

**Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecom Limited and Arqiva Limited – Project Canvas**

The OFT's decision on reference under section 33(1) given on 19 May 2010. Full text of decision published 28 May 2010.

---

**PARTIES AND TRANSACTION**

1. The British Broadcasting Corporation (BBC), ITV plc (ITV)<sup>1</sup>, Channel Four Television Corporation (Channel 4), Channel 5 Broadcasting Limited (Five), British Telecommunications plc (BT), Talk Talk Telecom Limited (Talk Talk) and Arqiva Limited (Arqiva) (the JV Partners) intend to set up a private limited joint venture company, Canvas Limited, (the Canvas JV).<sup>2</sup>
2. Project Canvas is intended to develop a common technical standard for a new internet-connected television platform IPTV (the Canvas platform). The Canvas JV's commercial objects are: i) the development and promotion of a common technical standard, ii) to offer UK audiences video-on-demand (VOD) and linear television along with interactive and digital applications delivered over the internet, and iii) the availability of Public Service and other Broadcast content in the UK.<sup>3</sup>

---

<sup>1</sup> ITV is the parent company of ITV Broadcasting Limited. It is included in this definition as its activities are relevant for this assessment.

<sup>2</sup> In this decision, references to 'Project Canvas' are to the project in its wider sense; references to the Canvas platform are to the technical standard; and references to the 'Canvas JV' are to Canvas Limited, the corporate joint venture company.

<sup>3</sup> Article 2 (Company's Objects) of the Articles of Association of Canvas Limited (Draft 16 March 2010) and Schedule 3 of the Shareholders' Agreement (Draft 16 March 2010).

3. The JV Partners have stated in their notification to the OFT that the Canvas JV will have no role in aggregating, producing or retailing any television content (including VOD).<sup>4</sup> None of the JV Partners intends to transfer any television content into the Canvas JV. Neither will the Canvas JV produce or market any devices carrying the 'Canvas' trademark. In addition, the JV Partners do not intend to contribute to Canvas JV any of their participations in the existing television platforms or IPTV businesses such as Freeview<sup>5</sup>, Freesat<sup>6</sup>, BT Vision, Talk Talk TV or Arqiva's Seesaw. These will continue under the control of their respective parent companies.
4. The JV Partners notified this transaction to the OFT on 17 March 2010 and submitted to the OFT the final draft version of the Shareholders' Agreement and the Memorandums and Articles of Association of the Canvas JV. Accompanying documentation included a list of the anticipated financial and non-financial contributions of each JV Partner into the Canvas JV. The OFT was advised by the JV Partners that these documents are in their final form and the substance of the arrangements would not materially change prior to completion and therefore it was appropriate for the OFT to review this transaction at this point.<sup>7</sup>
5. The OFT administrative deadline to make a decision expires on 19 May 2010. The OFT's analysis has been based on the documentation and other information concerning the Canvas JV as submitted to the OFT at this point in time. To the extent that there are future changes to the Canvas JV, these could conceivably change the jurisdictional analysis applicable.

---

<sup>4</sup> The JV Partners have stressed that this is a critical difference with Project Kangaroo. Competition Commission: BBC Worldwide Limited, Channel Four Television Corporation and ITV plc. A report on the proposed joint venture relating to the video on demand sector (2009).

<sup>5</sup> Freeview is a broadcasting platform providing free-to-air digital television channels, radio stations and interactive services. It is managed by a joint venture company whose shareholders are BBC, British Sky Broadcasting Limited, Channel 4, ITV and Arqiva.

<sup>6</sup> Freesat is a satellite digital terrestrial television platform, owned and managed by a 50/50 joint venture between BBC and ITV. Both platforms broadcast a large number of channels from many content providers.

<sup>7</sup> Project Canvas is an anticipated transaction subject to the approval of the BBC Trust and the competition authorities. This means that the OFT must take into account all arrangements in progress or in contemplation among the JV Partners at the time of this decision regardless of the actual timing when such arrangements are implemented.

