

ERICSSON / CREATIVE
ANNEX: POTENTIALLY UNCLEAR STATEMENTS IN THE CC’S PROVISIONAL FINDINGS

Paragraph Reference*	CC Statement	Parties’ Comments*
8.38	“We found that the BBC and ITV had the most complex broadcast operations”.	This phrase is potentially misleading as the CC’s provisional conclusion is that, along the spectrum of operational complexity, “the BBC and ITV’s operational playout requirements were more complex than those of other broadcasters” ¹ and that it “did not see convincing reasons to indicate that the outsourced playout requirements of the BBC and ITV were overall substantially more complex at an operational level than those of some other broadcasters... Therefore the operational aspects of their outsourced playout requirements <u>were not in a class of their own</u> ” ² (emphasis added).
8.39	“We found that there were certain operational issues unique to each of the BBC and ITV, with a degree of commonality between the two (such as the role coordinating regional playout), and therefore it was unlikely that playout providers other than the parties would have experience with these issues” (emphasis added).	These paragraphs suggest that regional content and the coordination of regional programming add to operational complexity. However, the CC acknowledges that the burden of regionality lies with the broadcaster (in the case of the BBC) or is dealt with through automation (in the case of ITV). As such, regionality does not, in fact, impact on the complexity of providing playout for the BBC and ITV.
8.40	“other PSB channels (Channel 4 and Channel 5, and some digital channels of the four PSBs)...display (to varying degrees) some of the characteristics of the BBC and ITV, but with many fewer advertising regions and <u>without regional programming variations to be coordinated</u> ” (emphasis added).	Further, paragraph 8.39 implies that there are multiple issues which are “unique to each of the BBC and ITV”. However, the CC notes separately that “the only unique feature of the BBC and ITV is their regional programming.” ³ These statements are inconsistent.
8.40	“We understand that live sports channels have complicated operations on a day-to-day (or hour-to-hour) basis, with many programmes being subject to manual intervention, <u>but they do not have regional content</u> or large numbers of advertising regions” (emphasis added).	
9.47	“we were concerned that, for the BBC and ITV (and possibly Channel 4) in particular, the merger may remove one of the two best sources of ideas since they are the only two suppliers with experience of setting up and operating systems to handle a large	

¹ Paragraph 8.48.

² Paragraph 8.38.

³ Appendix D, paragraph 29.

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	<i>number of regions, and coordinating with in-house playout staff.</i> (emphasis added).	
9.72	"While Channel 5 has <u>fewer regional requirements</u> than the BBC, it still offers experience of most of the complexities that the BBC has" (emphasis added).	
8.48	"The remaining operational complexity of BBC One and ITV1 would still be at the highest end of the spectrum".	It is not clear what other aspects are "remaining" given that the CC confirm that "apart from regional programming and high audience shares, there are no features that are exclusive to customers of RBM and Technicolor". ⁴ Neither of these features impacts operational complexity as the CC accepts at paragraphs 8.33, 8.39 and Appendix D, paragraph 79.
8.59	"The majority of (complex) switching was between in-house provision and outsourcing".	The certainty of this statement is at odds with the CC's acknowledgement in the previous sentence that "there is little direct evidence about switching". It may, therefore, be better to qualify the statement by noting that it is based on the evidence available which is limited, in large part, to the first generation of outsourcing.
8.75	"We thought that older [i.e. pre-2009] contracts still have significance".	These two statements are not consistent.
8.81	"the Channel 4 tender is of limited relevance, given the amount of time that has elapsed since the contract was awarded [i.e. 2008]".	
8.81	"There has not been an open tender of linear play-out services for a reactive mixed-genre channel since the Channel 4 tender in 2008".	It is not clear why the CC distinguishes "mixed-genre" as this is not a feature that the CC identifies as being relevant to complexity for the playout provider. Indeed, the CC acknowledges that "the multi-genre nature of PSB channels seemed to us to be <u>primarily an issue for the broadcaster</u> ; from a playout provider's perspective, dealing with schedule changes for a mixed-genre channel <u>did not seem more operationally challenging than doing so for a dedicated sports channel</u> " ⁵ (emphasis added).
8.82	"The only recent market test of a complex mixed-genre channel was an RFI conducted by the BBC in November 2012".	
8.85	"Arqiva... has been successful in renewing and obtaining playout contracts for sports channels. It won a playout contract for ESPN... and renewed the British Eurosport contract...[but] Arqiva does not have experience with, and has not been shortlisted for,	Based on the CC's analysis, experience playing out live sports channels is highly relevant to playing out PSBs as the CC acknowledges that (i) "the need to play out reactive live content is...the primary differentiator between broadcasters' needs" ⁶ and (ii) live sport is "reactive live content". ⁷ The CC also notes that apart from regional

⁴Appendix D, paragraph 29.

⁵Appendix D, paragraph 56.

