

Neutral citation [2008] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: [unallocated]

Victoria House
Bloomsbury Place
London WC1A 2EB

9 January 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Potential Applicant

- and -

(1) THE COMPETITION COMMISSION

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

Potential Respondents

**ORDER OF THE PRESIDENT ON APPLICATION FOR EXTENSION OF
TIME TO APPLY FOR REVIEW**

1. On 14 December 2007 the Competition Commission (“the Commission”) sent a report to the Secretary of State for Business, Enterprise and Regulatory Reform (“the Secretary of State”) entitled “Acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc” (“the Report”). The non-confidential version of the Report was notified to British Sky Broadcasting Group plc (“BSkyB”) after 4.30pm on 19 December 2007. The Secretary of State published the Report on 20 December 2007. The Report was produced pursuant to section 50 Enterprise Act 2002 (“the Act”) on a reference made to the Commission by the Secretary of State under section 45(2). This was the first reference to be made under Chapter 2 of Part 3 of the Act.
2. The Commission concluded in the Report that BSKyB’s acquisition of a 17.9 per cent stake in ITV plc (“ITV”) may not be expected to operate against the public interest having regard only to the media public interest consideration (specified in section 58(2C)(a) of the Act) but was likely to result in a substantial lessening of competition (“SLC”) based on an assessment of the competitive effects of the acquisition. The Commission concluded that, overall, the acquisition may be expected to operate against the public interest.
3. In consequence of the Commission’s adverse public interest finding of an SLC, the Commission concluded that remedial action should be taken by BSKyB partially to divest its shareholding in ITV down to a level below 7.5 per cent.
4. Under section 54(5) of the Act the Secretary of State has 30 business days from the date of receipt of the Commission’s Report in which to make and publish a decision pursuant to section 54(2).
5. Section 54(2) provides that:

“The Secretary of State shall decide whether to make an adverse public interest finding in relation to a relevant merger situation and whether to make no finding at all in the matter”.
6. In deciding whether to make an adverse public interest finding the Secretary of State is required by virtue of section 54(7) of the Act to accept the Commission’s findings as to whether there is an anti-competitive outcome.

7. If the Secretary of State decides to make an adverse public interest finding, the Secretary of State has power under section 55(2) to:

“take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned”.

8. If the Secretary of State decides to make no finding at all in the matter, under section 56(6) the Commission shall:

“proceed under this Part as if a reference under section 22 or (as the case may be) 33 had been made to it instead of a reference under section 45”.

9. In so far as material, section 120(1) of the Act provides that:

“Any person aggrieved by a decision of ... the Secretary of State or the Commission ... in connection with a reference ... in relation to a relevant merger situation ... may apply to the Competition Appeal Tribunal for a review of that decision”.

10. Under rule 26 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) (“the Rules”) any such application must be made within four weeks of the date on which the applicant was notified of the disputed decision.

11. Rule 8(2), which applies to applications under section 120(1) by virtue of rule 28(2), provides that:

“The Tribunal may not extend the time period [for making an application for review under section 120(1)] unless it is satisfied that the circumstances are exceptional”.

12. On the assumption that the Report is challengeable at the time of this application for an extension of time, then unless an extension is granted time for making an application for review would expire on Wednesday 16 January 2008, representing a period of 17 working days, given the Christmas and New Year bank holidays.

13. By virtue of section 54(5) the Secretary of State’s time for taking a decision under section 54(2) will expire on Tuesday 29 January 2008. A separate four week period for review of that decision under section 120(1) will commence with that decision.

