SKY RESPONSE TO THE BBC CONSULTATION ON THE DRAFT BBC DISTRIBUTION POLICY

EXECUTIVE SUMMARY

1. The regulatory framework created by the Royal Charter and the Framework Agreement requires the BBC to make its public service content "widely available", doing "all that is reasonably practicable" to ensure viewers can access that content "in a range of convenient and cost effective ways". The Distribution Policy must set out how the BBC will fulfil this obligation, whilst only imposing reasonable conditions on third parties, and ensuring that the BBC acts in a fair, reasonable and non-discriminatory manner. The policy must also ensure that the BBC makes its content available outside of the BBC's own services (such as the BBC iPlayer), unless it can justify such a limitation as being in the public interest and reasonable. The Draft Distribution Policy fails to meet these basic requirements.

2. The BBC's Draft Distribution Policy is fundamentally flawed for the following reasons:

   a. The BBC's 'conditions' are unreasonably vague and fail to specify with any certainty the terms and conditions by which the BBC will grant access to BBC content and services. Astoundingly, the Draft Policy contains materially less guidance for third parties than the current Distribution Guidelines published shortly before the new Charter came into force;

   b. The Draft Distribution Policy is wholly inadequate as a means of enabling third parties to assess the reasonableness of the BBC's terms and the likelihood of securing supply; and

   c. This lack of transparency leads to tortuous and inconclusive negotiations between the BBC and any third party as to how the BBC's content may be made available, allowing the BBC to act as 'gatekeeper' across all platforms with BBC content, not just those in which it has an ownership interest.

3. As a result of these failings, the Draft Policy creates significant uncertainty which results in adverse consequences for platforms and services, for innovation and for Licence Fee payers.

4. Sky does not expect the BBC to set out in complete detail the finite conditions that it will impose on third party platforms and service providers in return for access to its content. However, the discretion the BBC affords itself in the Draft Policy is excessive, fails to meet the requirements of the Charter and the Framework Agreement, and is not in the public interest.

5. The BBC must provide significantly greater transparency as to what it will or will not require of third parties, including when it will permit bespoke arrangements, such as that on Sky's platform, which is highly valued by millions of Licence Fee payers who choose to access the BBC's content via its Sky+ HD and Sky Q platforms and provides significant incremental viewing to the BBC.

6. In marked contrast to its dealings with every other major broadcaster, with whom Sky has successfully concluded agreements to distribute content across its services in their entirety; Sky has been in negotiations with the BBC for access to its content for over two years. In part
this is as a result of the lack of certainty over the BBC’s position. In order to avoid such inefficient processes, the BBC should develop a procedure for dealing with access requests that would provide certainty for third parties that their requests will be dealt with in a timely and reasoned manner, speeding up access for Licence Fee payers.

7. Finally, the Draft Policy gives effect to the BBC's Distribution Strategy, which is to prefer the BBC iPlayer app over bespoke applications such as Sky's integrated service. In light of the presumption of supply outside of the BBC's own services, the Strategy contains insufficient justification for the BBC’s 'iPlayer-first' strategy. Sky has presented the BBC with extensive evidence of how Sky's customers value accessing BBC content via its integrated service, and the BBC Policy should acknowledge the benefits of platform differentiation and innovation in delivering the BBC’s Mission and Public Purposes.

8. Accordingly, the BBC should re-consult on a revised Draft Policy, including a re-published and properly evidenced Distribution Strategy, which:
   a. Describes in greater detail the reasonable conditions that the BBC will require for access to BBC public service content, including for bespoke solutions;
   b. Sets out a process by which the BBC will consider requests for access, with clear timelines for the BBC to provide reasoned responses to third parties;
   c. Ensures that the BBC can only limit the distribution of its output and services to third parties via the BBC’s own services where this is reasonable and in the public interest; and
   d. Provides clarity as to how disputes should be resolved.

9. In practice, however, the Distribution Strategy and Policy are simply statements of intent, approved by the BBC Board. Ofcom's Distribution Requirements represent clear and free-standing obligations on the BBC to meet reasonable requests for supply, on fair, reasonable and non-discriminatory bases, enforceable by the independent regulator. If the BBC chooses not to elaborate further on how it intends to interpret its obligations, it merely increases the likelihood of Ofcom determining these issues by settling disputes.
SKY RESPONSE TO THE BBC CONSULTATION ON THE DRAFT BBC DISTRIBUTION POLICY

SECTION 1: INTRODUCTION

1.1 The BBC has published its Distribution Strategy (“the Strategy”) and a draft Distribution Policy (“the Draft Policy”). The BBC is seeking feedback on the Draft Policy, which it says “will govern how its services are made available to the public to watch, listen or use, including the conditions it sets for distribution via third parties.” The BBC states that the Strategy “sets out the BBC’s distribution objectives and is provided as context to the consultation” and is not, according to the BBC, within the scope of the BBC’s consultation.

1.2 The Draft Policy mainly describes the seven conditions according to which the BBC will distribute the UK Public Services, as well as the circumstances in which the BBC will withdraw supply of its content and services.

1.3 The Strategy seeks to provide background and justification for the Draft Policy, and sets out for the first time the BBC’s ‘distribution objectives’. Throughout the document, the BBC attempts to justify its preferred strategy of making its on-demand audio-visual content available through the BBC iPlayer app (“the iPlayer app”) which then finds its expression in the Draft Policy. As such, and notwithstanding the BBC’s assertions to the contrary, the Strategy forms an integral part of the Draft Policy and must be considered at the same time. To do otherwise undermines the consultation whose purpose is to provide feedback on how the BBC makes its content and services available. The fact that the BBC has chosen to put the justification for its approach in a separate document should not prevent stakeholders from commenting, nor should it remove the need for the BBC to consider feedback on its strategy and make changes based on that feedback.

1.4 Accordingly, to the extent relevant to the Draft Policy, Sky has provided comments on the Strategy as part of its response.

SECTION 2: THE REGULATORY FRAMEWORK

The BBC is in a unique position

2.1 The BBC is the principal public service broadcaster in the UK. It represents a significant state intervention into the broadcasting sector. As Ofcom stated recently:

“The BBC is a unique institution, funded by a licence fee to deliver programmes and services that are integral to the wide range of high-quality and varied content UK audiences enjoy. It is the broad range of material which it offers to audiences across TV, radio and online that enables the BBC to play a central role within the UK’s cultural life: some 96% of the UK’s adult population will access one or more BBC services each week.”

2.2 The BBC is funded by a mandatory licence fee of £150.50 each year paid by every UK household watching linear or catch-up TV. In 2016/17 the Licence Fee provided £3.7bn of guaranteed revenue, which the BBC supplemented with other revenues from commercial sources.}

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ventures and investments to bring its total revenue to over £5bn. According to Ofcom estimates the BBC allocated £2.5bn to TV activities in 2016/17.2

2.3 The BBC's public ownership, funding method, remit and scale mean that it has the potential to have a significant impact on both the interests of UK television viewers and competition in the UK TV sector. Its special status justifies the additional regulation to which it is subject beyond the rules applicable to the commercial PSBs and commercial broadcasters. This regulation is set out in the BBC Charter and Framework Agreement. The current versions of those documents came into effect on 1 January 2017 and introduced a number of significant changes to the BBC's regulatory framework.

2.4 One of the key changes was the abolition of the BBC Trust, with its dual roles as regulator and supervisor of the BBC. The Trust model was described by the independent ‘Review of the governance and regulation of the BBC’ (“the Clementi Review”)3 as “flawed” as it conflated governance and regulatory functions within the single body, leading to confusion over the Trust’s role and confused responsibilities as between the Trust and the BBC Board. These flaws were also responsible for perceptions in relation to the BBC Trust, of regulatory capture, conflicted interests and insufficient rigour in holding the BBC to account noted by the review.4

2.5 In abolishing the BBC Trust, the Government adopted the Clementi Review’s recommendation that Ofcom be appointed as an external and independent regulator of the BBC, and that there be a unitary Board with responsibility for compliance with the BBC’s obligations and for representing the interests of Licence Fee payers, thereby remedying a number of the failings of the Trust:

“The fundamental principle of independence needs to be protected and there needs to be clear accountability, strong management and a regulatory system that holds the BBC to account for delivering against its public purposes and acting in the public interest.”5

2.6 While the Charter appoints Ofcom as the external independent regulator of the BBC, the BBC Board is fully responsible for the governance of the BBC and the delivery of its services. The Board is named in the Charter as the entity “responsible for the proper, effective and independent exercise of all the functions of the BBC in accordance with the provisions set out in this Charter and the Framework Agreement”.6 One of the principal functions of the Board is to ensure that the BBC fulfils its Mission and promotes the Public Purposes, in particular by setting (inter alia):

(a) The strategic direction for the BBC within the framework set by the BBC Charter and Framework Agreement;7

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4 Paragraphs 3 and 4, page 43 of the Clementi Review.
6 Article 19 of the Charter.
7 Article 20(a) of the Charter.
(b) A framework to assess the performance of the BBC in delivering its strategies and creative remit, and obligations under the Charter and the Framework Agreement, including performance measures to assess the performance of the UK Public Services in fulfilling the Mission and promoting the Public Purposes.\(^8\)

d) A framework within which the BBC must handle complaints;\(^9\)

d) A policy on the distribution of the UK Public Services;\(^10\) and

e) A plan for compliance with each of the BBC’s general duties (which include the BBC’s duty to act in the public interest under Article 20(3) of the Charter).\(^11\)

2.7 The Charter also requires the Board to ensure compliance by the BBC with its obligations under the Charter, Framework Agreement, Operating Framework and the general law.\(^12\)

2.8 Through the new BBC Charter and Framework Agreement on 3 April 2017 Ofcom took on significant duties to regulate the activities of the BBC. Those duties included setting an Operating Framework to secure effective regulation of the BBC’s activities and an Operating Licence for the UK Public Services that includes conditions appropriate to require, amongst other things, the BBC to fulfil its Mission and Public Purposes.\(^13\)

2.9 Ofcom’s Operating Framework must include requirements to protect fair and effective competition in the United Kingdom in relation to the UK Public Services.\(^14\) It is under this Operating Framework that Ofcom has established the Distribution Requirements considered below.\(^15\)

The BBC’s obligations under the Charter and Framework Agreement

2.10 Under the BBC Charter, the object of the BBC is to fulfil its Mission and promote the Public Purposes.\(^16\) The BBC’s Mission is to “act in the public interest, serving all audiences though the provision of impartial, high quality and distinctive output and services which inform, educate and entertain” (emphasis added).\(^17\)

