

Anticipated acquisition by Telefonaktiebolaget LM Ericsson (PUBL) of Creative Broadcast Services Holdings (2) Limited

ME/6110/13

The OFT's decision on reference under section 33(1) given on 30 September 2013. Full text of decision published 7 November 2013.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. Telefonaktiebolaget LM Ericsson (Ericsson) is a worldwide provider of telecommunications equipment and services to mobile and fixed network operators. Ericsson bought Technicolor Broadcast Services (Technicolor) in 2012, and is now active in the provision of linear playout, media logistics services, compliance editing, disaster recovery and digital media services. For the financial year ended 31 December 2012, Ericsson generated a global turnover of approximately SEK 227,779 million (approximately £21,220 million) and UK turnover of [] derived from Technicolor's broadcast services operations in the UK.
2. Red Bee Media Limited (RBM) is a media management company headquartered in London, UK. RBM is wholly-owned by Creative Broadcasting Services Limited (CBS) which, in turn, is wholly-owned by Creative Broadcasting Services Holdings (2) Limited (CBS2). RBM currently operates from offices in the UK, France, Germany, Spain and Australia. RBM is active in a broad range of broadcast services, including the provision of playout, media logistics services, metadata service, access services, disaster recovery, and creative services. In the year ending 30

June 2012, RBM's worldwide turnover was £144.3 million, of which its UK turnover was [].

TRANSACTION

3. Ericsson and CBS have entered into a Share Purchase Agreement pursuant to which Ericsson agreed to buy the entire issued share capital of CBS2. Under the terms of the Share Purchase Agreement, the acquisition of CBS2 by Ericsson is conditional on the clearance of the Transaction by the UK competition authorities.
4. The parties notified the Office of Fair trading (OFT) by way of an informal submission on 22 July 2013. The OFT's extended administrative deadline to make its decision is 30 September 2013.

JURISDICTION

5. As a result of this transaction the enterprises Ericsson and CBS2 will cease to be distinct. The UK turnover of CBS2 exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied.
6. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation satisfying the requirements of section 23(1) of the Act.

MARKET DEFINITION

Background to the broadcasting services chain

7. A number of services are required before television programmes can be viewed by audiences. One key broadcasting service is playout, which can be for traditional television broadcasting (known as linear playout), or for non-traditional broadcasting, such as video on demand (known as non-linear playout). Other complementary services in the broadcast services chain - content provision, media logistics, access and metadata services and distribution/transmission – are described in table 1 below.

Table 1: Broadcast Services Chain

Content Provision	Media Logistics	Access and Metadata	Playout Services	Distribution
Content (programmes, sports, news feeds and advertising), and supporting data for scheduling is delivered from producers/broadcasters on tape or digitally	Content is ingested, tagged and checked, encoded (if necessary) and stored on a library system	Subtitling, audio description, signing and electronic programme guide content are created and inserted.	Content is scheduled and versioned for different formats. Ads, trailers and feeds are inserted (some real time for live feeds). Channel is playout out and monitored for quality	Content is distributed to the various platforms (that is, cable, satellite, digital terrestrial, internet protocol) and from there to the end user.

Source: Parties (Media Asset Capital, June 2013)

Linear and non-linear playout services

8. In the OFT's previous decision in *Creative Broadcast Services Limited/BBC Broadcast Limited*¹ linear playout was described as: '...the process by which programme content is transformed from a number of individual tapes or digitised formats to a continuous stream of content ready for transmission'.
9. **Linear playout** is a process whereby content is compiled and prepared for subsequent transmission to the audience in strict compliance with the broadcaster's programme schedule. In addition to the actual programme content (live and/or pre-recorded) linear playout must take account of advertising and sponsorship breaks, trailers, inserts and other announcements in the programme schedule when required.
10. Recent technological developments and increased consumer demand for on-demand programmes/films and video content via different devices

¹ See Case Me/1962/05 Completed Acquisition by Creative Broadcast Services Limited of BBC Broadcast Limited (2005)

including desktop/laptop computers, mobile telephones and tablets has resulted in the need for playout services that are referred to as non-linear. The on-demand playout frequently involves content that has been compiled for linear playout but where consumers have a demand for a specific content which can be accessed and played out without the need for any scheduling, otherwise known as video on demand (VOD). Current examples of non-linear playout content are Filmflex and BBC iplayer.

Complementary services to linear and non-linear playout

11. There are various services within the broadcast services chain that are often ancillary to linear and non-linear playout. For example **media logistics services** include a number of elements that are necessary before content is readied for playout preparation. These elements include (i) content ingest,² (ii) encoding,³ (iii) quality control⁴ and (iv) storage services. **Access and metadata services** involve certain data such as subtitles and programme guides being inserted into the programme content and **distribution services** are the means by which the programme content is finally transmitted to the audience. Transmission can be carried out through various platforms such as cable, satellite, digital terrestrial and internet protocol. **Digital media services** is the media logistics and non-linear playout for VOD.

Parties' business activities

12. The parties are present at multiple stages of the broadcast services chain. The parties submitted that they overlap in the supply of: a) linear playout services; b) media logistics services and c) digital media services. Of these, the main overlap is in the provision of linear playout services.

Product scope

13. The OFT considers the product scope serves only to provide a framework within which the competitive effects of the merger can be assessed and the following discussion therefore serves to examine the appropriate frame

² Content ingest is a process whereby programme content (often in tape or software file format) is played and converted into digital format which is required before transmission.

³ Where information from a tape or file is converted into a compressed digital format

⁴ Quality control ensures that the ingested content contains no period of blank screen time or other technical errors and that the audio matches the video and is in synchronisation.

of reference for the competitive assessment. The OFT's approach is to consider whether narrow candidate product frames can be widened through substitution on the demand-side in the first instance, and then, if appropriate, to consider whether substitution on the supply-side allows the frame to be widened or aggregated.⁵

14. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, as well as further segmentation within the relevant market.⁶

Linear playout services

15. The parties submitted that the market for linear playout is a bespoke bidding market and business is mainly acquired through contracts that are 'built to order' and put through a competitive tender. They also submitted that it is not appropriate to segment the market according to attributes of the customer, whether by customer type, size, broadcasting content, audience share, value of advertising or their quality standards or whether linear playout is outsourced or provided in-house.
16. In bespoke bidding markets, contracts may be unique from a demand side substitution perspective, and customers would be unlikely to switch their requirements in response to a small but significant price increase. However, several narrow markets may be aggregated on the basis of supply-side factors when:
 - there are categories of contracts where firms have the ability and incentive to quickly shift capacity between contracts depending on demand
 - the same set of providers compete to supply these bespoke contracts and the conditions of competition between the firms are the same for each contract.⁷
17. The OFT considers that it may be appropriate to group linear playout contracts together where customers have sufficiently similar product

⁵ This approach is in line with the *Merger Assessment Guidelines*, paragraphs 5.2.6 to 5.2.19.

⁶ *Merger Assessment Guidelines*, paragraph 5.2.2

⁷ *Merger Assessment Guidelines*, paragraphs 5.2.17-19

requirements, and where the same providers are credible suppliers of their linear playout services (with the same conditions of competition between those suppliers).

18. The evidence gathered by the OFT during its market testing indicated that contracts can be aggregated into segments narrower than all linear playout services because customers vary in their requirements. Moreover, customers (and competitors) indicated that the set of suppliers who can credibly meet those requirements differ across the range of requirements.
19. Both customers and competitors highlighted a number of features of linear playout services that affect the range of providers from whom customers are willing or able to procure. The main features identified were:
 - reactivity and intervention levels
 - quality and service standards required
 - scale and risk of certain channels.
20. Third party evidence suggested that, broadly speaking, the more of these features are present in a customer's requirement and the greater the extent of these features, the more complex, staff and resource intensive, and risky is the contract for the supplier. As a result, it appears that for certain subsets of customers, the credible providers and conditions of competition on the demand-side (and possibly the supply-side) are substantially different from those prevailing for other customers. These broad features are discussed below.

