



## Non-Confidential

### Virgin Media's response to Ofcom's consultation on the Distribution of BBC Public Services

Virgin Media welcomes the opportunity to respond to Ofcom's consultation on the Distribution of the BBC's Public Services ('the **Consultation**') and its proposed Distribution Framework ('the **Framework**'). The distribution of BBC services lies at the heart of the compact between: (i) the BBC and licence fee payers; namely, how does the BBC ensure that viewers are able to access BBC content that they have paid for with the licence fee; and (ii) the BBC and industry to ensure that licence-fee payers are able to directly access content through third party platforms.

Ofcom rightly identifies that the manner in which the BBC distributes its services can have a significant impact on competition in the market<sup>1</sup>. The BBC is required under the Charter to '*have particular regard to the effects of its activities on competition in the United Kingdom*'. In particular, this requires the BBC to '*seek to avoid adverse impacts on competition*' and rather '*have regard to promoting positive impacts on the wider market*'<sup>2</sup>. This is reflected in the Agreement which requires the BBC in carrying out its obligation to make the UK Public Services 'widely available' the BBC must not '*adversely impact fair and effective competition and be fair, reasonable and non-discriminatory*'<sup>3</sup>.

The Charter requires that the BBC must '*show the most creative, highest quality and distinctive output and services....in many different genres and across a range of services and platforms..*'<sup>4</sup> To ensure viewers gain access to this content the BBC Agreement requires 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. These could include (for example) broadcasting, streaming or making content available on demand, whether by terrestrial, satellite, cable or broadband networks (fixed or wireless) or via the internet*'<sup>5</sup>.

In Virgin Media's view, the manner in which the BBC disseminates its content is also central to the BBC's new Partnership requirements set out in the Royal Charter to '*work collaboratively and seek to enter into partnerships with other organisations, particularly in the creative economy, where to do so would be in the public interest*'<sup>6</sup>.

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<sup>1</sup> Para 1.3, Consultation

<sup>2</sup> Article 11, Charter

<sup>3</sup> Clause 61(3), Agreement

<sup>4</sup> Article 6, Charter

<sup>5</sup> Clause 61, Agreement

<sup>6</sup> Article 13, Charter

These requirements dovetail: the BBC should be seeking to maximise the opportunities it has to make its digital content and services widely available on a range of digital platforms and devices; this ensures that competition in the market is not distorted and that it acts as a collaborative partner. The converse is also true, restrictive distribution of BBC content will undermine the creative economy; negatively impact fair and effective competition and damage the BBC's relationship with industry and the licence-fee payer.

It is paramount that the Framework ensures that platforms have clarity and consistency on what content they will receive from the BBC. The BBC's content is 'must have' for all platforms and TV devices within the UK: over 98% of Cable households have watched a BBC channel in the last 12 months. The BBC should be working proactively and positively with platforms, such as Virgin Media, which has invested more than £13bn in developing and delivering a superior, market-leading ultrafast broadband network. Virgin Media's current £3bn investment in its network, 'Project Lightning', is underway across the UK. The expansion of the cable footprint will ensure ultrafast broadband to meet consumers' demand for bandwidth-hungry content, optimised for video quality viewing to customers' TV sets. In return, Virgin Media has been fully supportive of a licence fee funded BBC producing a wide range of content. We would like to enter into a long-term relationship with the BBC which ensures flexibility for licence fee payers in how they choose to access BBC content and where the BBC is a true partner and a stimulant for innovation within the market.

Any review of the BBC must recognise that, as a result of its public funding, it is able to produce content the market may otherwise not, and it is through the mechanism of widespread distribution of that content, to licence fee payers and in a platform-neutral manner, that the BBC is best able to deliver its core remit and mission. The BBC has the ability to influence the desirability (and viability) of alternative platforms. A level-playing field and FRAND distribution requires that the BBC enables innovation by allowing all platforms to innovate and develop functionality. The BBC cannot develop its services just for platforms where it has an ownership stake or for its own managed platform. These platforms are important but it must also support competing platforms such as Virgin Media. It is therefore vital to ensure widespread distribution of BBC content - given its 'must have' status.

To date, the BBC has not been a true partner. To be effective Ofcom's Framework needs to ensure a change in behaviour such that the BBC sees other platforms as a crucial link to allow the BBC to fulfil its distribution remit. Whilst inevitably such change in behaviour will happen through the complaints mechanisms and the outcome of any disputes, relying exclusively on this route will be cumbersome, inefficient and time consuming. Ofcom therefore needs to ensure that the Framework is sufficiently robust at the outset both in terms of the policy and also in its application. This will not only provide certainty for industry and the BBC but also reduce the potential for complaints in the first place.