2.11 The BBC’s Public Purposes include the following purpose:

“To show the most creative, highest quality and distinctive output and services; the BBC should provide high-quality output in many different genres and across a range of services and platforms which sets the standard in the United Kingdom and internationally. Its services should be distinctive from those provided elsewhere and should take creative risks, even if not all succeed, in order to develop fresh approaches and innovative content”. (emphasis added)\(^18\)

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8 Article 20(d) of the Charter.
9 Article 20(g) of the Charter.
10 Article 20(h) of the Charter.
11 Article 20(i) of the Charter.
12 Article 20(8) of the Charter.
13 Clause 46(2) of the Framework Agreement.
14 Clause 46(5) of the Framework Agreement.
15 Clause 15(4) of the Framework Agreement.
16 Articles 4 and 5 of the Charter.
17 Article 5 of the Charter. The BBC also has a duty under Article 9 of the Charter to act in the public interest.
18 Article 6(3) of the Charter.
2.12 The BBC is also subject to a number of further requirements under the Charter that are relevant to its obligations to make its content widely available, namely:

(a) the requirement for the BBC to comply with its duties under the Charter, including its general duties (set out in articles 9 - 18);¹⁹

(b) the BBC’s obligation to “strictly and faithfully comply” with the Charter and Framework Agreement, and supplementary requirements such as Ofcom’s Distribution Requirements;²⁰ and

(c) the requirement that the BBC must also have particular regard to the effects of its activities on competition in the UK, and in doing so, “seek to avoid adverse impacts on competition which are not necessary for the effective fulfilment of the Mission and the promotion of the Public Purposes”, and “have regard to promoting positive impacts on the wider market”.²¹

2.13 Clause 61 of the Framework Agreement, headed “Making the UK Public Services widely available” 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. 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” (emphasis added).

2.14 Clause 61 states that the BBC may impose reasonable conditions under which it will make its output and services available to third parties in complying with Clause 61. Any such condition must not adversely impact fair and effective competition and be fair, reasonable and non-discriminatory. These obligations have in turn been separately reflected in Ofcom’s Distribution Requirements.

2.15 Furthermore, it is self-evident from Clause 62(2)(c) of the Framework Agreement that the obligation in Clause 61 creates a presumption of supply by the BBC to third parties outside of a BBC environment such as the iPlayer app, as under this provision the BBC’s Distribution Policy must ensure that:

“the BBC can only limit the distribution of its output and services to third parties via the BBC’s own services or platforms where it is satisfied this is reasonable and in the public interest”

2.16 This presumption of supply to third parties outside of the BBC’s own services is consistent with Government’s views expressed during the Charter Review process:

“The BBC should look to maximise the opportunities it has to make its services and content as widely available as possible and it should only place reasonable conditions on how its content is distributed. The BBC can rely on a proprietorial approach but only where the public interest is best served by this.”

2.17 It is also consistent with concerns expressed by Ofcom under the previous framework described in Annex 1, and may be inferred from Ofcom’s statement that:

¹⁹ Article 8 of the Charter.
²⁰ Article 56(1) of the Charter.
²¹ Article 11 of the Charter.
“the onus should be on the BBC to demonstrate why it should not make public services available on the basis requested, or why the conditions for supply are fair, reasonable and non-discriminatory”;22 and more recently

“[w]e also expect [public service] broadcasters to support innovation and technology. The BBC is rightly looking to develop the iPlayer, the UK’s most popular catch-up service, so it remains a world-class product. But the world is moving on. If the BBC is to remain relevant, it also needs to reach audiences wherever they are, in ways that are convenient for them. That means fair and flexible access to its content”.23

(emphasis added)

2.18 The Framework Agreement therefore clearly anticipates a world where (i) there is a presumption that elements of the UK public services should be distributed outside of a BBC service; and (ii) catch-up content is made available in a range of ways, and not solely via the BBC iPlayer.

**BBC obligations under the Distribution Requirements**

2.19 As noted above, these obligations on the BBC are supplemented by Ofcom’s Distribution Requirements. The Distribution Requirements were imposed pursuant to Ofcom’s duty24 to set requirements to protect fair and effective competition in the UK in relation to both the effect on fair and effective competition of the UK Public Services,25 and agreements with, and conduct affecting, third parties in relation to UK Public Services. Following consultation, Ofcom imposed the following obligations on the BBC:

(a) to “offer its public services to third parties in response to reasonable requests for supply, except where the BBC has an objective justification for not doing so” (the “First Distribution Requirement”); and

(b) “In offering its public services for supply, and in supplying those services, the BBC must act on a fair, reasonable and non-discriminatory basis” (the “Second Distribution Requirement” and together the “Distribution Requirements”).26

2.20 In summary, therefore, it is evident from the regulatory framework that, in relation to the distribution of its UK public services:

(a) the BBC is under an obligation to supply its content, or elements from its content to third parties for distribution outside of a BBC service;27

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22 See paragraph 4.7 of Ofcom’s statement “Distribution of BBC public services, Ofcom’s requirements and guidance” dated 29 March 2017 (the “Distribution Statement”).


24 Pursuant to Article 46(5) of the Charter.

25 “UK Public Services” is defined in Schedule 1 Part 1 of the Framework Agreement as all named BBC television and radio services, and online services including the BBC iPlayer. Ofcom’s Distribution Statement acknowledges that the nature of what a UK Public Service is, and how audiences access content, may evolve in light of changes in technology and viewer preferences and that such changes may not immediately be reflected in the list of UK Public Services, maintained by the BBC. Ofcom therefore refers to “public services” to capture this (see paragraph 1.4 of Ofcom’s Distribution Statement). Furthermore, with regard to the distribution of the UK Public Services, Clause 61 of the Framework Agreement makes clear that the obligation on the BBC to make its content available applies to the UK Public Services “or elements of their content”, thereby ensuring that the obligation is not taken to mean that the entirety of the UK Public Services have to made available to third parties.

26 Paragraph 3.32 of the Distribution Statement.

27 It is relevant that this has always been the case since the BBC Trust approved the distribution of BBC on-demand content in 2007. A brief description of the regulatory background underpinning the BBC’s distribution of its on-demand content, and Ofcom’s concerns therein, is attached as Annex 1.
(b) there is a presumption that such supply is in the public interest;
(c) if the BBC wishes to limit supply only to its own services it must establish that
doing so in any particular instance is both reasonable and in the public interest;
(d) the BBC must offer its public services to third parties in response to reasonable
requests for supply, except where the BBC has an objective justification for not
doing so;
(e) in offering its public services for supply, and in supplying those services, the BBC
must act on a fair, reasonable and non-discriminatory basis; and
(f) it is for the BBC to explain why any refusal to offer its public services is justified or
why any conditions for supply of the public services are fair reasonable and non-
discriminatory.\(^{28}\)

2.21 The BBC’s Distribution Policy ought to set out how the BBC will fulfil each of these
obligations, but at a minimum must:\(^{29}\)

(a) set out how it will fulfil its obligations under Clause 61 Framework Agreement;
(b) include the reasonable conditions under which the BBC will make its output and
services available to third parties;
(c) ensure that the BBC can only limit the distribution of its output and services to
third parties via the BBC’s own services or platforms where it is satisfied this is
reasonable and in the public interest; and
(d) ensure the BBC acts on a fair, reasonable and non-discriminatory basis.

2.22 The remainder of this response sets out:

(a) Sky’s approach to making the BBC’s public service content available and its recent
experiences in negotiating with the BBC;
(b) how the Draft Policy fails to meet the BBC’s minimum obligations under the
framework created by the Charter and Framework Agreement and set by Ofcom,
and suggests how those failures can be remedied;
(c) Sky’s concern that the Strategy fails to give due acknowledgment of the benefits of
bespoke services such as Sky’s, thereby undermining the BBC’s preferred strategy
of distributing the BBC iPlayer app; and
(d) Sky’s further concerns with the Strategy and Draft Policy.

SECTION 3: SKY’S INTEGRATED APPROACH TO BBC TELEVISION CONTENT

3.1 Sky provides the Sky and NowTV services in the UK, supplying television services to over
million Licence Fee payers. As set out in more detail below, Sky is directly impacted by the
Draft Policy as it provides access to a wide range of linear and on-demand BBC content on
its hybrid digital satellite/IP platform and via its streaming service. Sky makes the BBC’s
on-demand television content available as part of a bespoke integrated service to its
‘satellite’ customers, and includes the iPlayer app on its NowTV streaming devices.

\(^{28}\) Paragraph 4.7 of the Distribution Statement.
\(^{29}\) Clause 62 of the Framework Agreement.
Furthermore, the BBC has refused to allow Sky to make BBC content available to the fullest extent across its entire Sky+HD and Sky Q services. In particular, the BBC has:

(a) refused to allow Sky to make its content available through the Sky Go and Sky Q apps on mobile devices as part of the overall service offered to customers, irrespective of whether the customer is at home or on the move; and

(b) refused to allow Sky to promote BBC content in the Sky user interface (“UI”) unless Sky guarantees the BBC disproportionate prominence for its content, which would necessarily be at the expense of other broadcasters, including the commercial public service broadcasters (“PSBs”).

The latest negotiations to resolve the current gaps in the availability of BBC content on Sky’s platform have lasted over two years. The parties are currently discussing a narrow arrangement whereby the iPlayer app would launch on Sky Q, and Sky would be allowed to continue to provide its bespoke integrated BBC on-demand service (“the Integrated Service”) until [redacted], as well as securing certain additional rights to make BBC content available to Sky’s service delivered over IP (but not via its apps). Sky is therefore particularly well qualified to respond to this consultation.

As context to Sky’s response, Sky has set out below its approach to distributing the BBC’s content and its lengthy engagement with the BBC in this regard. Accordingly, in this section we provide a description of (i) the development of Sky’s bespoke integrated service, and (ii) Sky’s negotiations with the BBC for access to BBC on-demand content. A more detailed chronology is attached at Annex 2 for completeness (“the Chronology”).

**Sky’s Integrated Service**

Sky launched IP-based pull-VOD services on its Sky+ HD boxes in 2010, thereby enabling Sky to provide a catch-up TV service via those boxes. From the outset Sky sought to include content from the UK PSBs in that service, given the importance of that content to UK viewers, and therefore the value that they were likely to place on access to PSBs’ catch-up content.