Reactivity and intervention

21. Reactivity and intervention was the element of customer demand that was most frequently highlighted by third parties. This relates to the degree and speed of adjustments needed to a broadcaster's programme schedule during the playout process. Third parties identified a number of factors that may affect the level of reactivity and intervention required by a broadcaster.

Live content

22. 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 (generally used synonymously with 'reactivity') as a key factor which distinguishes the most complex customers from others, and as a result limits the number of competitors for their business.
23. Live content is challenging for playout providers because of the possibility for overrunning programmes (such as long tennis matches) or under-running programmes (such as cricket where rain stops play) and the necessity to rearrange the schedule around the programme as a result. Live content is predominantly (although not exclusively) news and sports broadcasting. The UK channels with the largest amount of live content are news channels (Sky News, BBC News 24, CNN), followed by BBC1, Sky Sports, Eurosport, and ITV1. Channels 4 and 5 also show some live content.
24. The parties submitted that live content can affect the reactivity of a channel but said that the effect is nuanced with some live content more complex for linear playout than others and with channels experiencing fluctuations in live content at certain periods, for example when Channel 4 was broadcasting the Paralympics and Channel 5 Big Brother. In this way, the parties submitted, the challenge posed by live content on playout services is experienced by the playout providers of all of the UK's main broadcasters.
25. 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 large audiences – are extremely important to meet (in particular because of regional variation opt-ins at that point). For example, overruns can necessitate short-notice moves of programming from one channel to another, and require announcements to let viewers know what is happening. The OFT was told by some third parties that this distinguishes 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.

26. The parties disagreed that mixed content channels provided a higher level of difficulty than single content channels. They submitted that channels such as ESPN and BT Sport also require high levels of intervention as a result of their live content mixed with advertising. However, the OFT received comment from both competitors and customers that the playout requirements for sport and news channels are simpler than for BBC1 and ITV1, which were considered to have the most complex linear playout requirements.
27. Overall, the OFT considers that the volume of live content contributes to the complexity of a channel's linear playout requirements, and that it may be relevant to distinguish between live content on mixed genre channels and similar levels of live content on fixed genre channels.

Regional variations in programming

28. Regional channel variations were also highlighted by competitors and customers as a contributor to reactivity and intervention and hence the complexity of playout. Regional channel variations involve regional 'opt outs' or 'opt ins', where regional channels can differ or converge with the main network feed. When a regional channel opts out of the main network feed, it plays an alternative programme for viewers of that region alone, before opting back into the main network feed at a later point. ITV1 has over 20 regions for advertising and news, BBC1 has 20 regionsⁱ for news (and other regional programmes), and BBC2 has 4 national services. Channel 4 has six advertising regions and Channel 5 has four.ⁱⁱ
29. The parties submitted that switching from a national to a regional feed forms part of a channel's pre-prepared broadcast schedule and will not require further intervention. The parties described switching as an automatic process.⁸
30. However, the BBC⁹ and ITV emphasised the unique complexity resulting from their original (and nations) programme variants, even in comparison with Channel 4, and that manual intervention is frequently required. Complexity particularly arises from the combination of regionality with

⁸ []

⁹ []

other elements of reactivity and intervention, such as live content, short notice changes, or non-uniform programme lengths across regions.

31. ITV emphasised that live events require opts to be manually triggered and involve changes by hand for each regional feed in the event of durations changing. They further submitted that, whilst the use of contingency schedules can help, only a small amount of contingencies can be prepared in advance and that there is a risk of introducing errors through making changes so close to transmission.
32. The BBC also supported the point that regional programming is complex when combined with uncertain durations. When durations change this has to be communicated to everyone by the main network playout director. The existence of mandatory network points (when all regions need to be showing the network feed) also increases the complexity of regional programming, with interstitial programming material needed to ensure that all programs come together at the correct time.
33. This was supported by competitors. They noted both that regionality adds to the complexity of linear playout requirements, and that it is one among a number of features which makes ITV and BBC unique. One supplier described the complexity of ITV's regional playout as akin to providing playout for a large number of channels.
34. On the basis of third party comments, and taking a cautious approach, the OFT considers that regional variation in programming adds further complexity to a channel's linear playout requirements and also adds to the scale of those requirements.

Other schedule interruptions and changes

35. More generally, third parties highlighted schedule interruptions as an element of the more complex contracts – this could be, for example, for news flashes. Customers argued that the complexity created by newsflashes relates to the difficulty of getting back on schedule, and may be compounded if the newsflash occurs at a point when a number of regions are opted away from the main network feed. In some instances, these interruptions are a requirement placed on the channel as a result of

their status as a Public Service Broadcasters (PSB) – these factors affect BBC, ITV, Channel 4, and to some extent Channel 5.¹⁰

36. Late schedule changes may also create complexity. For example, [] emphasised its need for a linear playout provider capable of dealing with late changes. [] also highlighted that it may need to change advertising content at very short notice (for example with advertisers pulling content in response to bad news stories). When asked to comment on how its own schedule changes differed from those which may occur on channels with advertising, 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 to the schedule.
37. Based on third party comments and taking a cautious approach the OFT considers that channels which have news flashes and other interruptions, as well as those which have late schedule changes, have more complex linear playout requirements. Because of their greater use of newsflashes, schedule interruptions may be more common for, but not unique to, the PSBs.

Quality, service and regulatory requirements

38. Within customer and competitor comments, other factors that differentiated the requirements of different customers (and the capabilities of different providers) centred on quality requirements, with some channels having particularly high service requirements. One competitor commenting on the difficulty of servicing BBC, ITV and Channel 4 playout said that the service level requirements of these channels far exceed that required by other broadcasters even with relatively complex needs.
39. However, the parties submitted that BBC, ITV and Channel 4 are not unique in requiring high service levels. [], for example, requires higher service levels than [] or [], of [] per cent in peak hours. [] main channels have the same requirement as [] and [] ([] per cent). The parties also presented some evidence suggesting that in the most recent year the total penalties incurred by the parties within the [] and [] contracts are not

¹⁰ As confirmed by the parties in their draft response to the issues paper paragraph 2.31

higher than in other contracts, although OFT notes that these figures may be affected by factors such as the resourcing of contracts and the resulting number of errors, as well as the scale of penalties. Moreover this data does not reflect the perception that even though the service level requirements of say, [] and [] are similar, their respective levels of reactivity and complexity may vary, significantly impacting on the likelihood of errors occurring.

40. Third party evidence also identified a number of other service level factors that could distinguish between broadcasters. For example, one third party submitted that distinctions could be drawn between PSBs (BBC, ITV, Channel 4 and Channel 5) according to the volume of additional services required such as media logistics that may be driven by the volume of repeats versus original programming, branding and compliance. Other factors mentioned by third parties included the extensive use of specialist graphics and extensive provision of access services as key factors that distinguish linear playout requirements of PSBs from the requirements of other channels.
41. The parties also submitted that a further complicating factor in linear playout is the use and extent of multi-lingual content, and that this widens the set of channels which may be considered complex. No customer or competitor raised this factor independently. When asked to comment on this contention, it was rejected by third parties as adding to the complexity of linear playout, the main reason being that the vast majority of programmes which carry multi-lingual content or subtitles (in different languages) will be pre-recorded and not complex.
42. Access services such as subtitles are present on several UK channels, although the BBC is the only UK broadcaster committed to subtitling 100 per cent of programmes. While ITV argued that some complexity was added by access services (especially in the context of regional programming), the BBC suggested that access services do not add significantly to the complexity of linear playout (for example because audio description is wrapped to the playout files during ingest, earlier in the broadcast chain). Comments from customers suggested that other factors, such as specialist graphics and multi-lingual content may add complexity but not to a significant degree.

43. Based on third party comment, and taking a cautious approach, the OFT considers that 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.

Disaster recovery services

44. Third parties also told the OFT that some customers are distinguished by the high value of their content and their resulting requirement for disaster recovery. Disaster recovery services are backup services designed to keep content safe and channels on air in the event of an emergency. While the high value of content may be reflected in the service level requirements and this may affect the range of providers able and willing to serve a particular customer, the OFT considers that the requirement for disaster recovery has little effect on competition for primary linear playout.

