

# Canvas proposals

# **Final conclusions**

25 June 2010



# Table of Contents

Glossary .....	1
1. Introduction and key findings .....	4
2. The assessment process to date .....	11
The Canvas assessment process .....	12
Approach to the PVA .....	16
Approach to the MIA .....	16
How the PVA and MIA informed the Provisional Conclusions .....	17
The Provisional Conclusions .....	18
3. Consideration of feedback on the assessment process .....	20
Criticism of the Trust's choice of assessment process .....	20
Criticism of the Trust's conduct of the PVA .....	20
Criticism of the Trust's conduct of the MIA .....	22
4. Considerations of submissions on the Trust's proposed conditions .....	28
Industry engagement .....	29
Cost .....	33
Free-to-air always .....	34
Accessibility and usability .....	34
Content providers' access to Canvas .....	37
Platform operators' access to Canvas .....	38
Syndication .....	41
Cross Promotion .....	44
Access to Canvas for ISPs .....	44
Legal compliance .....	45
5. The Trust's Final Conclusions .....	48



# Glossary

Broadband	A high-speed network service with the capacity to transmit significant amounts of data at a high rate, supporting the delivery of a range of digital services, some or all of which can be delivered simultaneously
Canvas	A joint venture intended to develop and promote a standards-based open environment for internet-connected digital television devices as described in the Executive application for approval
Canvas UI	Canvas core user interface; the subset of the user experience which is managed by the Canvas joint venture
Charter	The Royal Charter for the continuance of the British Broadcasting Corporation of October 2006
Conditional access	(Abbreviated: CA) The protection of content by requiring certain criteria to be met before granting access to this content
Content providers	Creators and distributors of content
Counterfactual	The current and future prospects of the affected products and services in the absence of the proposals
Core technical specification	(Abbreviated: CTS) a set of technical standards to enable delivery of on demand interactive and web based content on television via a broadband connected digital device
Dbook6	Detailed technical standards for digital terrestrial television in the UK as developed through DTG and published in 2009
DRM	Digital rights management
DTG	Digital Television Group
DTT	Digital terrestrial television; delivered most commonly through Freeview
DTT /IPTV	Consumer electronics equipment such as set-top boxes which have a DTT tuner and an IPTV capability
DVD	Digital versatile disc

EPG	Electronic programme guide
Executive	The Executive Board of the BBC, which has responsibility for delivering the BBC's services in accordance with the priorities set by the Trust and for all aspects of the BBC's operational management, except that of the Trust's resources
Framework Agreement	Framework Agreement, dated July 2006, between the BBC and the Secretary of State for Culture, Media and Sport, also referred to in the PVA as the 'Agreement'
Freesat	Refers to the Freesat joint venture and satellite distribution platform, which was launched in May 2008
FTA	Free to air
iPlayer	Online, on-demand catch-up BBC offering, which allows users to watch BBC programmes from the previous seven days
IPTV	Internet Protocol television; is a system through which digital television service is delivered using the architecture and networking methods of the Internet Protocol Suite over a packet-switched network infrastructure, e.g., the Internet and broadband Internet access networks
IPVOD	A device broadly similar to an IPTV device but which is used to access VOD
ISP	Internet service provider
Kangaroo	Proposed VOD platform offering content from BBC Worldwide (the commercial arm of the BBC), ITV.com and Channel 4oD, initially expected to launch in 2008 but prohibited by the Competition Commission in 2009
Non-Linear content	On-demand content not viewed as part of a linear TV channel
MIA	Market impact assessment; an assessment of the market impact of new BBC proposals
Non-service activity	(Abbreviated: NSA) BBC activities which do not have the nature of a service and are therefore outside the scope of many of the formal requirements expressed in the Framework Agreement (such as the system of service licences and the detailed requirements about the PVT and MIA). See clause 22 of the Framework Agreement for more information
On-demand	Allows users to select, stream or download, store and view film and television programmes, usually within a certain timeframe, using a digital cable box or online service

PSB	Public service broadcaster
Push VOD	A technique whereby content is downloaded and stored on the receiving device (usually during times where there is more capacity on the network, such as overnight) and consumed at the time that the viewer chooses
PVA	Public value assessment; undertaken by the BBC Trust to assess the value of the BBC proposals, including value to licence fee payers, value for money and wider societal value
PVR	Personal video recorder
PVT	Public value test; the means by which the required full and public scrutiny of significant changes to the BBC's UK Public Services takes place. A PVT is a thorough evidence-based process, which considers both the public value and market impact of the proposals. During PVTs, the BBC Trust will consult the public to ensure its decisions are properly informed
Reach	A measure of the reach of the BBC's activities to its audience
R&D	Research and development
Service licence	Records the remit and expectations for each BBC service, and how that service will create public value by delivering the BBC's Public Purposes, as set out by the BBC Trust in a published licence to ensure that the BBC offers high quality and original services for all licence fee payers
Trust	The BBC Trust, which is responsible for setting the overall strategic direction of the BBC, including its priorities, and exercising a general oversight of the work of the Executive Board
VOD	Video on demand
UI	User interface

Any other defined terms used are taken from the Framework Agreement, unless otherwise stated.

# I. Introduction and key findings

- I.1. This document sets out the final decision of the Trust to approve, subject to conditions, the participation of the BBC in Canvas. The BBC's participation in Canvas is restricted by the scope of this approval and conditions set by the Trust, as detailed in this decision. The Trust's decision, and the analysis that has informed its decision, is set out below. This decision goes on to set out the reasons for the conclusions that the Trust has drawn and the conditions that it proposes to impose on the approval.
- I.2. The Executive sought approval to participate in a joint venture intended to create, develop and promote a set of core technical specifications to enable delivery of on-demand, interactive and web-based content to a television via a broadband connected digital device ("Canvas"). Canvas also involves the creation and/or development of standards that support a user experience, which incorporates access to linear, broadcast and non-linear, on-demand content. Copies of the information submitted by the Executive in support of its application can be found on our website.<sup>1</sup>
- I.3. The Trust has assessed the proposal that the BBC participate in Canvas by considering it in the context of:
  - the public value of Canvas;
  - whether the proposal represents value for money;
  - the interests and perspective of the licence fee payer in respect of Canvas;
  - the market impact of Canvas;
  - the risk (financial, operational and reputational) that in the Trust's view attaches to the BBC's participation in Canvas; and
  - whether, in the view of the Trust, Canvas is likely to comply with the law and with BBC policies.
- I.4. This decision explains the way in which the Trust has taken each of these considerations into account in determining that the BBC may participate in Canvas subject to conditions. The Trust considered that the key element of the assessment was satisfying itself as to whether any likely adverse impact on the market is justified by the likely public value of the proposal. The Trust also considered the requirement that the proposal be consistent with the Trust's Fair Trading Policy and, in particular, the Competitive Impact Principle ("CIP"). The CIP requires that, when carrying out its Public Service Activities, the BBC must endeavour to minimise its negative competitive impacts on the wider market, whilst always ensuring the fulfilment of its Public Purposes and taking into account its other obligations under the Charter and Framework Agreement. The Trust has, accordingly, not only considered whether any likely adverse impact on the market is justified by likely public value but also whether the BBC has endeavoured to minimise any likely negative impact on the market

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<sup>1</sup> [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas\\_supporting.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas_supporting.shtml).

without significantly compromising the way in which Canvas contributes to the delivery of the Public Purposes.