Sky’s pull-VOD platform uses progressive download (“PDL”) technology to deliver catch-up services (and other pull VOD services) to consumers. In order to deliver this service, Sky ingests its own and third party content into its servers. When a viewer wishes to watch an on-demand programme, they select the programme from the UI and it is downloaded to the set top box hard drive from Sky’s servers. The programme becomes available to view as soon as enough of the programme has been downloaded for the user to be able to start watching the programme.

Sky chose to implement PDL technology, rather than streaming of content from the internet, due to its superior user experience. In contrast to a streaming service, the use of PDL technology means that Sky can guarantee that every user has the same high quality viewing experience, irrespective of broadband speed, free from buffering or pixilation when viewing.

Furthermore, Sky considers that an integrated approach is more aligned with consumer interests than a standalone non-integrated approach, for example by providing easy access to on-demand content from a range of providers through a single, coherent user interface and playback mechanism, and avoiding the need for users to switch between [30] This supplemented Sky’s existing push-VOD service, which was launched in 2007, where programmes were delivered to the hard drive on the set top box via satellite. A catch-up TV service enables broadcasters to provide programmes to viewers for a period of time after their initial broadcast.
individual apps with different layouts and navigation paradigms to find and view the content they want to watch.

3.9 Despite all the other UK PSBs granting Sky the relevant rights, the BBC and BBC Trust initially refused Sky’s requests for access to BBC catch-up content for its catch-up service. It was only after a protracted process that Sky was able to persuade the BBC to provide its content for the Integrated Service, which finally launched in October 2012, by which time up to 6.7 million homes were using the Sky catch-up service.32

3.10 Sky’s PDL service has been, and continues to be highly valued by customers, as well as successful for the BBC in delivering incremental viewing. In 2015 Sky commissioned a survey from independent consultants to understand customer responses to Sky’s Integrated Service via the Sky+ HD set top box.33 The headline findings from that research included that:

(a) viewing via the Sky set top box scored the highest levels of satisfaction compared with other iterations of the BBC iPlayer across a wide range of aspects, including ease of use, ease of navigation and layout;

(b) Sky customers’ overall satisfaction with the Integrated Service on the Sky box was higher than but broadly comparable to the BBC iPlayer website, tablet app and Smart TV app;

(c) the Sky box was the most frequently used device for accessing BBC programmes via iPlayer; and

(d) around 60% of those customers who used Sky Go would use it to watch BBC catch-up content if it were available.

Other rights sought by Sky

3.11 Sky has also sought the following rights for the Sky+ HD set top box and related Sky Go app. Discussions between Sky and the BBC in relation to these rights have taken place periodically since launch of the relevant service or feature (if not before):

(a) The right to editorially select, in conjunction with the BBC, BBC content for stand-alone promotion in the Sky+ HD UI: Sky introduced editorially selected recommendations to the Sky+ HD UI in 2014;

(b) The right to include BBC children’s content in the Kids section of the Sky+ HD UI: Sky introduced a new Kids section to the Sky+ HD UI in April 2015; and

(c) The right to include BBC content in the Sky Go app available outside of the Licence Fee payer’s home: Sky launched its mobile TV service, “Sky Go” in July 2011.

Sky Q

3.12 In 2013 Sky began work on a new ground-breaking service, Sky Q, which launched in March 2016. Whilst Sky Q uses the same hybrid satellite and IP infrastructure, including PDL, as

31 This included the BBC Trust commissioning external consultants to verify Sky’s statements that the Sky+ HD set top box was technically incapable of hosting a browser, and therefore iPlayer app. See the Executive Summary of ‘Technical Review of the iPlayer TV Landscape’, Decipher Media Consultants, dated November 2011, published by the BBC Trust as part of its November 2011 consultation. (http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/on_demand/2011/revised/independent_report.pdf).


33 Key headlines of this research were shared with the BBC Trust in August 2015, the slides for which are attached at Annex 3. Annex 4 contains the full output of this research.
Sky+ HD, it builds on that technology to deliver a range of new functionality and a new high quality UI, in a similarly coherent and easy to use manner.

3.13 Sky has invested significantly in developing Sky Q’s set top box, UI and app as its next generation service. It is designed to enable Sky to compete with the wide and increasing range of TV services now available to consumers, including devices and services produced by Apple and Amazon, and smart TVs. As made clear to the BBC as far back as July 2014, the rationale for Sky Q as a ‘Simple, Seamless and Rich’ viewing experience is the ability to present the content that customers expect to see in a coherent and consistent manner, making the discovery and viewing of content as easy as possible.34

3.14 The Sky Q service enables users to enjoy a range of features which make TV viewing seamless in, around and outside the home. These include the ability to pause viewing on one TV screen and pick up in another room on a TV or tablet, as well as saving recordings onto a tablet to watch anywhere. Sky continues to accelerate this innovation, introducing Sky Q Ultra HD and voice search in 2016, and voice control and favourites in 2017. Sky has recently announced the next suite of product innovations for Sky Q, including voice functionality, improved recommendations and personalisation, an improved widescreen UI allowing better navigation, the launch of High Dynamic Range (HDR) technology for 4k televisions, a Kids mode integrated with the Sky Kids app, and the launch of the Sky Q app on smart TVs and third party devices, in addition to the launch of new content services.35

3.15 Sky Q has clearly resonated with customers, with the service having been installed in over million homes since launch ( ), as well as receiving plaudits from consumer and technology experts.36

3.16 In 2017 Sky commissioned a further survey from independent consultants to understand customer responses to the Integrated Service experience via the Sky Q set top box, in particular as compared to the BBC iPlayer app. The headline findings from that research included that:

(a) the majority of Sky Q customers are either very or extremely satisfied with the ease of use and consistent ease of navigation on Sky Q;
(b) Sky Q customers prefer to watch BBC content through the Integrated Service rather than using the iPlayer app on other devices;
(c) 65% of Sky Q customers would be either quite or very dissatisfied if they had to watch BBC content via an app rather than the Integrated Service; and
(d) 54% of Sky Q customers would watch less BBC content if they had to watch BBC content via the iPlayer app rather than the Integrated Service. Only 4% of Sky Q customers thought that they would watch more BBC content via SiP.

3.17 Elements of this research were shared with the BBC following a meeting on 18 January 2018.37

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34 The slides from that meeting are at Annex 5. In addition, a promotional video discussing the decisions underpinning Sky Q and its creation, published in November 2015, is available at: https://www.skygroup.sky/corporate/media-centre/articles/en-gb/behind-the-scenes-on-the-making-of-sky-q.
37 The slide deck from that meeting is attached as Annex 6.
Furthermore, whilst the BBC recently announced that “BBC iPlayer recorded its best year ever in 2017” with total requests increasing 11% on 2016, usage of the Integrated Service has increased by more than twice that rate at 24%. For the BBC’s busiest period, December 2017, the Integrated Service produced a 32% increase in downloads versus 2016, as compared to the iPlayer app at 17%.

**Negotiations in relation to Sky Q and continued provision of the Integrated Service**

Sky first approached the BBC for additional rights needed to make BBC content available via the new Sky Q functionality in October 2013. The BBC rejected those requests. Sky then made a further presentation to the BBC in July 2014 as part of a concerted effort to acquire the additional rights necessary to facilitate the additional functionality that Sky Q would deliver. The extracted slide at Figure 1 below summarises the potential benefits to the BBC of Sky’s new service were the BBC to grant Sky the requested rights. These requests were also refused.

**Figure 1: Extract from “Future Sky+ product plans – Our Next Generation TV Experience”, July 2014**

Following launch of the Sky Q service in March 2016, Sky continued to seek the additional rights being withheld by the BBC (across Sky+ HD and Sky Q) in return for including the iPlayer app (and the BBC’s Red Button Plus service) on Sky Q.

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39 See Annex 5.
40 The BBC’s Red Button Plus service allows viewers to access the BBC’s interactive services (iPlayer app, BBC News and BBC Sports) by pressing the interactive ‘red button’ while viewing BBC linear channels. The BBC has sought to require distribution of this service, providing an additional access point for iPlayer app and an integral part of iPlayer app.
3.22 Sky also requested confirmation from the BBC that it would make BBC content available to Sky’s proposed Sky over IP service.\textsuperscript{41}

3.23 Over the course of over two years, between March 2016 and April 2018, Sky has put a series of revised proposals to the BBC, as detailed in the Chronology, and which continue to be subject to negotiation, without certainty of outcome. Throughout this process Sky has approached the negotiations pragmatically and constructively in an effort to reach agreement. In particular, Sky has (a) acceded to a significant number of the BBC’s demands, and (b) progressively reduced the scope of its own requests, in order to increase the likelihood of reaching an agreement with the BBC. By contrast, Sky considers that the BBC has not engaged constructively until very recently when negotiations have been held with members of the BBC Executive Committee.

3.24 Overall, Sky’s experience of requesting and negotiating access to the BBC’s public service content has not been a positive one, due to the BBC’s refusal to accede to Sky’s requests which are clearly in the public interest; the lengthy duration of negotiations without clear explanations for refusals to supply BBC content; and lack of certainty. Licence Fee payers have suffered as a result as they have not been able to benefit from Sky’s investment and innovation to access BBC content fully across Sky’s platform. In doing so, the BBC has undoubtedly reduced viewing of its content.\textsuperscript{42}

Now TV

3.25 Sky also makes the Now TV OTT service available to UK customers via a website, app, and a number of streaming devices including a set top box and a smartstick. In order to provide a compelling service for UK consumers, Sky has pre-loaded catch-up TV apps from the BBC, ITV, Channel 4 and five on to those devices alongside the NowTV app.

3.26 Whilst this response focuses on Sky’s experiences in dealing with the BBC regarding access for its hybrid satellite/IP platform, the BBC has imposed similarly draconian requirements on Sky in relation to the iPlayer app via the Now TV box. This has restricted Sky’s ability to innovate in the interests of its customers. Not only is Sky disincentivised from making changes that require BBC consent, but it then faces considerable delay in seeking consent and the risk that the BBC will require further changes to any proposal or refuse permission, meaning that a change cannot be made.

3.27 Furthermore, Sky contests the BBC’s assertion that its work with Now TV on implementing an HbbTV triggering solution is an example of it working “flexibly to integrate its content with platforms’ own innovations.”\textsuperscript{43} As a condition of Sky including the BBC’s content on the latest Now TV box the BBC required that Sky also launch its Red Button Plus service, at a cost to Sky of over $\text{XXXX}. The functionality is not used by any other broadcaster or content provider on the platform.

