BSkyB/ITV: Competition Appeal Tribunal Dismisses BSkyB's Appeal

Howard Cartlidge and Dervla Broderick
Olswang, London

Introduction

In September 2008, the Competition Appeal Tribunal ('CAT') handed down its judgment[1] dismissing in its entirety the challenge by British Sky Broadcasting Group Plc ('BSkyB') to the Competition Commission ('the CC') report on BSkyB's acquisition of a 17.9 per cent stake in ITV Plc ('the report').[2] According to the CAT, BSkyB identified no defect in the CC's finding that the acquisition resulted in a relevant merger situation which gave rise to a substantial lessening of competition. The CAT also rejected BSkyB's application in so far as it related to the decision by Secretary of State for Business Enterprise and Regulatory Reform ('the Secretary of State') ordering the partial divestment of BSkyB's interest ('the decision').[3]

However, the CAT did uphold the challenge by Virgin Media Inc. ('Virgin') to the CC's finding that BSkyB's acquisition would not operate against the public interest in addition to raising competition concerns. The CAT found that the CC had misdirected itself in its interpretation of sections 58 and 58A of the Enterprise Act 2002 ('EA') which deal with the media plurality considerations. Having set aside the CC's conclusion on media plurality together with the corresponding Secretary of State decision, the CAT was required to examine the impact of the ruling on the remedy proposed by the CC. The CAT concluded that the remedy remained valid and BSkyB would, therefore, be required to reduce its shareholding in ITV Plc to 7.5 per cent.[4]

BSkyB and Virgin both sought permission to appeal to the Court of Appeal against certain aspects of the CAT judgment. The CAT rejected these applications in early December[5] following which BSkyB submitted an application to appeal direct to the Court of Appeal. On 20 March 2009, the Court of Appeal granted BSkyB permission to appeal the CAT Judgement.

The case as a whole is significant in a number of respects, not least for the noteworthy 'firsts' it produced. It was the first time the government used its powers under section 42 of the EA to intervene in the usual merger control process[6] and it is the first time the media plurality provisions in section 58 EA have been applied. However, while the CAT judgment is useful in providing clarification on the correct interpretation of these provisions, perhaps more important from a competition law perspective are the implications it can be expected to have for the UK competition authorities' approach to asserting jurisdiction over acquisitions of minority shareholdings and how this differs from the position under the EC merger rules. This, together with the issue of the limitations on the CAT's ability to effectively review merger decisions, is discussed in more detail below. First, however, this article provides a summary of the background to the appeal and the judgment itself.

Background

The Reference

On 17 November 2006, BSkyB (the leading UK pay-tv broadcaster) announced that it had acquired 696 million shares representing 17.9 per cent of ITV Plc shares for a total of £940 million. ITV Plc is the United Kingdom's biggest commercial broadcaster, broadcasting a range of free-to-air ('FTA') channels. The government used its powers under section 42 EA to intervene in the usual merger control process, by issuing an intervention notice to the Office of Fair Trading ('the OFT') stating that the EA's media public interest consideration was, or could be, relevant to this case. BSkyB's biggest shareholder is News Corporation, owner of the United Kingdom's biggest newspaper group, News International.

Under the public interest intervention regime the Secretary of State (not the OFT) has the discretion as to whether or not to refer a merger to the CC for an in-depth review, to clear it unconditionally or to clear it subject to undertakings. In doing this, he must accept the OFT's recommendations as regards any competition concerns raised by the transaction, but can

1 British Sky Broadcasting Group Plc v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform supported by Virgin Media, Inc; Virgin Media, Inc v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform supported by British Sky Broadcasting Group Plc [2008] CAT 25 '(the CAT judgment)'.

2 Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the shares in ITV Plc, report sent to Secretary of State (BERR) 14 December 2007.

3 Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9 per cent shareholding in ITV Plc dated 29 January 2008.

4 Virgin Media, Inc and (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform and British Sky Broadcasting Group Plc [2008] CAT 32.

5 British Sky Broadcasting Group Plc v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform supported by Virgin Media, Inc; Virgin Media, Inc v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform supported by British Sky Broadcasting Group Plc [2008] CAT 35.

