



Response to the BBC Trust consultation on its provisional conclusions on on-demand syndication

Executive Summary

1. Sky supports the wide distribution of BBC public service content, including BBC on-demand content, which licence fee payers are entitled to receive using a wide range of technologies and devices to accommodate their preferred choice of television platform. The fundamental principle of broad distribution of publicly funded content ought to lie at the heart of the Trust's evaluation of on-demand syndication.
2. Yet, the BBC Trust's Provisional Conclusions adopt an unnecessarily restrictive approach to the syndication of long form, on-demand TV content, proposing to limit the distribution of such content solely to "BBC aggregation products", namely the iPlayer, which will only be made available in three 'standard' technologies.
3. Bespoke versions of the iPlayer will only be permitted in exceptional circumstances, and at the expense of the relevant platform operator. The Provisional Conclusions suggest that Sky is not an 'exceptional case', despite the fact that its installed base of over 3.5 million broadband enabled set-top boxes are unable to support any of the BBC's 'standard' iPlayer versions.
4. The knowing exclusion of millions of existing licence fee payers is one of a number of perverse outcomes resulting from the Provisional Conclusions. It demonstrates that the Trust has not acted in the public interest in arriving at its draft syndication policy. In addition, the Trust's proposals appear incompatible with the BBC's own YouView project, are inconsistent with the approach taken for on-demand public service content other than full length TV programmes, allow existing 'disaggregated products' to co-exist indefinitely, and cost more than alternative solutions.
5. These outcomes are a result of a number of failings in the Trust's analysis of the BBC's proposals and the evidence it has gathered in support of its policy decision to adopt them. These include the Trust's conclusion that Sky's connectable set top boxes are capable of taking a standard BBC iPlayer version if Sky undertakes unspecified modifications to its box software. It should be noted that the Trust has at no point asked to discuss with Sky whether such modifications are technically possible or practicable. Such disregard for basic intelligence gathering has resulted in the interests of millions of licence fee payers being compromised. That the Trust could design a policy that explicitly excludes such a large proportion of licence fee payers is fundamentally wrong.
6. It is clear that the Trust has failed to scrutinise effectively the Executive's proposals. In doing so, the Trust has erred in concluding that their own assessment of public value outweighs the negative market impacts resulting directly from the Draft Policy, and that any attempt to minimise such negative impacts would prevent the BBC from fulfilling its Public Purposes.
7. Had the Trust undertaken a more robust Public Value Assessment, these errors might have been avoided, and the Trust would not have risked infringing its legal obligations under the Charter and Framework Agreement.
8. The Provisional Conclusions and Draft Policy should not be adopted without substantial changes. In particular, the Trust should reconsider how the BBC could deliver on its obligation to make its services widely available, maximise public value and minimise negative market impacts by embracing a 'hybrid' syndication policy. This requires the BBC to support both aggregated and disaggregated on-demand products. The Trust has accepted that such an approach maximises public value in relation to content other than full length TV programmes,

but has failed to establish why such an approach should not be adopted for all BBC public service content.

9. As acknowledged by the Trust, the current BBC strategy could lead to millions of licence fee payers being denied access to the BBC's on-demand content on their chosen television platform, resulting in the "significant negative impact on reach" identified by the Trust. This cannot be in the public interest. A hybrid approach would have considerable benefits over Trust's proposed approach, in extending reach, reducing cost and minimising market distortions, in particular, by:
 - a) providing better value for money by reducing the BBC's costs of distributing its content;
 - b) reducing the need for multiple standard versions of the BBC iPlayer product as third parties would have the choice of adopting the BBC standard version or of taking a disaggregated product;
 - c) allowing existing TV platforms and devices unable to take standardised versions of iPlayer to make BBC on-demand content available, thereby delivering a significant increase in reach as compared to the Trust's proposals; and
 - d) allowing licence fee payers to access content in the manner that they choose.

1. Introduction

- 1.1 Sky supports the wide distribution of BBC public service content, including BBC on-demand content. As the BBC's output is funded by licence fee payers, those viewers and listeners have the right to receive the BBC content they have paid for.
- 1.2 The question posed by the present consultation is whether the BBC can and should restrict access to that content to BBC owned and controlled services, or whether its duty to make its content widely available means that it is obliged to facilitate access to BBC content over a range of services, platforms and technologies.
- 1.3 The BBC Trust's Provisional Conclusions adopt a restrictive approach, proposing to limit the distribution of BBC on-demand content solely to "BBC aggregation products (currently iPlayer)". Furthermore, the Trust has provisionally endorsed the BBC's proposals to limit the technical versions of the BBC iPlayer to three 'standard' technologies which are to be made available on a non-discriminatory basis. Bespoke versions of the iPlayer will only be permitted in 'exceptional cases', and at the expense of the relevant stakeholder.
- 1.4 In this response Sky has interpreted the Provisional Conclusions and "Draft statement of policy on on-demand syndication" ('the Draft Policy') as meaning that, based on the information available to it, the Trust does not consider that Sky would be an "*exceptional case*" within the meaning of paragraph 17 of the Draft Policy, justifying a bespoke aggregation product. If this is not the case, then Sky asks that the Trust make this clear in any final decision. In such circumstances, Sky would expect the Trust to impose a condition on the BBC similar to that in paragraph 21 of the Draft Policy requiring the BBC to work with Sky to deliver a bespoke aggregation product within an appropriate timeframe.
- 1.5 As explained more fully below, the Trust has not provided an adequate justification for limiting distribution of public service content to "*a BBC built, controlled and maintained product*", and furthermore, if made final, the proposals (as manifested in the Draft Policy) would result in poor outcomes for licence fee payers, and for the wider market, and accordingly cannot be considered to be in the public interest.
- 1.6 Accordingly, Sky's response sets out the extent to which:
 - a) implementation of the Provisional Conclusions is likely to result in a series of perverse outcomes;