3.28 These experiences have informed Sky’s comments below.

\textsuperscript{41} This relates to a next generation Sky service, currently in development, in which all services are delivered to the set top box via IP.

\textsuperscript{42} For example, see the results of the ‘A/B Insight Test’ at Annex 7.

\textsuperscript{43} Paragraph 49(a) of the Strategy.
SECTION 4: THE BBC’S DRAFT DISTRIBUTION POLICY FAILS PROPERLY TO SPECIFY THE REASONABLE CONDITIONS UNDER WHICH IT WILL MAKE ITS OUTPUT AND SERVICES AVAILABLE TO THIRD PARTIES

The fundamental purpose of the Policy is to provide greater certainty to third parties

4.1 As noted above, the BBC has an obligation to provide either BBC content (outside a BBC service) or BBC services (channels, the iPlayer app, etc.) to third parties to make available to Licence Fee payers. The fundamental purpose of the Distribution Policy is to enable third parties seeking access to that public service content to understand the terms and conditions of supply in a transparent and comprehensive manner and in advance of any negotiations.

4.2 In this way, the purpose of the Distribution Policy is similar to other existing situations regulated by Ofcom relating to access requirements, for example, obligations imposed on SMP operators for the provision of network access, interconnection or service interoperability,44 television platform services,45 and the wholesale must offer remedy imposed by Ofcom following the Pay TV Review.46 The benefits of such arrangements are material:

(a) third parties are able to assess in advance and on an informed basis whether and how access will be granted;
(b) access is provided more speedily as negotiations for access are streamlined;
(c) the transparency of the arrangements provides confidence to third parties that they are being dealt with on a fair, reasonable and non-discriminatory basis; and
(d) unnecessary disputes, requiring regulatory intervention by the BBC and/or Ofcom may be avoided.

The Draft Policy fails to specify the reasonable conditions of supply

4.3 The fundamental failure of the Draft Policy is that it fails clearly to specify the reasonable conditions under which the BBC will make its output and services available to third parties, both in relation to when it will make its content available outside of a BBC service, and the terms of any supply.

4.4 The BBC’s flawed approach is exemplified by:

(a) the contradictory statements in paragraph 2.3 of the Draft Policy: on the one hand “[t]he BBC requires each of the seven conditions set out in the following section to be met” and yet on the other hand, “compliance may be a matter of degree, and certain

44 See, for example, Ofcom’s NBMR statement dated 30 November 2017 (https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108353/final-statement-narrowband-market-review.pdf).
elements of the overall Policy may be more or less important depending on the circumstances of the case”; and

(b) the fact that even the previous BBC Distribution Guidelines, published in November 2016 under the previous regulatory framework, contain greater detail and guidance than the proposed Draft Policy.47

4.5 The BBC’s approach engenders uncertainty and requires individual negotiations with the BBC, who will determine, unfettered by any clear statement of intent or purpose, whether the BBC will provide access to its public service content and services, and the terms on which supply will be granted.

4.6 The consultation asks the following questions:

(a) Has the BBC identified reasonable conditions in relation to the distribution of its public services?

(b) Are the conditions appropriate to ensure that the distribution of the UK public services enables the delivery of the BBC’s public purposes and the fulfilment of the BBC’s mission in the interests of its audiences across the UK?

(c) Are the conditions proportionate and targeted given the BBC’s duty under Article 11 of the Charter to have particular regard to the effect of its activities on competition?

4.7 For the reasons set out below, the BBC has failed in relation to each question and the Draft Policy is fundamentally flawed.

The BBC’s ‘conditions’ are unreasonably vague

4.8 Sky accepts in principle the concepts identified by the BBC at paragraph 3.1 as being the basis on which the BBC will make its content available. Sky further understands the need for a case-by-case approach in some circumstances. Given the range of public service content created by the BBC in terms of audio, text and audio-visual content, linear and on-demand, and the many different ways in which content can be delivered to viewers, it is clear that not all circumstances can, or should, be taken into account in advance. There will need to be an element of judgement exercised in many instances in the light of all relevant circumstances. The balance in the Draft Policy is, however, entirely wrong.

4.9 Instead of setting out guidance for third parties, the “conditions” presented by the BBC at section 3 include a number of vague, aspirational topics that the BBC itself states merely “form the basis on which the BBC will make its content available”.

4.10 Through the Draft Policy the BBC has reserved for itself excessive flexibility as to what arrangements it would consider and the terms upon which it intends to deal with third parties. If adopted by the BBC, third parties would have no certainty in advance of any request to the BBC as to whether they will be granted the access they require, or the cost in terms of concessions to the BBC, or costs of supply that they will have to meet.

4.11 The extent of that uncertainty is illustrated in relation to each of the ‘conditions’ below.

4.12 In relation to ‘Prominence’:

The Draft Policy states that “BBC content and services should be given fair and appropriate prominence, wherever they appear on the platform”;

“Fair” in this context is further defined as “not unfairly disadvantaged relative to that of other content providers, including the platform owner”.

“Appropriate” is defined as being “in line with audience needs and expectations”, which “may take into account” a number of factors, including audience expectations, relative usage of BBC content on the platform and whether or not services require additional payment from users.

Such vague and subjective concepts result in considerable uncertainty as to what this means in practice for individual platform and service providers. In Sky’s experience, such a broad remit allows the BBC to seek disproportionate and excessive prominence for its content and services, with the platform or service provider having little scope to argue that the BBC exceeds its remit in doing so. Sky has experience of this in relation to both the BBC’s demands in relation to the prominence of the iPlayer app and content on the NowTV homepage, and for the Integrated Service where the BBC has rejected the terms accepted by every other broadcaster and has instead sought disproportionate minimum guarantees of prominence for its content. The negative consequences of the BBC’s position in doing so are discussed below.

In relation to “Quality”:

The Draft Policy states that the experience of BBC content should be of “high quality (comparable to objectively similar platforms) including but not limited to factors such as picture/audio quality, content availability, reliability, accessibility, metadata accuracy, easy of navigation and content loading times”, without specifying any particular standard or minimum quality threshold;

The policy states that platforms will be expected to facilitate the deployment of certain unspecified technical features and functionality developed by the BBC, but does not set out any detail as to which features or functionality, the process for notifying third parties of what might be required or timelines for adoption of ‘required’ functionality. Conversely, there is no clarity as to whether the BBC will support additional functionality available on the third party platform – the BBC has steadfastly refused to allow Sky to make BBC on-demand content available through its innovative Sky Go, Sky Kids and Sky Q apps, preventing Licence Fee payers using Sky’s service to benefit fully from Sky’s investment, and reducing the overall quality of the experience for those viewers.

In relation to “Editorial Control” the BBC includes some clearer statements, but also seeks “adequate curatorial influence over the selection and ordering of its constituent programmes that are presented to users within the interface, such that the BBC can introduce a broad range of public service content to users, except in the case of publishing by the BBC” without specifying in further detail what this would actually entail for any third party distributor.

In relation to “Data” “the BBC expects platforms to facilitate the timely and accurate collection of data to enable the BBC to monitor and understand the usage of its content and services”. The BBC does not state what data it requires as a minimum and on what

49 Paragraphs 3.5 – 3.9 of the Draft Policy.
50 Paragraph 3.16 of the Draft Policy.
frequency. Does ‘timely’ mean real time access or weekly reporting? Does the data need to relate to individual users or is average or estimated viewing acceptable? Without more detail, third parties have no idea whether their platform will meet the BBC’s needs.

4.17 For ‘Value for Money’, there is significant uncertainty as the BBC defines this criterion as requiring that the “incremental audience value delivered by a given distribution arrangement must outweigh incremental costs incurred by the BBC”.\textsuperscript{51} The BBC’s inclusion of its “indirect costs of additional complexity and management overhead” mean that, even where a third party commits to meeting all incremental BBC costs associated with the supply of BBC content, it cannot be certain of meeting the BBC’s criterion. Sky notes that the lack of specificity of the BBC conditions actually increases the management cost of distributing the BBC’s content and services due to the additional negotiations required as a result of the BBC’s vague criteria, and that this should not be a factor that is taken into consideration in determining whether to supply a third party.

**There is no guidance as to when alternative arrangements might be considered**

4.18 Sky further notes that even greater uncertainty surrounds the circumstances in which the BBC will consider alternative arrangements for the supply of long-form TV content. Paragraph 3.3 of the Draft Policy states that “As explained in the BBC’s strategy, in the case of long-form TV content, the BBC will normally expect to make its content and services available in the form of a standard service product. For online channels and on-demand TV content, this will normally take the form of BBC iPlayer. But as noted above, the BBC will apply this Policy on a case-by-case basis.”

4.19 There is therefore no guidance as to when the BBC will depart from its ‘normal’ policy. This is unacceptable in circumstances where, as noted above, there is a presumption that the BBC will supply its content and services outside BBC services such as the iPlayer, and the BBC can only limit distribution of its content in such a way if it is both in the public interest and reasonable. It is not clear why the BBC has ignored this fundamental requirement.

**The lack of certainty has adverse consequences for those seeking access to the BBC’s content, and Licence Fee payers**

4.20 The lack of detail included in the Draft Policy would, if adopted, result in significant uncertainty for platforms and services as to what precise criteria they would need to meet in order to agree supply with the BBC. This results in uncertainty for platforms as to whether they meet the conditions and what changes they would need to make in order to meet the conditions.

4.21 There is also a risk that, in the absence of reasoned clarity, there is less discipline on the BBC to ensure that its requests are reasonable. It may be natural when starting a purely commercial negotiation to request a more favourable (and potentially less reasonable) position than one expects ultimately to agree with the other party. That is not the approach the BBC ought to be taking given its regulatory obligations, and its position in the UK market. Worse, such an approach is self-reinforcing as, absent clear and transparent guidance as to what is reasonable, third parties may agree to the BBC’s unreasonable conditions in order to obtain supply of BBC content. In future negotiations, the BBC is then able to point to those acceptances as support for the apparent reasonableness of its position. The only time such an issue might perhaps receive an objective consideration would be in the event of a regulatory complaint. Such complaints are, however, rare in circumstances where the third party needs access to the BBC’s content. A complaint is likely to result in access being further delayed and may negatively

\textsuperscript{51} Paragraph 3.22 of the Draft Policy.
impact ongoing relationships. Only clear and transparent conditions can prevent such failings.