- 1.5. The Trust published Provisional Conclusions on 22 December 2009, indicating that the BBC's participation in Canvas should be approved subject to conditions. These were opened to public consultation until 2 February 2010. Extensions of time for responding to the consultation were granted to those stakeholders who requested it. The Trust has taken account of responses made in respect of previous phases of consultation where it considered them to be relevant.<sup>2</sup> The Trust received 32 responses to the consultation on the Provisional Conclusions, of which six were from members of the public and 26 were from the Executive, industry stakeholders and the BBC's audience councils. In addition, the Trust undertook a number of meetings with stakeholders (a list of stakeholders we met during our assessment is at Annex 1). All non-confidential responses to the consultation are published in full alongside this document alongside this decision. The Trust held a number of further meetings with some stakeholders following closure of the public consultation.
- 1.6. In March 2010, the Canvas joint venture partners made a submission to the Office of Fair Trading (OFT) requesting an opinion on whether the joint venture constituted a relevant merger under the Enterprise Act 2002. The Trust continued its assessment of the Canvas proposals while the OFT considered the project, but postponed concluding the assessment pending an opinion from the OFT. The OFT concluded on 19 May 2010 that the Canvas joint venture does not qualify for investigation under the merger provisions of the Enterprise Act 2002. The Trust has taken account of the OFT's conclusion in reaching its own final decision.
- 1.7. The Trust's assessment has been informed by that information that the Trust considers relevant to the issues subject to consideration, weighted as the Trust considers appropriate. This information includes submissions made by the Executive, those views expressed by stakeholders and licence fee payers that the Trust considers relevant to its assessment, independent research commissioned by the Trust to inform its assessment, as well as the perspective and experience that the Trust brings to bear on this matter.
- 1.8. As explained above, the Trust considered that it was necessary in this case to satisfy itself as to whether any likely adverse impact on the market is justified by the likely public value of the proposal. The Trust accordingly carried out a detailed assessment of the public value likely to be delivered by Canvas (the PVA) as well as a detailed assessment of likely impacts on relevant markets as a result of Canvas (the MIA).<sup>3</sup>
- 1.9. The PVA included an analysis of delivery against the Public Purposes, fit with BBC strategy, value for money and the interests and perspective of the licence fee payer. The PVA identified that Canvas represents a significant enhancement to DTT. Alongside the linear channels already available from Freeview, the Trust considered that Canvas would provide a cohesive upgrade of the DTT platform including access at the television screen to on-demand content, such as the catch-up television service provided by the BBC iPlayer. Research commissioned by the Trust showed that there was considerable consumer demand for the Canvas proposition. This was reflected in the Trust's assessment, which recognised that there is growing audience demand for access to this kind of content and that it was

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<sup>2</sup> These are published at: [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas.shtml)

<sup>3</sup> These are published at: [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas.shtml)

important that the consumers wishing to access television services by the DTT platform should be able to benefit from the ambition underpinning the Canvas proposition and not be disadvantaged against consumers on other platforms (satellite and cable) who already have or will have access to catch-up services.

- I.10. The Trust's assessment found that particular value lay in the aspects of the proposals designed to make these technological developments as accessible as possible to all audience groups. Taking these considerations together, the Trust considered that Canvas would make a significant contribution to the BBC's sixth Public Purpose: helping to deliver the benefits of digital communications technologies. The overall conclusion of the PVA was that Canvas represents potentially high public value for particular audience groups and medium public value overall.
- I.11. Therefore, the PVA concluded that, over time, Canvas may offer the potential for high overall value. Given that the PVA models public value over 5 years, the Trust takes note of the potential long term value of Canvas but does not treat it as a definite finding as to the long term value that Canvas will deliver.
- I.12. The MIA identified a number of interrelated yet separate products and services that are likely to be impacted by Canvas, some positively and some negatively. The Trust reached a view as to the impact of Canvas on each affected product or service. The Trust took the view, given the range of different products and services affected, that it was not appropriate to set those impacts off against each other and arrive at an overall net market impact of the proposal.
- I.13. The Trust is satisfied, subject to conditions, that the adverse impacts likely to affect some products and services, as identified by the MIA, are justified by the public value created by the BBC's participation in Canvas, as per the PVA. The Trust is also satisfied, subject to conditions, that in participating in Canvas, the BBC has endeavoured to minimise the likely adverse impacts that might result from the proposal and that it is not possible to address some such impacts without compromising the delivery of the Public Purposes by the proposal.
- I.14. The Trust is, accordingly, of the view that the BBC's participation in Canvas shall be approved subject to a number of conditions in order to ensure that the public value promised by Canvas is maximised and that likely negative market impacts are, where possible, minimised without compromising the delivery of the Public Purposes.
- I.15. The conditions are as follows:

### Industry engagement

- I.16. This approval is conditional upon the completed component documents of the Canvas core technical specification, to the extent not done so already, being released no later than 20 working days from this final approval. Further developments or refinements to the core technical specification must be published by the Canvas joint venture as they are completed and no later than eight months prior to launch of the first wave of set-top boxes. The Trust remains of the view that it is not appropriate to make its approval of Canvas conditional on the Canvas joint venture achieving industry consensus on each material component of the core technical specification.
- I.17. The putative Canvas joint venture partners published on 28 May 2010 a "roadmap" detailing the process and timetable for publication and engagement on the core technical specification.

This roadmap can be read in full here: [www.projectcanvas.info](http://www.projectcanvas.info). The Trust has reviewed the roadmap and understands that the putative Canvas joint venture partners intend to work with industry stakeholders to develop the core technical specification. In addition the Trust has been informed by the Executive that it will publish its choice of digital rights management (DRM) shortly after the publication of this decision and will engage with industry on that choice. The Trust places a high degree of importance on the continuation of that process and has strong expectations that the core technical specification will be developed with industry engagement.

- I.18. The Trust will keep the process of engagement under review as set out in paragraph I.37 below.

## Cost

- I.19. The Trust understands that Canvas is likely to publish a revised budget in the next few weeks. The Trust has been informed that the overall cost to the BBC of participating in Canvas will not increase (indeed, due to the addition of putative joint venture partners to share the overall costs, it may even decrease). The revised budget may approach the phasing of each tranche of costs differently. On the basis that the aggregate cost to the BBC will not change, the Trust has decided to maintain the condition that the annual cost of the BBC's involvement in Canvas shall not exceed the estimated cost of £24.7 million over a 5 year period by more than 20 per cent.

## Free to air always

- I.20. This approval is given subject to the "free-to-air principle", that users will always be able to access Canvas free to air, although they may be charged for:
- additional pay services that third parties might opt to provide via the Canvas platform;
  - the one-off purchase cost of the device used to access the platform; and
  - any broadband subscription fees.
- I.21. The BBC is not authorised to participate in Canvas unless it ensures that the free-to-air principle is enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Accessibility and usability

- I.22. This approval is conditional upon the accessibility and usability features contemplated by the proposal being incorporated into the core technical specification and / or UI as appropriate in accordance with the statements made in the proposal and, in any case, as soon as is reasonably practicable.
- I.23. This approval is conditional upon the Executive participating in the joint venture on the basis that the Canvas joint venture will provide appropriate information and signposting to enable users to make informed choices about the suitability of content wherever possible.

## Access to Canvas for content providers

- I.24. This approval is made on the understanding that Canvas will be governed by the following principles:
- the joint venture may develop ways in which to recover operational costs but, for the avoidance of doubt, any such activity will be charged to third parties on a "cost recovery" basis only;
  - entry controls in terms of technical and content standards will be minimal;
  - access will not be bundled with other products or services; and
  - listing on the electronic programme guide and UI will be awarded in a fair, reasonable and non-discriminatory manner.
- I.25. The BBC is not authorised to participate in Canvas unless it ensures that that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Platform operators' access to Canvas

- I.26. This approval is made on the understanding that Canvas will be governed by the following principles:
- the Canvas core technical specification will be made available to third parties on a fair, reasonable and non-discriminatory basis; and
  - the Canvas trade mark will be made available to those third parties eligible to license it on a cost recovery basis.
- I.27. The BBC is not authorised to participate in Canvas unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Syndication

- I.28. This approval is conditional on there being safeguards in place as soon as reasonably possible after approval to prevent any sharing of strategy on syndication and other commercially sensitive information between the competing members of the Canvas joint venture. The Trust will review this area as set out in paragraph I.37 below.