Scale and risk

45. 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 in part linked to complexity, it is also driven by the number of channels and amount of content featured on the channel.
46. Linear playout providers themselves submitted that there were differences between the linear playout services required for some broadcasters in terms of the scale and risk involved, pointing in particular to the fact that the BBC's and ITV's requirements necessitate more people and capital expenditure on the part of the playout provider. Furthermore, 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.

47. Some providers indicated that they may not be able to expand sufficiently to meet certain broadcasters' requirements, and that there would be risks in doing so, given that so few customers require such capacity. This is in addition 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.
48. These comments were supported by [].
49. The OFT considers that linear playout contracts vary in terms of their scale and the risk involved for providers, and that this can affect the range of providers willing and able to bid for the contract.

Conditions of competition

50. The preceding discussion has highlighted the practical ways in which broadcasters' linear playout requirements differ. This suggests that there is a range of complexity of requirements across broadcasters. Because of the scale and complexity of their regional requirements and the interaction of this regional requirement with other factors such as the amount of live content and the scale and risk involved, the requirements of the BBC and ITV appear to be particularly complex. Although the parties submitted that a segment including only the BBC and ITV is unduly narrow and that a number of other channels have complex requirements (that is, Channel 4, Channel 5, Disney, BT Sport, ESPN and British Eurosport), the proposition that the BBC and ITV have playout requirements which are uniquely difficult to meet was supported by comments from a number of linear playout providers.
51. As set out earlier, the OFT may aggregate narrow demand side markets associated with bespoke bidding markets on the basis of supply side factors, including whether the same set of providers compete to supply different contracts and the conditions of competition between them are the same across contracts.¹¹
52. The OFT asked customers and competitors to comment on the possibility and credibility of different providers supplying different customers'

¹¹ *Merger Assessment Guidelines*, paragraphs 5.2.17-19

requirements. This evidence is considered in more detail within the competitive assessment, but indicates that the conditions of competition vary across contracts.

53. The parties argue that for all customers with complex requirements, there are at least four credible bidders including the parties, Encompass and Arqiva.¹²
54. However, evidence from customers and competitors shows, firstly, that in the eyes of [].
55. Secondly, there exists a group of customers whose requirements are less complex than those of BBC and ITV but more complex than the simplest channels. In general these broadcasters considered that RBM, Technicolor and one or more of Encompass and Arqiva are credible bidders.
56. Finally, based largely on competitor comments, the OFT considers that there is a further group of simple channels that has a wider set of choices of provider.

Conclusion on customer segmentation

57. On the basis of this evidence about the credibility of providers, along with the evidence on how customer requirements vary, the OFT considers that it is appropriate to separately consider the competitive effects of the merger for each of the following segments:
 - 'Level one' – ITV and BBC
 - 'Level two' – other complex channels including Channel 4, Channel 5, BT Sport, and ESPN
 - 'Level three' – other simple channels with pre-recorded content such as PBS.¹³
58. BBC and ITV have several channels, some of which will not require the same level of complexity as their main, larger, channels. [].

¹² []

¹³ The OFT notes that the same conclusion would be reached in the competitive assessment if the market was segmented by linear playout service requirements rather than by customer.

59. Therefore, on a cautious basis, the OFT considers that the linear playout requirements of these channels should not be split from the main PSB channels for the purposes of market definition. The OFT considers that, in any case, this will have limited impact on the competitive analysis of level one services, but could alter any magnitude of harm that could result if there is a realistic prospect of a substantial lessening of competition.

Distinction between in-house and outsourced linear playout services

60. Having concluded on a relevant segmentation within outsourced linear playout, the OFT has considered whether these segments should be expanded to include in-house supply. This assessment has focused on levels one and two. For level three customers, it has not been necessary to conclude on this point, since no competitive concerns are raised on any basis.
61. In assessing whether self-supply forms part of the relevant market, the OFT considers whether, a) in response to a small but significant price rise it would be profitable for current self-suppliers to supply other broadcasters with linear playout and/or b) whether the ability of customers to choose to self supply affects the profitability of such a price rise.¹⁴
62. In respect of the first question – whether current self suppliers provide a constraint through the possibility of the supplying to other customers – there is evidence that Sky already provides this service to other broadcasters, and that one other broadcaster might consider doing so in future. The parties argue that Sky is a competitor in linear playout. However, there is evidence (including in []) that to third parties Sky offers less complex playout, to simple channels only.
63. On the second question, the parties submitted that the ability of broadcasters to supply linear playout in-house exercises a significant constraint. They pointed to a number of pieces of evidence, including the range of broadcasters currently self-supplying; broadcasters including the BBC retaining some elements of playout in-house; and examples of

¹⁴ Merger assessment guidelines paragraph 5.2.20. In this context, and elsewhere in this decision, price is used as a shorthand for all aspects of competition such as quality and service (see paragraph 1.7 of the Merger assessment guidelines)

providers moving from outsourcing to in-house provision (or threatening to do so). They also argued that switching to in-house is facilitated by recent technological developments, and by the *Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)*, under which provider employees working exclusively on that customer's contract would transfer with the work in the event that the customer chose to move to in-house supply (or to another supplier).

64. However, the large majority of customers that responded to the OFT's enquiries said that they would not switch to in-house supply in response to a five to 10 per cent price rise. The reasons given included a lack of technical expertise and the need for significant investment. Customers noted key personnel that would not transfer under TUPE, and also the necessity for investment and skilled staff well in advance of the actual transfer of work. This evidence, that self-supply is not a sufficient constraint to be included within the relevant market, was supported by competing providers of linear playout who highlighted, for example, that such a move would act as a distraction for management, and that for smaller broadcasters self-supply would not be economic given the economies of scale involved.
65. For market definition the relevant test is whether the constraint provided by self supply would be felt in response to a small but significant price rise. Evidence from third parties has not supported the parties' view that self supply should be included in the relevant market for level one or two customers. However, the OFT has considered the constraints provided by self supply within the competitive assessment below.

Media logistics and digital media services

66. In addition to linear playout, the parties also overlap in the provision of a number of services within the broadcasting services chain. The parties grouped these services under the headings of media logistics and of digital media services (as described earlier). The OFT has not found it necessary to conclude on the market definition for any of the services falling under these headings, since no concerns have been received about these segments in themselves, and the OFT has received evidence from the

parties, competitors, and customers that there is a good choice of suppliers of all services.

67. However, within the competitive assessment, the OFT has considered whether any competitive concerns arise as a result of the parties supplying any media logistics or digital media services in combination with linear playout.

Geographic scope

68. The parties submitted that in line with the OFT's approach in *Creative Broadcast Services Limited/BBC Broadcast Limited*¹⁵ the relevant geographic frame of reference should be no narrower than UK-wide, and that there are arguments in favour of an even wider geographic frame of reference. In support of this, they provided examples of channels broadcast in countries other than those in which they are played out.
69. However, the evidence received by the OFT suggests that this approach is largely taken only by international broadcasters, such as ITV international or BBC Worldwide, which plays out from the UK. The OFT received very 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. This is particularly true for level one and level two customers with more complex linear playout requirements. The most common reason given for wanting a UK-based provider was the value of face-to-face meetings and the ability to manage schedule changes together. Connectivity costs, language barriers and the need for the provider to understand the UK regulatory and broadcasting framework were also mentioned. Evidence from competitors supported the conclusion that cross-border playout is likely to be desirable only for international channels.
70. The OFT also considered whether suppliers based outside the UK should be included within the relevant market on the basis that they have the ability and incentive to quickly shift capacity into the UK in response to a price rise. While the OFT received some evidence that customers may be willing to consider a provider with no current presence in the UK but an intention

¹⁵ See Case Me/1962/05 Completed Acquisition by Creative Broadcast Services Limited of BBC Broadcast Limited (2005)

to invest, there is no 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, particularly for complex channels.¹⁶

71. The OFT also considered whether there was a narrower frame of reference. Only one broadcaster suggested that the geographic frame of reference could be narrower than the UK on the basis that it gave a bidder a lower marking for being located further away from the channel than other bidders. However, location was just one of many factors that affected the evaluation of bids, and there was no suggestion from other third parties that a UK provider being slightly further from the broadcaster but within the UK would prevent a provider from winning a UK linear playout contract.
72. In relation to media logistics and digital media services the OFT did not find it necessary to conclude on geographic scope on any of the services falling under these headings given that no concerns have been raised in respect of these services
73. The OFT has therefore considered the merger on the basis of a UK frame of reference.