4.22 Equally material is the process that they would have to go through in order to settle any agreement with the BBC for supply, including how long negotiations might take. Sky notes that the current policy, which also lacks clarity and fails to impose any formal timelines on the BBC, has resulted in long and drawn out negotiations between the parties, and allows the BBC to hold out for its preferred solution whilst the platform has to do without the BBC’s content, preventing launch or inhibiting innovation.

4.23 Such uncertainty also allows the BBC to act as ‘gatekeeper’ in relation to not only the distribution of its own content and services, but those of third parties, who are unlikely to want to launch a new platform or service in the UK without knowing whether and how BBC content will be available. This means that third party platforms and services must reveal commercially sensitive future plans to see if they will meet with BBC approval. For example, under the current arrangements it has in relation to the availability of the BBC iPlayer on Sky’s NowTV service, limiting Sky’s ability to innovate and implement changes designed to make the platform more user-friendly.\(^{52}\) Furthermore, the ‘must have’ nature of the BBC content, and its rights of approval mean that the BBC is able, to a large degree, to influence the presentation of content across a wide range of services and devices, reducing differentiation, which is an important aspect of competition. Such influence would extend beyond that already enjoyed by the BBC through its ownership interests in a number of significant platforms and services in the UK, namely YouView, Freeview, Freesat and the BBC iPlayer, through which the BBC has already secured uniformity of approach to content availability.

4.24 The lack of certainty harms third party platforms by preventing them from having a clear understanding of how they will be able to access BBC content and services, and the terms and conditions of supply. As a result, the development of new and innovative services is delayed or restricted unnecessarily, as well as being subject to undue BBC influence. Licence Fee payers suffer as a result of delays in the launch of new and innovative services including the public service content they have paid for, or as a result of the prevention of such services.

4.25 The Draft Policy therefore infringes the BBC’s obligations under Article 11 of the Charter as it fails to seek “to avoid adverse impacts on competition which are not necessary for the effective fulfilment of the Mission and the promotion of the Public Purposes”, and in particular, fails to “have regard to promoting positive impacts on the wider market”.\(^{53}\) The uncertainty created by the Draft Policy cannot be said to be a positive impact on the wider market.

**The inadequate specificity breaches the BBC’s legal requirements**

4.26 The BBC’s vague approach in the Draft Policy (and Strategy) would, if implemented, infringe the BBC’s obligations under the Charter and Framework Agreement for a number of reasons, including:

(a) The Draft Policy does not set out how the BBC will fulfil its obligations under Clause 61 of the Framework Agreement, which requires that the BBC:

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\(^{52}\) See paragraph 3.26 above.

\(^{53}\) Article 11 of the Charter.
“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.”

The Draft Policy does not contain a clear policy statement to give effect to this obligation as the BBC has not done “all that is reasonably practicable” to ensure third parties are able to distribute BBC content. This is a material omission, and demonstrates the flawed nature of the Draft Policy. The BBC must include a clear statement of its policy in respect of all BBC content and services;

(b) The Draft Policy fails to include “the reasonable conditions under which the BBC will make its output and services available to third parties, for example in order to secure appropriate prominence, attribution, quality and value for money”.54 As noted above, the lack of specificity renders the BBC’s ‘conditions’ void for uncertainty, and incapable of assessment for reasonableness;

(c) By failing properly to specify the conditions under which it will not supply its content, (or the conditions for supply to alternative solutions), there is no basis on which to judge the Draft Policy’s compliance with clause 62(2)(c) which requires that the Policy ensure that “the BBC can only limit the distribution of its output and services to third parties via the BBC’s own services or platforms where it is satisfied this is reasonable and in the public interest.” The lack of detail makes it impossible to assess whether the BBC’s proposed conditions of supply are reasonable or in the public interest, as it will depend on how the BBC interprets and implements these conditions in practice (and on a case-by-case basis under the Draft Policy).

(d) The Policy must ensure that the BBC acts on a fair, reasonable and non-discriminatory basis.55 The lack of specificity makes it impossible for the BBC or any third party to judge whether conditions of supply are compliant. Consideration of questions of fairness and discrimination, in particular, benefit from transparency which is entirely absent from the Draft Policy;

(e) Article 12 of the BBC Charter states that “The BBC must observe high standards of openness and seek to maximise transparency and accountability.” The Draft Policy manifestly fails to meet that standard for the reasons stated above; and

(f) Finally, Sky notes that Article 56 requires that “The BBC must strictly and faithfully comply with this Charter and the Framework Agreement in force.” Compliance with its regulatory obligations is not a matter of discretion. The BBC must correct its failures.

The Draft Policy must provide greater certainty to third parties

4.27 In order to fulfil its obligations under the Charter and Framework Agreement, and to provide meaningful guidance to third parties, the BBC must set out in greater detail the conditions of supply for its content and services, and the circumstances in which it will not normally supply its content.

54 Clause 62(2)(b) of the Framework Agreement.
55 Clause 62(2)(d) of the Framework Agreement. Sky notes that Ofcom’s second Distribution Requirement imposes an identical obligation on the BBC.
4.28 It is not unreasonable to expect the BBC to provide details of what conditions are actual requirements, as it does in relation to aspects of ‘Editorial Control’ (for example, “Platforms must not edit the BBC’s content or metadata unless otherwise agreed”\(^\text{56}\) that must be met by third parties, and a complete set of factors that it “will” (rather than “may”) take into account and how these would operate.

4.29 Accordingly, one would expect the Draft Policy to cover the following:

(a) **Prominence:**

(i) When prominence will be required (for example, only in relation to audio-visual content and not in relation to audio content, as seems to be current practice);

(ii) Whether prominence obligations match existing regulatory obligations or go beyond what might otherwise be enforceable under law (for example, whether the BBC requires prominence for on-demand TV content when Ofcom’s rules only apply to linear services);

(iii) The types of contractual prominence obligations the BBC requires, for example:

a. where in a list of apps the iPlayer app should be presented, whether prominence only applies relative to other similar apps;

b. what obligations the BBC will require in relation to journeys to and from any ‘home page’ to the iPlayer app; and

c. whether deep-links into the BBC service are required from elsewhere in a user interface (‘UI’);\(^\text{57}\) and

(iv) In relation to the presentation of BBC content, the frequency, duration, and proportion of any UI real estate that would be required, and the impact of the BBC’s requirements on algorithmic presentation of content – can BBC content be subject to such treatment where its application could, in theory, lead to a loss of prominence for BBC content, for example as a result of a user or household not accessing BBC content for a period or by not choosing the iPlayer app as a ‘favourite’ service?\[^\text{56}\]

To the extent that the BBC has views on such matters, they should be set out in the Draft Policy clearly and transparently in order to a) provide third parties with the opportunity to comment and b) provide adequate certainty for third parties considering making BBC content available.

(b) **Editorial Control:**

(i) What the BBC means by “adequate curatorial influence over the selection and ordering of its constituent programmes”, for example whether this is limited to

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\(^{56}\) Paragraph 3.7 of the Draft Policy.

\(^{57}\) Paragraph 3.3 of the Draft Policy states that the BBC will “enable app-to-app deep-linking to support platform discovery innovations” – but it is unclear on reading the Policy whether deep linking is a condition of supply or merely desirable.
the principal location of BBC content, or a requirement across all instances where BBC content is available;\(^{58}\)

(ii) Whether the statement that the BBC ‘expects’ platforms to “carry the full range of applicable BBC content and services except where an item demonstrably contravenes a reasonable and objective editorial policy of the platform” is a requirement that platforms must take a bundle of BBC services or be denied access to any. For example, the BBC has required Sky make available the iPlayer app and the BBC Red Button Plus service, notwithstanding Sky’s concerns that the BBC Red Button Plus service is incompatible with Sky’s navigational paradigm by providing an alternative access point for the BBC’s on-demand content.\(^{59}\)

(c) **Branding & Attribution:**

(i) The BBC should clarify what is meant by “sufficient opportunity to present all relevant visual or audio branding alongside its content and services”. It is entirely possible for the BBC to describe what it requires in this regard, whether it is ensuring that channel brands are visible at all times and that third parties respect the BBC’s branding guidelines.

(d) **Quality:**

(i) The BBC should set out minimum quality standards below which BBC content and services will not be supplied. If the BBC cannot define such standards, it suggests that this is not a valid criterion;

(ii) Technical features and functionality should not be relevant to any assessment of the relative ‘quality’ of a platform unless relevant to the quality of the presentation of BBC content or service.\(^{60}\) If the BBC is providing its own service, such as the BBC iPlayer app, then provided full access to the service is granted, then such matters are irrelevant. To the extent that the BBC is supplying its content to a platform, then provided the minimum quality standards are met, the additional features and functionality available should not matter. In particular, the fact that a platform does not replicate the technical features and functionality of a BBC service (for example, ‘live restart’ on BBC iPlayer) cannot be a ground for refusing supply unless it is integral to the delivery of the content, content protection, or to the attribution of content to the BBC. Nor should the BBC require a platform to develop such functionality as a condition of supply. Technical features and functionality are an important element of differentiation between platforms. Indeed, Sky’s Sky Q service is widely acknowledged to be a market leading product with a wide range of innovative features and functions that are not present on the BBC iPlayer (e.g. PDL and voice search and control).

(iii) Similarly, the BBC should be clear about what third party features and functionality it will and will not support. Sky considers that it is reasonable to expect the BBC to use its reasonable efforts to support any and all features and functionality, including through the acquisition of additional

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\(^{58}\) See paragraph 3.8 of the Draft Policy.

\(^{59}\) See paragraph 3.21 of the Draft Policy.

\(^{60}\) See paragraph 3.14 of the Draft Policy.
rights, and not restrict innovation in the sector solely to those features developed or adopted by the BBC.

(e) **Data:**

(i) The types of data that the BBC requires, including frequency and format, as well as details of how the BBC will use that data and whether and in what format it will be made public.

(f) **Free access:**

(i) This condition is sufficiently clear within the Draft Policy.

(g) **Value for Money:**

(i) The Draft Policy ought to state clearly that this criterion would be met where a third party agrees to meet the BBC's reasonable incremental costs of supplying that third party platform. There should be no additional test or condition, as the additional availability provided by the third party platform ought to be sufficient justification in terms of 'incremental audience value'.