14. In these circumstances by a written application dated 21 December 2007 and received by the Tribunal on that date, BSKyB applies for an extension of time in which to apply for a review of the Report pursuant to section 120 of the Act. The extension sought is such as would bring the expiry of the time for applying for such a review into line with the expiry of time for seeking a review under section 120 of the Secretary of State's decision on the matter pursuant to section 54(2).
15. In support of its application for an extension of time BSKyB states that although it has not yet decided whether to seek a review of the Report pursuant to section 120, if it does so it will inevitably need to challenge both the Report and the Secretary of State's decision under section 54(2). In BSKyB's submission the sensible way forward would be for there to be a single application for review in relation to both the Report and the Secretary of State's decision, with the deadline for that application being that applicable to the Secretary of State's decision. The alternative of successive applications, with the earlier one almost certainly needing to be the subject of an application to amend, does not seem to BSKyB to be an efficient use of the Tribunal's or parties' resources.
16. BSKyB wrote to the Commission and the Secretary of State on 12 December 2007 proposing this course of action. The Commission and the Secretary of State responded by letters dated 18 December 2007. The Commission stated that "Successive applications under section 120, separated by some weeks, to review aspects of the CC report, later to review the Secretary of State's decision, and then to amend earlier applications, would not seem to be an efficient use of CAT resources" and that it "would not oppose therefore a single application by BSKyB covering all matters on which review is sought". The Commission stated that it would consent to this application. The Secretary of State stated "For the reasons you state in your letter, we agree that these are exceptional circumstances and the Secretary of State would support your application to the CAT."
17. BSKyB's application stated that BSKyB had not contacted any third party in relation to the application for an extension of time.
18. BSKyB submitted that the following amounted to exceptional circumstances to which the Tribunal should have regard for the purposes of rule 8(2) of the Rules.

19. *First*, under section 45 of the Act the Secretary of State's involvement in merger cases is necessarily restricted to exceptional cases where public interest considerations may arise. This is the first occasion on which the Secretary of State has referred a merger to the Commission under section 45 and the first occasion on which the Secretary of State has intervened in a merger in relation to a media public interest consideration. None of the previous section 120 applications to the Tribunal (*IBA Health Ltd v Office of Fair Trading* [2003] CAT 27, on appeal in [2004] EWCA Civ 142, CA; *UniChem v Office of Fair Trading* [2005] CAT 8; *Somerfield plc v Competition Commission* [2006] CAT 4; *Celesio AG v Office of Fair Trading* [2006] CAT 9) have arisen out of public interest cases.
20. *Secondly*, it is submitted that the procedure is exceptional in that it is necessary for an applicant to challenge decisions which are separated in time but which are inextricably linked steps in a single procedure. The decisions in the Report, whilst representing final decisions of the Commission, do not take full effect until the Secretary of State takes his section 54(2) decision, and take effect subject to and in accordance with the decision of Secretary of State. Until the Secretary of State's decision the Commission's decisions are of an inchoate character and the extent to which they will take full effect is unknown.
21. In regard to the last point BSkyB refers to the fact that a prospective application for an extension of time was made in *Hasbro UK Ltd v Director General of Fair Trading* [2003] CAT 1 ("the *Hasbro* case") and was heard by the former President of the Tribunal. The President of the Tribunal exercised his discretion to reject that application. However, BSkyB submits that this case is clearly very different from the *Hasbro* case. There, Hasbro sought an extension of the two month period for appealing an infringement decision taken by the Office of Fair Trading ("OFT") pursuant to section 2(1) of the Competition Act 1998 on the basis that Hasbro was expecting a second infringement decision arising out of a related investigation and where the OFT had been conducting the two cases together until the issue of decisions for administrative convenience. BSkyB submits that this case is very different because of the exceptional nature of the bifurcated procedure involved here. This is a single investigation leading to two inter-related but separate decisions, rather than two separate but related investigations as was the case in *Hasbro*.

