



**BBC response to Ofcom's 'Review of Sky's
Access Control Services Regulation'**

17 September 2014

Overview

This submission should be read in conjunction with the BBC's 26 September 2013 response to Ofcom's previous Review on this subject¹.

The BBC uses Sky's technical platform services to provide our interactive TV services.

We expect continued strong audience demand for interactive TV services for the foreseeable future, including for our current services BBC Red Button (broadcast) and BBC Connected Red Button (IP-delivered) ('the BBC's Existing Services'). These reached 17.7 million or over a third of all UK adults in July 2014².

The BBC and Sky work effectively together in a range of areas of mutual interest. We have, for example, agreed to continue to discuss opportunities that offer Sky customers new and innovative ways to discover and consume BBC content as part of the 2014 agreement on payments for platform services.

In order to deliver the greatest audience benefits in an efficient manner, and continue to invest and innovate, the BBC needs regulatory certainty about access to Sky's set-top box (STB) and access control functionality on fair, reasonable and non-discriminatory terms (FRND).

The BBC agrees that Sky's market position, with sole control of a vertically integrated platform and 10.6m subscribers, means that access to Sky's STB is a critical route to market for interactive TV services. There is no suitable alternative that would enable the BBC to provide its interactive TV services to these licence fee payers. In light of these conclusions, this response focuses on how best to secure such access.

While we appreciate Sky's proposal, on careful consideration, voluntary commitments are not an adequate tool to ensure access on FRND terms, particularly in terms of certainty and transparency, and an effective route for independent assessment of terms, dispute resolution and enforcement. These are intrinsic obstacles that cannot be resolved by amendments to the proposed commitments themselves.

Depending on the type of interactive service and its overall strategy, Sky is likely to face mixed incentives. The inability to secure access on FRND terms and/or protracted and costly negotiations would compromise the BBC's offering on the Sky platform to the detriment of consumers, competition and the wider public policy goals for public service broadcasting.

Ofcom's alternative approach of regulation is necessary and appropriate. There is a sound legal basis on which to intervene. Sections 45, 73 and 74 of the Communications Act 2003 are clear that access-related conditions can be applied to Sky's STBs if certain tests are met, which they are in this case.

Regarding the scope of regulation, we strongly support Ofcom's position in para. 7.79 of the

¹ BBC response to Ofcom's Review of Sky's Access Control Services of 26 September 2013
<http://stakeholders.ofcom.org.uk/binaries/consultations/review-access-control/responses/BBC.pdf>

² BBC/CMI

consultation: *'access to these enhanced TV services should be provided not just on existing STBs but also on any future STBs. This may mean existing services are replicated on future STBs, or that Sky provides access to allow enhanced TV services to be developed which take account of new technology and functionality'*. Both of the BBC's Existing Services – BBC Red Button (broadcast) and Connected Red Button (IP) – are 'enhanced TV services' under Ofcom's definition. As in Ofcom's proposed conditions, to deliver the benefits of the BBC's public service content and new technologies to all audiences, the BBC's Existing Services and further developments to those services should be made widely available on current and future STBs, i.e. if a Sky STB is technically able to carry such services and they require Sky's access control services to work, technology neutral access conditions should apply.

As proposed by Ofcom, regulated access control services must include the navigation link from the enhanced TV service to other complementary services accessible via the Sky STB, including BBC iPlayer (available on Sky's current STB). If technically supported by a future Sky STB, regulation should also cover the dedicated BBC Sport and BBC News apps for connected TV (available via BBC Connected Red Button on other platforms and devices, but not supported by Sky's current STB).

We also welcome Ofcom's commitment at paras 1.19-20, 3.79 and 7.78 of the consultation, where Ofcom states that it expects to apply the same analytical framework to other types of content services in the future, in particular VOD services, and that it will follow developments closely and consider what further work it should do.

Ofcom's upcoming Public Service Broadcasting Review provides the opportunity to consider whether the wider regulatory framework is fit for purpose in light of the growth of IP-connected devices and platforms more generally. PSB services, including their on-demand services, should be widely available and easily discoverable or 'prominent' across platforms. As mentioned above, platforms have mixed incentives and the potential to control gateways, which could prevent these policy objectives being met and impede competition, innovation and investment.

Responses to questions

(Q1) Do stakeholders agree with our assessment of demand for and potential alternatives to Sky's AC services?

