



# Review of the BBC's Royal Charter

**Ofcom response to the Green Paper**

**Issued: 8 June 2005**

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## Section 1

# Introduction and summary

### Scope of this document

1.1 This document represents Ofcom's response to the Government's Green Paper on the Review of the BBC's Royal Charter<sup>1</sup> ("the Green Paper"). The basis for our response lies in our statutory duties as set out in the Communications Act:

- to secure the availability throughout the UK of a wide range of television and radio services which, taken as a whole, are both of high quality and calculated to appeal to a variety of tastes and interests, and
- the maintenance of a sufficient plurality of providers of different television and radio services.

1.2 In formulating our response, we have drawn on much of the extensive analysis contained in our recent review of Public Service Broadcasting (PSB), which was charged by the Act with reporting on proposals for maintaining and strengthening the quality of public service broadcasting in the UK, in the context of the changing market and progress towards digital switchover.

1.3 We agree with much of the analysis and proposals in the Green Paper:

- We support the principle of a strong, public-service focused, effective, and politically independent BBC
- We agree that the BBC should be fully-funded by the licence fee model for the next Charter period, at a level that allows it to make the necessary investments both on-screen and on-line
- We welcome the fact that the definitions of PSB purposes and characteristics set out in the Green Paper are consistent with those proposed by Ofcom in the PSB Review for all providers of public service broadcasting
- We support the emphasis that the BBC should aim to complement the content provided on commercial channels, rather than directly competing with commercial providers using "copycat" and derivative programming formats
- We agree that the BBC, given its privileged funding position, should play a key role in the digital switchover process, in supporting the independent production sector, and in playing a greater role in the Nations and Regions
- Finally, we welcome proposals that Ofcom should carry out market impact assessments for the BBC's proposed new services, and that we should carry out more work on options for a Public Service Publisher (PSP), as proposed in our PSB Review.

1.4 However, the Green Paper, perhaps understandably, does not fully address the

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<sup>1</sup> Review of the BBC's Royal Charter: *A strong BBC, independent of Government*. Published on 2 March 2005.

public service broadcasting issues beyond the BBC. In particular, it stops short of setting out the steps needed to secure the longer term future of public service broadcasting in the round, in a fully digital world. Securing the BBC is not the same as securing PSB for the future.

- 1.5 In our PSB Review, we explained how the broadcasting landscape is changing, and we set out proposals to secure the future supply of a broad and rich range of programming and content from a range of suppliers. We argued that as the ability of commercial broadcasters such as ITV and Five to deliver a full range of PSB commitments unwinds, it will be essential to construct a new model for PSB, with the BBC at its heart, but with strong contributions from Channel 4, a new PSP, and perhaps local TV and broadband services. Direct public funding will be needed, to replace the implicit funding which is draining from the current system. Only by taking steps in the near term to put this new approach in place will we be able to ensure that we are prepared for the fully digital world.
- 1.6 Broadly speaking, Government faces a choice between two options:
  - A future, after digital switchover, in which PSB is the sole responsibility of the BBC
  - Or a future in which a broader system for PSB is secured, encouraging mutually-reinforcing competition for quality across a range of PSB providers in addition to the BBC – including Channel 4, local television services, and a PSP.
- 1.7 The first of these options risks delivering a long-term decline in PSB – as the BBC becomes more isolated, as its share of the sector declines, and as the market and audience tastes are increasingly conditioned by commercial rather than public service values.
- 1.8 The second option offers the prospect of a dynamic, innovative, and strongly supported mix of PSB from a range of suppliers – with a much wider influence and impact on the broadcasting sector and on public attitudes. We believe that this option can be secured, in a manner that strengthens rather than undermines the BBC's funding, its quality and its independence.
- 1.9 In order to secure the continued provision of a range of high quality content from a diversity of suppliers, the following actions should be taken:
  - Prior planning and early action are needed to help ensure that other PSB providers remain in the system alongside the BBC. This means bringing forward the Government's reviews of PSB funding to ensure that they are completed by the end of the decade, and taking the necessary action before then to support the reviews, including reviews of the options for local TV, and more detailed work on the PSP and prospects for Channel 4
  - In advance of the funding reviews, more immediate steps should be taken to help finance pilot schemes for new forms of PSB. The funding for these pilot schemes could most easily come in the short term from an enhanced licence fee model
  - Alongside strong support for the BBC, there should be clear boundaries to and external scrutiny of its impact on the wider market. This requires a clearer and more consistent competition framework, with independent

oversight of the BBC's Fair Trading Commitment, and transparent and independent assessments of the market impact of BBC services

- Cross-sector content regulation should evolve by the middle of the next Charter to ensure clear and consistent high standards for all broadcasters – rather than a two tier system which implies that only the BBC can be relied on to provide a gold standard
- A clear system of governance, accountability and regulation is needed. This should ensure that the BBC has effective internal corporate governance via an Executive Board, a separate body which ensures accountability to the general public, and a single regulatory body taking a consistent approach across the broadcasting sector. Thought should be given now to how this system might evolve over time, given that in future it might be called on to allocate public funds to other broadcasters
- Above all, the measures taken should aim to bind the BBC more closely into the broadcasting sector as a whole – rather than to set it apart. The BBC needs strong support, but it also requires clear boundaries. The more the BBC is seen to observe accepted and independently scrutinised rules, the more likely it is to retain wider public and industry support. The more it is seen to work with and support UK broadcasting as a whole – with an effective approach to governance and accountability – the stronger it will ultimately be.

1.10 The rest of this section summarises the recommendations in this document. Subsequent sections provide a more detailed discussion of each set of issues. Our response focuses on those Green Paper issues most relevant to Ofcom's statutory duties and its obligations regarding the continued success of PSB – and so we open each section with a reference to the area of the Green Paper to which we are responding. In addition, Annex 1 sets out Ofcom's answers to each of the Green Paper's questions for consultation.

## **Planning for the future of PSB**

1.11 Allowing the BBC to become a monopoly supplier of PSB would not be a desirable outcome – it would weaken the provision of PSB, the BBC itself, and would result in reduced public support for PSB. We offer the following recommendations:

- We believe that there should be a clearer commitment to securing a diversity of suppliers of PSB, now and in the fully digital world. Securing the BBC is not the same as securing PSB as a whole
- It is important to start planning for the future at this early stage, as the Government commits to the digital switchover process. The Green Paper proposes reviews of wider PSB funding and the BBC funding model towards the end of the digital switchover process. These reviews should be brought forward in time and be concluded by the end of the current decade – 2010
- This would help to ensure that any required new mechanisms could be put in place before the completion of switchover. If the reviews take place on the Government's proposed timetable, it will be too late to secure the effective supply of PSB for the future. In advance of these reviews, Ofcom will

conclude its work on the mechanisms and spectrum arrangements for local TV (in 2005/6), a financial review of Channel 4 (in 2006/7) and detailed plans for the PSP to be operational by 2010

- We also recommend that Government takes steps before the reviews to ensure that a modest amount of funding for pilot schemes and other PSB development is built up over time. An enhanced licence fee model could be used to provide the necessary funding
- A commitment to the wider PSB system will require direct funding to other PSB providers. Consideration should be given now to the potential sources of funding and to the new models of accountability that would be needed for a world in which public funding for broadcasting is directed beyond the BBC. Final proposals should be advanced as part of the proposed funding reviews
- An enhanced licence fee model should be considered as one possible longer term mechanism for wider PSB funding, alongside the other options set out in our PSB Review, such as spectrum proceeds. As long as the BBC is fully-funded, an enhanced licence fee model will not, as some have suggested, weaken the BBC, or destroy its independence, and it could also be designed to ensure proper accountability to licence fee payers.

### **Governance, accountability and regulation in the broadcasting sector**

1.12 There should be greater consistency and clarity in the separation of the three different roles of internal governance, accountability and regulation. The Green Paper goes some way to bringing clarity to the system, but it should go further – in some cases, further action should be taken now.

#### **Competition issues**

1.13 The broadcasting market exhibits special features which, it is generally recognised, require sector specific competition rules. The BBC, like any other large player in the market, has the potential to distort competition through aspects of its conduct, and could have a significant and adverse impact on the development of a successful commercial sector. To secure a level playing-field in such a fast-moving market, the BBC's activities need to be subject to independent oversight from a competition authority which has sufficient powers to be able to act quickly – and on an ex ante basis if needed.

1.14 We believe that this objective can be achieved through the following mechanisms:

- There should be a competition-focused BBC Fair Trading Commitment, which applies to licence-fee funded as well as commercial services, and which is subject to independent approval and oversight
- The BBC Agreement should contain a general obligation that the BBC should have due regard to its effect on competition, to be informed by considerations similar to those contained in competition codes and guidelines issued to commercial licensees
- Market impact assessments – of both new and significant changes to existing BBC services – should be carried out independently by Ofcom.

1.15 By ensuring that the system is both fair and seen to be fair, all parties in the

sector – including the BBC – will benefit from this greater certainty and clarity.

### **Clarity in content regulation**

1.16 There should also be greater clarity and consistency in content regulation. We therefore support the suggestion in the Green Paper that changes to the regimes for Tier 1 and Tier 2 regulation will be considered further. We believe that these issues should be resolved by the middle of the next Charter period, or earlier if there is evidence that the current arrangements are not working properly. In the meantime we commit to working with the Trust to ensure that we achieve a consistent approach across the sector.

