



## Response of British Sky Broadcasting Limited ("Sky") to the BBC Trust's Consultation on Project Canvas

### 1. Executive summary

#### *The incomplete nature of the Proposals and the Trust's defective process*

- 1.1. The BBC Executive's (the "Executive") Canvas proposals (the "Proposals") are not made sufficiently clear in fundamental respects. In the absence of greater clarity, the Proposals cannot be properly assessed, either by respondents to this consultation, or by the Trust. The lack of clarity renders this stage of the process necessarily preliminary and not determinative.
- 1.2. Although there is a lack of clarity in material respects, the Proposals appear to envisage a significant range of possible activities for the BBC, from technical standards specification to the creation, operation and promotion of a new platform and the exercise of platform-related services, each involving a degree of collaboration between competitors. Activities of this nature involving the BBC clearly have the propensity to affect significantly the development of existing and emerging competition on relevant markets. The Proposals are, moreover complex, involving numerous potential parties active in a broad range of sectors (for example, broadcasters and other content providers, ISPs, box manufacturers and so-called "Venture Partners" such as BT), raising a wide range of difficult issues. The wide range and complexity of the Proposals reinforce the need for this stage of the process to be preliminary, rather than determinative.
- 1.3. In light of the breadth and complexity of issues raised by the Proposals and their propensity to affect significantly the development of competition, the Trust should subject the Proposals to the highest level of scrutiny, in as transparent a way as possible, including submitting the Proposals to a full public value test or equivalently robust procedure, with a market impact assessment conducted by Ofcom. Instead, the Trust has chosen to conduct its review of the Proposals before they are properly defined, a flaw compounded by the short initial consultation phase and wholly inadequate proposed two-week second phase. Such an approach does not allow respondents sufficient opportunity to provide their views, or enable the Trust properly to assess the impact of the Proposals in a manner consistent with its duties under the BBC Charter and Framework Agreement.
- 1.4. As a relatively new body, facing scepticism in some quarters as to its independence from the body it regulates, it is especially important for the Trust to demonstrate its ability to regulate the BBC's proposed activities (which could have very far-reaching consequences) in a rigorous and impartial manner. The fact that the Trust is now reviewing Proposals that result from a challenge that the Trust itself has issued to the BBC Executive, calls into question the Trust's independence and the scrutiny to which those Proposals will be put. Accordingly, it is all the more incumbent on the Trust, having thus challenged the Executive, to demonstrate that it is considering the resulting Proposals in a suitably rigorous and entirely impartial manner.
- 1.5. If the Trust does not adopt a suitably impartial, rigorous and structurally sound process to assess the Proposals and to allow full participation by interested parties, the Trust risks reaching an unreasonable and invalid decision based on a set of inchoate proposals whose impact has not been properly gauged.

### ***Primary purpose and obligations of the BBC***

- 1.6. The BBC's primary purpose is to create public service content and to distribute it as widely as possible to licence fee payers, which it should do without discrimination as to their chosen means of delivery. The BBC is not required to develop, promote or operate its own means of delivery, and should work with industry and in partnership with other organisations to facilitate understanding and adoption of emerging technologies. In its unique privileged position in receipt of guaranteed public funding, the BBC is required to adopt the least intrusive means of fulfilling its core purpose, to minimise competitive harm. To do otherwise would have a disproportionate impact on competition in the relevant affected markets.
- 1.7. The Executive has not adequately demonstrated that there is unsatisfied consumer demand that the Proposals are necessary to meet. The Trust should, therefore, ask first, whether there is robust and compelling evidence of the alleged unsatisfied consumer demand. If it is satisfied that there is, the Trust must then ask whether the Proposals are a proportionate means of addressing that unmet demand. In Sky's view, the BBC's primary purpose and obligations could be discharged more efficiently and proportionately through a genuinely broad policy of on-demand content syndication across third party platforms and services. Were the BBC to adopt such a policy in conjunction with participation in existing industry-led initiatives to develop common technical standards, in an open, platform and technologically-neutral manner, this would also fulfil its role under the Charter, though in a manner that is far more likely to minimise competitive distortions. If the Proposals are indeed at this end of the spectrum of proposed activities, the Trust's chosen process for scrutiny might be appropriate, though only once certain aspects (for instance as to the nature of the standards under consideration and as to how they would be developed so as to remain open and platform-neutral) of the Proposals are made clear.

### ***The potential for the Proposals to significantly distort competition***

- 1.8. The Proposals, however, would appear to reach far beyond the minimum required of the BBC to fulfil its primary purpose with the minimum of negative competitive impact, and appear to position the BBC as market maker in an area where commercial operators have made, and continue to make, significant investments, such that the potential for distortion of competition is manifest.
- 1.9. The Trust should not approve the Proposals unless satisfied that the BBC is using public funds efficiently, effectively, and proportionately, and in a manner that would not significantly distort competition leading to an overall worse outcome for consumers. Even were the Trust able to satisfy itself that these requirements were met, and to approve the Proposals (or certain aspects of them), the Trust would need to ensure that adequate protections were in place to minimise any likelihood of distortions of competition going forward. In that context, it would be necessary to ensure that the BBC adheres to the principle of platform and service neutrality in the way in which it distributes and promotes its content and services. Given the propensity for the distortion of competition caused by the injection of public funds into a commercial marketplace, adherence to the principle of platform and service neutrality on the part of the BBC is critical, and it is the Trust's role and responsibility to ensure that the BBC does more than pay lip-service to this principle.