1. Yes, we agree with Ofcom's assessment of demand for and potential alternatives to Sky's access control services.
2. As explained more fully in our response to Ofcom's previous consultation³, by virtue of their link to the BBC's linear channels, Red Button services (broadcast or IP connected) provide prominent access to public service interactive TV and on-demand content, which might not otherwise be easily discovered. They are vital to the delivery of the BBC's public purposes.
3. In particular, the BBC's current interactive TV services BBC Red Button (broadcast) and BBC Connected Red Button (IP-delivered) ('the BBC's Existing Services'), deliver nearly all types of 'enhanced TV services' identified by Ofcom. BBC Red Button (broadcast) is delivered by digital satellite and offers the following content linked to linear: alternative video streams with navigation to other BBC on-demand services such as BBC iPlayer⁴; information services; subtitles, audio description and text-based news; games.
4. In addition to this, Connected Red Button (with IP delivery) offers: extra content to supplement the linear broadcast such as the 'making-of' a Nature documentary; catch up with linear channels like CBBC when they are off-air; relevant BBC recommendations and curation to extend the public service journey from the programme viewed; the latest News headlines and Sports highlights with navigation to the BBC's News and Sports apps for connected TV; voting; (planned) alternative audio streams for broadcasts, and travel news and severe weather warnings.
5. As such, Red Button is an efficient means of extending audience journeys around public service content, in a way that provides value for money and the greatest benefits for licence fee payers.
6. The BBC's interactive TV services are highly valued by consumers: 17.7 million or over a third of all UK adults used the BBC's Existing Services in July 2014⁵. As can be seen by our innovation and ongoing investment in the BBC's Existing Services, we expect continued strong demand for the foreseeable future.
7. In addition, through a familiar TV environment and simple interface, Red Button services play a vital role in encouraging new audiences to try on-demand and 'lean forward' media experiences. They contribute to broader public policy objectives on media literacy and use of digital services, and can pave the way for new interactive TV services from the wider industry.

³ BBC response to Ofcom's Review of Sky's Access Control Services of 26 September 2013
<http://stakeholders.ofcom.org.uk/binaries/consultations/review-access-control/responses/BBC.pdf>

⁴ Including access to preview and exclusive programmes or an online BBC Three, subject to BBC Trust approval

⁵ BBC/CMI 2014

8. Over 4 million BBC Red Button (broadcast) users do not use any other BBC Online content, while over 2.5 million BBC Red Button users do not use *any Internet at all*⁶. A large number of households would therefore be excluded entirely from enhanced TV services if these were not offered on the main screen.
9. Meanwhile, by using IP connectivity, the BBC Connected Red Button service is introducing the benefits of connected services to new audiences. It is already available on Virgin TiVo and all major connected devices launched during 2013 and 2014. We continue to innovate and invest in both of the BBC's Existing Services, especially given the relatively slow turnover of consumer devices, including TV sets, and low proportion of smart TVs that are connected to the Internet.
10. As set out in our previous submission, the alternatives considered for Sky's access control services are not practical substitutes: additional EPG listings, second screens or smart TVs. We agree with Ofcom that access via the main screen is necessary for audiences to easily move to and from complementary material while maintaining continuity and that requiring a second screen to be connected to the main screen is technically more complex for consumers, especially when the BBC's Existing Services reach audiences that do not use the Internet at all or do not otherwise use BBC Online.
11. Therefore, the importance of access on fair, reasonable and non-discriminatory (FRND) terms for enhanced TV services, including an onward navigation link, will persist in relation to current and future Sky set-top boxes.

(Q2) *What are stakeholders' views of Sky's proposed commitments?*

12. We appreciate Sky's proposal, and have carefully considered the commitments. The approach of voluntary commitments is not appropriate to replace the Access Control continuation notice for a series of intrinsic reasons, which could not be overcome by amendments to the proposed commitments themselves. In particular, we are concerned that:

- a. Terms and Conditions:

There would be no obligation for Sky's standard terms to be FRND, and no independent route to require changes to the terms or to resolve a dispute. Sky would be the sole judge of whether any standard terms were amended for 'good reason'. For pricing, although there is a cap, the same points apply.

In addition, stakeholders are asked to comment on the principle of standard terms, without having sight of these in the consultation. While third parties would have to meet Sky's technical requirements in order to secure access on Sky's standard terms, these technical requirements would not be published at all. This would create uncertainty and the possibility of delays or restricted access.

⁶ Ibid

b. Enforceability:

There would be no route for enforcement action where there is a problem with gaining access or with the terms for access. Ofcom states that it could subsequently propose new regulations if the voluntary commitments did not have the necessary effect, but this would not be speedy and responsive. It would likely not be in response to a particular problem but rather at the end of a series of problems. Depending on the time that has passed, proposing regulation could require new market analysis. Regarding the possibility of private court action, this only applies where a broadcaster already has a contract that it might argue Sky has breached. It is not available where a broadcaster is seeking access. Lastly, Sky has stated (para 4.29) that neither Ofcom nor Oftel have been called upon to resolve a dispute between Sky and a third party relating to access control services. It is likely that the presence of regulation to date has had a moderating effect. Nonetheless, as outlined in our previous response, there have been a number of problems in securing access to the Sky platform, even with the benefit of the current Continuation Notice providing a regulatory back-stop.