## JURISDICTION<sup>8</sup>

6. The jurisdictional test in the Enterprise Act 2002 (the Act) is met if the OFT reaches a level of belief that it is or it 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'.<sup>9</sup> It is clear, given the progressed state of the contractual arrangements and the steps taken towards the incorporation of the Canvas JV as an entity, that 'arrangements are in progress or in contemplation'. The OFT has therefore considered the key question as to whether these arrangements will lead to the creation of a 'relevant merger situation'.
7. A 'relevant merger situation' arises where two or more enterprises<sup>10</sup> cease to be distinct and either the turnover or the share of supply test is met.<sup>11</sup> This definition covers different kinds of transactions, including the transfer of assets or the creation of a joint venture.
8. The OFT's Jurisdictional and procedural guidance<sup>12</sup> discusses the concept of an 'enterprise' and explains the factors the OFT will consider when

---

<sup>8</sup> The OFT's merger investigation involves the analysis of two issues: 1) consideration of whether the OFT has jurisdiction (that is the legal power) to review the transaction (the jurisdictional test); and, if so, 2) an assessment of the competitive impact of the merger on a market or markets in the UK (the substantive analysis). A lack of jurisdiction means the OFT does not need, and is not able, to decide on the substantive competitive assessment. Therefore, the OFT has first considered in this case whether it has the legal jurisdiction to consider the Canvas JV arrangements (ie whether the Canvas JV gives rise to a relevant merger situation).

<sup>9</sup> Section 33(1)(a) of the Act.

<sup>10</sup> The term 'enterprise' is defined in section 129 of the Act as 'the activities, or part of the activities, of a business.' In turn, a 'business' is stated to include 'a professional practice and [.../...] any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.

<sup>11</sup> The turnover test is met if the UK turnover of the enterprise being taken over exceeds £70 million. The share of supply test is met if the merging parties together supply or obtain 25 per cent or more of goods or services of any (reasonable) description in the UK or a substantial part of the UK (and where the merger enhances that share of supply).

<sup>12</sup> OFT527 Mergers - Jurisdictional and procedural guidance, Enterprise Act 2002, June 2009. Paragraph 3.8 *ff.*

determining whether two or more enterprises are ceasing to be distinct.<sup>13</sup> Of particular relevance to the analysis of this transaction are the statements that:

*'Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an 'enterprise' unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer.'*<sup>14</sup>

*'In the case of a 'start-up' joint venture, the question under the Act will be whether the activities transferred to the joint venture by one or more parents (or acquired from a third party) are sufficient to constitute an enterprise.'*<sup>15</sup>

9. In deciding whether these arrangements will lead to two or more enterprises ceasing to be distinct, the OFT has considered:
- whether any of the individual contributions to the Canvas JV by the JV Partners is sufficient to form an enterprise (or whether multiple enterprises are being contributed); and
  - whether the JV Partners will cease to be distinct from (ie have some degree of control over) the Canvas JV.

**Are any of the contributions from the JV Partners to the Canvas JV sufficient to constitute an enterprise?**

10. The question for the OFT is whether the JV Partners will transfer any existing<sup>16</sup> enterprises into the Canvas JV.<sup>17</sup>

---

<sup>13</sup> OFT527 Mergers - Jurisdictional and procedural guidance, Enterprise Act 2002, June 2009. Paragraph 3.14 ff.

<sup>14</sup> Paragraph 3.10. On the defined term 'enterprise', see further footnote 10 above.

<sup>15</sup> Paragraph 3.7, footnote 11.

<sup>16</sup> By contrast, whether the Canvas JV could itself develop into an enterprise in due course is not pertinent to the OFT's jurisdictional assessment in this case.