22. *Thirdly*, it is argued that there is a clear case management benefit in the Tribunal having before it a single application from BSkyB to which the respondents can respond, in a single document if so advised, and to which such interveners as may be permitted can address statements in intervention. The alternative of separate applications, separate responses and separate intervention statements, plus applications to amend would create time-consuming and unnecessary procedural complexity.
23. *Finally*, BSkyB submitted that it is of some relevance that the period for bringing an application under section 120(1) of the Act in relation to the Report coincides with the festive holiday period with the consequence reduction in working days.
24. Given that the written application was received at the Tribunal in the afternoon of Friday 21 December 2007 I considered it as a matter of urgency and without the benefit of oral argument. Further I considered it (and make the order set out below) on the assumption that the Report represented, at the time the application for an extension of time was made or indeed at any time prior to the Secretary of State's section 54(2) decision, a decision capable of being the subject of a review under section 120(1) of the Act. The correctness of that assumption has not been the subject of any argument or submissions and is not to be taken as being decided by me, one way or the other, by reason of the order made. If the assumption were to be incorrect then the extension applied for would not of course be needed as time would not yet have begun to run in respect of the Report.
25. As to whether the criterion of exceptional circumstances is satisfied here, I bear in mind the statement of the President in the *Hasbro* case that:

“It is impossible to produce any indicative, let alone comprehensive, definition of what is meant by “the circumstances are exceptional” in [what is now Rule 8(2)]. Each case must turn on its own facts” (at page 5)

26. Having then referred to a passage in paragraph 4.14 of the Tribunal’s “Guide to appeals under the Competition Act 1998” (now contained in paragraph 6.14 of the Tribunal’s current (October 2005) “Guide to Proceedings”)¹ the President continued:

“Cases that do not involve *force majeure* in the strict sense will, in my judgment, only rarely give rise to “exceptional circumstances”.”

27. I respectfully agree that in determining whether exceptional circumstances exist to justify an extension of time in which to apply for a review under section 120(1) each case must be considered on its own facts, and that although such circumstances should not be restricted to cases of *force majeure*, the cases where exceptional circumstances are found to exist are likely, by their very nature, to be rare. As the Tribunal has emphasised on more than one occasion (see, for example, the President’s Order in *Prater Ltd v Office of Fair Trading* [2006] CAT 11, paragraphs 31-34), respect for the deadline for commencing an appeal under the Competition Act 1998 and an application under section 120 of the Act is crucial given the importance and urgency of the matters which are in issue in many such cases. Such deadlines must therefore be strictly adhered to.
28. In the present case I am of the view that there exist certain circumstances which, combined, render them exceptional so as to be capable of justifying the extension sought. I emphasise that it is the *combination* of circumstances in this case which had led me to the conclusion that it is appropriate to extend time to make an application for review, rather than any one particular factor.
29. On the negative side I do not consider that the fact that this is the first reference by the Secretary of State under section 45 of the Act and the first occasion on which the Secretary of State has intervened in a merger in relation to a media public interest consideration can qualify as a candidate for an “exceptional circumstance” justifying an extension of time for challenge either alone or in combination with other factors.
30. As to the festive season point, it is true that the period for bringing an application under section 120(1) in relation to the Commission’s Report coincides with the Christmas

¹ The Guide to Proceedings is available from the Tribunal’s website: www.catribunal.org.uk. The requirements of the Tribunal’s Guide to Proceedings, dated 20 October 2005, constitute a Practice Direction issued by the President pursuant to Rule 68(2) of the Tribunal Rules.

holiday period resulting in some inevitable reduction in working days. Such a reduction is however hardly exceptional and entirely predictable. Further there has here been a provisional report by the Commission. It is not as though work on a possible challenge can only begin when the final report is available. I therefore do not consider that the intervention of the festive season supports the application for an extension.

