

**TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) /
CREATIVE BROADCAST SERVICES HOLDINGS (2) LIMITED**

**INITIAL SUBMISSION
TO THE
COMPETITION COMMISSION**

REBUTTAL OF OFT'S REFERENCE DECISION

21 October 2013

**SLAUGHTER AND MAY
PPC/AMZL/VZK**

TABLE OF CONTENTS

1.	SUMMARY	1
	A. The facts	1
	B. The OFT's Decision	4
2.	TRANSACTION BACKGROUND	7
	A. Ericsson / Technicolor	7
	B. Creative Broadcast Services / Red Bee Media	7
	C. Deal background	7
	D. Industry context	7
	E. Deal rationale	8
	F. The counterfactual	8
3.	PRODUCT MARKET DEFINITION	10
	A. The facts	10
	Demand-side factors	10
	Supply-side factors	13
	Resources needed for linear playout	14
	Resources are broadly the same across all channels	15
	Resources for reactivity and intervention	17
	How to plug the gaps for a new contract	18
	Conclusions	21
	B. The OFT's Decision	22
	Reactivity and intervention	23
	Quality, service and regulatory requirements	29
	Scale and risk	30
	Conclusions on OFT approach	32
4.	GEOGRAPHIC MARKET DEFINITION	33
	A. The facts	33
	B. The OFT's Decision	33
5.	HORIZONTAL UNILATERAL EFFECTS	35
	A. The facts	35
	The competitive dynamics of the market	35
	Active competitors in the UK linear playout market	36
	Any specific concerns regarding the BBC and ITV are unfounded	41
	Parties are not uniquely close competitors	42
	Barriers to entry and expansion are surmountable	43
	In-house supply is a significant competitive constraint	43
	Customers have significant buyer power	46
	Conclusions	47
	B. The OFT's Decision	47
	Market shares	47
	Tender data for "Level One" in isolation	49
	New entry/expansion would be "timely, likely and sufficient"	50
	Buyer power is a sufficient competitive constraint	52
	Conclusions on OFT's analysis	53

LIST OF ANNEXES

Annex 1	Cross-reference to Responses to Annex B of CC First Day Letter
Annex 2	Glossary
Annex 3	Transaction Timeline
Annex 4	Part A: Broadcast playout introduction Part B: Interventions overview
Annex 5	Linear Playout Contracts Part A: Summary Part B: Copies of Parties' current and past UK linear playout contracts
Annex 6	Linear Playout RFQs/ITTs Part A: Summary Part B: Copies of UK RFQs/ITTs received by the parties
Annex 7	Playout equipment and technology used by the parties
Annex 8	BBC market testing-related documents [confidential] [confidential] Part C: VEAT Notices, 24 April 2013 [confidential] [confidential] [confidential]
Annex 9	Synergies summary
Annex 10	Key Competitor Profiles
Annex 11	Live programming case studies Part A: Technicolor - ITV tennis coverage Part B: RBM - BBC Wimbledon coverage and Channel 4 Paralympics coverage
Annex 12	UK linear playout contract tender data, 2009-2013
Annex 13	Summary of playout staff employed by the parties for their past and current contracts
Annex 14	Indicative bidding timeline

1. SUMMARY

1.1 The OFT Decision concluded that:

- (i) The BBC and ITV together form a distinct linear playout market segment (“Level One”) with unique requirements for which RBM and Technicolor are the only credible bidders.
- (ii) As a result of the Transaction, there is therefore a reasonable prospect of an SLC resulting from horizontal unilateral effects in this “Level One” segment.
- (iii) Given its conclusion on “Level One” contracts, the OFT declined to reach a conclusion on a further segment termed “Level Two” (which comprised linear playout for channels including Channel 4, Channel 5, BT Sport and ESPN), but confirmed that at least Encompass and Arqiva are also credible bidders for “Level Two” contracts.
- (iv) There was no other market, or theory of harm, which gave rise to even a reasonable prospect of an SLC.

1.2 We rebut these conclusions on a number of grounds and this Initial Submission focuses on demonstrating that:¹

- (i) Whether considered from the demand- or supply-side, there is no plausible basis for drawing a distinction between linear playout contracts in order to define contracts according to the OFT’s “Levels”; and
- (ii) There is, in any event, significant competition in the market for linear playout contracts such that the merger will not give rise to an SLC.

1.3 This Initial Submission considers first the market facts which support the parties’ case, and then rebuts the assertions upon which the OFT’s contrary conclusion appears to have been based.

A. The facts

1.4 Every broadcaster must take a “make or buy” decision in relation to linear playout services, not as a “one-off” decision for all time, but on an ongoing basis as contracts approach the end of their term. These decisions are made relatively infrequently (typically, no more than once every five years), but customers will start to think about this well in advance of the expiry of their current contracts such that contracts are awarded following competitive tender

¹ The parties reserve the right to address additional issues if raised/re-opened by the CC.

processes. At their most basic level, the competitive dynamics of the UK linear playout market are illustrated by Figure 1.1: contracts change hands both between outsource providers (Arqiva and Encompass notably winning a number of recent contracts), and between outsource and in-house.

**Figure 1.1
Market Overview**

	2005	2006	2007	2008	2009	2010	2011	2012	2013
BBC	RBM								
ITV	In-house		Technicolor						
Channel 4	In-house			RBM					
Channel 5	RBM & Encompass						Encompass		
Turner	In-house								Arqiva
BT Sport	(New Channel) RBM								
British Eurosport	NTL (merged with Arqiva)	Arqiva						Arqiva	
ESPN	RBM				Arqiva				
MTV Europe	In-house				In-house				
Disney	Technicolor							Encompass	
Discovery	Ascent (bought by Encompass)		Encompass			In-house			

- 1.5 A detailed understanding of the requirements of the BBC and ITV does not identify any unique or special features so as to distinguish them from the requirements for, among others, Channel 4 (RBM), Channel 5 (Encompass), BT Sport (RBM), ESPN (Arqiva), British Eurosport (Arqiva) and Disney (tender ongoing, currently with Encompass). (See further paragraphs 3.6-3.10).
- 1.6 The skills and resources needed to serve the BBC and ITV contracts are the same as those used for at least these other “complex” contracts. The fact that some of these skills/resources may, on average, be deployed slightly more frequently when servicing the BBC and ITV contracts does not render them a separate market segment. (See further paragraphs 3.11-3.40).
- 1.7 Outsourced linear playout is a bidding market. As a result, demand is “lumpy” (only a few contracts are tendered each year) and there are strong incentives on all providers to compete for contracts when they come up for tender. (See further paragraphs 5.4-5.5).
- 1.8 Technicolor has bid for a number of contracts for which it was invited to tender since 2009. It has not, however, won **[confidential]** any of these. (See further paragraphs 5.6-5.17). Technicolor cannot therefore be said to offer a uniquely strong competitive constraint to RBM. Conversely, Arqiva and Encompass (among others) are strong, credible competitors, more than capable of bidding for contracts for the BBC and ITV. They were each invited to tender for over **[5 to 15]** of the contracts tendered since 2009, were shortlisted for **[0 to 10]** and **[0 to 10]**, and subsequently won three and two, respectively. It should therefore be uncontroversial that at least Arqiva and Encompass are “credible bidders” for playout contracts.
- 1.9 The BBC and ITV are expected to tender their next contracts competitively. (See further paragraphs 5.18-5.23). The BBC and ITV are large, sophisticated players who can encourage entry to create competitive rivalry among bidders,

regardless of how many bidders there are. Further, the BBC is required (under the Public Contracts Regulations 2006) to tender its contract and ITV has shown, through its approach to its international channels and media management services, that it would also tender its contract competitively. The BBC and ITV contracts are attractive given their scale and profile; the parties would expect numerous bidders to be interested in these contracts.

- 1.10 Payout contracts can and do change hands, as the parties themselves have experienced: since 2009, Technicolor has lost contracts to GlobeCast, Encompass and WRN and RBM has lost contracts to Encompass and Arqiva. As incumbent suppliers respectively for the BBC and ITV, RBM and Technicolor also do not have any inherent advantage relative to other bidders for these contracts when they next come up for tender. (See further paragraph 5.24-5.26). Further, any incumbency advantage would be unrelated to the effects of the Transaction.
- 1.11 The parties are also not uniquely close competitors for those, or other, contracts (see further paragraphs 5.27-5.29).
- 1.12 The timeline and characteristics of the bidding process are such that all bidders entering into a competitive bid do so on an equal footing. Beyond normal-course costs of responding to ITTs etc., capital costs are not incurred before contracts are won. At least for the larger contracts, this is a “build-to-order” market and bidders are given long lead times to prepare their bids and get ready for contract delivery. (See further paragraphs 5.30-5.31). **[confidential]**. The timelines for the expiry of certain key contracts in the market are as follows:
- (i) The **BBC** contract expires in March 2017, c. **3.5 years** from now.
 - (ii) The **ITV** contract expires in **[confidential]**, c. **[0 to 5] years** from now.
 - (iii) The **Channel 4** contract expires in **[confidential]**, c. **[5 to 10] years** from now.
 - (iv) The **Channel 5** contract is believed to expire in **[confidential]**, c. **[0 to 5] years** from now.
 - (v) The **BT Sport** contract expires in **[confidential]**, c. **[5 to 10] years** from now.
 - (vi) The **ESPN** contract is believed to expire in **[confidential]**, **[0 to 5] years** from now.
 - (vii) The **Disney** contract is believed to expire in **[confidential]**, **[0 to 5] years** from now. **[confidential]**.
- 1.13 The operation of TUPE means that, in practice, all bidders are in the same position as regards contract staffing. The staff who are not transferred under

TUPE are typically not “key” staff, and are either redundant for the performance of the contract or who have a cross-channel role, such that they will be employed already by any playout services provider, or can easily be hired. (See further paragraphs 3.31-3.33).

- 1.14 Moreover, either of the BBC or ITV could choose to bring the work in-house should they be dissatisfied with the outsourcing options available on the market. (See further paragraphs 5.32-5.39). The threat of these broadcasters bringing their playout services in-house is therefore a real one and this operates as a strong constraint on bidders, particularly given their buyer power (see paragraphs 5.40-5.41). For example, **[confidential]**.
- 1.15 There are further potential entrants to the linear playout market who, with modest investment, could credibly bid for any of the outsourced playout contracts on the market. These include:
- (i) Companies specialising in the provision of outsourced managed services on a generic basis. For example Accenture - who recently secured the non-linear playout contract of BT Sport’s new channels and is currently the IT outsourcing provider for ITV; and
 - (ii) Companies which are able to leverage their expertise in IT managed services as a result of the technological shifts in the playout market. For example Atos, which has a well-established IT outsourcing relationship with the BBC **[confidential]**.
- 1.16 Companies like these are able to offer bundles which include general IT services alongside playout. Both customers and suppliers are currently evaluating these new models which, in view of the timeframes set out above, are highly relevant to the next generation of linear playout contracts. (See further paragraphs 5.17 and 5.26).

B. The OFT’s Decision

- 1.17 Despite the evidence outlined above, the OFT concluded that the BBC and ITV together form a distinct linear playout market segment (“Level One”) with unique requirements for which only RBM and Technicolor are credible bidders.
- 1.18 Whilst it is right that in a build-to-order market there are inevitably differences between individual channel contracts, these do not amount to segmentation for the purposes of competitive assessment of market dynamics. (See further paragraph 3.43 *et seq.*). Furthermore, the OFT’s assessment that only the merging parties are credible bidders for certain classes of contract is not supported by the facts.

1.19 The OFT's conclusion seems to be based on a rather outdated view of the market:

- (i) An assessment of the market by reference to value market shares (which are skewed by the **[confidential]** contracts awarded many years ago) does not give sufficient weight to recent contract tenders. Shares based on contracts tendered in the last five years show a different story as shown by Table 1.1 below. (See further 5.45-5.48).