## Access to Canvas for ISPs

- I.29. Approval is accordingly made on the understanding that the Canvas joint venture will be governed by the following principles:
- quality standards for ISPs delivering Canvas will be set at a minimum level; and
  - applied in a fair, reasonable and non-discriminatory manner.
- I.30. The BBC is not authorised to participate in Canvas unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Legal compliance

- 1.31. This approval is conditional upon Canvas complying with all applicable laws, including competition and state aid law. To ensure that the BBC's participation in Canvas complies with state aid and competition law, the Trust requires as a condition of approval that:
- there should be no subsidising by the BBC of joint venture partners;
  - before Canvas is launched, the Canvas joint venture shall reimburse the BBC in respect of its expenditure prior to October 2009 via:
    - i) the purchase of all assets resulting from this expenditure at market value. The market value shall be determined by an independent valuer at the time of the purchase; and
    - ii) the reimbursement of any remaining expenditure (including appropriate interest) which did not result in any assets being created.
  - any potential frontloading of BBC contributions on behalf of joint venture partners must be in line with the market economy investor principle;
  - the BBC must keep its interaction with Canvas operationally separate from its involvement with other free-to-air platforms, namely Freeview and Freesat;
  - that Canvas will not be implemented in Jersey before receiving all the necessary approvals from the Jersey Competition Regulatory Authority.

## Review

- 1.32. A number of stakeholders asked the Trust what role, if any, the Trust would play in overseeing the Canvas joint venture should the proposal be approved. Stakeholders have also asked whether the Trust is able to sanction either the Executive or the Canvas joint venture itself if any of the conditions and expectations set by Trust approval are not met.
- 1.33. This decision sets out the scope of the BBC's approved participation in Canvas. Should the BBC breach the conditions to this approval or otherwise act outside the scope of activity approved by the Trust in participating in Canvas, it would not be acting on an authorised and proper regulatory basis. The Trust would consider the sanctions appropriate to such a breach depending on the circumstances of the case.
- 1.34. It is important to note that the Trust is responsible for oversight of the BBC's activities, including its participation in Canvas, but cannot exercise direct oversight of the joint venture or attempt to control its activities beyond considering the BBC's own participation. Such oversight would, consistent with the regulation of other platforms, properly fall under the remit of Ofcom, ATVOD and other regulatory authorities with relevant jurisdiction.
- 1.35. The Trust will not, therefore, regulate or oversee the day-to-day activities of the Canvas joint venture. However, the scope of this approval and the conditions provided in these Final Conclusions set defined parameters within which the BBC is authorised to participate in the joint venture.
- 1.36. The Trust has made clear that the BBC is not authorised to participate in the joint venture unless the objects and shareholders' agreement of the Canvas joint venture enshrine certain

principles. These principles flow from the conditions set by this approval and are intended to protect the attainment of the BBC's public service objectives or otherwise to minimise potential adverse market impacts of the proposal. The Trust has also identified in this decision certain expectations as to how the joint venture will operate in future if it is to ensure ongoing compliance with the law and how the BBC will participate in the joint venture if it is to ensure ongoing compliance with its regulatory responsibilities.

- I.37. The Trust has made the BBC's participation in Canvas subject to a number of conditions, and proposes to review the implementation of certain of those conditions so as to satisfy itself that the BBC's ongoing participation is consistent with the terms of this approval. Approval of the BBC's ongoing participation in Canvas will, accordingly, be subject to:
- the Executive reporting to the Trust every three months from the date of this approval, until six months after launch, on the progress of industry engagement against the roadmap published on 28 May 2010 by the putative joint venture partners and any material changes or potential risks to delivery against the roadmap;
  - a review by the Trust, 12 months after launch, of the implementation of the accessibility and usability features by Canvas;
  - a review by the Trust, 12 months after launch, of the steps taken by the Canvas joint venture to provide appropriate information and signposting to enable users to make informed choices about the suitability of content wherever possible;
  - a review, 12 months after launch, of the effects, if any, of Canvas on the incentives of joint venture partners to syndicate their content to other platforms. This review is separate to, and carried out independently of, the Trust review of its own syndication policy for the BBC.
  - The Trust will consider the BBC's cross-promotion activities alongside its review of syndication to satisfy itself that the BBC cross-promotion code is working effectively in relation to any issues created by Canvas.
- I.38. Should the Trust not be satisfied, following consideration of the reports and reviews provided for, that the BBC's participation in Canvas is consistent with the terms of this approval, the Trust will consider actions required, up to and including requiring the BBC's withdrawal from the joint venture.
- I.39. The Trust is conscious of the importance of ensuring the promotion of the BBC Public Purposes whilst protecting the BBC's brand and reputation. It has considered this in the context of permitting the BBC to participate in the joint venture as proposed. The Trust is of the view, as explained at section 4.7 below, that the risk to brand and reputation in this context is low and that, further, delivery of the Public Purposes and likely public value created as a result of the BBC's participation in Canvas justifies the BBC pursuing this course of action.
- I.40. The rest of this document sets out the Trust's consideration of submissions to the public consultation and the reasoning behind the Trust's Final Conclusions. Section 2 sets out the assessment process to date, Section 3 examines criticisms of the Trust's assessment process and analysis and Section 4 explains the Trust's consideration of consultation responses on the conditions proposed by the Provisional Conclusions. Section 5 sets out the final decision of the Trust.

## 2. The assessment process to date

- 2.1. This section describes the assessment carried out by the Trust in considering whether the proposal that the BBC participate in Canvas should be approved. This includes a summary of the Trust's assessments of public value and market impact, and how these assessments have informed the Trust's conclusions. The summaries contained here are offered as context to the Final Conclusions that follow and are in no way intended as a substitute for reading the original PVA, MIA and Provisional Conclusions documents.
- 2.2. In November 2008, the Executive applied to the Trust for permission to participate in a joint venture partnership, that would set and promote a common standard for delivering on-demand TV and other internet content through a broadband connected device such as a set-top box. The BBC would not be involved in the manufacture or distribution of equipment.
- 2.3. The Trust first considered the nature of the proposal and the process that most appropriately ought to be applied to assess whether it was an activity that the BBC might carry out. The Trust determined that the BBC's proposed involvement in Canvas was a non-service activity of potential significance that might raise issues of public value and market impact.
- 2.4. The Trust has discretion as to the way in which non-service activities are assessed but is under a responsibility to ensure that the principles that underlie the treatment of services are, where relevant, applied to non-service activities in a way that the Trust considers appropriate to the circumstances. In this instance, the Trust considered that the Executive's proposal warranted a detailed, evidence-based assessment and consultation with stakeholders.
- 2.5. The Trust considered in this case that an important part of the assessment was satisfying itself as to whether any likely adverse impact of Canvas on the market is justified by the likely public value of Canvas. The Trust determined that its assessment appropriately ought to take account of:
  - the public value of Canvas;
  - whether the proposal represents value for money;
  - the interests and perspective of the licence fee payer on the BBC's participation in Canvas;
  - the market impact of Canvas;
  - the risk (financial, operational and reputational) attaching to the BBC's participation in Canvas; and
  - whether, in the view of the Trust, the BBC's participation in Canvas is likely to comply with the law and with BBC policies.
- 2.6. The Trust also noted that the proposal must comply with the CIP, in accordance with the Trust's Statement of Policy on Fair Trading. The CIP requires that, when carrying out its Public Service Activities, the BBC must endeavour to minimise competitive impacts on the wider market, whilst always ensuring the fulfilment of its Public Purposes and taking into

account its other obligations under the Charter and Framework Agreement. The Trust accordingly determined to consider not only whether any likely adverse impact of Canvas on the market would be justified by any likely public value but also whether the BBC was endeavouring to minimise the likely negative impact on the market without significantly compromising the way in which Canvas might contribute to the delivery of the Public Purposes.

- 2.7. Finally, the Trust determined that its non-service assessment process would consider whether, if approved, Canvas should be subject to any ongoing terms or conditions. The purpose of any such terms or conditions might be to enhance the public value created by Canvas and/or minimise any potential negative market impact of Canvas.
- 2.8. As explained in section 1 above, the Trust can properly be responsible only for oversight of the BBC's activities and so any conditions that the Trust might impose would necessarily be limited to the BBC's behaviour and participation in Canvas rather than controlling the joint venture itself.