- b) the Trust's analysis and assessment are flawed;
- c) the Trust has failed to consider and follow the appropriate procedure;
- d) the Draft Policy is deeply flawed; and
- e) implementation of the Provisional Conclusions would breach the Trust's duties under the Charter and Framework Agreement.

2. Implementation of the Provisional Conclusions is likely to result in a series of perverse outcomes

2.1 If the Trust affirms the Provisional Conclusions and allows the BBC to pursue the strategy described in the consultation document, it is likely to result in a number of perverse outcomes for licence fee payers and the wider market:

- a) As acknowledged by the Trust, the strategy could lead to millions of licence fee payers being denied access to BBC public service content on an on-demand basis on their chosen television platform:

*"The Trust considers that the decision as to whether to include (or continue to include) a BBC aggregation product on either Sky or Virgin's platforms is a commercial decision for the platforms to make. The Trust is keen to maximise availability of BBC aggregation products, but recognises that either or both platforms may choose not to offer it to their subscribers. This would have a significant negative impact on reach."*¹

There is currently no BBC on-demand content on either of Sky's set top box-based on-demand services (Anytime and Anytime+). It appears from the consultation document that the Trust consider that the only way that BBC on-demand content would be made available on Sky's platform would be for Sky to conduct the necessary "*amount of modification*" to its connectable set top boxes in order to be able to distribute a browser-based BBC iPlayer version. Noting that the Trust has at no time enquired of Sky whether such modifications are technically possible or practicable, the Trust clearly does not consider that provision of BBC public service content to millions of licence fee payers on Sky's platform is something that should disturb its proposed approach. That the Trust could design a policy that explicitly excludes such a large proportion of licence fee payers raises serious questions about its evaluation and judgment.

Sky notes that the Trust's approach to syndication of on-demand content to Sky in this consultation is of disproportionately greater significance than the Trust's approach to Virgin Media. Virgin Media has a smaller installed base of connectable set top boxes, has had access to BBC on-demand content since 2005 (as ntl:Telewest), and is soon to launch a new range of TiVo-based set top boxes designed to access internet-based on-demand services over Virgin Media's cable network using one of the technologies proposed by the BBC. It is therefore reasonable to state that Virgin Media is in a materially different position to Sky, and that licence fee payers wishing to access BBC public service content on Sky's platform merit particular consideration by the Trust.

- b) One of the proposed 'standards' to be adopted by the BBC is proprietary software from Adobe that is only currently in use in Wii consoles, but will be used in the BBC-backed YouView platform and in Virgin Media's soon-to-launch TiVo set top box. As the Trust's expert report puts it "[a]t present the installed base of Flash in this latter sense [i.e. the Stagecraft version] is as restricted as the browser plug-in is ubiquitous."²

¹ Page 20 of the Provisional Conclusions.

² Page 7 of the Screen Digest report "[The potential technical adoption of the 'big screen' iPlayer: An assessment of the reach of three proposed versions for the BBC Trust](#)".

The Trust's failure to adopt a policy that addresses the delivery of BBC public service content to the existing base of connectable installed set top boxes is bizarre. Nowhere in the Trust's consultation document does the Trust take into account the likely cost to licence fee payers of upgrading to next-generation hardware, nor does the Trust appear to have considered the expected lifetime of existing hardware in relying on Screen Digest's conclusion that by 2014, 99% of connectable devices in UK homes will be 'technically capable' of receiving the iPlayer. As noted below, such 'evidence' is highly suspect in a sector where the average set top box lifetime far exceeds the four year period considered by the Trust's 'expert'.