6 The second occurred in autumn 2008, when the Secretary of State specified the stability of the UK financial system as his reason for stepping in to examine the acquisition of HBOS Plc by Lloyds TSB. See the decision by Lord Mandelson, the Secretary of State for Business Enterprise and Regulatory Reform, not to refer to the Competition Commission the merger between Lloyds TSB Group Plc and HBOS Plc under section 45 of the Enterprise Act 2002 dated 31 October 2008.

decide that the public interest considerations override any such competition concerns.[7] Having considered reports by the OFT[8] and Ofcom,[9] as well as other representations, the Secretary of State announced his decision to refer BSkyB's acquisition to the CC for investigation on 24 May 2007.[10]

The reference was made under section 45(2) of the EA on the basis that a relevant merger situation had been created which may have been expected to result in a substantial lessening of competition, that a public interest consideration was relevant to the consideration of the merger and that, taking account only of the substantial lessening of competition and the relevant public interest consideration, the merger operated or may have been expected to operate against the public interest. The media public interest consideration specified by the Secretary of State was the need, in relation to every different audience, for there to be a sufficiency of plurality of persons with control of the media enterprises serving that audience (section 58(2C)(a) EA).

The CC's Findings

After an investigation which extended over nearly six months, the CC found that the acquisition gave BSkyB the ability materially to influence the policy of ITV Plc such that, the turnover test under section 23(1) EA also being satisfied, a relevant merger situation had been created. The CC took the policy of ITV Plc in this context to mean the management of its business, in particular in relation to its competitive conduct, including its strategic direction and its ability to define and achieve its objectives. The CC found that the size of BSkyB's holding was such that on the basis of past voting patterns it would be able to block special resolutions proposed by ITV Plc's management and this ability would limit ITV Plc's strategic options, for example its ability to raise funds. The CC also highlighted BSkyB's importance and stature as an industry player. Together with its position as the largest shareholder, this was considered to give additional weight to its views, increasing its ability to influence other ITV Plc shareholders.

Having regard only to the media public interest consideration in subsection 58(2C)(a) EA, the CC concluded that the acquisition would not be expected to operate against the public interest. The CC considered that, given the extent of the influence conferred on BSkyB, the regulatory mechanisms, combined with a strong culture of editorial independence within television news production, were likely to be effective in preventing any prejudice to the independence of ITV Plc's news operations. As a result, the CC found that BSkyB's influence over ITV Plc would not materially affect the sufficiency of plurality of persons with control of media enterprises servicing audiences for news.

However, in assessing the competitive effects of the acquisition against the counterfactual of an independent ITV Plc, the CC found that BSkyB would exercise its ability to influence ITV Plc's strategy so as substantially to lessen competition in the market for all-television services (which includes both pay television and FTA television services). It identified several examples of the ways in which, in practice, this might occur, for example seeking to influence ITV Plc's strategy in relation to content production and commissioning and attempting to influence the course of any future transactions involving ITV Plc in order to weaken the constraint that FTA television services would otherwise provide.

The CC concluded that, based on its assessment of the competitive effects, overall the acquisition may be expected to operate against the public interest. The CC consequently considered a number of remedy options which ranged from full divestment of BSkyB's stake to the remedy finally recommended by the CC which involves divestment of such part of BSkyB's shareholding in ITV Plc as to result in it ceasing to have material influence over ITV Plc, combined with behavioural undertakings not to be represented on the ITV Plc board, not to dispose of shares to an associated person and not to re-acquire share in ITV Plc. The CC considered that a divestment of shareholding to a level below 7.5 per cent would be effective in remedying the substantial lessening of competition and the adverse effects resulting from the acquisition. This was thought to be less intrusive and more proportionate than a full divestment.

The CC also assessed the suitability of two remedies proposed by BSkyB. These were: placing the entirety of BSkyB's voting rights in ITV Plc in a voting trust and an undertaking by BSkyB not to exercise any of its voting rights in ITV Plc. However, the CC ultimately concluded that remedial action should be taken to require BSkyB to partially divest its shareholding.

