1 February 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.

REVIEW OF THE TELEVISION BROADCASTING SERVICES
UNDERTAKINGS GIVEN BY THE BRITISH BROADCASTING CORPORATION (‘THE BBC’)

ISSUE

1. Under Section 88 (4) of the Fair Trading Act 1973 (FTA)¹ the Office of Fair Trading (OFT) has a duty to keep under review undertakings given as a consequence of a monopoly report by the Monopolies and Mergers Commission (MMC).

2. Monopoly undertakings given under the FTA were given to the Secretary of State. In 2004, the power to vary or release the majority of such undertakings, including the undertakings which are the subject of this advice, was transferred to the Competition Commission (CC).² The OFT advises the CC if it considers that, by reason of any change of circumstances, the undertakings are no longer appropriate and should be varied, released or superseded by a new undertaking.

3. Pursuant to this duty, we have reviewed the Television Broadcasting Services undertakings (‘the undertakings’) given by the British Broadcasting Corporation (‘the BBC’).³

4. This review is being carried out by the OFT as an own-initiative review. The BBC has not requested a review of these undertakings. A driver for this review is the

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¹ The relevant sections of the Fair Trading Act 1973 are still in force by virtue of Schedule 24 of the Enterprise Act 2002.
² As a result of the Enterprise Act 2002, Schedule 24, paragraph 16 and SI2004/2181, Schedule 1, part 2, paragraph 6 of the decision making power on these undertakings were transferred from the Secretary of State for Trade and Industry to the Competition Commission as of 4 October 2004.
change in ownership of the consumer magazines business of British Broadcasting Corporation Worldwide (‘BBCW’).

BACKGROUND

5. In August 1992 the Monopolies and Mergers Commission (MMC) published its report on ‘Television broadcasting services – A report on the publicising, in the course of supplying a television broadcasting service, of goods supplied by the broadcaster’. This report found ‘a monopoly situation by virtue of section 7(1)(a) of the Fair Trading Act 1973. This situation existed in favour of the BBC and its subsidiary, BBC Enterprises, (‘BBCE’).

6. The MMC were asked to investigate and report on whether a monopoly situation existed in the supply of television broadcasting services in the United Kingdom and, if so, whether another monopoly situation existed in the particular context of broadcasters publicising goods to viewers, that is, programme support material by way of fact sheets, and other products such as books and magazines (‘reference goods’), in the course of transmission. These announcements could take the form of moving trails (that is, videos, lasting between 10 and 40 seconds), and still trails (that is, voice over the end credits of a programme or over a single slide).

7. The MMC estimated that BBCE’s share of the consumer magazines market was between seven and 10 per cent, but that it had much larger shares amounting to scale monopolies in certain market sectors (see below). The MMC found there was no significant promotion of reference goods on commercial television and no distortion of competition there. The MMC did identify, however, actual or expected adverse effects on the public interest arising from the BBC publicising its magazines on BBC television.

8. At the time of the MMC report, the BBC would inform its viewers of the availability of fact sheets and programme support material. The BBC also used junctions between programmes for promotional announcements. These were mainly devoted to trails for future programmes, but products such as magazines, books videos and records were also trailed. Magazine trails were typically in the

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4 See OFT Decision paper of 17 November 2011 on the anticipated acquisition by Exponent Private Equity LLP of the consumer magazines business of BBC Worldwide: www.oft.gov.uk/OFTwork/mergers/decisions/2011/exponent
6 Paragraph 7.17 of the Television Broadcasting Services MMC report
7 Paragraph 1.4 of the Television Broadcasting Services MMC report
8 Paragraph 1.6 of the Television Broadcasting Services MMC report
form of moving trails (that is, filmed announcements recorded on video tape), often using one or more television personalities, and lasting from 10 to 40 seconds. Still trails (for example, a colour slide accompanied by a voice-over announcement) were used mainly for books and fact sheets (as on commercial television).  

9. The MMC found that the BBC’s publicity of Good Food magazine on BBC television by trails and in-programme mentions was an action which operated and may be expected to operate against the public interest by reason of the distortion of competition in the food cookery sector of the consumer magazines market.  

10. The MMC concluded that the publicity of Radio Times and Gardeners’ World magazines on BBC television by trails and in-programme mentions may be expected to operate against the public interest by reason of the distortion of competition in the listings and gardening sectors respectively of the consumer magazines market.  