- c) The proposals appear to rule out the inclusion of BBC public service on-demand content being made available via the BBC-backed YouView 'backward scrolling EPG'. Access from a platform or service EPG does not fall within the proposed definition of a 'BBC aggregation product' which dictates that it must be controlled by the BBC; nor is such access considered in the consultation document (appearance in search results – *"searching for BBC content in central 'non-BBC' menus should be allowed"*³ – is clearly different from incorporating separate listings for content outside of the 'BBC aggregated product'). If this is not the Trust or Executive's intention, then this should be made clear to avoid discrimination and uncertainty, but it does not fit easily with the 'exclusivity' required by the Trust to deliver public value, as content will be listed in a manner that is determined by the service/platform provider, and not by the BBC.
- d) There would be an inherent contradiction as the Draft Policy provides that some BBC public service content be made available exclusively on an aggregated basis (i.e. full-length TV programmes) and other BBC public service made available on a disaggregated basis (i.e. all other content).
- e) Notwithstanding the Trust's insistence on the uniform adoption of a BBC aggregated product, the Trust has sanctioned the continued provision of disaggregated BBC on-demand services on the BT Vision, TalkTalk and Virgin Media platforms. This outcome is contrary to the Trust's proposed policy and therefore perpetuates the harms that the Trust says justify iPlayer exclusivity. Furthermore, it exacerbates the ongoing negative competitive impact of the BBC's activities on the wider market caused by the continued absence BBC on-demand content from Sky's television platform as compared to competing platforms. It is regrettable that the negative impact of this strategy is felt by the millions of licence fee payers not able to access content they have paid for on the platform of their choice. The Trust's proposal to limit support for the BT and TalkTalk disaggregated services to a period of two years does not mitigate the distortion of competition. Furthermore, without explanation, the Trust appears to have placed no restriction on the ongoing supply of BBC on-demand content to Virgin Media's bespoke 'iPlayer' service, thereby compounding the distortive effects of the Trust's policy.
- f) At a time when the BBC is taking steps to reduce its costs by 20% and recently announced cuts in BBC Online's budget of £34m,⁴ it is strange that the Trust has proposed the more costly option for syndication of BBC on-demand content. Similarly, by focusing on 'over the top' delivery of public service content, the Trust has selected one of the most costly distribution technologies for licence fee payers who will need to upgrade to more expensive broadband packages in order to be able to access BBC public service content or will be subject to additional charges by ISPs for exceeding usage caps. The Trust has failed to consider the public value in delivering on-demand content via other technologies (e.g. push-VOD services) to take advantage of more cost effective delivery mechanisms, or of requiring platforms to take responsibility for delivery (including costs).

³ Page 22 of the Provisional Conclusions.

⁴ See, for example, the BBC News article "[BBC to cut online budget by 25%](#)" dated 24 January 2011.

- 2.2 These outcomes could be avoided if the Trust took a more proportionate approach to the distribution of the BBC's public service content and gave due consideration to the interests of licence fee payers and the wider market.

3. The Trust's analysis and assessment are flawed

- 3.1 The Trust has assessed the evidence and issues regarding syndication of BBC on-demand content incorrectly, ascribing public value exclusively to the proposed policy, and giving insufficient consideration to its adverse effects. In particular:
- a) the Trust's assessment appears based on a misguided analogy with linear broadcasting;
 - b) the Trust's evidence does not support its conclusions;
 - c) the Trust has failed to give due consideration to all relevant options; and
 - d) the Trust has not adequately explained its rationale for differentiating between full length TV programmes and other content.
- 3.2 For the reasons set out below, the Trust's conclusions in respect of both the decision to require exclusive syndication via BBC aggregated products and to limit such syndication to three 'standard' versions are invalid.

BBC iPlayer exclusivity is not analogous to linear broadcasting

- 3.3 The Trust appears to base its assessment of the Executive's proposals on its view that exclusive distribution via BBC aggregated products is analogous to the BBC broadcasting its linear channels. The Trust states that *"the ability to schedule and signpost BBC content (achieved through the operation of the BBC TV channels) is essential to fulfil the BBC's Public Purposes"*,⁵ that disaggregation undermines its role as a broadcaster of content;⁶ and that therefore exclusive BBC iPlayer distribution is the only way to deliver the same benefits in respect of on-demand content, for example through the use of "recommended" and "new" filters, and in order to maintain the BBC's role of promoting a broad range of BBC PSB content.
- 3.4 This analogy is flawed as it ignores the role played by third party distributors and platform operators in making the BBC public service channels available to licence fee payers (whether via cable, satellite or over IPTV networks), and the fundamental distinction between supplying an indivisible linear channel and a range of separable on-demand programmes. Furthermore, certain of the benefits that the Trust ascribes to the *"packaging of content into linear channels"*, and which are consequently deemed important in justifying the Draft Policy, are tenuous or not applicable at all. For example, it is not at all clear how linear channels guarantee *"that BBC PSB output is free-at-point of use (or in basic tier) without ads"* or establish *"consistency of user experience"*.⁷ The first has nothing to do with the inherent nature of a linear channel. Rather it is achieved through contractual arrangements and the enforcement of copyright by the BBC. If 'consistency of user experience' refers to the viewing experience (e.g. programme schedule, branding and ids), this is simply a function of a linear service.⁸ Otherwise, how the channel is accessed, and the quality of the user experience is as much dependent on the television platform used to access the channel or the device manufacturer, as the BBC. This argument should therefore be disregarded. As noted later in this response, the use of pre- and post-roll cross-promotions around on-demand programmes would provide a more effective tool to promote the range of BBC PSB content, and would be a more appropriate equivalent to 'hammocking' around more popular content in linear services.