The Decision

The Secretary of State had 30 business days from the date of receipt of the CC's report in which to publish his decision on the merger.[11] Accepting the CC's findings that a relevant merger situation had been created and that it resulted in a substantial lessening of competition in the market for all-television services,[12] the Secretary of State decided to make an adverse public interest finding on the basis of the anti-competitive outcome of the acquisition (the EA provides that an anti-competitive outcome shall be treated as adverse to the public interest unless justified by one or more public interest considerations). However, the Secretary of State agreed with the CC's finding that the acquisition did not have an adverse public interest effect so far as the relevant public interest consideration (that is, media plurality) was concerned.[13] The Secretary of State accepted the CC's recommendation on remedial action.[14]

7 In the Lloyds/HBOS case, the Secretary of State cleared the merger on public interest grounds without making a reference to the CC and without imposing undertakings, within a week of receiving the OFT report which found a realistic prospect that the merger would lead to a substantial lessening of competition.

8 'Acquisition by British Sky Broadcasting Group Plc of a 17.9 per cent stake in ITV Plc, Report to the Secretary of State for Trade and Industry,' 27 April 2007.

9 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting Plc's acquisition of 17.9% shareholding in ITV Plc', 27 April 2007.

10 'The reference by Alistair Darling, the Secretary of State for Trade and Industry, of the British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV Plc to the Competition Commission under Section 45(2) of the Enterprise Act 2002' dated 24 May 2007.

11 Subsection 54(5) EA.

12 In reaching his decision under section 54 EA, the Secretary of State is required, under section 54(7)(a) EA to accept the CC's findings as to whether there is an anti-competitive outcome.

13 Decision, paragraph 15.

14 In reaching his decision under section 55 EA on remedies, the Secretary of State is required, under section 55(3) EA, in particular, to have regard to the CC's findings.

The Appeal

BSkyB and Virgin brought applications under section 120 EA requesting that the CAT quash, in whole or in part, the CC's report and the decision of the Secretary of State.[15] Between them, BSkyB and Virgin challenged almost every element of the report and the decision. In view of the inter-relationship of the two applications they were heard together by the CAT and dealt with in a single judgment.

BSkyB's Application

Much of BSkyB's application for review was concerned with its arguments that certain key findings of the CC were irrational or perverse or based on inadequate evidence. However, BSkyB also made a number of points, including, in relation to the CAT's approach to applications under section 120 EA, the appropriate standard of proof and the need for consistency with the counterfactual, which were discussed, and dismissed, by the CAT at the outset of its judgment.

- *CAT's approach to applications under section 120*: Subsection 120(4) EA requires the CAT in determining an application under that section to 'apply the same principles as would be applied by a court on an application for judicial review'. BSkyB argued that the CAT, whilst applying the same judicial review principles as the Administrative Court would apply, should do so with a greater intensity of review because it is a specialist body.[16]

  The CAT rejected BSkyB's submissions, emphasising that the CAT must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits: 'it is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the CC. The latter is not permissible in a review under section 120.'[17]

- *Standard of proof*: BSkyB argued that the CC failed properly to direct itself as to the standard of proof required in order to be entitled to conclude, in particular, that BSkyB had material influence over the policy of ITV Plc and that a substantial lessening of competition might thereby be expected. The statutory test was not in dispute, namely that the CC must satisfy itself as to the relevant criteria in accordance with the normal civil standard of proof, the balance of probabilities.[18] However, BSkyB argued that the CC erred in refusing to specify the likelihood of circumstances arising in which influence over ITV Plc's policy could be successfully exercised.

  The CAT disagreed with BSkyB, stating that where there are a range of ways in which competition in a market might be lessened substantially, it would be wholly unrealistic for the CC, in respect of each potential circumstance it identifies, to establish that it is more likely than not to occur. In the CAT's view, the CC's approach of identifying plausible examples was appropriate.[19]

- *Counterfactual*: Sky contended in its application that the CC evaluated the statutory test for a substantial lessening of competition inconsistently with its chosen counterfactual of an independent ITV Plc and that this vitiated its conclusions. In particular, BSkyB referred to one of the CC's examples relating to the possibility that an acquisition of ITV Plc might occur in the future. BSkyB argued that consideration of such a scenario is directly contrary to the chosen counterfactual of an independent ITV Plc and thus irrational.[20]

