



SKY'S RESPONSE TO OFCOM'S CONSULTATION ON HOLDING THE BBC TO ACCOUNT FOR THE DELIVERY OF ITS MISSION AND PUBLIC PURPOSES

SECTION 1: SUMMARY

- 1.1 The new Charter and Framework Agreement place a number of obligations on the BBC that are relevant to the distribution of the BBC's UK public services, including within the context of the BBC's Mission and Public Purposes. The Charter and Framework Agreement also give Ofcom a role in holding the BBC to account for its performance in delivering its Mission and Public Purposes.
- 1.2 Given the continued importance of the BBC public services to UK consumers, it is important that Ofcom employs its powers and duties to hold the BBC to account in relation to these obligations.
- 1.3 Sky therefore submits that the BBC operating licence (or, if Ofcom deems more appropriate, Ofcom's performance measures) should include a requirement for the BBC to make its UK public services available across a range of services and platforms, in a range of convenient and cost effective ways, thereby putting the BBC under a clear duty to explain how it is meeting its obligations in this regard.

SECTION 2: THE BBC IS UNDER A DUTY TO MAKE ITS CONTENT WIDELY AVAILABLE ACROSS A RANGE OF SERVICES AND PLATFORMS

- 2.1 The BBC represents a significant intervention in the market with the ability to influence and condition what other parties in the value chain can achieve. The high value audiences place on BBC content, and its ubiquity, may act as an important determinant of a platform's success. Specific regulatory oversight of the BBC's distribution arrangements is a proportionate response to the potential impact such arrangements may have on the UK broadcasting ecology.
- 2.2 The new Charter and Framework Agreement place a number of obligations on the BBC that are relevant to the distribution of the BBC's UK public services. Specifically:
 - (a) the BBC's object is "*the fulfilment of its Mission and the promotion of the Public Purposes*";¹
 - (b) the BBC's Mission is to "*act in the public interest, **servicing all audiences** through the provision of impartial, high-quality and distinctive output and services, which inform, educate and entertain*";² [emphasis added]
 - (c) Public Purpose 3 requires the BBC to "*show the most creative, highest quality and distinctive output and services: the BBC should provide high quality output in many different genres **across a range of services and platforms***";³ [emphasis added]
 - (d) In addition to the requirements under Public Purpose 3, the BBC also has a general duty under the Charter to:

¹ Article 4 of the Charter.

² Article 5 of the Charter.

³ Article 6(3) of the Charter.

- “act in the public interest”;⁴
 - “carefully and appropriately assess the views and interests of the public and audiences, including licence fee payers, across the whole of the United Kingdom”;⁵
 - “make arrangements to ensure that the diverse perspectives and interests of the public and audiences, including licence fee payers, across the whole of the United Kingdom are taken into account in its decision-making”;⁶
 - “promote technical innovation, and maintain a lead role in research and development, that supports the effective fulfilment of its Mission and the promotion of the Public Purposes”⁷ and in complying with this requirement to “seek to work in partnership with other organisations”;⁸
- (e) The BBC also has a general obligation under the Framework Agreement 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**. These could include (for example) broadcasting, streaming, or making content available on-demand, whether by terrestrial, satellite, cable or broadband networks (fixed or wireless) or via the internet”.⁹ [emphasis added]

2.3 Sky is concerned that the BBC’s approach to distribution may result in the BBC failing to meet the above obligations. As explained in Sky’s response to Ofcom’s consultations on competition regulation of the BBC,¹⁰ the BBC’s approach appears to be guided by a strategic preference for delivering its content exclusively via the so-called ‘standardised syndicated iPlayer experience’ (where the licence fee payer is restricted to viewing BBC content in a BBC controlled walled-garden), rather than being open to alternative delivery, distribution and promotion arrangements.

2.4 The indications are that this strategic preference will only strengthen in the coming years, for example the BBC’s recently published Annual Plan for 2017/18¹¹ states that “[w]e want the widest range of audiences to be able to easily find and enjoy our content, and we want to maximise the value of that consumption by maintaining a direct relationship with audiences”¹² and “we aim over the next few years to double iPlayer’s reach and quadruple the time each person spends on the service”.¹³

2.5 It is self-evident that the uniform and exclusive availability of BBC public service content within the BBC iPlayer App (to the exclusion of alternative delivery methods) would not

⁴ Article 9(1) of the Charter.

⁵ Article 10(1) of the Charter.

⁶ Article 10(2) of the Charter.

⁷ Article 15(1) of the Charter.

⁸ Article 15(2)(b) of the Charter.

⁹ Clause 61(1) of the Framework Agreement.

¹⁰ See section 3 of Sky’s response (https://www.ofcom.org.uk/_data/assets/pdf_file/0025/99241/Sky.pdf)

¹¹ BBC Annual Plan for 2017/18 dated July 2017.

¹² BBC Annual Plan, page 51.

¹³ BBC Annual Plan, page 53.

meet the BBC's obligations as outlined above. Such an approach would not be in the interest of licence fee payers, who expect to be able to access BBC content in the same way as they access other content on their platform(s) of choice and across a range of services (not just one). Such an approach also restricts technical innovation by limiting the ability and incentives of platforms to innovate in order to set themselves apart from other platforms.