Table 1.1
Market shares based on value of contracts tendered 2009-2013

Company (listed alphabetically)	Market share - all contracts
Arqiva	[20-30]%
Encompass	[20-30]%
GlobeCast	[0-5]%
In-house	[10-20]%
RBM	[10-20]%
Technicolor	[0-5]%
Unknown/ongoing	[10-20]%
Vision 247	[0-5]%
WRN	[5-10]%
TOTAL	100%

- (ii) The current BBC and ITV contracts were among the first to be outsourced in the UK. Moreover, both **[confidential]** and **[confidential]** tendered for the ITV contract. The BBC contract was not, however, tendered as it was awarded to RBM as part of the sale of BBC Broadcast. (See further paragraphs 5.49-5.50). Furthermore, the parties believe that **[confidential]**.
- (iii) The most accurate picture of the current competitiveness in the market is provided by an analysis of the most recent tender data. Those data show clearly that Technicolor has not won a single linear playout services contract put out to open tender for any type of channel since 2009, despite having been invited to participate in **[5 to 15]** tenders over this period. By contrast, Arqiva has won three contracts and Encompass has won two contracts. Based on the evidence cited above, the OFT concluded that Encompass and Arqiva are a significant competitive constraint for "Level Two" channels but that they were not credible competitors for "Level One". This is despite finding that Technicolor is a credible competitor for both Levels without having **[confidential]** won, any such contract for over five years. The parties disagree - the evidence shows that both Arqiva and Encompass are at least as credible

as Technicolor when competing for all contracts, including those for the BBC and ITV (see further paragraphs 5.6-5.16, and 5.51-5.59).

- (iv) The OFT does not give sufficient weight to the importance of the negotiating power which buyers are able to exert as a result of the credible and viable alternatives (including from in-house provision) available to them when they select how they will procure their playout service requirements for the future (see further paragraphs 5.60-5.62).
- 1.20 The OFT's analysis is therefore unduly backward-looking, and does not take account of the timeline within which broadcasters are making their tender decisions. This is despite the fact that the basis for merger review is a prospective review (the OFT/CC guidance clearly states that they "*will consider any merger in terms of its effects on rivalry over time in the market or markets affected by it*"²).
- 1.21 The remainder of this Initial Submission considers each of the above points in more detail.

² See paragraph 4.1.3 of the Merger Assessment Guidelines. See also *Hutchison 3G UK Limited v Ofcom* [2005] CAT 39 at paragraph 33 and *Case C-12/03 P Tetra Laval* [2005] ECR I-1113 at paragraphs 41-42.

2. TRANSACTION BACKGROUND

A. Ericsson / Technicolor

- 2.1 Ericsson is a world-leading provider of telecommunications equipment and services to mobile and fixed network operators. It operates in the UK linear playout market through Technicolor, which currently operates as a separate company to Ericsson.
- 2.2 For further details, please see Section 2A of the Informal Submission.

B. Creative Broadcast Services / Red Bee Media

- 2.3 RBM is a media management company headquartered in London, UK. RBM was formerly called BBC Broadcast Limited and was created by the BBC in 2002. In 2005, BBC Broadcast Limited was sold to CBS, a company set up specifically for the purchase and jointly owned by Macquarie Capital Alliance Group and Macquarie Bank Limited.
- 2.4 For further details, please see Section 2B of the Informal Submission.

C. Deal background

- 2.5 On 13 June 2013, Ericsson and CBS entered into a Share Purchase Agreement pursuant to which Ericsson agreed to buy the entire issued share capital of CBS2. RBM is wholly-owned by Creative Broadcast Services Limited, which, in turn, is wholly-owned by CBS2. Under the terms of the Share Purchase Agreement, the acquisition of CBS2 by Ericsson is, *inter alia*, conditional upon clearance of the Transaction by the UK competition authorities. For further details, please see the transaction timeline attached at Annex 3.

D. Industry context

- 2.6 The global playout industry is currently undergoing widescale transformation, driven by changes in broadcasters' business models.
- 2.7 Consumer behaviour has changed as a result of technological advances in media, internet and telecoms technologies; broadcasters have had to adapt accordingly. In particular, their role has been challenged by new "broadcast" entrants (such as Google TV, Apple, Lovefilm, Netflix and Blinkbox) and by consumer desire to access content anytime, anywhere. To satisfy this demand, broadcasters need new and innovative ways to provide their content to consumers.
- 2.8 The resulting impact on "traditional" linear playout is marked. Whilst linear playout spend is expected to increase by only 6-7% per annum over the next few years, spend on non-linear playout is expected to grow by over 20% per

annum. This shift was recently emphasised in a speech given by Tony Hall, the Director-General of the BBC (see further paragraph 3.21).

- 2.9 Consolidation is expected as broadcasters and outsourced providers look to reduce costs across their international operations.

E. Deal rationale

Ericsson intends to increase its market credibility and position by [confidential]

- 2.10 RBM is one of the leading media management service providers in the UK and has a strong position in Europe. Ericsson's broadcast services business was started in 2007 and expanded in 2012 with the acquisition of Technicolor's Broadcast Services Division. [confidential].

[confidential]

- 2.11 Technicolor's UK reputation was severely damaged by an incident during the football World Cup in 2010 when Technicolor [confidential] accidentally cut to an advertising break just as England scored its first goal of the tournament in its opening match against the USA. [confidential].

[confidential]

- 2.12 RBM is one of the leading European providers of access (subtitling, audio description and signing), non-linear playout and metadata/content discovery related services. [confidential]
- 2.13 [confidential].³ [confidential], the combined group should benefit from [confidential] other changes in the environment for providing services [confidential] prices for linear playout services are falling and customers demand price reductions at each tender.

F. The counterfactual

- 2.14 The CC's "*application of the SLC test involves a comparison of the prospects for competition with the mergers against the competitive situation without the merger*" a.k.a. the "counterfactual".⁴ This requires a comparison of the most likely future situation in the absence of the merger.⁵

³ [confidential].

⁴ See paragraph 4.3.1 of the Merger Assessment Guidelines.

⁵ See paragraph 4.3.6 of the Merger Assessment Guidelines.

Technicolor

2.15 In the absence of the merger, Ericsson would **[confidential]**, Ericsson's geographical focus, **[confidential]**, Ericsson would **[confidential]**.

RBM

2.16 **[confidential]**.

3. PRODUCT MARKET DEFINITION

- 3.1 The market for linear playout services for TV was considered by the OFT in 2005 in the Creative Broadcast Services decision.⁶ In that case, the OFT concluded that the relevant product market was the outsourced supply of linear playout services.
- 3.2 Consistent with that approach, the parties believe that the relevant product market is the outsourced supply of linear playout services as a whole, although some contracts may be more complex than others (particularly if they require the building of a bespoke playout suite). Alongside the BBC and ITV contracts, these would include Channel 4, Channel 5, BT Sport, ESPN and Disney. This is supported by evidence of both demand- and supply-side factors:
- (i) From the demand-side, the core customer requirements of all linear playout contracts are broadly the same.
 - (ii) From the supply-side, numerous linear playout providers active in the UK are equipped to meet these requirements.
- 3.3 In **Part A** of this Section, we set out the market facts which are pertinent to the question of market definition and which support the parties' arguments that the market should be defined broadly so as to include at least all build-to-order playout contracts in the UK, and arguably an even broader set of contracts.
- 3.4 In **Part B** we then rebut the assertions upon which the OFT Decision appears to have been based.

A. The facts

- 3.5 Whether considered from the demand- or supply-side, there is no plausible basis for drawing bright lines around the requirements of the ITV and BBC contracts so as to distinguish them from the contracts for, among others, Channel 4 (RBM), Channel 5 (Encompass), BT Sport (RBM), ESPN (Arqiva), British Eurosport (Arqiva) and Disney (tender ongoing; currently with Encompass).

Demand-side factors

- 3.6 In large part, outsourced linear playout is a build-to-order market such that there are inevitable differences between the particular requirements of broadcasters and these are reflected in the subsequent contracts concluded. That said, the

⁶ Case ME/1962/05 *Completed acquisition by Creative Broadcast Services Limited of BBC Broadcast Limited* (2005).

requirements at the heart of all linear playout contracts is the same: the compilation and preparation of broadcasters' content precisely in accordance with the set programme schedule for subsequent transmission to consumers.

- 3.7 This is supported by a review of the requirements specified in the requests for proposals/invitations to tender received by the parties for the provision of linear playout services (see Annex 6) and the parties' linear playout contracts (see Annex 5). These reveal that the overall requirements of **[confidential]**. All of these customers have chosen to outsource their linear playout services because they want a specialised provider who can be held to account and who must adhere to high service provision standards. In the paragraphs that follow we consider these standards in more detail by reference to the prescribed service levels themselves and the financial penalties for failure to meet those levels.
- 3.8 The BBC and ITV are not unique in requiring high service levels. Table 3.1 summarises the service level requirements of key contracts (or tender requirements where the contract was not awarded to the parties) and illustrates what those service levels translate to in terms of permitted error minutes per year. Table 3.1 shows that there is nothing unique about the BBC and ITV in terms of required service level standards. Annex 5 and Annex 6 show that this is also the case across numerous other parameters including the capability for dealing with live events and late schedule changes/late deliveries, real-time editing and/or manual checking/monitoring of content, and sub-streaming requirements.

**Table 3.1
Comparison of Playout Service Levels**

Service Level Availability	All channels unless specified	Practical impact - max error minutes per year^[1]
100%	[confidential]	Max 0
99.999%	[confidential]	Max 6 minutes ([confidential])
99.997%	[confidential]	Max 16 minutes
99.995%	[confidential] ^[2] [confidential] [confidential]	Max 26 minutes
99.99%	[confidential] [confidential] [confidential] ^[3] [confidential] [confidential] ^[2] [confidential]	Max 53 minutes [confidential] [confidential]
99.98%	[confidential] [confidential]	Max 105 minutes
99.97%	[confidential]	Max 158 minutes
99.95%	[confidential] [confidential] [confidential]	Max 263 minutes
99.90%	[confidential] [confidential] [confidential]	Max 526 minutes

Source: Parties.

- Notes: [1] Assuming 365-day year; 525,600 minutes a year; 34,536,000 seconds a year.
 [2] Based on tender requirements.
 [3] [confidential].

3.9 Further, as illustrated by Table 3.2, the financial penalties (also known as “service credits”) that are at risk if service falls below these levels are not generally higher for customers such as the BBC and ITV as compared to other customers. [confidential].

Table 3.2
Annual Service Credits incurred by Technicolor and RBM^[1]

Provider	Customer	Revenues generated (£)	Service credits (£)	Service Credits as % of Revenues
RBM	UKTV	[confidential]	[confidential]	[confidential]
RBM	Channel 4	[confidential]	[confidential]	[confidential]
RBM	BBC	[confidential] ^[2]	[confidential]	[confidential]
Technicolor	NBCU	[confidential] ^[3]	[confidential] ^[3]	[confidential]
Technicolor	ITV	[confidential]	[confidential] ^[4]	[confidential] ^[4]
Technicolor	CSC	[confidential]	[confidential] ^[5]	[confidential]

Source: *Parties.*

- Notes: [1] RBM's figures are for the financial year ending 30 June 2013, Ericsson's figures are for calendar year 2012.
 [2] [confidential].
 [3] [confidential].
 [4] [confidential].
 [5] [confidential].

3.10 The level of service credits which a broadcaster can accrue in a year may be capped (to avoid unlimited service credit exposure on the part of the playout provider), but broadcasters often have the right to terminate in the event that service credits exceed a particular value. By way of comparison, [confidential].

Supply-side factors

3.11 From the supply-side perspective, what we need to consider is which third parties are "credible bidders".⁷ Given that this is (at least in large part) a build-to-order market,⁸ a finding of credibility cannot require a bidder to be currently servicing a mirror-image contract. Rather, an assessment of bidder credibility must take account of both market presence and market potential.

3.12 In the paragraphs that follow we:

- (i) Describe the resources (principally staff and technology and infrastructure) used for a "typical" build-to-order linear playout contract;
- (ii) Highlight how these are broadly the same regardless of the contract concerned;

⁷ OFT and CC Merger Assessment Guidelines at paragraphs 5.2.18.

⁸ [confidential]

- (iii) Focus, in particular, on the resources needed to address the “reactivity and intervention” requirements of the BBC and ITV and show that they are not unique; and
 - (iv) Describe how any gaps in current resourcing can be met in order to satisfy a new contract.
- 3.13 In summary, these features confirm that, in addition to the parties, at least Arqiva and Encompass, and likely also others, are credible bidders for all contracts in the linear playout market, including any of those which are more “complex” and require a bespoke playout suite.

Resources needed for linear playout

- 3.14 Linear playout is the process by which programming content is compiled and prepared precisely in accordance with a broadcaster’s programme schedule for subsequent transmission to consumers. In brief, a linear playout service provider will receive content from a broadcaster on tape or in digital format and piece it together to match the schedule set by the broadcaster. This involves slotting together not only the programmes themselves but also advertising and sponsorship breaks, trailers, inserts and continuity announcements. The linear playout service provider has no role in the creation of the content it receives, nor in setting the schedule. These tasks are performed (or outsourced to others) by the broadcaster: the linear playout provider simply follows instructions, both for pre-planned content and for any last minute changes. Annex 4 describes the linear playout provider’s role in more detail.
- 3.15 The linear playout process involves staff putting together files in the right order and monitoring them on various screens as they are played out to ensure that everything goes to plan. The OFT appears, at various points in its Decision, to have misunderstood the linear playout process and ascribed complexity to the parties when in fact, it rests with the broadcasters: e.g. while mixed genre channels might be more complex for a broadcaster to produce and manage schedules for, the playout of such content is exactly the same as fixed genre channels, regardless of the level of live content⁹; regionality is also difficult for broadcasters due to the need to produce and manage different content for each region - however, the playout process for regional content is, in effect, the same as for other content.¹⁰ See Annex 4 for further details.
- 3.16 In broad terms, therefore, the resources needed are (i) trained staff, and (ii) relevant technology and infrastructure.