CONCLUSION ON RELEVANT FRAME OF REFERENCE

74. In its competitive assessment, the OFT uses the following frame of reference:
 - Supply in the UK of complex, highly reactive outsourced linear playout services to level one customers as defined in paragraph 57.
 - Supply in the UK of reactive outsourced linear playout services to level two customers as defined in paragraph 57.
 - Supply in the UK of linear playout services to level three customers as defined in paragraph 57. This segment is not considered further in this decision as no competition concerns arise.

¹⁶ []

75. The OFT has also considered the effect of the merger on ancillary services such as those falling within media logistics services and digital media services, as a result of portfolio or bundling effects involving linear playout in the UK.

COMPETITIVE ASSESSMENT

76. The OFT has assessed the following theories of harm in respect of each of the segments set out in paragraph 57:

- i. horizontal unilateral effects in the supply of complex, highly reactive outsourced linear playout services (level one) in the UK
- ii. horizontal unilateral effects in the supply of reactive outsourced linear playout services (level two) in the UK
- iii. horizontal unilateral effects in the supply of certain bundles including linear playout along with other services in the UK
- iv. horizontal unilateral effects in the supply of certain other bundles as a result of the removal of a potential competitor (Ericsson) in the supply of bundled services in the UK, and
- v. conglomerate unilateral effects in the supply of certain other services in the UK, through foreclosure of rivals not present in linear playout, due to the merged firm bundling services.

HORIZONTAL UNILATERAL EFFECTS

Horizontal unilateral effects for level one playout

77. The outsourced linear playout market is characterised by long term lumpy contracts being tendered by broadcasters, and switching requires long lead times (usually around 12 to 18 months). Broadcasters have different requirements for linear playout according to the complexity of their channels. Given the nature of this market the parties submitted that market shares could change significantly with the loss or gain of one contract.

78. As set out in the Market Definition section, the OFT considers that the BBC and ITV are the broadcasters that currently form the 'level one' segment, although the OFT notes that there is a range of complexity of requirements.
79. The parties are currently the only providers of linear playout for the BBC and ITV main channels. Ericsson (Technicolor) provides this service for ITV until [2013 - 2020] and RBM for the BBC until 2017.
80. The parties submitted that the industry is subject to technological evolution as it moves to digital and software based solutions. The parties told the OFT that the BBC recognised the importance of the technological advancements in the industry when it invited potential suppliers of playout and media services to discuss the BBC's requirements.¹⁷ The OFT is conscious of the importance of innovation for technological advancement and therefore considers that insofar as the merger raises competition concerns, these will relate to a degradation of service quality (including innovation) as well as the possibility of price rises or effects on other elements of service.

Closeness of competition

81. The parties submitted they are not close competitors because Ericsson (Technicolor) is currently a weakened competitor that has not won ([]) a contract since 2009 [].¹⁸ All of these contracts were for level two or three customers and therefore are discussed further in detail later in this decision. However, the parties submitted that the underlying reasons for Technicolor's lack of recent success []. That is, there has been [] and, moreover, it has suffered reputational damage ever since the high profile mistake it made for ITV during live coverage of the 2010 World Cup match between England and USA¹⁹ and that this has weakened it as a potential supplier for all channels.
82. However, the OFT questioned [] on the reputational issue and although [] acknowledged the seriousness of the World Cup incident []. In relation to

¹⁷ BBC's Voluntary Ex Ante Transparency Notice, Official Journal of the European Union, 24 April 2013.

¹⁸ [].

¹⁹ During live coverage of the England v USA game, the broadcast switched to an unscheduled advertisement at a crucial part of the match just before England scored a goal.

the lack of investment, In relation to the lack of investment, [] said that they were aware of this and were looking to address the matter with Ericsson who took over Technicolor in 2012.

83. 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, [] that was eventually won by Technicolor. ITV said that both RBM and Technicolor demonstrated an understanding of ITV's complex broadcast chain []
84. However, there have been also been some more recent indications of the competitive interactions between the parties, and with other providers, in the level one segment.
85. Firstly, following the 2010 World Cup incident, ITV considered switching its linear playout provider. []. It chose to remain with Technicolor [].
86. Secondly, BBC recently (although before the merger was announced) initiated a request for information (RFI) from a number of providers [].
87. Similarly, in responding to the OFT's questionnaire the BBC and ITV [].
88. Finally, the parties also submitted a number of internal documents as part of their submission. [].
89. On the basis of the evidence, the OFT therefore considers the parties to be close competitors in the supply of outsourced level one linear playout.

Constraint on the parties by other competitors

90. The parties argued that it is not appropriate to consider the needs of BBC and ITV separately from those of other broadcasters, and that there are a number of credible competitors with the ability to service channels across the entire spectrum of complexity, evidenced by recent tender successes by both Arqiva (Disney and British Eurosport) and Encompass (Channel 5). In addition the parties submitted that Arqiva's recent bid for BT Sport was

further proof that it is a credible provider of linear playout for complex channels [].²⁰

91. However, some competitors submitted that the complexity and scale of both BBC's and ITV's operation would make it difficult for other competitors to adequately service BBC's and ITV's requirements. One competitor suggested that the level of investment would be prohibitive and expertise difficult to obtain.
92. The parties argued that at the time of ITV's original contracting with Technicolor, Technicolor had a similar level of experience to that of Encompass and Arqiva now, and that ITV was willing at that time to take the risk of placing its playout services with such an inexperienced provider. [].
93. When competitors were specifically asked whether they felt they could successfully provide services for BBC and ITV based on their current experience, [] noted that regional variations and (to a lesser extent) mixed genre content of both BBC and ITV increases the complexity but felt that this additional complexity was not significant for it. [].
94. The OFT also noted from [].
95. Whilst there is some evidence that [] may be capable of supplying level one linear playout in the future, there is very little evidence to suggest that any other suppliers are able to do so. The OFT considers that currently there is not a strong constraint from other competitors on the parties in relation to the supply of outsourced level one linear playout.

In-house constraint on the parties

96. As mentioned in paragraph 65, the OFT felt that in-house supply should not be considered as part of the same product market as outsourced supply. However, this does not mean that there would necessarily be no constraint placed on the merged entity from the threat of ITV or the BBC switching to in-house supply.

²⁰ The BT Sport play out contract was subsequently won by RBM

97. The parties have submitted that there is clear evidence that in-house supply will constrain linear playout providers. It told the OFT that Sky, a very large and complex broadcaster, provides its linear playout service in-house. Sky also provides linear playout for some other broadcasters.
98. The BBC and ITV also supplied themselves in-house before outsourcing in 2005 and 2007 respectively. The BBC maintains some in-house provision, for some of its less complex channels that are either small scale non-reactive channels or channels where playout is largely editorial in function, such as BBC News. However, evidence from level one customers is not sufficient to conclude that in-house supply would adequately constrain the parties.
99. [].
100. [].
101. A second broadcaster submitted a similar response, saying that [].
102. On this point, competing providers of linear playout noted that there is a number of key staff who typically does not work exclusively on one contract and that would not transfer with a contract under TUPE. In any event, [] said that they would be prepared to switch their linear playout requirements in-house in response to a price rise in outsourced linear playout services.
103. The OFT therefore considers that the threat of in-house supply does not provide a constraint sufficient enough to maintain the strength of competition at pre-merger levels. The OFT is especially concerned that there would be some scope for prices to rise as a result of the merger, perhaps quite significantly, [].

Evidence from third parties

104. []. [] argued that this is largely because of the importance of experience and reputation, and the need [] to have []. [] noted that RBM and Technicolor are the only providers currently providing linear playout of sufficient complexity. The main concern raised by [] was that, post

merger, there would be a creation of a monopoly provider in outsourced linear playout, for the level of complexity required by this segment, and that this would lead to an increase in price and a deterioration of service quality and innovation.