<sup>17</sup> The JV Partners have already carried out some preparatory work, which will be transferred to the Canvas JV once it is formally constituted (by way of assignment or licence of certain intellectual property rights). Following incorporation of the Canvas JV, the JV Partners also

11. According to the JV Partners' joint submission, their contributions to the Canvas JV comprise intellectual property rights (IPR) from the BBC and, to a more limited extent, ITV; whilst the remainder of the contributions from the other JV Partners are financial.<sup>18</sup> No staff are transferring to the Canvas JV, although some staff from the JV Partners (predominantly from the BBC) will supply some technical services to the project in the period leading to incorporation.<sup>19</sup> No customer contracts or existing goodwill are being transferred. In the JV Partners' view, none of those contributions is sufficient to constitute an enterprise because they do not comprise the 'activities, or part of the activities, of a business'.
12. Three complainants made representations to the OFT suggesting that it may be the case that enterprises will cease to be distinct. Based on publicly available information – some of which the JV Partners stated is now out of date<sup>20</sup> – those third parties argue that the different activities that would need to be transferred into the Canvas JV would comprise an enterprise. These representations refer primarily to:
- BBC's contributions: R&D and know-how, contributions 'in-kind', staff and syndication of content; and
  - other JV Partners' contributions: R&D and know-how, contributions 'in-kind', staff, syndication of content and transfer of customers.
13. These representations are considered below. For completeness, this decision also addresses other concerns third parties have put to the OFT (such as the possible integration of Freeview and Freesat into Canvas).

---

expect to novate certain contracts with third parties (such as recruitment agencies and technical contractors) that they have entered into on behalf of the Canvas JV.

<sup>18</sup> Or contributions in kind - see further paragraphs 18 *ff* below.

<sup>19</sup> As explained further in paragraphs 18 *ff* below, post-constitution of Canvas JV, the JV Partners will be able to make contributions 'in-kind' (including the supply of technical support to Canvas JV) instead of financial contributions.

<sup>20</sup> Including extensive published information during the BBC Trust's earlier assessment of this transaction.

## ***Do the BBC's contributions form an enterprise?***

### BBC's R&D and know-how

14. It was put to the OFT that the R&D that the BBC will contribute to the Canvas JV itself forms an 'enterprise'. Specifically that the IPR and know-how derived from the BBC comprise the essence of a free-to-air hybrid DTT/IP platform.<sup>21</sup> This would include BBC R&D regarding hybrid DTT/OTT (over-the-top)<sup>22</sup> service development and BBC Future Media & Technology (regarding development of BBC iPlayer services for hybrid DTT/OTT platforms and the syndication of on-demand content to such platforms).
15. Based on the information supplied to the OFT, the BBC intends to transfer to the Canvas JV some software,<sup>23</sup> designs,<sup>24</sup> specifications<sup>25</sup> and know-how at different stages of development. In all cases, these contributions will require a substantial amount of further work and development before that combination of assets can be deemed to be an 'enterprise'.
16. The OFT believes that the BBC's total expected R&D contribution, while including some important IPR, would not amount to an 'enterprise' in itself for the purposes of the Act for the following reasons:
  - no direct turnover related to the IPR - As stated above (see paragraph 8 above) a key question for the OFT in this context is whether the IPR in question is revenue generating. The evidence available to the OFT indicates that the IPR the BBC will contribute does not currently have any turnover directly related to it, and that it is not possible for that IPR to be used in the short term to generate turnover on its own account;

---

<sup>21</sup> Digital Terrestrial Television platform based on an IP solution.

<sup>22</sup> 'Over-the-top' relates to the feasibility of transmitting over any public internet network (as opposed to a closed network).

<sup>23</sup> Including tailor-made software to support the Canvas platform and ensure the implementation of the set top box standards.

<sup>24</sup> For user interfaces and user experiences.

<sup>25</sup> The platform compliance definitions for the set top boxes manufacturers and content owners.

