Dear Katherine

The BBC’s Draft Distribution Policy

TVPlayer Limited (TVP) welcomes the opportunity to respond to the consultation on the BBC’s draft Distribution Policy. Our response is as follows.

Summary

TVPlayer is an innovative online TV platform. Among other things, it streams to its users the major PSB channels, including for example BBC One. It competes for audiences with iPlayer and other platforms. With the exception of the BBC, all the broadcasters whose channels are carried on the platform provide a direct feed of their programmes or permit the signals to be sourced off air. The BBC, however, insists that TVP accesses its channels via iPlayer. This is unwelcome both to TVP’s audiences and to TVP, particularly as it leads to iPlayer taking over TVPlayer’s audiences.

The BBC’s draft Distribution Policy indicates that it intends to continue to refuse to supply access to its channels otherwise than via iPlayer. This response therefore sets out TVP’s reasons for believing that this refusal is unfair and wrong, that TVP is entitled to unbundled access to BBC content and that the draft Policy is inconsistent with the BBC’s regulatory duties and is anti-competitive.

The response also sets out TVP’s concerns that the conditions that the BBC proposes to impose on distributors of its UK public services appear to be oppressive and calls for a different approach to them.

Introduction: TVPlayer and its wish for unbundled access to BBC linear programme streams

TVPlayer is a next generation television platform. It provides a live TV streaming service to a wide range of devices for reception by the general public in the UK, aggregating over 100 free to air and pay channels, including the main UK TV/PSB services, into a single service. It is now the fastest growing pay TV service in the UK, adding more net paying subscribers per quarter than any of the incumbents (Sky, Virgin, BT and TalkTalk). It has over 1.5 million active users, many of whom use TVPlayer as their principal means of receiving television services (a recent customer survey indicated 47% for 18 – 35 year olds). Most (90%) of consumption on the platform is linear, mainly because the BBC and other PSBs have not yet supplied catch up content to TVP. TVP is at a disadvantage to the incumbent pay TV operators who have access to PSB catch up services on their platforms.
Meeting the Clause 62 requirements

The consultation document says (in paragraph 6) that the BBC is seeking views on whether the draft Distribution Policy meets the Clause 62 requirements. TVP welcomes the opportunity to explain why it has formed the clear view that the draft Policy does not meet those requirements.

There are four requirements with which the Policy must comply. They are listed in clause 62(2) of the BBC’s Framework Agreement. By failing to deal with unbundled access to BBC output, the Policy fails on all four tests, for the reasons we explain below.

Does the draft Policy set out how the BBC will fulfil its obligations under clause 61 (making UK Public Services widely available)?

The first requirement is that the Policy must “set out how the BBC will fulfil its obligations under clause 61 (making UK Public Services widely available)”. The Policy fails at this first fence. Clause 61 requires it to provide unbundled access but the Policy ignores it. It omits any reference to how the BBC might fulfil its obligations in this respect.

In more detail, clause 61 says that the BBC must do all that is reasonably practicable to ensure that users are able to access not only the UK Public Services but also “elements of their content” in a range of convenient and cost effective ways. It is clear from the wording of clause 61 that the BBC is expected to provide access to individual elements of the content of the UK Public Services as an alternative to a bundled service. It says that what users are to be able to access is “the UK Public Services that are intended for them, or elements of their content” (our emphasis). It is quite clear from the wording that the requirement is to provide access either to the services themselves or to “elements of their content”. In other words, clause 61 contemplates the provision of access either to the bundle of elements that are comprised in a particular service or, in the alternative, to unbundled elements of their content, and it obliges the BBC to do all that is reasonably practicable to ensure that users have access on either basis. Clause 62 requires the BBC to set out how the BBC will fulfil this obligation. But the draft Policy does not do so. It says nothing at all about the alternative, notwithstanding that clause 62 requires it to do so.