## **Specific Comments on Ofcom's Distribution Framework**

### ***Regulatory oversight of the BBC***

Whilst we welcome the requirement set out in the Consultation that the BBC '*must offer the public services to third parties in response to reasonable requests for supply, except where the BBC has an*

*objective justification for not doing so*<sup>7</sup>, we remain concerned that without sufficiently defined boundaries in the Framework this could allow far too much scope for the BBC to refuse to syndicate its content.

The BBC Trust, whilst it has implemented better processes and oversight than under the previous governance arrangement, has not been sufficiently effective to regulate the BBC. A clear example of this is the BBC Trust's Distribution Framework (which remains in force until Ofcom takes over regulation of the BBC on 3<sup>rd</sup> April 2017)<sup>8</sup>. Virgin Media provided weighty comments on the draft Distribution Framework and the Trust adopted many of Virgin Media's suggestions as a way to balance the interests of the platforms vis-a-vis content providers. However, the BBC Guidelines (which were only published 12 months after the Distribution Framework came into force<sup>9</sup>) have departed significantly from the content of the detailed discussions the BBC Trust had with industry to create a fair Distribution Framework. For example, the Trust's Distribution Framework requires prominence should be *'in line with audience expectations, such that they can be easily found and discovered through means such as the Electronic Programme Guide (EPG), home page, search tools and other means which encourage access to, and consumption of, BBC Content'*. This is reasonable and provides a high level policy statement that prominence is to be judged by way of audience expectations so that they can find BBC content easily. The Guidance issued by the BBC departs significantly from the intentions of the Trust and sets out in granular detail the BBC's requirements for: prominence across all services and platforms, both in absolute terms and relative to other providers; the nature of search algorithms; the prominence given overall to broadcast channels; the requirement for the BBC to be *'among the most prominent providers of on-demand TV content, or Radio content'* and that free content should always be listed ahead of content which requires incremental payment where multiple episodes, series or titles are offered. The list is highly subjective and open to the BBC's interpretation and extends far beyond what Virgin Media considers the average consumer would consider in line with their expectations, especially where those consumers have chosen to purchase Pay TV and therefore would want to see content they had paid for also promoted.

The BBC's current Guidance (which we recommend should be thoroughly reviewed and revised by the new BBC board) allows far too much scope for the BBC to refuse to syndicate its content and fails to take into account any costs incurred by third parties to carry this 'must have content'. It places the BBC as the gatekeeper over its content and quasi-regulator of key issues such as data sharing, accessibility, EPG prominence and search and discoverability of BBC content. It is not the role of the BBC to be the gatekeeper but rather to ensure its content is widely disseminated. We consider that the current Guidance contradicts the requirement in the Agreement that the BBC distribution strategy and policy must only include *'reasonable conditions under which the BBC will make its output and services available to third parties, for example in order to secure appropriate*

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<sup>7</sup> 3.31, Consultation

<sup>8</sup> [http://www.bbc.co.uk/bbctrust/news/press\\_releases/2015/bbc\\_distribution\\_framework](http://www.bbc.co.uk/bbctrust/news/press_releases/2015/bbc_distribution_framework)

<sup>9</sup> [http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/policiesandguidelines/pdf/BB\\_C\\_Distribution\\_Guidelines2016.pdf](http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/policiesandguidelines/pdf/BB_C_Distribution_Guidelines2016.pdf)

*prominence, attribution, quality and value for money*<sup>10</sup> (emphasis added). We consider that one of the first steps the new BBC Board should undertake is to review the current Guidelines.

Whilst we are supportive of the BBC being afforded prominence in the linear EPG, and we adopt a similar approach in relation to the iPlayer in the Apps section of the user interface, consumers do not expect, and the BBC should not require licence fee payers, to be immersed in BBC content. The BBC already has far greater opportunities than any other broadcaster to promote its content to viewers due to the existing prominence rules for linear TV. The BBC also has an unrivalled amount of radio hours, web pages and TV shows to promote their content to viewers. It should not be mandating further immersion in BBC content on other platforms. Consumers should be allowed to use platform functionality to be able to view and search for content which suits their individual tastes. The BBC's current strategy will not secure universality and will harm consumers, platforms and competing broadcasters and ultimately the BBC.

Our point is that regulatory oversight needs to be sufficiently granular to be able to alter the BBC's behaviour to ensure it is operating in an environment where it understands the clear regulatory parameters and does not seek to fill any void with its own view of what conditions it can impose on distribution. This will lead to the BBC having a preference for arbitrage and to wait for the outcome of any dispute raised to Ofcom. Ofcom needs to therefore set defined and strict parameters in which the BBC can operate. Failing to do so could result in the same issues we have seen in relation to the BBC Trust.