## **2. Introduction**

2.1. In this Response, we consider:

- 2.1.1. the incomplete nature of the Proposals, and the kind of information we believe is missing from the Executive's application (**Section 3**);
- 2.1.2. the defects in the Trust's current process (**Section 4**);
- 2.1.3. the primary purpose and obligations of the BBC under the relevant regulatory framework (**Section 5**);
- 2.1.4. the potential competitive impact of the Proposals (**Section 6**);
- 2.1.5. further authorisations that may be required (**Section 7**); and
- 2.1.6. the conclusions to be drawn (**Section 8**).

## **3. The incomplete nature of the Proposals and further information required**

- 3.1. As Sky explained at its meeting on 30 March 2009 with representatives of the Trust, Sky considers that the scope of the Proposals has not been made sufficiently clear in some very fundamental respects. To inform its response, Sky sought greater clarity as to the Proposals from the Trust. At the meeting, however, the Trust was unable to provide the clarification sought, and informed Sky that the Executive was continuing to develop and therefore change the Proposals (notwithstanding the outstanding application and current consultation). It remains the case, therefore, that the Executive's application is deficient in material respects and important questions remain unanswered, for instance as to the nature of the standards under consideration and as to how they would be developed so as to remain open and platform-neutral. With such deficiencies in the Executive's application, it is not possible for respondents to comment meaningfully on the likely effects of the Proposals.
- 3.2. We identify in this Section 3 where we believe there to be deficiencies in the information provided (as invited by the Trust) and begin to explore the sorts of question that are thereby raised. We do so with reference to what we perceive to be the five main areas of proposed activity (a theme which we revisit in Section 6 when looking at the potential competitive impact of the Proposals), namely: (i) the specification of technical standards; (ii) the specification of the user interface; (iii) the specification of editorial standards; (iv) the operation and promotion of a platform and distribution of the BBC's content; and (v) the restriction of third party participation in the proposed venture.

### ***(i) Specification of technical standards***

- 3.3. At one end of the spectrum of proposed activities, the Executive makes some broad statements as to the scope of its application, as being to develop "*a standards based open environment for internet connected TV platforms*", which "*would be achieved by the creation of a new technical specification (building on that currently specified for Freeview/Freesat boxes)*"<sup>1</sup>. But the Executive does not make clear how the BBC proposes to create an "*open environment*", how it is intended to be "*standards based*", what "*technical specification*" it is referring to, or who will create and develop it and how. Important questions arise, therefore, as to the technical security and EPG aspects of the Proposals:

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<sup>1</sup> See page 10 of the Executive's Summary.

for instance as to whether the security standards to be employed will be interoperable with those employed by the providers of pay television services, so as not to exclude them from participation in Canvas; and as to what will be the technical (format, process for delivery and validation) EPG standards.

***(ii) Specification of the user interface***

- 3.4. The BBC is also understood to be considering specification of certain “*user experience standards*” of an inherently platform-related nature, although these aspects of the Proposals also suffer from a lack of clarity. The Executive explains that the Proposals envisage “*a simple consistent and dynamic user experience*” or “*a common EPG*” “*that is capable of being updated and personalised and which conforms with best practice in terms of accessibility*”<sup>2</sup>. A rather fundamental omission, however, is that “*this paper does not analyse the EPG element of the Canvas standard*”, seemingly on the basis that “*the EPG will be regulated by Ofcom’s EPG Code*”<sup>3</sup>. Notwithstanding the application of Ofcom’s Code, questions arise, for instance, as to who will design and operate the EPG, as to the method and fees for listing, and any prominence or other listing rules, none of which has been made clear. The lack of engagement by the Trust on these fundamental issues also brings into question the Trust’s understanding of the importance of such matters to the overall proposition suggested by the Proposals.

***(iii) Specification of editorial standards***

- 3.5. The BBC also appears to be considering the specification of certain “*editorial standards*”, of a similarly platform-related nature, which are equally unclear. The Executive states that “*One of the advantages of having a controlling stake in Canvas will be the ability to determine minimum editorial standards*”, with internet content to be “*subject to clear editorial standards*”. It does not expand on what those editorial standards should be in its application. This appears to be because the “*BBC is currently working on detailed proposals to determine the appropriate level of editorial management*”<sup>4</sup>. But questions arise as to who will determine, apply and enforce the editorial standards, what those standards will comprise, and how they will be made known. For example, it is not clear whether the BBC or “*Venture Partners*” will determine and enforce the editorial standards, and if so, whether this would create a conflict of interests between their interests and those of non-“*Venture Partners*”. Nor is it clear whether the editorial standards will be confined to a set of safeguards against obscene or “*offensive content*”, or whether they will involve a wider range of more subjective judgements, for example as to the type of content or content provider (pay or free) to be allowed on the platform, or indeed as to the quality and quantity of (Web) content to be allowed.