1.17 Regarding Tier 2 regulation, we suggest that a clearer approach would be for the BBC's production quotas in future to be set independently, in common with the sector as a whole; but the programme aspects of Tier 2 regulation should remain the responsibility of the Trust.

1.18 In reviewing the approach to Tier 1 accuracy and impartiality regulation, we suggest that the following principles should be applied:

- Clear incentives to achieve the highest editorial standards across the sector - a gold standard for all, not a two tier system with one rule for the BBC and another for the rest
- Consistency of application, with appropriate sanctions if codes are breached
- Clarity of process, including public confidence in the independent scrutiny of broadcaster decisions, and in the opportunities for obtaining redress.

### **Governance and accountability**

1.19 The proposed "BBC Trust" and new Executive Board represent an improvement on the current system, but need further detailed work:

- A new model will be needed if PSB funding is to be directed to a plurality of providers in future. Ideally, the approach should be the same for all PSB providers, including the BBC
- Government should therefore consider how the Trust could evolve into an external, independent body in the future. Thought should be given now to the steps that would be necessary in order to achieve this, with a view to finalising proposals as part of the proposed review of wider PSB funding
- The Green Paper notes that "BBC Trust" is only a working title for the new body. We therefore ask Government to reconsider whether the "BBC Trust" is an appropriate name for a body that has a potential future role in serving the wider public interest (for example, would it be appropriate for the "BBC Trust" to be responsible for allocating funds to Channel 4?). The less possessive "The Trust" may be a better title.

## Other Green Paper issues

1.20 This response also sets out Ofcom's views on a number of other key issues:

- We support the Green Paper's approach to defining the public purposes and characteristics of the BBC. Ofcom and the BBC should be asked to propose a final and consistent definition of purposes and characteristics to be applied across the sector as a whole
- It is important that these definitions are put into practical effect – through the planned public value tests and service licences for the BBC, and through a cross-sector approach to PSB assessment
- We support the commitment to a key role for the BBC in digital switchover, but emphasise that the whole sector must remain fully engaged in the process, including through Switchco; and the BBC's participation must be on a platform-neutral basis
- Content production is an important source of plurality in the PSB system, and we welcome the Green Paper's commitment to the independent production sector. We are considering these issues in more detail as part of our ongoing review of the television production sector
- We also welcome the Green Paper's commitment to a key role for the BBC in the Nations and Regions. Our policy conclusions in this area are being published separately, following the consultation on PSB in the Nations.

## Questions and comments

1.21 If you have any questions or comments on the points raised in this paper, please contact Robin Foster or Khalid Hayat at Ofcom:

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## Key messages in this response

BBC Charter Review Green Paper		
Ofcom agrees with	Issues for further analysis	Ofcom disagrees with
<ul style="list-style-type: none"> <li>• BBC's public purposes defined, consistent with Ofcom's research</li> <li>• BBC "complementary" to commercial broadcasters</li> <li>• Licence fee secured for the new charter</li> <li>• The PSP welcomed and Ofcom asked to do more work on the idea</li> <li>• Impact assessments for BBC's proposed new services to be carried out by Ofcom</li> <li>• BBC to work with Ofcom on approach to PSB assessment</li> <li>• BBC to play a key role in digital switchover</li> <li>• Further discussion of the BBC's role in the independent production sector, with the option of increasing the BBC's current 25% quota</li> <li>• BBC to play greater role in Nations and Regions</li> </ul>	<ul style="list-style-type: none"> <li>• BBC's Governors replaced by the BBC Trust tasked with the oversight of public funds and the public interest. <b>Further work needed on the division of responsibilities, and on "future proofing" the Trust for its possible role in the wider oversight of PSB in a fully digital world</b></li> <li>• Current approach to Tier 1 (accuracy and impartiality) and Tier 2 regulation retained. <b>This should be reviewed and clarified by the middle of the next Charter period, if not before, to ensure consistent high standards across the sector, effective independent scrutiny, and public confidence in the process</b></li> </ul>	<ul style="list-style-type: none"> <li>• Reviews to take place towards the end of the switchover process, of the funding model, and the case for the wider use of public funding to for PSB. <b>Given the pace of change, Ofcom believes this must happen by 2010, and Government should start planning for the future at an early stage</b></li> <li>• Cross-sector regulation responsibilities kept as today, but Ofcom invited to submit more detailed proposals regarding sector-specific competition powers. <b>BBC's fair trading commitment to be subject to independent regulation, to ensure effective competition in a dynamic and changing market</b></li> </ul>

## Section 2

# Public service broadcasting and the BBC

### Green Paper questions for consultation

*Question 5: Do you support the proposal for a further review of alternative funding methods, before the end of the next Charter period?*

*Question 6: Do you have a view on any aspect of the operation of the licence fee: concessions, its collection or its enforcements?*

*Question 20: Do you agree that the case for plurality of publicly-funded broadcasters should be kept under review?*

### Our recommendations

Allowing the BBC to become a monopoly supplier of PSB would not be a desirable outcome – it would weaken the overall provision of PSB, the BBC itself, and would result in reduced public support for PSB. We offer the following recommendations:

- We believe that there should be a clearer commitment to securing a diversity of suppliers of PSB, now and in the fully digital world. Securing the BBC is not the same as securing PSB as a whole
- It is important to start planning for this future at an early stage. The Green Paper proposes reviews of wider PSB funding and the BBC funding model towards the end of the digital switchover process. These reviews should be brought forward in time and be concluded by the end of the current decade – 2010
- We also recommend that Government takes steps before the reviews to ensure that a modest amount of funding for pilot schemes and other PSB development is built up over time. An enhanced licence fee model could be used to provide the necessary funding
- A commitment to the wider PSB system will require direct funding to other PSB providers. Consideration should be given now to the potential sources of funding and to the new models of accountability that would be needed for a world in which public funding for broadcasting is directed beyond the BBC. Final proposals should be advanced as part of the proposed funding reviews
- An enhanced licence fee model should be considered as one possible longer term mechanism for wider PSB funding, alongside the other options set out in our PSB Review, such as spectrum proceeds. As long as the BBC is fully-funded, an enhanced licence fee model will not, as some have suggested, weaken the BBC, or destroy its independence, and it could also be designed to ensure proper accountability to licence fee payers.

### The overall context

- 2.1 Ofcom's statutory duties require it to ensure the quality of public service broadcasting (PSB) is maintained and strengthened – this was a key objective of Ofcom's PSB Review, the overall remit of which was defined by Government

and Parliament in the Communications Act. Much of the research and analysis in Ofcom's PSB Review are relevant to the Green Paper proposals.

2.2 We agree with many of the proposals in the Green Paper, and consider that the following will help to secure more effective provision of PSB:

- We welcome the Government's aim of securing the future of PSB in the UK, recognising the continued support for and the enduring importance of PSB in television, even beyond digital switchover
- We support the BBC's central role in the provision of PSB. We share the Government's view that the BBC should be strong, effective, independent of government, and fully funded by the licence fee
- We think that many of the Green Paper's proposals to provide greater clarity to the remit and governance of the BBC will address concerns raised by industry and the public.

2.3 But securing the BBC is not the same as securing PSB. While we recognise the importance of a public-service focused BBC as the cornerstone of PSB, we do not believe that the quality of PSB can be maintained and strengthened solely through the cornerstone.

### **The future of PSB**

2.4 Through detailed and comprehensive audience research, Ofcom's PSB Review established that there continues to be strong public support for PSB in television – as well as clear ongoing support for a plurality of providers in the PSB system. We also concluded that there are some valuable aspects of television that even a better functioning market would not provide, or would under-provide. As a result, public intervention to secure such content remains justified, even in the fully digital world.

2.5 At the same time, the broadcasting market is changing rapidly, bringing both opportunities for and threats to the sustainability of PSB. In particular, commercial broadcasters will inevitably wind back their PSB content over time, and we will need to find new providers and new sources of funding if we want to preserve plurality and competition for quality – a new model of PSB will be needed for the digital age.

2.6 The majority of UK households now have access to digital television, and penetration continues to accelerate. Competition in the television market is becoming fiercer, and choice is increasing, handing more power from producers to consumers. Viewers are benefiting from the greater choice afforded by the development of digital television, and from the increasing distribution of content over broadband and other new delivery platforms.

2.7 Technological developments present new opportunities for creating and distributing PSB content: audiences will be able to access on-demand libraries and archives of PSB programming; interactive features will enhance the provision of news and educational material; content will be made available on portable and mobile devices, as well as on the main household TV screen; and effective and user-friendly navigation around different types of content will allow viewers to find PSB content more readily.

