Mr. Duncan Liddell (Partner, Ashurst LLP) appeared for Virgin Media, Inc.

Mr. John Swift QC, Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for The Competition Commission.

Mr. Rupert Anderson QC and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform

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THE PRESIDENT: Are you going to deal with some housekeeping points. We have a few, but if you have some you can go first.

MR. BELOFF: No, we have none so far as we are aware; most matters have been resolved under your direction and advice. I think the question of length may be an issue between the parties and no doubt you have some directions or views about that, but for the moment, if I may I will resume my seat.

THE PRESIDENT: Well obviously one of the matters which may arise is the question of confidential information, there may be reference from time to time to matters that are confidential, and I suppose we will have to go into camera. I do not know whether you have had an opportunity to discuss amongst yourselves how that might be orchestrated so as to minimise the inconvenience to everyone. No doubt a lot can be done simply by asking us to read things – I think we are very much in your hands on this, but I raise it just so that people bear it in mind. Mr. Flynn?

MR.FLYNN: Well, sir, I have tried to structure what I will be saying to the Tribunal so that all the confidential information which I need to refer to comes in one block, which will be when we get on to the substantial lessening side of things. I am not sure there is going to be a very convenient way of doing it without, I am afraid, clearing the room, but I have tried to reduce it.

THE PRESIDENT: That is very helpful, that is very much what I think we were hoping might be possible. The other thing is, of course, the batting order and also the related subject of the timing. I do not know whether there has been any development since yesterday. We were seeking to cut through what was a bit of an issue and along the lines of what the Treasury Solicitors were suggesting, and I do not know whether or not that is still the proposed order of events.

MR. ANDERSON: Yes, as we understand it, it is.

THE PRESIDENT: Good. So far as getting through is concerned. The Tribunal is able to sit a bit earlier tomorrow and on Thursday if you think that would be helpful and also to sit a bit later on each of the three days including today – we would not want to go beyond five – but we are willing to do that so that is something you might have a think about.

So far as the documents are concerned, thank you very much for the skeleton arguments and the bundles, and other bits and pieces that you have sent through. We have all read at least the Competition Commission report at some stage and the pleadings and the skeletons. I suspect we have probably read different bits of the other documents, and the annexes, but we have read the core stuff. That is all we had really, over to you?

MR. BELOFF: Sir, can I assume, before I say anything else that we are working now on the assumption of sitting hours between 10 and 5 in the evening for the next three days?

THE PRESIDENT: If that is what you collectively are content to do.

MR. BELOFF: For our part certainly. There seems to be general acquiescence to the right and to the left of me.

Mr. Chairman, members of the Tribunal, this is, as you will be aware, the first Reference to be made under Chapter II of Part 3 of the Enterprise Act of 2002 and if I may be forgiven for abbreviations in identifying the representation I appear with my learned friend, Mr. Flynn and Mr. Robertson for Sky, my learned friends, Mr. Swift, Mr. Beard and Mr. Williams appear for the Commission. My learned friends, Mr. Anderson and Miss Holmes appear for the Secretary of State, and my learned friend, Mr. Gordon with Miss Demetriou appear for Virgin.

The background to these applications arises, as you well know, out of Sky's acquisition of 17.9 per cent of ITV shares, and they focus on the report of the Commission of 20th December of last year and the Decision of the Secretary of State of 29th January of this year. I am sure you are all familiar, both with the chronology and the decisions that are under challenge, so if I may go straight to an identification of what we understand to be the substantive issues which fall to you to determine, they are four in effect in number.

The first is whether or not the Commission could properly find a relevant merger situation within the meaning of sections 23, 24 and 26 of the Act. Secondly, whether the Commission could properly find that this had resulted, or might be expected to result in a significant lessening of competition within the meaning of s.47 (1) and (2)(a). Thirdly, whether or not the Commission and the Secretary of State could properly find that the relevant merger situation did not operate against that aspect of the public interest identified in section 52(2)(c)(a), that is to say the media plurality need. Fourthly, whether the Commission's recommendations for, and the Secretary of State's acceptance of, remedies directed at the perceived adverse effect on the public interest of the significant lessening of competition were reasonable and proportionate.

The first two issues arise on Sky's application, the third arises on Virgin's application, and the fourth arises on both applications, Sky submitting that the requirement that it divests itself of a shareholding in ITV to a level below 7.5 per cent is excessive, Virgin submitting *au contraire* that it is wholly inadequate. So the parties align themselves in different ways on the issues before this Tribunal. On Sky's application it is confronted by the Commission, the Secretary of State and Virgin as intervener. On Virgin's application Sky

switches sides and supports the Commission and the Secretary of State. Underlying all the applications is, of course, an issue as to the proper approach of this Tribunal in applications made under s.120 of the Act. I am going with all deliberate speed to address that threshold issue of the standard of review and connected matters. My learned friend Mr. Flynn will address the substantive issues arising from Sky's application on the relevant merger situation, the significant lessening of competition and the remedies, and then I shall return, as it were, to the front line to make Sky's issue on the third issue, the media plurality issue, after joining forces with, indeed sheltering, I suspect, gratefully behind those adversaries who are representing the Commission and the Secretary of State.

Members of the Tribunal, Lord Cooke of Thornden, once said in a lecture that the principles of judicial review could be summarised in three adverbs, that a public body had to act lawfully, reasonably and fairly, but the 6th edition of Professor de Smith's judicial review runs to 1,098 pages. There is no dispute between the parties as to the need for both the Commission and the Secretary of State correctly to direct themselves in law – that is to say as the ingredients of the relevant merger situation or significant lessening of competition or the need for media plurality. The last of those raises perhaps the main, if not the only, issue of pure, or almost pure, construction before you. There is no dispute between the parties as to the need for the Commission and the Secretary of State to act fairly, and my learned friend Mr. Flynn will develop submissions on the material issues that he will assert were not put to Sky unfairly in the provisional findings.

There are issues as to the degree to which this Tribunal can supervise factual findings, conclusions drawn from those findings and decisions as to what to do in the light of such findings.

The issue as to what is precisely meant by s.120(4) which provides, as you know, that the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review is in one sense well trodden ground. There is clearly room for debate about the correct approach, as is exemplified in the various written submissions that you have before you. It may not be a gulf, but it is a perceptible gap, and each party seeks to pull the Tribunal, as it were, in different directions. The Competition Commission, the Secretary of State and, for that matter, Virgin seek to limit the grounds for an intensity of review and Sky to, on the other hand, expand them.

Conscious as I am of the constraints of time, certainly not wishing to trespass on Mr. Flynn's time, I am going to address you, if I may, briefly under four headings. For ease of presentation we have prepared a mini-bundle that contains in sequence the only passages

in the case law and the commentary to which I wish make reference. We have also, for the Tribunal and my colleagues' ease, put in the right hand corner of each particular page where it occurs in the main authorities bundle so there will be no difficulty in tracing its source. The four short headings that I wish to address you on are these: firstly, to make some general observations based on the Act itself in the context of the development of judicial review; secondly, to identify the different issues to which principles of judicial review can fall to be applied and how they relate to the issues that do fall to be determined in the present application; thirdly, to deal briefly with jurisprudence on s.120 itself, both before and since the Court of Appeal's seminal judgment in the *IBA* matter; and fourthly and lastly, to identify where and why Sky quarrel with the submissions made in writing on behalf of the Commission and the Secretary of State.

The first document in the mini-bundle is s.120 of the Enterprise Act, but I do not need to recite that to the Tribunal. If one considers the matter wholly without the benefit of authority, we would make the following submissions: firstly, that the principles of judicial review are not static. Indeed, since the phrase "judicial review" migrated from the earlier editions of Professor de Smith's seminal work **Judicial Review Administrative Action**, migrated to the Rules of the Supreme Court and to the Supreme Court Act in 1981. On any view its content has been increasingly amplified and on any objective assessment, even in the confines of the Administrative Court, as it is now called, the degree of review has intensified.

Secondly, the principles of judicial review are notoriously acutely context and fact sensitive. At one end of the spectrum, for example, a policy decision relating to the allocation of scarce public funds; on the other, procedural issues where human rights of a fundamental kind are at stake.

Thirdly, what a court – and I emphasise that word – would or would not do by way of judicial review is informed by two important perceptions. They are, firstly, constitutional propriety, which is based on the need for the judicial arm of government not to intrude into spheres properly for the other arms; and secondly, of its own institutional competence or perceived lack of it, because the Administrative Court and indeed the appellate courts above it are generalist courts.

Fourthly, this Tribunal, by contrast, has been endowed with a power to review decisions not of the mainstream executive but of two bodies, the OFT and the Commission, which both operate in a statutory defined activity, an activity in relation to which this Tribunal is, of itself, a specialist body with, as you well know, a President and Chairman who must have,

by statute, specialised experience and knowledge, and members of course who are selected for the same qualities.

So the submission in short is that the legislature has, by design, chosen to allocate the power of review to a specialist not a generalist body and must be taken to have anticipated the particular consequences for the degree of review that would flow from that choice.

Fifthly, and lastly, in our submission, whereas under s.120(4) this Tribunal is obliged to apply the same principles as would be applied by a court on an application for judicial review, they are not obliged by statute or otherwise to apply them in the same way. In our submission, this appears, this analysis, to be conformable with the perception of the government in introducing this provision as an alternative to what was mooted in the course of the parliamentary process as a full merits appeal in this area. We have put at the second of our tabs the discussion that took place between Conservative spokesmen and Mr. Alexander who was then responsible in the lower House for the Bill. There are two passages that I draw to your attention. The first is the second paragraph of Mr. Alexander first observation where he says:

> "The CAT offers a faster and less expensive route to justice than would be possible through the courts via a body expert in competition law and practice. The current case law suggests that those grounds may include errors of law, or material or procedural error such as a failure of an inquiry panel to comply with the Chairman's procedural rules and material errors as to fact and other illegalities such as unreasonable or lack of proportionality".

He returns to the same theme on the penultimate paragraph of the page:

> "For the sake of clarity, I affirm the jurisdiction which will mirror judicial review in the courts and will allow scope in some circumstances for the Tribunal to consider whether a decision was based on a material error of fact. The distinction between a material error of fact and a general view of the merits of a decision per se is important".

That, of course, we accept. But, we emphasise, as it were, the reach as well as the limits of what was contemplated.

If I may just turn very briefly to general case law before coming to that which is particular to this Tribunal. If you go to the third of the tabs in the mini-bundle, there are two extracts from the famous *Tameside* case which I wish to draw to your attention, one of which is alluded to in summary, but not in its full amplitude in the *IBA* decision. This was a decision, as everyone will remember, in which the Secretary of State was challenged in his efforts to

prevent the perpetuation of selective grammar school education in the Tameside area. If you turn to what is p.23 (which is the second of the pages over the page in the bundle) you see the relevant statutory provision which has been construed in their Lordships' house. Summarising, what is said is that the Secretary of State has to be satisfied on complaint that managers or governors of voluntary school have acted, or are proposing to act, unreasonably with respect to the exercise of any power conferred on them. Then he is given a discretion: he may give such directions as the exercise of the power as appear to him to be expedient. So, one there has the triple function: first, the Secretary of State had to find certain facts; then he had to make a judgment on them - whether he was satisfied that they led to a particular conclusion, both as to what was happening and what might be happening; and then, thirdly, he had to consider whether to exercise his discretion.

Lord Wilberforce pointed out that whatever might be the limits of judicial review, even in that era and in that context, there was scope for considering whether or not the facts had been properly analysed and proper conclusions drawn.

If I can go to the penultimate paragraph on that page, three lines in, having said that judicial review is excluded on what is, or has, become a matter of pure judgment. He says,

> "If a judgment requires, before it can b e made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken in to account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge".

Lord Diplock, taking an extract of his speech on the opposite side of the page (p.35 in the extract), at the penultimate paragraph five lines from the foot of the page, says,

> "Or, put more compendiously [that is how the challenge is put] the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps [which is also important] to acquaint himself with the relevant information to enable him to answer it correctly?"

So, this was in the context of what one calls Administrative Court judicial review, but in our respectful submission it points the way to what might be called an intrusive, but, we would say, a proper inquisition as to whether appropriate standards have been met.

I next go, if I may, very briefly, to the *Interbrew* case, which is of course the competition case decided in the Administrative Court. Here there were some interesting submissions

about the extent to which the doctrine of proportionality should intrude into the court's powers. Mr. Justice Moses (as he then was) decided it was not necessary - although he was tempted to resolve that conflict -- What he did was to say at p.9 that the balancing test had no part to play in the instant case. (That is just before the rubric goes to his reasoning).

> "These arguments will not turn upon the approach I should adopt. In the instant case it does not seem to me that my ruling depends upon the extent to which I think those reasons lack cogency. If the reasons make no sense and are without foundation then I should so rule".

So, in other words, he decided he would put on one side proportionality and simply decide the case on the basis of orthodox principles of judicial review.