Conclusion on horizontal unilateral effects in level one linear playout

105. 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 Services Broadcasters (BBC and ITV). Even if [] 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.

106. Therefore, the OFT considers that the merger raises a realistic prospect of a substantial lessening of competition (SLC) in the provision of outsourced linear playout services in level one.

Horizontal unilateral effects in level two linear playout

107. The OFT considered a second level of linear playout that deals with some level of reactivity (due to live content and/or advertising) but may not be as complex or reactive as level one linear playout. This is mainly because it lacks regional programming variation and the interaction this may have with live content and news bulletins or where the volume of such complicating factors is far less.

108. The OFT considers 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. Channels such as BT Sport, Disney, UKTV and NBCU may also fall within the level two category. The parties both provide linear playout within this category of complexity with Technicolor providing linear

playout for NBCU²¹ and RBM for Channel 4, UKTV, BBC Global News and BT Sport. Encompass provides linear playout for Channel 5 and Disney.

109. The parties submitted that they face at least two other credible suppliers for all playout services; Encompass and Arqiva. The evidence is examined below.

Market share

110. The OFT was unable to obtain market share data by segment. Across all linear playout (that is, including ITV and the BBC), the parties estimated that, post merger their combined market share will be [60 – 70] per cent with a [10 – 20] per cent increment from Technicolor. Although the parties' share of level two alone will be lower, they are two of only a small number of providers active in this segment, as shown in table 2 below.

111. According to the parties' estimate, Encompass has an estimated [10 – 20] per cent market share, GlobeCast has [0 – 10] per cent and both Arqiva and WRN have [0 – 10] per cent (of all linear playout). Aside from the parties, only Encompass and Arqiva currently hold contracts that the OFT considers to lie within the level two segment.

Table 2: Linear playout providers

	Red Bee Media	Technicolor	Encompass	Arqiva	Globecast	WRN
Level 1 customers	BBC	ITV				
Known Level 2 customers²²	Channel Four, UKTV, BT Sport	NBCu	[]	[]		
Known Level 3 customers			[]	[]	[]	[]

112. The parties submitted that the market for outsourced linear playout is a bidding market and therefore existing market shares do not reflect market

²¹ Technicolor currently provides linear playout for the Chart Show Channels (CSC) [].

²² Here, the OFT has listed all channels listed as 'complex' in the parties' submission in response to the issues paper, although it has not been possible to assess the exact needs of each customer.

power. The parties further submitted that historical market shares do not provide a good proxy for success in winning further contracts and the competitive dynamics of the market are best reflected by examining each competitor's success in recent tenders. However, the OFT considers that whilst due consideration needs to be given to recent market activity there is not – given the importance of experience and reputation – sufficient evidence to completely disregard that the parties are among only a small number of competitors that hold current contracts in the level two segment.²³

Closeness of competition

113. Given the relatively small number of competitors in this segment, the OFT has considered whether the merger may give rise to competitive concerns as a result of the parties being close competitors. Two broadcasters in this segment raised concerns about the merger, and others listed only one other provider besides the parties as a credible bidder for their linear playout contract.

Bidding data

114. As mentioned above in the competitive analysis of level one linear playout, the parties submitted that []. The parties submitted bidding data to demonstrate this. The data shows that Technicolor has not won a contract since 2009 [].

115. Table 3 below shows data relating to nine tenders identified by the parties as within the level two segment.

²³ OFT considers that the necessary conditions for a pure bidding market may not be met in this case. For example, barriers to entry may be high and the evidence indicates that there is some incumbency advantage based on the experiences of Channel 4, Channel 5 and British Eurosport, amongst others. For a discussion of bidding markets, see Paul Klemperer's discussion paper on Bidding Markets 2005)

www.competition-commission.org.uk/search?keywords=Klemperer&type=all

Table 3 Linear playlist tenders for complex channels held between 2009 and 2013²⁴

Contract (date awarded)	Bidders invited to tender	Shortlist	Winner
Disney (ongoing)	[]	[]	Ongoing
Turner (2013)	[]	[]	Arqiva
BT Sport (2013)	[]	[]	RBM
Disney (2012)	[]	[]	Encompass
British Eurosport (2012)	[]	[]	Arqiva
Channel 5 (2011)	[]	[]	Encompass
Discovery (2010)	[]	[]	In-house
ESPN (2009)	[]	[]	Arqiva
MTV Europe (Viacom) (2009)	[]	[]	In-house

Source: Parties: Note: []

116. The bidding data shows that, while RBM submitted bids in [five – 10] tenders and Technicolor in [0 – five] tenders, there was []. In addition the data shows that not only has Technicolor been unsuccessful in winning any contracts, []. This evidence does provide support to the parties' arguments that Technicolor is not a particularly strong competitor in this segment.

117. [].

118. By contrast to Technicolor, Arqiva and Encompass have enjoyed recent success in bidding for contracts, including for Disney, British Eurosport and Channel 5.

119. The parties further submitted that in the recent tender for the new BT Sport channel, which the parties consider a complex reactive channel with a high level of live content, [].

120. In the level two segment, both Encompass and Arqiva appear to be significantly constraining the parties and in particular RBM. Evidence of the number of times competitors have been invited, shortlisted and awarded contracts for level two complex channels is set out below in table 4.

²⁴ The tenders provided by the parties are the ones that have taken place that the parties are aware.

Table 4: Bidders invited to tender and shortlisted for complex channels (2009-2013)

Company	No. of times invited to tender	No. of times shortlisted	No. of wins
Encompass	[5 – 10]	[0 – 5]	2
Arqiva	[5 – 10]	[0 – 5]	3
RBM	[5 – 10]	[0 – 5]	1
Technicolor	[5 – 10]	[0 – 5]	0

Source: Parties

121. Comment from customers and competitors indicate that RBM and Technicolor are both credible competitors in level two linear playout, and may even be one another's closest competitors for some complex contracts. However, [] in recent contracts, whereas Encompass and Arqiva have enjoyed recent success.

In-house constraint on the parties

122. The OFT considers that in-house supply of linear playout services does not fall within the same market as outsourced provision of Level two linear playout services. However, the OFT has considered whether in-house supply might present a constraint on the parties post merger.
123. Some third party comments from broadcasters with Level two requirements suggested that in-house supply might present a constraint to outsourced providers or might be expected to in the near future. Sky and Discovery, whose channels have similar requirements to level two, also provide its linear playout requirements in-house with Sky having never outsourced this service and Discovery having moved back from outsourcing to in-house.
124. The evidence from some of the larger broadcaster in this segment was mixed on their ability to move their linear playout operations in-house. Those who did not consider in-house an option cited obstacles such as the level of investment required and the lack of experience in this area. Therefore, broadcaster responses were similar to level one responses. Those who did think that in-house provision may be feasible seemed to be relying on their current capabilities in relation to their non-reactive

programmes. The majority of respondents submitted that it is unlikely that in-house provision would provide a constraint on the parties post merger.

125. Another reason that in-house provision may be unlikely to constrain the parties in level two is that most broadcasters would lack economies of scale and critical mass to make it cost effective for them. Some broadcasters also expressed doubts about the quality of in-house provision.
126. In this case the OFT has not found it necessary to conclude on the constraint provided by in-house supply, on competition for level two linear playout, given its SLC finding in level one linear playout services.

Evidence from third parties

127. Responses from third parties were somewhat mixed in relation to whether the parties competed against each other but in some cases suggesting that they were each other's strongest competitors.
128. Competitors strongly identified the parties to be close competitors with their ranking of credible suppliers in linear playout. Two of the three other providers with highest shares of the playout market ranked the parties [] in terms of their strength as a provider for reactive linear playout services. The evidence from level two customers was more mixed in this regard. One customer ranked Technicolor well below RBM whilst other level two customer responses supported the idea that the parties are close competitors.

Conclusion on horizontal unilateral effects in level two linear playout

129. On the basis of an SLC finding in level one linear playout, the OFT did not find it necessary to conclude on whether there is a realistic prospect of an SLC in level two.