⁹ See paragraphs 25 to 27 of the OFT Decision.

¹⁰ See paragraphs 28 to 34 of the OFT Decision.

Resources are broadly the same across all channels

Staff

- 3.17 All linear playout service providers employ a mix of staff. Some will be dedicated to the provision of linear playout and ancillary services for a particular contract, whilst others are shared across all of the service provider's contracts. The staffing levels of the parties' key playout contracts are set out at Annex 13. As illustrated in that Annex, the roles which these staff perform are broadly the same, regardless of the channel concerned.
- 3.18 The skills required for any playout contract are therefore broadly the same and are not unique to any contract or level of complexity. Indeed, staff can and do switch from working for one channel to another. For example: RBM has [confidential] hired playout directors who used to work for [confidential]. Technicolor has also moved [confidential] transmission controllers [confidential]. It also employs staff that have come from a number of its competitors, [confidential].
- 3.19 Staff are also readily available on the freelance market. RBM, for example, regularly uses freelance staff for its playout operations. RBM will be one of several companies they freelance for; they will typically also have worked for other broadcasters (in-house) and other playout providers. Freelance staff are used both for longer-term projects (e.g. to cover shift patterns on channels such as [confidential] and [confidential]), and *ad hoc* (e.g. channel service launches/migrations and to cover specific programme scheduling where additional staff are required). Technicolor also currently has [confidential] freelancers working as transmission controllers [confidential].

Technology and equipment

- 3.20 The underlying technology and infrastructure equipment (i.e. automation software, video servers, control decks, monitoring screens, playout infrastructure, etc.) is broadly the same regardless of the channel concerned.
- (i) The same technology suppliers provide similar equipment to all playout service providers. Hardware and software are both readily available to purchase from third parties and, as a result of digitisation, are now much less specific to linear playout services than was previously the case.
 - (ii) Annex 7 sets out the main equipment used by Technicolor in servicing the ITV and NBCU contracts. As that Annex shows, much of this is the same, readily available, off-the shelf technology.
 - (iii) The key piece of infrastructure for providing linear playout services is the automation equipment, which is either programmed to switch automatically between programmes, adverts, regional feeds, etc. according to a broadcaster's schedule or can be manually overridden to

accommodate last minute changes. The parties both use automation equipment produced by either **[confidential]**. Table 3.3 below summarises the parties' chosen automation equipment and shows that there is nothing unique to distinguish ITV and BBC as a separate segment.

Table 3.3
Parties' use of automation equipment

Producer	[confidential]		[confidential]	
Brand	[confidential]	[confidential]	[confidential]	[confidential]
Channel(s) for which used	[confidential]	[confidential]	[confidential]	[confidential]

Source: Parties.

- 3.21 In fact, the pace and extent of technological change in this market since the BBC and ITV contracts were last awarded (in 2002¹¹ and 2007 respectively) have made the provision of linear playout services a much more generic activity. The past decade has seen a rapid shift away from tape-based playout based on specialised equipment to online, digital and software-based solutions. The scope of those original contracts therefore differs significantly from those concluded today, a fact recognised by the BBC in its recent announcement that it wants to overhaul the way it broadcasts and publishes content, with a view to moving to a *"new solution and operating model"* from April 2017.¹² **[confidential]** The BBC's vision for the future was also set out in a recent speech by Tony Hall, the BBC's Director-General, in which he stated that the BBC will *"have to use [its] own resources better [and] look at [its] investment priorities."* Hall also emphasised the importance of iPlayer to the BBC's future vision, noting that *"We want to transform it from being catch-up TV - to online TV"*, making it clear that the future will be dominated by digital, non-linear, technology-based playout.¹³ Similarly, the emphasis of **[confidential]**¹⁴ **[confidential]**.
- 3.22 Advancements in technology are mainly driven by the hardware/software suppliers such as Miranda and Snell and are gradually simplifying playout

¹¹ The BBC contract was not *per se* awarded: the 2002 contract coincided with the formation of BBC Broadcast. The agreement was then revised and restated in July 2005 when the company was sold to Macquarie.

¹² "BBC takes Red Bee deals to 2017 as overhaul continues" by George Bevir (20 June 2013), available at <http://www.broadcastnow.co.uk/techfacils/bbc-takes-red-bee-deals-to-2017-as-overhaul-continues/5057578.article>.

¹³ See <http://www.bbc.co.uk/mediacentre/speeches/2013/tony-hall-vision.html> for the full text of the speech given by Tony Hall on 8 October 2013.

¹⁴ See further Annex 8.

operations and reducing the need for experienced operational staff (e.g. more sophisticated alarm, monitoring and automation systems). The parties consider that the provision of linear playout services is moving towards becoming a generic capability with a global reach.

Resources for reactivity and intervention

- 3.23 The primary reason underlying the OFT's conclusion of a separate "Level One" market segment is the level of reactivity and intervention involved in the delivery of the BBC and ITV contracts. However, as shown below, in terms of both staffing and technology the resources involved for this are common to all contracts.

Staff

- 3.24 Annex 4 describes the linear playout process generally and also details the actions involved when interventions are required. This shows that, even if for different reasons, all channels have some need for intervention/reactivity in their playout and that the actions involved in such interventions are broadly the same. At least at a basic level, it should therefore be uncontroversial that the resources needed for interventions are common to all channels.
- 3.25 It is arguable that differences arise when content is played out that may require intervention at short notice due to unexpected events (such as live sporting events overrunning their allotted schedule time) or that needs to take account of multiple regional feeds. However, insofar as this is the case, the resulting difference in resourcing is simply that more staff are on site to monitor the broadcast and, if necessary, intervene in the playout process. In any event, this is triggered by a broadcaster's decisions on content and editorial context: as explained further in Annex 4, the core playout service remains the same. See also Annex 11 which provides case studies of particular live programming "special events" on the channels for which the parties run the playout services.
- 3.26 The staff involved in these processes possess similar skill sets, regardless of the channel concerned (e.g. attention to detail and the ability to spot and react to mistakes quickly): more interventions simply require a few more staff to perform this monitoring operation, rather than a higher level of technical expertise amongst those staff. The precise number of staff that are required to play out a certain channel's content will depend on that channel's programme schedule at any given point in time and on the channel's willingness to incur additional monitoring costs in the form of employing one or two extra members of staff.
- 3.27 If a linear playout supplier finds that it needs extra resources to cope with more demanding periods, it can also choose to employ some of the many freelancers operating in this sector. Both of the parties have had to do so on previous occasions. For example on channel launch to ensure smooth transition - **[confidential]**; or for special events (e.g. **[confidential]**); or during particular

periods (such as Christmas or during engineering works) where risks of error may be higher. These are common to all channels and there is no reason why the parties' competitors could not do the same. Indeed, it is clear that third parties are already doing the same - for example in reaction to new programming acquisitions by their clients (e.g. [confidential]) which are likely to require additional monitoring for interventions.

Technology and equipment

- 3.28 The mechanisms of playout for different types of intervention and programming involve broadly the same technology and equipment; they do not indicate any basis for distinguishing the BBC and ITV playout contracts. See further Annex 4.

How to plug the gaps for a new contract

- 3.29 It is clear from the above that, by reference to their current skills and resources, both Arqiva and Encompass meet the "credible bidder" test with respect to the contracts for the BBC, ITV and any other outsourced linear playout contract. Their ability to contest major new contracts is facilitated by the typical timeline for bidding for linear playout services contracts - service provision is not expected overnight as broadcasters are well-aware of the lead-in time needed to ensure a smooth transition to a new provider.
- 3.30 At Annex 14 we provide an indicative timeline of the bidding process for linear playout contracts. This shows that suppliers typically have up to 18 months (and sometimes longer) between the time a formal RFP is issued and when service provision is expected to commence. Further, the contract is typically awarded within a few months such that the chosen bidder will typically have up to 12 months between contract signature and service start date to invest in necessary technology etc.

Staff

- 3.31 Staffing requirements for a new contract can easily be satisfied. In particular:
- (i) **Recruitment:** on a new channel launch, a linear playout service provider can simply go out to the market and hire staff as appropriate, [confidential].¹⁵ It is therefore not difficult to find and employ appropriate staff to operate a linear playout suite for complex channels. Staff are typically recruited based on having experience of working in a similar role; both Technicolor and RBM draw from the pool of resources

¹⁵ [confidential]

available in the general broadcast services market place. This includes freelance staff and contractors. [confidential] and previous experience of working in other playout/broadcast sector facilities will be transferable and ease a new employee's transition. Technicolor and RBM also provide training so that new recruits can build up "local knowledge". This covers, *inter alia*, any customer-specific requirements and agreed processes. New recruits are trained *in situ*, working alongside experienced operators. [confidential].

- (ii) **TUPE:** on a change of supplier, relevant employees (and therefore their expertise) will transfer to the new supplier (or to the customer if an in-house option is chosen) under TUPE. Indeed, this is often a requirement in the contract (see further Annex 5). For example, [confidential]. The operation of TUPE therefore ensures that technical knowledge is transferred to the successful bidder. The OFT states that "*customers noted key personnel that would not transfer under TUPE*".¹⁶ However, the parties themselves have first-hand experience of losing the personnel that were dedicated to a particular channel in the event of a customer deciding to switch provider and - using those experiences - it is clear that the staff who would not transfer are by no means essential to the performance of the contract (see Table 3.4). Rather, those staff were either deemed redundant to the new contract, or are staff who have roles across multiple channels at the service provider (and therefore would have a counterpart at any competitor company already).¹⁷

3.32 Table 3.4 shows that the majority of staff working on a particular contract are caught by TUPE and therefore entitled to transfer across on a change of service provider. In practice, the majority of staff entitled to do so will transfer across. Where they have not, in fact, transferred this has generally been because it became clear during the contract notice period that the new service provider would, in practice, not have a (long term) need for those employees and they have therefore chosen not to transfer and instead sought alternative employment. The employees that are not caught by TUPE are those that are shared across contracts and perform more general management or support roles. RBM currently employs c. [60-80] people and Technicolor c. [20-40] people in such roles - see further Annex 13. The proportion of time that such "shared employees" devote to any particular contract fluctuates over time - they will have been trained to work across multiple clients and multiple technical platforms.

¹⁶ See paragraph 64 of the OFT Decision.

¹⁷ The UK Government's proposed changes to TUPE (published on 5 September 2013) will not affect the automatic transfer of staff who provide services primarily to one customer under the terms of their linear playout contract in the event that the customer switches provider (or moves its linear playout requirements in-house).

Table 3.4
TUPE summary of key contracts won/lost by the parties

Company	Previous service provider	New service provider (from date)	“Dedicated” ^[1] staff entitled to transfer under TUPE	No. of staff who actually transferred	Reason(s) for staff choosing not to transfer
Channel 4	In-house	[confidential]	[confidential]	[confidential]	[confidential]
Channel 5	RBM	[confidential]	[confidential]	[confidential]	[confidential]
Disney	Technicolor	[confidential]	[confidential]	[confidential]	[confidential]
		[confidential]	[confidential]	[confidential]	[confidential]
		[confidential]	[confidential]	[confidential]	[confidential]
		[confidential]	[confidential]	[confidential]	[confidential]
		[confidential]	[confidential]	[confidential]	[confidential]

Source: *Parties.*

Notes: [1] “Dedicated” employees are those who would be classed as having been “assigned to the organised grouping of resources or employees” under TUPE.
[2] [confidential].

3.33 Given the more generic nature of their roles, shared employees will be required by any linear playout service provider, such that the parties’ competitors are likely already to have the employee resource needed to deal with any new contract wins. If a new service provider requires further staff, it can either negotiate with the outgoing service provider to take across additional employees, or go into the market and hire one of the many freelancers operating.

Technology and equipment

3.34 When a new contract is awarded, the broadcaster will typically provide its chosen supplier with a detailed list of its requirements, which the supplier will use to prepare a “Bill of Materials”, which sets out all of the constituent parts of the infrastructure that it requires to service the customer’s linear playout requirements.