- according to an audit performed by CapGemini Consulting:<sup>26</sup> '*[t]he IPR being transferred is a small portion of the total investment the joint venture will make before it can launch a viable business. ... The IPR is at an early stage and will require further development and testing before it can be commercialised and that the joint venture anticipates over £100 million to 2014 to complete the development and testing of the IPR, and launch and market the service [compared with a market valuation of up to £5.5 million for the intellectual property rights being transferred]*';
- Canvas technology remains substantially incomplete - of the six technology strategy work streams in Project Canvas, only one is said to be substantially complete
- significant development milestones remain before the project becomes operational - Innovation Partners<sup>27</sup>, such as set-top box manufacturers, need to contribute to the development of Canvas; IT consultants need to be engaged to work on important parts of the IT solution; and a large proportion of the budget is allocated to technical development and to fund the appointment of staff by the Canvas JV to undertake this work, and
- substantial financial contributions are still necessary to fund development to launch - the Canvas JV will use a significant proportion of the financial contributions from the JV Partners scheduled for the coming years to fund the additional development required to launch, promote and maintain the new Canvas platform. The extent of the work remaining before the Canvas platform is operative means that the Canvas platform is not now expected to launch until well into 2011.<sup>28</sup>

---

<sup>26</sup> Evaluating the IPR developed by the BBC which will be transferred to the Canvas JV for the purposes of State Aid analysis. 15 March 2010, page 2.

<sup>27</sup> Three set-top box manufacturers have been pre-selected during the preparatory work of Canvas to contribute to the development of this project.

<sup>28</sup> The JV Partners stated that if the Canvas platform had reached the point where it could be commercialised now then the Canvas JV would be under strong pressure to commercialise the Canvas platform to be ready for the retail period up to Christmas 2010. The BBC suggested that third party representations may have been influenced by outdated press comment on the timing of the launch of the Canvas platform.

17. The Innovation Partners, who are familiar with the development of the project, have also confirmed to the OFT that Project Canvas is still at a relatively early stage and that it may take up to a year before the Canvas platform can be operative, that is before the Canvas JV could be producing any revenue. These companies have explained that there are still fundamental technical developments which need to be made by the Canvas JV before progress can be made in developing the set-top boxes and achieving the validation of the standards through the Digital Television Group.<sup>29</sup>

BBC's contributions 'in-kind' to the Canvas JV

18. The JV Partners have argued that this alternative way to fulfil their contractual obligations (as opposed to making purely financial contributions) should not be regarded as amounting to the transfer of an asset (or staff). This is because these services will be acquired by the Canvas JV on an arm's length basis and will effectively be co-funded by all JV Partners (given that the acquisition of these services will reduce the contributing JV Partner's obligation to make financial contributions). In this sense, these services are akin to any other required services provided to the Canvas JV by other unrelated third parties. The JV Partners have stressed that it does not involve the transfer of any assets or personnel.
19. The 'contributions in-kind' which are expected to take place include: marketing and customer support services, television commercial airtime, on-line marketing<sup>30</sup> activity and the provision of technical support. The OFT acknowledges that these may be important support services for a business, including the Canvas JV. However, these services are being acquired by the Canvas JV at arms length. It is not the case that the businesses providing these services are being transferred into the Canvas JV. Put differently, these arrangements are more akin to standard commercial agreements (in which the Canvas JV will be a customer) than structural transfers of staff or assets subject to the merger control provisions of the Act.

---

<sup>29</sup> The Digital Television Group is the industry association for digital television in the UK. It has over 120 members including broadcasters, platform operators, retailers, trade bodies, charities and consumer groups. It publishes and maintains the 'D-Book' which sets out the detailed technical standards for digital terrestrial television in the UK and, and runs the industry test and conformance centre: DTG testing.

<sup>30</sup> The BBC is precluded from providing television commercial airtime and on-line marketing.