4.30 In relation to the circumstances in which the BBC will depart from its 'normal' strategy of the standard iPlayer, it is incumbent on the BBC to provide a sufficient degree of clarity to enable third parties to determine whether they are required to take the BBC's standard product or whether they might benefit from a non-standard arrangement. Such detail should include as a minimum:

(a) The types of alternative solutions the BBC would consider (this could not be an exhaustive list but the BBC ought to be able to give a selection of examples);

(b) The types of alternative solutions it would not consider, together with a reasoned explanation as to why (including why such refusal is both reasonable and in the public interest);\(^6\) and

(c) The criteria that a third party platform seeking alternative access would need to meet, if different from those listed in paragraph 3.1 of the Draft Policy, for example, if the BBC required a minimum number of users, the ability to limit distribution of the BBC's content to UK Licence Fee payers and support for the BBC's linear channels.

The **BBC Distribution Policy must include a clear process and timeframe for responding to requests for supply**

4.31 Sky's experiences in negotiating access to BBC content demonstrate the pitfalls of inadequate 'conditions' and guidance, and the absence of a clear framework for granting access to BBC content and services. In addition to improving the clarity of the BBC's conditions, the BBC must take this opportunity to establish a formal process under which third parties can apply to the BBC for access, such that they can have a reasonable prospect of knowing how quickly any request will be dealt with. Failure to do so means that third parties will continue to suffer excessive delays in making the BBC's content available, to the detriment of Licence Fee payers, innovation and competition.

\(^6\) Clause 62(2)(c) of the Framework Agreement.
The BBC is capable of designing and implementing such a process. For example, it has done so already in relation to its programme commissioning framework, which sets out a detailed, but flexible timeframe to “ensure fair dealings across all suppliers”.

Section 5: The BBC’s Distribution Strategy is Insufficiently Reasoned

5.1 As noted above, the Strategy and Draft Policy are intrinsically linked (the former cross refers to the latter and vice versa) with the former, effectively forming an integral part of the latter.

5.2 This section of Sky’s response challenges the apparent justifications set out in the Strategy for the BBC’s strategic preference for distributing its television content via the iPlayer app (‘the iPlayer-first strategy’) which underpins the Draft Policy. The importance of this strategy is magnified by the lack of clarity in the Draft Policy as to when the BBC will allow third parties to depart from the strategy and provide BBC content to Licence Fee payers through a bespoke service.

5.3 This response demonstrates that not only has the BBC failed to make its case adequately, but that bespoke iPlayer solutions, such as Sky’s integrated service, play an important and valued role in helping the BBC to deliver its strategic goals and distribution objectives which must be acknowledged by the BBC in its Strategy and final policy.

The Strategy is not supported by evidence

5.4 Normally, it would be expected that a strategy statement by a major, publicly owned and funded entity would be rigorous, with conclusions supported by clear evidence and analysis. The Strategy fails in this regard. Despite having taken over a year to produce the Strategy and Draft Policy, the BBC has not undertaken any additional analysis or research to support its strategy or its assertions as to the apparently unique ability of the BBC iPlayer to meet the BBC’s distribution objectives.

5.5 In particular, Sky is not aware of the BBC having done any research into audience views on Sky’s Integrated Service, or of the BBC itself having considered the merits or otherwise of the service, or of having asked Sky to provide information about the service as part of the development of the Strategy and Policy. Overall, therefore, the Strategy represents a wholly inadequate basis for such an important policy, given its profound implications for provision of BBC content to third parties and the future development of the sector.

5.6 Sky does not consider that there is a sufficient justification for discriminating in favour of distribution of the iPlayer app in circumstances where platforms may offer alternative methods of delivering BBC content to Licence Fee payers.

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63 See paragraph 3.3 of the Draft Policy and paragraph 37 of the Strategy.

64 Save for a single, non-specific reference to audience research in footnote 12 of the Strategy, the BBC otherwise relies on past reports created for its own purposes or Charter Review and then only to cherry-pick statements praising the role of the iPlayer in developing the UK market for video on-demand. For example, Sky notes that the BBC omits less favourable references, such as the statements in the O&O/Oxera report for DCMS as to the likely chilling effects of the BBC iPlayer on the commercial sector, for example in the second paragraph on page 22 of BBC market impact assessment.pdf.
Making the BBC’s content available to bespoke services furthers the BBC’s objectives

5.7 The Strategy states that the ‘Distribution Objectives’ (which are themselves aimed at delivering BBC’s overall strategic goals which include universality, value for money, personalisation, distinctiveness and “Reinvention”) are as follows:

(a) “Maximising the ease and convenience by which all audiences can access BBC content and services, while

(b) Giving audiences access to the BBC’s complete content and service offer, and

(c) Ensuring audiences have the best possible experience of that content.”

5.8 As is clear from Sky’s experience of negotiations with the BBC described above and in the Chronology, and the limitations placed on the availability of BBC public service content on Sky’s platform, the BBC has not been acting in a manner consistent with these objectives.

5.9 Furthermore, as is clear from the remainder of this section, bespoke arrangements, such as that made available to Licence Fee payers by Sky, are equally able to deliver these objectives as the BBC’s iPlayer app, and indeed in certain areas, such as quality and value for money, exceed the BBC’s preferred approach.

Sky’s bespoke service delivers the BBC’s need for prominence

5.10 It is self-evident that the promotion, or prominence of the BBC’s content within a service does not require an iPlayer-first strategy as a bespoke service can be promoted as prominently, or more prominently, than the BBC’s iPlayer app.

5.11 Sky notes that the Strategy’s approach to prominence (“…in line with what audiences expect, and in ways that are consistent with the discovery mechanisms a platform seeks to deploy”) actually supports its bespoke solution, as audiences using Sky’s platform expect to experience BBC content in the same way as they access all other broadcast and catch-up content on the platform, through Sky’s PDL service, including the dedicated apps where the BBC currently prohibits Sky from making the BBC’s content available.

5.12 Furthermore, although there are no prominence obligations in relation to the BBC’s on-demand content, Sky has nevertheless placed the BBC’s content in Sky’s integrated service in the most prominent broadcaster position within the “Catch Up TV” section on Sky Q and Sky+ HD – where Sky believes customers would expect to find it – see Figure 2 below. Even in those areas where Sky has been unable to secure an agreement to actually show the BBC content (for example, for on-demand content on the Sky Q app), Sky has nevertheless still afforded the BBC this prominence by providing information about BBC content that can be accessed on the set top box, but not the app. The BBC is able to select which of its programmes receive prominence within Sky’s integrated service, as the BBC has full editorial control over how its content is presented.

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65 Paragraph 25 of the Strategy.
66 Paragraph 38 of the Strategy.
Sky’s bespoke service delivers the BBC’s need for curation

5.13 The Strategy asserts, without supporting evidence, that its strategy of distributing “packaged services” (channels or the iPlayer) “are greater than the sum of their parts thanks to the added value of public service curation” and that, again without evidence, “the huge choice and enhanced discovery features enabled by connected platforms mean there is even more need - and also greater value – for the BBC to curate and innovate its online services in digital environments.”

5.14 At paragraph 44 the Strategy attempts to explain why the BBC’s need for ‘public service curation’ justifies an iPlayer-first strategy:

“[I]t is critical to the delivery of the BBC’s mission that it is able to curate its on-demand service to surface a broad range of public service programming. Content curation within BBC iPlayer has proven highly effective at achieving this […] The BBC’s curation objectives, which reflect its public service objects as set out in its Charter, are notably different to those of commercial platforms, who are typically incentivised to promote the most popular programming, such as entertainment and drama, but not, for example, educational or factual content.”

5.15 In one of the few items of evidence, the BBC points to the uplift in viewing to lesser known programming through its prominence within the iPlayer as being determinative of why the iPlayer has “proven highly effective” at surfacing a “broad range of public service programming.”

5.16 Sky recognises that it is legitimate for the BBC to seek to curate its content and direct audiences towards the full range of public service content. The Sky Q UI is designed to enable Licence Fee payers to access the BBC content they want quickly.

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67 Paragraphs 16, 17 and 44 of the Strategy.
68 Paragraph 44 of the Strategy.
69 Ibid.
5.17 It is also capable of surfacing less populist BBC content that might be of interest to viewers or that the BBC is particularly keen to promote, such as through automated recommendations based on viewing, or editorialised promotion, where Sky works with broadcasters available on the platform to promote relevant content, for example using the Hero position on the Sky Q homepage (My Q). Within the BBC catch-up area, the BBC has full editorial control of the placing and prominence of programmes and may direct viewers to any of its content as it sees fit. In this way it can curate its service in the same way that it does on the iPlayer app.

5.18 While the BBC has not generally permitted Sky to include BBC content within editorially selected recommendations (such as the Hero position) as Sky has demonstrated the service’s ability to surface content in order to try to persuade the BBC to work with Sky as all other broadcasters do on the platform. During negotiations in 2017, Sky conducted an ‘A/B Insight Test’ to test take up rates for content promoted in the Sky Q Hero position. Figure 3 below illustrates a promotion of Poldark in the Hero position during the A/B Insight Test.70

**Figure 3: Sky Q Screenshot during ‘A/B Insight test’**

5.19

5.20 Sky also notes that there are other ways for the BBC to promote its content. For example Sky notes that the BBC has recently started to include cross and self-promotions before on-demand content on the iPlayer app and on audio podcasts, and could choose to do so on the Sky’s platform.

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70 The “A/B test” was conducted in June and July 2017. The aim of the test was to demonstrate to the BBC the beneficial impact on traffic and downloads of featuring BBC content in the “Hero” position of the “My Q” section of the Sky Q UI. In December 2017 the BBC also permitted Sky to promote the BBC’s “Blue Planet II” documentary (in UHD) in the Hero spot.
Sky’s bespoke service ensures Licence Fee payers benefit from innovation

5.21 The Strategy states that “[d]istributing packaged services also supports the BBC’s ability to offer current and future functionality and service innovations”. The Strategy goes on to cite features and functionality available via the iPlayer app, such as access services, Live Restart and personalisation, which the BBC suggests “would be lost in a world of disaggregated BBC programmes on third party platforms”.

5.22 The Strategy also asserts that “[t]he BBC is able to deploy these features in its standard applications, and will try wherever possible to replicate them in bespoke implementations. The experience achieving the latter has proven difficult, and has resulted in a marked divergence in aspects of quality (such as timely and reliable availability of content) between the evolving standard BBC iPlayer application and the comparatively static bespoke implementation”.