***(iv) Operation and marketing of a platform and distribution of BBC VOD content***

- 3.6. The Proposals also envisage the creation, operation and promotion of a new platform, with a new brand and existing operations. For instance, the Executive states that “*Primarily, Canvas will enable the creation of a hybrid broadband and broadcast platform*” which would be “*a new venture to launch under a new brand to include the Freesat operation*”, with a “*single governance framework and brand architecture*”<sup>5</sup>. Ofcom similarly recognises that Canvas “*may effectively result in the creation of a new platform*”<sup>6</sup>. And the

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<sup>2</sup> See page 11 of the Executive’s Summary.

<sup>3</sup> See footnote 51 at page 26 of the Executive’s Summary.

<sup>4</sup> See footnote 34 on page 12 of the Executive’s Summary.

<sup>5</sup> See Annex 9, page 84, of the Executive’s application.

<sup>6</sup> See its letter to the Trust of 17 April.

Executive asserts that the BBC's strategy for the "*evolution of [its] free to air platform ventures*" should be "*seen as complimentary [sic], rather than as a substitute to syndication on pay platforms*"<sup>7</sup>. However, the Executive does not elaborate on how the BBC plans to govern and promote the Canvas platform under the new brand/architecture, nor how the BBC will be genuinely committed to content syndication on pay platforms, and to the same degree as absent the Proposals.

***(v) Restriction of participation at various levels of the Canvas venture***

- 3.7. The BBC appears to intend to restrict participation by third parties in the Canvas venture to various different levels according to the role the BBC expects the third party to play, though again the BBC's exact plans are not made clear. This proposed approach raises further unanswered questions.
- 3.8. At the "*Venture Partner*" level, the Executive states that "*the BBC and other parties including Public Service Broadcasters would set up a new venture*", that "*the BBC or other PSB DTVSL shareholders*" could participate in, and that shareholders in the venture will be "*made up of interested PSBs*"<sup>8</sup>. The Proposals fail to provide transparent and objective criteria for participation at "*Venture Partner*" (or any other) level, whether any up front investment is to be made by participants, nor do they specify the matters that will be dealt with at this level, or the basis for any decision-making process (e.g. whether there are any issues that will be reserved to the BBC). Clearly these are essential if respondents such as Sky are to assess whether they ought to be involved as "*Venture Partners*", though it is not at all clear whether it or "*other parties*" will be allowed to participate at the "*Venture Partner*" level given the apparent focus on PSBs and BT.
- 3.9. At the "*Strategic Partner*" level, the Executive also anticipates that "*Canvas will provide many opportunities for 3<sup>rd</sup> parties to develop their own propositions and services*", though "*any such partnership would be subject to the Canvas principles of openness and non-subscription*" and "*the venture may choose to partner with providers of some of these specific services at launch*"<sup>9</sup>. The Executive does not, however, clarify which providers the venture will choose to partner with. Nor is it clear whether, or to what extent, Canvas will be open to providers of pay television services under the "*non-subscription*" principle (for instance whether this excludes content providers wishing to charge subscriptions, but allows those wishing to charge on a pay-per-view/transactional VOD basis).
- 3.10. At the "*Distribution Partner*" level, the Executive states that the Proposals will be "*open to users of all access providers (ISPs)*"<sup>10</sup>, but at the same time "*open to all ISPs that can offer a quality experience*"<sup>11</sup>, suggesting that some judgement as to the quality of an ISP's service may be applied and that there may be some form of accreditation of ISPs for the Canvas 'standard'. Questions arise, therefore, as to the likely basis for ISP accreditation: who will accredit; what criteria will be adopted; and how will the criteria be made known and consistently applied, none of which is made clear.
- 3.11. It remains the case, therefore, that the Executive's application is deficient in material respects.

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<sup>7</sup> See page 9 of the Executive's Summary.

<sup>8</sup> See Annex 9, page 84, of the Executive's application.

<sup>9</sup> See page 21 of the Executive's Summary.

<sup>10</sup> See page 12 of the Executive's Summary.

<sup>11</sup> See page 20 of the Executive's Summary.