He then summarised the argument of Mr. Sumption, who was appearing for the complainant, who said of the reasoning,

> "The reasoning contains a series of contradictions and non-sequiturs combined with assumptions not based on the evidence and contrary to the probabilities".

All those are the vocabulary that he used without in any sense being contradicted by the judge. Indeed, the judge appears to have accepted that that was an appropriate way of approaching the matter because, on the other side of the page, you will see that his conclusion was that the reasons do stack up. "I do not think the reasoning lacks cogency." In other words, he was saying that the approach contended for by Mr. Sumption is correct. It is a synonym for perversity or irrationality, but it was not made out on the facts of that case.

The next page is p.14, and you should have, under the rubric 'Unfairness', a brief epitomy of what standard is meant to be met by the Commission. He says at para. 69,

> "There can be no doubt but that the Commission owed a duty of fairness in conducting its investigation as to the merger. The content of the duty will vary from case to case but generally it will require the decision-maker to identify in advance areas which are causing him concern in reaching the decision in question".

This is one of the issues, no doubt, which will be raised by my learned friend, Mr. Flynn as to whether or not that obligation was fulfilled universally.

Lastly, before I come to the particular case law, I would just like to remind you of what Professor Sir William Wade said about the so-called 'no evidence rule' in the ninth edition of his classic work. That is found at Tab 5. You will see, dealing with the facts, that findings

of fact in general are exempt from review by the court. This is under the rubric 'No Evidence Rule'. He says,

> "The limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which h might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make unsupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene".

Then he explains what he means by no evidence across the page.

> "'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence taken as a whole, is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence".

He then draws certain analogies with the perversity principle and the substantive evidence rule, or substantial evidence rule of American law.

So, all of those matters, I say, are in the context of general judicial review. I turn then to what issues can arise. As appears from, in particular, the *Tameside* case there are a variety of exercises for a decision-making body whose decisions are amenable to judicial review. These exercises are, I fear, not always aptly distinguished in either the case law or the commentary. Indeed, to be fair, they, on occasion, overlap. But, we would list four. There are, firstly, the findings of primary fact; secondly, the conclusions drawn from those findings of fact as to whether a statutory test has been satisfied, which is in itself an exercise of judgment as long as the statutory test is correctly analysed; thirdly, sometimes included within the second (as it was in *Tameside* and as is here) conclusions drawn from the findings of fact as to what might occur in the future. Fourthly, the conclusions drawn from the findings of fact or the findings as to what might happen in the future as to what to do about them, and that is properly called an exercise of discretion.

In the statutory framework with which you are concerned, there are cumulative obligations on the Competition Commission and the Secretary of State. If, for example, the Competition Commission erred in either the first, second or third of the exercises I have identified then any exercise of discretion by the Secretary of State based on those errors is necessarily flawed. Of course, the converse is not true. It might well be that findings of primary fact are properly made, conclusions are properly drawn indeed as to what may

happen in the future, but nonetheless, the exercise of discretion, since there was no duty could be reviewed.

In this particular instance we say at the various stages all these various matters fall to be considered. The relevant merger situation requires a proper self-direction in law, findings of primary fact and conclusions as to whether the statutory test has been satisfied, ditto with the acronym I will use the SLC, but they are including findings as to what might occur in the future.

Thirdly, whether the merger was not expected to operate against the public interest – the media plurality of public interest criterion was just the same as under the SLC – and then the remedy that is required on the base of the above is all to do with discretion.

Perhaps I should just add a footnote, that the Secretary of State in certain instances, as you well know, is compelled to adopt the conclusions of the Commission, in others he can choose to do so and is not so compelled. But to the extent, whether by choice or compulsion, he were to rely upon decisions or recommendations of the Commission which were flawed in any way, in our respectful submission his conclusion would inevitably be flawed; it would be a conclusion that as built, as it were, on sand and not on firm terrain.

Thirdly, if I may just deal very briefly with the case law now, pertinent to this Tribunal. The *locus classicus* is of course the decision of the Court of Appeal in the *IBA* case, and we have extracted Lord Justice Carnwath's analysis at tab 6. Lord Justice Mance (as he then was) agreed with him, and the Vice-Chancellor (now the Chancellor) did not, as I understand it, dissent.

After somewhat acerbic observations about the ability to locate the sources of judicial review in para.89, I will if I may just, as it were, since no doubt you will have read and no doubt have the opportunity to read again, just summaries the succeeding paragraphs as to what they say. Paragraph 90 says that it is a specialist Tribunal does not mean that they have to approach the concept of reasonableness in a different way because reasonableness demands a flexible approach.

At para.91 he deals with the spectrum of review that I have already alluded to. In para. 92 he says that a factor that is relevant he intends to review is whether the issue before the Tribunal is one properly within the province of the court, and he is therefore making the institutional competence point and contrasting the court with the specialist Tribunal. At para.93 he makes the pertinent distinction between factual judgment and police issues saying that the ability to review is m ore available in respect of the factual judgment issues than of pure policy issues.

He goes on again to exemplify 94 and 95, the considerable variation in the intensity of review, and he cites from a speech of Lord Radcliff in *Edwards v Bairstow* and I will just take the last three lines of the citation: "Their duty .." this is the Commissioner's duty of the Inland Revenue "… is no more than to examine those facts with a decent respect for the Tribunal appealed from, and if they think the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado." So that is, as it were, a call to arms of an appropriate sound.

At para.98 he refers to *Cellcom* which is always cited by persons who are seeking to defend decisions of Regulators. It is interesting that he says that it is closer to the present context, he does not say it is identical to the present context, and no doubt had well in mind that Mr. Justice Lightman was, as it were, a generalist institutional terms as distinct from the Tribunal.

Then at para.99 he deals with the fact that what is an issue of fact, and what is an issue of law, is sometimes somewhat hazy and the vocabulary itself somewhat blurred. Then at para.100 he reaches a conclusion. He says:

> "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 revaluation by a court. It involved no policy or political judgment, such as would be regarded as inappropriate for review by the Administrative Court."

And then he agrees with the Vice-Chancellor. Now, that of course was a decision that informed the subsequent practice of this Tribunal although it did not entirely eliminate debate. There are five cases, and again mercifully they can be referred to very briefly in which the Tribunal has had to consider the issues. *Unichem*, which was an unsuccessful challenge by competitors to an OFT decision not to refer a concentration involving two

pharmaceutical companies. *Somerfield*, which was an unsuccessful attempt by Somerfield to challenge the scope of a divestment order imposed by the Commission, *Celesio*, which was an unsuccessful challenge by the complainant to a decision of the OFT not to refer an acquisition by Boots of Alliance, and *Stericycle* was a challenge to interim directions imposed on parties to complete the merger, and the *Co-Operative* case was a challenge to the OFT's refusal in the context of certain undertakings given by the Co-Operative to approve particular purchases of businesses to be divested.

Now, in *Unichem* which we have at 7, at para. 173 (p.68) one sees that the Tribunal accept that there is at any rate a two stage process, the first is the evaluation of the primary facts and the second is whether on those facts the OFT was entitled to draw the conclusion there was insufficient likelihood of an SLC.

Then at 174 they say optimistically it appears to be common ground that the Tribunal has jurisdiction acting in a supervisory rather than appellant capacity, to determine whether the OFT's conclusions, and one might interpolate, as it were, mentally numbers here – (1) adequately supported by evidence, (2) the facts have been properly found, (3) all material factual considerations have been taken into account; and (4) material facts have not been omitted. Then they say that *IBA* appears to be confirmed in a case involving an asylum seeker *E v Secretary of State*.

Then at 175 they say of course there is a separate issue of procedural fairness.

In *Somerfield*, which is the next tab, tab 8, one sees that notwithstanding what had been said to be common ground between the disputed parties in *Unichem*, at 55 and 56 one sees the traditional contest between the challenger and the challenged. The challenger in 55 asking for a relatively intense standard of review, the Commission, on the other hand, saying, as it says again in this case with the support of the Secretary of State, and it should be accorded a wide margin of appreciation. The Tribunal itself said it did not find it necessary to embark on any elaborate examination of the standard of review and they simply adopted what was said in the *Unichem* case and the passages that I have cited.

It is quite interesting to note at the end of that determination at 183, which is at the bottom of p.59:

> "In the light of the foregoing …"

- and this is the way they put it –

> "… we can see no basis for suggesting either that the Commission should not have regard to the totality of the evidence referred to [in certain passages of the report] or that the weight given by the Commission to different items of evidence was

> perverse, or amounted to a manifest error of appreciation, or that the Commission's conclusion as regards the exclusion of the LADs from the competitor set during the initial phase of the divestment period was unreasonable on the evidence before it."

They, as it were, analysed the matter in a variety of ways. They come to the conclusion in that instance that the challenge was not made out.

The purpose of reminding you of the way in which it is approached is that we have moved on from what might have been thought was the position in what I will describe as the "immature days of judicial review" from equating perversity or irrationality to a situation which the decision maker is on the verge of, as it were, being sectioned for being mentally incapable, and has become a much more sophisticated and intrusive mode of challenge than that which might have been derived from some of the early case law.

Then coming to the penultimate decision, or pre-penultimate decision, one comes to *Celesio* (tab 9). In *Celesio* all that was said is that they were going to use the same approach as was adopted by CAT in *Somerfield* and in *UniChem*. That is at paras.75 and 76. They merely say the same.

The next tab, this is the *Stericycle* case, there again they said exactly the same.

Finally, in the *Co-Operative* case at the next tab, 91, once again they recite what one might call the general cannon of approach. There is an interesting phrase or clause at the end of para.91. One of the issues is:

> "whether the decision to which it has come is one which is reasonable in this sense: that it is, or can be, supported with good reasons and is a decision which a reasonable authority might reasonably reach."

Then they rely there upon *Somerfield* and the cases there cited.

The last point that I would make under this heading is this approach. It appears to reflect that of the court of first instance applying judicial review principles in the merger context under the Community regime. It is not, of course, a direct precedent, but it is analogically of some interest because, firstly – and we have set out for your recollection at tab 14 the relevant provisions of the Treaty – the grounds upon which the court acts are clearly equivalent to those of judicial review (lack of competence, infringement of an essential procedural requirement of the Treaty or of any relating to this application, or misuse of the powers), and the case itself at tab 15, one sees again that the passages will be familiar to you, I am not going to read them to you. It is quite interesting to see at 48 the way in which the Court of Justice endorse the conclusion of the CFI. It says:

> "It follows from these examples that the Court of First Instance carried out its review in the manner required of it … It explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence."

So that is another, as it were, formula of approach for a judicial review body of particular expertise.

I have got two more matters, if I may, to deal with. The last of course is where we take issue with the Commission and the Secretary of State. The first is the question of standard of proof. We can deal with this matter very shortly. In our submission, the presumptive position would be that any decision made has to be justified as being on the civil test or standard of a balance of probabilities. Two authorities are cited against us in that context. The first is the *Rehman* case, which is at tab 12. In *Rehman* what was in issue was the deportation of someone suspected of activities contrary to the public interest. There are two speeches from which I have taken extracts. One is that of Lord Slynn, who was in the chair on that occasion, tab 12, para.22 at the foot of the page. He says:

> "Here the liberty of the person and the opportunity of his family to remain in this country is at stake, and when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof."

There is no dispute there as to whether one is looking, as it were, at the primary evidence, the factual findings. Then he goes on to say that the Secretary of State is entitled to have regard to the precautionary principle, and he goes on to say in the last sentence of para.22:

> "Establishing a degree of probability does not seem to be relevant to the reaching of a conclusion on whether there should be a deportation for the public good."

To like effect was Lord Hoffmann at paras.55 and 56. Again, all this in the context of what he described as a case such as the present. As he said at the end of para.56:

> "The question of whether the risk to national security is justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."

He does not appear to be quarrelling with Lord Slynn as to what you need to find particular facts. What he is saying is that once you have found particular facts at the appropriate level

then you have got to exercise judgment. It is perhaps hardly surprising that what was in issue was an issue of national security that the threshold would be put low, one would not want them to say if there was any risk that was a real risk, as opposed to a trivial risk, but nonetheless, because it was not said to satisfy some theoretical standard of probability, the person should not remain in this country. It is very much context specific and not simply to do with the difficulty of equating or using standards of proof when one is concerned with issues of judgment.

The second of the two cases, the case of *Regina (N) v. Mental Health Review Tribunal*, which is at tab 13, there the Court of Appeal went into an elaborate analysis of the difference between making findings of fact on the basis of civil balance of probabilities and, on the other hand, exercising judgment as to whether to detain or free someone who was detained under the Mental Health Act. Interestingly, although they echoed what Lord Hoffmann said about the difficulty of using concepts of standard of proof in relation to evaluation as to what should happen in the future, at the foot of para.100, you will see the last line says:

> "Since the evidence cannot be divorced from the argument, and since there is also an argument on pure issues of fact, it is perfectly acceptable to refer to the whole process as one in which the court has to be satisfied on the balance of probabilities, in relation to the evaluative part of the process that may involve an element of shorthand, but it gives rise to no conceptual or practical difficulty."

