OFFICE OF FAIR TRADING

Anticipated joint venture between BBC Worldwide Limited and Woolworths Group plc

The OFT's decision on reference under section 33 given on 20 September 2004

PARTIES

1. **BBC Worldwide Limited (BBCWW)** is a wholly-owned subsidiary of the BBC, responsible for the majority of its commercial activities. Its turnover for the financial year 2003/4 was approximately £657 million. BBCWW has five main divisions: magazines; television; channels; global marketing brand development; and consumer publishing (including a sub-division engaged in VHS/DVD (video) publishing with a UK turnover for the financial year 2002/3 of approximately [ ] [1]).

2. **Woolworths Group plc (Woolworths)** is principally a retailer focused on family and home entertainment and leisure products. It also wholly owns a wholesale distributor of home entertainment products, Entertainment UK Limited (EUK), and a media publishing group, **VCI plc (VCI).** For the financial year ending 31 December 2003, the UK turnover of VCI was approximately [ ][2]. Its core business is split into three main divisions: video; audio; and production. The video division, Video Collection International Limited, specialises in acquiring, producing and developing publishing rights, and marketing videos.

TRANSACTION

3. BBCWW proposes to transfer its video publishing activities (excluding its children's, music and learning portfolios) and Woolworths, the video publishing, music publishing and production activities of VCI, to a joint venture (JV). This will be owned 60/40 in favour of BBCWW, but with unanimous voting required on material issues. The JV will be licensed existing BBCWW video rights, plus [certain rights relating to][3] new BBC programmes that do not involve independent production.

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1 Figure excised at the request of the parties for reasons of commercial confidentiality.
2 Figure excised at the request of the parties for reasons of commercial confidentiality.
3 Information excised at the request of the parties for reasons of commercial confidentiality.

4. The JV agreement was signed and made public on 9 July 2004. The administrative deadline is 20 September 2004.

JURISDICTION

5. As a result of this transaction BBCWW and Woolworths (the parties) will acquire joint control of the JV. The parties overlap in the supply of TV programmes published on video, in relation to which the share of supply test in section 23 of the Enterprise Act is met. 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.

RELEVANT MARKET

Product market

6. Video publishing for present purposes includes the acquisition of the right to produce and sell content in video format, production (creating master copies), and marketing and sales (either to wholesalers or directly to retailers). No distinction has been made between DVD and VHS since such a distinction does not affect the analysis.

7. Industry practice and large retailers distinguish between different genres of videos (e.g. film, music, TV, sports and fitness), as well as by different type (e.g. comedy, drama, action), although the boundaries between each are blurred. While it is clear that genre delineations provide a useful means for industry participants to segment a large catalogue of individual titles, it does not necessarily follow that one or more video genres constitute distinct product markets.

8. The parties submit that the relevant market in this case is UK video publishing, and that genre/type distinctions have no antitrust significance. The parties' internal documentary evidence [supporting] this point consists of BBCWW's business plan. VCI told us it had no written business plans. While the parties' combined shares of supply along genre/type distinctions are not significant in other segments, the JV would represent approximately [35-45 per cent] of UK sales of TV programmes published on video (increment approximately [15-25 per cent]).[4] Accordingly, the OFT sought to test whether a hypothetical monopolist publisher of video in such a genre could profitably increase price. No evidence tending to support such a theory emerged from third parties, none of whom raised substantiated horizontal concerns about the merger, and none of whom appeared

[4] The actual figures, based on British Video Association (BVA) 2003 estimates, have been replaced by ranges at the request of the parties.

to negotiate on the basis of genre or type, or indeed seek better terms by playing the parties' (TV genre) products off against each other in negotiations.

9. For the end customer, many video purchases would appear to be by specific title, for which there are no substitutes. Retailers say this extends into their purchasing of chart titles from wholesalers and publishers. For those end customers seeking a gift, or specialist retailers seeking to provide a broad range of back catalogue, a wider degree of substitutability may exist. However, price tends to reflect how long a title has been available, dropping as demand drops, rather than particular types or genres. Some third parties indicated as a general rule that new release films have a slight margin over new release TV, but the parties state that pricing is determined by a multitude of factors, e.g. novelty, cost of production. Third party comment indicates that the prime motivation for retailers (and, therefore, wholesalers) is increasing sales, without any regard to a particular genre or type.

10. The weight of evidence available does not therefore permit economic significance to attach to genre distinctions in this case. While video publishing, irrespective of genre or type, appears to be the most appropriate frame of reference for the substantive assessment in this case, it is unnecessary to decide this point conclusively, as no party raised substantiated horizontal concerns, and resolution of the vertical concerns discussed below does not depend on a firm conclusion in this respect.

Geographic market

11. As video publishers active in the UK make most of their sales within this area, the geographic frame of reference is UK-wide.