#### 4. The Trust's defective process

- 4.1. The Trust's position that its approach and information provided in this consultation is sufficient<sup>12</sup> is unsustainable in light of these material omissions in the Executive's application. Further information is required by respondents to assess the likely impact of the Proposals. As matters presently stand, Sky is necessarily limited to identifying the further information that is required (as we have begun to do in Section 3 above, as invited by the Trust), and amongst a broad range of proposed activities, the issues potentially raised (which we do as far as we are able below in Section 6).
- 4.2. The Trust's chosen process is, moreover, structurally unsound, in that it has chosen to consult on Proposals that are both inchoate and potentially far-reaching, with insufficient time or certainty to allow proper consideration by respondents, or the Trust, alike. The early stage in the development of the Proposals should have been taken into consideration by the Trust in structuring its review process, for example, by conducting an initial consultation on a general proposition<sup>13</sup>. That proposition could then be refined into a concrete proposal (if thought appropriate) following the first consultation, and that proposal subject to a public value test or equivalent, which would include a market impact assessment based on a clearly defined proposition on which stakeholders would also be able to comment meaningfully. As explained further below, the approach adopted by the Trust is defective due to its lack of appreciation of this key issue, in addition to its chosen procedure allowing respondents insufficient time to consider the Proposals and respond appropriately.
- 4.3. At the potentially less intrusive end of the spectrum of proposed activities (for example, were the BBC proposing to participate in existing industry initiatives to develop common technical standards – as to which, see further paragraphs 6.2 and 6.3 below), the Trust's current process could potentially be appropriate, though only once such aspects of the Proposals or at least the process for developing them had been made clear. However, there are aspects of the Proposals that far exceed participation in industry development of technical standards, which give rise to the potential for significant distortion of existing and emerging competition. The Trust should, therefore, subject the Proposals to the highest level of scrutiny, in as transparent a way as possible, so that the market and competition law impact of the Proposals are independently and rigorously assessed.
- 4.4. As a relatively new body, facing considerable scepticism in some quarters as to its independence from the body it is charged with regulating, it is especially important for the Trust to demonstrate its ability to regulate the BBC's proposed activities in a rigorous and impartial manner. Sky considers that such a review is unlikely, given the Trust's starting point in launching its consultation, in which it said:  
  
*“The Trust has challenged the BBC Executive to come up with proposals to help bring the benefits of the BBC's public investment to the whole PSB sector. This is the first of these proposals to come forward to the Trust and we will be scrutinising it to ensure the best possible outcome for licence fee payers”.*<sup>14</sup>
- 4.5. The fact that the Trust is now reviewing Proposals that result from a challenge that the Trust itself has issued to the Executive, (and moreover one unjustifiably skewed towards the PSBs) suggests that the Trust will naturally be predisposed towards those

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<sup>12</sup> As per its letter to Sky of 7 April.

<sup>13</sup> It cannot be said that that is what the Trust is now doing, if it merely proposes to have a truncated two-week second phase after this one, to consult on “emerging conclusions”, as is set out in its letter to Sky of 7 April.

<sup>14</sup> Diane Coyle, BBC Trustee - [http://www.bbc.co.uk/bbctrust/news/press\\_releases/2009/project\\_canvas.html](http://www.bbc.co.uk/bbctrust/news/press_releases/2009/project_canvas.html).

Proposals<sup>15</sup>. Accordingly, it is all the more incumbent on the Trust, having thus “*challenged*” the Executive, to demonstrate that it is considering the resulting Proposals in a suitably rigorous and entirely impartial manner.

- 4.6. In this regard, Sky finds it highly unusual that the Trust, charged with the independent regulation of the BBC’s activities, has “*clarified certain details contained in the Executive’s application*” and superseded the Executive’s description of the Proposals with its own<sup>16</sup>. To make matters worse, the Trust has declined to make known which details it has ‘clarified’ and how they have been changed<sup>17</sup>.
- 4.7. As the guardian of the public interest, the Trust is required, under the BBC Framework Agreement<sup>18</sup>, to take account of the nature and potential significance of the proposed activities. To the extent they involve platform operation and marketing and related services in particular, the impact of the Proposals is likely to be significant, to raise issues of public value and have market implications. Although the Trust has classified the Proposals as ‘non-service’, the BBC Framework Agreement expressly envisages that a public value test may be appropriate, and does not preclude a bespoke test which might be at least as rigorous as a public value test where circumstances require it, if not more rigorous. The Trust should therefore submit the Proposals to a full public value test, or equivalent procedure. As part of this process, Ofcom should also conduct a full market impact assessment of the Proposals.
- 4.8. Regardless of the relevant authority conducting the assessment, it should be of a proposal that is sufficiently concrete. The Trust states that “*any significant development*” of the Proposals should “*not itself form part of the proposals submitted to the Trust for consideration*”, and, where further aspects of the Proposals are subsequently developed, or made clear, they should be subject to a further assessment process, or processes, “*as appropriate*”. We concur with the underlying principle that further consideration should be made (by the appropriate body) of any significant developments of the Proposals, though would regard the specification of the IP television standard itself as a significant development, as it does not yet form part of the Proposals. This merely reinforces the case for this stage of the consultation to be preliminary, rather than determinative.
- 4.9. A full consultation, with an appropriate timetable, on a more precise Canvas proposition once crystallised is essential to ensure a proper assessment is conducted and compliance with the Trust’s supervisory obligations. It would be inappropriate in advance of a further consultation and impact assessment based upon a fully worked proposition, for the Trust to formulate any conclusion, “*emerging*” or otherwise, as to whether the Proposals should be implemented.
- 4.10. In the circumstances, if the Trust continues with its current process, the Trust risks reaching a decision based on a set of inchoate proposals whose impact on the public interest, of which the Trust is the guardian, has not been properly gauged. This could ultimately call into question the reasonableness and validity of the Trust’s decision.

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15 A truly independent regulator would have no involvement in the development of the strategy of the entity that it regulates, or indeed in the development of its application for approval.

16 See paragraph 2.1.4 of the Trust’s “assessment of the Canvas proposals” .

17 When asked at our meeting on 20 March which details had been amended, the Trust’s reaction was instead to invite us to make clear which aspects of the Proposals we were uncertain about.