So, in fact, in broad terms they appear to accept, even in that context specific issue, that standards of balance of probability were an appropriate guidance, if a cautious guidance, to the relevant body that had to take the decision.

I come, lastly, and briefly to where we then have a dispute with both the Competition Commission and with the Secretary of State. The Competition Commission's defence is the place where they set out most amply, and they cross-refer to it in their skeleton argument, their approach to the standard of review. Could I just ask you to go to para.48 … (Pause) One sees the first sentence of that,

> "Although the CAT has the advantage of being a specialist tribunal, it must approach a review under s.120 in the same way as a judge of the Administrative Court would".

We respectfully quarrel with that formulation. It is clear they must apply the same principles, but we would respectfully submit not necessarily in the same way - indeed, in a distinctive way reflecting the fact that they are a specialist and not a generist tribunal.

Equally, we respectfully demur from references made to decisions involving the Monopolies & Mergers Commission which were subject to review again in the ordinary course of law. They are now, with respect, in our submission, obsolete and they distract, rather than lead to the correct conclusion.

I have already made my submissions that *Cellcom* again is a decision as to what a court, as distinct from a specialist tribunal, should do.

Then they go on to deal with review of the factual matters. You have our submissions on that. They refer to the case of *E -v- Secretary of State*. This was the question of someone from Afghanistan and whether or not he should be deported back there. They say there in the penultimate sentence on p.18 of that defence,

> "Indeed, the circumstances in which such a challenge would be appropriate (or succeed) would be limited".

They then set out the requirements for such a challenge. But, in our respectful submission, although it is true that the Court of Appeal said that this was an issue of fairness, if in fact there is no evidence, or no evidence of sufficient probative value, to justify a conclusion, that is indeed unfair. Really it is the fourth of the propositions of the Court of Appeal which is significant. Over the page, "The mistake must have played a material, not necessarily decisive, part in the Tribunal's reasoning". So, if there is an error of fact which has played a material part in the Tribunal's reasoning, that, of itself, in our respectful submission, shows that a decision based upon it is fair.

Finally, as to standard of proof, what the Commission say here is this -- They deal with this at paras. 59 and following. What they do say, as we understand it, is that they did in fact apply the civil standard of proof. They say that at para. 59:

> "The Commission considers that, in applying each of the tests, the relevant standard of proof is the ordinary civil standard, i.e. the balance of probabilities".

They then cite from Lord Hoffmann in *Rehman* and Lord Justice Richards in *Mental Health Review Tribunal*, appearing, as it were, to retreat from the position which we say they properly took at the outset. I have already made my submissions on the fact that the *Mental Health Review Tribunal* case actually support a body such as this in using the balance of probabilities as a test both of fact and of judgment, and that *Rehman* can clearly be distinguished on the basis of the issues which were at stake.

Finally, if one goes back to para. 50, the phrase 'wide margin of appreciation'-- In our respectful submission, again, one has to be very careful to distinguish between those matters which are policy-laden and judgmental and those matters which are factual, and then, as it

were, inferences drawn from. In the first we accept the width of the margin of appreciation, but certainly not in the second, for reasons Mr Flynn will explain particular to this report. Finally one goes to the Secretary of State. Here, the Secretary of State, helpfully in his skeleton, sets out his approach to the proper standard of review. There are only two paragraphs which I need to make reference to. In para. 29, having cited from your predecessor, Sir Christopher Bellamy's determination with his colleagues in the *Unichem* matter, he said that,

> "To the extent the passages in *Unichem* cited by Sir Christopher Bellamy in *Somerfield* purports to extend the Tribunal's jurisdiction beyond this summary [the summary which had been set out earlier at para. 27] it should not be applied".

It goes on to say that the principle of judicial review is that it must be confined to the circumstances summarised by the Tribunal in the *Co-Operative Group* as above. The difficulty with that submission, which seeks, if I may put it this way, to play off Co-Operative, on the one hand, against *Unichem* and *Somerfield*, on the other, is that in the *Co-Operative* case, as I have already shown the Tribunal, they thought and considered that they were applying *Somerfield.* So, they were not in any sense seeking to confine *Somerfield*, but rather to confirm it in its amplitude.

> The only other observation I would make is (and this comes very much to the heart of the dispute between the parties as to approach) that the Commission say that,
>
> "To this extent Sky is wrong to assert at para. 10 of its skeleton that 'the Tribunal is entitled, under s.120 to consider the facts before the Commission to determine whether there was adequate material before the Commission to make the findings it did'. The Tribunal is entitled to undertake such an assessment only to the extent that it is alleged the decision to which the Commission, or equally the Secretary of State, is one which is unreasonable or one which no reasonable Secretary of State for the regulator might reasonably reach".

The difficulty with that is twofold: (1) that if the material to support a particular conclusion is inadequate, in our respectful submission the finding must be an unreasonable finding; but, (2) the language of adequacy is used in IBA and it is confirmed in the jurisprudence of this Tribunal. So, in other words, you are being tempted by the Secretary of State to beat a retreat rather than to proceed down the path which the Tribunal have, with the assistance of the Court of Appeal, and indeed jurisprudence prior to the establishment of this Tribunal, already properly plotted.

Sir, I fear I may, by a little, have over-run my time. I immediately yield to Mr. Flynn to deal with substantive issues arising.

THE PRESIDENT: Thank you very much, Mr. Beloff.

MR. FLYNN: Members of the Tribunal, obviously the case has been pleaded in great detail. You have extensive written submissions from all the parties. I am certainly not going to be repeating all of those from our side now. I will try to pick out some key points. I will be addressing the three principle topics on this side of the case where we submit that the finding of relevant merger situation is not one which was open to the Commission on the facts before it. Even if you were to find that there was material influence, no substantial lessening of competition is made out on the balance of probabilities. The finding is irrational and it is not one which the Commission was entitled to reach on the basis of the evidence before it. Even if you consider that Sky acquired material influenced through its stake in ITV and that the SLC finding can be supported, we submit as to the remedies that the non-divestiture remedies, which Sky was prepared to enter into, were both wholly adequate to address the concerns identified by the Commission and less intrusive, more proportionate than the divestiture remedy that was ordered.

The overall approach of the Commission in its skeleton we say is extremely telling. It boils the issues down to four propositions which are set out in para.2, and I will just run through those quickly.

The first of those propositions is that Sky and ITV are very significant competitors in the sense that ITV poses a significant constraint on SKY's behaviour. What is said in the skeleton about that is that the significance of the competition between two of the largest broadcasters means that links between ITV and Sky have serious potential repercussions for competition in the television market. This, we would suggest, indicates that the Commission assumes from the start that any links between Sky and ITV will be material and will have serious repercussions for competition.

It links to the second proposition (at para.5 of the skeleton), namely that the acquisition of the 17.9 per cent shareholding gives Sky a material influence. What the Commission says at para.5 of the skeleton is that this conclusion is entirely reasonable because there is an inherent implausibility to Sky's protestations that it bought such a substantial shareholding at the time it did, at the price it did, without obtaining any material influence.

Proposition three is that Sky has the incentive to minimise competitive constraints that ITV imposes, and given the opportunity may be expected to act on that.

Proposition four is that it is likely that Sky will have the opportunity to exercise its material influence over ITV and hence – and hence, as the formulation in the proposition – and hence substantially to lessen competition in the market.

Developing that at para.26 of the skeleton, again the Commission says that it is plain that any such influence could have a substantial effect. We say that taking those propositions together, or in the round, a the Commission would urge us to do, the overall attitude of the Commission to this transaction is that Sky must have acquired material influence through buying the stake because otherwise why would it have bought it, and that any exercise of that influence will lead to a substantial lessening in competition. We say – and we will obviously go into this in more detail – that this is a revealing summary of the way that the Commission wishes to put its case now. It explains some of the matters which we criticise in the detail of our application, the assumption of materiality of influence, the failure to consider the discretion as to whether or not any influence found should be treated as leading to control, the failure to consider whether the lessening of competition would be substantial, or rather the assumption that it would be substantial.

The Commission's general response to these criticisms, and again we will be going into them in detail, but the general response is that these are matters for the Commission. The Members of the Commission are experienced, experienced in business and that they are appointed to make this sort of judgment, and it has the complete freedom to assess the evidence before it and to attach what weight to it that it may choose. These formulations are plainly designed to eliminate, or minimise the extent to which this Tribunal may inquire into those, and I am not going to repeat matters that Mr. Beloff has gone into and to the standard of review.

The overall posture in this presentation of the law and the approach that the Commission is entitled to take is that matters are presumed in the absence of compelling evidence from Sky to the contrary rather than being established on the balance of probabilities. In other words, what is being operated, more or less subtly, is a reversal of the burden of proof – that is what you see in phrases such as "inherent implausibility" that is used in para.5, in para. 14, it comes up again in para.27 of the skeleton where they refer to a necessary counter argument, in other words, a counter argument that Sky would have to make if it wished to succeed, but it would have no opportunity to exercise the ability that it obtained through acquiring the stake, and that is again said to be "inherently implausible".

In one respect the emphasis in the Commission's skeleton is different, we would say, from the report – one amongst others, but a significant one – and that is the more or less direct

insinuations that are made about the rationale for the transaction. Now this is something that obviously I do not wish to go into in open session, and I may not need to, but if I just point you to the paragraphs in the skeleton where these points are made, they are 6, 12 and 13 for example. We may need to come back to that in reply possible. But for the moment I think I can say that these observations in the skeleton sound more like the case put forward by Virgin Media, which the Commission did not accept or follow, and I refer there to para.3.17(a) of the report, rather than the more balanced conclusion that the Commission itself came to which is set out in para.3.19 of the report, and reflected in para.9 of the summary at the front of the report.

The report, we say, attaches very little importance to the rationale for the acquisition but if it is now being suggested that the Commission all along harboured a suspicion that there is more to it than meets the eye, it is important to stress that no trace of that appears in the report, and may I just make one further reference again for the note, I think.

In its defence in the Virgin case at para.111, the Commission says very clearly that it did not find that the rationale for the transaction gave rise to an SLC.

Lastly, by way of these preliminary observations it is worth pointing out that of course the Commission rightly examined very closely all Sky's board papers and so forth leading up to the transaction in which it was discussed and decided, and it can confidently be said that nothing emerges from those papers to suggest that the rationale for the transaction was any of the famous examples that led to the Commission's SLC finding, so it was no part of the rationale of the transaction that Sky would wish to thwart ITV's investments in content or had anything to do with additional spectrum for hi-definition television or, indeed, the matters summarised at para.18(c) of the report affecting the course of future transactions concerning ITV to weaken the constraint that free-to-air services might otherwise provide. Those are not the basis on which Sky went into this transaction.

With those preliminary, overall observations can I move to the material influence part of the case? On this we start with two points on construction, as you will have seen, which can be taken together. The point going to the materiality of influence and the question of the Commission's discretion to consider whether any material influence found should, in the particular circumstances of the case, be treated as giving rise to control. We would say the Commission's approach in both these areas betrays a certain lack of caution, or a fixity of view, and given the size of the companies involved they seem to have assumed that it was bound to be material, and that it must be treated as giving rise to control. We say that when the statute talks about material influence there is a reason for that. For your note, the point

is made in para. 62 of our notice of application, and taken up again at para. 39 of our skeleton. In short, the point is that the degree of influence over policy - policy being what goes to the competitive or strategic conduct of the company - has to be sufficiently significant material to justify the application of the merger control provisions of the Enterprise Act. It is not any old influence. It has to be material influence. There is no suggestion in the report that the Commission addressed its mind to this aspect. The Commission, we say, has no answer to the point. It did not address it in the defence, and in the skeleton it refers - and I will take you to them - to paras. 3.31 and 3.67 of the report. Those are the paragraphs to which the Commission now, in its skeleton, refers the Tribunal to say, "Actually, the Commission did address its mind to this issue of materiality". That is para. 8 of the Commission's skeleton.

If we just have a quick look at those -- Paragraph 3.31 is on p.28 of the report. Paragraph 3.67 is three pages later at p.35. These are the paragraphs in which the Commission opens and closes the discussion. It sets out the question in para. 3.31. "We considered whether Sky has obtained the lowest level of control [that is, material influence]." They discuss the issue as to whether it has material influence, and they conclude at para. 3.67 that it has material influence. There is no suggestion of specifically addressing their mind in that discussion to the materiality influence.

THE PRESIDENT: Do we have to look at 3.66 to get the flavour of it?

MR. FLYNN: You read the whole of it, but nowhere does the Commission suggest that it has to look at the degree of influence that is being obtained to see whether it is influence or whether it is material influence. The Commission makes the same answer to this as it does to the next point - the discretion under 26(3) - the may be treated' point. In both cases what is said, effectively, is "This does not matter a row of beans because the Commission impliedly consider that it must have been material and that it should be treated as control. So, really, what are you on about?"