11. The MMC reported that the BBC had planned to increase its share and penetration of the consumer magazines market. It intended to continue publicising its magazines on BBC television to help achieve this objective. The MMC found that the BBC had the ability and retained the flexibility to introduce trails of varying length, to time the frequency and positioning of these trails, and to use them effectively to promote one or other magazine and to bolster the launch or relaunch of individual magazines. The MMC found that it could, at its discretion, target particular sectors if it chose to do so.  

12. The MMC concluded that the action of the BBC in continuing to use trails to publicise its consumer magazines on BBC television may be expected to operate against the public interest by increasing the risk of further withdrawals from particular sectors of the consumer magazines market and raising entry barriers to particular sectors of the consumer magazines market, leading to a reduction in consumer choice.  

13. On 4 November 1992 the then Secretary of State accepted undertakings from the BBC, a summary of which can be found on the OFT’s website.  

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9 Paragraph 3.8 of the Television Broadcasting Services MMC report  
10 Paragraph 7.173(a) of the Television Broadcasting Services report  
11 Paragraph 7.173(b) of the Television Broadcasting Services report  
12 Paragraph 7.173 of the Television Broadcasting Services report – The withdrawal of Let’s Cook magazine resulted in a reduction in consumer choice.  
undertakings restrict the ways in which the BBC can promote on BBC1 and BBC2 magazines which are published by it or any associate of it. The broadcasting of moving trails publicising BBCE’s magazines was prohibited. Still trails over the end of credits over a programme or over a single slide are allowed but subject to conditions.

14. The effect of the undertakings was to limit the amount of free airtime the BBC used to promote its magazines and to remove the distortion of competition benefitting the BBC.

CHANGE OF CIRCUMSTANCES

15. The OFT believes that there have been ‘changes of circumstance’ for the purposes of Schedule 24, paragraph 16 of the EA02. These include changes in ownership/publishing rights, reductions in market share and changes in policy at the BBC regarding trailing of magazines on air.

Ownership of the BBC’s magazine business

16. Exponent Private Equity LLP (‘Exponent’) acquired the whole of the consumer magazines business of BBCW on 28 October 2011. A number of titles, ‘Sales Titles’ are now owned outright by Immediate Media, which is in turn owned by Exponent. A limited number of special interest consumer magazines, ‘Licensed Titles’ - including [ ] - transferred to Immediate Media under a long term (20-year) licence which is terminable only in limited circumstances. ‘Contract Published Titles’ - including [ ] - were retained by BBCW with an agreement in place that

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14 On 29 June 2004 the BBC Director General, Mark Thompson, announced four major reviews, one of which was a review of the BBC’s commercial activities. The outcome of the reviews was announced by the Director General on 7 December 2004. In reporting the conclusions of the commercial review, the Director General said: ‘Magazines should focus more on brands and subjects connected to the BBC’s core programmes and mission, but there will be ‘opportunities overseas’ and that ‘trailing magazines on air should stop’. The BBC advised us that its Fair Trading Guidelines were updated and published on 1 July 2007. The second annex to those guidelines (‘Guidance for the trailing of BBC Programme-Related Materials on BBC public service television and radio services’) stated that: ‘The BBC believes that only books, audio recordings, DVDs, CDs and CD ROMs are the type of BBC Programme-Related Materials that can be justified for a trail for clear editorial and public purpose reasons. The BBC will not transmit trails for any other types of products. Magazines must not be trailed on BBC radio, television or bbc.co.uk.’ We do not consider the reintroduction of moving trails advertising magazines to be likely. If they were re-introduced we consider it likely that a re-evaluation of the BBC’s place in the magazines market would be necessary to establish whether the undertakings were still relevant in their current form.

15 BBCW is the successor company to BBCE

16 The following information was acquired from General Counsel at BBCW on 7 February 2012.
Immediate Media will contract publish these titles on behalf of BBCW on a [ ] licence.