### ***Innovation***

The Charter requires the BBC to '*promote technological innovation*', to '*seek to work in partnership with other organisation*' and '*share, as far as is reasonable, its research and development knowledge and technologies*'<sup>11</sup>. Virgin Media agrees with Ofcom's statement in the Consultation that '*the BBC's position, and the importance of its content, gives it the potential to act as a catalyst for innovation and development in the media sector*'<sup>12</sup>.

The BBC should recognise that it operates in a broad ecosystem and interconnected supply chain. The BBC is reliant on the investment Virgin Media makes in its network as this enables a high quality experience when consuming content, thereby enabling the BBC to fulfil its remit. A successful and efficient broadcast landscape with high speed and high capacity distribution platforms is vital to the UK culturally, educationally and economically. We therefore fully support Ofcom's requirement that the BBC must offer the public services to third parties in response to reasonable requests to supply and it must also have an objective justification for not doing so<sup>13</sup>. We think it should be made explicit in the Framework that the starting presumption is that the BBC must distribute its content. Only in circumstances where there is a very good objective justification should this override the general obligation.

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<sup>10</sup> Clause 62(2), Agreement

<sup>11</sup> Article 15, Charter

<sup>12</sup> Para 3.5, Consultation

<sup>13</sup> Para 3.31, Consultation

Unfortunately, Virgin Media has found that rather than seeking out partners to profile the benefits of a connected entertainment experience, the BBC has been reluctant, and in some cases has refused, to support any enhanced functionality provided by Virgin Media's connected TV technology. For example, the BBC objected to the inclusion of the BBC channels fully integrated into the Virgin Media TV Anywhere App. [X] There is also no easy return path for the consumer to return to other content available to them on the Virgin Media service. The BBC should seek to encourage new forms of distribution by permitting its content on third-party multi-screen applications, rather than trying to steer consumer demand to its one preferred delivery mechanism or environment. These sentiments are echoed by the wider industry. Where licence fee payers derive value from different methods of distribution, the BBC should be obligated to provide a full bundle of its services, and not be able to arbitrarily decide, for example, that its linear channels cannot be distributed via third party applications, or insist on complete customer immersion within the iPlayer.

Competition and innovation occurs where platforms are able to compete and offer enhanced and innovative services to licence fee payers. The ability of platforms, such as Virgin Media, to provide a competitive television service to licence fee payers is premised on offering access to the full range of BBC content across our multiscreen offering – this is what licence fee payers desire. For example, Virgin Media received complaints from customers when we launched the Virgin Media TV Anywhere App without BBC content.

There is no need for the BBC to be the sole distributor of its content or for the BBC to place unnecessary restrictions on distribution. Not all consumers wish to view BBC content solely through the iPlayer. The BBC should make it as easy as possible for platforms to distribute its content to licence fee payers; it is what consumers want, and it enables a competitive and innovative market for platforms, aggregators, and device manufacturers.

### ***Enforcement Procedures***

We note that in paragraph 4.3 of the Framework Ofcom reflects the requirements of Agreement (Clause 56(4)) such that if there is a disagreement with the BBC about distribution, the platform should first take its complaint to the BBC. Although we would hope that the majority of disputes can be resolved without recourse to Ofcom, we remain concerned, particularly where BBC content could be withdrawn from consumers or the BBC delays distribution of content to a new service, that there is no 'fast-track' appeals process mentioned in the Framework if a complaint needs to be dealt with urgently. We note that there is an exceptional fast track procedure allowed for in the Agreement (Clause 57(2)) and the Framework needs to reflect this. We think it is vital that in extremely urgent cases Ofcom is able to review a complaint without recourse first to the BBC.

### ***Submissions from the BBC and the complainant***

We welcome Ofcom's statement that it is appropriate that the onus should be on the BBC to demonstrate why it should not make public services available on the basis requested or that the conditions of supply are fair, reasonable and non-discriminatory<sup>14</sup>. This fairly reflects the fact that as BBC's content is 'must have' the onus rightfully should be on the BBC to justify why it is restricting

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<sup>14</sup> Para 4.6, Consultation

distribution of its content. This requirement accurately reflects the Agreement such that the obligation is on the BBC that it ‘*must do all that is reasonably practicable*’ to ensure its content is widely available<sup>15</sup>.