3.35 In order to satisfy these bespoke requirements, the service provider will typically (unless it already has the capability in-house) engage an external “systems integrator” who will be paid a fee by the linear playout provider to:

- (i) Purchase the relevant equipment (hardware and software) that is needed to service a customer’s linear playout contract (noting that the broadcaster may prescribe what is to be used for its contract);
- (ii) Assemble the playout suite on behalf of the linear playout provider; and
- (iii) Present the linear playout service provider with a solution which is ready to use.

3.36 This option is available to any company that wants to enter or expand in the UK linear playout market.¹⁸ Multiple systems integrators (such as **[confidential]**) exist in the market and are used as outlined above for both smaller and larger scale playout operations, thus eliminating the need for the linear playout provider itself to have any particular expertise in assembling this infrastructure. Such systems integrators would provide the “*skilled staff well in advance of the actual transfer of work*”¹⁹ mentioned by customers to the OFT.

Conclusions

3.37 The facts underpinning customer demand and supplier capability in the market provide no support for drawing a distinction between different “levels” of the outsourced linear playout market as the OFT proposes. The parties do, however, acknowledge that some linear playout contracts may be more complex than others,²⁰ particularly if they require the building of a bespoke playout suite. Alongside the BBC and ITV contracts, these would include Channel 4, Channel 5, BT Sport, ESPN, British Eurosport and Disney.

3.38 From a demand-side perspective, despite the need for bespoke contracts to meet their precise requirements, all broadcasters in the UK are contracting for the same core service, with little variation evident in the contractual documentation setting out the specifics of such service provision.

3.39 From a supply-side perspective, it is clear that bidder credibility, particularly for the more complex build-to-order contracts, cannot be assessed only by reference to differences in current contracts. Broadcasters’ bidding processes necessarily take place over a number of months to ensure a smooth transition to a new provider (see further Annex 14). Indeed **[confidential]**.

3.40 Furthermore, as we explore in more detail below, there are a number of other industry facts which undermine any conclusion that third parties (most notably Arqiva and Encompass) are not credible bidders for the BBC and ITV contracts:

- (i) Tender data show that they are strong competitors (**[confidential]**) (see in particular paragraphs 5.8 and 5.9). This is further supported by their current customer base.

¹⁸ For further details, see paragraph 3.27(iii) of the Response to the OFT’s Issues Paper.

¹⁹ See paragraph 64 of the OFT Decision.

²⁰ As the OFT also acknowledges - see for example paragraph 108 of the OFT Decision.

- (ii) As far as the parties are aware, [confidential] (see further paragraph 5.21) and both [confidential] and [confidential] were invited to tender for the current ITV contract (see further paragraph 5.23).
- (iii) Contracts in the industry do change hands and, in almost all cases (whether this is a change of provider, initial outsourcing, or contract renewal with the incumbent provider), this requires a complete rebuild/refit of the relevant facilities (see further paragraph 5.30). Contract terms are generally aligned with technology asset lives. As a result, all bidders for the next generation contract are in the same position of planning a build-to-order contract. [confidential]. There is therefore little, if any, incumbency advantage at the time of contract award (see paragraphs 5.18-5.26). If there is any incumbency advantage, it does not extend to undermining the *credibility* of third parties, nor would any such advantage be a Transaction-specific market outcome.
- (iv) Other companies currently active or expected to enter into the linear playout market are in an advantageous position due to the extra services they can offer which can be bundled with linear playout (e.g. Arqiva and GlobeCast both provide distribution services, while Atos and Accenture offer general IT outsourcing services and have established relationships with the BBC and ITV (see e.g. paragraph 5.22(iv)). Deluxe also benefits from having been [confidential] (see paragraph 5.31).

B. The OFT's Decision

- 3.41 Despite the evidence outlined above, the OFT concluded that the outsourced linear playout market should be segmented into “*Level one - ITV and BBC*”, “*Level two - other complex channels including Channel 4, Channel 5, BT Sport, and ESPN*” and “*Level three - other simple channels with pre-recorded content such as PBS.*”²¹
- 3.42 The OFT has based this segmentation on (i) reactivity and intervention levels, (ii) quality and service standards required, and (iii) scale and risk of certain channels. Within these factors, the OFT's Decision appears to have rested on the reactivity and intervention necessitated by live content; its conclusion that regional variations in programming, other schedule interruptions and changes, and quality and service standards add complexity is specified as “*taking a cautious approach*”.²²

²¹ See paragraph 57 of the OFT Decision.

²² See paragraphs 34, 37 and 43 of the OFT Decision.

- 3.43 Whilst it is true that there are some differences between individual channel contracts (this is largely a build-to-order market, with some contracts being more complex than others due to their bespoke facilities), an observation of the differences between channels does not amount to segmentation for the purposes of the competitive assessment of market dynamics. Nor does it determine whether rivals would be credible bidders for contracts put out to tender.
- 3.44 The remainder of this section considers each of the OFT's features in turn and reveals that they do not provide a justifiable basis for distinguishing the BBC and ITV from other channels such as Channel 4, Channel 5, BT Sport, British Eurosport, ESPN and Disney.²³ The parties acknowledge that some contracts may be more complex than others (as the OFT also does at paragraph 108 of its Decision), particularly if they require the building of a bespoke playout suite, but this does not distinguish the BBC and ITV as unique, nor does it limit the set of credible bidders to just Technicolor and RBM.

Reactivity and intervention

- 3.45 The OFT notes that "*reactivity and intervention*" relates to "*the degree and speed of adjustments needed to a broadcaster's programme schedule during the playout process.*"²⁴ Third parties identified a number of factors that may affect the level of reactivity and intervention required by a broadcaster: (i) live content; (ii) regional variations in programming; and (iii) other schedule interruptions and changes.

Live content

- 3.46 The OFT stated that "*when competitors were asked whether there was any subset of contract where the conditions of competition are significantly different, all respondents highlighted the role of live content as a key factor which distinguishes the most complex customers from others, and as a result limits the number of competitors for their business.*"²⁵
- 3.47 The parties acknowledge that live content can pose a challenge for playout providers because of the possibility of programmes over-running (e.g. long tennis matches, breaking news stories) or under-running (e.g. rain stops play) and the consequent need to rearrange the programme schedule. However, as

²³ The OFT has accepted that Channel 4, Channel 5, BT Sport, Disney, ESPN, UKTV and NBCU do, or may, fall within "Level Two": see paragraphs 57 and 108 of the OFT Decision. The OFT also noted that Sky's and Discovery's requirements were "similar" to those of "Level Two" channels.

²⁴ See paragraph 21 of the OFT Decision.

²⁵ See paragraph 22 of the OFT Decision.

the OFT itself acknowledges, the presence of live content is not unique to the BBC's and ITV's channels: the OFT states that "*the UK channels with the largest amount of live content are news channels (Sky News, BBC News 24 and CNN), followed by BBC One, Sky Sports, British Eurosport, and ITV1. Channels 4 and 5 also show some live content.*"²⁶

- 3.48 Figure 3.1 illustrates the percentage of live broadcasts (by number of hours) on a number of key UK channels, and provides examples of fluctuations in the degree of live content on channels at certain periods (e.g. when Channel 4 was broadcasting the Paralympics in 2012 and when Channel 5 broadcasts Big Brother). Figure 3.1 shows that the BBC and ITV are by no means outliers in terms of the extent of live programming they broadcast and that companies such as **Arqiva** and **Encompass** already have the capability to deal with the reactivity necessitated by certain live broadcasts and have much experience of doing so. **In-house** suppliers such as Sky, the BBC and Turner (CNN) also clearly have the same.

Figure 3.1
Percentage of live programming on main UK channels

[According to analysis performed by MAC in August 2013, the UK channels with the greatest percentage of live programming (by number of hours) are, in descending order, Sky News, Sky Sports News, BBC News, CNN, Channel 4 (when showing the Paralympics), BBC One, British Eurosport 1, Sky Sports 1, Channel 5 (when showing Big Brother), ITV 1, ESPN, Sky Sports 2, British Eurosport 2, BT Sport 2, BT Sport 1, Channel 5 and Channel 4].

- 3.49 In any event, the OFT fails to draw a distinction between the challenges live content creates for the broadcaster and those it produces for the linear playout service provider. See further Annex 4 which describes linear playout and interventions more generally and Annex 11 which provides case studies for particular live events on the BBC (Wimbledon fortnight), Channel 4 (the 2012 Paralympics) and ITV (French open tennis). These case studies highlight first that, in large part, complexity rests with the broadcaster, and secondly that the processes followed are all broadly the same, regardless of the channel. There is no reason to think that the processes would be materially different for Arqiva when it plays out e.g. ESPN and British Eurosport, or Encompass when it plays out e.g. Disney or Channel 5.
- 3.50 The OFT noted that third parties identified that a "*particular challenge is when live programming overruns in an environment where some points in the schedule - such as the timing of the news or entertainment programmes with*

²⁶ See paragraph 23 of the OFT Decision.

*large audiences - are extremely important to meet*²⁷, giving as examples the need for “*short-notice moves of programming from one channel to another*” and “*announcements to let viewers know what is happening*”. While such events do create the need for action on the part of the linear playout service provider, the action itself is by no means complex, is inherent in any playout suite, and will typically occur on the instruction of the broadcaster (see also Annex 4 and Annex 11).

- 3.51 The evidence shows that the amount of live content on a channel does not have any real bearing on a service provider’s ability to deal with live content: the action required is the same, the only difference being that it may be required more frequently (and this can be dealt with by bringing in extra staff). This is further supported by the fact that the amount of live content broadcast on any particular channel can vary significantly over time, linked as it is to the content that a broadcaster chooses for its schedule - in such circumstances, broadcasters do not change their linear playout service providers but merely require more resource.
- 3.52 Third parties stated in response to the OFT’s questions that the above factors “[*distinguished*] the requirements of mixed genre channels with live content from those of other channels with live content - in particular from news or sport only channels.”²⁸ The OFT therefore concluded that it may be relevant to distinguish between live content on mixed genre channels (i.e. BBC One and ITV1) from similar levels of live content on fixed genre channels (e.g. BT Sport).
- 3.53 However, the OFT’s suggestion that the BBC and ITV contracts should be analysed as a separate segment is not well founded:
- (i) **The nature of the actions/interventions is the same** regardless of whether the channel is fixed or mixed genre (see also Annex 4).
 - (ii) **Fixed genre channels are also affected by short notice changes** to scheduling: for example, if a sporting event on any of the main sports channels (e.g. BT Sport, ESPN, Sky Sports) overruns, it may have a knock-on effect on the scheduling of the next live sports event and require short-notice moves from one channel to another and live announcements to keep viewers informed. This can in fact be more complicated on fixed genre “live” channels on which there is less flexibility in terms of programme scheduling: on a mixed genre channel, there is more opportunity to play around with the schedule due to the presence of pre-recorded programming (which can be dropped and

²⁷ See paragraph 25 of the OFT Decision.

²⁸ See paragraph 25 of the OFT Decision.

shown at a later time/date) - this is simply not possible if a broadcaster has committed to showing multiple live events, even if these are of the same genre.

- (iii) **The majority of fixed genre channels also carry advertising:** changes to the timing of valuable advertising slots will require careful consideration to fit the progress of the sporting or other live event. The playout service provider will have to liaise with the broadcaster, who will decide when to take an advertising break.
- (iv) In fact, **fixed genre channels can necessitate a far greater degree of interventions than mixed genre channels: [confidential].** Arqiva, servicing as it does British Eurosport and ESPN, can clearly deliver the required level of service. Self-supply is also a credible option as Sky keeps the playout of all of its main UK sports channels **in-house**.

Table 3.5
RBM intervention statistics^[1]

Channel (listed alphabetically)	12 month total (September 2012- August 2013)	Monthly average
[confidential]	[confidential]	[confidential]
[confidential]	[confidential]	[confidential]
[confidential]	[confidential] ^[2]	[confidential]
[confidential]	[confidential]	[confidential]
[confidential]	[confidential] ^[2]	[confidential]
[confidential]	[confidential]	[confidential]

Source: *RBM.*

- Note: [1] Only top 10 channels shown - full details are available in Annex 1 to the Response to the Issues Paper. That Annex also includes details of Ericsson’s estimates of intervention statistics for its channels.
 [2] [confidential].

