

## **DISTRIBUTION OF BBC PUBLIC SERVICES**

### **Samsung Electronics (UK) Limited response to Ofcom's consultation**

13 February 2017

#### **1. Introduction**

1.1 Samsung Electronics (UK) Limited (**SEUK**) is one of the largest manufacturers and distributors of consumer electronics devices in the UK, including televisions, media players and smartphones. It is the largest distributor of Internet-connected televisions in the UK market. It welcomes the opportunity to comment on the issues raised in Ofcom's consultation on the distribution of BBC public services and in particular to put before Ofcom certain concerns about the balance between the need for the BBC to fulfil its public service objectives and the need to maintain fair and effective competition in markets where its activities may have some impact.

1.2 SEUK has a long relationship with the BBC with regard to distributing BBC's linear broadcasting and on-demand services, including the iPlayer service, on the Samsung Smart TV platform. Samsung recognises the valuable contribution that the BBC makes to the UK and to people's lives, both as citizens and consumers, but believes that the privileges that flow from that contribution should be proportionate and should not go beyond what is necessary and what the law allows.

1.3 Part of the BBC's mission is to make its public services widely available so that consumers can access them in a range of convenient and cost effective ways including those that may become available in the future. This should mean that easy and timely access to BBC's content and services should be and remain available across a wide range of media devices including televisions in particular, on which a significant amount of BBC content and services are still consumed and are likely to continue to do so in the future. Given the BBC's mission and its influence in the UK broadcasting and media markets, it is extremely important that the BBC should (among other

things) respond quickly and effectively to developments in television receiver technology and functionality in its dealings with manufacturers and distributors of televisions.

1.4 At the same time, BBC needs to ensure that its actions do not become anti-competitive and in particular do not harm the ability of others to compete effectively, including not only media service providers but also receiver manufacturers. Given the BBC's market power, its actions in the distribution of its services could have adverse impacts both on consumers and on competition in related markets. SEUK therefore welcomes Ofcom's examination of potential competition concerns and its proposal to address them by imposing *ex ante* requirements on the BBC to supply its public services on reasonable request and to do so on fair, reasonable and non-discriminatory terms (the **Requirements**).

## 2. **Two key areas of concern**

2.1 SEUK would like to take the opportunity to highlight to Ofcom two key areas of concern where the current regulatory arrangements in relation to the distribution of the BBC's public services can make it difficult for some UK consumers to access BBC content and services, particularly the iPlayer service on Samsung receivers, and can have adverse impacts on competition generally in the UK broadcasting and media markets. SEUK hopes that this will assist Ofcom in understanding these concerns and how they have arisen. It also hopes that, by describing certain features of the arrangements by which the BBC secures distribution of its services, and the market context of those arrangements, Ofcom will be able also to take SEUK's concerns into account both in assessing any risk to fair and effective competition and when designing the Requirements. This would help to ensure that UK consumers continue to benefit from the full range of BBC content and services and that the UK markets remain competitive in the future.

2.2 Part of the context for any such assessment is the advent and development of non-broadcast content on connected televisions. With connections to the internet, television users can now

access content that is available on IP-based on-demand platforms that span across multiple internet-connected devices such as televisions, media players, streaming devices, computers, laptops, smartphones and many others. The IP-based connected digital economy operates on a foundation of openness and offers a level playing field for all participants to create the most attractive content services for consumers. It leads participants to invest in the latest technical innovations and highest quality content to satisfy consumer demand. In this economy, as a result of limited regulation and intense competition, the ultimate winner and beneficiary is the UK consumer. It is important that competition in these digital markets should not be distorted. The BBC, however, has incentives and opportunities to seek privileges for itself in these markets that go beyond what statute permits others to do and to withhold access to its online services from distributors who decline to accord it those privileges, which could give rise to a serious risk of market distortion as well as harming consumers. That is one of SEUK's major concerns, as is explained more fully below.