## The Canvas assessment process

- 2.9. The Trust launched a public consultation on the Canvas proposal from 26 February 2009 until 17 April 2009. It published the Executive's application for approval of the proposal and the supporting information annexed to that application. The Trust also published a consultation paper setting out the Trust's proposed approach to assessment, explaining that Canvas had been characterised as a non-service activity and the principles underlying services (such as public value) that it proposed to consider in assessing the proposal. The paper noted some of the aspects of the proposal as described by the Executive and invited views on the proposal as a whole. The Trust also asked for specific views on a number of areas, including:
  - delivery of public value and the Public Purposes;
  - current and future impact upon stakeholders;
  - scope to mitigate such impacts on the part of both the BBC and stakeholders;
  - assumptions made by the Executive in setting out the case for the proposal (including the Executive's identification of the counterfactual should the proposal not go ahead); and
  - compliance with competition law.
- 2.10. The Trust asked respondents to substantiate their comments with available supporting evidence whenever possible.
- 2.11. The Trust received over 800 submissions from individuals and stakeholders during the initial consultation.<sup>4</sup> The Trust published a summary of the individual consultation responses and all the non-confidential stakeholder responses on 4 June 2009.

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<sup>4</sup> 743 responses were received from members of the public

- 2.12. The Trust Unit met all four of the BBC's audience councils to inform them of the Executive's proposal. The audience councils advise the Trust how well the BBC is serving licence fee payers across the UK and have formal rights to be consulted. Both the Audience Council for Wales and the Audience Council for Northern Ireland subsequently provided written responses to the proposals.
- 2.13. Meetings were also held with representatives of more than 60 organisations, including:
- broadcasters;
  - platform operators;
  - internet service providers ("ISPs");
  - content providers; and
  - various industry bodies.
- 2.14. A list of entities with whom the Trust met is at Annex I.
- 2.15. Several stakeholders expressed concern as to the approach taken by the Trust in assessing the proposals. Notably, some questioned the decision to characterise the activity as a non-service activity. Having considered the points raised by stakeholders, the Trust remained of the view that the BBC's participation in Canvas amounted to a non-service activity, and was fortified in its view that the proposal was one of significance warranting careful assessment.
- 2.16. In addition to submissions from the consultation, the PVA and MIA drew on evidence from a variety of sources.
- 2.17. This evidence included, for example, additional material submitted by the Executive alongside or subsequent to its proposal. This comprised:
- a study on the concept development of IPTV;
  - BBC Marketing Communications & Audiences research on Virgin Media subscribers' usage of video-on-demand;
  - video-on-demand usage and awareness; and
  - conjoint research for the BBC that considered consumer demand for different potential aspects of the Canvas proposition.
- 2.18. Although the Trust placed greater reliance on its own or third party evidence, it also drew on this material to confirm or support its conclusions where appropriate.
- 2.19. As with any new product or service in a nascent market, assessing the likely demand for Canvas and the full range of impacts will always be more difficult than in a more mature market. So, to support its analysis of the application, the Trust commissioned market research and expert analysis from specialist consultancies.
- 2.20. These reports provided an independent perspective on issues relating to the public value and market impact of the Canvas proposals. The Trust evaluated and drew upon this commissioned work to assist its consideration of the material from the Executive,

members of the public and stakeholders. The Trust considered all evidence, whether commissioned from independent sources or provided by the Executive or stakeholders, in the round.

- 2.21. The Trust commissioned Opinion Leader to conduct research into the potential demand for Canvas and the value it would create for licence fee payers and the desirability and benefit of BBC involvement in the joint venture. This comprised a quantitative phase involving 2,171 interviews with a representative sample of the UK population and a qualitative phase involving 18 in depth interviews with households spanning a range of socio-demographics as well as different TV platforms. The report was published on the Trust website in December 2009.<sup>5</sup>
- 2.22. To support its analysis, the Trust also commissioned Value Partners to report on the:
- impact of Canvas on the TV and related markets, where relevant;
  - impact of Canvas on the cost base of internet service providers; and
  - impact of Canvas on the delivery of pay-video on-demand services and the consequent impact on the rental and retail DVD markets.
- 2.23. These reports were published on the Trust website in December 2009.<sup>6</sup>
- 2.24. Value Partners analysed a wide range of publically available information, the views and submissions of stakeholders, a range of market research (including the Opinion Leader research commissioned by the Trust) and drew upon their own expertise and knowledge of these markets. They built three interconnected models:
- a TV model – which forecast a range of potential demand for Canvas against an assumed counterfactual, and the impact of that demand on other platforms;
  - a viewing model – which forecast the impact of Canvas on viewing trends (such as linear versus non-linear viewing) based on the outputs of the TV model and against the same counterfactual; and
  - an ISP cost model – which used the outputs of the TV model to estimate the impact of different Canvas take-up scenarios on the network costs of ISPs.
- 2.25. Value Partners also built a model to estimate the potential impact of Canvas on the demand for pay-VOD services.
- 2.26. The Trust also took into consideration a wide range of industry forecasts, which included reports by Screen Digest, Enders Analysis, and Ofcom's latest annual reports on the communications market.
- 2.27. Following closure of the initial consultation, the Trust determined to seek from the Executive further information on the following aspects of the proposal:

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<sup>5</sup> [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas\\_provisional\\_conclusions.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas_provisional_conclusions.shtml)

<sup>6</sup> [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas\\_provisional\\_conclusions.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas_provisional_conclusions.shtml)

- operation of the EPG;
  - joint venture structure, governance and costs;
  - access to Canvas by content providers;
  - editorial and quality controls;
  - industry engagement in developing the Canvas standard;
  - technical matters including technical and monetisation solutions that the Canvas standard will support and data security;
  - customer support; and
  - marketing and promotion.
- 2.28. The Trust published the Executive's Additional Statement on 26 July 2009, providing interested stakeholders with the opportunity (until 1 September 2009) to make any additional submissions or comments that they wished to make (and noting that there would be further opportunities to comment as the assessment process progressed). The Trust received 17 responses from stakeholders.
- 2.29. The Executive further supplemented the information submitted in support of its application on 30 October 2009, providing to the Trust revised governance proposals and updated cost information (referred to throughout as the "Governance and Cost Information"). The Governance and Cost Information was published by the Trust on 4 November 2009. The Trust allowed two weeks for any specific comments on the information from stakeholders and noted upon publication that there would be a further opportunity to comment on both governance structure and costs as part of the consultation on the Provisional Conclusions. The Trust received six responses from stakeholders.
- 2.30. The Trust used the consultation responses submitted to it and the independent work that it commissioned so as to inform its overall assessment as it considered appropriate. This included a detailed assessment of the public value likely to be delivered by Canvas as well as a detailed assessment of likely impacts on relevant markets as a result of Canvas. The approach to the PVA and to the MIA is explained in greater detail below.
- 2.31. The Trust formulated its overall assessment of the proposal as Provisional Conclusions. These indicated that, subject to a number of conditions, the Trust was minded to approve the proposal that the BBC participate in Canvas on the basis of the relevant information provided.
- 2.32. On 22 December 2009, the Trust published its Provisional Conclusions, the PVA and MIA, the underlying independent research that informed the PVA and MIA, and stakeholder comments on the Additional Statement and Governance and Cost Information. The Trust invited comments on the Provisional Conclusions, with the consultation running from 22 December 2009 to 2 February 2010.
- 2.33. The Trust received 32 consultation responses, of which six were from members of the public and 26 were from industry stakeholders and audience councils. In addition the Trust undertook a number of meetings with stakeholders.