Horizontal unilateral effects relating to bundles of services

130. The OFT has considered whether the merger could harm competition through horizontal effects which are linked to the fact that the parties supply more than one input to the broadcast chain:

- Some customers were concerned that competition would be harmed through a reduction in the number of firms able to provide certain bundles of services.
- The OFT also considered whether the merger removes the constraint provided by Ericsson as a potential competitor in the provision of other bundles of services.

Current competition for bundles of services

131. The OFT received evidence that for some services it is difficult, or not preferable, to purchase from a provider other than the playout provider. More generally, customers and competitors commented that there are benefits from reducing the number of different suppliers (and resulting interfaces) within a broadcaster's supply chain.

132. In line with this evidence, it is common for broadcasters to purchase multiple elements of their broadcast chain from the same provider as their linear playout, although the combination of services purchased from the same provider varies across broadcasters. In addition, even where multiple services are bought from the same provider, this is not always as part of the same contract.

133. The OFT considered whether the merger could lead to substantial lessening of competition for bundles of services including linear playout and one or more of:

- Ingest, storage, or disaster recovery. Third parties indicated that these are particularly likely to be purchased together with linear playout.
- Compliance, access services, quality control, or non-linear playout. Some customers purchase these services from their linear playout provider.

134. For customers that prefer to purchase additional services from their linear playout provider, there may be a lessening of competition for this bundle of services if there is a reduction in the number of providers that can provide the preferred bundle.

135. The parties argued that in the case of ingest, storage and disaster recovery, all providers of linear playout can also provide these services. As a result, the OFT's concern in relation to these elements is focused only on those customers with a limited choice of linear playout provider – in particular level one customers. However, [] does not currently purchase these services from their linear playout provider. This suggests that unbundled purchasing will remain as a constraint on the parties' supply to level one customers of bundles involving linear playout along with ingest, storage or disaster recovery.
136. In the case of compliance and access services, the parties do not even overlap, so there is no reduction in competition. For quality control, there is widespread evidence of customers procuring separately from linear playout. For non-linear playout, while most customers currently purchase this from their provider of linear playout, BBC is currently moving this service in-house, and a number of other customers indicated that they were already planning, or were willing to move non-linear playout in-house or switch provider.
137. Overall, this suggests that the parties, in supplying bundles including non-linear playout and other complementary services, will continue to be constrained by the possibility of customers unbundling their requirements.

Potential competition for other bundles of services

138. RBM currently supplies a full range of services across the broadcasting supply chain up to the point of distribution, including some services not currently supplied by Ericsson such as access services, metadata, or creative services. [] The OFT does not have any concerns about competition within any of these segments individually. However, given some customers' preference to limit the number of suppliers from whom they purchase, the OFT considered whether the merger removes a constraint provided by Ericsson as a potential competitor in the provision of other bundles of services, and whether a substantial lessening of competition may be expected as a result.

139. On balance, the evidence did not support this concern – many customers currently purchase these services from suppliers other than their linear playout provider (given that linear playout providers other than RBM do not generally offer these services), and among RBM customers, these services fall under separate contracts than those for linear playout. This suggests that unbundled provision will remain as a constraint on the parties, sufficient to counteract any reduction in competition as a result of the loss of the (actual or perceived) threat of entry by Ericsson into the supply of new combinations of services.
140. In any event the OFT does not consider that there is evidence, sufficient to conclude that there is a realistic prospect of an SLC, that Ericsson would have entered into new segments of ancillary services (or exerted a constraint through the threat of entry) in the absence of the merger.
141. On the basis of evidence available to the OFT at phase one, the OFT considers that there is not a realistic prospect of an SLC for bundling ancillary broadcasting services to linear playout

CONGLOMERATE EFFECTS

142. On the basis of the OFT's conclusions on the unilateral merger effects in level one outsourced linear playout, it has considered the possibility of the merged entity leveraging its market position in the supply of complex, highly reactive and reactive outsourced linear playout into other media related markets.
143. Conglomerate mergers do not involve a loss of direct competition between parties (which would be examined as a part of unilateral or co-ordinated effects analysis), nor do they involve suppliers that are vertically related in some way (that is, they are active at different stages of a supply chain). Instead, conglomerate mergers involve goods or services which customers do not regard as substitutes.²⁵
144. In certain circumstances, a conglomerate merger can result in the merged entity foreclosing rivals (through tying and bundling or through 'portfolio

²⁵ Merger Assessment Guidelines, paragraph 5.6.1

effects') and thereby increasing its own market power and profitability.²⁶ The OFT only regards foreclosure as anti-competitive where it has resulted or may be expected to result in a realistic prospect of a substantial lessening of competition in the foreclosed market(s), not merely where it disadvantages one or a few competitors.

145. The OFT's approach in examining the possibility of such scenarios involves analysing the strength of the following factors and the extent to which the merger materially changes the:

- ability of the merging parties to undertake such strategies
- incentive of the parties to do so, and
- the effect of this strategy.²⁷

146. Competitors and customers raised concerns that the merger may harm competition as a result of the merged firm bundling linear playout with other services (or using pricing that encouraged such bundling) – and as a result foreclosing rivals not present in linear playout. The OFT would be concerned if, having foreclosed rivals in this way, the parties were then able increase prices (or reduce quality) as a result of the weakened competition they face.

Ability

147. OFT guidance states that in conglomerate mergers the merger may create or strengthen the ability of the merged firm to use its market power in at least one market to reduce rivalry.²⁸ The OFT considers that the merger enhances the merged entity's market power in level one linear playout, and as a result may enhance the parties' ability to undertake a foreclosure strategy. However, the parties' argue that this ability is limited by the fact that the structure of contracts and bidding exercises is determined by the customer rather than supplier.

²⁶ Merger Assessment Guidelines, paragraph 5.6.5

²⁷ Merger Assessment Guidelines, paragraph 5.6.6.

²⁸ Merger Assessment Guidelines, paragraph 4.1.5.

Incentives

148. It is not clear from the available evidence that the parties' have strong incentives to engage in this strategy. Because linear playout contracts are long, there would be a prolonged initial cost to the parties of a strategy involving low pricing in ancillary services in order to promote bundling. Weighed against this would be an uncertain ability to subsequently raise prices in these ancillary services.

Effect

149. In terms of the effect of this strategy, the OFT notes that there would remain a number of other competitors in each service which the parties could choose to bundle with linear playout. Given that the OFT has found concerns only in relation to level one linear playout, rivals could be foreclosed from supplying only the two level one broadcasters (BBC and ITV). As a result, competing suppliers would therefore be unlikely to exit altogether and would be able to re-enter the level one segment in response to any subsequent price rise.

150. Based on the evidence currently available to the OFT at phase one, the OFT does not consider that the merger leads to a realistic prospect of a SLC through conglomerate effects.

VERTICAL ISSUES

151. Ericsson provides inputs into coding and multiplexing and distribution, which are steps that follow linear playout in the broadcasting chain. However, on the basis of evidence available, neither Ericsson nor RBM have a significant presence in these downstream segments. The OFT received one concern relating to the supply by Ericsson of these inputs, relating to the fact that its position in the upstream segment could give it privileged information about the intentions of linear playout rivals that may wish to offer customers a bundled service involving linear playout along with coding and multiplexing and distribution.

152. However, the OFT does not consider that there is a merger specific effect in relation to this issue. The OFT also notes that there are other providers

of the upstream inputs in question, and that a linear playout rival has in the past chosen to switch away from purchasing this input from Ericsson, suggesting that these other suppliers provide a constraint. The OFT does not therefore consider that there is a realistic prospect of a substantial lessening of competition through vertical effects resulting from the merger.

BARRIERS TO ENTRY AND EXPANSION

153. Given that the competitive assessment has found a realistic prospect of a substantial lessening of competition within the market for level one linear playout, the OFT has considered whether this lessening of competition may be mitigated by the expansion of existing providers into serving this segment, or by new entry.