18 Clause 22 (2).

## 5. Primary purpose and obligations of the BBC

- 5.1. The starting point for the Trust's assessment should be to consider the BBC's primary purpose and obligations. The BBC's primary purpose is to create public service content and to distribute it to as many licence fee payers as possible, without discrimination as to their chosen method of delivery, and it is obliged to act proportionately in fulfilling its primary purpose, so as to minimise any competitive distortions that may arise from its intervention.
- 5.2. The BBC Charter states that "*The BBC's main activities should be the promotion of its Public Purposes through the provision of output which consists of information, education and entertainment, supplied by means of (a) television, radio and online services; (b) similar or related services, which make output generally available and which may be in forms or by means of technologies which either have not previously been used by the BBC or which have yet to be developed*"<sup>19</sup>. Accordingly, the BBC's principal role is to create public service content that promotes its Public Purposes.
- 5.3. Article 4 of the BBC Charter sets out the BBC's Public Purposes. The sixth Public Purpose, that the BBC should help to "*deliver to the public the benefit of emerging communications technologies and services ...*"<sup>20</sup> is subordinate to the other purposes as it is qualified by the words "*...in promoting its other purposes...*". Accordingly, this purpose does not represent an end in itself, as one might be led to infer from the Proposals.
- 5.4. Furthermore, the limitations on the extent to which the BBC ought to be driving so-called "*emerging technologies*" is supported by the relevant BBC Trust Public Purpose Remit<sup>21</sup>. This document establishes that the Trust has focussed on a number of priorities for the Executive in relation to the Public Purpose, which include: "*mak[ing] engaging digital content and services available on a wide range of digital platforms*"; "*work[ing] with the industry to deliver a UK-wide network of digital television*"; and "*work[ing] in partnership with other organisations to help all audiences understand and adopt emerging communications technologies and services*" (emphases added). The BBC Canvas proposals clearly envisage going far beyond these priorities.
- 5.5. The Framework Agreement lists the BBC's public services and obliges the BBC to "*do all that is reasonably practicable to ensure that viewers, listeners and other users (as the case may be) are able to access the UK Public Services that are intended for them, or elements of their content, in a range of convenient and cost effective ways which are available or might become available in the future*"<sup>22</sup>. This wording does not require the BBC itself to develop or promote such means, or to operate them, and the obligations in the Framework Agreement requiring availability of BBC public services relate to the distribution of the BBC's linear public service channels via terrestrial means only<sup>23</sup>.
- 5.6. The BBC Charter, moreover, places on the Trust a duty, when regulating the Executive, to "*have regard to the competitive impact of the BBC's activities on the wider market*"<sup>24</sup>, in fulfilment of which the Trust has adopted a "*Statement of policy on competitive impact*" which outlines how the Trust will ensure adherence from the BBC to this principle. Under the Statement, the Trust specifies a "*number of special responsibilities*" placed on

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19 See Article 5(1) of the BBC Charter.

20 See Article 4(f) of the BBC Charter.

21 The Trust's "BBC Public Purpose Remit: Emerging Communications" explanatory note of December 2007.

22 See Clause 12 of the Framework Agreement.

23 See Clauses 34-36 of the Framework Agreement.

24 See Article 23 (c) of the BBC Charter.

the BBC when carrying out its Public Service Activities in light of its “*privileged status*” and “*unique funding position*”. These require “*the BBC to comply with competition law*” and “*to endeavour to minimise its negative competitive impacts on the wider market*”. The BBC is therefore required to act proportionately in the fulfilment of its primary purpose, in order to minimise competitive harm.

- 5.7. In short, the BBC’s primary purpose is, therefore, to create public service content and to distribute it as widely as possible to licence fee payers, which it should do without discrimination as to their chosen means of delivery. The BBC is not required to develop, promote or operate its own means of delivery, and should work with industry and in partnership with other organisations to facilitate understanding and adoption of emerging technologies. In its unique privileged position in receipt of guaranteed public funding, the BBC is required to adopt the least intrusive, proportionate means of fulfilling its core purpose, to minimise competitive harm.
- 5.8. The Executive argues that there is “*overwhelming consumer demand... to watch long form on demand content through the TV screen*” and that “*the restriction of most video on demand services to a PC screen was a very significant barrier to wider use*”<sup>25</sup>, in support of its case for the need for Canvas. But the ‘evidence’, such as it is, in support of these propositions appears limited to a survey of 40 people in 17 households and the comparison of the proportion of viewing of BBC VOD content on the TV by Virgin Media subscribers, with that on the PC. The Executive has not adequately demonstrated, therefore, that there is “*overwhelming consumer demand*”, that there is a genuine “*barrier*” to meeting it, nor that Canvas is the appropriate means of doing so, in the face of alternative commercial provision. Sky notes that Canvas is seeking to address the same target viewers as already addressed by iPlayer, and as are already addressable by other distributors of VOD content to the television (as with Sky Anytime) as well as to the PC (such as Sky Player, and like a set top box, a PC can be connected to the television). The Trust should, therefore, ask first, whether there is genuine consumer demand that is not being met (currently or imminently) and if so, whether Canvas is a proportionate and effective means of meeting it.
- 5.9. Before analysing the details of the Executive’s Proposals, the Trust should also satisfy itself that a genuinely broad policy of content syndication across third party platforms and services would not be a more effective and proportionate means of fulfilling the BBC’s primary purpose.
- 5.10. Equally, the Trust must satisfy itself that participation by the BBC in existing industry initiatives to develop common technical standards for the IP-enablement of set top boxes, would not be a more effective and proportionate means of meeting its Public Purpose under the Charter<sup>26</sup> to help deliver the benefit of emerging communications technologies in participation with industry, as under the BBC’s Public Purpose Remit.