## Approach to the PVA

- 2.34. The Trust published its PVA alongside the Provisional Conclusions on 22nd December 2009.
- 2.35. The PVA considered the proposal's fit with the BBC's Public Purposes and whether it delivers potential public value. The assessment of whether the proposals deliver potential public value was structured around the following four key questions:
- Is there consumer demand for IPTV?;
  - Is there a role for the BBC and what form should this take?;
  - In which ways will BBC involvement deliver value to audiences, taking account of the impact, reach, quality and value for money as drivers of public value?; and
  - What will happen in the absence of the Canvas proposals?
- 2.36. The overall conclusion of the PVA was that Canvas represents potentially high public value for particular audience groups and medium public value overall. The PVA noted that, over time, Canvas may offer the potential for high overall value.

## Approach to the MIA

- 2.37. The MIA considered the products and services likely to be affected by the Canvas proposals and the potential impacts on provision of those products and services if the Canvas proposals were approved in their current form. The Trust published its MIA on 22 December 2009.
- 2.38. To understand the range of likely impacts that Canvas might have on affected products and services, the MIA considered:
- the likely take-up of Canvas-enabled devices;
  - the potential impact of the Canvas proposals for affected products and services; and
  - the current and future prospects of affected products and services in the absence of the Canvas proposals (the "counterfactual").
- 2.39. The MIA identified a number of different products and services that are likely to be impacted by the BBC's participation in Canvas, some positively and some negatively. It did so by analysing the various facets of the Canvas proposals, as a technical standard and as a facilitator of access to on-demand content.
- 2.40. The Trust acknowledged in the MIA the inherent difficulty in identifying affected products and services (and in forecasting potential effects), given the emerging nature of the provision of VOD and IPTV products and services. The Trust took account of the uncertainty that might attach to some of the underlying research and evidence considered in estimating potential effects. Where it considered it appropriate, the Trust reviewed a range of estimates so as to account for some of the variables that might come into play.

## How the PVA and MIA informed the Provisional Conclusions

- 2.41. The PVA identified a clear link between the proposals and the delivery of the Public Purposes by the BBC and found that, by improving access to the full range of BBC services and increasing the scope of the offer on DTT, Canvas would make a significant contribution to the delivery of the sixth Public Purpose: delivery of the benefit of emerging communications technologies and services.
- 2.42. The PVA found public value in the benefits to consumers and identified quality and distinctiveness as a key area for the delivery of public value.
- 2.43. The PVA also identified a number of factors as being necessary both to safeguard and optimise the public value created by Canvas. These were, in summary:
- access to free-to-air on-demand content on the DTT platform by way of a high quality user experience without contract or subscription;
  - industry engagement in the development of the core technical specification so as to encourage openness and flexibility and encourage widespread adoption of the Canvas standard;
  - accessibility and usability of the Canvas UI for consumers, including appropriate provision of technical support;
  - low entry barriers for content providers to ensure a wide range of content and, therefore, choice for licence fee payers;
  - appropriate content safeguards (in addition to parental controls) through the use of guidance or signposting; and
  - sufficient Trust oversight of BBC investment in the joint venture.
- 2.44. The MIA found that Canvas is likely to have a number of positive impacts on a range of interrelated products and services. The MIA also identified a number of aspects of the proposals that could potentially have a negative impact on other products or services or reduce the potential for the positive impacts anticipated for the proposals. These adverse impacts can be summarised as follows:
- Canvas-led growth in the supply of on-demand content will have a small negative impact on DVD rental and, in the longer term, might also adversely impact on DVD retail;
  - modest negative impact on future growth of non-DTT-based subscription platforms;
  - potential negative impacts on Freeview and Freesat;
  - likely negative impact on existing hybrid DTT/IPTV platforms and likely deterrence of investment in new hybrid DTT/IPTV platforms;

- mandating a single UI and linking that to the Canvas brand will have an adverse impact on the incentive of hybrid DTT-based platforms to invest in and innovate alternative UIs; and
  - potential adverse impacts on provision of Push VOD services.
- 2.45. The MIA also noted two points of potential risk:
- Canvas might not be as flexible as possible if not developed with industry engagement and so not accommodate a wide range of stakeholder needs. This could diminish some positive market impacts and/or generate further adverse market impacts; and
  - stakeholders argued that Canvas would create a disincentive for Canvas joint venture members to syndicate their content to third parties/other platforms. Whilst the MIA found that it was not clear that Canvas would create such a disincentive, it did note the issue as a matter for concern.

## The Provisional Conclusions

- 2.46. The Trust concluded that the proposal had potentially high public value for particular audience groups and medium public value overall and provisionally concluded that the likely adverse impacts on the market of the proposal were justified by the public value likely to be created.
- 2.47. The Trust considered whether and how the negative impacts of Canvas identified in the MIA could be minimised, having regard to the assessment in the PVA of how Canvas fulfils the BBC's Public Purposes. The Trust concluded that the Executive had endeavoured to minimise adverse impacts in the way that it had structured the proposal and that it was not possible to minimise adverse impacts further without compromising the delivery by the proposal of the Public Purposes. The Trust was of the view, however, that any approval ought to be subject to certain conditions regarding delivery of the public value promised by Canvas and minimising negative market impacts where possible, consistent with delivery of the Public Purposes.
- 2.48. The Trust provisionally concluded that it would be neither appropriate nor possible to address all risks of market distortion or negative market impacts by way of proposed conditions. It noted in the Provisional Conclusions that not all the negative impacts identified in the MIA should be minimised if to do so would significantly compromise delivery of the Public Purposes identified (or any of the BBC's other regulatory obligations). The Trust considered that some negative market impacts could not be mitigated by the imposition of conditions. In some instances the imposition of a condition could not mitigate an identified potential negative market impact. This could be due to the fact that an adverse impact, such as the potential negative market impact on the DVD rental market, was not addressable through the imposition of one or more conditions. Alternatively, some potential negative market impacts could not be mitigated by the imposition of conditions without also compromising the delivery of the Public Purposes. For example, the mandating of a common UI could have a potential negative impact of making it more difficult for other potential hybrid DTT/IPTV platforms to innovate with their own consumer proposition in competition with Canvas. However, the Trust did not consider that it was possible to impose more restrictive conditions in respect of the UI in this approval without compromising the Public Purposes that are likely to be delivered by Canvas.

- 2.49. The Trust determined on the basis of the information available to it and privileged legal advice that the proposals were compliant with competition law (including state aid law).
- 2.50. The Trust proposed a number of conditions to approval, as set out in its Provisional Conclusions.<sup>7</sup> The Trust took into account that it would have no remit to police the conduct of the joint venture, and so proposed that BBC participation in Canvas should be dependent on certain of the conditions being enshrined as principles in the objects and shareholders' agreement of the Canvas joint venture. It also set particular expectations regarding the future operation of the Canvas joint venture and the BBC's participation in Canvas.
- 2.51. The following sections deal with the Trust's consideration of submissions received in response to its consultation on the Provisional Conclusions. Section 3 deals with submissions received on the assessment process while Section 4 describes the Trust's consideration of responses to the conclusions themselves.

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<sup>7</sup> See [http://www.bbc.co.uk/bbctrust/our\\_work/television/canvas.shtml](http://www.bbc.co.uk/bbctrust/our_work/television/canvas.shtml)

## 3. Consideration of feedback on the assessment process

- 3.1. In this section the Trust addresses submissions concerning the Trust's handling of the assessment process and criticisms of some of its analysis.
- 3.2. Some general concerns about process were raised by a number of stakeholders. Three stakeholders provided more detailed criticisms of the Trust's underlying analysis and the evidence and legal advice that informed the Provisional Conclusions, MIA and PVA.
- 3.3. The Trust has considered all the points made by stakeholders in relation to the process adopted and taken these into account as it considers appropriate regarding the Trust's assessment of the proposals to date and the substantive analysis undertaken. The Trust looks first at submissions regarding the Trust's choice of assessment process, then considers specific points regarding the PVA and the MIA.