### **3. The first key area of concern: the BBC Distribution Guidelines**

3.1 The BBC published the BBC Distribution Guidelines in 2016 to provide guidance to its distribution partners such as SEUK as to the terms on which the BBC makes its content available to them. The Guidelines were made pursuant to a Distribution Framework issued by the BBC Trust. The terms are no doubt intended to be fair, reasonable and non-discriminatory since among other things the Framework requires that, while seeking to pursue distribution opportunities, the BBC should ensure that it acts on a fair, reasonable and non-discriminatory basis when entering into any arrangement.<sup>1</sup> In practice, the BBC's implementation of these Guidelines leads to several potential issues for device manufacturers and, in turn, consumers.

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<sup>1</sup> Distribution Framework for BBC Services paragraph 9.

3.2 SEUK understands that the BBC needs to ensure its services maintain a certain level of prominence and quality of service in order to meet the expectations of the UK consumers and licence fee payers. However, SEUK believes that if the BBC were to focus solely on these objectives without understanding the broader context of UK consumers' expectations on when, where and how the BBC services should be accessible, the BBC would not only cause various device manufacturers to be disadvantaged and to become uncompetitive in the market due to lack of the BBC services on their platform, but also would fail to meet the expectations of UK consumers and licence fee payers who not unnaturally expect to gain access to facilities such as the BBC iPlayer service from the latest and most advanced connected televisions.

#### 4. **The second key area of concern: the BBC's role in the evolution of the UK Digital TV market**

4.1 Following the emergence of digital TV (**DTV**) technologies in the mid-1990s and the UK and wider EU political direction to migrate from analogue to digital TV, the UK DTV market emerged in the late 1990s. The UK DTV platform emerged initially as a mixed free/pay digital terrestrial TV (**DTT**) offering. Pay TV emerged on the vertically integrated satellite and cable platforms that became over time Sky and Virgin Media.

4.2 Following the commercial collapse of ITV Digital and its pay TV offering, the UK DTT platform was re-launched as Freeview, a primarily free to air offering that was sustained by a horizontal retail market of DTV receivers comprising STB, PVR and IDTVs sold through UK retail outlets.

4.3 A number of stakeholders emerged to support the new Freeview platform:

4.3.1 **Freeview:** DTV Services Ltd (**DTVS**), a not for profit joint venture between the BBC, ITV, Channel 4, Sky and transmitter operator Arqiva. DTVS owns the Freeview brand, including the Freeview logo, which it uses in its B2C marketing and promotion of the Freeview platform and in its B2B licensing of the Freeview logo to others including

customer equipment manufacturers and retailers primarily against requirements of technical compliance against the UK D-Book.

4.3.2 **Digital UK (DUK):** also a not for profit organisation and (apart from Sky) between the same parties, albeit in their capacity as holders of the DTT multiplex licences. DUK developed aspects of the technical specification for DTV, including the service information (SI) protocols. The Digital Tick initiative used to support consumers migrating from analogue to DTT was operated by DUK. It holds the licence for the DTT EPG and administers the allocation of channel numbers for it.

4.3.3 **Digital TV Group (DTG):** The DTG is an industry association that currently addresses a wide range of DTV and mobile related activities. It continues to support its original activity to develop and maintain the UK D-Book. The UK D-Book is developed by consensus of its membership and can be considered the specification for how DTT is broadcast in the UK. Compliance with the D-Book is the main requirement for a television or related product to be “Freeview Compliant”.

4.4 Until the emergence of Freeview Play, the UK DTT ecosystem can be considered to have supported a true horizontal market for DTT receivers in the UK. Any manufacturer could join the DTG and access the current version of the D-Book. Any manufacturer could also obtain a licence to use the Freeview logo and, by demonstrating compliance with D-Book through testing and certification, be eligible to sell Freeview branded products through UK retail outlets.