154. In assessing whether entry or expansion might prevent a substantial lessening of competition, the OFT will consider whether such entry or expansion would be:

- i. timely
- ii. likely, and
- iii. sufficient.²⁹

Timely

155. The OFT's market testing indicated that there are high barriers to entry in the supply of playout services for level one customers. The OFT has been told that market entry would require significant investment including the recruitment of staff with recognised credibility in the industry. In particular, such staff would need to possess appropriate experience and a good understanding of the customer's operations. A successful bidder would also need to have premises to facilitate the location of dedicated infrastructure and operations. Competitors have told the OFT that in bidding processes, tours of a current facility often play a vital part in the winning of new work.

²⁹ Mergers Assessment Guidelines, paragraph 5.8.3.

156. A new provider would therefore have to invest significantly before being able to take new work. One competitor commented that while the cost of hardware and software is generally coming down over time, the level of complexity imposed by the customer continues to rise. On this basis, it has been estimated by a third party that it would take approximately five years for a new entrant investing on a sufficient scale to gain credibility and establish a position where it is possible to bid for major contracts. The OFT noted that in the recent [] tender, [], but the OFT does not consider this to be common industry practice.
157. A number of third parties did indicate that changes in technology are likely to affect the range of providers present in the market in the long term. For example, Deluxe, the most recent entrant into linear playout is offering playout solutions based on cloud technology. However, the OFT received no evidence to suggest that technology changes and the resulting possibilities for new entry would be sufficiently timely to counteract a substantial lessening of competition resulting from the merger in the supply of level one playout. This is particularly true because any new developments are most likely to be adopted and their ability proved in respect of simpler channels' playout before they begin to be considered by broadcasters with more complex needs.
158. Some of the main broadcasters submitted that cloud technology is a number of years away from being considered appropriate technology for their linear playout requirements.

Likely

159. The OFT considers that in respect of existing providers, the most likely firms to expand into serving level one customers are Encompass and to a lesser extent Arqiva. The parties argued that this would be facilitated by the 'build to order' nature of the market, 'systems integrators' that can be employed to purchase and assemble the relevant hardware and software, and the possibility of gaining staff along with a contract, through TUPE. However, as discussed in detail within the competitive assessment there are number of barriers which could hinder this movement, 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. This suggests that expansion into level one may be unlikely, and that in any case the constraint provided by expanding providers may not be sufficient to counteract the loss of competition caused by the merging of two experienced rivals.

160. The OFT also considered whether there may be timely and likely entry into the UK market by providers currently active in other countries, but received no evidence to support this view.

Sufficient

161. The parties submitted that barriers to entry are not insurmountable and point to the entry and expansion of GlobeCast, Arqiva, WRN and Encompass since 2006. The parties also said that they anticipate entry by firms that have not traditionally provided linear playout, but which are present in media logistics (such as []) or more generally in IT outsourcing (such as [] and []). However, with the exception of [], 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.
162. In addition, although barriers to expansion may be lower, for example, for [], the evidence in this case indicates that this would not be sufficient to offset the OFT's SLC finding. For example, both customers and some competitors told the OFT that expansion from existing suppliers not currently present in level one would be unlikely or insufficient in the short-term.
163. The OFT does not therefore consider entry or expansion in outsourced linear playout services to be likely, timely or sufficient to alleviate its competition concerns in the level one linear playout segment.

BUYER POWER

164. Customers may be able to use their negotiating strength to limit the ability of a merged firm to raise prices. Such countervailing buyer power may

make competition concerns less likely to arise.³⁰ The OFT has therefore considered the extent to which buyer power is held in the market for level one linear playout (by the BBC and/or ITV), and how this buyer power is likely to be affected by the merger.

165. The parties submitted that UK customers of linear playout are typically large, sophisticated channel owners who exert significant pressure to extract better prices and/or service quality levels. They also noted that contracts typically include strict price controls, cost transparency, benchmarking provision, service level standards and detailed exit and transition arrangements.
166. An individual customer's negotiating position will be stronger if it can easily switch its demand away from the supplier. This will be more likely if there are several alternative suppliers to which the customer can credibly switch, or the customer has the ability to switch to self supply or sponsor new entry. Customers may also exert buyer power if they can impose costs on the supplier without switching, for example by refusing to buy other products from the supplier. In bilateral negotiations, the relative bargaining strength of the supplier and each customer is affected by their mutual dependency. For countervailing buyer power to prevent an SLC, it is not sufficient that it merely existed before the merger. It must also remain effective following the merger.³¹
167. As set out in the competitive assessment, [].
168. The possibility of self-supply by [] has been discussed within the earlier competitive assessment. The OFT does not consider that the threat of self supply is sufficient to counteract the prospect of a substantial lessening of competition in linear playout.
169. [].
170. [] This means that it is difficult to test and develop a provider through a smaller contract for a portion of the work. It may be possible to separately

³⁰ See *Merger Assessment Guidelines*, Section 5.9

³¹ See *Merger Assessment Guidelines*, Section 5.9

procure playout for the broadcasters' international channels or some simple '+ 1' channels (as ITV has done) or for their disaster recovery (as other broadcasters have done). However, evidence from linear playout providers and broadcasters suggest that these requirements are not sufficiently similar to the core playout requirement to act as a means to test and develop provider capacity in core playout.

171. The OFT also considered whether the BBC or ITV could constrain the parties through refusing to purchase other services from the parties. []

172. At present, the BBC and ITV represent a large proportion of revenue for RBM and Technicolor, suggesting that the parties have some dependency on the level one broadcasters, and that the broadcasters may have some buyer power as a result. However, the OFT notes that the merger may cause the parties to be less dependent on the BBC or ITV individually, further weakening the broadcasters' bargaining power.

THIRD PARTY VIEWS

173. The OFT received comments from a range of broadcasters, linear playout providers and other ancillary service providers including the parties' customers.

174. [] The BBC and ITV considered their outsourced linear playout requirements to be among the most complex in terms of the level of reactivity and intervention, quality and service standards and the scale and risk required. [].

175. Other competitors confirmed the view of the BBC and ITV in relation to the complexity of their linear playout requirements and that they did not feel they had the necessary capacity, experience and expertise to take on a contract with either the BBC or ITV. However, one competitor said that it does have the required experience and expertise to provide outsourced linear playout successfully to the BBC and ITV but noted that what distinguished them from other PSBs was the volume of live content and regional variation.

176. Broadcasters other than the BBC and ITV ranked other outsourced linear playout providers in addition to the parties capable of fulfilling their linear playout requirements but generally the parties featured highly in the eyes of these broadcasters. Whilst there were concerns raised by a number of other broadcasters, there were some broadcasters (with complex requirements) that did not raise any significant concerns.
177. Other specific third party comments have been set out in the main body of the decision where relevant.

UNDERTAKINGS IN LIEU

178. Where the duty to make a reference under section 33(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.
179. The OFT notes that undertakings in lieu are appropriate only where the remedies proposed are clear cut and remove all competition concerns meeting the test for reference. Furthermore, they must be capable of ready implementation.³²
180. The OFT is generally unlikely to consider that behavioural undertakings will be sufficiently clear cut to address the identified competition concerns given the number of risks such remedies may bring.³³ The OFT, therefore takes a cautious approach towards considering behavioural remedies.³⁴

Option A

181. In lieu of reference to the Competition Commission, Ericsson offered to commit that, []. Ericsson submitted that a similar remedy was accepted by

³² OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.7.

³³ OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.39 – 5.41.

³⁴ OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.42.

the Secretary of State as suitable in relation to the merger of Carlton Communications plc and Granada plc in 2003.³⁵

Option B (applies in addition to Option A)

182. In the event that option A be considered insufficient to remedy any SLC, []. Ericsson said that this would mean that pricing will be based on [].

183. [].

OFT evaluation of the remedy offers

184. Section 73(3) of the Act refers to the obligation on the OFT 'to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable' and the OFT's starting point would be to seek an outcome that restores competition to the level that would have prevailed absent the merger. Further, in order to accept undertakings in lieu of reference, the OFT must be confident that all the potential concerns that have been identified would be resolved by means of an undertaking in lieu without the need for further investigation and are thus clear-cut.³⁶

185. The OFT has found a realistic prospect of an SLC in level one linear playout, where the only two customers are currently the BBC and ITV. The OFT's main concern is an increase in the price of outsourced linear playout and a degradation of quality of service and innovation. In neither of the options offered by Ericsson do the undertakings in lieu of reference reach the clear-cut standard.