⁵ Page 13 of the Provisional Conclusions.

⁶ Page 24, *ibid.*

⁷ Page 13, *ibid.*

⁸ Noting that the increasing ubiquity of PVRs challenges the indivisibility of the linear channel.

The Trust's evidence does not support its conclusions

- 3.5 The Trust's evidence that a majority of individuals questioned (53%) "*were in favour of a BBC aggregation strategy*"⁹ is unreliable as the question respondents answered asked whether "*BBC programmes should always be made available in the context of a BBC package (such as a BBC TV channel (BBC1 for example) or via the BBC iPlayer on a PC, TV or mobile phone*" (emphasis added).¹⁰ The inclusion of linear services in this question is misleading and effectively posits whether respondents wish to see the BBC reduced to a public service production company wholesaling content to third parties. Given the narrow majority responding positively to this question, one might reasonably expect a much larger proportion to respond in favour of a disaggregated approach solely in relation to on-demand content.
- 3.6 In addition, when assessing the impact of the proposals, the Trust places significant weight on the Trust's conclusion, drawn from its external consultant's report, that it is Sky's 'commercial decision' to operate a platform that is not able to adopt one of the BBC's 'standard versions', and that accordingly, the resulting "*significant negative impact on reach*"¹¹ does not result from the Trust's decision.
- 3.7 This approach appears to enable the Trust to dismiss this negative impact in its assessment of the proposals, notwithstanding Sky's significance in terms of its installed base of connectable devices capable of providing access to BBC public service content, and the availability of disaggregated and aggregated BBC content on competing pay and free TV platforms (Virgin Media, BT Vision and TalkTalk, in addition to the myriad iPlayer versions on individual connected devices).
- 3.8 The Trust's conclusion that "*this negative market impact is outweighed by the public value identified in aggregating*" relates solely to the adverse effect identified in relation to the "*development of small existing platforms and/or new platforms or innovative delivery methods within platforms*"¹² and not to the greater negative impact on reach due to the absence of BBC on-demand content on Sky's platform. It therefore appears that the Trust has not taken due account of this negative impact in its assessment (including in the Trust's purported application of the Competitive Impact Principle).
- 3.9 In any event, the Trust's evidence does not support its conclusion that it is a 'commercial decision' whether Sky takes a standard version of iPlayer, and that accordingly, these devices are capable of using one of the proposed 'standard versions' of the iPlayer. On the contrary, the Trust's "external technical consultancy" report states that "*Sky's connectable STBs don't currently support a browser*" and would require "*a certain amount of modification*" in order to do so, and that implementing such a solution "*would be more difficult for Sky than it would be for Apple or Microsoft*".¹³ Accordingly, the Trust's consultant has confirmed that Sky's set top boxes do not support a browser. The fact that the Trust's consultant has assessed that these devices could be adapted to take a browser does not detract from the starting point that they are not capable of doing so now.
- 3.10 The report amounts to mere speculation, both as to the technical capabilities of Sky's set top boxes, and as to Sky's possible motivations to make the modifications required to support the BBC's public services via a browser (listed as "*adding niche channels*", "*broadcaster catch-up services*" and "*advanced interactive services*").¹⁴ Accordingly, the report cannot be relied upon by the Trust as evidence that Sky's set top boxes are capable of providing such access.

⁹ Page 10 of the Provisional Conclusions.

¹⁰ Page 8 of the Public Knowledge report "Review of BBC On-demand Syndication Policy and Executive Guidelines: Analysis of Public Consultation, Main Report" – 31 August 2010

¹¹ Page 20 of the Provisional Conclusions.

¹² Page 21, *ibid*.

¹³ Page 3 of the Screen Digest report (see footnote 2 above).

¹⁴ Page 14, *ibid*.