We say as to the 'may be treated' point that the Commission seems to have failed to appreciate that there is a discretion. It does have a discretion as to whether material influence should be treated as giving rise to control for the purposes of s.26(3), and certainly it has not expressly exercised or considered that discretion. We say that is a failure to address its mind to relevant considerations, and that it is a mis-direction in law. It is a particularly significant one in the circumstances of this case where the Commission rightly put aside from its mind any possibility of Sky obtaining a seat on the board, or of Sky increasing its shareholding from 17.9 percent to the statutory maximum. So, in

circumstances where there is to be no board representation and this is assumed to be the top level of shareholding, it is admitted -- it is of course said this is at the lower levels of shareholding where a material influence finding has been made. We say it is a particularly significant error, not to have considered whether, whatever degree of influence had been acquired - if one had been acquired - that it could be treated as leading to control. Again, the Commission's answer to this in the defence at paras. 105 to 109 says simply that the fact that they made a common control finding means that the Commission must have exercised its discretion. That is the point that is repeated at para. 9 of the skeleton, again referring to para. 3.67 of the report.

THE PRESIDENT: There is material influence and material influence. So, you can have material influence where you would still, by reference to some criteria or other ----

MR. FLYNN: There is influence and there is material influence and potentially there is material influence ----

THE PRESIDENT: -- and material influence.

MR. FLYNN: -- which does not lead to control, or does not have to be treated as control in the particular circumstances of the case. It may be treated as control. There is a history to this which is set out in the application. I do not need to trouble you now with that. But, Sky made the point in the administrative procedure that there was a discretion, and the Commission said there was not. Then it came back and the position in the defence is, "That is all water under the bridge. It has been cured". However, it has been cured, in our submission, by simply a leaping to conclusions. The conclusion is at 3.67. They conclude that Sky has acquired material influence. They say, "This ability gives rise to common control". In the Commission's executive summary at the front of the report - para. 12 is the one here:

> "We concluded that Sky had acquired the ability materially to influence the policy of ITV, which gives rise to common control for the purposes of s.26 of the Act".

I know this is a summary, but it is even clearer there than at para. 3.67 that the Commission seems to have considered that it is automatic: you get a material influence, and that gives rise to common control.

THE PRESIDENT: The criteria on which you would exercise the discretion that you argue for are simply open-ended.

MR. FLYNN: The Commission has not addressed its mind to them. We would say, following it through, that it is important to consider how any material influence would be exercised, and whether it is going to go, as I said, to the policy issues of the company -- whether it goes to

the strategy; whether the influence or whether the influence that the acquirer has obtained through the transaction can directly translate to affecting the company's policy. There may be a degree of influence and here we have a case where part of the influence is said to derive from industry stature and making informed comments. There has to be a connection between the influence obtained and the purposes of the Act.

THE PRESIDENT: Sorry to interrupt, but was that not encompassed in "direct or directly control all material to influence the policy"? So that is not the discretion part that you are arguing for, is it, because you do not get to the discretion.

MR. FLYNN: That is the degree of influence on policy.

THE PRESIDENT: So there has got to be material ----

MR. FLYNN: We say it has been assumed that it is material here, and it is assumed that the degree of influence obtained is to be treated as control for the purposes of the Act. So there is a step missing. Obviously we do not know how the Commission would have addressed its mind to that, what considerations it would have applied. Our submission, of course, is that we are effectively capped to that level, or the Commission itself has no expectation that Sky would seek to increase its shareholding, and no expectation that it would either seek, or be successful if it did seek, board representation. It is particularly important to consider whether such degree of influence as one might have by simply sitting there is material and whether it is, for the purposes of the Act, appropriate to treat it as a species of merger. Obviously the Commission did make a finding as to material influence, so we say it left out relevant considerations in reaching that finding. The basis of the finding, we say, on any fair reading of the report, the central finding on material influence was Sky's alleged ability to block a special resolution. That is the direct influence aspect of the Commission's finding. We say if you read the analysis sequentially the finding that Sky could block special resolutions is the key, is absolutely at the heart of the Commission's material influence finding.

In the report we are around 3.39 at this point. There is a heading above 3.39, "Factors which might give rise to material influence":

> "*Absolute and relative size of BSkyB shareholding and ability to block special resolutions"*

Then it essentially launches into a discussion of the importance of special resolutions.

It is true, and we will come back to it, that at 3.42 the Commission also considers schemes of arrangements. It goes straight over from scheme of arrangement in 3.43 and following to

a discussion of the relevance of special resolutions for funding raising for investment purposes.

Then it considers at 3.45 and following voting behaviour, the likelihood of Sky, with its 17.9 per cent actual shareholding, being able to muster a 25 per cent blocking vote on a special resolution.

In dealing with this aspect of the report, sir, I can deal with the voting issues, strength of vote, in open session, as it were, but for the funding matters, as I indicated, they come up again in the SLC section and I think we can usefully deal with them then. At the moment if I just deal with the voting patterns which we dealt with at paras.74 to 80 of the Application Notice, 72 to 75 of our skeleton. The point we are on is, can Sky muster a sufficient number of votes to block a resolution? You need 25 per cent, so you cannot with 17.9. We say you therefore need some particularly convincing evidence that Sky would be able to secure 25 per cent at meetings of the kind where resolutions going to policy or competitive conduct of the company would be put to the vote. We say of course that the unequivocal evidence of the only AGM that had taken place after Sky's investment and before the Commission reported was that Sky had below 25 per cent – admittedly just below 25 per cent, but it had below 25 per cent. Sky put in the evidence from experts in these matters, the Linstock Reports which you will have seen reference to saying, essentially, that the trends in institutional investing meant that there would be concentrations in ownership of institutional investors in companies of this kind, increasingly the votes would be exercised, so turn-out would be higher, more people would be expected to vote, and that contentious issues would tend to lead to higher voting levels anyway. We say that that last point is not particularly surprising.

We say it is perverse of the Commission to have given greater weight not to the actual evidence of what happened since the transaction and what is explained in the Linstock Report, but to what had happened in the past.

Incidentally, and I can only say it is incidentally, we wrote to the Tribunal on Friday with the results of the AGM of ITV that was held in May, which we say – "we would say that, wouldn't we", but it does – neatly confirms the Linstock theories. Sky's share of votes cast on any view, had Sky turned up and voted its shares, would have ranged between 22.4 and 23.2 per cent of the votes cast.

We say that those matters, I am not saying that of the 2008, I am saying that that confirms our theory that it was perverse to place weight on what had happened in the past and before

Sky, to place greater weight or the preponderant weight on what had happened beforehand rather than after.

Then in relation to schemes of arrangement, the other occasion which the Commission looks at, at which 25 per cent of the vote is sufficient to defeat the proposal, is a general meeting called to vote on a scheme of arrangement used in the Commission's hypothesis as a means of achieving a takeover or a merger with ITV. Again, this is an area where, in our submission, the skeleton of the Commission seeks to make much more of this than the report does. The report focuses very heavily on the special resolutions required for funding purposes and really the place of scheme of arrangement in paras 3.43 and when it comes back to it in the SLC section – I am going to stick my neck out - 4.117, it is just a paragraph in each case.

THE PRESIDENT: 3.43?

MR. FLYNN: It is 3.43 in the material influence section of the report, and 4.117 on p.56 of the report, when it comes back to it in the SLC section. You will immediately see, if you look at 4.117 that it has a lot of confidential material in it, so we will come back to that later if we may.

In relation to schemes of arrangement for the significance that they are given in the report we say that the Commission failed to consider whether voting patterns or voting behaviour of shareholders on a scheme of arrangement would be the same or different as voting patterns in relation to a special resolution. It might be reasonable to expect different voting patterns when the question is really for the shareholders: are they going to hold or sell their shares, than voting on the corporate arrangements of the company in which they are invested. The Commission did not assess that matter, did not investigate whether voting behaviour might be different, and it simply assumes that if Sky can block a simple resolution then it will also be able to block a scheme of arrangement. You see that from para.3.42 which you may have open in front of you.

> "A company able to block a special resolution will also be able to block a scheme of arrangement."

Now, that is true if you have 25 per cent or upwards of the shares because you can, but if you have not then you have to make some more assumptions about what is going to happen at a meeting called for a scheme of arrangement, or a meeting to vote on a special resolution, and they are not necessarily the same.

The Commission's response to this I think is to be found in footnote 9 of their skeleton, and I think this will be a moment, Sir, when I can point you to a page and just say "Have a look

at it", and I shall not read it out. What the Commission says in footnote 9 is that Sky's suggestion that the Commission had no evidence on which to find that Sky could block a scheme of arrangement and that this point was not put to Sky are both incorrect. There are two points that are said to be incorrect, first, that it had no evidence; and secondly, that the point was not put to Sky. It refers firstly to para.3.49 of the provisional findings and secondly to 3.53 of the report. The logical order would be to look at the provisional findings first, but you may have 3.53 open as it is on the next page from the one we were looking at.

THE PRESIDENT: So do you want us to look at the actual report then?

MR. FLYNN: I will take you to both, if I may, but I was just saying that you might already have the page open.

THE PRESIDENT: Yes, we will read that.

MR. FLYNN: If you read that. If you read those documents it is hardly unequivocal evidence that Sky thought it could block a scheme of arrangement.

THE PRESIDENT: (After a pause) Yes.

MR. FLYNN: If we then turn up 3.49 of the provisional findings, which are in tab 5A of the core bundle, I believe. If you have that document it is para.3.49, largely something I cannot read in open session, but there is one phrase which I think I can break the confidentiality to the extent to say it says "we noted", and the last sentence of the paragraph, "we noted".

THE PRESIDENT: Yes.

MR. FLYNN: Our submission on that is that simply noting something is hardly trailing or putting it fairly and squarely. This particular point is going to be an essential plank in the material influence finding which is the way that the Commission now presents it.

If one indulges in a bit of textual analysis there are other occasions on which the Commission notes something but does not place any weight or seek to rely on it as a nodal point of its analysis. If you look at the bottom of the page you may still be on in the report, footnote 68.

THE PRESIDENT: Is it 68 or 62.

MR. FLYNN: I am looking now at the report, and if you look at footnote 68, this is a different point but it is simply the "noting" point, "we note", again I will not read the rest of the sentence, but that is noted. But actually if you now turn on, just to see what happens with the point that is being noted, to para. 6.36, p.92 in the report, the last sentence, you see where the Commission came out on that: "We do not place weight on the argument". The same point features in relation to the same issue at footnote 220, which is at the bottom of

the next page. All that is simply to say that merely "noting" something is not really putting it to us, and in the context, we have seen the size of these documents, we cannot be expected to pick out from that that this is regarded as an essential plank of the analysis.

THE PRESIDENT: It might depend on what is being noted as to whether you would raise eyebrows and rush around, scurrying around and find you have to refute something. If one is noting something significant, I do not know – maybe you persuaded them in relation to 6.36 having seen what they had noted may be they were then persuaded by you that that no weight should be placed on it, I just do not know.

MR. FLYNN: We say if that is going to be an essential part of the analysis it can be made a lot clearer than noting it at the end of a sentence. The material which is relied on, which you have seen is, in any event, we would say hardly convincing evidence that that was Sky's opinion, but I had better not say more than that.

In any event, in relation to the scheme of arrangement point, we say that there are serious problems with this aspect of the decision. First, of course, it is directly contrary to the counterfactual of an independent ITV and that is an aspect of the case which I will come back to when we discuss the SLC aspects, and I can go into it in more detail then. The second point is that we contend, in the strongest possible terms, that the idea that board's recommendation in the event of a takeover is to be regarded as an aspect of the company's policy, as that is to be understood for s.26(3) purposes, is wrong. The hypothesis that we are in – what is the situation to which the Commission is considering here? First of all it is not a hostile takeover. If you look at para.3.56 that is what the Commission unequivocally says – a hostile takeover would not form part of ITV's strategy.

The Commission also recognises that an approach made by a potential bidder directly to the shareholders is not the hypothesis we are addressing now, and it says that expressly – perhaps we do not need to turn it up – in its skeleton in the Virgin Media case at para. 29(b). so we are not talking about a hostile takeover, and we are not talking about approaches which are made directly to shareholders. We are talking about approaches that are made to the board and on which the board has to express a view.

We also have to bear in mind that it is common ground that Sky cannot influence the ITV board, they are independent grown up people, led by Mr. Grade, and Sky cannot influence them – according to para.148 of the defence. Sky cannot hope to persuade the board of something that it does not itself believe in.