  The CAT did not agree with BSkyB's arguments, stating that the identification of a counterfactual does not mean that possible changes to the market cannot be considered in the assessment of whether the transaction will lead to a substantial lessening of competition.[21] In the CAT's view, the CC was entitled to compare the competitive effects of the merger with those it regarded as the most likely counterfactual of an independent ITV Plc, but at the same time to take account in its competitive assessment of plausible situations or strategies which might result in ITV Plc ceasing to be independent.[22]

The CAT then turned to BSkyB's challenge to the CC's findings as they related to the issues of the 'relevant merger situation' and the 'substantial lessening on competition'. In relation to those arguments, it was necessary for the CAT to consider the material which was before the CC. Some of the specific findings challenged by BSkyB tended to go to both of these issues but they were mainly concerned with the material influence finding (that is, the jurisdictional test):

- *Sky's ability to block a special resolution*: The CC concluded that BSkyB's shareholding gave it the ability to block a special resolution[23] and that this ability arose due to the size of the shareholding and the expected turnout at shareholders meetings, based on historical voting patterns.[24] This was an important element in the CC's conclusion that the acquisition gave BSkyB the ability to exercise material influence over the policy of ITV Plc.[25]

  Contrary to BSkyB's assertions, the CAT held that the CC was entitled to rely on unadjusted voting patterns in preference to reports submitted by BSkyB and that the CC's preference for the voting outcomes of several ITV Plc general meetings prior to the acquisition, rather than one meeting post-acquisition could not be characterised as perverse or irrational.[26]

15 Section 120(1) EA provides that any person aggrieved by a decision of the OFT, Secretary of State or the CC in connection with a reference, may apply to the CAT for a review of that decision. It was not in dispute that BSkyB and Virgin were persons aggrieved for the purposes of section 120(1).
16 CAT judgment, paragraph 59.
17 CAT judgment, paragraph 63.
18 The decision, paragraph 70. See also 'Merger References: Competition Commission Guidelines ', published June 2003 and IBA Health v OFT [2003] CAT 27, paragraph 182 and IBA (in the Court of Appeal) per the Vice Chancellor at paragraph 46.
19 CAT judgment, paragraph 75.
20 CAT judgment, paragraph 88.
21 CAT judgment, paragraph 91.
22 CAT judgment, paragraph 92.
23 To block a special resolution at least 25 per cent of the votes cast are required.
24 CAT judgment, paragraph 112.
25 CAT judgment, paragraph 110.
26 CAT judgment, paragraph 119.

- *Scheme of arrangement*: The CC found that BSkyB had an effective veto over resolutions relating to schemes of arrangement recommended by the ITV Plc board as part of its business strategy.[27] Contrary to BSkyB's arguments, the CAT held that the CC was entitled to rely on this finding in assessing the ability of BSkyB to exercise material influence, stating that if a person is able to influence, directly or indirectly, the board's advice to shareholders on how to deal with their shares in the context of a proposed takeover or merger, then that person is able to influence the policy of the company for the purposes of subsection 26(3).[28]

- *Indirect influence*: BSkyB contended that the CC's findings of indirect influence were unsustainable and were liable to be set aside. BSkyB argued that the finding was speculative and based on nothing more than the self-serving evidence of ITV Plc and Virgin who had submitted representations to the CC warning of the danger of underestimating the ability of BSkyB to use its importance and stature of an industry player, together with its position as the largest shareholder, to influence the strategy and commercial direction of ITV Plc.[29]

  The CAT did not share BSkyB's views. It concluded that the CC was entitled to decide that BSkyB's pre-eminent experience and standing in the audio-visual market, together with the level of shareholding, would be likely to add to the weight which its views would have on other shareholders, and in doing so, it was entitled to draw on the experience and knowledge of business and managements of its members.[30]

- *ITV Plc's need for funding*: The CAT found that the question of ITV Plc's need for funding, and in particular the kind of funding for which a special resolution is required (that is, non-pre-emptive issue of shares) overlapped the jurisdictional test and the competition assessment. In concluding that there was a relevant merger situation, the CC held that BSkyB's ability to block special resolutions was the main means by which BSkyB could exert material influence over ITV Plc's policy, as a special resolution was likely to be required in the reasonably near future in order to obtain funding for major strategic options. The CC also concluded that the ability to block funding would impact on strategic projects which would affect ITV Plc's competitive position on the market.[31] BSkyB contended that the CC's findings were so unreal as to render irrational or perverse any conclusion based upon such a situation because ITV Plc would not need to raise funds by means that required a special resolution as it had other alternative sources of funding available to it.[32] The CAT found no flaw in the CC's approach.