### Criticism of the Trust's choice of assessment process

- 3.4. One stakeholder argued that the Trust had failed to provide an objective justification for classifying the Canvas proposition as a non-service activity. The Trust's determination in November 2008 was that classification of non-service activity was appropriate given that the proposition was the BBC's participation in a joint venture to launch a new platform and not the provision of a content service like a television channel, which would require a service licence. This being the case, there was no mandated assessment process to follow and the Trust had a choice to make about the methodology to apply. As it has set out in Section 2 and in previous documents, the Trust considered it appropriate to undertake a detailed and evidence-based inquiry involving a full PVA and MIA, as well as other considerations.
- 3.5. More specifically some stakeholders have questioned the ability of the Trust to undertake a MIA. Stakeholders expressed concern that they could not provide certain information to the Trust since it is responsible for setting the BBC's strategic direction. The Trust considered the scope of assessment necessary at the outset of the process and throughout, concluding that it was able to carry out the work necessary to form a view on the proposal. It commissioned independent research from Value Partners and Opinion Leader to inform the MIA. It also discussed with stakeholders the evidence that they considered the Trust must take into account and even agreed a limited confidentiality agreement with one stakeholder where it considered this necessary in order to obtain relevant information. The Trust considers specific criticisms of aspects of the MIA below.

### Criticism of the Trust's conduct of the PVA

- 3.6. While putative Canvas joint venture partners, the BBC's audience councils, individual respondents and some industry stakeholders were supportive of the Trust's assessment that the proposals would create public value, there was criticism from other stakeholders that the Trust had overstated the public value. Three stakeholders argued that there was no need to create a new platform and, along with others, suggested that the case for a mandated UI had not been made. Several stakeholders, , maintained that the counterfactual was unduly pessimistic and that the market would deliver appropriate IPTV solutions which would require the BBC only to syndicate its content in order to achieve its Public Purposes.

- 3.7. The Trust has concluded that the development of a common UI as contemplated by the application should be approved. Canvas is a new proposition with no direct comparator. Therefore, the Trust has reached a view based on its judgment of the public value created and potential negative market impacts.
- 3.8. The PVA identifies several reasons why the development of a common UI can create public value relative to the alternative of simple release of a core technical specification. These reasons included:
- establishing a simple upgrade path to IPTV for Freeview users - by bringing together the PSBs and major ISPs behind a single proposition, this provides a choice and reduces confusion.
  - the promotion of widespread adoption of IPTV services through the offering a plug-and-play solution which will give a consistent experience from one box to another. Establishing a common interface imposes a discipline on the user experience that would not be realised if Canvas were to be delivered only using the core technical specification.
  - the inclusion of users who normally find it hard to utilise new technology by seeking to apply best practice on accessibility and by providing a direct route to a compelling package of free-to-air content.
  - the reduction of uncertainty about platform standards for content providers and should therefore encourage delivery of a wide variety of content services.
- 3.9. The Trust is satisfied that the PVA identifies grounds to conclude that the UI makes the difference between simply making available services by means of IPTV and turning them into a compelling proposition that users will find easy to adopt. To this end the common UI should help consumers access broadband services in new ways, and help some users with accessibility needs gain regular access to broadband for the first time.
- 3.10. Some stakeholders disagree with the conclusions drawn by the Trust in this regard. The points made by stakeholders have, where relevant, been considered by the Trust, however, it remains of the view that the conclusions drawn are appropriate in view of all relevant considerations. The Trust provides detailed discussion of its consideration of submissions on the mandated UI in Section 4.
- 3.11. One stakeholder raised concerns that the BBC had misrepresented the scale of the increase in costs between the application and the revised cost estimates published and consulted on by the Trust on 30 October 2009.<sup>8</sup> In the PVA, the Trust set out why and where it was relevant to compare revised cost estimates with those set out in the Application. Further, the PVA was based on final estimated costs and not earlier, now incorrect, estimates of those costs. In any event, the condition relating to costs will enable the Trust to keep under review any increases of 20% or more.

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<sup>8</sup> The stakeholder suggested that the cost of £6m is comparable to the final cost of £24.7m (assuming 6 partners) and this disparity was not appropriately acknowledged / explained in the Provisional Conclusions. In fact, as was outlined in the PVA, the costs in the original application included synergies from Freesat. Without such synergies the estimated cost at the time of application would have been circa £16m. Therefore it is valid to compare the £24.7m with the estimated £16m estimated cost in the application.

## Criticism of the Trust's conduct of the MIA

3.12. Most stakeholders were either supportive of the conclusions set out in the MIA or did not comment. Several stakeholders, notably potential competitors to Canvas, set out a number of more detailed concerns with the PVA and MIA analysis. The main concerns can be grouped under the following headings:

- The MIA does not reach an overall conclusion as to whether the impact of Canvas will be positive or negative;
- The choice of counterfactual is inaccurate and does not reflect recent trends in the market;
- The modelling by Value Partners should take account of the distribution of premium content over the DTT platform;
- The impact of Canvas on both Sky and Virgin could be greater than the high case scenario set out in the MIA;
- It is not clear to what extent the MIA takes account of the impact of the marketing spend of Canvas relative to competitors. The estimates of marketing spend of other platforms is either inaccurate or an inappropriate benchmark for comparison;
- The modelling of the cost impact of Canvas on the ISP networks should be more detailed in relation to the various approaches set out to mitigate potential network costs created by Canvas, and in particular the cost impact of Canvas on the Virgin network has not been set out in sufficient detail;
- Two stakeholders argued that the MIA should quantify the revenue opportunity created by Canvas for the delivery of their content and, one stakeholder, disputed that Canvas represented an opportunity for a cable operator to grow its subscriber base on the back of its superior network capability; and
- Canvas represents an intervention by the BBC in the triple play market by offering ISPs other than Virgin and Sky an opportunity to compete. This does not take into account the significant investments (awaiting return) that the incumbents have incurred and represents an unjustifiable intervention by the BBC to inject more competition in an already competitive market.

### Conclusions drawn in the MIA

3.13. Sky argued that the MIA fails to reach an overall conclusion as to whether Canvas will have a positive or negative impact. This, Sky argued, is inconsistent with the methodology adopted by Ofcom when it undertakes a MIA on behalf of the Trust. There are a number of relevant points to make in respect of this observation.

3.14. As explained above in section 2, the Trust has discretion as to the way in which non-service activities are assessed but is under a responsibility to ensure that the principles that underlie the treatment of a service are, where relevant, applied to non-service activities in a way which the Trust considers appropriate to the circumstances. The Trust is not required to carry out a PVT or to replicate in full the approach undertaken for PVTs in respect of non-service activities. In this instance, the Trust considered that a PVT was not required but that

the Executive's proposal warranted a detailed, evidence-based assessment and consultation with stakeholders. It then considered the approach appropriate to assessment in the context of the specific proposal. The Trust determined to carry out the MIA and took the view in approaching the MIA that it was appropriate to identify impacts on affected products and services. The MIA identified a number of interrelated yet separate products and services that are likely to be impacted by Canvas, some positively and some negatively. The Trust has reached a final overall conclusion in relation to each of the identified affected products and services. The Trust took the view, given the range of different products and services affected, that it was not appropriate to set those impacts off against each other and arrive at an overall net market impact of the proposal. This is consistent with the approach that Ofcom has taken in respect of some previous MIAs.

- 3.15. In any event, the Trust does not agree that Sky's contention is an accurate interpretation of Ofcom's methodology as set out in the statement.<sup>9</sup> Ofcom's methodology for MIAs of BBC services states that "account will be taken of both 'negative' substitution effects and 'positive' market creation effects." Given the wide range of impacted markets and the mix of positive and negative impacts in this case, the Trust determined to evaluate the identified negative market impacts against its assessment of public value. Had the Trust sought to derive a net position for the MIA then this would have required the setting of the negative impacts identified against the positive impacts also identified before considering the assessment against public value. The Trust considers that such an approach, by aggregating market impacts, whilst not changing the overall conclusions, might have obscured its ability to consider effects in particular areas.
- 3.16. Finally the observation makes no difference to the overall conclusions drawn by the Trust. Given the wide range of impacted markets and the mix of positive and negative impacts, the Trust adopted a prudent approach by evaluating the identified negative market impacts against its assessment of public value. Clearly, had the Trust sought to derive a net position for the MIA (setting the negative impacts identified against the positive impacts also identified) before evaluating this net position in relation to the estimated public value) there would not have been a change to the overall conclusions drawn.