17. On 17 October 2011\textsuperscript{17} the OFT decided not to refer Exponent’s acquisition to the CC because the OFT did not believe that the merger would be expected to result in a substantial lessening of competition within a market or markets in the UK: the market share increment was minimal, causing Exponent to account for an estimated [five-10]-[five-10] per cent of sales of all print-based consumer magazines by volume and value.\textsuperscript{18}

18. This transaction consisted of a number of different agreements, chief among them being:

a. an agreement for the sale and purchase of the magazine business, containing rights to certain magazine titles and other key assets of the consumer magazines business

b. a licence with a 40 year term ([ ]) for the purchased magazine business to publish on its own account certain magazine titles, and

c. a 10 to 20 year licence [ ] for the purchased magazine business to publish on its own account certain magazine titles, pursuant to which it will pay BBCW an annual licence fee, being a proportion of net sales.

19. Of the three magazines in respect of which the MMC had competition concerns in 1992, [ ] was acquired outright; [ ] to a 10-20 year licence; and [ ] is subject to a [ ] year publishing contract to be fulfilled by the merged entity on behalf of BBC Worldwide Ltd.

20. On 17 October 2011 the OFT decided not to refer Exponent’s proposed acquisition of the consumer magazines business of BBCW to the CC because the OFT did not believe that the merger would be expected to result in a substantial lessening of competition within a market or markets in the UK. In doing so the OFT found that the 10-20 year licence duration referred to above was a sufficient period of time for those magazines to be considered to have ceased to be distinct from Exponent and hence that the essential competitive features that would be transferred in an outright disposal had been transferred from BBCW to Exponent.

\textsuperscript{17} The OFT’s decision on a reference was given on 17 October 2011. The full text of the decision was published on 17 November 2011.

\textsuperscript{18} Paragraph 25 of the OFT decision paper on The Anticipated Acquisition by Exponent Private Equity LLP of the Consumer magazines business of BBC Worldwide.
It also found that control of the business relating to the magazines transferred under the 40 year licence had been transferred from BBCW to Exponent.

21. Although the OFT’s findings on the merger were that control of the BBC’s magazine business has been transferred from the BBC to Exponent, there remains the question of whether the undertakings are still relevant through the third undertaking which states that: 'For the purposes of this undertaking a person is an associate of the BBC if … the BBC receives from that person any payment calculated according to sales by that person of any magazine’. Under the terms of the agreement, the BBC does receive an annual licence fee for magazine titles within the 10 – 20 year licence category.

**Market share of the magazines identified as (potentially) operating against the public interest**

22. Market share circulation and distribution figures for June 2012\(^{19}\) indicate that the *Radio Times* currently has 20 per cent of the TV Listings magazines market compared to 32 per cent in 1992. *Good Food* has 3.6 per cent of the Cookery and Kitchen magazines market compared to nearly 90 per cent in 1992. *Gardeners’ World* has a 34 per cent share of the Gardening magazines market compared to 43 per cent in 1992.

**Other changes to the market**

23. As the CC found in its review of the ITV Contract Rights Renewal undertakings\(^{20}\) judgement there are a number of ways to measure market shares for TV broadcasting. However the following analysis will provide a useful indication of how the market has changed. At the time the undertakings were given the BBC had two broadcasting channels, namely BBC 1 and BBC 2. The annual percentage share of viewing figures combined for BBC 1 and BBC 2 was around 43 per cent.\(^{21}\) This percentage of viewing figures for these two channels dropped to 27.3 percent by 2011.\(^{22}\) By 2011 BBC TV channels also included free-to-air digital only channels including: BBC 3, BBC 4, BBC One HD, BBC HD, BBC News 24, BBC Parliament, CBBC Channel and CBeebies. The BBC’s total audience share for

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\(^{19}\) Percentages have been calculated using ABC Trend Data – Total Average Net Circulation/Distribution by title within market sector – ABC Consumer Magazines Report – Jun End 2012.


\(^{21}\) Table 2.1 of the Television Broadcasting Services MMC report

\(^{22}\) [www.barb.co.uk/facts/annual-share-of-viewing? s=4](http://www.barb.co.uk/facts/annual-share-of-viewing? s=4) - BARB Annual per cent Shares of Viewing (Individuals) 1981-2011
2011 was around 33 per cent.\textsuperscript{23} This is an audience share percentage drop of around 10 per cent. While it is not clear on its face that in the context of this particular review this constitutes a change of circumstances (we have concluded neither one way or the other), it does support the overall conclusion based on the changes in circumstances identified above that there are significant differences in the relevant markets at the time of the undertakings compared to the present day.