## Provision of staff to the Canvas JV

20. The staff involved in Project Canvas during the period leading up to the constitution of the Canvas JV can be grouped as follow: i) six of them, who will work in future for the Canvas JV once it is incorporated, have been selected by all JV Partners<sup>31</sup> (the 'Canvas Staff'), ii) another group of employees can be described as 'on secondment' or 'on short term loan' - with the BBC being the largest supplier of this staff - who will return to their employer, and iii) external contractors. For the purpose of this assessment, the OFT does not believe that the provision of these services could amount to the contribution of any enterprise prior to the constitution of Canvas JV because:

- while the work carried out by the Canvas Staff and the staff on secondment is necessary and important for the success of Project Canvas, it is not sufficient to form an enterprise by itself; as noted by the need to involve a substantial amount of external contractors and other companies
- the cost of their services is co-funded, that is by the equal contribution of all the JV Partners, and
- the benefit of the work carried out by all the staff during this period is held by the JV Partners on trust for the benefit of Project Canvas as opposed to the JV Partners individually.

21. Nor does the OFT believe that an enterprise will be transferred upon the formal constitution of the Canvas JV. This is for the following reasons, as confirmed by the JV Partners:

- neither the employment contracts of the Canvas Staff, nor any other staff currently working in the preparatory stages of Project Canvas, will be automatically transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006
- the majority of the staff 'on secondment' or 'short term temporary loan' will be replaced through an open recruitment process undertaken by the Canvas JV itself, and

---

<sup>31</sup> Canvas staff have been appointed with the agreement of all the JV Partners. Their employment contracts, currently under a BBC cost code (for accounting purposes), will be novated to the Canvas JV following its formal constitution.

- the remaining staffing needs will continue to be covered by contractors. As stated above,<sup>32</sup> the Shareholders' and other agreements contemplate the possibility that the JV Partners supply some of the required services as any other external contractor could do. (See paragraph 19 above).

#### Aggregation of content

22. Based on the submissions made to the OFT, the BBC does not intend to transfer, aggregate or retail any of its content to the Canvas JV (see paragraph 3 above). Unlike the position in Project Kangaroo,<sup>33</sup> each JV Partner will retain control over its archived content activities and the Canvas JV will have no rights over content. The existing market structure remains unchanged.

#### Does the aggregated combination of all the BBC's contributions form an enterprise?

23. The OFT has concluded that, taken individually, neither the BBC's contribution (if any) of R&D, in-kind, staff or content is an enterprise (see above). The conclusion that the BBC's contribution is not an enterprise does not change even after aggregating all the contributions from the BBC. The continuing need for further development of the R&D (see paragraph 16 above) and the estimate by the JV Partners and some informed third parties that less than a quarter of the project has been achieved so far by the BBC<sup>34</sup> have led the OFT to conclude that even aggregating all contributions anticipated from the BBC, does not constitute an enterprise for the purposes of the Act. The fact that external third parties such as the Innovation Partners, IT consultants and other technical contractors will continue to be contracted by the Canvas JV to assist with the project corroborates that, overall, the BBC contribution is not sufficient to form an enterprise. This conclusion would hold even if it were the case that some level of know-how would be 'transferred' from the BBC technical and R&D staff working on developing the Canvas platform.

---

<sup>32</sup> See paragraph 18 above.

<sup>33</sup> See footnote 4 above. Paragraphs 3.3 to 3.17.

<sup>34</sup> This estimate includes the development of this project until April 2010.