## **6. The potential competitive impact of the Proposals**

- 6.1. As the Proposals conceive of a BBC role far beyond content syndication and participation in industry-led, technical standards development, they have the potential to distort significantly existing and emerging competition. It is incumbent, therefore, upon the Trust, if it is to grant approval, to ensure that the principles of openness and non-discrimination as to platform or service are fully adhered to by the BBC in carrying out each of the proposed activities. In this section, we consider the application of these

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<sup>25</sup> See pages 5 and 6 of the Executive’s Summary.

<sup>26</sup> Article 4 (f).

principles to what we perceive to be the five main areas of proposed activity (as in Section 3 above).

**(i) Specification of technical standards**

6.2. Even at the potentially less intrusive, ‘technical standards development’ end of the spectrum of proposed activities, the BBC appears to be seeking to set its own standards, potentially without regard to existing initiatives and the genuinely open standards that they have or are developing:

6.2.1. the Digital Television Group (DTG) is already working on technical standards for the DTT platform and has recently completed a specification for the HD and IP-enablement of Freeview set top boxes (D-Book 6). The DTG is an independent and platform neutral organisation that uses open and participatory processes to secure industry consensus on standards specification. Moreover, it has developed technical interoperability standards which provide a framework for the development of compliant products, rather than specifying the look and feel of the user interface;

6.2.2. the Executive, however, makes no reference to such initiatives and instead states that “*by working with industry...we help clarify the emerging IPTV market through setting open standards*”<sup>27</sup>, suggesting that rather than participating in existing industry-led initiatives, the BBC is considering specifying its own potentially new set of standards.

6.3. Such a unilateral initiative on the part of the BBC could significantly distort existing innovations, developments and investment, particularly without the protections (as to openness, non-discrimination, technological neutrality) that full participation with industry under an independent third party (such as the DTG) would better afford. The BBC should be required to minimise the impact of its Proposals on developing standards, and to participate openly in existing industry-led initiatives, rather than permitted to mandate entirely new standards of its own.

**(ii) Specification of the user interface**

6.4. Similarly, the user interface aspects of the Proposals, as far as they can be understood, are far-reaching. The Executive explains that it wishes to maintain “*a direct relationship with the audience ensuring the prominence of public service content free of charge and the potential to influence the user experience and design including branding of BBC services and content*”<sup>28</sup>. The BBC’s rationale for Canvas also appears to be inherently defensive, to safeguard against the “*introduction of commercial gateways and reducing the level of control the free to air broadcasters can exert in terms of positioning and branding*”<sup>29</sup>.

6.5. Such proposals far exceed the minimum required of the BBC and have the potential to distort competition to a significant degree, a concern also of Ofcom<sup>30</sup>. The Trust should ensure that the BBC’s role in the development of the user interface or EPG is proportionate. At the less intrusive end of the spectrum, the BBC could be required to participate in industry-led developments of technical EPG standards (as to format,

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<sup>27</sup> See page 12 of the Executive’s Summary.

<sup>28</sup> See page 13 of the Executive’s Summary.

<sup>29</sup> See page 9 of the Executive’s Summary.

<sup>30</sup> In its letter to the Trust of 17 April, Ofcom expresses concern at the potential to create “a competitive bottleneck for third parties wishing to reach audiences via Canvas”.

process for delivery and validation). If the Trust is satisfied that the BBC should have a more involved role in developing the “*user experience and design*”, it must ensure that adequate safeguards against non-discrimination are put in place, so as to ensure no undue discrimination/unfair treatment in the prominence, branding and positioning of other services and content in the Canvas EPG and user interface.

***(iii) Specification of editorial standards***

- 6.6. The editorial standards aspects of the Proposals could also exceed the minimum required of the BBC. Whilst it is not entirely clear what is proposed, the BBC appears to have far reaching ambitions for “*an editorial opportunity to shape this market on behalf of audiences*”<sup>31</sup>, which should perhaps be read in light of its defensive rationale as to prominence and positioning (as in paragraph 6.4 above). The Trust should also make its approval of any editorial aspects of the Proposals as are made clear, conditional on the implementation of adequate safeguards against discrimination of third party content providers.

