



BSkyB's Second Response to the BBC Trust on 'Project Canvas'

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BSkyB**

Context

Sky has written to the BBC Trust to outline its views on the proposed 'Project Canvas'. This formal response – Sky's second – centres on the substance of the Proposals and follows the publication of further information from the BBC Executive, as requested by a range of industry stakeholders - including Sky - following the initial Canvas consultation. This second formal submission supplements Sky's previously expressed concerns relating to the Project Canvas proposals and the BBC Trust's handling of the consultation process.

In this second response, Sky outlines its principled objections to the BBC engaging in platform development and commercialisation when its public purposes and obligations could be discharged more proportionately through a genuinely broad policy of content distribution across third party platforms and services. Sky also highlights the main areas of further information that must be made public in order for the Trust to properly assess the impact of the Proposals, and reach robust conclusions, taking due account of stakeholder views. Since, notwithstanding such concerns, the Trust has indicated that it is minded to reach provisional conclusions, Sky goes on to consider possible conditions the Trust should attach to any decision to approve the proposals. Sky also briefly considers possible state aid and merger control issues, before raising its continued concerns with the Trust's process.

Contained below is the main body of Sky's response, as submitted to the BBC Trust.

Sky's second submission

1. Appropriate role of the BBC

- 1.1. The Further Information confirms the Executive's apparent intention to develop, launch and operate an entirely new content distribution platform together with a limited number of competitor venture partners, for mutual benefit, to the exclusion of other industry participants.
- 1.2. As such, the Proposals go far beyond the BBC's remit described in the BBC Charter and Framework Agreement. For the reasons set out in detail in section 5 of Sky's response of 7 May 2009 to the Trust's initial consultation ("Sky's First Response"), the BBC's duties do not require it to develop, promote or operate its own means of delivery. Moreover, the Executive has failed to demonstrate any need for the BBC to take the disproportionate step of creating an entirely new platform in the manner described by the Proposals.
- 1.3. Whilst the BBC has certain specific duties in relation to supporting the development of digital terrestrial television, the particular circumstances relating to the creation of Freeview are not relevant to the proposed creation of a new IPTV/video on-demand platform. Nor can the BBC's unnecessary participation in the development and launch of BBC/ITV Freesat be used as a precedent to justify further intervention in content delivery platforms.

- 1.4. In particular, the Executive has failed to demonstrate adequately that there is unsatisfied consumer demand that would be met by the Proposals. Moreover, the BBC's objectives, namely the development of standards for online services capable of complementing other digital television services (including Freeview and Freesat), could be met in a less interventionist and distorting manner.
- 1.5. The Trust, in its supervisory role, should, therefore, ask first, whether there is robust and compelling evidence of the alleged unsatisfied consumer demand. If it is satisfied that there is such demand, the Trust must then ask whether the Proposals are consistent with the BBC's primary purpose and obligations, including as to whether they are a proportionate means of addressing the alleged unmet demand. The question is whether the Proposals are an appropriate use of the licence fee (not whether there is any reason why the BBC should *not* implement the Proposals).
- 1.6. Only if the Trust is so satisfied, should it grant approval, and only then, subject to appropriate conditions to ensure proportionality in the implementation of the Proposals by the Executive.
- 1.7. The Trust must make this assessment against a counterfactual in which the Proposals are not implemented. This is not one in which hybrid broadband-enabled devices are not available or are limited to niche products. The counterfactual is that a wide range of IP-connected televisions, set top boxes and games consoles are emerging exponentially, providing access to the same content. Where the BBC's content is made available, this is at no extra charge. A good example is the availability of the BBC's on-demand content via the PS3, in particular when used in conjunction with the Play TV DTT tuner. To the extent that standardisation is required, this is taking place through the DTG and through global technology manufacturers.
- 1.8. As set out in detail in section 5 of Sky's First Response, the BBC's primary purpose is to create public service content and to distribute it as widely as possible, without discrimination.¹ Moreover, in its unique, privileged position in receipt of substantial guaranteed public funding, the BBC is also required to adopt the least intrusive, proportionate means of fulfilling its core purpose, and to minimise any distortions of competition that might arise from the commercial deployment of its public funding.²
- 1.9. In Sky's view, the BBC's public purposes and obligations could be discharged more efficiently and proportionately through a genuinely broad policy of linear and on-demand content syndication across third party platforms and services. Such a policy would support the development of a wide variety of devices and services capable of distributing audiovisual and audio content to consumers in innovative and efficient ways. At the same time, this would minimise the negative market impacts likely to result from the Proposals: namely the stifling of investment and innovation in a nascent sector faced with competition from a platform supported by the licence fee, free of the commercial pressures faced by other platforms and retail services.
- 1.10. The Trust must determine whether technical standards development is required to facilitate such a policy in light of current industry developments (including, for example, the existence of devices containing similar functionality to that described in the Proposals). If the Trust considers that they are required, the Executive should work with industry to develop such standards and to achieve a broad consensus in the appropriate manner. We consider both aspects in more detail below.