4.5 The BBC takes a leading role in both DUK and Freeview, and is a shareholder of both organisations. The BBC has a director on the DTG board and is a Council Member and active contributor to the work of the DTG. It is apparent that the BBC has significant influence in the management and development of the UK DTT Platform.

#### **Verticalisation of the UK DTV market by the BBC**

4.6 Beyond the original satellite and cable Pay TV platforms, nowadays Sky and Virgin, BBC has also been an active player in creating new DTV platforms.

4.7 The new platforms are nominally built on the back of the BBC's remit of providing free TV to UK license fee payers but the platforms have increasingly moved away from the horizontal, Freeview, market model to increasingly vertical market models where more and more control is exerted by the platform. And none of the platforms are independent: they are all joint ventures among different combinations of broadcasters, thereby reducing competition and increasing their market power.

### **FreeSat**

4.8 FreeSat is jointly owned by the BBC and ITV through Freesat (UK) Limited, a joint venture. It emerged from a need to provide free to air satellite TV to UK licence fee payers who lived in areas not covered by DTT transmissions after analogue switch off.

4.9 Whilst the BBC had initially offered its services over the Sky DTH platform, protected by Sky's conditional access system (CA) on a free to view basis via a special "White Smart Card from Sky", the BBC chose to leave the protection of Sky CA and migrate its services to a different satellite with a narrower beam focused on the UK. This new free to air service emerged as FreeSat.

4.10 Nowadays the FreeSat platform contains more or less the same service bouquet as Freeview, delivered over satellite and marketed by FreeSat as a competing platform to Freeview.

4.11 Whilst FreeSat used DTG to develop some of its technical specifications and associated test suites for FreeSat receivers, FreeSat chose to move from the cross industry/consensus based model to develop the Freeview Specification to a more vertical model where the specification is under sole control of the FreeSat company. Customer equipment (CE) companies wishing to implement

FreeSat in their television receivers now have to obtain the specification under an NDA/MoU from FreeSat (UK) Ltd.

4.12 Further, whilst the FreeSat satellite transmissions are free to air (**FTA**), in the clear, the metadata for the FreeSat EPG is compressed by Huffman Coding, the look-up table for which is only available under licence from FreeSat (UK) Ltd.

4.13 Whilst the first generation FreeSat Specification used a lightweight DVB profile, with MHEG-5, to receive the service (G1 Platform), FreeSat went on to develop a 2<sup>nd</sup> generation FreeSat platform known as Freetime. Freetime is available only under commercial licence from FreeSat (UK) Limited and there is a per device licence fee payable to implement it.

4.14 It is clear in the case of FreeSat that BBC has significant part to play in the control of this “vertical” platform.

4.15 Whilst it remains possible for CE manufacturers to independently implement a FTA satellite receiver that can receive FreeSat, the Huffman Licence required to descramble the EPG metadata greatly affects the receiver’s ability to provide a good experience to the consumer.

4.16 In summary in relation to FreeSat:

4.16.1 To implement a FreeSat G1 receiver, it is necessary for a CE manufacturer to enter into a commercial agreement with FreeSat (UK) Ltd to access the specifications and Huffman Tables.

4.16.2 Furthermore FreeSat (UK) Ltd requires a right to review/inspect aspects of each TV, including the user interface, before granting approval for the manufacturer to launch FreeSat branded product for sale in the UK.

4.16.3 Access to the 2<sup>nd</sup> generation Freetime specification and product certification by FreeSat (UK) Ltd is largely similar to the G1 Spec above. There is, however, a per device fee payable to FreeSat for a manufacturer to implement a Freetime product.

### **Youview**

4.17 Youview is another UK DTV Platform. It is operated by Youview TV Limited, a non-profit consortium of UK telcos and broadcasters. (BT Group, TalkTalk Group, Arqiva, BBC, ITV, Channel 4, Channel 5). The Youview platform is a hybrid platform including access to UK DTT FTA TV with additional access to IPTV services.