Virgin's Application

At the heart of Virgin's application was the meaning and effect of subsection 58(2C)(a) EA read together with subsection 58A(4) and (5), essentially the media plurality provisions. Virgin's case was that the CC and the Secretary of State misdirected themselves in law as to the interpretation of these provisions.[33]

Virgin submitted that in order to determine whether there was sufficient plurality of persons with control of the media enterprises serving a particular audience, the CC had to answer two central questions: (i) at the relevant time for analysis, that is to say post-merger, how many and which persons were in control of how many relevant enterprises; and (ii) was that a sufficient or insufficient number of persons with control?[34] The main question for the Tribunal was whether the CC was entitled to take account of what it called 'internal plurality' in its assessment of the sufficiency of persons with control of the media enterprises under subsection 58(2C)(a), or whether the effect of subsection 58A(4) and/or (5) is such that the degree and nature of control that BSkyB would be able to exert over ITV Plc (in this case, material influence rather than full legal control) is not a relevant consideration in relation to that issue and should not be taken into account in circumstances where BSkyB and ITV Plc are treated as under common control for the purposes of section 26.

The CAT concluded that the CC erred in finding that the degree of control was relevant to a plurality assessment under subsection 58(2C)(a). The CC was instead required by section 58A(5) to treat BSkyB and ITV Plc as being under the control of a single person.[35] The restriction imposed by subsection 58A(5) on the scope of the assessment was said to be justified by the fragility and importance of the media public interest consideration in question, which once lost, may be very difficult or indeed impossible to restore.[36]

The CAT therefore decided that in conducting its assessment of the sufficiency of media plurality, the CC took into account irrelevant considerations which were material to its conclusions as to the sufficiency of plurality and the question of whether the acquisition may be expected to operate against the public interest. The CC's conclusions and the corresponding decisions of the Secretary of State were consequently set aside.

Remedies

Both BSkyB and Virgin made submissions challenging the lawfulness of the proposed remedy. BSkyB argued that the CC and Secretary of State went too far, and should instead have imposed a lesser behavioural remedy, such as requiring BSkyB to give an undertaking not to exercise voting rights or to put the shares into a voting trust. Conversely, Virgin submitted that the adopted remedy did not go far enough and that BSkyB should have been ordered effectively to divest itself of its entire shareholding in ITV Plc.

The CAT upheld the CC's approach on both of these grounds. The CAT considered the CC's concerns relating to BSkyB's proposed behavioural remedies were reasonable and, moreover, having concluded that the proposed behavioural undertakings were not effective to remedy the identified competition concerns, the CC was entitled not to consider their proportionality in comparison with the more intrusive and costly divestment remedies.

27 CAT judgment, paragraph 123.
28 CAT judgment, paragraph 130.
29 CAT judgment, paragraph 137.
30 CAT judgment, paragraph 138.
31 CAT judgment, paragraph 146.
32 CAT judgment, paragraph 159.
33 CAT judgment, paragraph 200.
34 CAT judgment, paragraph 214.
35 CAT judgment, paragraph 266.
36 CAT judgment, paragraph 262.

The CAT also decided that the CC was entitled to take a cautious, conservative approach to assessing the level at which BSkyB might be able to exercise influence in future votes, and to take account of the possibility that BSkyB's influence might be increased by other shareholders voting against a resolution. Contrary to Virgin's submission, the CC was not required to adopt a solution that was so comprehensive that it guarded against unrealistic prospects of material influence.

