Review of proposed increased amount of archive content on BBC iPlayer

Virgin Media O2 response

14th November

Non-Confidential response

EXECUTIVE SUMMARY

Virgin Media O2 welcomes the opportunity to respond to the Ofcom Consultation ("the Consultation") regarding the proposed increased amount of archive content on BBC iPlayer.

As a TV platform, VMO2 is very much aware of the ever-changing landscape regarding how TV content is consumed. The number of VOD players, and the amount of content they hold, continues to increase providing viewers with an almost unlimited choice from which to consume content. Alongside the amount of content held by VOD services, they provide viewers with the flexibility to consume content as and when they wish. This proliferation of VOD services has had an impact on linear TV viewing, and we therefore understand the desire of traditional broadcasters to evolve their offerings in order to meet the evolving needs of viewers.

In responding to the BBC PIT, we made it clear we understand why the BBC is looking to evolve iPlayer so that it can satisfy its Public Purposes and Mission and remain relevant in a digital world. The changes that were made to iPlayer in 2019 paved the way for iPlayer to become a platform in its own right and the current proposal clearly looks to firm up this position and further establish iPlayer as a destination, competing directly against SVOD services and, in practice, traditional pay TV platforms. In principle, although we do not object to the BBC innovating in order to meet the evolving needs of audiences, we do have concerns about the specific changes the BBC is proposing.

Without repeating much of our response to the BBC PIT, which we are aware Ofcom has reviewed, we will look to provide a high-level view of the points raised within that response, along with a more detailed analysis of the impact any potential changes may have on the Pay TV market. Overall, we are concerned that any focus on a 'digital first' BBC may detract from its traditional linear offering. If this were to happen, we would be concerned that much of the BBC's linear audience would be disadvantaged if they are unable, or unwilling, to access content in this way. Throughout both the original PIT and the follow up submission, the BBC places significant emphasis on the development of commercial VOD players and their impact on the market. Although it is clear these platforms help to shape the market, we are concerned that the BBC is looking to align itself with, and compete against, such platforms.   This appears, in many respects, to manifest in a desire to prioritise quantity (of iPlayer content) over quality. We think this is misguided. Whilst we acknowledge that delivering value to consumers and remaining relevant are key factors in the BBC's delivery of its Mission and Public Purposes, it does not have a requirement to ensure that it can compete with commercial SVOD providers.

Having reviewed both the original PIT and the follow up submission, we still hold concerns regarding the depth of analysis provided by the BBC. Firstly, we do not believe there is an accurate reflection of the changes made in 2019 and the impact they have had on the wider market. Secondly, we believe the potential impact the latest proposed changes may have on the secondary market, and Pay TV services specifically, has been completely overlooked. The BBC has taken a 'broad brush' approach and has concluded that based on a high-level view across VOD platforms, the proposed changes to iPlayer will not have a significant impact on the viewing figures of those platforms, given the volume of consumers using them, their content and how they are used. However, it is misguided to assume that Pay TV should be treated in the same way. It is clear that these two types of platform are fundamentally different and must be treated as such. It is our belief that the changes proposed by the BBC at this time pose a significant threat to the Pay TV market and Ofcom

should, at the very least, look to introduce protections in this area. Looking back at the changes made in 2019, there has been significant changes to both our consumer base and their viewing habits. Our analysis has looked at overall subscriber numbers but also focussed on the relationship between iPlayer and UKTV pay channels and how our customers' behaviour has changed. The reason we have focussed on this area is that it is clear those pay channels are likely to be most impacted by any further changes to iPlayer due to the proportion of BBC archive content they hold.

UKTV pay channels are a fundamental part of the VMO2 Pay TV proposition, (✂). It is clear these channels are important for our customers, with Gold consistently appearing in the top 5 most watched pay TV channels on our platform, and any detrimental changes to them would have a significant impact on our base. In this regard, we disagree with Ofcom's assertion at paragraph 2.41 that BBC archive content is not a crucial input to any of its 'rivals'. On the contrary, the majority of the content shown across the UKTV channels are BBC (archive) programmes. When reviewing UKTV Gold and Eden, 85% and 80% respectively of the top 20 most viewed titles are BBC titles.