CONCLUSION AND RECOMMENDATION

24. For the reasons given above, we consider that there have been changes of circumstance as described in Schedule 24, paragraph 16 of the EA02, by reason of which we consider that the undertakings in their current state are no longer appropriate. We recommend that the BBC should be released from them, or that the undertakings should be varied or superseded.

25. This advice has been published on the OFT website, consistent with paragraph 22 of the Memorandum of Understanding between the OFT and the CC on the variation and termination of merger, monopoly and market undertakings and orders under the FTA and the EA02.\textsuperscript{24}

\textsuperscript{23} BARB: \url{http://www.barb.co.uk/facts/tv-trends?_s=4} Trends in Television: 2011 Table 5 – Audience share (%) by broadcaster.

\textsuperscript{24} \url{http://www.oft.gov.uk/shared_oft/595316/595319/of1060.pdf}
Annexe A

Television broadcasting services

1 Title of report Television Broadcasting Services: a report on the publicising, in the course of supplying a television broadcasting service, of goods supplied by the broadcaster (MMC - Cmnd 2035)

2 Date of report 22 May 1992 Published 6 August 1992

3 Orders N/A

4 Date of original undertakings 4 November 1992 Press release DTI, 6 November 1992

5 Companies giving undertakings British Broadcasting Corporation (BBC)

6 Undertakings

1. The BBC will not after 6 am on 7 November 1992 in the course of supplying the television broadcasting services in the United Kingdom currently known as BBC 1 and BBC 2 promote magazines which are published by the BBC or by any associate of it except by announcements:

   (a) which contain no moving images; and
   (b) which (except as set out in paragraph c(i) below) are not made in the course of a programme; and
   (c) which are made by a single speaking voice over:
      i. the final credits of a programme, or
      ii. a single slide; and
   (d) which (except announcements for the Radio Times) are directly relevant to the immediately preceding or the immediately following programme; and
   (e) which contain a statement that alternative magazines (if any) with the same general content are available from newsagents or other retail outlets; and
   (f) which (apart from the statement referred to in paragraph (e) above) may consist only of a statement:

      i) of the name of the magazine, its publisher and its price, and
      ii) (in announcements for the Radio Times):
         (A) that the magazine contains listings information, and
         (B) of the television and radio channels listing information for which is contained in the magazine, and
(C) of the connection between the magazine and a BBC television programme, or
(iv) (in announcements for other magazines) of the connection between the magazine and the immediately preceding or the immediately following programme, and
(v) that the magazine is available from the newsagents, other retail outlets or the BBC; and

(g) which make the statements in an objective manner and do not attempt to endorse magazines or otherwise persuade viewers; and

(h) which (except announcements for the Radio Times) are not made by any person who has appeared or whose voice has been heard other than incidentally in the programme to which the announcement is directly relevant; and

(j) which are not made by any well known person; and

(k) the aggregate time taken for which in any period of seven days commencing at 6 am on Saturday does not exceed seven minutes.

2. Nothing in this undertaking shall prevent the BBC from promoting magazines which are published by the BBC or by any associate of it otherwise than in accordance with the undertaking in or in connection with:

(i) the Radio Times country file photography competition until 30 November 1992, or
(ii) the BBC Wildlife Magazine video film makers award scheme until 31 March 1993, or
(iii) the Radio Times Children in Need sponsored run until 20 November 1992

3. For the purposes of this undertaking a person is an associate of the BBC if:

(a) both are members of a group of interconnected bodies corporate; or
(b) that person is a body corporate and the BBC or a person interconnected with it –
i. holds or is beneficially entitled to more than 10 per cent of the issued equity share capital of that person; or
ii. possesses or is entitled to exercise or to control the exercise of more than 10 per cent of the voting rights in that person; or
(c) the BBC or a person interconnected with it is entitled to share in more than 10 per cent of the profits earned by that person; or
(d) the BBC receives from that person any payment calculated according to sales by that person of any magazine;
and for the purposes of this definition 'group of interconnected bodies corporate' has the meaning given to it by section 137(5) of the Fair Trading Act 1973 and a person is to be treated as interconnected with another person if each of them is a member of one and the same such group.

7 Date of amendments N/A

8 Index information Cross-promotion

SIC code: 92.20 (Radio and television activities)