- 2.8 These developments could strengthen the effectiveness of PSB content and reinforce its special role. They will provide viewers with more choice, convenience and control. They will also provide added dimensions – such as interactivity and mobility – to public service content. They underlie our vision of an exciting and durable PSB system as the UK moves into the digital age.
- 2.9 However, technological change could also pose a real risk to the sustainability of PSB in the commercial sector. Specifically, the increasing penetration of digital television raises two key issues:
- As audience fragmentation continues, privileged access to the analogue spectrum reduces in value. The revenue from analogue advertising is no longer the only source, and possibly not the main source, of income for commercial broadcasters
  - There are alternative routes for broadcasters to reach audiences. In the past, the main broadcasters could only reach audiences through analogue television – and so they had no choice but to accept PSB obligations. But in the multichannel world, broadcasters can reach audiences through many routes: not only analogue but also digital terrestrial TV (DTT), digital satellite and cable platforms. Indeed, as technology develops further, content providers may at some stage no longer need television platforms to reach their audiences.
- 2.10 As a consequence, at a point at or before digital switchover, the compact between the commercial broadcaster and society will erode. The costs of retaining PSB status (the sum of licence payments and the costs of PSB obligations) will at some stage exceed the scarcity value of the analogue spectrum (the advertising revenue generated on the analogue platform).
- 2.11 Even if commercial public service broadcasters remain highly profitable, as some no doubt will, it will not be possible to impose extensive PSB obligations on them. They will simply opt for a different and less costly digital licence and use alternative routes to audiences. Channel 4 is in a slightly different position, but it too may face longer term commercial pressures. There is therefore a real danger that, if no action is taken, the BBC could be left as a monopoly supplier of PSB in television<sup>2</sup>.
- 2.12 This would not be a welcome development, for several reasons:
- First, the PSB space would become much smaller over time. A publicly-funded BBC would find itself increasingly isolated in a growing and fully commercially-focused sector. Audience tastes would be increasingly conditioned by the commercial majority, not the public service minority. Producers, writers, editors, talent would all be influenced heavily by the commercial rather than the PSB sector
  - Second, the BBC's output would suffer as a result. A lack of competition in PSB programming risks leading to complacency at the BBC, inefficient production, lack of innovation, lower quality programming, a narrowing of perspectives, and the loss of PSB programming for certain groups

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<sup>2</sup> Ofcom's work on plurality has, to date, focused on the television broadcasting sector. The question of plurality in radio is currently being considered as part of Phase 2 of Ofcom's Radio Review.

- Finally, public and practitioner support for the BBC's privileged position could decline if the BBC is not part of a wider culture of PSB. If the BBC's PSB output is less watched and less relevant, there will be more opposition to licence fee funding – and the importance of the BBC would erode.

2.13 This outcome would not be in society's interest, and nor would it be in the longer-term interests of the BBC.

### **The need for new forms of funding**

2.14 In order to support a diversity of providers and competition for quality in the fully digital world, Ofcom believes that new forms of funding will need to be in place. With this in mind, the PSB Review recommended that the Government should examine the case for new explicit forms of funding for PSB, including the scope for direct taxation, use of spectrum proceeds, and an enhanced licence fee model to support direct funding of PSB across a range of suppliers.

2.15 Further analysis of all these options is still needed, but we think it is important to point out that some of the claimed drawbacks of an enhanced licence fee model can be effectively addressed. The use of licence fee income for providers other than the BBC would amount to a major change in the system of public service broadcasting. But we do not believe that this would undermine the BBC as some have suggested. Specifically:

- The use of the licence fee mechanism to generate funds for providers of PSB beyond the BBC is not the same as taking money away from the BBC. If we start, as we do, from the principle that the BBC should be fully funded, the wider use of the licence fee model does not amount to a top-slicing. This is the principle of an enhanced licence fee. First decide what the BBC needs, then agree an amount of additional funding needed by other PSB providers. This system could still allow for five or ten year funding contracts to be agreed with the BBC – there need be no more uncertainty in the BBC's funding than is currently the case
- We do not believe that this model raises significant concerns about the link between the BBC and its licence fee payers, and hence its accountability to licence payers. Such accountability would not be damaged, as long as the use of the licence fee and the identity of the recipients of its funding are effectively understood by, and endorsed by, licence fee payers. Indeed, qualitative research for our PSB Review indicated that licence fee payers would support wider use of the licence fee, if they through it was essential to protect PSB across the system
- A wider licence fee model could in fact strengthen public support for the funding of PSB as a whole. Discussions on the level of the licence fee would then become a public debate concerning the total quantity of public funds used to deliver PSB rather than, as now, a narrower debate on the level of funding given to the BBC. Support for the licence fee currently tends to be influenced by licence fee payer perceptions of the performance of BBC television. Wider use of the licence fee could strengthen support for the mechanism, by demonstrating that the mechanism is used to fund a much wider range of content across the system
- Moreover, a system involving wider use of the licence fee would not diminish the BBC's political independence, as some have claimed - indeed it might

strengthen it. In contrast with the current arrangements, which involve periodic, Government-run reviews of the BBC's income and all that the BBC does, a new and independent body could be set up to decide on the allocation of funding to several different PSB providers, including the BBC, thus distancing the decision from a significant and periodic Government intervention. Government would properly periodically decide how much funding to devote to PSB in the round – but this would be a decision about all forms of PSB, not just the BBC. We return to the question of accountability later in this response.

### **The Green Paper's proposals**

- 2.16 The Green Paper recognises the value of multiple providers of PSB content and the importance of competition for quality in the PSB system. It states a commitment to examining possible ways of ensuring the BBC is not left as a monopoly PSB broadcaster.
- 2.17 We are concerned, however, that the Government's proposals do not go nearly far enough to guard against the risks posed to the PSB system. The Green Paper commits Government to the following measures:
- A review, towards the end of the digital switchover process (provisionally due to be completed by 2012), of the funding model, and in particular, an examination of subscription as the alternative way of funding the BBC after 2016
  - A separate review of the case for the wider use of public funding to fund PSB beyond the BBC. The Green Paper proposes that this review will also take place towards the end of the switchover process. But, at the same time, the Secretary of State has reserved the right to order an earlier review of the options for maintaining plurality, should this be deemed necessary.
- 2.18 The Green Paper gives initial consideration to Ofcom's proposal for a Public Service Publisher (PSP) – as discussed in the PSB Review, this would be the first provider of PSB content designed purely for the digital and broadband world. The Green Paper describes the PSP as a potentially exciting new entrant, and asks Ofcom to provide more detailed work on the PSP in the run up to the review of the wider use of public funding.
- 2.19 The Green Paper also recognises the special role that Channel 4 plays alongside the BBC in the PSB system. In Phase 3 of the PSB Review, we noted that Channel 4 may require further regulatory support to maintain its PSB contribution. The Green Paper acknowledges this finding, and agrees that potential help with Channel 4's transitional switchover costs should be explored further, subject to legal issues and constraints.

### **Planning for the future**

- 2.20 Our key recommendation is that Government should begin planning for the future at an early stage. Government may at some point be faced with the option of providing support for a wider range of PSB providers – we believe that planning for this stage should start sooner rather than later.
- 2.21 Digital penetration currently stands at around 60% of digital households, and Ofcom's projections suggest that this will be in excess of 80% by the end of the decade – even without further intervention. The switchover process is expected

to begin in 2008 – by 2010, around half of UK households will no longer have access to analogue TV signals. Therefore, in much of the UK, the potential for new services such as the PSP will already be present, and the financial threat to existing commercial providers of PSB will be increasing.

- 2.22 We therefore recommend that Government should undertake both of its reviews of PSB funding earlier than is proposed by the Green Paper. Rather than coming towards the end of the digital switchover process, these reviews should be concluded by the end of the current decade – by 2010. On this revised timetable, they could be preceded by Ofcom's second PSB Review. This would help to ensure that – if any new measures are needed to secure plurality, and if any new models of PSB funding are necessary – there will be sufficient time to put some of these in place before the UK enters the fully-digital world after 2012.
- 2.23 A number of additional steps will need to be taken in advance of the Government's funding reviews. We propose that the key steps are as follows:
- Further consideration of a number of key issues over the short to medium term. We are reviewing the future prospects for local TV services in 2005/6 – this work will consider the mechanisms and spectrum issues surrounding local TV provision. We will review Channel 4's financial position in 2006/7, assessing the extent to which the future prospects for Channel 4 raise concerns about plurality in the PSB system
  - As requested by the Green Paper, we will carry out further work on the proposed PSP. Phase 3 of the PSB Review identified the possible remit and organisation of the PSP, and our further work will consider these issues in more detail. This could include, for instance, audience research into the acceptability and perceived value of the various options for the PSP. In advance of the Government's reviews, our overall aim will be to develop detailed plans for PSP options that could be operational by 2010
  - Ofcom's next PSB Review should take place before the Government's proposed reviews of PSB funding<sup>3</sup>. The Government's funding reviews could then follow and build on the work carried out in that Review.
- 2.24 Even on this timetable, it may not be possible to establish fully a new PSB funding model until 2012 – the end of the switchover process. We therefore suggest that options for establishing pilot funding schemes should be pursued in parallel with the above work programme.
- 2.25 For example, should further work on local TV, the PSP or Channel 4 identify options which have a clear public benefit, we believe that Government should consider the scope for providing more immediate funding for the early stages of development for these services in advance of the full reviews of PSB funding. This could be necessary if Ofcom's work in 2005/6 were to suggest that some initial funding could be put to effective use in delivering pilots of these services.
- 2.26 One approach, which offers scope for quick action, would be for the current licence fee review to put in place a mechanism for a "PSB Trust Fund". This

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<sup>3</sup> The Communications Act requires that Ofcom conduct the PSB Review at least every five years. The main body of work on the first PSB Review took place in 2004/5, and so the second PSB Review would take place in 2009/10 at the latest.

could use an enhanced licence fee model that ensures that the BBC is fully funded, but which also sets aside a small amount of licence fee funding every year for the next five years, as an investment in PSB for the future.