2. Further information required and possible conditions to approval

¹ Article 5(1) of the BBC Charter.

² For example, through the application of the Competitive Impact Principle.

- 2.1. Without prejudice to the question of whether it is appropriate for the BBC to be engaged in platform development and commercialisation, we consider below the main areas where more information is required in order to clarify the Proposals. The Trust cannot reach any robust conclusions without such information (or stakeholder views on such information), as without it, the impact of the Proposals cannot be properly assessed.
- 2.2. Nevertheless, since the Trust has indicated that it is minded to reach provisional conclusions (without necessarily having all the appropriate information, including adequate responses to its questions) where relevant we have also identified below the conditions that the Trust should attach to any decision to approve the Proposals. We do so in respect of each of the main areas of the Proposals, namely: (i) participation in the joint venture; (ii) control over the core user interface; (iii) technical specifications; (iv) content syndication; and (v) ISP standards. We also consider briefly any potential state aid and merger control issues.

Venture participation

- 2.3. In the first instance, for the reasons given above, Sky does not consider that it is necessary for the BBC to enter into a joint venture to achieve its stated objectives. The BBC should work with industry to develop open standards for the delivery of IPTV and on-demand services to television related devices, and make its content available to such devices whether directly or for (re)distribution by third party service providers.
- 2.4. Even were it prudent or necessary to divide any risk or costs with other parties, Sky can see no reason why there should be any limits as to the permitted venture partners. In particular, there is no justification for restricting joint venture partners to 'public service broadcasters'. Neither general competition law nor the BBC's Fair Trading framework, including the Competitive Impact Principle, allows the BBC to favour other public service broadcasters to the exclusion of others. Furthermore, by allowing BT to be a venture partner, the BBC has already widened membership beyond public service broadcasters, and cannot now limit participation further (whether by different classes of membership as previously described, or by exclusion). In this regard, the Trust will recall Ofcom's concerns in its letter of 17 April 2009 that, "*an inequitable approach to participation in the joint venture which favours certain participants may lead to potential harm for consumers as a result of market distortion*".
- 2.5. Were the Trust minded to approve the Proposals in a form that retained the joint venture structure, it should, as a condition of approval, require the Executive to make full membership of the joint venture open to all. In particular, this should be irrespective of business model (for example, pay or free), both in terms of initial and subsequent participation (i.e. in relation to parties joining at any time after this initial phase).
- 2.6. With regard to subsequent entry to the joint venture, conditions are also required to safeguard against discrimination, both as between post-launch partners, and as between them and the initial partners (recognising that an objective, cost-based methodology for determining fees, applied uniformly and transparently, may legitimately require post-launch participants to bear a proportionate share of the development as well as ongoing costs of the venture).

Control over the Core User Interface

- 2.7. The Further Information amended the Canvas proposition to clarify that the joint venture would control the 'Core User Interface' (UI), intended to mean a fixed menu and listing structure within which content is made available and accessed. Within the UI, non-linear content providers appear to be able to determine the environment in which their content services are made available. This is a significant development from statements in the first consultation that the joint venture would control the Electronic Programme Guide (and means of accessing content).