- 2.6 Sky is therefore deeply concerned that there is no mention of wide distribution being an important consideration of how the BBC is delivering its Mission and Public Purposes in the Consultation document. There is also no indication of how the availability of the BBC's content across "a range of services and platforms" will be measured.
- 2.7 Sky recognises that distribution of BBC content is already addressed from a competition perspective as part of the requirements and guidance placed on the BBC to protect fair and effective competition.¹⁴ However, under the competition framework, the BBC must offer its public services to third parties **in response to reasonable requests**, except if the BBC has an objective justification for not doing so [emphasis added].¹⁵ Accordingly, the requirements are focussed on how the BBC *responds to requests* for its public service content. By contrast, the Charter and Framework Agreement place *positive obligations* on the BBC in respect of its content.
- 2.8 The new Charter gives Ofcom a role in holding the BBC to account for its performance in delivering its Mission and Public Purposes (as further outlined in Annex 1). Given the continued importance of the BBC public services to UK consumers,¹⁶ it is important that Ofcom employs its powers and duties to hold the BBC to account in relation to these obligations.
- 2.9 Sky therefore submits that the BBC operating licence (or, if Ofcom deems more appropriate, Ofcom's performance measures) should include a requirement for the BBC to make its UK public services available across a range of services and platforms, in a range of convenient and cost effective ways, thereby putting the BBC under a clear duty to explain how it is meeting its obligations in this regard.
- 2.10 The operating licence and/or performance measures should also include indicative measures as to how and where BBC's output should be made available. For example, Ofcom could state that:
- (a) it would expect the number of services/platforms via which BBC public services can be accessed to increase year on year;
 - (b) it would expect the BBC to seek to make its public services available on audio-visual platforms with in excess of 500,000 users;¹⁷ and
 - (c) uniform availability of the BBC iPlayer App (to the exclusion of alternative delivery methods) would not satisfy the BBC's obligations.

¹⁴ Ofcom Statement, *Distribution of BBC Public Services*, 29 March 2017 ("**Distribution Statement**").

¹⁵ Paragraph 3.32, Ofcom's Distribution Statement.

¹⁶ As evidenced by the data presented in Ofcom's PSB Annual Research Report 2017, https://www.ofcom.org.uk/data/assets/pdf_file/0019/103924/psb-annual-report-2017.pdf

¹⁷ This is the materiality threshold used by the BBC in its Code on Cross Promotions (http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/fair_trading/fair_trading_policies_framework.pdf).

- 2.11 In terms of compliance monitoring and information gathering, we recommend that Ofcom requires the BBC to provide Ofcom with a list of the services/platforms via which each UK public service is made available, and to identify whether such content can be accessed solely via the BBC iPlayer App, or via an alternative delivery mechanism. It would also be informative for Ofcom to gather data on viewer satisfaction in relation to consumption of BBC public services across these different services/platforms. We do not consider such an approach would be particularly onerous for either Ofcom or the BBC, and would likely fit within the “Availability” or “Consumption” measures that Ofcom has proposed at paragraph 5.11 of the Consultation.
- 2.12 We understand that Ofcom intends the performance regime to be flexible and that it expects the regulatory conditions (in the operating licence) and the performance measures to evolve over time. Such evolution would be informed by the BBC’s performance over time, changes in audience behaviour and expectations, technology and the broader market¹⁸ Accordingly, should Ofcom decide not to include a specific requirement for the BBC to make its public services available across a range of services and platforms as part of the initial operating licence and performance measures, we would nonetheless expect Ofcom to regularly review this position.

Sky

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¹⁸ Paragraphs 1.30 to 1.33 of the Consultation.

Annex 1 – Ofcom’s Duties in relation to BBC performance

Under the new Charter, Ofcom has a duty to:

- *“have regard, in carrying out their functions, to such of the following as appear to them to be relevant in the circumstances-*
 - (a) *the object of the BBC to fulfil its Mission and promote the Public Purposes;*
 - (b) *[...]*
 - (c) *the requirement for the BBC to comply with its duties under the Charter, including its general duties (set out in articles 9-18);*¹⁹
- *“prepare and publish an Operating Framework which must contain the provisions Ofcom consider appropriate to secure the effective regulation of the activities of the BBC as set out in this Charter and the Framework Agreement”;*²⁰
- *“set an operating licence for the BBC’s UK Public Services, in accordance with the Operating Framework, which must contain regulatory conditions they consider appropriate for requiring the BBC-*
 - (a) *to fulfil its Mission and promote the Public Purposes;*
 - (b) *to secure the provision of distinctive output and services; and*
 - (c) *to secure that audiences in England, Scotland, Wales and Northern Ireland are well served”;*²¹
- *“determine measures (further to those determined by the BBC under article 20(3)(d) (principle functions of the Board)) they consider appropriate to assess the performance of the UK Public Services in fulfilling the Mission and promoting the Public Purposes”.*²²
- In making proposals for the operating licence, performance measures and operating framework documents, Ofcom is also bound by its general duties in section 3 of the Communication Act 2003. Those duties include Ofcom’s principal duty to *“further the interests of consumers in relevant markets, where appropriate by promoting competition”.*

¹⁹ Article 45(2) of the Charter.

²⁰ Article 46(2) of the Charter. See also Clause 5(1) of the Framework Agreement.

²¹ Article 46(3) of the Charter. See also Clause 13(2) and Clause 14 of the Framework Agreement.

²² Article 46(4) of the Charter. See also Clause 13(3) and Clause 14 of the Framework Agreement.