***(iv) Operation and marketing of a platform and distribution of BBC VOD content***

- 6.7. At the more intrusive end of the spectrum of proposed activities, the BBC is also proposing to create, operate and market a platform, in collaboration with its competitors, with the clear potential to affect competition (indeed the Executive effectively admits this when describing the BBC’s desire to protect the “*reach and share of PSB channels and services by protecting the scale of Freeview compared with pay platforms*”<sup>32</sup>). The Trust will be acutely aware of the possible distortions (for example as to coordination and information sharing) to which this could give rise from the recent experience with ‘Kangaroo’ (see further paragraph 7.2).
- 6.8. If the Trust is minded to approve the platform aspects of the Proposals, it should satisfy itself that this is a proportionate way for the BBC to fulfil its primary purpose and obligations, and if so, that the Proposals do not give rise to competition law issues.
- 6.9. The Trust should also ensure that the BBC promotes the Canvas platform in a manner that is platform and service provider neutral. The BBC’s involvement in Freeview resulted in it promoting its digital channels in ways that favoured Freeview over Sky and cable before it was required by the Trust to abide by similar rules to the commercial public service broadcasters under the Ofcom Cross-promotions Code<sup>33</sup>. The Trust should, if it is minded to approve the platform aspects of the Proposals, ensure that similar protections are in place.
- 6.10. In relation to the distribution of its content, the Executive also asserts that the BBC’s Canvas strategy should be “*seen as complimentary [sic], rather than as a substitute to syndication on pay platforms*”<sup>34</sup>. But the BBC has sought to restrict distribution of its on-demand content exclusively to ‘iPlayer branded’ services and in doing so, it has limited online distribution to its own service. It has also restricted licence fee payers from accessing BBC on-demand content on other on-demand services to the television, as was originally envisaged by the Trust’s approval of those services. The Trust should, if it is

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31 See page 11 of the Executive’s Summary, emphasis added.

32 See page 12 of the Executive’s Summary.

33 Sky believes that, as the BBC is dependent on continued broad public support for the licence fee, it has a tendency to favour those platforms on which its viewing share is the least fragmented – i.e. platforms offering a limited number of free to air channels and no pay channels.

34 See page 9 of the Executive’s Summary.

minded to approve the Proposals, ensure that the BBC adopts a genuinely complementary content syndication strategy across all platforms.

***(v) Restriction of participation at various levels of the Canvas venture***

- 6.11. The intention of the BBC to restrict participation in the Canvas venture at various levels would also appear to exceed the minimum required and could distort competition.

*“Venture Partner” level*

- 6.12. As referred to in paragraph 3.8 above, there is some uncertainty as to who will be allowed to participate at the “*Venture Partner*” level, although the Executive refers to possible participation by at least “*the BBC or other PSB DTVSL shareholders*” and other “*interested PSBs*”<sup>35</sup>. The implication, therefore, is that the BBC, ITV, Channel 4 and perhaps five only will be eligible to participate in the venture itself, and we know BT is also participating in it, but other free-to-air and pay broadcasters, will not. This could hardly be described as a transparent and non discriminatory approach and has the potential to have a significant restrictive impact on competition. Indeed, Ofcom has made clear its concern with any “*inequitable approach to participation in the joint venture which favours certain participants [and] may lead to potential harm for consumers as a result of market distortion*”<sup>36</sup>. If it is minded to approve such aspects of the Proposals, the Trust must ensure that there are adequate safeguards to ensure an open and equitable approach to participation in the venture.

*“Strategic Partner” level*

- 6.13. As an alternative to third party participation at the “*Venture Partner*” level, the Executive would appear to envisage limiting the role of other free to air and pay broadcasters to the role of content or service providers (aside from the box manufacture and ISP roles that broadcasters vertically integrated at these levels could also play – as to the latter, see further below). The Trust must ensure that that all broadcasters, whether PSB, free or pay, have a genuine opportunity to participate in the development of the Canvas platform and delivery of their services over it.

*The “Distribution Partner”, or ISP, level*

- 6.14. As referred to above in paragraph 3.10, the Proposals could also involve the accreditation of ISPs. This raises the prospect that the accreditation principles could in themselves favour certain ISPs or exclude others, potentially having a distorting effect on competition, particularly if “*Venture Partners*” who are ISPs (for instance BT) are to be responsible for ISP accreditation, given their inherent conflict of interests. Comparing different ISPs’ technical capability is a far from straightforward exercise, as Ofcom has discovered in its attempts to publish a comparison of different ISPs’ delivered speeds. It is made complex by the number of dimensions to the assessment, including for example: the headline or maximum theoretical speed of the line; the impact on this headline speed of capacity constraints, for example how much capacity is shared with other users, reducing line speed at peak times; and the traffic shaping policy of the ISP (whether the ISP slows down or prioritises certain applications of its choosing).
- 6.15. Some ISPs do better on some measures; some better on others. It is not a purely objective process to determine which services would be best suited to Canvas.

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<sup>35</sup> See Annex 9, page 84, of the Executive’s application.

<sup>36</sup> In its letter to the Trust of 17 April.

Therefore, the proposal that Canvas would accredit ISPs raises significant concerns. If the Trust is minded to approve such aspects of the Proposals, it will need to ensure that accreditation criteria are non-discriminatory, transparent and applied impartially.