- (v) **BBC One and ITV1 are in any event not the only mixed genre channels.** Most notably, Channel 4 and Channel 5 are also mixed genre channels which show a significant amount of live content, which can, as illustrated by Figure 3.1, exceed the amount of live broadcasting on BBC One and ITV1 (e.g. when Channel 4 was showing the Paralympics and when Channel 5 broadcasts Big Brother). In addition, both of these channels show significant amounts of advertising, on both a national and regional basis. Given the financial importance of advertising to these channels, it is crucial that slots are managed

carefully and altered appropriately if live content necessitates changes to a broadcast schedule. Channel 5 is serviced by **Encompass** and although RBM currently holds the Channel 4 contract, **[confidential]**.

Regional variations in programming

- 3.54 The OFT stated that “*regional variations in programming were also highlighted by competitors as a contributor to reactivity and intervention and hence the complexity of playout.*”²⁹ Complexity particularly arises from “*the combination of regionality with other elements of reactivity and intervention, such as live content, short notice changes, or non-uniform programme lengths across regions.*”³⁰
- 3.55 Regional programming in and of itself does not entail a significant degree of reactivity, if any. Switching from a national to a regional feed will simply be part of a channel’s pre-prepared broadcast schedule and will not require further intervention on the part of the playout service provider: at the scheduled time, the national feed will switch to the appropriate regional feeds. All of this happens in accordance with the set slots in a channel’s broadcast schedule and is assisted by the automation software used by linear playout providers, e.g. if Technicolor needs to make a change to the schedule broadcast on the main ITV network, this will automatically flow through to the regions. This is supported by **[confidential]**.”
- 3.56 As for live content, the challenges posed by regional variations rest largely with the broadcaster rather than the linear playout service provider. **[confidential]**. In addition, many contracts will prescribe procedures on how the linear service provider should deal with an emergency or last-minute change in schedule. See further Annex 4.
- 3.57 The OFT noted that “*one supplier described the complexity of ITV’s regional playout as akin to providing playout for a large number of channels.*”³¹ Continuing with that analogy, there are a number of broadcasters other than the BBC (**[confidential]**) and ITV (**[confidential]**) which tender their playout requirements on the basis of a large number of channels and which would, on that supplier’s analysis, be akin to servicing ITV:
- (i) **Disney**: the ongoing Disney tender is **[confidential]**.

²⁹ See paragraph 28 of the OFT Decision.

³⁰ See paragraph 30 of the OFT Decision.

³¹ See paragraph 33 of the OFT Decision.

- (ii) **Turner:** the recent Turner tender was for **[confidential]** and was won by **Arqiva ([confidential])**.
- (iii) **Discovery:** Discovery went out to tender for playout services for multiple channels in 2010 but ultimately decided to bring these **in-house**.

Other schedule interruptions and changes

- 3.58 The OFT considered that “*channels which have news flashes and other interruptions, as well as those which have late schedule changes, have more complex linear playout requirements.*”³²
- 3.59 The OFT acknowledged that “*in some instances, these interruptions are a requirement placed on the channel as a result of their status as Public Service Broadcasters - these factors affect BBC, ITV, Channel 4, and to some extent Channel 5.*”³³ There is no reason for separating out Channel 5 from the other Public Service Broadcasters: the playout of its channels is just the same. The OFT appears to acknowledge this at paragraph 108 of its Decision where it notes that “*the level two category of channels is broader than level one in terms of reactivity and complexity with perhaps Channel 4 and Channel 5 (both channels having mixed genre content with regional advertising feeds) being at the higher end of the spectrum of complexity in this category.*” In addition, in 2008 Ofcom approved a request from Channel 5 for it to be added to the same category of television programme services as BBC One, BBC Two, ITV1 and Channel 4 for the purposes of the listed events rules. These are the broadcasters which must be given a genuine opportunity to acquire the rights to broadcast listed events (e.g. live rights to the Olympics, FIFA World Cup, European Football Championship, Wimbledon).³⁴
- 3.60 Further, such interruptions are not unique to the Public Service Broadcasters, e.g. a number of countries in the EU, including the UK and France, operate “child abduction alert systems” designed to produce a coordinated response by the emergency services and the media if a child is abducted.³⁵ This applies to all channels and means that all playout providers need to have the resources and expertise to manage schedule interruptions. These are the same resources and expertise that are used for other live content/regional interventions - i.e. an ability to push a button to make the change

³² See paragraph 37 of the OFT Decision.

³³ See paragraph 35 of the OFT Decision.

³⁴ See <http://stakeholders.ofcom.org.uk/broadcasting/tv/channel-5-listed/>.

³⁵ See paragraph 2.39 of the Response to the Issues Paper.

instantaneously and make a live announcement if required. The only difference is that channels which carry more live or regional content make such interventions more often; the nature of the action required is exactly the same.

- 3.61 As the OFT acknowledged, advertising can also create complexity, particularly due to last minute changes to advertising slots. However, the OFT noted that the BBC commented that “*whilst last minute changes to advertising slots can add complexity they do not add any complexity to the subsequent programme schedule as it would not lead to any knock on effects.*”³⁶ This is an oversimplification of the playout of advertising (see further Annex 4) - although the amount of advertising that can be shown in any given period on a particular channel is regulated, there is scope for a significant degree of variation and alteration within any slot. This is particularly true if adverts are changed or sold at the last minute which may necessitate a rapid reshuffle of the schedule to fill the allotted time period in full, or when advert breaks are of variable duration such as during live programming (e.g. handling advertising on Channel 5 during live boxing as the duration of a fight is very unpredictable, and the broadcaster is likely to want to include commercial breaks between rounds). These issues can arise on any channel that carries advertising, including numerous channels serviced by the parties’ competitors (e.g. Channel 5 and Disney (both serviced by **Encompass**) and ESPN and British Eurosport (both serviced by **Arqiva**)). Importantly, they do not arise on any BBC channel since the BBC’s channels do not display advertising. The actions required to make changes to advertising at short notice are, in effect, the same as for live and regional changes (see further Annex 4).

Quality, service and regulatory requirements

- 3.62 The OFT considered that “*based on third party comment, and taking a cautious approach...while service level standards, specialist graphics, access services, and multi-lingual content may contribute to the complexity of linear playout, they do not do so to a significant extent. In particular, they may not weigh as heavily on the issue of complexity and reactivity as does live content and regional variation.*”³⁷ The parties agree that there is no justification for drawing a market segmentation on the basis of any of these factors. These factors do, however, further blur any attempt to draw a sharp distinction between “Level One” and “Level Two” contracts:

- (i) **Service level standards:** as discussed in paragraph 3.8 above, service level standards are generally the same across all main broadcasters: the BBC and ITV are by no means outliers.

³⁶ See paragraph 36 of the OFT Decision.

³⁷ See paragraph 43 of the OFT Decision.

- (ii) **Specialist graphics:** specialist graphics are used to deliver a channel's onscreen brand and channel navigation (i.e. between programmes and between channels). Specialist playout graphics equipment is used for this purpose; this is increasingly an automated process and common to all channels. Some of the most complex graphics are on channels such as MTV which use onscreen graphics alongside Twitter or SMS feeds with track, artist and other topical information. However, as all channels use specialist graphics, the skills involved are broadly comparable across all playout service providers.
- (iii) **Access services:** the provision of access services (which involves the creation of subtitling and audio description files) is a separate product market from linear playout and is not an area in which the parties overlap. The presence of subtitling or audio description on a programme has little, or no, effect on the playout process. Access services have been part of the linear television service offer for many years. As a result, the delivery mechanisms have become mature with standard mechanisms of delivery across the industry.³⁸
- (iv) **Multi-lingual content:** the broadcast of multi-lingual content on a channel can increase the complexity of the playout process. By way of illustration, the playout of Disney's channels requires monitoring by staff in over 10 languages. In addition, when Discovery broadcast Oprah Winfrey's interview with Lance Armstrong in January 2013, this went out live across the world in over 70 languages. This means that if a playout service provider is to service multi-lingual channels, it requires additional staff with local language capabilities, who have to pay specific attention to language-related issues (e.g. incorrect dubbing) in real-time.

3.63 The OFT also concluded that "*the requirement for disaster recovery has little effect on competition for primary linear playout.*"³⁹ The parties agree with this conclusion.

Scale and risk

³⁸ **Subtitles** can be delivered in three ways: (i) embedded in the content (used almost always for advertisements), (ii) standard EBU format files for insertion as the programme plays to air (most common for long-form content), or (iii) as data stream for live programmes. These delivery mechanisms are all very well established and are interoperable with EBU or Digital Television Group standards used by all suppliers.

The standard method of delivery for **audio description** is to wrap the additional audio description file into the programme file prior to playout. The audio description then becomes an integral part of the programme asset, making the playout process straightforward even if the audio description authoring was originally performed by a third party.

³⁹ See paragraph 44 of the OFT Decision.

- 3.64 The OFT noted that “in addition to complexity, the OFT’s market testing provided evidence that the expense and risk involved in different linear playout services provides an additional distinguishing feature between channels’ requirements. Whilst this is in part linked to complexity, it is also driven by the number of channels and amount of content featured on the channel”.⁴⁰
- 3.65 Contrary to the OFT’s assertion, it is simply not the case that the BBC’s and ITV’s requirements necessitate more people and expenditure risk on the part of the playout provider. Employee numbers are summarised in Table 3.6 (see also Annex 13), and capital expenditure is considered in the paragraphs that follow.

Table 3.6
Channel playout staff overview

Contract (listed alphabetically)	No. of channels	No. of “dedicated” staff^[1]	Average no. of staff per channel
BBC	[confidential]	[confidential]	[confidential]
BT Sport	[confidential]	[confidential]	[confidential]
Channel 4	[confidential]	[confidential]	[confidential]
Channel 5 ^[2]	[confidential]	[confidential]	[confidential]
Disney ^[2]	[confidential]	[confidential]	[confidential]
ITV	[confidential]	[confidential]	[confidential]
NBCU	[confidential]	[confidential]	[confidential]

Source: Parties.

- Notes: [1] “Dedicated” employees are those who would be classed as having been “assigned to the organised grouping of resources or employees” under TUPE.
 [2] Past contract.

- 3.66 Capital expenditure/upfront investment is amortised over the life of the contract such that upfront costs are reflective of contract value and are, in any event, not incurred until after the contract has been awarded (and some contracts - see Annex 5 - include “upfront fees” for the period between signing and start-of-service). By way of example of upfront capital expenditure:
- (i) [confidential].
 - (ii) [confidential].
 - (iii) [confidential].

⁴⁰ See paragraph 45 of the OFT Decision.

3.67 The OFT noted that some third parties “*felt that there is also risk involved in making the necessary investment given the low likelihood of winning certain contracts, driven by the importance of reputation and experience required by some broadcasters.*”⁴¹ However, this ignores two key issues:

- (i) Costs are not incurred until after the contract has been awarded. In the meantime, the only costs associated with bidding are the management time involved in preparing the bids (see further Annex 14). Whilst this is not trivial (management time costs can run to many thousands of pounds), it is an ordinary course “cost of business” and many providers will have some dedicated sales staff employed to run these processes.
- (ii) Broadcasters are incentivised to run competitive tender processes, ensuring that incumbent suppliers cannot be sure of renewing their contracts. **[confidential]**. **[confidential]**. **[confidential]**. This is a strong indication that reputation and experience linked purely to “Level One” linear playout is not a prerequisite. **[confidential]**.⁴²

3.68 It is also important to remember that when Technicolor won the ITV contract it had serviced only one “complex” channel (Disney). In other words, it had less experience than Arqiva and Encompass do now.

3.69 The OFT also draws attention to “*the risks created by the combination of high service levels, complex requirements, and financial and reputation costs associated with failure by the playout provider.*”⁴³ However, as explained at paragraphs 3.8-3.10 above, **[confidential]**. It is also incorrect to assume that a large global brand like Disney or NBCU would be less risky than the BBC or ITV.

Conclusions on OFT approach

3.70 Whilst it is right that there are some differences between individual channel contracts, an observation of the differences between channels does not justify a conclusion that the BBC and ITV contracts are in a clear market segment of their own. Linear playout services do not differ significantly between channels. While some channels may be more reactive (i.e. require more interventions) than others, reactivity itself is a core skill set of any linear playout contract. Coping with more reactivity is also simple - it just involves hiring more people.

⁴¹ See paragraph 46 of the OFT Decision.

⁴² See further Annex 8.

⁴³ See paragraph 47 of the OFT Decision.

4. GEOGRAPHIC MARKET DEFINITION

4.1 In the OFT's 2005 decision in the Creative Broadcast Services case, it concluded that the market for linear playout services was UK-wide. Although there are suggestions in the market that the geographic scope is broadening (see Part A below), the parties acknowledge that, at least currently, some UK customers prefer national solutions and have therefore considered the market for the purposes of this case as UK-wide. The OFT agrees with this conclusion whilst acknowledging some cross-border activity in the market (see Part B).