When looking at the consumption of iPlayer by our customer base, there is a clear crossover between those who consume both iPlayer and UKTV pay channels. (✂).

From this analysis, it is clear there is a distinct relationship between UKTV Pay channels and iPlayer for our customer base. This is not particularly surprising, given the significant BBC presence on UKTV channels, but we do believe that it means that UKTV linear viewers will spend more time watching iPlayer if it is loaded with archive content. Put another way, it will reduce the desirability and therefore the 'value' of the UKTV pay channels. We believe that the changes proposed would lead to a disproportionate impact on the Pay TV market as a whole, not just VMO2, as we assume other Pay TV platforms would see a similar relationship occurring.

Further analysis showed that many of the top viewed titles on UKTV also appear on iPlayer, with thirteen of the seventeen top 20 titles on Gold and seven of the sixteen top 20 titles on Eden currently available on iPlayer. However, the key point is that these are mainly single episodes, rather than box sets, so their diluting effect on Gold and Eden is relatively small. In order to consume more than single episodes of these programmes, viewers rely on UKTV channels, a situation that may significantly change if the BBC is allowed to load iPlayer with an unlimited archive library.

Having provided a baseline and established a clear link between UKTV and iPlayer audiences, we conducted further analysis on the changes to audience behaviour and our customer base since the 2019 changes. Since the BBC extended the archive window on iPlayer in 2019, its share-of-viewing growth has outpaced that of UKTV Pay Channels in VM homes. (✂). These changes suggest that, as the BBC has increased the window on iPlayer, it has had a direct impact in pay channels that predominantly hold similar BBC archive content. (✂).

Finally, we believe that the proposal from the BBC lacks clarity, specifically regarding the return of archive titles. The rationale behind new and returning titles appears to be clear although we hold concerns about giving the BBC free reign to release complete box sets onto iPlayer ahead of a series returning to linear TV. In explaining its reasoning, the BBC highlights how audiences consume content on other VOD platforms and how they are looking to replicate it, allowing viewers to "binge" on entire series ahead of a new release or dip in and out of series as they wish. However, this once

again appears to suggest that the BBC is looking to place iPlayer in direct competition with the commercial SVOD providers. Whilst we acknowledge that delivering value to consumers and remaining relevant are key factors in the BBC's delivery of its Mission and Public Purposes, it does not have a requirement to ensure that it can compete with commercial SVOD providers.

The PIT submission also references how other PSBs are developing their VOD platforms and evolving in the market. Whilst we understand this comparison, it fails to acknowledge that there is a distinct difference between the BBC and other PSBs and how they are able to distribute content. For example, BBC has the ability, via BBC Studios, to distribute and monetise content through the secondary market meaning archive content is available via Pay TV. Since the 2019 changes were made, the landscape around BBC Studios has changed significantly. Following the purchase of the stake previously owned by Discovery, UKTV is now solely owned by BBC Studios meaning it is uniquely positioned amongst PSBs to monetise archive content and receives significant renumeration from Pay TV platforms in order to carry UKTV channels. The remaining PSBs, on the other hand, have chosen alternatives routes regarding content and use their own VOD players to hold archive content, monetised via advertising revenue. It is therefore slightly misleading to directly compare iPlayer with other PSB VOD platforms.

Although we do not have an objection in principle to box sets of new and returning series being made available on iPlayer, we are concerned that allowing an unlimited number of these to be placed on the platform could have a significant impact on the secondary rights and therefore Pay TV markets. We believe that Ofcom must place some overarching protections in place to prevent this happening.