186. First, the undertakings do not comprehensively resolve the concerns of the OFT in relation to level one linear playout. The parties submitted that [],³⁷ while the [].

³⁵ The OFT notes that the *Carlton/Granada* remedies were accepted under a different legal regime, the Fair Trading Act 1973. The OFT notes that the CC's review of those undertakings said that the behavioural undertakings created some costs in deterring ITV from providing some HD services (paragraph 7.2), provided unintended incentives for ITV to focus on commercial 'impacts' (paragraph 7.3) and created difficulties for ITV to react to customer demand (paragraph 7.3). *Review of ITV's Contracts Rights Renewal Undertakings*, 12 May 2010.

³⁶ OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.6.

³⁷ Annex 12 to the parties' informal submission

187. The OFT does not therefore believe that an undertaking which [] would be sufficient to protect price competition. In addition, absent the merger, other non-price terms may improve from the current contracts from the customers' perspectives. Such improvements are likely to result from the competitive dynamic which is being substantially lost by the merger. The OFT is conscious that it does not wish inadvertently to ossify the market dynamics by accepting such undertakings.
188. Second, the undertakings do not address the OFT's concerns in relation to a degradation of quality of service, including innovation. Absent the merger, customers could expect to be in a position to demand an improvement in quality service and innovation. The OFT does not consider that Option B provides a strong incentive to the merged entity to reduce costs, which may be one area of innovation absent the merger. The OFT was also concerned with a general reduction of quality of service in outsourced linear playout given the lack of competition that may exist post merger.
189. Third, both proposed options would involve significant monitoring by the OFT. Even if costs and margins were subjected to independent expert review, the OFT would need to monitor the compliance with the undertakings. OFT guidance says that the cost of monitoring is one factor as to why the OFT would be reluctant to accept behavioural undertakings.³⁸ Further, the OFT is concerned that the behavioural undertakings may introduce undue risk in that they may be able to be circumvented so that they do not present a clear cut solution to the competition concerns identified above.³⁹
190. Fourth, both proposed options apply to the parties' existing customers. However, other customers may benefit from the competition between the parties even if they ultimately choose another provider (since that provider will face price and non-price competition from the parties).

³⁸ OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.41

³⁹ The OFT notes that the Competition Appeal Tribunal has said 'the fact that behavioural remedies typically require ongoing monitoring and enforcement, and the associated risks, are relevant considerations for the [Competition] Commission' *British Sky Broadcasting Group plc v The Competition Commission*, [2008] CAT 25 (paragraph 302).

191. Furthermore, given that the merger involves a structural change to the market, the OFT considers a structural solution to be a more appropriate remedy as it believes that it may be the case that a merger may be expected to result in an SLC.⁴⁰
192. The OFT therefore considers that the remedies offered are not capable of clearly addressing the competition concerns identified as arising from the merger.
193. Accordingly, the OFT has decided not to exercise its discretion under section 73(2) of the Act to consider whether to accept undertakings in lieu of a reference.

ASSESSMENT

194. The OFT considers that arrangements are in progress or contemplation which, if carried into effect, will result in the enterprises Ericsson and CBS2 ceasing to be distinct. The turnover test is met in this case. Therefore, the OFT considers a relevant merger situation will be created.
195. The parties' main overlap is in the supply of linear playout services to television broadcasters. RBM also provides a full suite of services ancillary to playout ranging from media logistics to disaster recovery and considers itself as a 'one-stop-shop' provider. Ericsson on the other hand focuses mainly on linear playout with some presence in ancillary services, namely, media logistics, digital media services and disaster recovery services. The parties' overlap in ancillary services is minor.
196. The OFT considers the relevant frame of reference for its assessment to be the supply of outsourced linear playout to level one, level two and level three linear playout in the UK on the basis of complexity requirements, with level one being the most complex, then two and so on. The evidence obtained by the OFT identified a spectrum of complexity requirements in linear playout services according to the level of reactivity and intervention of playout (defined by the volume and nature of live program content, regional variations and other scheduling interruptions) the quality and

⁴⁰ OFT's *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference*, paragraph 5.20

service standards required by the customer and the scale and risks of certain channels. Within the relevant frame of reference the evidence did not support the inclusion of in-house supply of linear playout by the customers themselves.

197. The OFT considered horizontal unilateral effects in level one and two linear playout and bundling of ancillary services with linear playout services, as well as conglomerate foreclosure concerns.

198. In relation to level one outsourced linear playout, the OFT's investigation found that the merging parties are close competitors for the only two broadcasters that require the level of complexity in this segment for the linear playout of their channels. The parties submitted that Technicolor is a weakened competitor because of the damage caused to its reputation following a critical mistake it made during ITV's live coverage of the 2010 World Cup and [], and therefore is no longer a close competitor of RBM, evidenced by Technicolor's lack of success in winning ([]) in recent tenders. In addition the parties submitted that there are a number of credible competitors with the ability to service channels across the entire spectrum of complexity, evidenced by recent tender successes by both Arqiva (Disney and British Eurosport) and Encompass (Channel 5).

199. The parties' contention was not supported by []. Moreover, there was insufficient evidence to suggest that the threat of in-house provision would constrain the parties post merger due to the high level of investment required and the difficulties in obtaining the necessary expertise.

200. On the basis of the evidence, the OFT therefore considered that the merger may lead to harm to competition in level one outsourced linear playout with the possibility of post merger price increases and/or degradation in quality, including innovation.

201. In relation to level two outsourced linear playout the evidence obtained by the OFT suggested that customers with a lower level complexity in their linear playout requirements have a wider choice of providers. The parties submitted that in all linear playout, there is effectively four credible competitors, [] and (to a lesser extent) []. The parties submitted bidding data confirming that Technicolor had not won a contract since 2009 and

therefore is not a close competitor to RBM. The bidding data shows that both Arqiva and Encompass have been more successful than the parties in recent tenders. However, third party views suggested that the parties are still close competitors even in level two.

202. On the basis of its finding of an SLC in level one linear playout services, the OFT did not find it necessary to conclude whether there is a realistic prospect of an SLC in level two.
203. In relation to horizontal unilateral effects in bundling linear playout with certain other ancillary services, the OFT considered evidence from third parties who confirmed that there would remain a significant constraint from a number of other providers of ancillary services which customers can choose to unbundle from linear playout. Furthermore, the overlap in bundled services between the parties is minor given that RBM has a more extensive range of supplying ancillary services.
204. The OFT also considered horizontal unilateral effects in bundled services because of a loss of potential competition (Ericsson) in certain other ancillary services. [].
205. On balance, the evidence did not support this concern given that many customers purchase these ancillary services from suppliers other than their linear playout provider. Furthermore, the OFT considered the evidence of Ericsson's potential entry as a 'one-stop-shop' to be insufficient to conclude on a loss of potential competition.
206. On the basis of the evidence, therefore, the OFT does not consider there is a realistic prospect of an SLC in bundled services.
207. In relation to concerns of foreclosure of rivals from conglomerate effects, the OFT considered that whilst the merger may enhance the parties ability to foreclose rivals (by tying, bundling or portfolio effects) through leveraging its market position in linear playout, there was insufficient evidence that the parties would have the incentive to foreclose rivals. Linear playout contracts are long in duration, there would be a prolonged initial cost to the parties of a strategy involving low pricing in ancillary services in order to promote bundling. Weighed against this, there would be

an uncertain ability to subsequently raise prices in ancillary services. On the basis of the evidence, therefore, the OFT does not consider there is a realistic prospect of an SLC on the basis of conglomerate effects.

208. Consequently, the OFT believes that it is or may be the case that the merger may be expected to result in an SLC within a market or markets in the United Kingdom.

DECISION

209. The OFT has therefore decided to refer the anticipated acquisition by Ericsson of Creative Broadcast Services Holdings (2) Limited to the Competition Commission pursuant to section 33(1) of the Act.

ⁱ The BBC have pointed out that BBC1 a total of 18 nations and regions, not 20.

ⁱⁱ Channel 5 have pointed out that Channel 5 has five advertising regions, not 4.