- 2.8. As noted above, control over the UI represents an additional level of intervention by the BBC which is unnecessary and disproportionate. First, the UI is one of the ways in which services are differentiated from each other and compete for viewers. Standardisation necessarily reduces innovation and competition between manufacturers and service providers.
- 2.9. Furthermore, contrary to the Executive's assertion, a uniform UI is not "vital" to "repeat the success of Freeview" (paragraph 2.5 of the Further Information"). Freeview does not have a uniform UI, and differences between the UI's of different boxes, and in particular, their ease of use, is often referred to in product reviews as a key distinguishing feature. Notwithstanding these differences, Freeview has been a success. There is no reason to assume that a Canvas proposition that does not dictate the UI, would not be similarly successful, whilst avoiding any risk of stifling innovation in the development of UIs.³
- 2.10. Accordingly, as a condition of any approval, the Executive should be required to allow different UI's within the Canvas-approved specification. The Trust must also clarify any differences (other than the use of the Canvas trade mark) between the Canvas-approved specification and the content and functionality that would be available to those not wishing to use the Canvas UI under the present proposals.

Technical specification

- 2.11. For a set of Proposals positioned as "*a standards based open environment for internet connected TV platforms*" (as per p.10 of the Executive's Summary), Sky considers it remarkable that the technical standards remain unspecified (and more remarkable still that the Trust is seeking to reach provisional conclusions in respect of them) and that the means by which they will be developed remain unsettled.
- 2.12. The Executive must first decide on the process to be followed for development of the technical specifications. The loose "*intention to work closely to assess the feasibility of working with the DTG*" (as per the Further Information) is not sufficient. The Trust should *require* the Executive to work with the DTG to develop a further version (for example, version 7) of the D-Book to fit the Canvas purpose, including both the 'base player' aspects of the Proposals and any further optional chapter of the specification concerning the Canvas UI. Furthermore, DTG must own the process for developing this specification, rather than be handed a *fait accompli* by the Executive and joint venture partners. This would ensure that all aspects of the Canvas technical specifications are developed in a way that enables full and open participation of industry and minimises distortions to existing developments and investments. At the same time, the DTG process would help to test fitness of the standards for the Canvas purpose/s, with the broadest range of manufacturers.
- 2.13. Of particular concern to pay TV providers such as Sky, is the Executive's suggestion, in the further information provided, that it should develop aspects of the standards governing conditional access (CA) and digital rights management (DRM) *only after* Trust approval, in particular, the technical means by which CA and DRM technologies would interface with the Canvas specification, and any protocols governing the relationships between them.
- 2.14. Currently, following discussions with various of the joint venture partners, including the BBC, Sky is unclear as to whether its Sky Player service would work on a 'Canvas' set top

³ It is unclear from the Proposals whether as an indirect consequence there will be standardisation of the linear EPG. The mock-ups published by the BBC appear to contemplate a particular linear user interface, but merely note that this will be controlled by DMOL. However, DMOL merely manages the channel numbering on the DTT platform and does not specify particular UI. Accordingly, the BBC/Trust should clarify whether, in addition to the risks associated with non-linear services, the Proposals would result in a standardisation of the linear EPG.

box. It is not certain whether the service would require further development, or whether the proposed standard would meet Sky's requirements in terms of the way it will interact with CA technology and DRM software, both for the purpose of managing subscriptions and to protect the interests of rights holders (including Sky itself).

- 2.15. Once approval is obtained, the Executive will have no incentive to develop these aspects beyond the requirements of the core joint venture partners, with the attendant risk of foreclosing access to the platform to other pay television providers (such as Sky) wishing to make their content available on the platform. One of the original aims behind Canvas was to support those platforms on which the PSBs have a high share of viewing due to limited competition from other free and pay channels.⁴ The PSBs, therefore, have an incentive to maintain their competitive advantage by restricting access to the platform. BT also has an incentive to favour its pay TV service that it intends to replace with the Canvas platform.
- 2.16. The Executive must, along with the DTG (thus securing the abovementioned safeguards) identify a clear framework for the development of technical pay television interoperability standards. Only once those standards are known can the Trust properly evaluate the impact of the Proposals, for example, the risk of foreclosure to pay TV content providers and, thereby, properly consider the case for approval of the Proposals, and any conditions that may be required if they are to proceed.
- 2.17. If the joint venture partners are able to develop the specification, rather than working with industry groups like the DTG, there is a far greater risk that the standard will be a UK-specific solution. If this is the case, then it is reasonable to assume that a further negative market impact will be to increase the cost of consumer equipment. Manufacturers will not be able to implement their chosen technologies across their entire product range. Separate technical solutions will have to be developed for the UK, increasing costs.
- 2.18. A further example of the extent to which the lack of information regarding the technical specification undermines the Trust's market impact assessment (MIA) can be seen in the desire of the Executive for the technical standards to be mainly open source, but its failure to identify, or exclude, any proprietary elements. The extent to which the technical specifications may include proprietary technology is a key aspect of any assessment of the potential for the Proposals to create gateways or bottlenecks, that would act as significant barriers to access to the platform (and might even be fatal to the Proposals if their existence is only made known at a late stage, when it is too late to adopt an alternative open standard and parties are unwilling to pay licence fees)⁵. This highlights both the prematurity of any Trust decision to reach provisional conclusions, and the need for adequate safeguards regarding the development of the technical specification that the DTG's processes are best placed to deliver.