### ***Conclusions on the potential competitive impact of the Proposals***

- 6.16. The Proposals would appear to reach far beyond the minimum required of the BBC to fulfil its primary purpose with the minimum of negative competitive impact, and appear to position the BBC as market maker in an area where commercial operators have made, and will continue to make, significant investments, such that the potential for distortion of competition is manifest.
- 6.17. The Trust should not approve the Proposals unless satisfied that the BBC is using public funds efficiently, effectively, and proportionately, and in a manner that would not significantly distort competition leading to an overall worse outcome for consumers. Even were the Trust able to satisfy these requirements and to approve the Proposals, the Trust would need to ensure that adequate protections were in place to minimise any likelihood of distortions of competition going forward. In that context it would be necessary to ensure that the BBC adheres to the principle of platform and service neutrality in the way in which it distributes and promotes its content and services.
- 6.18. Given the propensity for the distortion of competition caused by the injection of public funds into a commercial marketplace, adherence to the principle of platform and service neutrality on the part of the BBC is critical and it is the Trust's role and responsibility to ensure that the BBC does more than pay lip-service to this principle<sup>37</sup>.

## **7. Other relevant approvals**

### ***Merger control***

- 7.1. As a brand, operational management and the existing Freesat business (and potentially in future also the DTVSL operation) are to be contributed to the venture, there would also likely be an 'enterprise' or 'enterprises' 'ceasing to be distinct'. As such, the Proposals are likely to qualify for review by the OFT as a 'relevant merger situation', resulting in a 'share of supply' of video on demand services in the UK (a narrower, yet reasonable description of a set of services, distinct from a relevant economic market exercise) in excess of 25%.
- 7.2. The Trust will, of course, be acutely aware of the recent decision of the OFT to refer 'Project Kangaroo', a proposal with similar objectives to Canvas, to the Competition Commission and the latter's decision ultimately to block the merger on competition grounds. That decision is in many ways instructive of the sorts of competition issue that could arise under Canvas (and would be assessed in any merger investigation). To the extent that the BBC is permitted to operate at the platform end of the spectrum, with certain of its main competitors, similar concerns, for example as to the coordination of competitors' strategies, and as to the sharing of sensitive information between them, could arise. Indeed, Ofcom notes in its letter to the Trust of 17 April, the possibility of further scrutiny by the OFT under merger control rules.

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<sup>37</sup> For example with assertions such as that the "specification would be platform neutral, aimed at both DTT and DSat" and that the BBC's strategy should be "seen as complimentary [sic], rather than a substitute to syndication on pay platforms" - See pages 9 and 10 of the Executive's summary respectively.

- 7.3. With a greater risk of coordination of competitors' strategy likely to result from the joint operation with competitors of a platform business, there is also an increased risk of scrutiny under general competition law, with Ofcom earmarking "a future role" for itself in this regard in its letter to the Trust.

***State aid***

- 7.4. The Trust must also consider the application of EU state aid rules. In the event that the Trust approves the creation of a new venture consistent with the Executive's apparent aspirations, the funding of any vehicle will have to be notified to the European Commission before implementation. Given the likely significance of such proposals in terms of market impact, and the current debate at European levels on issues surrounding state aid and PSBs, the Trust should take a prudent assessment of risk and ensure that the Proposals are notified to the European Commission for approval. Failure to do so would leave the venture in doubt as to its legitimacy and at risk of further regulatory intervention.
- 7.5. Sky notes in this regard that the speculative arguments relied on by the Trust in justifying the non-notification of the launch of BBC/ITV freesat are not applicable to the Proposals. In their most complete incarnation, the Proposals are a significant extension to the BBC's existing functions that require examination by the Commission to determine whether they are compatible with the Treaty rules. The BBC's participation in a Canvas joint venture would not constitute existing lawful aid (thereby avoiding the need for prior notification) as it qualifies neither as aid pre-dating the entry of the UK into the EU, nor as aid previously notified to the European Commission.

**8. Conclusion**

- 8.1. The BBC's primary purpose is to distribute its content as widely as possible, without discrimination and it is obliged to do so in a proportionate manner, so as to minimise competitive distortions. Both broad content syndication and participation in existing industry standards initiatives would be a proportionate means of the BBC fulfilling its primary purpose, and minimising, in its privileged position as the recipient of guaranteed public funding, the "*negative competitive impacts on the wider market*" of its intervention. At this end of the spectrum of proposed activities, the Trust's chosen process for scrutiny could be considered appropriate, though only once certain aspects of the Proposals are made clear (for instance as to the nature of the standards under consideration and as to their means of development).
- 8.2. The Proposals, however, conceive of a role for the BBC seemingly far beyond what is necessary for it to fulfil its primary purpose and obligations and appear to position the BBC as market maker in an area where commercial operators have made, and continue to make, significant investments, such that the potential for distortion of competition is manifest. The Trust should, therefore, subject the Proposals, once made sufficiently clear, to the highest level of impartial and rigorous scrutiny, including submitting the Proposals to a full public value test or equivalent, with a market impact and competition law assessment conducted by Ofcom.
- 8.3. If the Trust does not adopt a suitably impartial and rigorous process to assess the Proposals and to allow full participation by interested parties, the Trust risks reaching an unreasonable and invalid decision based on a set of inchoate proposals whose impact has not been properly gauged.