5.23 These statements are unfounded. First, as noted above, technical functionality is an important element of differentiation between platforms and Sky Q is widely acknowledged to be a market leading product with a wide range of innovative features and functions that are not present on the iPlayer app (voice search and control, PDL, the ability to record live TV and watch recordings on other devices to name but a few). The absence of particular functionality from one platform should not therefore be a justification for non-supply of BBC content, or for favouring the iPlayer app, unless it is integral to the delivery of the content, content protection, or to the attribution of content to the BBC.

5.24 Second, the BBC is wrong to assume that its innovations would be “lost” if it were to make its content available outside of the iPlayer app. The issue is not binary, and the BBC’s push for the iPlayer to be made available on a wide variety of connected devices means that if a Licence Fee payer regards a particular feature as essential, then they will be able to access it elsewhere.

5.25 Sky notes that a number of features currently available on the iPlayer app could also be made available on Sky’s integrated service for example, in relation to personalised recommendations, “Live Restart” and subtitles).

5.26 As regards “timely and reliable availability of content”, as the BBC is aware, Sky has devoted a great deal of time and resource to ensuring that BBC content is made available as quickly as possible to audiences on its platforms. In the period from November 2016 to 17 April 2017, on average, 98% of BBC content was made available within 11 minutes of the end of the broadcast transmission of the relevant programme. Technical solutions have

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71 Paragraph 18 of the Strategy.
72 Ibid.
73 Ibid.
74 Paragraph 19 of the Strategy.
75 Ibid.
76 Paragraph 49(a) of the Strategy.
77 This functionality is available for Sky Cinema content and certain entertainment titles and involves linking the live stream to the relevant on-demand programme, however this could not currently be delivered for live content.
78 Paragraph 49(a) of the Strategy.
79 More recently, delays have increased slightly due to, for example, the greater volume of on-demand content being provided by the BBC for Sky’s integrated service over the Christmas period (in particular, box sets), and the greater volume of live content being provided during the Winter Olympics (live content, which cannot be ingested in advance, takes longer to be made available on Sky’s services).
recently been introduced, and further solutions are being implemented for programmes where delays are experienced. Sky does not consider that delays in making BBC content available can reasonably be said to be a material disadvantage of Sky’s integrated service.

**Sky’s bespoke service ensures Licence Fee payers benefit from the full range of BBC content**

5.27 The Strategy states that “the BBC syndicates its VOD content in the form of a service (branded BBC iPlayer), ensuring that audiences have access to the full range of the BBC content that they already pay for”. The Strategy further states that “packaged services” such as the iPlayer app are “greater than the sum of their parts […] including, where available, access to the BBC’s archive”.

5.28 It is clear that the BBC can ensure that Licence Fee payers benefit from the “full range” of BBC content on alternative distribution platforms by granting such platforms the rights to include such content (including access to the BBC archive content) and setting minimum requirements in relation to the inventory of BBC content that must be included on the platform.

**Sky’s bespoke service delivers the BBC’s need for audience data**

5.29 The Strategy states that:

“The BBC can deliver a better and more valued service by maintaining a direct relationship with audiences. This is a stated BBC strategy - in common with most consumer-facing organisations - and critical to the delivery of its public mission in this Charter period.

The BBC has always sought to understand as much as possible about those who consume its services at an aggregate level, through surveys, panels (e.g. BARB, RAJAR) and direct collection of consumption data. This data allows the BBC to measure the reach of its content and services, and to make better commissioning, curatorial and strategic decisions”.

5.30 While Sky agrees that the BBC should have access to data about its services, a direct relationship between the BBC and Licence Fee payers (via the iPlayer app) is not essential to achieving this aim.

**Sky’s bespoke service meets the BBC’s need for clear branding and attribution**

5.31 The Strategy states that the “BBC seeks to ensure that its content and services are clearly branded and can be reliably and accurately attributed. This delivers two important benefits for

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80 Paragraph 44 of the Strategy.
81 Paragraph 16 of the Strategy.
82 Currently, the BBC does not provide Sky with all of the content that is available on the BBC's iPlayer app. For example, the BBC has declined to make World Cup 2018 UHD content available to Sky.
83 Paragraphs 51 and 52 of the Strategy.
audiences, and for the effective functioning of competition in the content and platform markets respectively. First, the BBC’s brands signpost the quality or tone that a user might expect from a programme, thereby helping the user to make better informed content consumption choices. Second, effective attribution ensures that the user can better identify the value they receive from the licence fee whichever route they choose to access BBC content.84

5.32 It is clear that distribution via the iPlayer app is not the only means of ensuring the BBC content receives clear branding an attribution. All BBC content on Sky has clear attribution, whether it is surfaced within the integrated service or in other parts of the Sky UI (for example, in a search result or recommendation driven by an algorithm).

The BBC’s catch-up content also appears in a dedicated BBC branded area of the menu, including the BBC iPlayer pink and black livery – when Sky adapted its Sky+ HD UI to accommodate the BBC’s branding and distinctive colours, it was the first time it had changed its UI design for a broadcaster. This change was carried through to Sky Q, and is illustrated in Figure 4 below.

**Figure 4 Sky Q screenshot illustrating BBC branding and attribution**

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**Sky’s bespoke service provides ‘free access’**

5.33 The Strategy states that “[m]any are incentivised to charge the BBC for access to platforms and networks and to charge audiences extra to receive BBC services.”85

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84 Paragraph 58 of the Strategy.
85 Paragraph 14 of the Strategy.
5.34 Without further information it is not possible to comment meaningfully on this statement. However, Sky notes that this cannot be a valid justification for preferring the iPlayer app or withholding BBC content from alternative distribution solutions. Sky notes that it does not charge the BBC for including BBC on-demand content in its integrated service and does not charge audiences extra to receive BBC content. Further, it is within the BBC’s gift not to provide its content to platforms who demand payment and to stipulate in its contracts with platforms that they must not charge end-users extra for access to BBC content.

**Sky’s bespoke service delivers efficiency and value for money**

5.35 The Strategy states that the iPlayer app is “a highly efficient and cost-effective means of making the BBC’s content and services widely available.”

5.36 While Sky agrees that the BBC should seek to provide value for money for Licence Fee payers in line with its obligations under the Charter and Framework Agreement, distribution via the iPlayer app is not the only way to achieve this.

5.37 As Sky meets all relevant incremental costs of supply in return for delivering significant viewing to the BBC Content. Sky has agreed to cover the BBC’s incremental costs of making BBC content available on Sky’s platforms and has offered to increase its contributions to reflect the BBC’s reasonable costs associated with any additional Sky uses.

**Sky’s bespoke service complies with the BBC’s FRND obligations**

5.38 The Strategy states that the iPlayer app is “a highly efficient and cost-effective means of making the BBC’s content and services widely available on a fair, reasonable and non-discriminatory basis.”

5.39 While Sky notes that the BBC is under an obligation to act on a fair, reasonable and non-discriminatory basis in offering its public services for supply, this does not mean that it is not possible (or appropriate) for the BBC to differentiate between platforms based on objective criteria. The BBC’s ‘one size fits all’ approach ignores the possibility, noted by Ofcom in 2011, that “there might be instances where a better consumer proposition and greater public value could be delivered through bespoke development.”

5.40 For example, Sky has deliberately sought to set itself apart from other platforms and service providers who have chosen to provide access to content via an app environment, requiring the user to switch between apps in order to access content from different providers. Sky’s service offers a better consumer experience as it provides access to content from a range of content providers via a sophisticated and coherent user interface which also incorporates a number of innovative features to assist customers in discovering and accessing the content in which they are interested. In Sky’s view, the BBC would be discriminating against Sky if it sought to treat Sky the same as all other platform.

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86 Paragraph 36 of the Strategy.

87 Paragraph 36 of the Strategy.

88 Paragraph 36 of the Strategy.

89 Paragraph 3.32 of Ofcom’s statement “Distribution of BBC public services, Ofcom’s requirements and guidance” dated 29 March 2017.

and service providers, without first taking into account the specific circumstances of Sky. In this regard it is relevant that all other major UK broadcasters have granted Sky all the relevant rights to make their content available to the fullest extent across the Sky Q service. This is illustrated by the Figure 5 below.91

**Figure 5: Rights granted by broadcasters**

![Figure 5: Rights granted by broadcasters](image)

5.41 It is also clear that the BBC is willing to distribute other public service content outside of a BBC service. The Strategy states that "[f]or certain content the BBC's mission is better met by publishing as individual assets, rather than syndicating as a packaged service".92 The BBC goes on to cite social media platforms and audio podcasts as examples of where the BBC has made individual assets available, notwithstanding the limited "curational influence" the BBC has under this approach.93 The BBC seeks to justify this alternative approach for social media platforms and podcasts on the basis of market norms, audience expectation and ability to achieve significant reach. However, the Strategy fails to explain why this alternative approach is not also appropriate in other scenarios. For example, as is illustrated by Figure 5 above, on the Sky platform, which also has significant reach, the "market norm" is for all broadcasters' catch up content to be made available via Sky's integrated service. The integrated service has the added benefit that the BBC's maintains curational influence over its content within that service. Accordingly, there is no objective justification for only distinguishing audio content and social media platforms as candidates for alternative means of distribution. There is no basis for discriminating against audio-visual content in this way.

5.42 Finally, as noted above, the Strategy is self-evidently discriminating in favour of the BBC's own distribution service, the iPlayer app, without any objective justification for doing so.

5.43 In summary, therefore, none of the benefits of the BBC's strategic preference for distributing its television content via the iPlayer app in fact justify such an approach, and overall there is a lack of analysis and evidence. The BBC ought to acknowledge the merits

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91 Details of the requests Sky has made to the BBC to allow Sky customers to access BBC content via the various functionality and features available on its platform and listed in Figure 5 are set out in the Chronology at Annex 2.

92 Paragraph 46 of the Strategy.

93 See paragraphs 39-41, 46 and 47 of the Strategy.
of bespoke solutions such as Sky’s integrated service, both for the BBC and Licence Fee payers, and ensure that its final Distribution Policy appropriately reflects the possibility of such approaches.