Access to BBC on demand content

- 2.19. Further information is also required on the Executive's proposals for use of the Canvas technical specifications (both at base player and UI levels) and access to the BBC's on demand content, so that the full impact of the Proposals can be properly assessed.

⁴ See section 4 on page 13 of "Public service partnerships – Helping sustain UK PSB" which states that one of the BBC's aims in putting forward the Canvas proposal is to protect the PSBs market shares by favouring free to air platforms such as Freeview which have limited competition - <http://www.bbc.co.uk/thefuture/pdf/phase2/partnerships.pdf>

⁵ A relevant example is the decision to mandate MHP API at a European level, only to find subsequently that the licence fee payments for certain IPRs used in the specification were prohibitively expensive – see for example, <http://www.broadbandtvnews.com/2008/06/13/via-licensing-drops-mhp-fees-for-fta-broadcasters/>

- 2.20. In Sky's First Response (see paragraph 6.10), we raised concerns at the BBC's approach to distribution of its on-demand content, which has been to restrict its content exclusively to 'iPlayer branded' services, and to limit online distribution of its content to its own service. The BBC has restricted licence fee payers from accessing BBC on-demand content on other on-demand services to the television by bundling access to its on-demand content with the iPlayer service or elements of the iPlayer service. As part of its MIA, the Trust must review the application of the BBC Syndication Guidelines by the BBC to examine whether they have been applied in a manner that is consistent with the spirit and letter of the Trust's Syndication Policy and Public Value Test approval.
- 2.21. We said in Sky's First Response that the Trust should, if it is minded to approve the Proposals, ensure that the BBC adopts a genuinely complementary content syndication strategy across all platforms. This would allow a broad range of services to incorporate BBC on-demand content, irrespective of whether a service is able to recreate the BBC's vision of an 'iPlayer experience', through requirements on the volume of content required, branding and navigational paradigms.
- 2.22. We remain of that view and consider that the Trust, if minded to approve the Proposals, should attach conditions so as to require the Executive to adopt a genuinely broad distribution strategy, rather than pay lip service to their own syndication guidelines which require fair, reasonable and non-discriminatory access to BBC on-demand content.
- 2.23. In this regard, the suggestion of the Executive in the Further Information that it will simply revisit its content syndication guidelines after approval is inadequate. Firstly, as a condition of any approval, the BBC should be prohibited from insisting that its on demand content appears only in its iPlayer-branded application, so as to provide for greater innovation and variety of services. Instead, the Executive should be required to make available its content in open standard format to enable third parties to access that content, and incorporate it in other services (subject to necessary constraints on copyright and branding, etc). Secondly, the BBC should be prevented from making access to its on demand content (or iPlayer service) conditional on use of any of the Canvas specification, including the UI, so that, for example: (a) the BBC cannot favour distribution to the Canvas specification over distribution over other platforms; and (b) a party wishing to use the Canvas hardware and software specifications, but its own UI, would have guaranteed access to BBC on demand content.