- 3.11 For these reasons it is not reasonable for the Trust to hold the belief that, “*both now and in 2014 there will be very few devices / platforms in the market which [cannot use one of the “standard” versions]*”.¹⁵ This is neither the case now (due at least to the position vis-a-vis Sky’s ‘unmodified’ set top boxes), nor will it be the case in future, based on any reasonably established counterfactual.
- 3.12 Even if it were possible for Sky to modify the different versions of its connectable set top boxes in such a way as to enable browser access, Sky would expect both the navigation and viewing experience to be extremely poor, particularly when compared to the viewing experience in Sky’s Anytime+ service (which would represent the benchmark for licence fee payers wishing to access BBC services via the Sky platform). Neither the expert’s report, nor the Provisional Conclusions, includes an assessment of the technical limitations of the BBC’s proposed standards when applied to existing technologies. The Trust has made no attempt to assess the viewer experience that would result from its policy.
- 3.13 Unlike Virgin Media, BT or TalkTalk, Sky has made no announcement that it intends to modify its set top boxes in the manner proposed. Therefore the status quo (i.e. where Sky’s connectable set top boxes are not capable of using the BBC standard versions) is the only appropriate counterfactual for the Trust’s assessment of public value and market impact, rather than the approach taken which relies on existing providers having successfully adapted their proprietary devices to fit the BBC’s chosen technologies and syndication policy.
- 3.14 Sky has spent over 20 years developing its customer offering, investing in content and innovation to create products and services that its customers value and enjoy. Those products include the current Sky+HD set top box and associated technical services and infrastructure that deliver the highest quality viewing experience to customers. Sky has over 3.5 million subscribers to its HD services, and many more Sky+HD set top boxes installed as standard, not to mention the millions of Sky+ customers who continue to enjoy PVR functionality and the ‘Sky Anytime’ push-VOD service. It would be highly inappropriate for the Trust, which is subject to a duty to act in the public interest, in particular to represent the interests of licence fee payers, and to have regard to the competitive impact of the BBC’s activities on the wider market, to base its final decision on a speculative requirement that Sky change the way it operates (and put its business at risk by making fundamental changes to its platform software) in order to be able to provide BBC public service content to licence fee payers that have chosen Sky as their preferred television platform.

The Trust has failed to give due consideration to all relevant options

- 3.15 The Trust has made a binary assessment of aggregation versus disaggregation before concluding that “*[i]f the BBC’s full-length PSB TV content were made available fully disaggregated outside a BBC context and throughout the internet, its ability to fulfil the Public Purposes would in the Trust’s view be heavily diminished.*”¹⁶
- 3.16 The Trust briefly considers the possibility of a hybrid approach, with aggregated and disaggregated products, as part of its application of the Competitive Impact Principle (CIP) in relation to the ‘viewer experience’. This is not, however, a fully worked assessment as the Trust merely repeats its conclusions as to the public value of a full aggregation approach, before summing up that “*The Trust considers that, on balance, a disaggregation approach – whether alone or in parallel with the continued development of aggregation products – would jeopardise the fulfilment of the Public Purposes to too great an extent.*”¹⁷
- 3.17 As the representative of the licence fee payers’ interests, the Trust is under a duty to act in the public interest. Such a duty requires the Trust to give appropriate consideration to the adoption of a hybrid approach to syndication, and further, to adopt such an approach

¹⁵ Page 37 of the Provisional Conclusions.

¹⁶ Page 24, *ibid.*

¹⁷ Page 25, *ibid.*

to make the BBC's public service content widely available. By making available content in a disaggregated format, in addition to any BBC aggregated products, the BBC would fulfil its Public Purposes to a greater degree than in the current proposals, whilst at the same time endeavouring to minimise its negative competitive impacts.

3.18 The Trust's dismissal of a hybrid approach is not justified as such an approach could deliver some of the key benefits of an aggregation-only policy, but would also lead to greater reach and fewer negative impacts:

- a) the BBC would "*maintain the prominence of its output, such as through a recognised user interface with ease of use and accessibility features*"¹⁸ in respect of its own aggregated products and could be facilitated on other platforms through innovation, e.g. integration with linear EPGs. However, whilst it would not be proportionate for the BBC to require prominence in all outlets, it cannot be said to be fatal to the fulfilment of the BBC's Public Purposes for BBC content to appear in other formats on other platforms;
- b) contrary to the Trust's assertion, the reach of the 'full range of BBC PSB output' can only be 'maximised' through syndication outside of BBC aggregated products, as exclusive distribution necessarily restricts access and limits availability. A policy of mixed distribution of aggregated and disaggregated products would maximise reach of the full range of BBC content (particularly if the BBC were to create a range of editorial packages);
- c) 'Public service context' will be delivered through BBC aggregated products, however, such context is also available in third party services through the use of embedded pre- and post-roll cross-promotions around on-demand programmes for other BBC public service content. As this content would form part of the overall content asset it would be controlled by the BBC (platform operators could not act as gatekeepers) and facilitate the 'discovery' of the wider range of PSB content;
- d) The BBC would retain 'a direct relationship with the audience' to the same extent as it currently enjoys in relation to the BBC's linear services. It cannot therefore be reasoned that the absence of such a 'direct relationship' would be fatal to the fulfilment of the BBC's Public Purposes. Furthermore, a hybrid approach would give the BBC the data it says it requires in order to improve its services (through iPlayer services and contractual arrangements with third parties) without preventing licence fee payers from accessing the content they have paid for;
- e) As acknowledged by the Trust,¹⁹ the threat of disaggregated services to the BBC's rights arrangements is not credible and can be managed through normal contractual arrangements and DRM; and
- f) the Trust's desire to 'retain as much flexibility as possible' in relation to future sectoral developments, and its concern that a disaggregated approach would make it difficult to return to an aggregation strategy in future, is inconsistent with the Trust's approach to this consultation. The introduction includes the statement that existing arrangements with third parties "*should not restrict the options available to the Trust and BBC in developing the new on-demand syndication strategy*".²⁰ It is not clear why the Trust would consider itself unable to adopt such an approach in the future.