When a board is giving its views to the shareholders, making a recommendation in relation to a takeover its duty as a board is to state what is in the best interests of the shareholders,

that is its obligation under the takeover code. It has to obtain advice as to the takeover, and present what is in the best interests of the shareholders, not what it as a board might like to happen necessarily, not what might have been its previous policy. It has to consider what is in the best interests of the shareholders, because after all what is being considered here is an offer to shareholders, that is what it is making a recommendation on, and it is making a recommendation to the shareholders as to how they should exercise really their property rights, their decision as to whether to sell their shares or to hold on to them; that is the decision that they have to make, and it is not open to a board in the exercise of its fiduciary duties to temper its advice because of the view that a particular shareholder might take. The board has to give advice based on independent advice that it secures on what is in the best interest of the shareholders as a whole, that is its duty. We say that this is not a facet of company policy, this is a recommendation to shareholders as shareholders.

THE PRESIDENT: If the board thought that a particular shareholder might do something in certain circumstances, which would not be in the interests ----

MR. FLYNN: If a company has a substantial minority shareholding, it does not matter whether they have more or less than 25 per cent, but a member of the awkward squad, the board may well take the view this offer for the company, this merger, this joint venture proposal, whatever it may be is a good thing and shareholders will be well advised to vote for it. It may well know that this could be someone with 35 per cent, it may well know that really whatever it does it has an enemy in the camp, but it has to put that out of its mind if it considers that it is in the best interests of shareholders taken as a whole to accept or refuse this particular proposal. It cannot play fast and loose with the advice.

THE PRESIDENT: I suppose "what is in the best interest" – it might think that one of the factors it has to advise the shareholders generally on would take account of what it is expecting a particular shareholder to do. Could that not be one of the factors that it has got to consider in order to give the right advice to the shareholders?

MR. FLYNN: I think not, sir, as I understand it. Its duty is to say what is in your best interests as shareholders, what is the attraction of this offer? Do we think we should go with it, or not? What an individual shareholder may -- They then have to make up their own minds based on their own considerations, but it is not for the board to seek to second-guess those in my submission. It has a fiduciary duty to consider the interests of all shareholders. That is not a matter of company policy. That is, if you like, a matter of the duties of the directors of a public company. That is dealing with Sky's direct influence, as it were.

The other aspect of material influence is what has been called the indirect influence. There, we say ultimately that any influence Sky may have stems from its ability to vote. We say that the Commission recognises at para. 3.55 (we are probably still on that same page) of the report that it is Sky's shareholding -- It is the fact that it has shares and can vote them which puts it in a position to materially influence the board's policy. Likewise, at para. 19 of the Commission's skeleton there they say that our case seems, in essence, to be that influence is a kind of property right which only exists when you can specifically and certainly block a particular vote -- that that is unrealistic -- that influence may be brought to bear in a range of ways. They do not say what that range of ways may be. They say that blocking a special resolution is one specific method and that an articulate, well-informed, large, well-funded and powerful entity with detailed knowledge of the media world and forceful leadership - I assume that they are describing Sky there - is plainly able to exert influence in a company of which it is the largest shareholder in a range of ways.

Again, what are those ways? Well, the Commission found that Sky would have the ability to influence ITV earlier in the policy development process by being able to hold a Damoclean sword over strategic options where a special resolution is required, and that Sky is plainly able to materially influence the policy of ITV without blocking a resolution at the vote. In other words, it does all stem from the ability, should it come to it, to vote down a special resolution.

I think it is not contested that most policy, or strategy issues for a company going to its competitive conduct do not actually require a special resolution. The Commission records at 3.41 that it is not required for the appointment or removal of directors, many acquisitions and disposals, or for most forms of fundraising.

This is the point we make in para. 79 of the skeleton. We say that it was perverse of the Commission to assume that the substantial and well-resourced shareholders of ITV will be influenced by Sky in deciding what is in their best interests. This is what we have called the mesmerising point. We note in our application that the Commission studiously -- or in any event did not ask ITV shareholders what influence it expected Sky to have. That is a point we make at para. 86 of the notice of application which refers to the questionnaire that the Commission sent to ITV shareholders. There was no question about, "Do you think you will be swayed by Sky?"

We have put in evidence in response to the Virgin Media application - a further Linstock report which shows that most shareholders who have holdings both in ITV and in Sky are more invested in ITV. So, they have a greater interest in ITV doing well than in, as it were,

Sky doing better by making ITV do worse. They tend, of course, to have shares in the whole of the media sector. So, we submit that the idea that they can recoup something that is adverse to ITV by some upside in Sky's shares or in their other media shares is fanciful and it is not behaviour that rational and prudent shareholders with an eye to their own interests would engage in. As we have said, this is all in relation to those relatively few policy matters which require a special resolution.

PROFESSOR GRINYER: Might we pause a moment? You are dealing with this, in fact, on the assumption that the other shareholders will recognise that their interests are in fact with Sky. How about the idea of Sky being in a better position to influence these other shareholders by persuading them that the proposal of the board is not within their interests - i.e. not in ITV's interests? Could it be argued, in fact, that the perception of the ITV board, which is critical, could well be influenced by a recognition of the potential for Sky to use their specialist knowledge to influence others, indicating in fact that the board's proposal is not in the interests of ITV.

MR. FLYNN: Sir, I do not think we deny that that could happen. The point is, firstly, that shareholders will always wonder why it is that Sky is saying, "ITV should not be making this investment or taking this step that its board is recommending". They are going to ask themselves, "Where is Sky coming from on that?"

PROFESSOR GRINYER: Could we take an example there? Let us take the decision on going into HD. This is one which it could be argued was not in ITV's interests because of the capital involved, major capital expenditure, determination of return. A powerful and knowledgeable body like Sky might be in a better position to persuade the other shareholders to this effect than, for instance, a general investment fund would be.

MR. FLYNN: Sir, in relation to the detail of the HD example, that is obviously something I would wish to come back to in the SLC section and discuss in detail by reference to information that is confidential to ITV. However, I think what is being suggested is that Sky would in some way have some inside knowledge not available to other shareholders which might lead them to take a decision which is in fact not in ITV's best interests. If, in fact, Sky had the better of the arguments, that does not seem to us to meet that objection. In other words, this is why we have characterised it as 'mesmerising'. It is not that Sky will have some special ability to bamboozle them to cause them to act, or to vote down, some proposal of ITV's, which is in fact in ITV's best interests. They will make a judgment according to their own interests and their own understanding. If, in fact, Sky assists them to that, that is not in any way an objectionable use of Sky's industry knowledge. In relation to

the ability or the likelihood that shareholders would vote against their own interests or against ITV's interests on the basis of information put forward by Sky because Sky has some special stature, the Commission says in its defence that this is precisely the sort of judgment which the Commission is entitled to make because of the experience and knowledge of its members. We say, and Mr. Beloff has already touched on that, that is not so if the conclusion is actually irrational. This Tribunal is, of course, appointed on the same basis, to be able to consider such questions in detail.

Sky's motives in opposing something which the ITV board have wanted to do, should it do that, will always lead the shareholders to consider more closely what the actual position is and how they wish to vote. We say it is irrational to suggest that they would be in some way influenced by its mere standing as a successful player in the industry with a different business model.

Just briefly on the use of special resolutions for financing purposes – this is one of the fairness points, but I will come back to it in the SLC section anyway – at 3.41 the Commission says in relation to special resolutions that they go to various matters, including the waiver of pre-emption rights. The second sentence says:

> "The ability to block a waiver of pre-emption rights may be particularly important if the company is looking to raise funds quickly to finance a strategic acquisition, for example."

I say two things about that, and I will come back to that later. Firstly, I think this is one of several indications that what the Commission had in mind was an *ad hoc* resolution, an *ad hoc* special resolution, for the waiver of pre-emption rights in relation to a specific acquisition of investment opportunity that had come along. That is the hypothesis that they have in mind.

We also say that the idea that this would in some way be quick was not put to us. For reasons which I will develop, the Commission actually has no particular evidence that it would be quick.

Sir, I am conscious of timing. I would propose to move to the SLC section of what I wanted to say to you, the first part of which relates to the statutory tests and the approach which the Commission took and should be taken, but thereafter I think we will have to go into closed session. Whether that means that you would want to go straight into that or ----

THE PRESIDENT: Shall we see where we get to. You are not developing those two points for the moment on fairness, or have you basically made the point that the quickness was not put?

MR. FLYNN: That is that point, and the other point, as I say, which we will come back to is ----

THE PRESIDENT: You are going to wrap up.

MR. FLYNN: -- what sort of situation would this theoretical special resolution be ----

THE PRESIDENT: Called upon.

MR. FLYNN: Yes, precisely.

In relation then to the substantial lessening of competition, which is set out at para.103 and following of our notice of application, the test for the Commission under s.47(2)(a) is whether the creation of the merger situation has resulted, or may be expected to result, in a substantial lessening of competition. As you know, we say that that implies three steps to determine whether there is an SLC. The first is to decide whether some event or course of events has taken place or is likely to occur. The second is whether that will lead to any lessening of competition. The third is whether any such lessening of competition will be substantial. We say that each of those has to be established on the balance of probabilities. In a predictive assessment, which is what we have here, as Mr. Beloff has explained, in any event, each of these steps has to be given convincing reason. There has to be convincing evidence for each of these steps.

We say that the Commission has not followed that approach, rather what it has done – and this is consistent with the somewhat back to basics approach set out in the four propositions of the skeleton – is to assume that any exercise of influence by Sky is going to lead to a substantial adverse effect on competition. Therefore, it has taken the approach of confining itself to giving examples of the ways in which Sky may have opportunities to exercise its influence. It gives three examples. It says that they are only examples, but they are the only examples that are given. The Commission expressly says at 4.104:

> "We did not, however, consider it necessary to establish that an y particular example was more likely than not to arise in order to form an expectation that BSkyB would be likely to exercise its ability to influence ITV's strategy."

So in none of the examples, the only examples given, does the Commission consider it necessary to form an expectation that they may happen. The conclusion is that the Commission expects there to be a substantial lessening of competition and they say that that conclusion is sound because while these examples might not be more likely than not to occur, unspecified other opportunities for Sky to exercise its influence may well eventuate. So the Commission could be satisfied on the balance of probabilities that a substantial lessening of competition is likely. That is the approach also - if we turn to the

Commission's skeleton at para. 27 – this is under Proposition 4. Paragraph 26 puts it in context.

> "Sky's shareholding gives it material influence over ITV. It has an incentive to exercise that influence to minimise the competitive impact of ITV upon it. Given the closeness of the rivalry and the nature and the scale of the two businesses, it is plain that any such influence exercised to minimise the competitive constraint from a close broadcasting rival could have a substantial effect on competition in television broadcasting in the U.K. The only remaining question, therefore, is whether Sky would not, in fact, have the opportunity to act upon its incentive and to use the shareholding it had acquired for just under £1 billion [a slightly prejudicial way of putting it] so as to substantially lessen competition".

The Commission concluded that it probably would have such an opportunity:

> "-- i.e. on the balance of probabilities Sky would have the chance to use its acquired shareholding substantially to lessen competition in the television market. That conclusion is reasonable, and it has an evidential basis".

Then there is the point I have already made to you in opening this: this is where the idea of a necessary counter-argument that we would have no opportunity whatsoever is suggested. We say the reverse -- it is operating a reverse burden of proof. We would have to show we would have no opportunity whatsoever, and that it is inherently implausible that we could present such a case.

That is how the Commission puts its case. It goes on to say at para. 28,

> "The disclosure provided by the Commission to Sky in these proceedings very clearly confirms that there was an evidential basis".

They say we quote selectively from it; we do not represent its meaning, but that that is the evidence. So, it seems that the evidence is the evidence that leads the Commission to take those examples.

In the defence the Commission says that it used the examples to 'sense check' its conclusion. I believe this is para. 13 of the defence. It used the examples to sense check its conclusion. We say that this is not an appropriate or adequate means of proceeding. A finding of substantial lessening of competition must be based on a developed theory of harm and an abstract view that Sky will have some opportunity -- must be up to something and will take an unspecified chance when it presents itself to influence ITV's conduct is not adequate without a clear idea of what that chance might be in the circumstances in which it might present itself. We say the Commission is not in a position to conclude that it expects

competition to be lessened, and to be lessened in a substantial way. We say that by taking that approach the Commission has not met the statutory test, and that it is a mis-direction in law.

We also say that it has not followed its own guidance. We quote the guidance at para. 107 of our notice of application. It may be helpful to turn it up there. (Pause) Just to introduce that, the points that I have just been making are effectively summaries of what is said on the previous page as to what we say the meaning of an SLC finding is under s.47(2)(a). We say in para. 107 that this appears to be the Commission's own view in its guidance. When the Commission had decided that there is a relevant merger situation it must consider whether the merger results in, or may be expected to result in, an SLC. When doing so it will not be sufficient for the Commission to believe that an SLC is possible.

> "For the Commission to reach an adverse decision, either the merger must have resulted in an SLC or the Commission must expect a result, and the Commission will usually have such an expectation if it considers that it is more likely than not that the SLC will result".