SECTION 6: FURTHER CONCERNS RAISED BY THE STRATEGY AND DRAFT POLICY

6.1 This section sets out a number of additional concerns raised by the Strategy and Draft Policy.

The BBC’s targets for BBC iPlayer usage distort its incentives to comply with its obligations

6.2 Sky questions whether it is appropriate for the Strategy to link the BBC’s obligation to provide distinctive output and services with the BBC’s aspirations for the BBC iPlayer. It is not at all clear how the two are linked. Furthermore, Sky is concerned that by setting a target of over 20m people enjoying the iPlayer app each week, and spending on average 2 hours per week using it, necessarily skews the BBC approach to distributing its content away from complying with its regulatory obligations and towards a strategy of BBC iPlayer-only (rather than iPlayer-first). Certainly, Sky’s experience in dealing with the BBC has been consistent with such an approach, and that the desire to drive usage of the iPlayer app has been one of the factors contributing to the excessively long negotiations.

The BBC’s involvement in new distribution platforms must be treated with scepticism and subject to external scrutiny at the earliest opportunity

6.3 Paragraph 31 of the Strategy states that:

“In preparation for a future where all TV is distributed over the internet, and to cater for licence fee payers who transition earlier, the BBC will work with the industry to ensure that there is a compelling free-to-view platform through which audiences can receive internet-delivered TV services, and will prioritise support for platforms that are fully internet-capable or committed to innovating to become so.”

6.4 Sky expects any new platform developed by the BBC alone or in partnership with others to be subject to the highest levels of scrutiny. A statement that the BBC intends to discriminate in favour of “fully-internet-capable” platforms is of concern to Sky as the combination of iPlayer-first, use targets for iPlayer, selective rights acquisition, and a new BBC streaming platform are all likely to have a chilling effect on innovation and investment in an area where Sky competes, and where Sky seeks to differentiate its services by adopting a technological approach and navigational paradigm that are different from the BBC’s declared strategy.

6.5 Sky notes that, if the BBC does enter into any new platform joint venture, it may be preferable, this time, for the BBC to retain adequate control over the venture in order to make sure its public service objectives are delivered. What began as Project Canvas, the BBC’s previous attempt to deliver a compelling free-to-view internet capable television service, ended as YouView: a less ambitious pay-TV platform for the BBC’s ISP partners which has neither delivered the innovative features and functionality heralded by the BBC, nor provided a significant subscription-free platform for Licence Fee payers, nor a viable
open access platform for third party content providers. Such projects do not appear to be the best use of the BBC's resources, neither offering value for money or the BBC's strategic objectives.

6.6 Sky submits that the BBC would fulfil its mission and public purposes better (particularly in relation to supporting technical innovation) by engaging with platform operators such as Sky and enabling full access to BBC content across its bespoke solution.

**The proposed iPlayer-first strategy would inhibit platform innovation**

6.7 The Strategy states that the iPlayer-first strategy “does not preclude or inhibit platforms developing content discovery innovations.” What this statement makes plain is that the BBC believes that it is acceptable for its strategy to preclude or inhibit other forms of differentiation and competition, such as in relation to playout and the functionality available, which are compromised by the BBC’s insistence on platforms taking its iPlayer app.

6.8 Indeed the Strategy goes on to state that “[u]nlike other large VOD services, the BBC does not operate a ‘walled garden’ service” as evidenced by the fact that the BBC is willing to supply metadata to enable content to be found outside of the iPlayer. In fact, this is the very definition of a walled garden service, as users are given the impression of BBC content being available outside of the iPlayer, but the content can only be viewed in the app. The BBC’s stated intention in doing so is to gain an advantage as against alternative solutions by keeping the user in the BBC’s environment (the walled garden) longer than they might otherwise stay.

6.9 During negotiations, the BBC sought to require Sky to provide such ‘deep links’ into the iPlayer app from the Sky Q UI, rather than using its integrated content. Sky could not agree to that proposal for a number of reasons. In particular, if implemented it would have subverted the paradigm for the navigation, presentation and viewing of content which is fundamental to the design of Sky Q. As discussed above, that paradigm eschews the delivery of content to consumers within a series of self-contained apps, with consumers being required to switch among them in order to find and watch content. Instead, it seeks to provide content from all broadcasters on the platform in a coherent and consistent manner, making the discovery and viewing of content as easy as possible for users.

**The BBC must not reinforce the iPlayer-first strategy through it rights acquisition strategy**

6.10 Paragraph 2.6 of the Draft Policy states that nothing in the Policy “create[s] any obligation for the BBC to acquire additional rights from a third party in order to meet a request for access to BBC content and services”.

6.11 Whilst it may be correct that the Policy does not create such an obligation, the distribution obligations in the Charter and Framework Agreement do create that obligation in circumstances where a third party has reasonably requested the relevant rights. Sky frequently negotiates with rights holders and content providers mid-contract to acquire additional rights in order to be able to provide its content across the full range of its services – particularly in relation to new and innovative services that could not have been contemplated at the time of the original content acquisition agreement. Sky has similar discussions with third party broadcasters in respect of their services, who will usually provide commitments to acquire the necessary rights from the underlying rights holders.

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96 Paragraph 45 of the Strategy.
97 For example, see paragraph 17 of the Strategy.
There is no reason why the BBC cannot do the same, and given the presumption of supply outside of BBC services, there is every reason to expect the BBC to do so.

6.12 During recent negotiations, however, Sky has learnt that in relation to certain content, the BBC only acquires rights to make the content available online in a “BBC controlled environment”, and accordingly, when the BBC supplies Sky with an IP feed of its linear channels there will be a greater proportion of ‘blackouts’ (programmes that must be masked due the absence of the relevant rights) on Sky's service than on the version included in the BBC's iPlayer due to differences in rights. If allowed, such an approach could be used to restrict access to BBC content even further, and undermine the availability of BBC content and services in non-BBC environments.

The BBC’s proposed approach to withdrawal of supply appears draconian

6.13 Section 4 of the Draft Policy describes in detail when changes made to a platform, including changes to the interface, would justify the BBC withdrawing supply.

6.14 Whilst it is appropriate in principle for the BBC to have a right to withdraw its content from a platform where there is a risk of harm to the BBC, this must be a very high threshold, and it should be made clear on the face of the policy that this right will only be exercised in extreme circumstances. Otherwise, notwithstanding the proper application of the “reasonable, proportionate and timely steps” the BBC says that it will take; the BBC is effectively giving itself a veto right over any and all changes to platforms where its content is made available. Given its role as both content producer and operator of multiple platforms and services the BBC should not be in a position to dictate how other, competing services should look or feel.

Enforcing compliance with the Policy

6.15 In addition to greater clarity as to the conditions for supply, there must be an appropriate enforcement mechanism. Without effective enforcement, the final policy will be of limited value to third parties. The BBC has not, however, included any information in the Draft Policy about what third parties should do if they are not happy with the BBC’s interpretation or application of the final policy.

6.16 The assumption must therefore be made that any third party unhappy with the BBC’s approach must make a ‘general complaint’ under the BBC Complaints Framework and Procedures. Any further ‘appeal’ would have to be made by judicial review of the BBC Executive Complaints Unit decision (after the third stage of the BBC’s process) or to Ofcom, but Ofcom could only enforce its Distribution Requirements, having regard to the BBC’s obligations under the Charter and Framework Agreement, including in relation to the policy.

6.17 This mechanism imposes a disproportionate burden on third parties and reinforces the need for the final policy to include a process whereby requests are considered within an appropriate timeframe, and fully reasoned explanations given for refusal of any requests. Only then will third parties be able to assess properly whether to accept any BBC proposal, or make a complaint which would involve significant resource and delay.

6.18 Without a clear process for considering requests, including a detailed timetable for engagement and responses, and a requirement on the BBC to justify any refusal in writing and by reference to the policy, third parties risk significant delays in launching innovative new services including the BBC’s public service content, or being forced to compromise their proposed service in order to accommodate the BBC’s requirements. Neither option is in the public interest, which is best served by the widespread availability of BBC content, across a range of services and platforms, and not solely in via the BBC iPlayer app.
6.19 Absent such a process, and further clarity as to the BBC’s conditions, third parties are more likely to resort to regulatory enforcement through Ofcom’s Distribution Requirements. These are clear and free-standing obligations on the BBC to meet reasonable requests for supply, on fair, reasonable and non-discriminatory bases, enforceable by the independent regulator. They are therefore likely to deliver a fairer outcome for third parties than lengthy and one-sided negotiations with the BBC against the vague ‘conditions’ in the Draft Policy.

SECTION 7: THE SIGNIFICANT FLAWS IN THE CURRENT DRAFT POLICY REQUIRE FURTHER CONSULTATION

7.1 The Draft Policy has a number of material flaws that must be remedied and should not be adopted in the final version of the policy, namely:

(a) The Draft Policy provides no clear guidance to third parties as to how the BBC will supply its public service content for inclusion in their service or platform, or the terms and conditions of supply, in breach of Clause 62(2)(a) and (b);

(b) The Draft Policy fails adequately to acknowledge the opportunity represented by bespoke solutions, or to explain when the BBC will agree to distribute its audio-visual content outside of the BBC iPlayer app;

(c) The BBC’s approach creates significant uncertainty, hindering innovation and harming the interests of Licence Fee payers; and

(d) The Draft Policy provides no certainty as to the process for acquiring access to BBC content, or resolving disputes in relation to such access.

7.2 In order to remedy these failings, the BBC should publish and re-consult upon a more detailed draft policy that:

(a) Describes in greater detail the reasonable conditions that the BBC will require such as to enable of third parties to assess in advance the reasonableness of the conditions and whether they are likely to be able to secure access to BBC content in whatever form they might request, including for bespoke solutions;

(b) Ensures that the BBC can only limit the distribution of its output and services to third parties via the BBC’s own services where this is reasonable and in the public interest; and

(c) Sets out a process, including the information that must be provided to the BBC, the timetable for the BBC to notify a third party of its decision, and the appropriate mechanism for dealing with disputes, including, but not limited to, formal complaints under the BBC Complaints Framework and Procedures.

7.3 For the avoidance of doubt, Sky does not believe that BBC should set out a finite set of absolute conditions, but rather that it should provide further detail in relation to each condition such that a third party can assess, prior to any subsequent negotiations, the boundaries of the BBC’s likely requirements.

7.4 Such an approach will also enable third parties to satisfy themselves that the BBC’s conditions are reasonable and that they are being treated in an FRND manner.

Sky April 2018
**SKY RESPONSE TO THE BBC CONSULTATION ON THE DRAFT BBC DISTRIBUTION POLICY**

**TABLE OF ANNEXES**

1. Summary of the previous regulatory framework
2. [Redacted]
3. [Redacted]
4. [Redacted]
5. Sky presentation to BBC on Next Generation platform – July 2014
6. [Redacted]
7. [Redacted]