We recognise that the draft Policy does set out an extract from clause 61 in which the BBC’s obligation in relation to the unbundled elements appears. But in the main text of the Policy and the accompanying consultation document the obligation is airbrushed away. It is simply omitted. This can be illustrated from the description of the scope of the Policy in paragraph 2 of the draft: when describing what is meant by “distribution”, the draft speaks of access to the UK Public Services themselves but omits any reference to the alternative that is expressly specified in clause 61 as explained above – access to “elements of their content”. Whereas clause 61 spoke of viewers, listeners and other users being 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” (our emphasis), the Policy says that distribution “encompasses any activity aimed at making the UK Public Services available to viewers, listeners and other users in the UK in a range of convenient and cost-effective ways.” Any reference to distribution by enabling users to access elements of the content of the UK Public Services has simply
linking to support platform discovery innovations. Where appropriate the BBC will require a third party to enter into a carriage agreement which will be individually negotiated subject to these conditions.

It seems clear from this passage that the current practice of imposing a bundling condition will continue in all normal circumstances. No indication is given as to the exceptions that the BBC might make on a "case-by-case basis" and in what circumstances a carriage agreement might be "appropriate" and consultation responses appear to be discouraged by the emphatic way in which the consultation says (and repeats) that the Strategy is outside the scope. In the absence of any fuller explanation of possible exceptions or the criteria that the BBC proposes to apply, and in light of the BBC's insistence in negotiations on access via iPlayer, it is not unreasonable that TVP should respond on the basis of a worst case scenario in which the BBC would continue to refuse to provide access otherwise than via iPlayer and to respond to the consultation on that basis.

TVP takes the view that what is said about bundled provision in the Strategy and the draft Policy is more than mere context. It is a condition which the BBC appears to continue to impose and which has already had an adverse impact on its business. TVP considers that a condition of this kind ought fairly to be unambiguously included in the draft Policy and the industry ought therefore to be properly consulted on it. And the BBC ought properly to consider whether it is consistent with its duties under clause 61 of the Framework Agreement which expressly extend to unbundled access. Certainly it appears to TVP that the condition is not consistent with those duties: users should be able to access disaggregated or unbundled elements of the UK Public Services as required by clause 61 of the Framework Agreement and unbundled provision ought therefore be available to platforms such as TVPlayer.

So far as the rationale for the condition is concerned, it appears from the Distribution Strategy that the purpose of distributing the UK Public Services in the form of packaged services, that is to say aggregated selections of content, is to meet the BBC's public mission and maximise value for licence fee payers. The examples that it gives include BBC One and iPlayer, as to which it indicates (in paragraphs 16 and 19) that they are:

"greater than the sum of their parts thanks to the added value of public service curation and functionality ... These and other benefits would be lost in a world of disaggregated BBC programmes on third party platforms, with the BBC acting merely as a content provider to others' services or platforms, unable to curate or introduce features (such as personalisation) around its content."

This bleak picture does not withstand examination. It disregards the added value and functionality that competing platforms are able to provide. And to assimilate BBC One to its idea of a package of a kind that justifies refusing direct access to the signal feed is an unrealistic exaggeration. Certainly the sequence of programmes in a linear television service may be curated to meet public service objectives but it is not necessary for access to BBC One to be via iPlayer to meet those objectives since the sequence will be the same whether the source is iPlayer or a direct signal feed. TVP should not be denied access to a direct signal feed for BBC One on such a flimsy ground.

In brief, the BBC's condition relating to bundled provision is not a reasonable condition of the kind required by section 62 but even if it had been it ought to have been included in the draft Policy for
application across comparable platforms and services." Since the seven conditions do not include the implicit restrictive condition that we have identified above, the draft does not appear to fulfil this fourth aspect of the Clause 62 requirement.

There is, however, more to be said about this fourth requirement that is relevant to the consultation. As the draft Policy acknowledges (at paragraphs 1.10 to 1.12), the Framework Agreement is not the only source of duties to which the BBC must have regard in setting the Policy. It says that, in setting the Policy, the BBC has also had regard to the Charter and to Ofcom's Operating Framework including Ofcom's so-called Must-Offer Obligation.

The Must-Offer Obligation consists of two parts, one obliging the BBC to offer its public services in response to reasonable requests, except where it has an objective justification for not doing so, the other obliging it, when offering and supplying those services, to act on a fair, reasonable and non-discriminatory basis. It is not clear whether this Obligation is wider or narrower than the comparable obligations arising from the Charter and the Framework Agreement and we express no view on that question. For present purposes, we focus on the Must-Offer Obligation.