Regarding archive content, we note that the BBC is looking to remove the previous distinction between non-returning titles and archive content, essentially using an umbrella definition of archive content. We do not believe that this change in definition is helpful and are concerned that it is being used to obfuscate what the BBC is intending to do. We are concerned by the distinct change to iPlayer that is being proposed and the apparent move from a large, but limited, content library to an unlimited and largely uncontrolled one. It is this area that is of most concern to VMO2 and we believe that more clarity is required on the BBC's plans. The ability to "publish any titles on BBC iPlayer…" would seemingly allow the BBC to flood iPlayer with archive content, many of which can already be found on pay TV platforms. This has the potential to seriously and disproportionately impact the secondary market and we are deeply concerned by this. Therefore, we believe that Ofcom, as the regulator of the BBC, should put further protections in place to avoid this issue. The current caveat included in the proposal – "subject to our financial and operational constraints and in line with our agreements with producers and underlying rightsholders" – is not sufficient in order to avoid significant market impact and distortion.

CONCLUSION

Overall, we do not object to the BBC looking to evolve iPlayer and we do not wish to stand in the way of such development. We understand that audience behaviour is constantly evolving and how they consume content is ever changing. We believe the BBC should have the ability to be agile and fulfil its Mission and Public Purposes to reach as large an audience as possible, including younger audiences who are moving away from traditional linear TV broadcasting to consume content via VOD platforms. However, we remain concerned with the apparent desire to position iPlayer as a

platform in its own right, looking to compete with commercial SVOD providers. In our experience, the BBC has continually innovated in the face of changing consumer preferences – yet innovation can mean offering a service that is differentiated from that of the global media players, as much as it can mean competing directly. The BBC's Mission and Public Purposes should strongly inform the type of innovation the BBC invests in.

Moreover, the BBC must ensure that its actions do not harm competition – indeed the Charter and the Agreement contain provisions to protect against this. We are strongly of the view that the current proposals will lead to such harms.

As our analysis has shown, there has been an impact to the Pay TV market since the 2019 changes were made to iPlayer and we believe that the proposals in their current form have the potential to have even more significant impacts. Therefore, we believe that Ofcom should put protections in place in order to dilute any disproportionate impact to the Pay TV market as we believe the caveats currently proposed by the BBC are not sufficient to do so.

Taking the key elements of the proposal in turn, we believe that additional conditions should be added to what is being suggested by the BBC, along with putting an overarching protection in place. Regarding new and returning titles, if Ofcom is minded to remove the current caps and allow the release of full boxsets, we believe that this should come in conjunction with certain protections. As stated, we understand the reasoning behind releasing boxsets of returning titles allowing viewers to "catch-up" ahead of a new series broadcast on linear TV. However, we believe this should be restricted to those titles where a clear narrative arc is present. For example, if a show such as Peaky Blinders were to return, there may be justification for making previous series available but a long running programme, where each series is independent of the last, would still fall under the definition of a "new and returning" title. In this case, there is clearly not a narrative arc in place that would justify previous series being made available prior to the latest being broadcast on linear TV. Furthermore, we believe that Ofcom should restrict the number of previous series that can be made available in long running series, particularly those lacking such a narrative. Finally, for the avoidance of doubt, reboots and spin-offs should be excluded from the definition of "returning titles".

Regarding the new classification of archive titles, this is where our major concerns lie and where Ofcom should be looking to protect the secondary market. Firstly, we would look to Ofcom to establish PSB editorial guidelines for the inclusion of archive titles in the BBC iPlayer to demonstrate fit with the BBC's Mission and Public Purposes, rather than chasing popularity. Secondly, in relation to windowing, we believe Ofcom should look to remove or at least reduce the overlap between the BBC iPlayer and secondary window licensees. For example, secondary window licensee(s) should be granted first pick of archive titles via their relevant PLA(s); these titles should then be excluded as full series box sets from iPlayer, either altogether or for a minimum number of non-overlapping months per year of licence. We feel this would significantly reduce the disproportionate impact on the Pay TV market.

We believe the current proposal should be updated to include the necessary protection we have discussed above. We therefore believe that Ofcom should require the BBC to expand the condition applying to the inclusion of this content in iPlayer, as follows: *"Subject to our financial and operational constraints and in line with our agreements with producers and underlying rightsholders,*

and without adversely impacting the value to Pay TV platforms of the secondary commercial market, publish any titles on iPlayer."