Our submission is that by saying, as the Commission does here, "Well, we expect the result. We think it is more likely than not that there will be a substantial lessening of competition. We do not have to consider whether any route that we can identify for that SLC to eventuate is more likely than note" -- We say that that is insufficient in the terms of the statute for an SLC finding to be made. It really is a finding that it is possible that there will be an SLC without a demonstration of its likelihood. That is the basis on which we say that the statutory test has not been fulfilled. The approach of the Commission is the wrong one here.

THE PRESIDENT: So, you say they have to point to a particular route, or a particular opportunity, as more likely than not to occur.

MR. FLYNN: We do not say, for example, as we have said in our plea, that they have to say, "We expect X and Y transaction to happen". But, in the examples that they give, we have to track it through so that it is plausible and that it will be affected by the mechanism under which Sky's influence is said to be exercised. So, this is the kind of investment, the kind of transaction we have in mind: it is plausible, more likely than not that it would be financed in this particular way. So, Sky would have an opportunity, on our theory, to block it, and if they did there would be a lessening of competition, and it would be a substantial lessening of competition.

Those are the steps which we say would have to be followed in relation to these examples. Of course, the Commission is not Mystic Meg. The Commission is not saying, "We predict

that in two years and three months' time X bidder is going to come out of the woodwork, and after a hard fight it is going to secure ITV". It is not that. However, it has to be a developed theory of the way in which the possible routes to the exercise of influence that they see may occur, and would, on the balance of probabilities need to be addressed, shall we say, by a means over which Sky has influence, and that if Sky were to exercise that alleged influence and prevent this example from taking place, that it would have a substantial adverse effect on competition. We say they have not followed that analysis through to the end. They say, "We think, on the whole, Sky would have an incentive. We think opportunities may present themselves. We do not have to decide which are more likely than others. We do not have to decide that they would be funded in a particular way. We just have these various bits of the jigsaw and from that we are able to take a view that there will be a substantial lessening of competition".

MR CLAYTON: (No Microphone): At least on a business case. So, your point is that it would have to be a hypothetical business case, if you will, following through the various steps that would then be taken ....

MR FLYNN: Yes. Yes, it would. You would have to show the potential investment is going to be one which would be addressed by the company in a way which Sky could itself influence.

MR CLAYTON: It is quite hard to envisage that being done actually. You would have to take an example like the HD that your colleague has mentioned.

MR. FLYNN: Those are the examples. But, where we make a case - as I will be trying to do shortly - that that example is not realistic or not going to happen, even if it happens, in a way which Sky is likely to influence. Then we are told it is only an example, there will be other opportunities.

Without a fairly developed theory of what is likely to happen, how can it be open to the Commission to conclude that there is going to be a lessening of competition which will be substantial.

THE PRESIDENT: Where I am being a bit slow here is where, as it were, the likelihood of probabilities on your argument should be. It seemed at one point as though you were saying that you are allowed to look at a range of possibilities, they do not have to be more likely than not to come about. Any individual one does not have to be more likely than not to come about, but you do have to be satisfied then down the road in relation to them, or at least one of them perhaps, that they would be able to block it, or more likely than not to be able to block it. Is that right, or are you saying there has to be a situation, a transaction, of

the opportunity, the route, whichever way one puts it, that is more likely than not that is identical, not the specific one, but a type has to be established to be more likely than not? It is not quite clear where, as it were, the probability arises that is required.

MR. FLYNN: We say that the probability in terms of the statutory test arises at each of the three stages.

THE PRESIDENT: Each of them separately?

PROFESSOR GRINYER: There is a difference in the way the balance of probability in favour of an option in a course of action case and the probability of at least one of a number N, which in this case of examples is three occurring, and the probabilities are clearly greater that at least one will occur than any individual one will occur.

MR. FLYNN: I think as a matter of probability theory that must be right.

PROFESSOR GRINYER: You are talking about here the probability of at least one of them occurring, are you, or are you looking at the balance of probabilities on the basis of ----

MR. FLYNN: I think one also has to remember that the category of examples, the first category of examples, investment in content, is itself quite broad, and we have detailed arguments about that as to why the probability test will not be satisfied in respect of a broad category. So we are not saying, "The Commission has to establish that ITV will wish to invest in a particular company, we identify that company as so and so", but there has to be a plausible theory from ITV may wish to invest to what nature of transaction would that be and how could Sky influence it.

PROFESSOR GRINYER: Do you mean when you say a plausible theory, do you mean one that is established on the balance of probabilities?

MR. FLYNN: Yes, I do. When I say "plausible" I mean more likely than not, because that is what the statutory test is.

Sir, I think that is about as far as I can take it without going into a closed session.

THE PRESIDENT: That is probably a convenient moment. We will rise then and start again at about five to two to try and keep ourselves up to time.

MR. FLYNN: Five to two, thank you.

(Adjourned for a short time)

(For In Camera hearing see separate transcript)

MR. FLYNN: I shall not take it personally that fewer people came back in than were here this morning!

THE PRESIDENT: I am sure it is not just down to you!

MR. FLYNN: Coming on to remedies, and this bit will certainly be a lot shorter than the previous sections, as I said in opening this, our case is that even if you do not accept our submissions on the relevant merger situation and significant lessening of competition, the remedial action that has been ordered in this case is liable to be quashed for the reasons that I will explain. Essentially, the Commission was wrong to reject the remedies that Sky was prepared to put forward. The Secretary of State has followed that recommendation and therefore his decision should be set aside.

In relation to what Virgin Media have to say about remedies, we do not think – we may be doing them an injustice, but we had not noticed that their case in intervention in our proceedings adds anything to what has been said by the respondents. Obviously their own case on remedies will be, I understand, opened when I have finished. That we will address at a later stage in the hearing.

The statutory provisions I probably do not need to read out, but it is the Commission's job to decide or take a view on whether action should be ordered by the Secretary of State under s.55 to remedy, if we can use that shorthand, the effects to the public interest which may have resulted from the merger situation. In deciding that question (this is s.47(9)) the Commission has to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and adverse effects resulting from it. We say that means that what is required is a remedy to the SLC and its effects. The task for the Commission was to examine each of the possible remedies on its own merits and ask itself whether that remedy would be an effective and proportionate means to remedy the SLC. I think that is accepted.

What we are in dispute about is the way in which that task was carried out in relation to the non-divestiture remedies that Sky offered, which are ceding either a voting trustee arrangement for all or some of the votes or giving an undertaking not to invoke a non-voting undertaking. We are also in dispute about the actual remedy ordered which, as you know, is to sell down to below 7.5 per cent.

In relation to the non-divestiture remedies we say that the Commission misdirected itself when considering those remedies by comparing them in each case with full or partial divestiture rather than examining their effectiveness on the merits. That led it to a conclusion which we say is both perverse and disproportionate.

Our alternative case is that if it were open to the Commission to require a partial divestiture remedy it set it too low, 7.5 per cent is lower than is proportionate, fair or indeed rational.

Could I start with the non-divestiture remedies, this is a misdirection because we say that the Commission took as its starting point for the comparison that it made, its yardstick, if you like, for effectiveness was, is this going to be as effective as the most extreme remedy you can imagine which is complete divestiture? We say that the Commission rejected the remedies that Sky was prepared to offer on the basis that they were not effective as complete divestiture.

The Commission says – this is its skeleton, para.57 – "Well, no, we started with full divestiture because that was simply the first remedy that we considered, and that is what it will normally do because in any conceivable case full divestiture will effectively remedy the SLC".

They say in para.59 of their skeleton that that does not amount to a presumption that remedying the merger situation will remedy the SLC. We say that it is that presumption. The presumption is that if you reverse the merger then you will have cured the SLC, and the Commission's starting point is the presumption against the other possible remedy.

We say that the Commission did not evaluate the alternative, the non-divestment remedies that Sky offered on their own merits. The reason for rejecting them, and I think here we need to come to the report and we are in section 6, is because they are not as effective as divestiture rather than because of any consideration of their own effectiveness. We can see that in 6.42 in relation to the voting trust arrangement:

> "We recognised that, in principle, such an arrangement could limit BskyB's voting power, thereby reducing its ability to influence ITV's strategy. We considered whether (a) monitoring and enforcement risks and (b) the retention of Sky's economic interest in its shareholding might reduce its effectiveness as a remedy compared with a straightforward full or partial divestiture of shares."

There is a similar conclusion in 6.52 in relation to the voting trust:

> "In summary, we have significant concerns regarding the likely effectiveness of the voting trust mechanism … when compared with a divestiture remedy."

Similarly, in relation to the non-voting undertaking in para.6.56 Sky said this proposal provided a clean cut structural solution. However, as the voting trust proposal we were concerned, the proposal would create the need for ongoing monitoring enforcement in contrast to full or partial divestiture. We say throughout the consideration of the non-divestiture remedies comparison was made with divestiture. The comparison should have been made with the factors which, on the Commission's analysis, had given rise to an SLC.

What we effectively had was a presumption against non-divestiture remedies because they are not as effective as a divestiture remedy.

THE PRESIDENT: Well, when they say "effective" do they not mean effective in relation to dealing with the identified SLC? They do not mean just effective in a vacuum, do they? That is what they said in 6.53 by way of their conclusion: "We therefore come to the view that BSkyB's proposal to cede all its voting rights to a voting trust would not address effectively the SLC and the consequent adverse effects. I have to say that reading this I rather assumed that by "effective" they meant effective to deal with the SLC ----

MR. FLYNN: Of course, I accept that that is what it says, but what I have sought to explain is that because the Commission starts from the position as it explains in its skeleton that full divestiture is where you start because in every conceivable case that will remedy the SLC, what the Commission is actually doing is starting from a remedy that will remedy the merger situation. It will unwind the merger and that, in a case of a full merger is one thing, in the case of a material influence analysis it is another. The SLC arises from the limited opportunities that Sky has to exercise the influence that it has putatively acquired. I accept, of course, they say what they are considering is the effectiveness of a remedy in the SLC, but our submission is that underlying that is actually a different analysis and it is a comparison between these potential remedies and divestiture, which is actually based on a theory of remedying a merger situation and not the SLC, the SLC found in this particular material influence case.

THE PRESIDENT: They could not impose any remedy unless it was effective, could they, that would be wrong, a breach of proportionality, so whatever they are contemplating doing they have to test its effectiveness.

MR. FLYNN: They have, of course, to have tested its effectiveness, but its effectiveness to remedy the SLC, yes.

THE PRESIDENT: Yes.

MR. FLYNN: I am sure we are not in disagreement ----

THE PRESIDENT: No, I do not think we are. I think what you are saying is by starting where they started, they misled themselves into raising a presumption – I am just wondering if that was a wrong starting point, as long as they looked at the right things in due course, does it matter?

MR. FLYNN: Well obviously I have some things to say about effectiveness, which is what I will come to, but in our submission it is the wrong comparison that is being made for the wrong

purpose, because there is no reason to presume in a material influence context, that your starting point will be – in a full merger it is quite different.

THE PRESIDENT: Sorry, anyway you carry on.

MR. FLYNN: So the reasons that were given for rejecting the non-divestiture remedies then were in relation to monitoring or enforcement risks and the possibility that even without being able to vote at all Sky would still have some influence over future transactions. Some of these themes come around and around.

In relation to the voting trust, the reasons that the Commission gives for suggesting that these are not effective are I think lacking. The Commission says that the structural remedies are likely to be considered preferable to behavioural remedies – I am quoting from the Commission's defence, 246 to 249 which is where I have discussed these things. It refers to the guidelines on merger references to say that structural remedies are likely to be considered preferable to behavioural remedies on the grounds of monitoring and enforcement of compliance, but it is not explained why the Sky proposals could not be accepted. We say particularly in relation to the voting trust there is no evidential basis, there is no rational basis for the Commission's refusal to accept the proposal that the shares should be entrusted to the Law Debenture Corporation who exist, their *raison d'être* is to be holding securities of all kinds in trust and for particular purposes, and with utmost probity ----

THE PRESIDENT: I am not quite sure why but the name is "yellowed".

MR. FLYNN: I can explain that, it was at one stage regarded as a confidential matter. We did not treat it as a confidential matter in the application.

THE PRESIDENT: We do not have to worry about that.

MR. FLYNN: I do not think we need to worry about it. It was treated as a confidential matter in the report. So we say that the Commission has simply failed to explain what it is about entrusting the shares to such a body that could possibly provide monitoring or enforcement risks when, as I say, it is the *raison d'être*, it is really what that company does and it is a completely irrational or perverse refusal to accept that remedy. We compare it with other very detailed behavioural remedies that the Commission has been prepared to accept, not least in relation to the merger which led to the creation of ITV, to which we are met with the answer "Well, all cases are different". Well, perhaps all cases are different but it would be good to know what the reasons are for not being able to trust Law Deb.

In relation to Sky's own undertaking not to vote the shares, again the Commission simply says it is entitled to form the view that this is not an effective remedy without giving any

evidence or reasons of the risks which it thought might occur. We say it is simply implausible that Sky could give such an undertaking and then vote the shares at a general meeting, any more than it could give an undertaking not to appoint a director and then seek the appointment of a director. These things do not require policing, it is an undertaking which, if breached would be immediately detected. We say it is complete perverse of the Commission not to have accepted a remedy in relation to voting when the whole theory of SLC in this case is based on Sky's ability to vote in the case of special resolutions and possibly schemes of arrangement.