31. On the other hand the linked, two-stage nature of the decision-making procedure under this reference is a factor which is relevant. Although when making the section 54(2) decision the Secretary of State is bound to accept the competition findings of the Commission, until the section 54(2) decision has been made any effect of the Report is inchoate, and its ultimate full effect is not certain. Moreover the two stages are interlinked. For example, if the Secretary of State decides to make an adverse public interest finding, in determining what enforcement action if any to take under section 55 he must “have regard” to the Report. In these circumstances there seems to me to be considerable force in BSKyB’s assertion that if it were to seek a review of the Report pursuant to section 120, it would inevitably need to challenge both the Report and the Secretary of State’s decision under section 54(2). I agree with BSKyB that the structural connection between the two stages of the procedure here and the connection between the extant decision and (at that time) the potential further decision in the *Hasbro* case (above) are significantly dissimilar. The circumstances of *Hasbro* are of little if any assistance here.
32. Given the structural interlinking of the two stages in the present reference, I also agree that, as summarised at paragraph 22 above, there would be considerable case management and other benefits, including savings of time and expense for the potential parties, interveners and the Tribunal if the period for challenging the Report were to be extended to the extent proposed. There would be corresponding additional expense, inconvenience and, quite possibly, delays if there were to be no extension.
33. There is another significant factor. Both the main potential respondents to a section 120 application, namely the Secretary of State and the Commission, consent to the proposed extension, and one of them actively supports the application, pointing to the same case management benefits as BSKyB. It is difficult to identify any likely adverse consequences to those potential parties or to any third parties and the wider public

interest. Given the linked two stage procedure and the important role played by the Secretary of State it is highly unlikely that the proposed extension would in this case cause any material delay at all in the resolution of any challenge to the Report. On the contrary, as indicated earlier, the procedural inconveniences and additional work likely to occur if separate and sequential challenges are made might well cause delay in ultimate resolution.

34. In the light of these factors in combination I took the view on 21 December 2007 that circumstances existed which would entitle the Tribunal to grant the extension sought by BSkyB. However I was concerned that before any order was made the application should be brought as far as possible to the attention of identifiable interested third parties. Accordingly the Tribunal's Registrar wrote to BSkyB's solicitors on 21 December 2007 informing them that I was minded to grant an extension of time for applying for review of the Report on and with effect from 9 January 2008. The letter stated that in the meantime I required an undertaking from the solicitors by 1pm on 24 December 2007 that, by 5pm on 28 December 2007, they would:

“ - use your best endeavours to bring copies of your client's application and this letter to the attention of ITV plc and all identifiable third parties listed on the Competition Commission website as having made submissions in respect of the Competition Commission's provisional findings and remedies notice - see the list at: http://www.competition-commission.org.uk/inquiries/ref2007/itv/responses_remedies.htm

- indicate to those persons that if they wish to make any written submissions to the Tribunal as to why the extension should not be granted they should send them to the Registrar by 5pm on 3 January 2008;
- inform the third parties of the Tribunal's postal address and fax number;
- send copies of your application and this letter to the Secretary of State and the Competition Commission forthwith.”

35. By letter to the Tribunal dated 24 December 2007 BSkyB's solicitors gave the required undertaking on behalf of BSkyB. By a further letter dated 31 December 2007 the solicitors confirmed that they had complied with the undertaking, and listed the third parties to whose notice they had brought the application for extension of time. Those third parties included Virgin Media Inc and the Virgin group of companies. Solicitors acting for these parties wrote to the Tribunal letters dated respectively 2 and 3 January 2008 indicating, in effect, that the extension sought appeared sensible and their clients would not oppose it provided that any extension granted should equally apply to any

party who as a person aggrieved may be considering an application for review of the Report. Letters from the Treasury Solicitor dated 3 and 7 January 2008 on behalf of the Secretary of State and the Commission respectively confirmed that those parties supported the suggested amendment to the terms of the proposed extension. I agree that if an extension is granted to BSkyB on the grounds discussed above then it should also apply to other potential claimants who are otherwise qualified to apply for a review of the Report.

36. In the light of the above I make the following Order:

The time within which any application may be made by British Sky Broadcasting Group plc or any other person aggrieved pursuant to section 120 of the Enterprise Act 2002 (“the Act”) in relation to the Competition Commission’s report of 14 December 2007 (“the Report”) is extended so as to be coterminous with the expiry of the time for making any application pursuant to section 120 of the Act in relation to the Secretary of State for Business, Enterprise and Regulatory Reform’s decision on the Report under section 54(2) of the Act.

The Honourable Mr Justice Barling
President of the Competition Appeal Tribunal

Made: 9 January 2008
Drawn: 9 January 2008