### Choice of Counterfactual

- 3.17. Several stakeholders disagreed with the Trust's choice of counterfactual to inform the MIA. One stakeholder argued that Value Partners had based their counterfactual on a static appraisal of Dbook6 devices and not taken account of the development of alternative IPVOD enabled devices. The DTG was concerned that the labelling of the counterfactual devices as Dbook6 devices meant that the analysis had not taken account of recent developments to develop next generation pan industry IPVOD enabled devices.
- 3.18. Whilst establishing the relevant counterfactual in a nascent market is not an exact science, the Trust's counterfactual analysis, as set out in the MIA, anticipates and includes the continued and growing provision of a range of IPVOD enabled devices, both by existing and new providers. This counterfactual included recent developments such as Sony's Bravia, Phillips Net TV and Panasonic's Vieracast. Hence, the Trust's choice of counterfactual is in fact consistent with that described by many stakeholders in their submissions.

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<sup>9</sup> <http://www.ofcom.org.uk/research/tv/bbcmias/statement/>

## Impact of Canvas on incumbent platforms

- 3.19. Sky argued that the MIA understates the potential market impact of Canvas because it assumes that no premium channels will be available on DTT or by implication over IPTV. It contends that the impact of premium content retailed over Canvas would increase the negative impact on Virgin or Sky. One stakeholder argued that Canvas could potentially have a bigger impact on subscriber growth for its network than the high case scenario modelled by Value Partners.
- 3.20. In the MIA the Trust discussed its reasons for not including the potential impact of the “must offer” obligation then under consideration by Ofcom. There was uncertainty over the timing and implementation of this regulatory intervention. More importantly, the retailing of Sky premium content over DTT is not dependent on the launch of Canvas as it only involves the broadcast of linear channels. In addition, the retailing of Sky premium content via Sky Player or from another retailer over IPTV is also not dependent on the launch of Canvas. Sky’s reasoning here is somewhat inconsistent with its view that the market will deliver an equivalent IPVOD enabled proposition without the need for Canvas. If this is true then the retailing of Sky premium content, from whatever route, is not dependent on the launch of Canvas. Hence Canvas does not generate a change relative to the counterfactual.
- 3.21. Nevertheless, it can be argued that the availability of Sky content on DTT combined with the Canvas proposition represents a stronger challenge to both satellite and cable. However, the Trust has not seen any evidence of this relationship. Value Partners considered this possibility but did not believe it would have a material impact on the results of their analysis as any such impact would fall within the range of impacts they modelled. The Trust agreed with that assessment and set out its reasoning in detail in the MIA.
- 3.22. In any event, it is still not clear to the Trust that the retail and/or wholesale of Sky content over DTT will not generate a net positive return for Sky as Sky will be able to generate revenues from a new segment of the market.
- 3.23. On 31 March 2010, Ofcom published its conclusions on the pay-TV review. The conclusions set out regulated prices for the wholesaling of Sky’s premium content on both the DTT and cable platforms. The Trust asked Value Partners to review their assessment of the impact of these conclusions on the results of the modelling of the impact of Canvas on other platforms. Based on that review, the Trust does not consider Ofcom's conclusions materially alter the assessment of the impact of Canvas on the satellite and cable platforms.
- 3.24. More generally, several stakeholders argued that Canvas could have a higher impact on the revenues of other platforms such as satellite and cable than that modelled by the Trust. The Trust has considered these views but believes that its estimates of the potential take-up of Canvas and its impact on other platforms are robust and in line with industry forecasts. Whilst some stakeholders may have different views on the degree of impact Canvas will have, the Trust is satisfied that its own work, which sets out a range of potential impacts and has been informed by detailed analysis and detailed modelling by expert consultants, is a robust assessment. The Trust has not been provided with persuasive evidence to suggest that Canvas will have a more marked impact on either Sky or Virgin than that set out in the analysis.

## Marketing spend

- 3.25. Three stakeholders raised concerns over the level of the Canvas marketing budget. This is expected to be circa £48.3m over five years for the venture as a whole and £25m for the BBC over the same period. Sky argued that the reported level of marketing spend for its operations is overstated, as the circa £900m of costs includes set-top box subsidies and the marketing of telephony and broadband. Another stakeholder argued that Sky's very high marketing spend was not a good reference point due to the fact that it was much higher than the marketing spend of any of its competitors. One stakeholder argued that the level of marketing spend by Canvas and the ability of PSBs to cross-promote Canvas made a competitive response difficult. .
- 3.26. The marketing spend of the different platforms was one factor which fed into Value Partners' assessment of the competitive position of existing platforms relative to Canvas. Value Partners considered information from publicly available sources, which indicated that both Sky and Virgin's marketing spend will be, at least, comparable with Canvas and is likely to be considerably higher. In the five-year period modelled, Canvas's peak annual spend on marketing is estimated to be circa £15m: this level of spend would not put Canvas in the top 100 advertisers in the UK. By comparison, in 2009, Sky ranked 5th (£91m) and Virgin 28th (£36m).<sup>10</sup> Whilst the Trust has noted criticisms from two stakeholders that these spends have been overstated, no stakeholder has provided the Trust with a more precise breakdown of their marketing spend.. On balance, the Trust is satisfied that it has used sufficient information to inform the assessment it made as to the impact of marketing on the competitive dynamics between Canvas and the satellite and cable platforms.
- 3.27. The marketing spend by Canvas (and any potential cross-promotion by PSBs) is likely to have a stronger impact on smaller platforms seeking to expand or grow within the hybrid DTT/IPVOD space. This is recognised in the MIA as part of the scale and scope of Canvas having an adverse impact within the market. However, as discussed in paragraph 4.33 the Trust believes that this level of marketing spend is necessary to support the delivery of the Public Purposes and that, given the importance of this spend to help deliver the Public Purposes, it is not possible to minimise this negative market impact without compromising the delivery of the Public Purposes.

## Impact of Canvas on ISP costs

- 3.28. One stakeholder argued that the MIA needed more detail in relation to the impact of Canvas on the cost base of ISPs. In particular, it was argued that the MIA identifies a number of methods for ISPs to mitigate their costs but does not quantify the cost of using these mitigation devices. Further, Virgin contended that the MIA should model the cost impact of Canvas on the cable network.
- 3.29. Like all internet connected devices, Canvas will have a cost impact on networks. Value Partners has modelled this impact and discussed this work with a number of ISPs. The modelling by Value Partners demonstrates that whilst Canvas will have an impact on network costs, the overall impact is relatively small, especially when set against the counterfactual. In some cases where the local loop has been unbundled the cost increases will be *de minimis*.