In seeking to understand its meaning and effect, it may be relevant to consider the approach taken by Ofcom or one of its predecessor organisations (Oftel) to the application of a similar obligation to BT in relation to local loop unbundling. TVP does not believe that it would be an exaggeration to say that, without that obligation being applied to BT, the development of broadband services in the UK would have been delayed by many years. TVP is concerned that, unless the Must-Offer Obligation is applied effectively to the BBC, the development of television platforms in the UK could be similarly delayed.

It is for Ofcom to enforce the Must-Offer Obligation but since the BBC's insistence on supplying its content via iPlayer appears so clearly to be inconsistent with it, TVP invites the BBC to consider whether the implicit inclusion in the draft Policy of such a restrictive condition is consistent with it. In particular, the BBC is invited to consider whether, when offering and supplying its public services subject to such a condition, it is acting (as required by the Obligation) on a fair, reasonable and non-discriminatory basis.

In the absence of any specific guidance, we suggest that acting on a "fair" and "reasonable" basis includes offering terms of supply which are fair between the parties and are sensible and practical, and which also take into account both the purpose of the requirement and, to the extent relevant, the BBC's Mission and Public Purpose as defined in the Charter. This suggestion is based on Oftel's approach to determining the reasonableness of terms required to be offered by BT in relation to local loop unbundling as set out in Oftel's Statement and Determination of February 2001. We are not aware that events since that time have led to any materially different approach.

Similarly, so far as acting on a "non-discriminatory" basis is concerned, we suggest that Oftel's approach in its Statement and Determination to interpreting provisions requiring BT not to discriminate in the provision of unbundled access to the local loop is helpful and a precedent that Ofcom is likely to follow. In that case, BT was required under provisions in both an EU Regulation and a condition of its licence under the Telecommunications Act not to discriminate in the provision of unbundled access to the local loop. Oftel said that the rule was designed primarily to stop BT misusing its market power, especially where it would cause an adverse effect on competition. In particular Oftel said (in Chapter Two) that it meant that BT must not —
The BBC’s Conditions for Distribution

Clause 61 of the Framework Agreement permits the BBC to impose reasonable distribution conditions on its third party distributors but they must not adversely impact fair and effective competition and must be fair, reasonable and non-discriminatory. For the reasons explained above, TVP does not consider that the bundling condition meets these requirements. Nor does it meet the requirement under clause 62 that the condition be included in the Policy on which the BBC must consult. But the draft Policy does include (or, more accurately, purport to include) seven conditions on which the consultation invites views.

TVP is not sure that these conditions, and the manner in which the BBC aims to apply them, are described in sufficient detail to enable TVP to offer a studied view in response to the consultation. As aspirations, they are understandable but as conditions of distribution, that is to say contractual conditions, they would be in some vital respects oppressive and unacceptable. For example, the condition for editorial control would among other things require a platform operator to allow the BBC to interfere with its user interface. The draft Policy says in this respect:

“Platforms must allow the BBC 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.”

No commercial platform operator could possibly accept such terms.

TVP recognises that, in introducing the seven conditions, the draft Policy says that the BBC will apply the conditions on a case-by-case basis having regard to the particular circumstances of each case and in accordance with its various regulatory duties. But while this could provide comfort it is not a safeguard against the application of oppressive contractual conditions. It is not even a comfort if it means that the conditions of this kind will apply subject only to the BBC’s regulatory duties since that would be a recipe for endless engagements with the BBC complaints procedures and with Ofcom. In TVP’s view, the contractual conditions that the BBC proposes should themselves be shaped by those duties, should be included in the Policy and should be consulted upon in draft, which is what clause 62, properly interpreted, appears to require. TVP therefore calls on the BBC to consult further on these matters.

The consultation questions

In the light of our comments as set out above, TVP’s answers to the consultation questions are as follows:

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

No. It has failed in particular to identify (and therefore to consult on) the condition that BBC content is available to distributors such as TVP only via iPlayer. Those conditions which it has identified are not described in sufficient detail to be fully assessed and, to the extent that they can be assessed, they are in some vital respects oppressive and unreasonable.