ISP distribution

- 2.24. The ISP distribution aspects of the Proposals also remain underdeveloped, which the Executive acknowledges (for instance in its suggestion in the Further Information that the current consultation could provide feedback with which it would engage). For example, insufficient detail is provided as to the "TV quality standard" to be adopted, or as to the exceptions that might be made to it, raising questions as to objectivity and non-discrimination. The Executive should provide further information on the ISP standards envisaged, so that their likely impact can be assessed.
- 2.25. There is a further concern that the joint venture partners will be responsible for setting the criteria by which broadband services will be accredited as being 'Canvas compliant'. The participation of ISPs (whether BT alone or in conjunction with others) in the joint venture creates a clear conflict of interest and opportunity to restrict competition. As Ofcom has found in relation to its broadband speed research⁶ the measurement of broadband speeds involves so many variables, which may vary from subscriber to subscriber, that any attempt to define criteria of suitability, would be inherently subjective, and could be used as a means to exclude competitors.

⁶ See, for example, http://www.ofcom.org.uk/media/news/2009/07/nr_20090728.

3. State aid and merger control issues

- 3.1. Hardly any further information has been provided on the costs to the BBC of Canvas. One significant oversight is in relation to the costs to the BBC of developing the Proposals, prior to incurring ongoing costs of operation. It is not sufficient for the Executive to say that such costs will be determined after approval. Without a robust assessment of the BBC's development costs, for example, the Trust cannot assess the extent of any state aid from which the joint venture partners will benefit. Sky welcomes the Trust's confirmation at our meeting on 18 September that the significant R&D costs of the BBC in developing the Proposals will be considered as part of the Trust's own state aid analysis.
- 3.2. Moreover, there remains insufficient clarity as to the Executive's proposals for the transfer of existing Freeview and Freesat operations and assets into the joint venture, to be jointly controlled by the joint venture partners. The Executive must make such aspects of the Proposals clear, in order for the Trust to be able to consider whether UK merger control is likely to apply.

4. Trust process

- 4.1. As Sky made clear in its recent correspondence, the Trust's process in considering the Proposals has been flawed as: (a) the information regarding the Proposals has been inadequate, (b) the periods given for responding to the initial consultation, Further Information and proposed for consideration of the provisional conclusions, were and are unduly short given the complexity and far-reaching nature of the Proposals; and (c) the Trust's failure to appoint Ofcom to conduct the full MIA has significantly undermined the (perceived and actual) independence and robustness of the assessment.
- 4.2. The Proposals, whilst more developed than initially in some respects, in others (not least the failure to specify the technical standards),⁷ remain substantially undeveloped and unclear. Until such information is provided, the Trust cannot properly assess the impact of the Proposals, nor properly reach conclusions, provisional or otherwise, which would necessarily be rendered invalid by the continuing lack of clarity.
- 4.3. The Trust needs to build more time into its consultation and assessment process as further important aspects of the Proposals are made clear, such as the technical specifications. The Trust's published timetable sought stakeholder views on some 70 pages of further information within 5 weeks and over the summer holiday period. It is not appropriate for the Trust to categorise the present phase as an informal consultation, in order to shorten the time made available to respondents (and for its own assessment). Whenever material aspects of the Proposals are clarified, there is in effect a further iteration of the Proposals, on which the Trust must properly consult.
- 4.4. In Sky's view, the Trust would be better equipped to assess whether the Proposals were proportionate to their intended purpose with an MIA conducted by Ofcom. This is due in large part to the wide range of sectors likely to be impacted (for example, the wholesaling and retailing of free and pay audiovisual content on a linear and on-demand basis as well as through web applications, the impact of arrangements with ISPs for the delivery of content over their networks, the impact on box manufacturers and retailers), and to the complexity of the issues involved. An MIA by Ofcom would also address concerns within industry as to the appropriate independence and rigour of the Trust's process.

⁷ There are numerous other examples, such as the lack of clarity as to the "Business rules and navigational grammar" that content providers will need to comply with in order to make their content available, and the "Business rules" for listing in the UI and the costs of listing. It is moreover, unclear how users will be able to adapt their UI, which the Executive should make clear prior to any Trust approval.

- 4.5. Similarly, to discharge its functions effectively, the Trust cannot rely on any impact assessment provided to it by the Executive, such as its impact assessment on commercial models and sensitivity analysis of user demand, nor for that matter on analyses provided by joint venture partners, all of whom have a vested interest in the outcome of the Trust's review.
- 4.6. The Trust is urged not to repeat these procedural errors between provisional and final conclusions (in respect of which four weeks, as currently envisaged, is wholly inadequate, particularly if further information such as the technical specifications emerges, as indeed it should).