### **A PSB Trust Fund**

*How could a fund be established to support pilot schemes for new PSB providers?*

One transitional approach would be to use an enhanced licence fee model to build up a fund, which could be drawn down for qualifying schemes as we approach switchover.

For instance, the current licence fee review for the BBC could start from an assumption of zero household growth. Once the size of the licence fee needed to fully fund the BBC has been determined, (perhaps a fixed amount in year 1, to be adjusted for inflation in subsequent years) a significant sum of additional money could be invested in the PSB Trust Fund by using the additional licence fee funding generated by projected increases in the number of UK households.

Ofcom's work in Phase 2 of the PSB Review suggests that household growth could allow a fund of around £300m to be built up over a five year period.

This would generate a sum of money that could be released at some future stage to support pilot schemes or early development of other PSB providers. The proposed fund would not generate ongoing funding for the future – but it could provide a starting-point to help manage the transition to a sustainable source of ongoing public funding.

2.27 We believe that there are key advantages to setting up such a transitional mechanism at an early stage:

- It provides some protection against future developments that might endanger the provision of PSB by providers other than the BBC: it would enable Government to plan for the future by accumulating over time funding that might be needed for the wider system
- It allows pilot schemes to be funded, and would also provide the public with an early benefit from digital switchover – e.g. trials of local TV or PSP services before the end of the switchover process
- The proposal also benefits from flexibility: a decision as to the use of this funding would not be necessary until the market position becomes clearer later in the decade – and so Government is acquiring an option to fund other PSB providers, rather than making a commitment to doing so
- The mechanism would also be easy to implement and should not require any legislation.

2.28 Ultimately, if Government were to direct funding to other PSB providers (whether through a PSB Trust Fund or through any other means), significant new mechanisms would need to be put in place to ensure that there is proper accountability in the use of public money. We return to the issue of governance

and accountability in the next section, but it is important to highlight some specific points that relate to funding decisions.

- 2.29 As discussed in more detail in the next section, the Green Paper proposes a Trust to ensure that the BBC is accountable to licence fee payers. But it is silent on the models of accountability that would be needed in the future, if a wider group of providers were to be in receipt of public funding. We believe that it is important to bring clarity to this question at an early stage.
- 2.30 In this regard, there are two options for ensuring accountability in the wider use of public funding:
- Just as the Government has proposed a Trust for the publicly-funded BBC, additional Trusts could be set up for each additional body in receipt of public funding.
  - Alternatively, at some point in the future, an independent body could be set up to oversee the use of public funding across the sector.
- 2.31 The first of these options risks creating an unnecessary degree of bureaucracy. We are therefore of the firm view that – in a world in which public funding is directed to providers beyond the BBC – the system would need a single independent body to oversee the use of that funding. This would help to ensure consistency of accountability, and – as noted earlier in this section – independence from political interference in the allocation of funds.

### Section 3

# Governance, accountability and regulation

## Overview of our recommendations

Broadcasting in the UK, and the BBC in particular, will function more effectively if there is greater consistency and clarity in the separation of the three different roles of internal governance, accountability and regulation. The Green Paper goes some way to bringing clarity to the system, but it should go further – in some cases, further action should be taken now.

We therefore make recommendations in the following areas:

- Improved effectiveness and independent application of competition law to the BBC, so as to ensure a level playing field in competition across the broadcasting sector.
- Greater clarity and consistency in content regulation. We therefore support the suggestion in the Green Paper that changes to the regimes for Tier 1 and Tier 2 regulation will be considered further, and we suggest the principles which should inform such reviews
- The proposed Trust and new Executive Board represent an improvement on the current system. But more work is needed to ensure that the new system has absolute clarity, and is fit-for-purpose for the future.

We expand on these issues – and also provide further summaries of our key recommendations in each area – at later points in this section.

3.1 Broadcasting in the UK, and the BBC in particular, will function more effectively if there is greater consistency and clarity in the separation of the three different roles of internal governance, accountability and regulation. In Phase 3 of the PSB Review, we proposed the following:

- The approach to competition issues should be the same across the sector – with the BBC subject to the same sector-specific rules as commercial broadcasters. This would allow prompt and independent intervention in the event of a possible threat to competition, and ensure a consistent approach across the market
- Where the BBC is proposing new services, Ofcom should carry out the market impact assessments (MIAs) which examine the effect of those new services on the market as a whole. The results of such assessments would be published and then used by those responsible for the accountability and oversight of the BBC in reaching a decision on the approval of a new service

- All Tier 2 quotas which currently remain with the BBC Governors should in future be regulated by Ofcom: at present Ofcom's powers in relation to Tier 2 quotas on the BBC are limited in some areas
- In addition, there should be further examination of the options for managing the internal governance of the BBC, and accountability and effective oversight of the use of public funding on behalf of the public.

### **Principles of governance, accountability and regulation**

- 3.2 The Green Paper accepts that a new model of governance and accountability is needed in the PSB system. It rejects, however, the Burns panel recommendation of an independent Public Service Broadcasting Commission (PSBC) with ultimate responsibility for how the licence fee is used, and for ensuring the BBC's delivery of its PSB objectives.
- 3.3 Instead, it is proposed that the BBC Board of Governors should be replaced by a new body, the working title for which is the "BBC Trust". In parallel, a new BBC Executive Board would replace the current Executive Committee.
- 3.4 On the issue of cross-sector regulation and competition powers, the Green Paper confirms that Ofcom, rather than the BBC Governors, should carry out the market impact assessments for any new service proposed by the BBC. The proposed Trust would have responsibility for market impact assessments of existing services, and for the "public value" tests for all BBC services. The Green Paper also states that the BBC's proposed "creative archive" (which will make existing BBC content more widely available on the internet) and ultra-local TV news services should be subject to new, enhanced public value and market impact tests.
- 3.5 In relation to our other proposals, the Green Paper is not persuaded that Ofcom should be given "open-ended" ex ante powers over the BBC as this, it argues, would cut across the Trust's duty to uphold the public interest. But proposals are invited for more tightly-defined powers in specific areas. In addition, Government has proposed no change at this time regarding the operation of Tier 2 quotas on the BBC.

## Cross-sector competition powers

### Green Paper questions for consultation

*Question 17: Do you agree with our proposals for handling new services?*

*Question 19: Is the existing fair trading commitment a useful addition to the arrangements for regulating the BBC's commercial services? If not, what would you prefer?*

### Our recommendations

The broadcasting market exhibits special features which, it is generally recognised, require sector specific competition rules. The BBC, like any other large player in the market, has the potential to distort competition through aspects of its conduct, and could have a significant and adverse impact on the development of a successful commercial sector. To secure a level playing-field in such a fast-moving market, the BBC's activities need to be subject to independent oversight from a competition authority which has sufficient powers to be able to act quickly – and on an ex ante basis if needed.

We believe that this objective can be achieved through the following mechanisms:

- There should be a competition-focused BBC Fair Trading Commitment, which applies to licence-fee funded as well as commercial services, and which is subject to independent approval and oversight.
- The BBC Agreement should contain a general obligation that the BBC should have due regard to its effect on competition.
- Market impact assessments – of both new and significant changes to existing BBC services – should be the responsibility of Ofcom.

These steps are needed in order to ensure a level playing field across the sector. They would not give the independent regulator open-ended powers over the BBC's business decisions. Rather, by ensuring that the system is both fair and seen to be fair, all parties in the sector – including the BBC – will benefit from greater certainty and clarity.

### Overall approach to competition issues

3.6 Rapid change in the broadcasting sector is changing the dynamics of competition:

- Broadcasting is moving away from a world of spectrum scarcity, to one in which more spectrum is available
- But the sector is still characterised by a relatively small number of powerful players
- At the same time, there are still major public interventions in the sector.

3.7 Against this background, the actions of major players, including the BBC, can

have a significant impact on the effectiveness of competition and the competitive process in the wider broadcasting market. General competition law applies to the sector as a whole, and can be applied by Ofcom and the other competition authorities. But this is not enough: it would be in the interests of all parties – including the BBC – for there to be a level playing field in competition, whereby the system is not only fair, but it is also seen to be fair by the sector as a whole.