4.18 Again the BBC is a leading shareholder in another UK DTV platform that is nominally competing with Freeview and FreeSat.

4.19 The operation of Youview is a true vertical market operation from the CE manufacturer's perspective. Whilst elements of the Youview specification are public, they are not sufficient to implement a Youview product.

4.20 To implement a Youview product the CE manufacturer must:

4.20.1 enter into a commercial agreement with Youview to access the specification to build the product;

4.20.2 implement the same user interface as all other Youview receivers;

4.20.3 submit prototype receivers for review and approval by Youview prior to launch; and

4.20.4 pay a per device fee to Youview to access the service/use the specifications.

4.21 It is impossible for a CE manufacturer to produce Youview products without a commercial agreement, product certification and per device payment to Youview.



## Verticalisation of Freeview

- 4.22 In 2015 the Freeview stakeholders, DTVS and DUK, launched the latest evolution of the UK DTT platform: Freeview Play. Similar to previous evolutions of Freeview, Freeview Play builds on top of what has gone before. Indeed Freeview Play references/requires the UK D-Book as its foundation.
- 4.23 The Freeview stakeholders, however, have made significant departures from the previous Freeview models which have had the effect of “verticalisation” of the Freeview Play platform.
- 4.24 The bulk of the Freeview Play specification is no longer developed by industry consensus in the DTG. Although it references the D-Book, the extended Freeview Play specification is developed privately by the DUK and its shareholders without industry consultation.
- 4.25 In order to build a Freeview Play product, CE manufacturers now have to enter into a commercial agreement with DUK to access the Freeview Play specifications. DUK’s commercial agreement for Freeview Play is very demanding and includes such elements as:
- 4.25.1 DUK’s right to review and approve an early prototype of the user interface
  - 4.25.2 a right for DUK and its shareholders to require prominence for their players (iPlayer, ITV Hub) over other applications that may be present in the receiver
  - 4.25.3 payment of a per device fee to access the IP metadata server to support the Freeview Play element of the Freeview EPG
- 4.26 It is impossible for a manufacturer to produce Freeview Play product without a commercial agreement with DUK, product certification and per device fee payment to DUK.
- 4.27 This represents a dramatic move from the horizontal market that has been the basis of the success of FTA DTT in the UK through Freeview. The emerging Freeview Play market represents a transition

of Freeview to a vertical market where the relevant broadcasters, acting together in concert through DUK, are in a position to and do insist on full control of all receivers entering the market.

#### **BBC's role in the evolution of the UK DTV market**

- 4.28 It is clear that BBC is playing a leading role in the development of a number of UK DTV Platforms that are increasingly moving away from the original horizontal, FTA market, that was Freeview.
- 4.29 The BBC's participation in the development and operation of these platforms in competition with commercial offerings, be they for broadcast services such as Sky and Virgin Media or IP/on-demand services such as Netflix or Amazon, and the trend towards verticalisation create opportunities for the BBC to use its market power in new ways to advance its interests. In doing so, it may have adverse impacts on free and effective competition in a number of markets, including in particular the stifling of innovation in receiver design, not to mention consumer frustration at not being able to access BBC services or facilities such as Freeview Play on the latest Samsung receivers.
- 4.30 If the BBC is to be (or remain) in a position, either directly or via the joint venture companies in which it participates as described above, to specify, certify and effectively police and control which TV receivers can enter the UK market, the need for a robust regulatory regime appears self-evident. The BBC Trust's requirement that there be a clear and strong justification for any decision to withhold or withdraw content from distribution<sup>2</sup> has not been sufficient in practice and Ofcom's proposal that the BBC should be obliged to supply its public services upon reasonable request is therefore a welcome starting point.<sup>3</sup>

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<sup>2</sup> Distribution Framework paragraph 11.

<sup>3</sup> Ofcom condoc paragraph 3.29.