***Do other JV Partners' contributions form an enterprise?***

24. Each JV-partner will contribute funding to the Canvas JV (mostly in cash, but potentially also, to a limited extent, 'in-kind').
25. In the case of contributions of R&D, know-how, contributions 'in-kind' and supply of staff to the Canvas JV from the JV Partners (other than the BBC), the reasons why the OFT does not believe that any of these anticipated contributions (either on an individual basis or aggregating all contributions made by a particular JV Partner) could amount to an enterprise are the same as those explained above for the case of the BBC.<sup>35</sup> The OFT is also conscious that these non financial contributions are less significant than those services the BBC will supply to the Canvas JV. By way of illustrative example, the OFT notes that ITV's contribution 'in-kind' of R&D staff is more limited in scope than that from the BBC. It expects to contribute around [ ] man days effort of skilled staff resourcing contribution to the Canvas JV. These skilled employees will work on specific projects where ITV has some area of knowledge and/or expertise. The OFT considers that the same arguments detailed above on why the BBC contribution does not form an enterprise for the purposes of merger control apply to the contributions from ITV and the other JV Partners.
26. As has been stated in relation to the BBC,<sup>36</sup> other JV Partners do not intend to transfer any of their content to the Canvas JV. Contrary to the position in Project Kangaroo,<sup>37</sup> each JV Partner will retain control over its archived content activities and the Canvas JV will have no rights over that content.
27. The OFT also believes, based on the internal documents presented and submissions made to it, that the JV Partners do not intend to transfer their respective customers from BT Vision, Talk Talk TV and or Seesaw. Some third parties have specifically stressed the presence of Arqiva (which acquired the technical platform developed for Project Kangaroo and has recently launched Seesaw) in this project. (Arqiva has confirmed to the OFT that its contribution will be financial only i.e. it will not include any assets or customers from Seesaw).

---

<sup>35</sup> See paragraphs 14 to 21 above.

<sup>36</sup> Paragraph 22 above.

<sup>37</sup> See footnote 4 above. Paragraphs 3.3 to 3.17.

### ***Conclusion on lack of an enterprise***

28. On the basis of the above, the OFT believes that – even on the 'is or may be the case' standard – the formation of the Canvas JV will not involve the contribution of a pre-existing enterprise by any of the JV Partners,<sup>38</sup> including the BBC. On this basis there are no 'enterprises' that could cease to be distinct in any manner.

### **Will any JV Partner have 'control' of the Canvas JV?**

29. Notwithstanding the OFT's above conclusion on the question of 'enterprise', the OFT has also considered whether, even if it were the case that the contribution of any of the JV Partners did in fact constitute an enterprise, it is or may be the case that such an enterprise could cease to be distinct from the JV Partners as a result of this merger for the purposes of section 26 of the Act.
30. In this context, the question for the OFT is whether one or more of the JV Partners will acquire control of the Canvas JV.<sup>39</sup> The lowest level of control under the Act that may give rise to a 'relevant merger situation' is 'material influence'. More precisely, that is the ability to materially influence policy relevant to the behaviour of the Canvas JV in the market place.

---

<sup>38</sup> The OFT believes that the correct analytical question for it is whether the anticipated aggregated contributions from any individual JV Partner could be said to constitute an enterprise. Asking whether the contributions of the different JV Partners collectively form an enterprise is not appropriate in the context of a start-up joint venture (given that this would be relying on the joint venture itself to create the enterprise). However, the OFT does not believe, in any event, that the anticipated contributions of all the JV Partners on a collective basis into the Canvas JV would in this case constitute an enterprise even on the 'is or may be' the case standard.

<sup>39</sup> Strictly speaking, the question is whether a JV Partner will gain control over any enterprise contributed by another JV Partner (see OFT527 paragraph 3.49, first bullet, second sub bullet). However, for the sake of simplicity, and given the conclusion ultimately reached, the OFT in this section refers to control over the 'Canvas JV'.