THE PRESIDENT: I think the initial point was that it would be a distortion because you would have one large chunk of shares that was not voted, and that would give greater weight to the votes of the other shareholders. That seems to be the point made in the report anyway.

MR. FLYNN: That is a point and we have replied to that. In terms of distortion, first, the relative weights of the shares held by the other shareholders they remain in proportion to each other, that is just arithmetically inevitable and, as we say in our notice of application, there is no shareholder of a sufficient size – Sky absent – has any particular degree of influence over ITV. In any event, this is not a concern which goes to competition law - an adverse effect flowing from an SLC. If one or other shareholder of ITV now has a slightly enhanced proportion of votes because it can count on Sky not voting, what impact on competition -- What is it that the Commission is reasonably concerned about there?

We say that the refusal to accept the voting remedies, as such, is perverse and it is not a rational conclusion.

In relation to Sky's potential influence over future transactions, whether the shares are entrusted to the trustee or simply the subject of a non-voting undertaking, Sky's retained economic interest in the shares could in some way preserve its ability -- or an ability of it to influence the shareholders and therefore influence on policy.

The Commission accepts that this concern is not to do with the SLC consideration. This, I think, is the distortion of business point in their skeleton. We have noted already the shareholders' incentives to vote in accordance with their own interests rather than Sky's.

We have noted that the Commission did not ask ITV shareholders whether they would be at all influenced by Sky. So, I think one is left on this theory with a view that Sky's decision whether or not to sell shares in the event of a future transaction could itself confer some form of material influence. As we have already said, that is, in any event, inconsistent with the counter-factual of the independent ITV. We have already said that hostile takeovers or approaches direct to shareholders are accepted by the Commission as not being part of the

material influence analysis. So, one is left simply with a decision by Sky as to whether or not to sell in the event of an approach that the board wishes to recommend and that that is an extremely limited and remote situation. I think you have my submissions on that.

In relation to the proportionality point, we would stress the very significant disparity in effect on Sky as between the voting remedies that Sky has proposed as opposed to divestiture remedies. The Commission says that this is never a consideration (skeleton, para. 71). We do not take the financial impact on the bidder into account in addressing the proportionality or effectiveness of the remedy. We do point out a statement of Mr. Justice Moses in the Interbrew case (p.971G) where he said,

> "There will be cases where it is necessary to consider whether a remedy is disproportionate in the sense that the advantages to be gained are outweighed by the detriment to the one against whom the measure is directed".

I do not think you can simply have a policy that the financial considerations on the acquirer are to be disregarded. We submit that the Tribunal should take proportionality into account in this respect.

Lastly then, the partial divestiture remedy that the Commission recommended that the Secretary of State ordered -- The Commission, I think, accepts that the target level of reduction, if you like, is one just below the level at which Sky would have material influence, and that you cannot justify a lower level. That is what one is trying to achieve through the partial divestiture remedy, as we understand paras. 225 and 226 of the Commission's defence.

The issues, shortly, on that are again the direct influence on voting, indirect influence on voting, and the level therefore that you take in order to remove that SLC, and the margin - if you like, the sort of safety buffer that the Commission might have in making a judgment as to that level. We say in this context in respect of the direct influence that this is not somewhere where you would have to give the Commission a very wide margin of discretion. What it depends on is analysis of voting in general meetings. The Commission has taken a 60 percent shareholder turn-out when the evidence before it was that there was nothing, I think, lower than 70 percent. We have given you the 2008 figures for what those are worth. However, we submit, as we have done in the notice, that this over-states the actual buying power, if you like, of Sky's stake by a material degree.

What the Commission then did was to attribute a further 7.5 percent of the shares to Sky's indirect influence. It assumed that it would be prudent to attribute about 7.5 percent additional. So, you have what Sky can command and then another 7.5 percent to bring it

down. We have gone into this in some detail. I will not bore you with it now, but this depends on what we have called the mesmerising factor - that Sky would be able to bring along with it such a significant number of the well-resourced and informed investors of ITV than doing something where Sky is trying to persuade it into a course of action when Sky's own motives are concealed. This is really a completely unwarranted assumption. We point to an example where the Commission, in the report, regards a company as independent with a lower level of shareholding than ITV has here.

We hear consistently on this that this is all a matter of judgment for the Commission. We do not say - as the Commission says we do - that there is one right answer. We say that the margins that have been taken are extreme and cannot be justified. The 7.5 percent additional safety is really completely over-the-top, if I may say so.

I think that is probably all that I need to say about it. There is one possible additional point which is that the Secretary of State followed the Commission's decision, and he says that these are legitimate conclusions and he was entitled to accept them. He may be saying that there is a double-barrier theory, is it rational for him to accept those conclusions – in other words, do we actually have to prove that not only was there something wrong with the Commission's conclusions but he in some way made a separate error of assessment in accepting them? We say that theory is not supported by the case law. It is certainly not what happened in *Interbrew* where the Secretary of State's decision was set aside because the Commission's report was set aside. We say the Secretary of State's decision follows the fate of the Commission's report.

Unless anyone tells me that there is anything else I should be saying, I think I can spare you any further submissions from me at this point.

THE PRESIDENT: Thank you very much, Mr. Flynn. We will take our ten minute break and then it is going to be you, Mr. Gordon.

(Short break)

THE PRESIDENT: Mr. Gordon?

MR. GORDON: Sir, the first part of Virgin Media's appeal is the issue of appropriate remedies, so it is slightly out of sync in a way. The first point I should make is that there is a direct connection between the two parts of our appeal, and I should indicate what it is. If, as contended on the second part of Virgin Media's appeal relating to plurality, the Commission erred in law in its approach to the media public interest consideration, it follows that its conclusions on appropriate remedies are also unlawful, so I signal that now, but it will

depend obviously how we fare on the plurality part of the appeal as to how that impacts on the remedies' submissions.

Sir, in his elegant exposition of what lay in store for us. Mr. Beloff characterised only one issue as raising an issue of what he called "pure law". It is my respectful submission that although he is correct to identify plurality as raising a pure issue of law, there are submissions which I now come to on remedies which also raise a discrete issue of law.

We accept, indeed we contend, that the Tribunal's jurisdiction in all of these appeals is one of judicial review on normal principles, and the specific issue of law that arises in relation to this part of the remedies appeal is whether, in ordering only partial divestment as opposed to total divestment, or at least divestment to a *de minimis* level, the Commission acted either irrationally or in breach of the relevancy principle in judicial review, which is to say taking material considerations into account, or failing to take material considerations into account. We make five central points, four of which I will develop together and the last one I will deal with separately.

Our five main submissions are these: first, we say public interest considerations aside, when addressing remedies the task of the Commission in law is (and was) to address the logic of its earlier lawful reasoning by reference to its duties arising under two heads. First of all, the relevant legislative regime and, secondly, for reasons to which I will come, any relevant guidance that it (the Commission) has issued.

Our second main point is that as to legislative prescription the Commission was required to have regard to the need to achieve as comprehensive a solution as was reasonable and practicable, and my learned friend, Mr. Flynn, has taken the Tribunal by reference to the Act, s.47(9).

Our third point, and this seems to be more or less in accordance with what the Commission says in its skeleton argument in para.62, is that that provision, i.e. s.47(9) has the legal consequence of requiring the Commission to achieve total divestment, unless less than total divestment provides either (i) an equally comprehensive solution; or (ii) less than total divestment is the closest reasonable and practicable comprehensive solution that can be achieved. That, we say, is the effect of the legislation.

Our final point on duties is that to similar effect, Commission guidance, which the Commission purported to take into account required the Commission to impose a remedy leading to the outcome, that there could be no possibility – and I emphasise those words "no possibility" of Sky exercising material influence over ITV. The Commission, we say, was under a separate duty to apply correctly the guidance that it purported to take into account.

Any failure to apply the logic of such guidance correctly constituted an error of law by reason of irrationality, misunderstanding its own Guidance, and/or taking immaterial considerations into account or failing to take relevant considerations into account.

So that is how we lead up to what were the duties on the Commission, and I will develop those points together.

Our fifth point is that in determining that divestment below 7.5 per cent would effectively address the relevant adverse effects, the Commission acted contrary to its duties under s.47(9) and/or irrationally or in breach of the relevancy principle by failing to implement the Guidance that it had purported to take into account.

Can I turn then briefly to our first four points and take them together? I have already indicated that as far as remedy is concerned, the Commission has got to address and apply the logic of its earlier reasoning. Secondly, of course, the Commission must correctly understand and apply the relevant statutory regime, and in the present case Mr. Flynn has correctly identified the material section, and it is s.47(9). I wonder if the Tribunal has that? It is at p.174 of the handbook. The key words in our submission in that sub-section are the words 'have regard to the need to achieve as comprehensive a solution as is reasonable and practicable'. It is interesting to note that in its skeleton argument the Competition Commission picks up those words. I repeat the reference for the Tribunal's notebook - para. 62 in their skeleton. The point is that s.47(9) does not have the effect that the Commission has a discretion to reach a solution or a remedy that is less than comprehensive in the sense envisaged in that provision. One should not, to use Mr. Flynn's word, be mesmerised by the words 'have regard to' because those words direct the decision-maker to take all relevant considerations into account in reaching the required comprehensive solution. They have got to have regard, when imposing remedy, to an overall imperative - the need to achieve as comprehensive a solution as is reasonable and practicable.

So, what follows from those words and from that analysis so far is that we accept that if two solutions are equally comprehensive, then proportionality compels the conclusion that the less draconian of the two remedies should be imposed. We fully accept that. We also accept that in terms of the statute if the only reasonable and practicable solution is the lesser of two remedies, or two solutions, then the lesser solution may be imposed rather than the greater, even if the greater remedy is more comprehensive in its scope. I put it that way because we accept that s.47(9) - and those key words that I have indicated - reflect considerations of proportionality. But, we do emphasise that the considerations of proportionality that they import are very specific and have to be applied to the correct question.

Now, what I have just said should not be confused with the quite different and separate proposition that a lesser remedy that is not comprehensive may lawfully be imposed merely because it is less intrusive.

Whatever remedy that is imposed must, to say the least, be comprehensive. That is the word the section uses. The statutory test is directed towards the means of achieving the most comprehensive solution to the adverse effects identified by the Commission.

Now, as far as total divestment is concerned the question in proportionality terms we have modified from a case called *De Freitas*. I am sure that some of the Tribunal will be familiar with the threefold proportionality test laid down in *De Freitas*. The case is *De Freitas -v- Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] AC, 69 at 80. The words of Lord Clyde, in that particular formulation, can be picked up helpfully in shorthand in Mr. Beloff's mini-bundle at Tab 4. If the members of the Tribunal go to the mini-bundle and look at Tab 4, at para. 25,

> "In De Freitas, in giving the opinion of the Board, Lord Clyde adopted a threefold analysis from Zimbabwe: Whether:
>
> a legislative objective is sufficiently important to justify limiting the fundamental right; the measures designed to meet the legislative objective are rationally connected to it; and the means used to impair the right or freedom is no more than is necessary to accomplish the objective".

So, that is the threefold test. Of course, that was a fundamental rights case.

So, applying that threefold test, but in a modified CAT context, may I suggest that the relevant proportionality questions which are relevant to s.47(9) are these: (1) does total divestment have a legitimate legislative objective? To that, we say the answer is plainly, 'Yes' because total divestment is the most comprehensive solution to address the adverse effects identified by the Commission. I will come to why we say that is so. We say that the Commission has expressly found that that is so. (2) Is total divestment rationally connected to the legitimate legislative objective? Answer: Yes - because the rational connection consists precisely in the fact that total divestment is the most comprehensive solution. (3) Does total divestment go beyond what is reasonably required to achieve the most comprehensive solution? Answer: No - because there is nothing unreasonable or impracticable about total divestment, given the very fact that total divestment is the only comprehensive solution.

Now, whether or not - and I will come to this with a few more sentences in a moment - it is more intrusive than partial divestment is neither here, nor there. The proportionality

question is a statutory reflection of proportionality and goes to the comprehensive remedy, or remedies, which the Commission has identified - not remedies which are less than comprehensive.

That is the statute. I will come back to why we say that the Commission has breached the statute in its analysis.

May I now turn to the Guidance? The first thing to say about guidance is that except in certain remote areas - and there are few - it is not binding because it is guidance. But, it must be taken into account. If a public body, such as the Commission, proposes to depart from its own Guidance, or the logic of its own guidance, it would have to articulate in its reasoning reasons for doing so. Of course, we say the Commission must correctly interpret its own Guidance. The reason why that is so is that if it mis-interprets its Guidance it has plainly taken an irrelevant consideration into account - namely, its own defective understanding of its Guidance.