VMO2 does not believe that the above protection should negatively impact iPlayer and would still allow the BBC to achieve its expressed aims within the original proposal.

Figure 1: Summary of proposals compared to 2019 BBC iPlayer Public Interest Test including VMO2 proposed additions (highlighted)

Category	Current Position – established in 2019	Proposal
Standard availability for all commissions (from first transmission of final episode)	Most titles – 12 months Children's – 5 years	No change
Past series of returning titles	Full series boxsets for: • Drama / scripted comedy – up to 50% titles (c.25 titles each year) • Children's – 100% (c.30 titles each year) • Other genres – c.25 titles each year	Subject to our financial and operational constraints and in line with our agreements with producers and underlying rightsholders, **and without adversely impacting the value to Pay TV platforms of the secondary commercial market,** publish any titles on BBC iPlayer. In particular, with reference to the 2019 Baseline, as of 2021, this would mean full-series boxsets for: • 100% of returning scripted comedy and drama titles (c.25 titles); • 100% of returning children's titles (c.39 titles, although no change to proportion • A number of full-series boxsets from other genres from a pool of c.230 returning titles. **• Limit increased flexibility in drama/scripted comedy and 'other' to titles with clear narrative arcs** **• Cap on the number of past series of returning titles made available, particularly where long-running and/or clear narrative arcs do not exist** **• For the avoidance of doubt, exclude reboots and spin-offs**
Single season (non-returning) titles	Titles extended for further 12 months: • Drama / scripted comedy – up to 50% titles (c.25 titles each year) • Children's – N/A • Other genres – c.100 titles each year	
Archive titles (i.e. no longer being commissioned)	Drama / scripted comedy – up to 35 titles available at any one time Children's – c.50 titles as full box sets at any one time Other genres – c.50 series Permanent From the Archive collection	

		from the definition of "returning titles" *• Establish PSB editorial guidelines for the inclusion of archive titles in the BBC iPlayer to demonstrate fit with the BBC's Mission and Public Purposes* *• Remove/reduce overlap between the BBC iPlayer and secondary window licensees.* Any other title beyond 12 months.
Acquisitions	Relatively small volume available for different periods on terms negotiated in market	No change

Further to the above protections, VMO2 believe that there should be an explicit monitoring requirement added, ensuring BBC adherence to the conditions, on an annual basis with Ofcom given the ability to act in the event that any finalised proposal is not adhered to. We are of the firm belief that such monitoring must go hand in hand with the conditions and not take place 'after the event' if issues were to arise.

CONSULTATION QUESTION RESPONSES

Please see below for our response to the specific questions in the Consultation.

Question 1: Do you agree with the BBC's assessment in the BBC PIT submission about the market impact of the Proposal? If you disagree, please provide any evidence supporting your reasoning.

VMO2 does not agree with the BBC's assessment about the market impact of the proposal. Specifically, we do not believe that the BBC has adequately assessed any potential impact to the Pay TV market. As shown above, we believe that the 2019 changes have had an impact on the market, and we believe the current proposal would further impact Pay TV providers if allowed to continue in its current form.

Question 2: Do you agree with Ofcom's initial assessment that the Proposal is not material? If you disagree, please provide any evidence supporting your reasoning.

VMO2 believes that the proposal would be material in relation to the Pay TV market. The 'broad brush' analysis presented by the BBC concludes that the impact on other VOD services overall is minimal (given the volume of them in existence, the way that they are used and the content that they contain). However, we do not believe that this argument necessarily holds at an individual platform level, particularly for Pay TV platforms. Rather, we believe that the Pay TV market, amongst others, would be disproportionately affected by this proposal in its current form.

Question 3: If you consider that the Proposal is material, please explain whether you consider Ofcom should undertake a BCA or a Shorter Assessment of the Proposal.

Whilst considering the proposal as material, we do not necessarily believe a full competition assessment is required. We believe that the inclusion of our proposed protections could avoid the need for a Competition Assessment. However, we are strongly of the view that the proposal should not continue in its current form.