***No individual JV Partner will have material influence over the Canvas JV***

31. The Canvas JV has been structured so that no individual JV Partner has any more influence than its peers. Each JV Partner (of which there are currently seven<sup>40</sup>) will have one director on the Canvas board and one-seventh of the voting rights – reflecting the proportion of its shareholding in the Canvas JV. Decisions of its board will generally be taken by simple majority. More significant decisions, for example to approve subsequent budgets, spending in excess of the business plan or budget, will be taken by 'super majority' (that is the approval of all but one of the shareholders). As a result, none of the JV Partners individually will have a veto right over any of the key strategic decisions relating to the Canvas JV. Each of them can be outvoted by the other JV Partners.<sup>41</sup>
32. Two third parties submitted that it is plausible that the BBC will have material influence over Canvas, reflecting the role that the BBC has already played in this project and, according to these representations, the key roles to be filled by former BBC employees in the Canvas JV and large number of BBC R&D staff seconded to the project. In addition there was a reference to the importance of having the BBC on this new platform given the commercial importance of its vast archived catalogue, R&D and know-how experience.
33. Whilst the OFT acknowledges that the BBC has been a key driver behind the establishment of Project Canvas, the question for the OFT is whether the BBC (or any other JV Partner) will have material influence over the Canvas JV once incorporated.
34. Internal business documents from the other JV Partners do not indicate any pressure to align their own commercial interests with those of the BBC. The other JV Partners have different areas of expertise (such as broadband delivery) which are also important for the success of the project.

---

<sup>40</sup> The JV Partners informed the OFT that it was possible that an eighth JV Partner would be brought in to the existing Canvas JV structure. However, this possibility, including the identity of any eighth JV Partner, remained open at the time of the OFT's decision and so the OFT's review has been carried out on the basis of the arrangements as notified to it.

<sup>41</sup> Changes to fundamental constitutional matters are 'reserved matters' that require the unanimous approval of the shareholders. However, these are regarded as investor protection rights that are not germane to the issue of control.

35. As stated above (see paragraph 21)<sup>42</sup>, Canvas is expected to recruit the majority of its permanent staff in an open recruitment process. While some of the recruited staff might previously have worked at one of the JV Partners, following the formal incorporation of Canvas JV, these members of staff will be responsible to the Canvas JV board where all JV Partners have equal representation and voting powers and their professional duties will be for the benefit of the Canvas JV (as opposed to their former employer). The fact that one or more members of staff may previously have worked at a JV Partner does not in itself give that JV Partner material influence over the Canvas JV.
36. The OFT has considered whether the BBC could exert material influence over the Canvas JV by threatening to exit from it, but has rejected this because: i) the JV Partners are contractually committed to funding the Canvas JV for a period of at least four years; and ii) the Canvas JV is intended to function as an independent entity which could continue operating even without the participation of the BBC.
37. The OFT notes also that there is a technical difficulty with some of the arguments presented to it suggesting that the BBC will acquire material influence over the Canvas JV. If the only pre-existing enterprise which is said to be transferred into the Canvas JV comes from the BBC (as some third parties have suggested)<sup>43</sup>, then the BBC already had control over that enterprise. Put differently, the BBC cannot cease to be distinct from its own pre-existing enterprise.
38. In summary, the OFT believes that the corporate structure governing the operation of the Canvas JV does not give any JV Partner material influence over the Canvas JV.

***Are the JV Partners associated persons?***

39. A third party argued that all the JV Partners should be deemed to be 'associated persons' pursuant to section 127 of the Act such that they should be viewed as acting together and therefore collectively acquired control over the Canvas JV.

---

<sup>42</sup> Second bullet point.

<sup>43</sup> See for example paragraph 14 *ff.*

40. Section 127(4)(d) of the Act provides that 'two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure control of any enterprise or assets shall be regarded as associated with one another'. The OFT's guidance, discussing this concept, states that: '*[t]his situation will most commonly arise where the acquiring persons are related or have a signed agreement to act jointly to make an acquisition*'.<sup>44</sup>
41. The Competition Commission considered when persons should be regarded as 'associated' and explained that: '*Section [127] (which is concerned only with establishing jurisdiction) is clearly based on the proposition that persons such as a husband and wife, or a trustee and settlor, are persons who commonly do not act independently of each other and hence can reasonably be expected to coordinate their behaviour*'.<sup>45</sup>
42. The mere fact that the JV Partners are party to a start-up joint venture does not, in itself, make them associated persons. They have not acted together to secure or exercise control over an existing body of persons corporate or to secure control of any existing enterprise or assets. Rather, they have come together as independents to enter into a new joint venture arrangement. No evidence has been provided to indicate why they should be regarded as associated persons beyond the fact that they are JV Partners.