### ***Ofcom’s analysis of a complaint***

Ofcom states that ‘*[a]s the focus of Ofcom’s role in this area is the protection of competition....[w]e are unlikely to intervene unless a material effect on competition can be identified*’<sup>16</sup>. We consider Ofcom’s role in relation to BBC distribution of its content to be broader than just protecting competition. It also has to ensure that the BBC meets its duties and obligations under the Charter and Agreement. For example, the BBC may decide to refuse to syndicate its content (or make it extremely difficult to comply with relevant pre-conditions) to a platform’s new device. Although this should merit consideration of whether the BBC has met its obligations under the Agreement and whether the conditions imposed on distribution are reasonable, it may not have a material impact on competition as the new device may not have a large number of subscribers and it may be unclear to what extent this is likely to stifle innovation. Distribution is at the heart of the BBC’s mission and it is important that Ofcom considers the impact of the BBC’s distribution arrangements not only under a narrow prism of competition but also in terms of the BBC’s compact with licence fee payers – the BBC can harm consumers without necessarily substantially undermining competition.

### ***Platform compatibility***

We note the requirements regarding different platforms technical capabilities and the impact this may have on their ability to carry the BBC’s public services. We welcome Ofcom’s statement that it will consider whether:

- the BBC is discriminating between platforms; i.e. by not providing services on comparable terms (Para 4.11.1);
- the complainant has technology capable of supporting the public services or whether the BBC would need to provide a degree of customisation (Para 4.11.2);
- the BBC has supplied another platform with a similar level of modification (Para 4.11.3).

We fully agree that the BBC should ensure that its content is made available on comparable terms (i.e. on a FRAND basis). However, we would not want to see the FRAND principle used to justify restricted distribution of BBC content. The BBC should be working with platforms who offer innovative functionality to its subscribers/licence fee payers. For example, we also think Ofcom should consider as part of the Framework the benefit to licence-fee payers of any customisation. Virgin Media was the first platform to work with the BBC to include iPlayer content to its Liberate subscribers and we would not want to see innovations such as this restricted on the basis of a misapplication of the FRAND principle, i.e. lowest common denominator. We understand in such scenarios where there is a direct benefit to a platform for a customised approach that this operator may be required to agree reasonable commercial terms for the development of such functionality for the benefit of its users.

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<sup>15</sup> Clause 61, Agreement

<sup>16</sup> Para 4.7, Consultation

### **Editorial control**

Whilst we fully support the BBC being able to ensure it retains sufficient rights and controls to be able to adhere to legal and compliance requirements<sup>17</sup>, we have found that the BBC has used ‘legal concerns’ to restrict developments. For example, in relation copyright the law is complex, multi-jurisdictional and many areas have not been tested within the legal system. Innovation is, however, happening around the existing copyright exemptions which have not been updated in the UK in some cases for decades. For example, consumers already benefit from the ability to download digital content, to copy files from physical materials (such as CDs) to electronic devices such as personal computers and iPads and the ability to record television programmes to the hard drive of personal video recorders (PVRs). These practices are now well established in the UK marketplace and the digital revolution has moved into phase two. Phase two practices, such as the ability to stream audio-visual content and access cloud-based lockers (including network PVR) on multiple devices via widely available and location-agnostic wi-fi connectivity, have the potential to offer UK consumers even more flexibility and portability in relation to their use of content. [X]

### **Curation of the public services**

Whilst we understand that the BBC will want to ensure appropriate curation of its content to enable viewers to seek out other BBC content, Ofcom needs to set out clearly the restrictions on the level of control the BBC can impose. The BBC should not be able to dictate platform functionality such as search and recommendation or the look and feel of the EPG. [X]. We consider that we have fulfilled Ofcom’s consideration under the Framework of whether there have been ‘*alternative ways to present and promote the public services that the might be proposed by the complainant would be likely to achieve the BBC’s objectives*’<sup>18</sup>,

### **Market norms**

We welcome Ofcom’s requirement that in considering a complaint Ofcom will consider ‘*[t]he extent to which the positions adopted by the BBC and the complainant are in line with standard industry practice*’<sup>19</sup>. For example, in relation to editorial control and the level of BBC sign-off required, we expect that Ofcom will assess the BBC’s behaviour in relation to what other PSBs require where brand attribution is important. We also welcome that Ofcom will consider, in assessing the market norm, the nature of competition in the market between different platforms and how this impacts on consumer expectations. We refer Ofcom to a report by Fingleton Associates into the workings of the BBC Trust Fair Trading Policy which stated that: ‘*[t]he Executive sees the BBC as a small player in an increasingly global marketplace, which may result in it underestimating its impact in some of the domestic markets in which it operates*’<sup>20</sup>. Virgin Media would like to see the BBC required in its distribution arrangements to consider the impact of such arrangements in UK domestic markets.

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<sup>17</sup> Para 4.16, Consultation

<sup>18</sup> Para 4.17.2, Consultation

<sup>19</sup> Para 4.19.1, Consultation

<sup>20</sup> Pg 4, Fingleton Associates, ‘*Fair Trading Policy Review*’ [April 2015]

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