On 30 October 2008, the CAT handed down a judgment on further relief and concluded that the validity of the remedy was not affected by the finding that the CC had made an error in the media plurality test. In order to avoid any delay in accepting the remedies if appropriate, and without prejudice to the outcome of BSkyB's application to appeal to the Court of Appeal, BERR decided to consult on a draft of the final remedial undertakings in advance. The deadline for comments on BERR's draft undertakings was 23 January 2009.[37]

Important Aspects of the Merger and the CAT's Judgment

Acquisition of a Minority Interest

The CAT judgment, in its confirmation of the CC's approach to asserting jurisdiction over the acquisition of a minority interest in ITV Plc by BSkyB and indeed the proposed remedial action, highlights the stark contrast between the UK and European legal positions. The expression 'material influence', referred to by the CC as the 'lowest level of deemed control'[38] which will allow the UK competition authorities jurisdiction over a transaction, is wider than its European counterpart 'decisive influence' in Article 3(2) of the EC Merger Regulation. The result is that some transactions that do not amount to mergers under EC law can be caught by the UK regime. An order[39] handed down by the Court of First Instance ('the CFI') in 2008 shows the particular issues that can arise at a European level as a result, demonstrating the ECMR's lack of teeth in so far as acquisitions of minority shareholdings are concerned.

The CFI's order was handed down following an appeal by Aer Lingus to a European Commission decision[40] refusing to take action to require Ryanair to divest its minority interest, 29.4 per cent, in Aer Lingus. The Commission had already blocked Ryanair's bid to acquire control of Aer Lingus on the basis that it would significantly impede effective competition on several routes to and from Ireland served by both airlines. The CFI's order clarified that the European Commission's power to review transactions under the ECMR is limited to situations which entail a change of control – mere acquisitions of minority interests that do not confer control are not subject to the merger regime. The CFI distinguishes this situation from an acquisition of full control where the power to require full divesture is still open, as in the Commission decisions in the *Tetra Laval/Sidel*[41] and *Schneider/Legrand*[42] transactions.

It is believed that the CFI's order prompted Aer Lingus to approach a number of national regulators to seek to persuade them to assert jurisdiction in order to force the sale of Ryanair's minority stake, although it is not believed that any of these approaches was successful. Aer Lingus had argued that a 'regulatory lacuna' would arise in the event of the court deciding that the Commission had no ability to review the acquisition of a non-controlling minority interest under the ECMR because, due to Article 21(3) ECMR, the Member States would be precluded from scrutinising the acquisition under their own national merger regimes where the minority interest was acquired in the context of a concentration which is subsequently blocked and abandoned.

The court found that no such lacuna would arise, as once the notified concentration was prohibited by the Commission and abandoned by the parties, Article 21(3) ECMR, would no longer apply to the acquisition of a minority interest intended to be part of the notified concentration, since that concentration would no longer exist. As a result, Member States would regain their competence to scrutinise the acquisition of the retained minority shareholding and could apply their own merger control regimes.

In addition, the court pointed out that Articles 81 and 82 of the EC Treaty could be applied by the Commission to address the conduct of undertakings holding a minority shareholding in another undertaking. However, the CFI acknowledged the shortcomings of relying on these provisions to review acquisitions of minority shareholdings.

Although the CFI's judgment confirmed the Commission's powers in relation to minority interests which do not involve the acquisition of control, it remains difficult for companies, and their lawyers, to determine the circumstances in which a minority interest involves control at European level. Conversely, the CAT judgment allows the UK authorities to be very confident in asserting jurisdiction over acquisitions of minority interests by virtue of the material interest test.

The CAT judgment seems to set a legal presumption in place that, for public companies at least, a possible de facto ability to veto special resolutions will amount to material influence. In previous decisions of the OFT and CC,[43] the ability to block special resolutions has been regarded as a very strong indicator of material influence, although in only one of those cases, *Southern Water Plc and Mid-Sussex Water Company*,[44] has the existence of that ability of itself been held to be sufficient to determine the existence of influence. However, in that case, Southern Water's shareholding was over 25 per cent, which gave it an automatic right to block special resolutions, and the CC did not, therefore, have to take account of voting patterns in its development as it did in the BSkyB acquisition.