- 3.8 Broadcasting markets raise complex competition issues that require sector-specific solutions. Market definitions are not always obvious, and markets are often populated by a small number of vertically integrated firms. Moreover, the sector is characterised by such significant and rapid change that competition authorities need to be able to respond quickly, and sometimes on an ex ante basis if necessary. Finally, the legacy effect of analogue scarcity and continuing public interest regulation means the market is still some way from effective competition in all aspects.
- 3.9 These complexities were recognised by Government and Parliament in the Communications Act – specifically, Section 316 of the Act grants Ofcom sector-specific competition powers over the commercial licensees<sup>4</sup>, allowing Ofcom to set the licence conditions Ofcom considers appropriate for ensuring fair and effective competition. This ensures that all parties have greater certainty about the acceptability or otherwise of specified conduct, and that aggrieved parties can obtain more rapid redress. However, the BBC is not covered in the same way.
- 3.10 Just like other broadcasters, the BBC can behave in a way that raises competition concerns. This could include:
- Unfair leverage from its licence-fee funded activities to its commercial activities
  - Foreclosure of competition through the activities of its licence-fee funded operation, for example by the purchase of exclusive rights or unfair promotion of a particular product or service.
- 3.11 In the past, the BBC's activities have been subject to competition investigations, and competition problems have been identified. However, the tools that exist for dealing with these competition problems are inadequate. More specifically:
- In relation to the BBC's licence-fee funded services, no sector-specific competition powers are available to deal with competition problems on an ex ante basis. As noted above, Ofcom's sector-specific competition powers apply only to commercial licensees
  - The application of Competition Act powers in relation to the BBC is not necessarily straightforward. Specifically, there is a potential lack of clarity over whether the BBC is an 'undertaking' for the purposes of competition

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<sup>4</sup> These powers generally apply to commercial broadcast licensees in relation to broadcast and related services. In the words of Section 316(1) of the Communications Act, "The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services."

law, and whether 'abuse' can be established given that the BBC does not have an intent to exploit its position in order to make profits.

- 3.12 The BBC argues that its internal Fair Trading Guidelines are an adequate response to these complexities. Indeed, they do represent a considered attempt to ensure internal compliance with competition law in some parts of the BBC's activities. However, we believe that they are not comprehensive enough in scope and, more importantly, they are not subject to external and independent oversight by a competition authority.
- 3.13 There are, therefore, clear gaps in competition law, and in the effectiveness of its application – these would benefit from being filled.
- 3.14 We recognise that the question of applying sector-specific competition rules to the BBC is a complex one, due to its status as the key provider of public service broadcasting in the UK. In one sense, by its very existence, the BBC impacts on competition in the market-place. It can also be difficult to trade off the BBC's public interest responsibilities against competition considerations.
- 3.15 However, these issues of public interest are explicitly allowed for within competition law. Services of General Economic Interest, such as public service broadcasting, are explicitly allowed for in the European Treaty. The same approach could be adopted in relation to sector-specific powers. The issue then becomes not one of **what** the BBC chooses to do in fulfilment of its public service remit, but one of **how** it conducts itself in the fulfilment of its remit.
- 3.16 In the light of the Green Paper's response to our proposals, we have conducted further work on the appropriate approach to competition issues. We remain of the view that competition powers need to be applied in such a way as to ensure a level playing field in competition across the broadcasting sector. Building on the suggestions in the Green Paper, we believe that this could be achieved through two key mechanisms:
- There should be a competition-focused Fair Trading Commitment, which applies to licence-fee funded as well as commercial services, and which is subject to independent approval and oversight
  - The BBC Agreement should contain a general obligation that the BBC should have due regard to its effect on competition, to be informed by considerations similar to those contained in competition codes and guidelines issued to commercial licensees.
- 3.17 A revised Fair Trading Commitment should be agreed with Ofcom, following consultation. It would not be open-ended, but – like the BBC's current guidelines – would address specific concerns. For example, it might include rules on platform neutrality, potential exclusionary conduct, or undue cross-promotion. Breaches of the Commitment would be investigated in the first instance by the Trust, but Ofcom would have ultimate responsibility for adjudicating on formal complaints and taking appropriate action. Ofcom would also need appropriate powers to obtain relevant information from the BBC in pursuing a complaint under the Fair Trading rules. The box below provides more detail on Ofcom's proposed new approach to the Fair Trading Commitment.

### **A new approach to the BBC's Fair Trading Commitment**

We agree with the suggestion that there should be a clearer separation between the compliance and brand protection issues described in the Green Paper as "internal BBC housekeeping"<sup>5</sup>, and those of external regulation. The BBC might still wish to retain such internal compliance guidelines in a different form, but the revised Fair Trading Commitment should be analogous to a competition code, covering only issues of competition and external regulation:

- The scope of the Fair Trading Commitment should be widened such that it covers licence fee funded services as well as the BBC's commercial services.
- For example, the BBC might be required to ensure that its licence-fee funded services do not result in an impact on competition that is disproportionate to the public benefits they aim to deliver. Examples of practices likely to raise competition concerns should be included in the new guidelines.
- These revisions to the Commitment should be allied to a strengthening of external oversight. The process for approving the Fair Trading Commitment should be administered externally, and Ofcom, as a competition authority for the broadcasting sector, would be the appropriate body. All additions to the Commitment would be subject to consultation, and the Trust would play an important role in defining the public value considerations.
- Complaints in relation to the Fair Trading Commitment would also need to be ultimately investigated and adjudicated on by Ofcom, just as competition complaints about other broadcasters are brought to Ofcom.
- Complaining parties should in the first instance seek to resolve issues satisfactorily with the BBC itself. However, if a formal competition complaint is considered necessary, we believe that this should be the preserve of Ofcom in its role as an independent regulator and competition authority.
- This proposal should be implemented through revisions to the BBC Charter and Agreement, which would clarify Ofcom's role and contain an obligation on the BBC to have due regard to its effect on competition

This approach would have a number of merits:

- It would secure a level playing field in competition across the broadcasting sector. It would also help to ensure greater clarity and certainty of roles across the sector.
- At the same time, this option could meet these objectives in the least intrusive way possible: it would only require revisions to the BBC Agreement, and to the Fair Trading Commitment – an issue recognised by the Green Paper as being in need of greater clarity.

Overall these arrangements would make it easier for the BBC and other players in the broadcasting sector to operate – by creating a clearer and more transparent level-playing field in competition.

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<sup>5</sup> See page 14 of the Green Paper.

3.18 We believe that these proposals will bring greater symmetry to the application of competition law across the broadcasting sector – and so help create a level playing field. While also recognising the BBC's special position, this approach would also help to ensure certainty and predictability in the sector – the danger is that, if the BBC's behaviour is unpredictable and the regulatory framework unclear, this uncertainty may in and of itself result in a crowding out of private sector investment.

### **Impact Assessments for BBC services**

3.19 Market impact assessments of BBC services also play an important role. Significant investment by the BBC in new services would – if not properly directed – have a chilling effect on private sector investment. Uncertainty about the BBC's plans could deter commercial operators, especially in niche markets.

3.20 Overall, therefore, Ofcom welcomes the fact that Government has accepted that Ofcom should carry out impact assessments of new BBC services. We also agree that the Trust should take the final decision about any new (or existing) service, balancing public value against the market impact. However, we believe that the proposals in the Green Paper should be enhanced in a number of ways.

3.21 Ofcom believes, for instance, that significant changes or repeated changes to existing services are not different in nature to new services, as to their impact on the market(s), competition, and on predictability / certainty in the market. Ofcom believes they should not be treated differently. In fact, if they are treated differently, there is a risk that the objectives of the market impact assessment regime – namely ensuring that the BBC's market impact is limited to an acceptable level – could be circumvented by simply reclassifying a new service as a change to an existing service.

3.22 Indeed, the above consideration raises the question of who defines what is or is not a new service. Our view is that, where Ofcom reasonably considers that a service launch or change may have a significant market impact, Ofcom needs to be able to assess the market impact.

3.23 In addition, there needs to be greater clarity on the process to apply when a new service is to be launched or an existing service is to be significantly changed. Ofcom considers that the BBC should publish its proposals for changes to existing services and its proposals for new services. This would leave an opportunity for third parties to assess the potential impact of these proposals on their businesses and to make representations to Ofcom if they believe that the market impact is likely to be significant. Ofcom could then decide whether a market impact assessment is necessary.

3.24 We therefore propose that:

- Ofcom's role should be revised in order to allow it to review the market impact of existing BBC services, where it believes that a significant change to the character of the service might generate a significant distortionary market impact. It is not clear that the responsibility for existing services should be left to the Trust, since the new body may not have sufficient market or competition expertise to be able to deal with these issues properly.

- This process of reviewing existing services would have two stages: first, following representations from third parties, Ofcom would decide and publicly state whether there has been a significant change (defined on the basis of a threshold agreed with between Ofcom and the Trust); and second, if there has been a significant change, Ofcom should conduct the MIA.
- 3.25 Ofcom has extensive information and analysis of the broadcasting sector, has relevant competition and market expertise, and has a statutory duty to carry out impact assessments more generally across its important regulatory decisions. It is therefore well placed to take an independent view of the market impact of any BBC service. Ofcom's clear statutory duties, and the scope for external scrutiny of any of its decisions, guarantee that any impact assessment will be properly carried out and independent in nature. We therefore believe that it is sensible for Ofcom to have responsibility for reviewing market impact, while at the same time leaving the final decision regarding net public value (i.e. public value over and above and competitive detriment of the service) to the Trust.
- 3.26 We also suggest the Government clarifies whether Ofcom will be asked to carry out impact assessments of the BBC's proposed creative archive and ultra-local news services. Our view is that these are new services or are at least significant changes to existing services, and that there could be reasonable grounds for believing that they may have a significant impact on the market. They should therefore be subject to an independent assessment by Ofcom.