A. The facts

4.2 Linear playout services can be - and often are - provided on a cross-border basis within a number of European countries.⁴⁴ Advances in technology have facilitated the cross-border provision of linear playout services, with broadcasters becoming increasingly willing to accept that such services need not be provided locally. There are numerous examples of cross-border provision of playout services.⁴⁵ [confidential].⁴⁶ [confidential]⁴⁷ [confidential].

4.3 That said, the parties accept that cross-border linear playout remains relatively limited and that some UK customers prefer national solutions, at least in the medium term (in the longer term, the parties believe that there will be much more scope for cross-border provision for the reasons set out above). They have therefore prepared relevant data for the purposes of this Initial Submission on a UK-wide basis. In any event, there is no plausible basis for considering a market narrower than the UK⁴⁸ and therefore this has not been considered further in this Initial Submission.

B. The OFT's Decision

4.4 The OFT concluded that the merger should be "*considered on the basis of a UK frame of reference*".⁴⁹

⁴⁴ See further paragraphs 8.34 and 9.20 of the parties' Informal Submission.

⁴⁵ [confidential].

⁴⁶ [confidential].

⁴⁷ See Annex 8.

⁴⁸ See further paragraph 9.22 of the parties' Informal Submission.

⁴⁹ See paragraph 73 of the OFT Decision.

- 4.5 In relation to the examples of cross-border provision of playout services, the OFT notes that *“this approach is largely taken only by international broadcasters”* and that there is *“little evidence that UK broadcasters would consider (in response to a price rise) using a linear playout provider based outside the UK for the playout of their UK channels”*.⁵⁰ The OFT notes that this is *“particularly true for level one and level two customers”* due to various factors including *“the value of face-to-face meetings and the ability to manage schedule changes”*.⁵¹ The parties note, however, that Eurosport (a “Level Two” broadcaster) plays out its UK channels from France.
- 4.6 Further, the OFT itself received evidence *“that customers may be willing to consider a provider with no current presence in the UK but with an intention to invest”*.⁵² Although the OFT goes on to discount this on the grounds that it could not find any evidence *“that any current providers without a UK presence have the ability or incentive to do so and very few, if any, have bid for contracts in the UK in recent years”*,⁵³ it is supportive of the parties’ broader case that credibility is not determined by the over-simplistic question of whether the bidder currently offers a mirror-image service but whether it is able to do so within the timeframe of the tender in question.

⁵⁰ See paragraph 69 of the OFT Decision.

⁵¹ See paragraph 69 of the OFT Decision.

⁵² See paragraph 70 of the OFT Decision.

⁵³ See paragraph 70 of the OFT Decision.

5. HORIZONTAL UNILATERAL EFFECTS

- 5.1 In **Part A** of this Section we show - on the basis of markets facts - that the Transaction will not give rise to an SLC on the market for linear playout services (or any segment of that market).
- 5.2 In **Part B** of this Section we then rebut the assertions upon which the OFT reached a contrary conclusion, at least as regards “Level One” linear playout contracts.

A. The facts

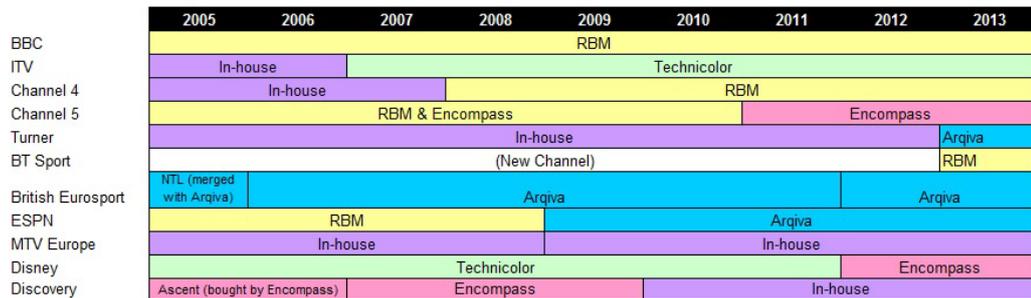
- 5.3 We start this Section with an introduction to the competitive dynamics of this market. Building on that foundation, we show that there is no plausible basis for concluding - on the balance of probabilities - that the Transaction will give rise to an SLC. This conclusion is supported, in particular, by the following:
- (i) Evidence that there are at least four active competitors in the UK and that Technicolor is - relative to Arqiva and Encompass - a weak competitive presence in the market;
 - (ii) That there are credible third party competitors even if we consider only the BBC and ITV contracts;
 - (iii) There is no evidence that the merging parties are uniquely close competitors;
 - (iv) Barriers to entry and expansion are surmountable;
 - (v) In-house supply is a real competitive constraint in this market; and
 - (vi) Customers can, and do, exercise buyer power.

The competitive dynamics of the market

- 5.4 The outsourced linear playout market is a bidding market. As a result, demand is “lumpy” (only a few contracts are tendered each year) and there are strong incentives on providers to compete for those contracts.
- 5.5 At their most basic level, the competitive dynamics of the UK linear playout market are illustrated by Figure 5.1:
- (i) This is a market where most contracts are still in their first generation of outsourcing: certain broadcasters have not recently (or ever) gone out to tender and so have not had the opportunity to test the competitive nature of the market since their initial move to outsourced provision (e.g. BBC, ITV, Channel 4).

- (ii) Recent tender wins clearly show that Arqiva and Encompass are strong competitors, who are more than credible bidders for the BBC and ITV contracts (see e.g. award of contracts by Channel 5, Turner, British Eurosport, ESPN and Disney).
- (iii) Switching between third party supply and in-house supply is also viable, even for contracts which are “built-to-order” (e.g. Discovery).

Figure 5.1
Illustration of competitive landscape of UK linear
playout market (2005-2013)



Source: Ericsson and RBM.

Active competitors in the UK linear playout market

5.6 The parties are aware of at least 19 tenders which have taken place in the last five years. These tenders indicate that there are at least four active competitors in the market and that Technicolor has consistently been the weakest of those four, and has also lost out in tenders to other third parties. This is particularly true of the more complex tenders requiring bespoke playout suites and is illustrated by Table 5.1. Further details are provided at Annex 12.

Table 5.1
Linear playout tenders (2009-2013), [confidential] ^{[1][2][3]}

	Contract (date awarded)	Bidders invited to tender	Shortlist	Winner
[confidential]	BBC Worldwide (Africa, HD and Nordic Channels) (2011)	[confidential]	[confidential]	RBM
[confidential]	BBC Worldwide (Poland) (2010)	[confidential]	Unknown	GlobeCast
[confidential]	Box TV (2011)	[confidential]	Unknown	RBM
[confidential]	British Eurosport (2012)	[confidential]	[confidential]	Arqiva
[confidential]	BT Sport (2013)	[confidential]	[confidential]	RBM

	Contract (date awarded)	Bidders invited to tender	Shortlist	Winner
[confidential]	Channel 5 (2011)	[confidential]	[confidential]	Encompass
[confidential]	CSC (2013)	[confidential]	[confidential]	WRN
[confidential]	Discovery (2010)	[confidential]	Unknown	In-house
[confidential]	Disney (2012)	[confidential]	Unknown	Encompass
[confidential]	Disney (ongoing)	[confidential]	[confidential]	Ongoing
[confidential]	ESPN (2009)	[confidential]	[confidential]	Arqiva
[confidential]	GBF Media (2012)	[confidential]	Unknown	GlobeCast
[confidential]	ITV International (2012)	[confidential]	Unknown	GlobeCast
[confidential]	JSTV (2011)	[confidential]	Unknown	RBM
[confidential]	MTV Europe (Viacom) (2009)	[confidential]	[confidential]	In-house
[confidential]	PBS (2010)	[confidential]	Unknown	RBM
[confidential]	Renault TV (2010)	[confidential]	[confidential]	Vision 247
[confidential]	Top Up TV (2010)	[confidential]	Unknown	WRN
[confidential]	Turner (2013)	[confidential]	[confidential]	Arqiva

Source: *Ericsson and RBM.*

- Notes: [1] Contract values provided in Annex 12.
[2] **Third party competitors shown in red text, in-house shown in blue.**
[3] Limited to contracts of which the parties are aware.
[4] **[confidential].**
[5] **[confidential].**

5.7 The following paragraphs consider the relative successes of each of the four most frequently cited competitors individually.

5.8 **Arqiva:**

- (i) Has won three contracts since 2009 - Turner, ESPN and British Eurosport, all of which should fall within the OFT's hypothetical "Level Two" segment.⁵⁴
- (ii) **[confidential]**⁵⁵, **[confidential]**.⁵⁶
- (iii) Arqiva has lost only **[confidential]** "Level Two" contracts for which it has tendered: **[confidential]** (having won Turner, British Eurosport and ESPN). The complex nature of these customers' channels is clear evidence that Arqiva does in fact have the capability to service the entire spectrum, and that it has been highly successful in winning business, even at the upper end of contract complexity.
- (iv) Arqiva's position is further strengthened by its ability to offer global distribution services. All broadcasters require distribution services as well as linear playout to ensure that their content reaches viewers' TV screens: an ability to offer a "one stop shop" package for these services therefore gives Arqiva a unique competitive edge, **[confidential]**. Neither RBM nor Technicolor offer distribution services and therefore have to purchase them from third parties (including Arqiva) at a price that includes a margin for the third party.

5.9 **Encompass:**

- (i) Encompass has won two contracts since 2009 - Channel 5 and Disney, both of which should fall into the OFT's hypothetical "Level Two" segment.⁵⁷
- (ii) **[confidential]**.
- (iii) The tender data show that **[confidential]**.

5.10 **RBM:** RBM has won five contracts since 2009 - BT Sport, BBC Worldwide (Africa, HD and Nordic Channels), JSTV, PBS and Box TV. Only one of these

⁵⁴ ESPN is specifically named in paragraph 57 of the OFT Decision as a "Level Two" channel. By analogy, British Eurosport and Turner should also be included in that category: the former has extensive live broadcasting of sports content and advertising; and the Turner contract covers 19 channels, all of which broadcast advertising and some of which require an ability to deal with multiple languages.

⁵⁵ BT Sport is specifically named in paragraph 57 of the OFT Decision as a "Level Two" channel.

⁵⁶ **[confidential]**

⁵⁷ Channel 5 is specifically named in paragraph 57 of the OFT Decision as a "Level Two" channel. The OFT acknowledges (Decision, at paragraph 108), that Disney may be a "Level Two" channel. **[confidential]**

channels would fall into the OFT's hypothetical "Level Two" segment: BT Sport (where the other shortlisted bidder was [confidential]).

5.11 Technicolor:

- (i) Has not won a single linear playout services tender since 2009, despite having been invited to participate in [5 to 15] such tenders over this period.⁵⁸ Further, it has lost three customers to competitors over the same period (BBC Worldwide Poland - lost to GlobeCast; Disney - lost to Encompass; and CSC - lost to WRN).
- (ii) Has suffered from a poor reputation (at least among some market participants) following the 2010 football World Cup incident, [confidential]. These perceptions have not materially changed following Ericsson's ownership of Technicolor since mid-2012.⁵⁹ Indeed, as recently as this month, press commentators have continued to refer to the World Cup incident.⁶⁰

5.12 The OFT's conclusion that Encompass and Arqiva "*appear to be significantly constraining the parties and in particular RBM*" in the "Level Two" segment is therefore consistent with the market evidence cited above.⁶¹

5.13 What is, however, inconsistent, is the OFT's effective conclusion that:

- (i) Technicolor is deemed to be a credible competitor for "Level Two" contracts despite not having [confidential] won, any such contracts for over four years.⁶²
- (ii) Neither Arqiva nor Encompass can be considered credible competitors for "Level One" contracts despite their resounding success in "Level Two" contracts.⁶³

⁵⁸ Technicolor has only secured two contracts since 2009: (i) [confidential] and (ii) one channel playout services for Fatstone, a UK-based service for a Norwegian customer. [confidential]

⁵⁹ See further paragraphs 3.11 to 3.15 of the Response to the OFT's Issues Paper.

⁶⁰ See e.g. <http://www.dailymail.co.uk/sport/football/article-2455493/Adrian-Chiles-trouble-ITV-bosses-bad-taste-Polish-builder-gag.html#ixzz2hUjEFreQ>, Mail Online, 11 October 2013.

⁶¹ See paragraph 120 of the OFT Decision.

⁶² See paragraph 121 of the OFT Decision.

⁶³ See paragraph 95 of the OFT Decision.