***Conclusion on lack of enterprises 'ceasing to be distinct'***

43. On the basis of the above, the OFT believes that – even on the 'is or may be the case standard' – none of the JV Partners will individually acquire material influence over the Canvas JV. Nor should the JV Partners be treated as associated persons who have collective control over the Canvas JV.

---

<sup>44</sup> OFT Jurisdictional and procedural guidance, paragraph 3.43.

<sup>45</sup> Competition Commission: Icopal Holding A/S and Icopal a/s A report on the merger situation (2001), paragraph 2.36. The report referred to section 77 Fair Trading Act 1973, but the reasoning is applicable also to section 127 of the Act.

## Share of supply / turnover test

44. The JV Partners also argued that a relevant merger situation would not be created for the purposes of section 23 of the Act because neither the turnover test nor the share of supply test would be met. However, the OFT has not needed to consider this issue because of its conclusions with respect to the lack of 'enterprises ceasing to be distinct'.

## THIRD PARTY COMMENTS

45. The majority of third party comments on jurisdiction have been considered above. In respect of other third party comments, the OFT has concluded that:

- it has seen no evidence suggesting that there will be any change of control over the JV Partners' content ingest and preparation facilities;
- the standardisation or consolidation of the electronic programme guide (EPG) Metadata<sup>46</sup> aggregation will not result in two or more enterprises ceasing to be distinct;
- this transaction does not bring about the integration of DTT Multiplex Operators Limited (DMOL)<sup>47</sup> and Canvas;
- the OFT has not seen any evidence suggesting that BT and CPW's existing broadband services (in relation to the sales of these services in conjunction with hybrid DTT/OTT services) will be transferred to Canvas; and
- neither Freeview nor Freesat will come under the control of the Canvas JV. Contrary to some representations made to the OFT by third parties, the OFT has not seen any evidence suggesting that this transaction would lead to either or both of these television platforms coming under the control of the Canvas JV. Equally, the question whether other television platforms (such as BT Vision and TalkTalk TV) will adopt the 'Canvas-standard', to the detriment of other

---

<sup>46</sup> The OFT understands that the Metadata is the software facilitating the control of the content in the set-top device and the EPG.

<sup>47</sup> DTT Multiplex Operators Limited is owned by the operators of the DTT multiplexes which include BBC, ITV, Channel4 and Arqiva.

technical standards, including Freeview, is not relevant for the purposes of the OFT's jurisdictional assessment.

46. It was also argued that the OFT should be mindful that the JV Partners, as a result of Project Canvas, might progressively wind-down some of their own R&D activities (directly related to IPTV) and their involvement with other television platforms (such as Freeview and Freesat). Certain third parties suggested that the OFT should also take into account this cessation or reduction in certain activities in assessing its jurisdiction. However, the OFT believes that these considerations are relevant only in so far as they inform whether an enterprise will be transferred to the Canvas JV, which has been dealt with above.
47. In addition to the above points, the OFT received a number of representations expressing concerns about the substantive competitive impact of this transaction. These representations are not relevant given the conclusion that the OFT does not have jurisdiction to review Canvas under the Act.

## **DECISION**

48. On the basis of the information available to it, the OFT has decided that Project Canvas, as it has been presented to the OFT, does not qualify for investigation under the mergers provisions of the Act, because the transaction does not lead to two (or more) enterprises ceasing to be distinct for the purposes of section 26 of the Act.

## **ENDNOTES**

49. With reference to footnote 31, post decision, the JV Partners have told the OFT that the employment contracts of the Canvas Staff will not be novated but terminated and renegotiated. This clarification does not alter the outcome of this decision.
50. With reference to footnote 46, post decision, the JV Partners have indicated that the term 'metadata' usually refers to the programme information and not the software managing that information. This technical note does not alter the outcome of this decision.