The UK competition authorities are not alone among national regulators in Europe in their approach to minority interests. For example, in June 2007, the Bundeskartellamt

37 See http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=388774&NewsAreaID=2&NavigatedFrom Department=True.
38 The report, paragraph 3.33.
39 Order of the President of the Court of First Instance of 18 March 2008, Aer Lingus Group Plc v Commission of the European Communities (T-411/07 R) [2008] 5 CMLR 7.
40 Commission Decision C(2007) 4600, 11 October 2007.
41 COMP/M.2416 Tetra Laval/Sidel.
42 COMP/M.2283 Schneider/Legrand.
43 For example, 'The Government of Kuwait and The British Petroleum Company Plc: a report on the merger situation', October 1988 (CM 477) and 'General Utilities Plc and the Mid Kent Water Company: a report on merger situation' (CM 1125). In these cases there were other factors (such as the presence or ability to appoint a board representative) in addition to the ability to block special resolutions.
44 'Southern Water Plc and Mid-Sussex Water Company: a report on the merger situation', July 1990 (CM1126).

prohibited the acquisition of a 13.75 per cent shareholding and the appointment of three members of the supervisory board of Norddeutsche Affinerie by the Austrian copper manufacturer and rival A-Tec on the basis that it would have created a dominant position on the EEA market for oxygen-free copper billets.[45] The test for asserting jurisdiction under German merger control rules is very broad; the Bundeskartellamt was able to assert jurisdiction in this case because it decided that A-Tec would have the ability to exert competitively significant influence over its rival. In a decision which echoes many of the CC's concerns in the BSkyB case, the Bundeskartellamt based its decision on the fact that A-Tec would have a de facto blocking minority. In addition, it considered that A-Tec, with its superior industry knowledge, could potentially influence the decision-making of the supervisory board.

This does risk creating a somewhat artificial approach to the regulation of minority interests, given its focus on a very narrow set of circumstances in which strategic decisions could potentially be affected by a special resolution. However, from a policy perspective, the inadequacy of the other tools available to address issues raised by a minority investment suggest that this approach is justified. As was recognised by CFI in its order in the *Ryanair/Aer Lingus* case, applying the non-merger competition provisions of the EC Treaty to the acquisition of a minority shareholding could be difficult. Application of the Article 81 prohibition of anti-competitive agreements, and indeed the corresponding Chapter I prohibition under the UK Competition Act, to cases where the shareholding has been acquired on the stock market would seem impossible due to the lack of any requisite 'agreement' or 'meeting of minds'.

Given that the CC's main competitive concern in relation to the BSkyB acquisition was the ability of BSkyB to affect directly ITV Plc's ability to compete in the market for all television, an Article 82/Chapter II complaint could be a way for ITV Plc to challenge BSkyB's behaviour. However, for such a challenge to be successful, ITV Plc would need to show that: (i) BSkyB holds a dominant position; and (ii) the acquisition of the minority shareholding would allow BSkyB to exercise influence over ITV Plc to a sufficient degree and thereby restrict competition to conclude that there is an abuse of a dominant position. In addition, ITV Plc would need to convince the appropriate authority to take up the case and then face a lengthy wait before any decision was reached. Clearly, the merger regime, with its definite timetable and notification procedure, is the preferred forum or examining the issues thrown up by acquisition of minority interests. Whilst of little comfort to BSkyB or indeed Aer Lingus, this should provide future certainty to those companies considering minority interest acquisitions under the UK regime, even if it is only the certainty that regulatory intervention cannot be ruled out.

Limitations of Judicial Oversight of Merger Cases and the Implications for 'Public Interest' Cases

A key feature of the UK merger provisions is that the state should not be involved in individual cases and that decisions should be taken by the OFT and CC: competition analysis in normal merger cases should be carried out by specialist competition authorities.[46] However, there are a number of situations in which intervention is considered justifiable on grounds of a wider public interest than its detrimental effect on competition. For example, the Secretary of State has the power to intervene in the normal merger control process on grounds of public security. In addition, thanks to section 375 of the Communications Act 2003, he has the power to intervene on the basis of several media public interest considerations.