- 5.14 Pointing to Arqiva's and Encompass' lack of success in relation to "Level One" contracts does not justify this inconsistency. No such contracts have been tendered in recent years and, as described in detail in Section 3, such a distinction is more imagined than real. Further, it is contradicted by **[confidential]**, and to participate in **[confidential]**.
- 5.15 The evidence above clearly confirms that **Encompass** and **Arqiva** are credible competitors for all linear playout contracts, and we explore this further in the remainder of this Section 5.
- 5.16 Further, the tender data also highlight the recent successes of other, smaller competitors:
- (i) **GlobeCast**: Has won three contracts since 2009. In 2010, it won the BBC Worldwide Poland contract (previously with Technicolor) **[confidential]**. In 2012, GlobeCast won the ITV International contract, in spite of the fact that ITV currently uses Technicolor to provide it with linear playout services for its main channels. GlobeCast is also believed to have won the GBF Media contract in 2012. GlobeCast's position is further strengthened by its ability to offer global distribution services. All broadcasters require these services as well as linear playout to ensure that their content reaches viewers' TV screens: an ability to offer a "one stop shop" package for these services therefore gives GlobeCast a competitive edge. Neither RBM nor Technicolor offer distribution services and therefore have to purchase them from third parties (including GlobeCast) at a price that includes a margin for the third party.
 - (ii) **WRN** is also gaining traction as a competitor, having won the CSC contract from Technicolor in March 2013, **[confidential]**. WRN also won Top Up TV as a customer in 2010. WRN's position is further strengthened by its ability to offer distribution services. As discussed above, all broadcasters require these services and an ability to offer a bundled package gives WRN a competitive edge.
 - (iii) **[confidential]** have been shortlisted in relation to the ongoing Disney tender.
 - (iv) The tender data also show that there are a number of other competitors active in the market, such as **Portland** and **Vision 247**.
- 5.17 In addition to the companies named above who are already bidding for UK linear playout contracts, the evolution to increasingly digital- and software-based technology has created opportunities for companies active in closely-related IT outsourcing, such as Accenture and Atos. Further details on these companies, and all of those named above, are included in Annex 10.

Any specific concerns regarding the BBC and ITV are unfounded

- 5.18 As is clear from the evidence described at Section 3, there is no justification for pursuing a frame of reference which includes only the BBC and ITV, whether from a demand- or supply-side perspective.
- 5.19 Further, the BBC and ITV are still in their first generation of outsourcing. The mere fact that other competitors have not yet provided linear playout services to these channels does not mean that they would not be credible bidders for the next generation contracts. Technicolor must have been a credible bidder when it won the ITV contract in 2007. Yet, at that time, it had less experience than Arqiva and Encompass have today.
- 5.20 The BBC and ITV contracts come up for renewal in March 2017 and **[confidential]** respectively and significant competition is expected for these contracts, as outlined below.

BBC

- 5.21 The BBC has already indicated its intention to look to alternative providers for its linear playout needs. For example, in its recent VEAT Notices (see Annex 8) and press comments surrounding the RBM contract extension, the BBC says that it is looking to move to a “*new solution and operating model*” from April 2017. **[confidential]**.⁶⁴ **[confidential]**.

- 5.22 **[confidential]**:

- (i) **[confidential]**.
- (ii) **[confidential]**⁶⁵ **[confidential]**.
- (iii) **[confidential]**.
- (iv) **[confidential]**.

ITV

- 5.23 Technicolor’s contract with ITV is due to expire in **[confidential]**. Moreover, despite Technicolor being ITV’s core service provider for linear playout, it was not selected to provide the linear playout services for ITV’s new international channel, ITV International. Instead, ITV chose GlobeCast for this contract.

⁶⁴ See also paragraph 3.67(ii) **[confidential]**.

⁶⁵ **[confidential]**.

[confidential].⁶⁶ In addition, when the ITV contract was first tendered in 2007, **[confidential]** and **[confidential]** were also invited to tender for the business. Although Technicolor is **[confidential]**.

- 5.24 The above illustrates how, as incumbent suppliers respectively for the BBC and ITV, RBM and Technicolor do not necessarily have an inherent advantage over other bidders. This is all the more important given the timescales to contract delivery discussed above. Further, **[confidential]** (see further Annex 5).
- 5.25 RBM and Technicolor will therefore be in the same position as any third party bidders once the BBC and ITV procurement processes commence.
- 5.26 In sum, given that these contracts come up for renewal in several years' time and that any barriers to entry are surmountable (see further paragraphs 5.30-5.31 below), credible competition is expected not only from current linear playout providers such as Arqiva (with its distribution capabilities) and Encompass, but also from potential entrants such as Atos and Accenture, which already have established relationships with broadcasters.⁶⁷

Parties are not uniquely close competitors

- 5.27 In addition to demonstrating the strength of third parties (most notably Arqiva and Encompass), the data above also confirm (contrary to the OFT's assertion at paragraph 89 of its Decision) that the parties are not each other's closest competitors.
- 5.28 No customers have switched between the parties since 2009. Each party has, however, lost contracts to third party competitors.⁶⁸ For example:
- (i) **RBM lost the Channel 5 contract to Encompass in 2011. [confidential].**
 - (ii) **Technicolor lost the Disney contract to Encompass in 2012 [confidential].⁶⁹**
 - (iii) **RBM lost the ESPN contract to Arqiva in 2009.**

⁶⁶ **[confidential]**.

⁶⁷ See further paragraph 3.27 of the Response to the OFT's Issues Paper.

⁶⁸ See Section 10(C) of the Informal Submission.

⁶⁹ See paragraph 10.10(ii) of the Informal Submission.

- 5.29 Furthermore, as far as the parties are aware, there have been no occasions in the last four years where **[confidential]** in relation to the same tender process (either for “Level Two” channels or within the wider UK linear playout market as a whole) - see further Annex 12.

Barriers to entry and expansion are surmountable

- 5.30 The parties acknowledge that if a company wins a linear playout tender, it is likely to need to make a degree of investment to satisfy the “build-to-order” aspects of that contract. However:

- (i) As the timeline shows (see Annex 14), these costs are not incurred until after the contract has been awarded and therefore sunk costs are limited;
- (ii) At least in the case of staffing needs, these are largely addressed by TUPE and available staff/freelance personnel for hire (see further paragraph 3.31);
- (iii) Any additional up-front investment required for each linear playout services contract is generally amortised over the expected life of the contract (see further paragraph 3.69); and
- (iv) In a build-to-order context, the need for investment applies equally to both incumbent suppliers and potential market entrants.

- 5.31 Customers can also sponsor new entry. For example, in the adjacent access services⁷⁰ market, the BBC recently tendered its access services requirements and created a highly competitive process with just two credible bidders (**[confidential]**). **[confidential]**.⁷¹ ITV is in a similar position in this respect. Many service providers (including new entrants) would jump at the prospect of bidding for the next generation ITV contract if encouraged to so by ITV.

In-house supply is a significant competitive constraint

- 5.32 Every broadcaster takes “make or buy” decisions in relation to linear playout services on an ongoing basis. The fact that a broadcaster may have outsourced linear playout services for one contract cycle (typically seven years) does not prevent it from bringing these services back in-house at the end of that contract (see e.g. Figure 5.1).

⁷⁰ Access services involve the creation of additional files to help the audio and visually impaired.

⁷¹ **[confidential]**.

- 5.33 We consider below the practicalities of bringing playout services back in-house to demonstrate that in-house provision is a credible alternative to outsourcing such that it presents a competitive threat to bidders. We then highlight some specific industry acknowledgement (including from ITV and BBC) of the credibility of in-house service provision by broadcasters.

Staff

- 5.34 As described at paragraph 3.31(ii) above, the operation of TUPE means that any staff that are dedicated to a particular contract will likely transfer across to the broadcaster should an in-house option be chosen. **[confidential]**. **[confidential]**.
- 5.35 Should a broadcaster find that it requires additional staff, these can easily be hired from the pool of freelancers active in the linear playout market (see paragraph 3.31(i) above).
- 5.36 In addition, some major broadcasters, such as the BBC, already have significant in-house playout operations. This will make a shift to in-house service provision even easier:
- (i) **BBC:** retains a team of broadcast engineers (and appropriate equipment) for the playout of its BBC News operation and Nations and Regions services. **[confidential]**.
 - (ii) **ITV:** has maintained a team of approximately **[50-70]** technical staff who have relevant experience and skill.

Technology and Infrastructure

- 5.37 Equipment is typically purchased for the broadcaster's requirements at the outset of the contract and amortised over the life of the contract. The relevant equipment is the same and is supplied by the same external suppliers whether linear playout is provided in-house or by an outsourced supplier. However, broadcasters typically enjoy two particular advantages over their outsourcing counterparts in the procurement of equipment:
- (i) Broadcasters' balance sheets are often stronger than those of outsourced playout suppliers, so they are able to secure better credit terms. ITV in particular has recently been described as a "*cash-generative, capex-light*" business.⁷²

⁷² See "UK companies sit on giant piles of cash" by Chris Flood, 29 September 2013, Financial Times, available at <http://www.ft.com/cms/s/0/379d917a-25c9-11e3-8ef6-00144feab7de.html#axzz2hiGpX6FA>.

- (ii) Broadcasters are also very knowledgeable about their own operations and could find the funds required to make the investments required to bring their playout services back in-house. Since several broadcasters, including the BBC, ITV and Channel 4, are still in their first generation of playout services contracts, it is incorrect to assume that they cannot or would not switch back to in-house provision, as some other broadcasters (e.g. Discovery) have done. In the case of the BBC, they continue to maintain highly capable and up-to-date facilities for the in-house provision of playout for live news and regional programming, played out from in-house regional playout centres in Scotland, Wales and Northern Ireland, and the playout in Scotland of a full channel, BBC Alba.

5.38 Broadcasters can also make use of the specialised systems integrators discussed at paragraph 3.35 above.

Acknowledgement by industry participants

5.39 A number of different sources support the credibility of in-house playout as a competitive constraint on outsourced bidders:

- (i) First and foremost, the number of UK broadcasters who currently choose to maintain some or all of their linear playout in-house supports a conclusion that in-house supply is credible.⁷³
- (ii) Further, major customers have explicitly referred to the possibility of in-house playout. For example [confidential].⁷⁴ [confidential].⁷⁵
- (iii) [confidential].
- (iv) The tender data (Table 5.1 and Annex 12) show in-house competing against third party options.
- (v) Specifically as regards the BBC, the OFT is wrong to dismiss its in-house playout as being only for “*less complex channels that are either small scale non-reactive channels or channels where playout is largely editorial in function, such as BBC News*”.⁷⁶ The news channels in particular contain a significant amount of live programming which often

⁷³ See paragraphs 8.13 to 8.19 of the Informal Submission and paragraphs 3.20 to 3.22 of the Response to the Issues Paper.

⁷⁴ [confidential]

⁷⁵ [confidential]

⁷⁶ See paragraph 98 of the OFT Decision.

necessitates changes at short notice. The BBC also operates two playout centres for its Nations and Regions services in Cardiff and Glasgow and has recently made a significant investment in New Broadcasting House, its new premises on Regent Street (which include a brand new BBC News linear playout suite). The BBC therefore retains a team of broadcast engineers and appropriate equipment for playout purposes, equally as capable as those of the outsourced linear playout service providers. [confidential].⁷⁷ [confidential]. The BBC therefore clearly has the technical knowledge, capability and experience to perform in-house linear playout. Further, the BBC's linear playout contract with RBM [confidential].

- (vi) ITV has also recently decided to bring back in-house certain ancillary services that were previously outsourced (e.g. content storage, which is currently provided by RBM).

Customers have significant buyer power

5.40 The BBC and ITV are expected to tender their next contracts competitively (see paragraphs 5.21-5.26). The BBC and ITV are clearly large, sophisticated players who can encourage or sponsor entry to ensure competitive rivalry among bidders, regardless of how many bidders there are.

5.41 The parties acknowledge that a buyer's negotiating strength will be influenced by the alternatives available to it.⁷⁸ However, the above shows that buyers in this market:

- (i) Have several alternative suppliers to whom they can credibly switch (see paragraphs 5.6-5.17);
- (ii) Have the ability to sponsor new entry (see e.g. paragraph 5.31); and
- (iii) Have the ability to enter the market themselves (see paragraphs 5.32-5.39).

It should therefore be uncontroversial that they are, in fact, able to exercise their bargaining power.

⁷⁷ [confidential].

⁷⁸ OFT and CC Merger Assessment Guidelines at paragraph 5.9.2-5.9.3.