- 4.31 If, as DUK and Freeview have openly stated, the UK market makes a full transition to Freeview Play and it becomes the new Freeview, it will not be possible for a consumer electronics manufacturer to produce a television for the UK retail market that does not:
- 4.31.1 fall under the umbrella of a commercial agreement with one of the platforms supported by BBC (Freeview Play, FreeSat, Youview)
  - 4.31.2 have its user interface “approved” by said platform
  - 4.31.3 have iPlayer etc. positioned with “prominence” over other applications on the device
  - 4.31.4 require payment of a per device fee payable by the manufacturer to the platform.
- 4.32 This will represent a final transition of the UK TV market from the horizontal structure on which the success of Freeview was built on to an exclusively vertical model where the BBC has a central role through its membership/shareholding of the various platforms it has set up to access its services and where the market power of the PSBs is concentrated in joint ventures.
- 4.33 In those circumstances, the incentives for the BBC, either alone or with other PSBs, to gain an advantage over commercial operators and the opportunities to do so through the effective control of the user interface in the design and development of television receivers would be very great. Ofcom’s proposal that the Requirement should require the BBC to offer its public services on reasonable request and should stipulate that the terms on which the BBC makes them available should be fair, reasonable and non-discriminatory is therefore welcome. SEUK does, however, suggest that the Requirement should be adapted to ensure that it covers action by the BBC through its joint ventures as described above and also extends not just to the provision of its public services but also to the provision of such rights, services and facilities that manufacturers such as Samsung require to make the televisions that users need to receive the services.

## 5. Conclusions

5.1 SEUK has two key areas of concern with respect to the current regulatory arrangements in relation to the distribution of the BBC's public services:

5.1.1 one is the current structure whereby responsibility for maintaining fair and effective competition and for setting the commercial terms for Samsung to have access to the BBC services and facilities that it needs in designing and manufacturing its televisions is located in-house within the BBC; and

5.1.2 the other is the trend towards vertical integration among the PSBs in their delivery of their services by means of the various distribution platforms discussed above and the concentration of market power in the joint ventures that facilitate that trend.

5.2 The current arrangements and their implementation can have adverse effects on both competition and the BBC's mission to make its public services widely accessible in a range of convenient and cost effective ways. In particular:

5.2.1 if Samsung has to discriminate in favour of the BBC by giving greater prominence to the BBC's services than to those of other broadcasters then, as well as compromising the public service objectives of the other PSBs, distortions are likely to arise in a number of markets, including the retail market in which Samsung sells its televisions;

5.2.2 discrimination of this kind may also compromise innovation in television set design;

5.2.3 as Ofcom itself has anticipated, the BBC's terms of supply are the central question in any disagreement about distribution;<sup>4</sup> without timely agreement on the terms, innovations such as the iPlayer app could be excluded from leading new Samsung

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<sup>4</sup> Consultation document paragraph 3.30.

models, disadvantaging Samsung in the market and consumers and frustrating the BBC's mission as to accessibility;

5.2.4 disagreements over the terms of supply may also involve Samsung incurring additional costs (which it may be forced to pass on to consumers), such as by having to provide customers with old or specific technology when innovation has moved on in ways that are inconsistent with those terms;

5.2.5 the trend towards both vertical integration and combinations of PSBs in platform joint ventures leads to concentrations of market power that could have adverse impacts on other market players and consumers; and

5.2.6 in the event of difficulties, other market players are largely dependent on *ex post* remedies that are slow and expensive.

5.3 In these circumstances, SEUK welcomes Ofcom's proposal to set both must-offer requirements on the BBC and a duty to deal with manufacturers such as Samsung on fair, reasonable and non-discriminatory terms. By imposing *ex ante* conditions of this kind on the BBC, Ofcom would be able to perform the role of an independent umpire in holding the balance between public service objectives and the preservation of effective competition and, subject to the BBC's complaints procedures, provide more rapid and efficient solutions than are available at present.