¹⁸ Page 25, *ibid.*

¹⁹ Page 18, *ibid.*

²⁰ Page 5, *ibid.*

The Trust has not adequately explained its rationale for differentiating between full length TV programmes and other content

- 3.19 The Trust's provisional conclusions propose an exclusively aggregated product policy for 'full length TV programmes' and maintenance of a disaggregated approach for all other content.
- 3.20 In practice, other BBC on-demand content is 'syndicated' on a hybrid basis due to the availability of other content via the BBC iPlayer in addition to availability directly via dedicated BBC channel and programme websites, and third party platforms and services, including iTunes (for use with Apple devices, including Apple TV), Zune (Microsoft compatible devices, including Xbox and PCs) and ZENcast (Creative ZEN compatible devices).
- 3.21 The Trust's justification for adopting the opposite approach in relation to other content is that this reflects *"the different usage pattern of radio"* which is *"commonly used in a mobile environment, such as on an MP3 player"*. As a result, according to the Trust, *"the maximisation of public value leads to a less restrictive approach than full length TV content"*. Furthermore, the Trust states that *"[t]he reach lost through restricting radio to aggregation products would be likely to be much greater than any public value gained."*²¹ No further evidence or analysis is adduced in support of these statements.
- 3.22 Sky contends that this explanation is an inadequate statement of reasoning in the context of the proposals to take the opposite course of action in relation to full length TV programmes. Having claimed that a particular approach *"would jeopardise the fulfilment of the Public Purposes to too great an extent"*,²² it is incumbent on the Trust to provide a fully reasoned explanation as to why the diametrically opposed approach 'maximises public value' in relation to other public service content.
- 3.23 In addition, the Trust's position is not supported by market developments. The widespread adoption of internet enabled devices, in particular smartphones and tablets, has resulted in the convergence of digital media. Viewing of 'full length TV programmes', whether via downloads or over WiFi connections, now takes place on the same devices that might once have only played audio content. Accordingly, the claimed justification is not founded in fact.
- 3.24 What is surprising is that the Trust and BBC are well aware of these developments, and did not take them into account as part of this assessment. The Trust approved BBC mobile apps in July 2010, and the BBC has recently launch BBC iPlayer apps for the iPad and Android devices (over a year after the BBC had intended).²³ The non-existence of the Trust's justification is further highlighted by a recent online newspaper article with the heading *"The iPlayer's future is mobile, says BBC"*.²⁴
- 3.25 The public value that has been maximised as a result of the long-standing disaggregated approach to the syndication of 'other content' would be replicated by a similar approach to 'full length TV content', albeit with additional public value benefits, e.g. in terms of value for money, etc, described above and in Sky's response to the first syndication consultation.
- 3.26 The Trust's failure to address the inherent inconsistency in approaches to syndication is a material failing of the Provisional Conclusions, in addition to the Trust's failure to analyse the available evidence appropriately in order to reach a set of robust and workable conclusions reflecting the interests of licence fee payers.

²¹ Page 42, *ibid*.

²² Page 25, *ibid*.

²³ See, for example, http://www.bbc.co.uk/blogs/bbcinternet/2011/02/bbc_iplayer_apps_coming_soon_t.html and the BBC Trust final decision on BBC mobile apps – July 2010.