As in many other democracies, the UK media industry has been subject to regulation for some time, whether in the form of structural regulation through ownership rules and licensing or behavioural regulation through content requirements. According to DTI guidance on the operation of the public interest merger provisions, media ownership rules have applied because market forces alone, even regulated by competition law, cannot necessarily provide the 'market-place of ideas that enable democracy to prosper'.[47] This highlights the deep political interest in cases involving the media, as distinct from other sectors of equal or greater economic importance (such as transport or healthcare), but less personal significance to politicians who rely on the media to address issues of concern to them and, critically, the electorate. In this regard, the Communications Act 2003 attempts to balance a desire to move towards a more deregulated media which relies on competition law to deal with the issue of media concentration, with a perceived need to retain some safeguards that would protect the plurality of the media.

The result of this is the application of two different, yet at times overlapping, tests in media mergers: (i) the standard economic test which assesses whether the merger can be expected to lead to a substantial lessening of competition; and (ii) the public interest test which looks at several considerations including the need for there to be a sufficiency of plurality of persons with control of media enterprises. The DTI Guidance recognises the overlap between the competition assessment and the sufficient plurality assessment and the fact that sometimes an action to safeguard competition will by itself be likely to provide a sufficient plurality of control.[48] The outcome of the CAT judgment together with its judgment on the validity of the proposed remedies clearly showed that this was true in the case of the BSkyB/ITV Plc transaction.

However, it will not always be the case that competition law concerns and public interest issues overlap. Accordingly, it is in the cases where, on the basis of public interest grounds, the UK Government can override competition concerns caused by a merger that the limited nature of judicial review in merger cases is potentially most worrying. As noted in the CAT judgment, the exercise of its powers under section 120 EA should be contrasted with an appeal 'on the merits', a standard which the Tribunal is required to apply in appeals under the provisions of the Competition Act 1998 and Communications Act 2003. In an appeal on the merits, the Tribunal is entitled to substitute its own views for those of the decision-maker.[49] In contrast, judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness. For

45 Decision of the Bundeskartellamt of 27 February 2008, B5 – 27442 Fa 198/07, A-Tec/Norddeutsche Affinerie.

46 See DTI White Paper on Productivity and Enterprise: A World Class Competition Reime Cm 5233 (2001), paragraph 5.23.

47 The DTI, 'Enterprise Act 2002: Public Interest Intervention in Media Mergers: Guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers', May 2004 ('the DTI Guidance').

48 DTI Guidance, paragraph 7.4.

49 CAT judgment, paragraph 107.

example, the judgment found it to be sufficient for the CC simply to show that it was aware of certain facts and arguments put to it by BSkyB rather than to show it had in any substantial way considered the merits of those arguments. In addition, as regards remedies, the CAT seems to accept the CC's rejection of BSkyB's proposed behavioural remedies with little probing. The same limitations can be seen in the challenge to the Secretary of State's decision to clear the merger of Lloyds and HBOS.[50]

The situation under UK law is in contrast to appeals at the European level where the CFI is prepared to look quite deeply into both the Commission's findings on primary facts and into the inferences drawn from them when determining whether its analysis was initiated by manifest errors of assessment. The series of annulments by the CFI of Commission prohibition decisions in 2002 are evidence of the difference in approach.[51]

The *Lloyds/HBOS* merger case demonstrates that the government retains the power not only to issue an intervention notice in reliance on the public interest considerations already set out in the EA, but also to ask parliament to approve new public interest considerations under section 58 of the Act.[52] This can be achieved in a very short timeframe and indeed in that case it took just nine days to obtain parliamentary approval. Accordingly, political involvement in the UK merger control process – which many thought had effectively finished when the EA came into force in 2003 – remains a live issue in certain sectors.

50 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform supported by HBOS Plc and Lloyds TSB Group Plc [2008] CAT 36.

51 Case T-342/99 Airtours Plc v Commission [2002] ECR II-2585; Case T-310/01 Schneider Electric v Commission [2002] ECR II-4201; and Case T-80-02 Tetra Laval v Commission [2002] ECR II-4519.

52 In that case the 'interest of maintaining the stability of the UK financial system' was added to the EA as section 58(2D).