13. The approach of voluntary commitments therefore exposes third parties to the risk of no access on FRND terms, protracted negotiations around 'non-negotiable' terms, and/or no independent dispute resolution or enforcement route. We would refer to the concerns summarised in the consultation from para 4.7 onwards. This could hamper competition, increase negotiating costs, and create uncertainty around innovation and investment, reducing benefits for consumers.
14. The BBC faces additional constraints. As noted in our September 2013 response, given our funding model, remit and requirement under the Charter and Agreement to deliver content and services widely, regulation has been important to ensure a more reasonable and balanced negotiation and a framework for determining the cost base relative to other platforms. Absent regulation, in order to protect consumer access to the BBC's Red Button services, we could face pressure to concede on points that reflect Sky's commercial priorities but do not further the benefits of PSB.
15. As mentioned above, we cannot see a way to overcome the major structural limitations of voluntary commitments, particularly regarding independent assessment of terms, dispute resolution and enforcement. These can only be overcome by the alternative approach of new Ofcom regulation.

(Q3) Does the provision of enhanced TV services via Sky's AC services result in benefits for end-users and competition, efficiency, innovation and investment benefits?

16. Yes, the BBC Red Button (broadcast) service, available on the current Sky STB, delivers all of these benefits, in line with Ofcom's analysis. We would note that BBC Connected Red Button results in the same benefits on other platforms (BBC Connected Red Button is not available on the current Sky STB due to Sky's technical constraints). Our

interactive TV services also support media plurality and cultural diversity, and access to PSB services. We refer to our response to the previous consultation of September 2013 for further detail, as well as our response to Question 1 above.

17. The BBC continues to invest in Red Button services. Building on the BBC's introduction of such services to consumers, we note the interest of other broadcasters in using Red Button in the future.

(Q4) What is your view of the case for replacement access-related conditions?

18. After careful consideration, replacement access-related conditions are both appropriate and necessary. The removal of regulation would be to the detriment of licence fee payers.
19. In particular, imposing conditions is the only approach that will ensure that Sky's access control services are provided in a transparent and timely manner, including through publication of a Reference Offer, with FRND obligations and an independent route for assessing terms and any modifications, dispute resolution and enforcement.
20. We agree with Ofcom's conclusions at paras 7.50 and 7.57 of the consultation that Sky may not have the necessary commercial incentives to make the all of the BBC's interactive TV services available on FRND terms. Sky has said that (para 4.27) that it makes content such as Wimbledon streams available because these are valued by consumers. However, taking our interactive TV content as a whole, views on what is 'valuable' and how 'value' should be measured is likely to differ between a PSB and Sky as a commercial platform provider and channel provider.

(Q5) Do you consider that the proposed conditions would secure effective access to Sky's AC services to allow the provision of enhanced TV services? Please give your reasons.

21. Yes. In addition to the major points in para. 18 of this response, when compared to Sky's proposed commitments, the proposed Ofcom conditions would provide benefits including:
- a. A technology neutral approach to interactive TV services. This is important in order to cover all of the BBC's Existing Services, i.e. both BBC Red Button (broadcast) and BBC Connected Red Button (IP-delivery). The latter is very much a part of our current portfolio of products and is available on a number of platforms (due to technical constraints on Sky's current STB it is not currently available to Sky viewers). Sky's proposed commitments would only capture interactive TV service delivered by digital satellite (para. 5.12)

- b. Ensuring access to new STB functionality that supports existing enhanced TV services and developments of those services, as envisaged by para. 7.79 of the consultation: *'access to these enhanced TV services should be provided not just on existing STBs but also on any future STBs. This may mean existing services are replicated on future STBs, or that Sky provides access to allow enhanced TV services to be developed which take account of new technology and functionality'*
 - c. Ensuring access for onward navigation from Red Button to other services supported by the Sky STB such as BBC iPlayer. If a future Sky STB technically supported them, regulation should also cover the BBC's dedicated BBC News and Sport apps for connected TV (available via BBC Connected Red Button on other platforms and devices, but not supported by Sky's current STB). We would note that, to offer value for money to licence fee payers the BBC usually provides a link to its standard products, like BBC iPlayer, over-the-top rather than linking to a bespoke version that can sit on Sky's servers, as is required by the current STB. If this was enabled on a future Sky STB, it would still require access to Sky's APIs
22. We welcome the statement in paras 1.19-1.20, 3.79 and 7.78 that Ofcom expects to apply the same analytical framework in respect of other types of services in the future, including VOD, and that it will keep market developments under review.
23. Lastly, while the proposed conditions do not include a cap for pricing unlike the Sky commitments, in light of para. 7.27 of the consultation we would not expect charges to materially increase and moreover, they might fall upon the application of FRND principles.

(Q6) In light of Sky's proposed commitments, do you consider that it is necessary to impose access-related conditions on Sky to secure the continued provision of enhanced TV services? Please give your reasons.

24. Yes, for the reasons set out above and in the BBC's September 2013 response to the previous consultation, we consider that it is both necessary and appropriate to impose access-related conditions, notwithstanding Sky's proposed voluntary commitments.