## Clarity and consistency in content regulation

### The Green Paper position

*“For the time being, regulatory responsibilities should be divided between Ofcom and the BBC Trust in the same way that they are currently divided between Ofcom and the BBC Governors. The Trust would retain responsibility for upholding standards of accuracy and impartiality. We propose to leave the arrangements as they are for five years before reviewing them.”<sup>6</sup>*

### Our recommendations

The Government should also move towards greater clarity and consistency in content regulation. We therefore support the suggestion in the Green Paper that changes to the regimes for Tier 1 and Tier 2 regulation will be considered further. We believe that these issues should be resolved by the middle of the next Charter period, or earlier if there is evidence that the current arrangements are not working properly. We commit to working with the Trust to achieve a consistent approach in the meantime.

- Regarding Tier 2 regulation, we suggest that the review should consider the following approach: the BBC's production quotas should in future be set independently, alongside similar quotas for the sector as a whole; but the programme aspects of Tier 2 regulation should remain the responsibility of the BBC
- Regarding Tier 1 regulation of accuracy and impartiality, we suggest a number of principles that should inform any review, including the need to ensure a consistent approach to high standards across the sector, and clear processes to engender public confidence in the system.

### A clearer approach to Tier 2 regulation

3.27 At present, the responsibility for Tier 2 regulation of the BBC is split between Ofcom and the BBC Governors in the following way:

- The BBC must obtain Ofcom's agreement to quotas for original productions (total and in peak); out of London production; the amount, range and expenditure of network programmes made outside the M25; and the range of production centres outside the M25
- The BBC Governors are responsible for setting all other quotas. They are, however, obliged to consult Ofcom and have regard to its comments. They also have to obtain Ofcom's agreement before allowing the quotas to fall below 2002 levels<sup>7</sup>.

3.28 The Green Paper proposes no immediate change to these arrangements, but states that the Government will revisit the situation during the upcoming

<sup>6</sup> See page 11 of the Green Paper.

<sup>7</sup> This applies to news on BBC1 (total and in peak); current affairs on BBC1 and BBC2 (total and in peak); regional programmes on BBC1 and BBC2 (total only); regional news on BBC1 (total and in peak); non-news regional programmes (in peak and near peak); and regional programmes made in the region.

Charter period. Specifically, the Green Paper defers taking a decision on the distribution of responsibilities between Ofcom and the BBC until both Ofcom and the new BBC governance structure have had sufficient time to establish themselves.

3.29 We support the Government's commitment to reviewing these arrangements further, and will work with the Trust in the meantime. We suggest that the following approach should be considered by the review:

- With regard to production quotas – for which the BBC must currently obtain Ofcom's agreement – Ofcom's powers could be strengthened and made consistent with the approach taken for the commercial sector. Specifically, Ofcom could have the power to set these quotas, alongside similar quotas for the rest of the sector, rather than simply agreeing their levels. Production quotas have an impact on the development and structure of the overall broadcasting and creative sectors. This proposal would improve our ability to maintain and promote a dynamic and effective production sector across the UK
- For the programme aspects of Tier 2 (such as news, current affairs and regional programming), however, these should remain the responsibility of the BBC. These matters are quite rightly for the Trust to decide, working on behalf of the public interest.

### **Tier 1 regulation**

3.30 At present, Ofcom regulates all aspects of Tier 1 in relation to the BBC, except for accuracy and impartiality, which is the responsibility of the BBC Governors. In future, the responsibility for accuracy and impartiality will transfer to the Trust, and the Green Paper proposes to review these arrangements in five years.

3.31 We support the proposal to consider these arrangements further. We are concerned that the current Tier 1 arrangements risk implying to the public and to the industry that there are two standards for news – a BBC gold standard, and the rest.

3.32 In reviewing the approach to Tier 1 accuracy and impartiality regulation, we suggest that the following principles should be applied:

- Clear incentives to achieve the highest editorial standards across the sector - a gold standard for all, not a two tier system with one rule for the BBC and another for the rest
- Consistency of application, with appropriate sanctions if codes are breached
- Clarity of process, including public confidence in the independent scrutiny of broadcaster decisions, and in the opportunities for obtaining redress.

3.33 If a common regulatory approach were adopted, this could provide greater clarity, and enable the application of common high standards across the sector. Such a system is entirely compatible with the Trust assuming responsibility for maintaining the BBC's editorial standards. All other news providers maintain their own responsibility for editorial standards in the face of Tier 1 regulation by Ofcom, and the Trust and Ofcom would still have key and clearly differentiated

roles in seeking to uphold the highest broadcasting standards at the BBC. Moreover, independent oversight with Ofcom as the final arbiter could help ensure that all procedures are appropriately followed and seen to be followed – thereby increasing public confidence in the system as a whole.

## Proposals for governance and accountability

### Green Paper questions for consultation

*Question 7: Have we defined the roles of the BBC Trust and the Executive Board sufficiently clearly?*

### Our recommendations

The proposed Trust and new Executive Board represent an improvement on the current system. But more work is needed to ensure that the new system has absolute clarity, and is fit-for-purpose for the future. We therefore make the following recommendations:

- As noted in the previous Section, new models will be needed if PSB funding is to be directing to a plurality of providers in the future. Ideally, the approach to allocating and ensuring effective use of public funds should be the same for all PSB providers, including the BBC.
- Government should therefore consider how the Trust might evolve into an external, independent body in the future. Thought should be given now to the steps that would be necessary in order to achieve this.
- The Green Paper notes that the “BBC Trust” is only a working title for the new body. Government should therefore reconsider whether the “BBC Trust” is an appropriate name for a body that has a potential future role in the funding and oversight of PSB across a wider range of suppliers. The less possessive “The Trust” may be a better title.
- More clarity is also needed on the role and constitution of the proposed Executive Board: regarding the relationship between the Trust and the Executive Board; the role of non-Executive directors; and on the system for appointments.

3.34 The Green Paper proposes that the Trust will be tasked with the oversight of public funds and public interest, and act as the bridge between the BBC and licence fee payers. The Trust’s key functions are expected to include: ensuring the BBC meets its public interest remit; representing views of licence fee payers; approving broad BBC strategy; determining top level annual budgets; approving service licences for each BBC service; and assessing performance of all BBC services against their service licences.

3.35 The Executive Board will be responsible for the delivery of all of the BBC’s activities and will be accountable to the Trust for its performance. Its key responsibilities will be developing programme strategies; developing service licences for all BBC services; and taking all financial and strategic decisions necessary to deliver the BBC services. The Executive Board will be chaired by the Director General, or a non-executive (at the discretion of the Trust). It will

also contain a “significant minority” of non-executive members.

3.36 We welcome the Government's recognition that new systems of governance and accountability are needed in the PSB system. In Phase 3 of the PSB Review, we argued for a clearer separation of the three different roles of governance, accountability and regulation. The Green Paper's proposals seek to move towards a model of separation – with the proposed Trust intended to be within the BBC, but as a separately constituted body. As such, we believe that the Green Paper's proposals represent a clear improvement on the current system.

3.37 But we believe that more could still be done to ensure that the new proposals are fit-for-purpose for a changing world.

3.38 In the future, Government will need to address the question of governance and accountability for a system in which a plurality of PSB providers are in receipt of direct public funding. In such circumstances, it would not be appropriate for a body within the BBC to oversee the use of public funding by other PSB providers. For example, it would be inappropriate for the "BBC Trust" to decide on the funding and governance of Channel 4. This would suggest that Government would have to choose between two options:

- Set up additional Trusts for each additional body in receipt of public funding
- Alternatively, an independent body could oversee the use of public funding across the sector.

3.39 Ofcom's view is that the first of these options would create unnecessary bureaucracy. The second is preferable – ideally, the approach to accountability in the use of public funds should be the same for all PSB providers, including the BBC. We therefore propose that Government keeps the option open for the Trust at some future stage to evolve into an external, independent body if PSB funding is to be used more widely.

3.40 If the Government wishes the Trust to evolve into an external body, the Trust would need to be set up such that it is separately constituted within the BBC initially, but it is able to evolve into an external body if one is considered necessary in the future. Its separation from the day-to-day management of the BBC could, for instance, make it well-positioned to act as the guardian of the wider public interest. If Government considers this to be a sensible goal, thought should be given now to the steps that would be needed in order to achieve this.

3.41 Given this point, in finalising the name for the new body, the Government should reconsider whether the “BBC Trust” is an appropriate name for a body that has a potential future role in serving the wider public interest. The less possessive "The Trust" may be a better title.

3.42 In addition, and in the nearer term, we believe a number of issues need to be addressed in order to ensure that the system works most effectively and that the sector as a whole has confidence in the new arrangements:

- More clarity is needed regarding the relationship between the Trust and the proposed Executive Board. Specifically, there are questions over the role that the Trust will play in relation to BBC strategy – there needs to be real

clarity regarding where the Trust's responsibility ends, and where the Executive Board's responsibility begins.

- The constitution of the Executive Board should be considered further. For instance, the development of corporate governance models in the UK elsewhere suggests that the Chairman and Chief Executive should not be the same person; the Chairman should be a non-executive; and the Board should have a majority of non-executive directors. The proposals for the BBC Executive Board do not meet these criteria. If the Government decides to proceed with these arrangements, it is necessary to provide a clear justification of why the BBC should be a special case. Without such justification, there may not be sufficient confidence in the new arrangements on the part of the sector as a whole.