²⁴ <http://www.guardian.co.uk/media/2011/feb/14/iplayer-ipad-android-mobile-bbc>

4. The Trust has failed to consider and follow the appropriate procedure

- 4.1 In its Provisional Conclusions the Trust rejects an argument that it should have conducted a full Public Value Test in to the proposals on the grounds that the Trust has a wide discretion as to the process to follow in relation to 'non-service activities' which, it claims, include adopting a policy on the syndication of PSB on-demand content.²⁵
- 4.2 Even if it were accepted that the changes proposed to the syndication policy qualify as a 'non-service activity', the Trust cannot dismiss its responsibilities under Clause 22 of the Framework Agreement. The Trust must *"ensure that the principles which underlie the treatment of services are, where relevant, applied to non-service activities in a way which the Trust considers appropriate to the circumstances"*, noting in particular the statement that *"the Trust should not assume that a full Public Value Test will not sometimes be appropriate even for non-service activities"*.
- 4.3 The original Trust approval for the BBC on-demand content was a result of a full Public Value Test, including a market impact assessment by Ofcom. That decision approved disaggregated syndication to Virgin Media and TalkTalk, in addition to the online BBC aggregation product. Syndication of BBC on-demand content to other third parties arose as a result of concerns raised in Ofcom's Market Impact Assessment ('MIA'). The current proposals represent such a significant departure from what was originally contemplated by its approval that the Trust should have conducted a further PVT to assess their impact in as robust and meaningful way as possible.
- 4.4 This view is supported by Ofcom's market impact assessment at the time, in which it stated that when reviewing future applications to make catch-up content available to other service providers *"[i]f there are doubts about the possible impact on competition, there would a strong case for a further PVT."*²⁶
- 4.5 Furthermore, the Trust does not appear to have considered whether the proposals would require amendment of the key characteristics of the BBC iPlayer, described in the BBC Online service licence, which would create a presumption in favour of a PVT under the Trust's PVT guidelines.²⁷
- 4.6 Also, an appropriately robust review procedure would have included an assessment of the operation and effectiveness of the current syndication policy and guidelines, and their impact on the wider market. Under a PVT, the Trust would have required Ofcom to conduct a market impact assessment. This process would have examined the extent to which the BBC complied with its existing syndication policy, including the impact of the BBC exclusively promoting access to its web-based iPlayer product (using the www.bbc.co.uk/iplayer URL), and not referencing the availability of the various iPlayer incarnations on other platforms such as Virgin Media's cable network, Sony's PS3 and the Nintendo Wii (which one would expect to meet the materiality threshold set out in the BBC Competitive Impact Code on cross and digital TV promotion), or the availability of relevant BBC content on a disaggregated basis from TalkTalk and BT Vision (which are less likely to have met that threshold). Such distortions should be dealt with in the Trust's policy, rather than being left to the guidelines.
- 4.7 The absence of such an assessment has resulted in a flawed analysis of the public value of the proposals and their market impact, and consequently, a draft policy that is not fit for purpose.

²⁵ Page 4, *ibid*.

²⁶ Paragraph 5.56 of Ofcom's Market Impact Assessment "BBC new on-demand proposals" dated 23 January 2006.

²⁷ The [BBC Online service licence](#) states that "The description of iPlayer in the annex is designated as part of the key characteristics of BBC Online." Paragraph 2.6 of the [PVT Guidance](#) states that "the Trust should presume that any change which requires ... any amendment of the key characteristics described in a service licence ought to be subject to a PVT".

5. The Draft Syndication Policy is deeply flawed

- 5.1 As a result of the flaws in the Trust's assessment, the Draft Policy is not fit for purpose. The Trust states that its principal aims in developing the Draft Policy are "*to secure the best interests of licence fee payers by maximising public value through the syndication of content; to ensure clarity and transparency; and to minimise adverse market impact.*"²⁸ The Trust's Draft Policy fails to achieve these objectives.
- 5.2 The Draft Policy does not secure the best interests of licence fee payers as public value is manifestly not maximised by a strategy that restricts access to public service content, and does so in a way that costs the BBC more than alternative approaches, thereby reducing funds available for content creation at a time of cost cutting elsewhere in the BBC.
- 5.3 For the reasons given above, the Draft Policy does not 'minimise adverse market impact'. Furthermore, there is a lack of clarity in the Draft Policy as it is proposed that detailed information as to how the policy will be implemented will be determined by the Executive's guidelines which have not been published, and which are unlikely to be consulted on.
- 5.4 In order to provide an appropriate degree of certainty for stakeholders, the Trust should redraft the policy to incorporate guidelines elaborating on the broad principles set out in the draft (suitably amended). Whilst the Trust can and should do so in consultation with the Executive, it is essential that the Trust set down the detailed guidelines as to how its policy should be implemented, rather than leave it solely to be interpreted by the Executive.
- 5.5 Sky also notes that the Trust proposes that the BBC is no longer required to provide access to its content on 'fair' or 'reasonable' terms. No explanation has been provided for this change to the current policy, nor any assessment made as to its impact. Such conditions are as important in minimising the 'adverse market impact' of the BBC's syndication policy as any obligation to supply on a non-discriminatory basis, and should therefore be re-instated. The removal of these terms from the current policy and guidelines would be of concern if intentional, given the BBC's public service remit, and Trust's overarching duties to the public interest.
- 5.6 Annex 1 provides further detailed commentary on the text of the Draft Policy.

6. The Trust's duties under the Charter and Framework Agreement

- 6.1 The Trust, and the BBC, risk infringing the legal obligations contained in the BBC Charter and Framework Agreement should the Trust choose not to address appropriately the concerns raised in this response.
- 6.2 Under Article 23 of the BBC Charter, the Trust is required to act in the public interest and, in particular, it must:
 - a) "*represent the interests of licence fee payers*"; and
 - b) "*have regard to the competitive impact of the BBC's activities on the wider market*".
- 6.3 Clause 12 of the Framework Agreement states that the BBC must "*do all that is reasonably practicable to ensure that viewers, listeners and other users (as the case may be) are able to access the UK Public Services that are intended for them, or **elements of their content**, in a **range of convenient and cost effective ways** which are available or might become available in the future.*" (emphasis added).
- 6.4 For the reasons set out above, the Trust's proposals to restrict access to BBC on-demand content are not in the public interest. The interests of licence fee payers are best served through providing access to the content intended for them. The instruction in the

²⁸ Paragraph 9 of the Draft Policy.