Importantly, in a case such as the present, if the Commission specifically purports to apply guidance, then whether that guidance is directly applicable or not, the Commission acts unlawfully if it fails to apply the logic of guidance which it has indeed itself purported to apply. Sir, in the present case statutory guidance was published by the Commission under s.106(3) of the Enterprise Act. The first point I should make - and it may be you would like to look at that briefly, but I can tell the Tribunal that the first point to note about the guidance that was issued is that it was issued under s.106(3). That sub-section relates to a duty on the Commission to prepare and publish general guidance and information about the consideration by it of references under s.22 or s.33. Here, of course, we are not dealing with a reference under s.22 or s.33.

However, the advice and information given in terms of underlying logic in that guidance was identical to the issues that give rise to remedy in respect of a reference arising under s.45. If the Tribunal has the report of the Commission easily to hand, may I simply cite part of para.6.4 of the Commission report, in which the Commission expressly stated relevantly as follows:

> "… we will approach the remedies phase of a reference under section 45 as we would a reference under sections 22 or 33 of the Act. Accordingly, we are guided by the considerations set out in our guidance."

So there could not be a more express connection drawn from that expressly drawn by the Commission to the relevance of that guidance in this case. That is why, when we get to the Competition Commission's answer to our case, it is no answer at all because what is

effectively said by the Commission is that because this guidance was not directly applicable it did not have to be followed, and that is clearly at odds with what the Commission is effectively saying here.

Paragraph 4.24 of the Guidance, and it is at authorities bundle 2, tab 38, p.41, if the Tribunal would like to look at it – it is also, I think, set out in our skeleton:

> "With an anticipated merger, the most effective remedy will often be the prohibition of the merger. This is usually implemented by an undertaking from the parties not to proceed with the proposal. A complication may be that the potential acquirer has, in connection with the relevant merger situation, acquired a shareholding in the target company. This will usually need to be reduced to a specified maximum level below which the CC judges there could be no possibility …"

– that is what we emphasise, "no possibility" –

> "… of material influence, within a specified and reasonable time period."

We suggest that the underlying logic of that Guidance, if applied to this case, is clearly to require divestment to be reduced to a level where there can be no possibility of material influence. It is at this point that I draw the Tribunal's attention to the skeleton argument of the Competition Commission at para.29(a). I do not know, sir, if you have it loose or in the bundles.

THE PRESIDENT: We have got it in the bundles.

MR. GORDON: In the bundles it is key documents 2, tab 14, para.29(a). As you will see, what is said there that this guidance was not directly applicable and then this insidious word "therefore" there was no misdirection. We say that that therefore is the hole in the Commission's case on this point because the Guidance was directly applicable in the sense that, as a matter of rationality and relevancy and logic, the Commission had identified it as guidance that which it was going to follow for the obvious reason that the same logical considerations applied to both sets of problem.

So that is the duty, or those are the duties, on the Commission arising whether you take the s.47(9) route or whether you take the Guidance route.

I now come to our final point which is that, in our respectful submission, in approaching remedies in this case in relation to Sky, the Commission acted unlawfully. It is not a fact point, this is a pure point of law. The Commission's reasoning is in its report. I am not going to go through that line by line because I am going to make a few very simple points about the reasoning. It starts at para.6.8. May I say, first of all, that in considering whether

the question of whether a remedial solution was or was not the most comprehensive in the sense of being reasonable or practicable to impose, the Commission considered a different and irrelevant consideration. If, sir, you and the members of the Tribunal look to para.6.70 of the report ----

THE PRESIDENT: "In our view, of the two remedies", that one?

MR. GORDON: Yes:

> "In our view, of the two effective remedies that we have identified, partial divestment is the least intrusive, as it requires BSkyB to divest a smaller proportion of its shareholding in ITV. We therefore thought it the more proportionate."

This comes under the heading of "Proportionality". We say that such a question – that is the question of intrusiveness – would only have been relevant had the remedies of partial divestment and full divestment been equally comprehensive. By "comprehensive", without going to a dictionary, it obviously has the effect of meaning "dealing with all possible contingencies". That is what it means.

The proportionality question, we say, should have been directed to the one comprehensive remedy, because we accept that if it was not reasonable or practicable to impose the most comprehensive remedy, then a less comprehensive remedy might have been imposed, although we do say that there are tensions in the Commission at any stage imposing a remedy that is less than comprehensive.

There was no suggestion that looking at total divestment it was not reasonable or practicable to impose it, apart from this identified word of "intrusiveness". Intrusiveness, a point I will come back to briefly, is not a concept, we say, relevant to a structural remedy such as divestment, or indeed any explanation of why it is unreasonable or impracticable to impose total divestment. There might have been reasons, but they are not explained or grappled with by recourse to a concept such as intrusiveness. The difficulty is, as we see the analysis of the Commission, that the two remedies were treated, see para.6.67, the first paragraph under the heading of "Proportionality", as being equally effective.

Forgetting for the moment any question of syntax, they were not equally effective, and we will see why from other passages in a moment. What we say is that what the Commission did was not to undertake an assessment designed to answer the question of whether partial or total divestment were equally comprehensive or what solution was the most comprehensive, but instead to carry out a completely different exercise which was to judge or evaluate what was the real and material risk of ordering only partial divestment to 7.5 per cent. That is what it did. That was not, we say, as a "pure matter of law", to use Mr.

Beloff's words, that was not the test required by s.47(9), and when we look at para.6.74, we see the key to the whole thing and the key to why the Commission has gone wrong in that first part of the first sentence we are satisfied that partial divestiture to a level below 7.5 per cent is in practical terms "likely" – and this is the key word "likely" – to be as effective a remedy as full divestiture, because, so it is said, it removes any realistic prospect that BSkyB will be able materially to influence the strategy. So what is being articulated here is the language of probability and I am prepared to accept for the purposes of argument, high probability but not certainty, and a remedy that is likely to be effective, even likely in practical terms to be effective, is not the same as a remedy will, on any analysis, be completely effective, and if the Tribunal goes back to para.6.18 of the report, we see a clear finding by the Commission:

> "We found that the full divestiture of BSkyB's shareholding would be effective in remedying the SLC and the consequent adverse effects on the public interest as it would rest ore the situation prior to the acquisition."

So undoubtedly the Commission has analysed the comprehensiveness of total divestment and reached a completely clear conclusion. What it has done, and acted contrary to s.47(9) is that first of all it never purported to consider – it rather assumed it in the paragraph I have cited – whether the remedies of total and partial divestment were equally comprehensive. That "equally effect" bit only crops up in a pair of brackets with no analysis, and secondly it assumed they were. Thirdly, its assumption that they were for the purposes of the proportionality exercise was eroded by its internally inconsistent conclusions that total divestment will be completely effective, see para.6.18, whereas partial divestment would merely be likely to be as effective, see the paragraph I have cited at 6.74.

The reasoning which led to the latter conclusion, that is to say that in practice partial divestment would be likely to be as effective itself necessarily accepted that there could be no certainty about the matter.

If, for example, the Tribunal goes to para.6.28 we see there, for example, and this is an example:

> "Although we recognised that, in some cases, votes may be withheld deliberately to demonstrate dissatisfaction, we did not think it possible to identify such votes with any degree of certainty in practice ..."

So there is no certainty, say the Commission, so they are not going along that route. That is part of their analysis as to what is the likelihood of things happening with a certain level of shareholding.

We say it is obvious that the following examples demonstrate that we are necessarily, when looking at partial divestment, in the area of subjective appreciation as opposed to certainty. For example, (1) whether shareholder squeeze-out could be blocked by Sky. That is a matter on which there is analysis by the Commission. I am not at this stage trying to disturb their factual conclusions. But, it is clearly an area of subjective evaluation; (2) whether a scheme of arrangement would necessarily be deployed to obviate the need for a squeeze-out if blocked. That is another area of subjective appreciation. There is no certainty about that; (3) whether *ex hypothesi* minorities - 7.5 percent shareholders - with a degree of industry knowledge, could in such a way as to materially influence shareholders. We see all the studies referred to in Virgin Media's notice of application. It is never really dealt with by the Commission. I would refer, by way of reference, to paras. 5.141 to 5.146 of Virgin Media's notice of application. I do not take the Tribunal to them now, but these are the Hermes studies about what minority shareholders can do. It is never analysed by the Commission. I am not criticising the analytic process. What I am saying is that it should never have been engaged in, given the Commission's conclusion about total divestment being the most comprehensive remedy.

I would also draw the Tribunal's attention very briefly to, I think, para. 6.36 of the Commission report at the last sentence: "Accordingly, we do not place weight on the argument regarding the squeeze-out in itself, although we note that a shareholder with a stake large enough to block a squeeze-out could enjoy additional credibility with other shareholders".

So, all I say about this is that this is not - unlike, with great respect, some of Mr. Flynn's points sounded this afternoon to us at least - an attempt to go into the facts. It is, however, an analysis designed to show that when you proceed down a subjective evaluation route as opposed to following the statute, and asking a different question - Is the most comprehensive remedy disproportionate in itself? - and instead ask a question about intrusiveness, you are following a line which is not permitted.

This is still on the statutory regime, and we say that the Commission never asked itself whether it was unreasonable or impracticable to impose the most comprehensive solution, save that reference to intrusiveness. The Commission confused intrusiveness - which would only have been relevant to behavioural remedies not in any event selected by the Commission - if the remedies of total and partial divestment were equally comprehensive. They confused intrusiveness with the different question of whether total divestment could rationally and reasonably have been imposed, to which the answer - which, in our

submission, may be a matter for remission to the Commission - is clearly all one way: total divestment could rationally and practicably have been imposed.

The proportionality question which Mr. Flynn urges on the court is a different one, and at a different part of the remedial equation, but we say that it should have been applied to a total divestment. That is the statute.

Turning to the relevant Guidance, we say that the Commission's approach was similarly flawed. The first point I make - and I have made it briefly before - is that the Commission is simply wrong in attaching any materiality, any legal materiality, to the fact that this Guidance was not directly applicable. It is just a bad point. Given that this was the very Guidance that the Commission purported to apply, it follows that it has got to get the Guidance correct. A general averment (see also the Commission's skeleton in the same paragraph, para. 29(a)) that Guidance may be departed from in the Commission's discretion misses the point, because the point is one of rationality. You cannot just have a discretion to move away from what you, the Commission, have said is relevant without any articulation of why you are doing it. There is no such general discretion.

What we say, in short, about the Guidance is that the Commission has never grappled with para. 4.24. They have flirted with it, because if the Tribunal looks at Footnote 206 at p.87 of the report - and it is always quite dangerous when things are buried in a footnote - what is said in that footnote, materially, is that para. 4.24 relates to an anticipated merger in which the potential acquirer has already acquired a shareholding in the target company. This is a different situation from that being considered here. With great respect to the Commission, we query how the situation being considered here is relevantly different, or why the logic underpinning para. 4.24 is any different from the remedial logic here. Here we are at the end game -- We are at the analytic end game in which one is looking at the remedy necessary to remediate the effects and the need for restoration as the starting point of the status quo is what underpins the need for removing any possibility of material influence. In para. 4.24 we can pick that up from para. 4.23 itself, the preceding paragraph which talks about the starting point.

So, as to guidance we say that the Commission (1) acted irrationally in purporting to distinguish para. 4.24 of its Guidance which it had purported to apply from the present case; (2) should not have departed from the logic of para. 4.24 without logical and articulated reasoning of which this footnote is not such; and (3) failed to take a material consideration into account - the underlying logic of para. 4.24, which the Commission did not appreciate and/or, I suppose, it took an irrelevant consideration into account, namely the Commission's

erroneous belief that there was a material difference between the logic compelled by para. 4.24 and this case. Just adding to that, if one is to take seriously what is said in the skeleton argument of the Commission, there is a further irrationality in that it thinks that guidance which it purports to apply does not have to be applied because it is not directly applicable when it has already said that it is going to apply it because it does relevantly cover the case in question.

Sir, if our submissions are well-founded as against the Commission on either the statutory limb, or the guidance limb, or both. We respectfully submit that we should also succeed against the Secretary of State for the reasons set out in our application, which really come to the simple point that the Secretary of State has merely adopted the reasoning of the Commission on remedies. We agree in this respect with my learned friend, Mr. Flynn, on the very last part of his address. That is the one thing we agree.

For all those reasons we respectfully invite the Tribunal to allow this part of our appeal, but also we link it, as I have said, to plurality which we have to come to. .

Those are my submissions.

THE PRESIDENT: Thank you very much. We have potentially got another twenty minutes left. I do not foresee anyone standing up. It does not look as though there is any enthusiasm to continue.

MR. SWIFT: I certainly rebut any suggestion as to enthusiasm, but I am very happy to accept the Tribunal wish to call an end at 4.40 today and start at 10.00 tomorrow.

(Adjourned until Wednesday, 4th June, 2008 at 10.00 a.m.)

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