## Section 4

# Other Green Paper issues

4.1 This section sets out Ofcom's response on a number of other key issues relevant to our work programme. Specifically, we cover four issues – the Government's approach to defining PSB; the role of the BBC in digital switchover; the television production sector; and PSB in the Nations and Regions of the UK.

### **Green Paper questions for consultation**

*Questions 1-3: Do you think it is helpful to define the purposes in this way? Are these the right purposes? Are these the right characteristics?*

*Question 4: Do you agree that the BBC should be at the forefront of developments in technology, including digital television?*

*Question 14: Do you think a 'window of creative competition' can be made to work? If not, would you support a raised quota for independent production in BBC television?*

### **Our recommendations**

In relation to the other key issues addressed by the Green Paper, Ofcom offers the following comments:

- We support the Green Paper's approach to defining the public purposes and characteristics of the BBC. The approaches proposed by Ofcom, the BBC and Government are largely consistent with one another. Ofcom and the BBC should be asked to propose a final and consistent definition of purposes and characteristics to be applied across the sector as a whole, using the Green Paper definitions as a starting point.
- It is important that these definitions are put into practical effect – through the planned public value tests and service licences for the BBC, and through a cross-sector approach to PSB assessment.
- We support the commitment to a key role for the BBC in digital switchover, but emphasise that the whole sector must remain fully engaged in the process; the BBC's participation must be on a platform-neutral basis; and Ofcom will ensure a range of services on the PSB multiplexes from a variety of operators.
- Ofcom believes that content production is an important source of plurality in the PSB system, and welcomes the Green Paper's commitment to the independent production sector. We are considering these issues in more detail as part of our ongoing review of the television production sector.
- Ofcom also welcomes the Green Paper's commitment to a key role for the BBC in the Nations and Regions. Our policy conclusions in this area are being published separately, following the consultation on PSB in the Nations.

## A new approach to defining PSB

- 4.2 In the PSB Review, Ofcom developed a new definition of the purposes and characteristics of public service broadcasting that moved away from describing PSB in terms of specific genres of programming or the output of particular broadcasting institutions.
- 4.3 Ofcom's review concluded that the PSB purposes and characteristics of PSB should be as set out in the box below.

### Ofcom's new definition of PSB

The **purposes** of PSB:

- to inform ourselves and others and to increase our understanding of the world through news, information and analysis of current events and ideas;
- to stimulate our interest in and knowledge of arts, science, history and other topics through content that is accessible and can encourage informal learning;
- to reflect and strengthen our cultural identity through original programming at UK, national and regional level, on occasion bringing audiences together for shared experiences; and
- to make us aware of different cultures and alternative viewpoints, through programmes that reflect the lives of other people and other communities, both within the UK and elsewhere.

The **characteristics** of PSB content:

- **high quality** – well funded and well produced;
- **original** – new UK content, rather than repeats or acquisitions;
- **innovative** – breaking new ideas or re-inventing exciting approaches, rather than copying old ones;
- **challenging** – making viewers think;
- **engaging** – remaining accessible and enjoyed by viewers; and
- **widely available** – if content is publicly funded, a large majority of citizens need to be given the chance to watch it.

- 4.4 We welcome the fact that our views coincide with those expressed by Government in the Green Paper, which defines the BBC's public purposes in the following way:

- Sustaining citizenship and civil society
- Promoting education and learning
- Stimulating creativity and cultural excellence
- Reflecting the UK, its Nations, regions and communities

- Bringing the world to the UK and the UK to the world
- 4.5 The Ofcom and Green Paper definitions are largely consistent with one another. The only partial exception is the final purpose defined by the Green Paper – which relates specifically to the BBC's international role.
- 4.6 The Green Paper supports the view that the BBC should be focused on its public service aims. It confirms that all BBC services should strive to fulfil the full range of public purposes, as should the vast majority of the BBC's programmes. In addition, the Green Paper has adopted the characteristics of PSB defined by Ofcom – and recommends that BBC programming should exhibit these characteristics. We support this approach, which will help to ensure a common standard for the benchmarking of PSB performance across the industry.
- 4.7 We support the emphasis in the Green Paper on the fact that the BBC should aim to complement the content provided on commercial channels, rather than directly competing with commercial providers using “copycat” and derivative programming formats. Its scheduling should also be complementary, ensuring the audiences are presented with the widest possible choice. The BBC should refrain from spending licence fee funds acquiring content that would otherwise be shown on commercial channels, thus staying out of often-expensive bidding wars for Hollywood films and some other acquired content. These proposals are in line with those set out in Ofcom's PSB Review.
- 4.8 We also welcome the fact that the Green Paper confirms that BBC services will be subject to public value tests to assess their contribution to the public purposes noted above, and that individual services will be held to specific service licences that prevent any significant change to their character. These proposals will, we believe, help to ensure that the BBC remains focused on its public service mission. Ofcom's view is that the service licences should include a clear commitment to how the service in question will contribute to the public purposes of the BBC, as well as a commitment to delivering the public service in the most efficient way – so as to minimise adverse market impact.
- 4.9 Finally, the Green Paper supports the need for a comprehensive system of performance measurement – consistent with Ofcom's arguments in the PSB Review. The Green Paper expects the BBC to work closely with Ofcom and other public service broadcasters in order to develop the appropriate measurement tools. Ofcom is already engaged in this process with the BBC and other broadcasters.
- 4.10 We welcome Government's commitment to a cross-industry approach to PSB assessment. In this regard, Ofcom suggests that the BBC and Ofcom should finalise a common approach to purposes and characteristics, using the definitions in the Green Paper as the starting point. These agreed definitions should be used to assess BBC performance, rather than those proposed by the BBC itself in its *Building Public Value* document.
- 4.11 This is an important issue, since a consistent set of definitions will help to ensure a consistent approach to benchmarking performance across the sector. In addition, we believe that Ofcom will need access to elements of BBC research data and output measures as part of the assessment process. The BBC has been open and willing to share research data with Ofcom. We ask that Government helps this process further by formalising and clarifying such

arrangements.

4.12 We should also note that Ofcom has defined PSB purposes for television. In contrast, the Green Paper defines the public purposes of the BBC across all licence-fee funded activities – whether television or radio. As part of the Radio Review, Ofcom is conducting further research amongst radio listeners on the specific question of public purposes for radio. We intend to publish the results of this research in the summer of 2005.

### **Digital switchover**

4.13 The Green Paper states that – given its important position – the BBC should play a key role in planning, preparing and implementing digital switchover. The next Charter will therefore include specific obligations to complete the switchover process, similar to those included in the digital replacement licences issued to commercial broadcasters at the end of 2004. According to the Green Paper, the BBC's responsibilities will be as follows:

- Replicating the analogue terrestrial coverage in digital
- Developing alternative reception options – for instance through a free digital satellite service, services on alternative platforms, and on-demand services
- Coordinating other stakeholders – playing a leading role in the establishment and management of the organisation created to implement switchover, currently referred to as Switchco
- Leading, with the rest of the industry, the public awareness and information campaign on when and how the switchover will happen
- Helping the most vulnerable with the switchover by helping establish and pay for schemes for the most vulnerable consumers to make the switch.

4.14 Ofcom broadly welcomes this approach, and makes the following recommendations to Government:

- We support the commitment to a key role for the BBC in digital switchover, and welcome the BBC's willingness to play a key role in Switchco
- However, it is essential that the BBC's leading role does not discourage the rest of the sector from remaining fully engaged in the DSO process – the whole sector needs to work towards common goals in this area, and Switchco will have a key role to play here
- Ofcom also believes that the BBC's participation must be on a platform-neutral basis, and Ofcom will ensure the provision on the PSB digital multiplexes of a wide range of services from a number of different operators. Any proposals from the BBC for new digital services should be subject to the MIA regime discussed earlier in this document.

### **Independent production**

4.15 Ofcom believes that content production is an important source of plurality in the PSB system. In Phase 3 of the PSB Review, Ofcom welcomed the BBC's proposed plans for a 25% "window of creative competition" (WOCC) for in-

house and independent producers. We also noted PACT's concerns regarding these proposals and committed ourselves to undertaking a more wide ranging review of content production in 2005 than originally planned.

- 4.16 The Green Paper states that the BBC should do more to use the licence fee as venture capital for the independent production sector. The Green Paper similarly supports the BBC's commitment to making its commissioning process more competitive. It states that the government will give further consideration to the BBC's proposed WOCC as a way of improving its commissioning process, especially the BBC's proposals on how WOCC will be made a fair and transparent process. However, it also opens the possibility of increasing the BBC's independent production quota from 25% to 50%.
- 4.17 Ofcom welcomes the Green Paper's commitment to the independent production sector. At the present time, Ofcom has not formed a firm view on the WOCC proposals, or on the extent to which change might be needed to policy in the production sector.
- 4.18 We are therefore not in a position to make specific recommendations in this document. Rather, we are currently considering these issues in full in our review of the television production sector (TPSR) – for which the terms of reference were published in May 2005<sup>8</sup>.
- 4.19 Ofcom will therefore continue to participate in the debates in this area, and intends to provide further input into the Government's deliberations on the Charter Review White Paper expected later in 2005.