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	<i>any PSB contract</i> ".	
9.74	<i>"[Arqiva's] experience providing complex playout is limited to sports broadcasters, which is widely perceived as being less relevant (or only partially responsive) to the needs of PSBs".</i>	programming and high audience shares (neither of which significantly affect playout operations) all other features of the BBC and ITV are provided by Arqiva to at least one of its customers. ⁸
Appendix D, paragraph 64	<i>"there may be elements common to mixed-genre PSB channels that are not found to the same extent in sports channels, so even though the broadcaster makes the decisions about how to deal with changes to the schedule, experience of the chain of communication that delivers those changes is an advantage".</i>	Drawing a distinction (as in paragraph 8.85) between PSB and sport channel experience, suggesting that such experience is less relevant, is misleading. Further, as noted in relation to paragraphs 8.81 and 8.82 above, it is not clear on what basis the CC distinguishes "mixed genre" - this is not a feature the CC identifies as relevant to complexity for the playout provider.
8.91	<i>"along the spectrum of complexity, the BBC and ITV's requirements were most complex".</i>	This statement forms part of the CC's provisional conclusion on competition pre-merger. It may therefore be clearer if this statement also reflected the CC's view that, in relation to operational complexity, these issues could be overcome (through TUPE transfers in particular) and need, therefore, not be a significant obstacle. ⁹
9.25	<i>"And secondly, we did not think it likely that the customer would be able to make savings across the bundled services, for the following reason. If the playout provider also had an advantage in the other service (eg because there were advantages to the customer of procuring them from the same supplier or because it had market power), then the customer would struggle to make a credible threat to switch supplier of the other service. Conversely, if there were effective competition for supply of the other service, we would expect the play-out provider to earn a low economic margin in that service, and the provider would rather sacrifice that margin than reduce its price for playout to the competitive level".</i>	This statement is unclear. In addition, it should be irrelevant whether a playout provider has market power in the other service or not. If a customer tenders for playout services and another service together, this will lead to <u>increased</u> competition - as the potential contract is worth more - and therefore a likely better price for the customer. It is not material if margin is "sacrificed" in relation to playout or the other service. The scenario described by the CC relates more to issues of tying / bundling rather than leveraging.

⁶ Paragraph 8.33.

⁷ Paragraph 8.31.

⁸ Appendix D, paragraph 29.

⁹ Paragraph 8.39.

Paragraph Reference*	CC Statement	Parties' Comments*
9.31	<p><i>"We also thought that this barrier may to some extent be mitigated if it is possible to recruit personnel with experience of playout for the broadcaster in question (either from the broadcaster or the incumbent playout provider), and thus demonstrate understanding—although we thought that availability of such personnel would be limited and therefore this may not always be possible".</i></p>	<p>Both of these statements appear to refer (at least in part) to operational staff. This is inconsistent with the CC's previous statement that <i>"suitable operational staff are broadly available on the open market"</i>.¹⁰</p> <p>In addition, it is not clear why, in paragraph 9.31, the CC implies that only staff with experience with a particular broadcaster would have the relevant understanding and expertise to deliver playout to that broadcaster. This suggestion is not accurate and is also inconsistent with the CC's conclusions that (i) <i>"a demonstrated reputation for handling similarly complex broadcasters tended to be the most important factor in choosing a supplier"</i>¹¹ (rather than experience with the broadcaster itself); and (ii) there are no features unique to the customers of RBM and ITV that impact operational complexity (see comment in relation to paragraph 8.48 above).</p>
Appendix E, paragraph 34	<p><i>"We also considered evidence on the availability of people with relevant skills and experience in both operational roles and those with planning and engineering skills... we agree that for certain roles there may be a limited number of individuals with direct experience. This may impact on a potential provider's ability to demonstrate knowledge at the bidding stage".</i></p>	<p>As regards the availability of skilled planning and engineering staff, the parties refer to paragraphs 3.18 to 3.25 in the main response, which describe how these roles are largely outsourced.</p>
9.49	<p><i>"This suggests that what really matters is whether one of the remaining suppliers can, by the end of this process, bid as strongly as the lost competitor would have. If so, the reduction in the number of bidders will be of limited impact".</i></p>	<p>The CC seems to refer to different tests for assessing the impact of the merger. This is potentially misleading. The <i>"credible bidder"</i> test as per paragraph 9.60 should be the more appropriate standard to apply, as the CC notes in its Merger Assessment Guidelines.¹²</p>
9.60	<p><i>"The effect on the customer depends on the extent to which the lost competitor is a credible provider".</i></p>	
9.84	<p><i>"We did not know how many bidders would be taken forward to the final ITT stage absent the merger, but we did think the merger would give the BBC an added incentive</i></p>	<p>This statement does not accurately reflect the CC's conclusion that it <i>"would expect broadcasters with complex requirements to have an incentive to do [level the playing</i></p>

¹⁰ Paragraph 8.33.

¹¹ Paragraph 8.67.

¹²CC2 - Merger Assessment Guidelines, paragraphs 5.2.18, 5.8.8 and 5.9.3.

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	<i>to work hard with at least one third party supplier</i> ".	<i>field through the tender process] with or without the proposed merger</i> ". ¹³ Indeed, the parties would expect all broadcasters, not just the BBC or those with "complex requirements", to have an incentive to do this.
9.86	<i>"We thought that other third party rivals may not turn out to be as strong a competitive constraint as Technicolor would have been, which may lead to a significant reduction in rivalry</i> ".	The statement does not accurately reflect the CC's conclusion that there was "the potential for other competitors to exert the same level of competitive constraint" ¹⁴ and that Arqiva and Encompass are "credible bidders for the BBC playout contract". ¹⁵

* All references are to the Provisional Findings Report unless otherwise stated.

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¹³ Paragraph 9.21.

¹⁴ Paragraph 9.87.

¹⁵ Paragraph 9.76.