HORIZONTAL ISSUES

Market shares

12. The parties estimate that the total size of the UK industry for video sales, which allows for a measurement of the position of the various video publishers, in 2003 was [approximately £2,000 million]. The JV will have a combined share of sales of [5-10 per cent] (increment [0-5 per cent]). [5]

13. The parties characterise this sector as being dominated by the major Hollywood film and TV studios, which are active across categories and operate on a global basis (being able to exploit both US and UK produced content alike). As a result,

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5 The actual figures, based on BVA 2003 estimates, have been replaced by ranges at the request of the parties.

these rival publishers would appear to provide a strong competitive constraint on the JV, which will be merely the sixth largest video publisher in the UK.

Barriers to entry and expansion

14. The parties submit that there are no significant barriers to entry into the video publishing sector. The primary hurdle for new entrants is acquiring video publishing rights from content owners. In this respect, the parties predict that there will be a significant increase in the number and diversity of content rights available due to the introduction of the Communications Act 2003, under which independent production companies retain video publishing rights, rather than bundling them with the sale of broadcast rights, to license as they wish.

15. Some third parties state that even with a larger supply of independent productions to license, they will still face an inherent difficulty in acquiring rights as major Hollywood studios generally produce and then publish content in-house. Therefore, new entry and/or expansion by existing publishers may not act as a significant competitive constraint on the JV.

Buyer power

16. The parties believe that potential customers of the JV, including supermarkets and major record/video retailers, possess significant buyer power due to their size and strong position at the retail and wholesale level and that this power will act as a competitive constraint on the JV. Furthermore, the parties argue that small retailers generally buy through wholesalers, thereby taking advantage of what negotiating strength the latter may possess with publishers. Third parties have indicated, however, that any buyer power that may exist by virtue of size is restricted in its impact on a title specific basis as only one supplier exists in relation to each title. Consequently, negotiation strength on the part of customers may not be effective on this basis.

VERTICAL ISSUES

17. The JV reinforces the vertical integration of its parents in the video chain of supply. Third parties have raised three concerns, [two of which relate] to the JV's potential relationship with the downstream operations of its parent, Woolworths.

18. The first is that EUK, which accounts for a significant proportion of the wholesale supply industry, might favour the JV's products over other publishers. As EUK's purchases will be determined by the pattern of demand from the retailers that it sells on to, there is no justification in terms of profitability for EUK to favour the JV's titles over better selling titles as this would result in a loss of potential sales

to retailers. Conversely, the JV would have no incentive to favour EUK as a dealer above others: a publisher will want to sell to as many retailers/wholesalers as possible to maximise the sales potential of each title it produces and will therefore be unlikely to enter into an exclusive supply arrangement.

19. The second concern raised by third parties is that the JV might give preferential treatment to Woolworths as retailer, thereby unfairly benefiting its retail power. Again, commercial reality suggests that the JV would lose profit by favouring one retailer (which alone accounts for [10-20 per cent] [6] of the total retail market) over others. Conversely, Woolworths would have no incentive to favour JV products in its outlets over other publishers (e.g., access to prominent shelf space) at the expense of more popular titles.

20. A third concern was raised that BBC programming content will not be as freely available to competitors in bidding processes following the creation of the JV. This does not appear to be the case as the parties submit that BBCWW currently enjoys first option rights to acquire video publishing rights in new programmes produced by the BBC without independent production input: thus, access to such content will not materially change after these rights are licensed to the JV.

THIRD PARTY VIEWS

21. Third party reactions have been mixed. Concerned third parties raised various vertical issues addressed above.

ASSESSMENT

22. The parties propose to form a JV active in video publishing and whose postmerger share of UK video sales is less than 10 per cent. The OFT's investigation revealed no basis for a positive and reasonable belief that the parties' substantial share of TV genre sales might represent market power as there is no evidence to suggest that a monopolist in such a genre could raise price. The effect on competition will be limited as a result of this transaction. While the entirety of video publishing appears to be the most suitable starting point for considering the scope of the competitive constraints on the JV, it is unnecessary to take a firm position on the appropriate frame of reference in this case as there were no substantiated concerns raised dependent on a firm conclusion in this respect. As noted, the JV's share of video publishing is modest, and it will face competition from a number of major Hollywood film and TV studios. The increment to the share of supply will also be small (less than 5 per cent). Similarly, the vertical relationships with EUK, Woolworths and independent publishers are not significantly affected by the

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6 The actual figure, based on a BVA 2003 estimate, has been replaced by a range at the request of the parties.

creation of the joint venture, as it would retain the incentive to show no preference to either of its parents and access to content would not materially change.

23. Consequently, the OFT does not believe that it is or may be the case that the JV may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

24. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.