Conclusions

- 5.42 A conclusion that only RBM and Technicolor are credible bidders for the BBC and ITV contracts is not supported by market facts, as it ignores the large number of third parties who are, clearly, credible. There are also no barriers to entry or expansion which would prevent those third parties from delivering those contracts. Further, there is no evidence to conclude that the parties are uniquely close competitors. This, coupled with the constraint of in-house supply and broadcaster buyer power, means that the Transaction cannot plausibly be said to give rise to an SLC.

B. The OFT's Decision

- 5.43 The OFT concluded that the merger raises a realistic prospect of an SLC in the provision of outsourced linear playout services in "Level One": *"Based on the evidence available, the OFT is concerned that the merger will remove a key competitive constraint - perhaps the only strong competitive constraint - within outsourced linear playout services for level one customers; that is for the two most complex Public Service Broadcasters (BBC and ITV). Even if [Confidential] were considered an effective competitor for the most complex customers, the loss of the parties as independent competitors would still be significant. Consequently the OFT is concerned that the merger will lead to an increase in prices and/or a worsening of service levels, including in innovation."*⁷⁹
- 5.44 The OFT's view appears, however, to be based on a rather outdated view of the market.

Market shares

- 5.45 As explained above, the market for linear playout services in the UK is a bidding market, characterised by long-term, lumpy contracts. Given that few (if any) contracts are awarded in any given year, there are strong incentives to compete aggressively for each contract.
- 5.46 Not only are there inherent weaknesses in available market share data in this industry,⁸⁰ but any such data reflect legacy contract wins rather than current

⁷⁹ See paragraph 105 of the OFT Decision.

⁸⁰ The linear playout services market has certain characteristics which make the calculation of market shares based on providers' current contracted customer base very difficult. In particular: (i) there is no clear metric on which to base volume shares (number of contracts held is too simplistic, number of channels does not work given the proliferation of small, lower-cost channels such as time-delayed channels and audience numbers bear no relation to the services provided); (ii) the scope of the services provided varies considerably on a contract-by-contract basis, thus affecting the value of contracts and making it very difficult to draw like-for-like comparisons; (iii) **[confidential]**; and (iv) it is

market positions. As a result, they do not provide a good proxy for success in winning further contracts, much less determine the effectiveness of the competitive constraint imposed by rivals.

- 5.47 The competitive dynamics in the market are therefore best reflected by examining each competitor's success in recent tenders.⁸¹ As shown above (see Table 5.1), the tender data show Arqiva and Encompass enjoying considerable success, with Technicolor languishing some distance behind. Based on the annual values of the contracts tendered and won since 2009, the market shares of the various players would be as shown in Table 5.2.

almost impossible to calculate the values which should be ascribed to in-house provision, particularly for those broadcasters which have never sought to out-source this function.

⁸¹ The OFT notes (at footnote 23 of its Decision) that "*the necessary conditions for a bidding market may not be met in this case*". In drawing this conclusion the OFT appears to rely on a definition of a bidding market provided in a 2005 paper by Paul Klemperer (see <http://www.competition-commission.org.uk/search?keywords=Klemperer&type=all>). That "discussion paper" lays out (at section 2.1) five criteria which the author claims need to be met for an "ideal bidding market". Of these, the OFT implicitly concedes that, in the present case, three of the five criteria are met. The only criteria that the OFT claim are, or may not, be met are "3: there is no 'lock in' by which the outcome of one contest importantly determines another" and "4*: Entry of new suppliers into the market is easy".

With regard to "3," contrary to the OFT's conclusion, there is no "incumbency advantage", let alone any "lock in", in this market. The examples the OFT provide as evidence of such an advantage (i.e. "the experiences of Channel 4, Channel 5 and British Eurosport") are merely examples of the incumbent provider having been re-appointed after a competitive tender. This is not evidence of incumbency advantage (or of "lock in") but rather that the same provider was able to win consecutive contracts. This is also inconsistent with the numerous other examples of the incumbent provider losing the next generation tender to a competitor.

With regard to "4*" even the Klemperer paper admits (at Section 2.1) that, where there is more than one firm competing in a market, criterion "4*" is not necessary for an ideal bidding market. There is no plausible basis for segmenting the linear play-out market in a manner which results in there being only one credible bidder post merger. Further, although the paper itself provides no guidance as to how "easy" entry needs to be in order to satisfy this criterion, the parties submit that entry is easy (or at least sufficiently so to render third parties credible bidders for the ITV and BBC contracts).

Table 5.2
Market shares based on value of contracts tendered 2009-2013

Company (listed alphabetically)	Value	Share
Arqiva	£[5-10]m	[20-30]%
Encompass	£[5-10]m	[20-30]%
GlobeCast	£[0-5]m	[0-5]%
In-house	£[0-5]m	[10-20]%
RBM	£[5-10]m	[10-20]%
Technicolor^[1]	£[0-5]m	[0-5]%
Unknown/ongoing	£[0-5]m	[10-20]%
Vision 247	£[0-5]m	[0-5]%
WRN	£[0-5]m	[5-10]%
TOTAL	£[30-40]m	100%

Source: Parties.

Notes: [1] Technicolor has only secured two contracts since 2009: (i) [confidential] and (ii) one channel playout services for Fatstone, a UK-based service for a Norwegian customer. [confidential].

5.48 Market shares based on the value of recent contract tenders therefore clearly indicate that the strongest players in this market are Encompass and Arqiva, with in-house also proving a strong competitive constraint.

Tender data for “Level One” in isolation

5.49 The OFT notes that “Neither the BBC nor ITV contracts have been tendered since 2007 when both parties (along with other providers) competed for ITV’s playout contract. At that time, [confidential] that was eventually won by Technicolor.”⁸²

5.50 The parties note further that:

- (i) **ITV:** whilst it is true that in the case of ITV, the merging parties were the [confidential], that tender was concluded in January 2007 and therefore represents a very out-of-date picture of the market. Moreover, ITV also invited [confidential] to the tender. They were all therefore credible bidders in 2007. Market developments since that time give no plausible basis for concluding that they are no longer credible. Rather, quite the opposite is true (see e.g. Table 5.1).

⁸² See paragraph 83 of the OFT Decision.

- (ii) **BBC**: the BBC contract was not tendered at all as its “award” to RBM was part of the sale of BBC Broadcast.

New entry/expansion would be “timely, likely and sufficient”

5.51 The OFT’s conclusions regarding high barriers to entry⁸³ should be rejected for the reasons described at paragraphs 5.30-5.31:

- (i) The required staff will either transfer under TUPE or can easily be hired;
- (ii) The required technology and infrastructure are readily available (and a requirement for all bidders); and
- (iii) In both cases, costs are not incurred until after the contract has been won.

5.52 Whilst customers may want to visit current facilities to understand a bidder’s business,⁸⁴ in a build-to-order market, tours of current facilities cannot be necessary to establish the credibility of a new entrant. Moreover:

- (i) Neither of the parties would be in any better position than other credible bidders as the new BBC and ITV contracts are likely to require a re-build of the current facilities.
- (ii) Nothing would prevent a third party from illustrating its build-to-order capabilities using a suite based overseas (see also Annex 10 which describes, for example, GlobeCast’s recently built state-of-the-art facilities in Singapore).

5.53 The following paragraphs consider more specifically the OFT’s assessment of whether entry would be timely, likely, and sufficient.

Timely

5.54 The OFT’s conclusion that entry would not be timely seems to have rested on the conclusion of “a third party (emphasis added)” who responded to the OFT’s market testing by estimating that it would take “*approximately five years for a new entrant investing on a sufficient scale to gain credibility and establish a*

⁸³ See paragraph 155 of the OFT Decision.

⁸⁴ See paragraph 155 of the OFT Decision.

position where it is possible to bid for major contracts.”⁸⁵ This does not seem to have been supported by other respondents to the OFT’s market testing.

- 5.55 Further, it is neither supported by industry facts on entry, nor is it relevant to the pertinent question of whether, post-merger, the merged firm would face sufficient constraints from credible rivals such that the merger would not give rise to an SLC:
- (i) Deluxe launched a playout facility based on cloud technology in April 2013 and has hired a number of previous RBM employees. **[confidential]**.
 - (ii) Neither Arqiva nor Encompass are “new entrants”. For them (and others) the relevant timescale is not the five year period referred to at paragraph 156 of the OFT Decision but rather the timeline for tenders for the relevant contract. This is typically up to 18 months (see Annex 14) but may be longer where preferred by the broadcaster (see e.g. the BBC market sounding exercise at Annex 8).

Likely

- 5.56 In terms of the likelihood of new entry/expansion, the OFT acknowledges at least two firms who may expand into serving “Level One” customers.⁸⁶ However, in reaching its conclusion regarding a reasonable prospect of an SLC in “Level One”, the OFT goes on to note that there were a number of factors that made expansion into “Level One” playout unlikely, including “*lack of credibility but also weaknesses in the incentive and ability for providers to expand into the level one segment, given the small number of customers and costs involved.*”⁸⁷
- 5.57 The parties disagree:
- (i) It is implausible to suggest that Arqiva and Encompass would fail the “credible bidder” test for the BBC and ITV contracts (see further paragraphs 5.8-5.9, and 5.21-5.22).
 - (ii) Technicolor itself shows that there is no need to have a previous track record in providing “Level One” services in order to be deemed a credible provider of such services.

⁸⁵ See paragraph 156 of the OFT Decision.

⁸⁶ See paragraph 159 of the OFT Decision.

⁸⁷ See paragraph 159 of the OFT Decision.

- (iii) The whole playout market is characterised by few contracts being tendered. There is no suggestion that third parties lack the incentive to bid for them when they arise.
- (iv) The costs incurred in presenting a credible bid for the BBC and ITV contracts are, in real terms, not materially different to those for other contracts - investment costs, as needed, are incurred only after contract award (see further paragraphs 3.65-3.67).
- (v) In light of the above, the entry of large outsourcing and IT players such as Accenture and Atos should be viewed as likely, especially considering their strong current relationships with ITV and the BBC.

Sufficient

5.58 In terms of the sufficiency of new entry/expansion, the OFT noted that “*with the exception of [Confidential], recent new entrants do not consider that they have the capacity (or to some extent inclination) to serve level one, suggesting that new entrants cannot be expected to provide a sufficient constraint within this segment.*”⁸⁸

5.59 Whilst this in any event confirms that there is third party capacity and inclination to serve “Level One”, even among new industry entrants (i.e. in addition to the most obvious credible bidders, Arqiva and Encompass), the parties disagree with the broader claim regarding insufficiency of capacity for new entry. This is contradicted by the tender data (which show the growth of companies like GlobeCast and the efforts of newer, smaller players such as Deluxe, WRN and Euro Media Group), and by the build-to-order nature of this market.

Buyer power is a sufficient competitive constraint

5.60 For the reasons described at paragraphs 5.40-5.41, the OFT is wrong to conclude that buyer power would not act as a sufficient competitive constraint in “Level One” linear playout as the broadcasters active in this segment, i.e. the BBC and ITV, “*do not have other providers to whom they could credibly switch or threaten to switch their level one requirements.*”⁸⁹ The BBC and ITV are among the most sophisticated clients in the market. They have the technical and financial resources to take linear playout back in-house, **[confidential]** (see e.g. paragraph 5.39(ii)).

⁸⁸ See paragraph 161 of the OFT Decision.

⁸⁹ See paragraph 167 of the OFT Decision.

- 5.61 More specifically, as the OFT acknowledges, **[confidential]** for RBM and Technicolor, which means that the parties' market position can easily change if they lose these contracts. These customers are therefore particularly well-placed to use the tender processes to ensure competitive prices and service levels. The threat to move in-house is enough to secure highly competitive pricing and service. **[confidential]** (see paragraph 5.31).
- 5.62 Further, many of the contracts are **[confidential]** (see further Annex 5 - these include **[confidential]**, and **[confidential]**); providing an extra incentive on providers to satisfy service requirements and ensure customer satisfaction.

Conclusions on OFT's analysis

- 5.63 The OFT's analysis appears unduly backward looking and contrary to the facts. This is despite the clear basis for merger review being a prospective review (the OFT/CC guidance clearly states that they "*will consider any merger in terms of its effects on rivalry over time in the market or markets affected by it*"⁹⁰) and that, if we are looking at the impact of the merger on the competitiveness of the bidding markets, the relevant timescale for readiness is driven by the tender process which gives all market participants ample opportunity to present credible bids for all playout contracts and to do so without incurring out-of-the-ordinary costs for doing so.

⁹⁰ See paragraph 4.1.3 of the Merger Assessment Guidelines. See also *Hutchison 3G UK Limited v Ofcom* [2005] CAT 39 at paragraph 33 and *Case C-12/03 P Tetra Laval* [2005] ECR I-1113 at paragraphs 41-42.