## **Nations & Regions**

- 4.20 In Phase 3 of the PSB Review, Ofcom set out its longer-term vision for PSB in the Nations and Regions. We recognised an increasingly important role for the BBC in the provision of news and a wide range of other programming for the Nations and Regions. We recommended that the BBC should be asked, as part of the Charter Review, to develop new proposals on how it will help provide more well-funded programming for the Nations & Regions. Moreover, we recommended that the BBC should be expected to work towards a similar position to ITV1, achieving 50% of network production out of London by both volume and spend. This contrasts with the BBC's own current quota of 25% by hours and 30% by spend.
- 4.21 The Green Paper endorses Ofcom's vision of the role of the BBC by stating that the BBC services need to reflect the full range of geographical communities in the UK. It accepts Ofcom's recommendation that the BBC should make a greater contribution to regional programming for regional audiences.
- 4.22 The Green Paper also supports plans to move a greater proportion of the BBC staff out of London and calls for the BBC to support a range of production centres across the UK. It recommends that the BBC should coordinate its approach with ITV to focus activity in the same areas of the country. However, the Green Paper stops short of making specific proposals relating to the provision of programming in the Nations and Regions, and detailed decisions in

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<sup>8</sup> These terms of reference are available on the Ofcom website at:  
<http://www.ofcom.org.uk/research/tv/tpsr/>

this area are left to the BBC itself.

4.23 Overall, Ofcom welcomes the Green Paper's commitment to a key role for the BBC in the Nations and Regions. We note, however, that the Green Paper does not include discussion of some issues that form important parts of the debate in this area:

- The provision of local TV services is not discussed in the Green Paper. Wider work across Ofcom and DCMS is ongoing on this subject, but we believe that Charter Review should give some consideration to the role that the BBC might play in this area.
- The Green Paper discusses proposals for Welsh and Gaelic language programming, but does not give consideration to the provision of Irish language services. Ofcom recommended in Phase 3 of the PSB Review that Charter Review should ensure that BBC Northern Ireland has sufficient funding to allow it to continue and expand its commitment to Irish language programming. This proposal is not mentioned in the Green Paper – and so we reiterate this point and ask the Government to give it further consideration.

4.24 More generally, work has been continuing in Ofcom on the key issues in this area. Ofcom consulted on PSB in the Nations following the publication of Phase 3 of the PSB Review. Therefore, Ofcom is separately publishing its policy conclusions in this area as part of the follow-up to the consultation. We hope that Government incorporates the thinking in Ofcom's final statement on this subject in its White Paper deliberations.

## Annex 1

# Responses to consultation questions

This annex sets out Ofcom's response to each of the questions for consultation set out in the Green Paper. In the interests of brevity, we have grouped together some questions, and cross-refer to the main body of this response where appropriate.

**Question 1: Do you think it is helpful to define the purposes in this way?**

**Question 2: Are these the right purposes?**

**Question 3: Are these the right characteristics?**

As discussed in more detail in Section 4 of this response, Ofcom welcomes the Government's proposed new definitions of the BBC's public purposes and characteristics, which are consistent with and build upon the purposes and characteristics set out in our own PSB Review. Ofcom suggests that the BBC and Ofcom should finalise a common approach to purposes and characteristics, using the definitions in the Green Paper as the starting point. We also believe that the agreed definitions should be reflected in the proposed service licences for specific BBC services.

Ofcom believes that this approach would help to ensure a consistent approach to benchmarking PSB performance across the sector.

**Question 4: Do you agree that the BBC should be at the forefront of developments in technology, including digital television?**

Ofcom agrees that the BBC – as the privileged recipient of public funding for broadcast services – should be at the forefront of developments in technology. In particular, and as noted in Section 4 of this document, Ofcom supports the commitment to a key role for the BBC in digital switchover. But we emphasise that digital switchover must be a cross-sector process. We therefore highlight that the whole sector needs to remain fully engaged in the process; the BBC's participation must be on a platform-neutral basis; and Ofcom will ensure a range of services on the PSB multiplexes from a variety of operators.

**Question 5: Do you support the proposal for a further review of alternative funding methods, before the end of the next Charter period?**

**Question 6: Do you have a view on any aspect of the operation of the licence fee: concessions, its collection or its enforcements?**

As noted in the PSB Review, and at various points in this response, Ofcom agrees that the BBC should remain properly funded by the licence fee for the period of the next Charter. However, we also believe that, due to the rapid change underway in the communications landscape, it will be necessary to review options for alternative funding models, and alternative means of collecting the licence fee.

We therefore support the Green Paper's proposal for a review of alternative funding methods, although – and as noted in Section 2 – we believe that this review should take place on a more rapid timetable than has been proposed by Government.

**Question 7: Have we defined the roles of the BBC Trust and the Executive Board sufficiently clearly?**

**Question 8: Is this the right way to define the public interest remit of the BBC Trust?**

**Question 9: How many of these options would you like to see adopted in the Trust's statement of promises? Are there any other options that you would like to see considered?**

Ofcom believes that the proposed new arrangements for governance and accountability represent a significant improvement on the current system. However, as we note in Section 3 of this document, we believe that there remains a need for greater clarity in the proposals – in order to ensure that they work effectively in the near term, gain the confidence of the sector as a whole, and are fit-for-purpose for a changing world.

**Question 10: Have you any views about how the BBC Trust should handle complaints?**

**Question 11: How many members do you think the BBC Trust needs?**

**Question 12: What skills and expertise do you think they need?**

**Question 13: Are there any particular communities or interest groups that you think the Trust members should represent?**

Ofcom believes that the Trust would need to have the membership and organisational structure necessary for it to be able to fulfil its functions with the utmost professionalism. Specifically, the members of the Trust – and the functions that support the operation of the Trust – would require several different types of relevant expertise, including broadcasting, public policy, strategic, financial and economic input.

While we believe that the work of the Trust should reflect the interests and needs of the entire UK population, we do not believe it is appropriate to impose a structure on the Trust whereby its members specifically represent particular communities or interest groups.

**Question 14: Do you think a 'window of creative competition' can be made to work? If not, would you support a raised quota for independent production in BBC television?**

In Phase 3 of the PSB Review, Ofcom welcomed the BBC's proposed plans for a 25% "window of creative competition" (WOCC) for in-house and independent producers. We also noted PACT's concerns regarding these proposals.

Ofcom has not yet reached conclusions on the WOCC proposal, and we are currently considering this and other issues as part of our review of the television production sector.

**Question 15: Do you think a voluntary 10% quota for radio is sufficient? Or should the quota be increased or made mandatory?**

Ofcom has seen no evidence that there is a need for intervention in this area, and we understand that the BBC has tended to exceed the voluntary quota. As such, we are minded to suggest that there is no need to change current arrangements at this stage.

**Question 16: Do you agree that the BBC should be able to propose changes to its range of services over the course of the next ten years?**

**Question 17: Do you agree with our proposals for handling new services?**

Ofcom agrees that the BBC should be able to propose changes to its range of services, but that these changes should only be acceptable if they make a significant contribution to public purposes, while also minimising disproportionate market impact.

As such, we support the Green Paper's proposal that all new BBC services should be subject to market impact assessment by Ofcom. However, as discussed in Section 3 of this document, we do not believe that Ofcom's role should be limited solely to new services – since a significant change (or changes to) an existing service can have as important a market impact as an entirely new service.

**Question 18: How strictly should the BBC's commercial services be restricted to those businesses that are linked to public purposes and public services?**

**Question 19: Is the existing fair trading commitment a useful addition to the arrangements for regulating the BBC's commercial services? If not, what would you prefer?**

Ofcom supports the principle that the BBC should supplement its licence fee income with income from commercial services, but we believe that these services should be structured in such a way as to minimise disproportionate market impact. As such, we agree with the Green Paper's proposal that all BBC commercial services should be linked to the BBC's public purposes.

As discussed in more detail in Section 3, we also believe that the current Fair Trading Commitment should be revised in order to help ensure a level playing field in competition across the broadcasting sector. We believe that this revision should ensure that the Commitment covers licence-fee funded as well as commercial services, while also subjecting the Commitment to approval and oversight by Ofcom.

**Question 20: Do you agree that the case for plurality of publicly-funded broadcasters should be kept under review?**

As noted earlier, Ofcom's statutory duties are set out in the Communications Act:

- to secure the availability throughout the UK of a wide range of television and radio services which, taken as a whole, are both of high quality and calculated to appeal to a variety of tastes and interests, and
- the maintenance of a sufficient plurality of providers of different television and radio services.

In formulating our response, we have drawn on much of the extensive analysis contained in our recent review of Public Service Broadcasting, which was charged by the Act with reporting on proposals for maintaining and strengthening the quality of public service broadcasting in the UK, in the context of the changing market and progress towards digital switchover.

We do not believe it is possible to meet our statutory duties in a system in which PSB is provided solely through the BBC. As discussed in Section 2 of this document, we believe that new steps will be needed to secure a range and diversity of PSB suppliers for the digital age, and explicit forms of funding may need to be directed to providers in addition to the BBC.

We therefore support the Green Paper's proposal that this issue should be kept under review. However, we believe that any review of plurality should take place at an earlier stage than that proposed by the Green Paper. Section 2 of this document proposes an alternative, and more rapid timetable.