Framework Agreement that this be achieved through “a range of convenient and cost effective ways” has not been followed by the Trust.

- 6.5 In respect of the requirement on the Trust to have regard to the competitive impact of the BBC’s activities on the wider market, the Provisional Conclusions state that “[t]he Trust accepts its proposed platform policy could potentially have an adverse impact on the wider market in certain areas”.²⁹ The Trust has not, however, ‘had regard to’ such adverse impact in arriving at those conclusions. It cannot be sufficient for the Trust merely to note such impacts without making any attempt to minimise them, as it is required to do by the CIP.
- 6.6 If the Trust had done so, it would have given more detailed consideration to the hybrid approach which the BBC already operates in relation to ‘other on-demand content’. Furthermore, the Trust has failed to have regard to the competitive impact of:
- a) the potential distortive effect of its public service content not being available to licence fee payers using certain television platforms, including Sky’s population of over 3.5 million connectable set top boxes. On a plain reading of the Provisional Conclusions, licence fee payers accessing BBC services using Sky’s platform will be denied access to BBC on-demand content over the platform unless Sky modifies its platform technology and business model to accommodate the browser based BBC iPlayer product. It is also relevant that, were a browser based approach technically possible, it would result in a poor viewer experience for licence fee payers, particularly when compared to the quality of other on-demand services available on the platform, which would increase the negative impact on users and Sky; and
 - b) the impact of its proposed approach to legacy arrangements. Certain operators will be allowed to continue to make available disaggregated BBC on-demand content until 31 December 2012 (BT Vision and TalkTalk) whilst they are transitioned to ‘standard’ versions. It appears that Virgin Media will be allowed to operate its bespoke, disaggregated on-demand service,³⁰ branded ‘BBC iPlayer’, indefinitely, as it is not subject to the same restriction. The Trust merely “acknowledges this arrangement, but considers that this arrangement should not prohibit the BBC amending its policy over time.”³¹ The BBC’s continuing discrimination against Sky vis-à-vis competing platforms and retail services exacerbates the distortive effects identified above.
- 6.7 Accordingly, not only do these failings undermine the Provisional Conclusions and Draft Policy, but if confirmed in the Trust’s final decision, would also represent a significant infringement of the Charter and Framework Agreement, exposing the Trust’s decision to the risk of challenge.

7. Conclusion

- 7.1 It is clear that the Trust has failed to scrutinise adequately the Executive’s proposals. In doing so, the Trust has erred in concluding that the public value of the proposals outweighs the negative market impacts that would result directly from the Draft Policy.
- 7.2 As a result, the Provisional Conclusions and Draft Policy are flawed and should not be adopted without substantial changes. In particular, the Trust should reconsider how the BBC could deliver on its obligation to make its services widely available, maximising public value and minimising negative impacts on the wider market through an alternative policy that includes:

²⁹ Page 37 of the Provisional Conclusions.

³⁰ Virgin Media customers have had access to a bespoke, disaggregated on-demand service, branded ‘BBC iPlayer’ since May 2008, although BBC on-demand content had been available under a ‘trial’ since at least 2005. This service was the subject of the original Public Value Test (PVT) into BBC on-demand content and has been responsible for a significant proportion of total views of BBC on-demand content since launch.

³¹ Page 6 of the Provisional Conclusions.

- a) retaining an online BBC iPlayer to provide the context and 'public space' that the Trust considers to be an important aspect of delivering the Public Purposes;
- b) facilitating disaggregated BBC on-demand products in cost effective manner, e.g. by making packages of individual assets and metadata available in a standardised format, such that platform operators would bear the costs of making the content available in future;
- c) permitting distribution of smaller ranges of BBC catch-up content (under the editorial control of the BBC) where appropriate (e.g. for platforms not technically or practically able to make the all BBC on-demand content available within the context of their existing service);
- d) prioritising third party distribution according to transparent and objective criteria; and
- e) combining the Trust Policy with interpretative guidance on implementation in order to provide clarity and transparency for stakeholders.

7.3 This hybrid approach would have considerable benefits over Trust's proposed approach, for example by:

- a) providing better value for money by reducing the BBC's costs of distributing its content;
- b) reducing the need for multiple standard versions of the BBC iPlayer product as third parties would have the choice of adopting the BBC standard version or of taking a disaggregated product;
- c) allowing existing TV platforms and devices unable to take standardised versions of iPlayer to make BBC on-demand content available, thereby avoiding the 'significant negative impact on reach' identified by the Trust in relation to Sky (and Virgin Media); and
- d) allowing licence fee payers to access content in the manner that they have chosen .

Sky

February 2011