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<sup>10</sup> Source: Marketing's Top 100 Advertiser 2009 (<http://www.marketingmagazine.co.uk/news/wide/893106/>)

- 3.30. Nevertheless, Value Partners also considered whether ISPs could mitigate any potential cost increases. Based on discussions with ISPs, Value Partners identified a wide range of ways that an ISP can mitigate these cost increases. Given much of this area is new technology, quantifying the cost of deploying these various devices would vary according to the specific investment decisions made by each ISP. In any event, setting out these costs is not necessary given the relatively low impact of Canvas relative to the counterfactual.
- 3.31. Whilst Value Partners did not model the network costs for the cable network, Virgin has been given the opportunity to set out and quantify the potential impact on its business but has not provided the Trust with any detailed analysis. In any event the Value Partners modelling did not forecast that significant numbers of Virgin customers would either switch to Canvas, using a broadband connection or use Canvas as a secondary device on their network. Hence, this would support the conclusion that Canvas would not generate a significant increase in costs for Virgin. Value Partners considered the potential cost increases on Virgin in their report and the Trust asked them to consider this again to see whether they could identify any further issues. Value Partners believe that their assessment is robust and that broadly their overall conclusions apply to Virgin. These are:
- The cost delta due to Canvas relative to the counterfactual is small;
  - A network upgrade will be required by all ISPs due to continued growth in underlying demand for internet connected devices;
  - Canvas contributes to this network upgrade but is not determinative;
  - As discussed in the report, ISPs are free to adopt a number of traffic management devices to manage demand for bandwidth to control any increase in costs;
  - The Trust is not aware that Virgin is not able to adopt one or more of these devices; and
  - Given that some stakeholders have also argued that the market will deliver a proposition broadly equivalent to Canvas, if this was true by extension Canvas will not drive cost increases on Virgin's network relative to the counterfactual (a broad range of IPTV suppliers offering a similar proposition to Canvas).
- 3.32. More generally, the Trust is surprised that any ISP would argue that there is a fundamental issue with supporting devices that grow demand for their product (broadband). The key output from the Value Partners' report is that all ISP networks are facing increased demand for bandwidth and that Canvas can be viewed as a part of this underlying trend rather than a step change in network requirements.

### Does Canvas create revenue opportunities for other platforms?

- 3.33. Sky argued that the MIA should quantify the revenue opportunity it identified for the retail of Sky content over Canvas enabled devices. In discussions with the Trust, Sky explained that Canvas is likely to represent a commercial opportunity for Sky, particularly in relation to Sky Player. The Trust believes that Sky is best placed to estimate this opportunity, but Sky has not provided the Trust with any estimates to date. Nevertheless, any positive contribution to Sky's business would not be set against the negative impacts the Trust's analysis identified. The Trust does not consider that its decision to approve would be materially affected as a result of any more detailed quantification.

3.34. One stakeholder argued that, because many of its broadband subscribers already benefited from fast access speeds, it did not agree that Canvas represented an opportunity to migrate customers to high-tier packages. Some ISPs believed that Virgin had an advantage in supporting Canvas due to its control of its own network and its choice of network architecture. The Trust believes that Canvas represents an opportunity for Virgin to market broadband packages and that, at the very least, Virgin is not in a weaker position relative to other ISPs. However, the Trust assessment has not placed reliance on this potential opportunity for Virgin, but rather has been based on the identified negative impact on Virgin's subscriber growth.

## 4. Considerations of submissions on the Trust's proposed conditions

- 4.1. This section sets out some of the key issues that the Trust has considered in determining whether it is appropriate to approve the BBC's participation in Canvas. The Trust's analysis is summarised below, noting views expressed by stakeholders and licence fee payers on the issues raised in the Provisional Conclusions where appropriate.
- 4.2. There was a considerable amount of support from stakeholders, including the Canvas joint venture partners, manufacturers, some content providers and the BBC's audience councils, as to the approach taken by the Trust in its Provisional Conclusions. However, in many cases support for approval was qualified, in particular by reservations about the nature of the joint venture's engagement with industry on the core technical specification and the intention of the joint venture to mandate a single UI for Canvas devices.
- 4.3. There was also significant criticism of the Provisional Conclusions. A number of stakeholders simply stated that Canvas was not an appropriate activity for the BBC to be involved in and that it is not within the remit of the BBC. Some queried the scope of the activity, commenting that the stated objectives of the proposal could be achieved in a less interventionist fashion (for example, by syndicating BBC content to third parties operating VOD services or by encouraging the development of a IPTV technical standard only instead of UI through an industry body). Others argued that the Trust did not adequately account for current and likely future market developments and that Canvas was replicating (and potentially jeopardising) industry initiatives.
- 4.4. The Trust sets out below some of the broad areas of concern that it has considered in reaching this decision, noting where appropriate comments made by stakeholders in respect of these issues, and giving an overall view on approach. The Trust has noted where it proposes to impose a condition on approval in order to ensure delivery of public value and the Public Purposes or that adverse market impacts are minimised or where it otherwise has an expectation as to the BBC's participation in the joint venture. The Trust also explains how these conditions and expectations relate to those proposed in the Provisional Conclusions.
- 4.5. As discussed in Section I, the Trust's remit concerns only the BBC's participation in Canvas. If the BBC proposes to act outside of the scope of this approval or to depart from the conditions set in respect of this approval, for example by increasing its contribution to joint venture costs above the cap set by the Trust, then the Executive would be obliged to return to the Trust in order to determine whether the BBC should be permitted to continue to participate in the joint venture.
- 4.6. It is also open to the Trust to give the Executive guidance, short of conditions on approval, as to how it expects the BBC to participate in Canvas. If the Executive fails to adhere to such guidance, or conditions set for approval, the Trust may require an explanation or otherwise investigate independently before determining whether remedial action is required.

## BBC participation in Canvas

- 4.7. The Trust has considered the proposed approach to governance of the joint venture and the role that the Executive anticipates that the BBC will play in the joint venture. The Trust has carefully considered in this context the operational and reputational risks attaching to participation in Canvas, including possible impacts on other ventures in which the BBC participates. Subject to the specific requirements below as to provisions to be secured in the joint venture objects and shareholders' agreement, the Trust is of the view that BBC participation in the joint venture is consistent with the public interest duties of the BBC and accords with the Trust's duty under Article 23 to secure the independence of the BBC.

## Industry engagement

- 4.8. The Provisional Conclusions expressed the Trust's firm expectation that the BBC should participate in Canvas only if the joint venture partners engaged with relevant industry stakeholders on the development of the core technical specification. The PVA identified industry engagement as a factor necessary both to safeguard and to optimise public value. The MIA noted that Canvas may not be as flexible as possible if not developed with industry engagement. It concluded that lack of industry engagement may cause Canvas to lose some positive market impact and/or generate further adverse market impacts.
- 4.9. The Trust expects that the BBC will participate in the joint venture on the basis that it will engage with industry in developing the core technical specification for Canvas. The Trust considers that effective industry engagement is necessary to ensure that a range of stakeholders, including manufacturers and content providers, have an opportunity to comment on the development of the core technical specification and, by having clarity as to the content of the core technical specification, are able to plan their investments and operations if they wish to account for the launch of Canvas. The Trust considers, in view of the conclusions drawn in the PVA and MIA, such engagement may help both to minimise adverse impacts and secure public value.
- 4.10. The Trust acknowledged the Executive's concern that the joint venture partners face significant hurdles readying the core technical specification for publication prior to launch.
- 4.11. The Provisional Conclusions made three proposals to effect better engagement between the Canvas joint venture and industry:
- A requirement that the Canvas joint venture publish the core technical specification well in advance of the planned Canvas launch date in order to provide sufficient opportunities for the widest range of manufacturers to adapt to the Canvas core technical specification should they wish. The Trust indicated that it would expect that it would be sufficient for manufacturers to receive this information eight months ahead of launch.
  - An expectation that the Canvas joint venture would use its best endeavours to develop the Canvas core technical specification with wide industry engagement and would achieve industry consensus for it. This would enable the Canvas joint venture to take account, where possible, of a wide range industry views on technical issues, such as conditional access.
  - An obligation for the Executive to report back to the Trust on the results of the joint venture's engagement with industry about the Canvas core technical standards.

This was to happen within 12 months of the date of final approval or within three months of launch, whichever was the sooner, and at regular intervals thereafter.

- 4.12. In addition, the Trust set out its expectation that the Executive would further consider how the Canvas joint venture could accommodate relevant business models; for example, the development of a commercial Push VOD service alongside its own provision of VOD services.
- 4.13. The degree to which the Canvas joint venture would engage with industry emerged as a significant issue in the first Canvas consultation and has remained a matter of stakeholder concern at each subsequent stage of consultation. A number of stakeholders commented that they are not clear as to what the core technical specification will include and expressed concern that there is a lack of openness regarding the technical development of the Canvas core technical specification. Many stakeholders argued that some form of engagement with industry is required.
- 4.14. In its Additional Statement of July 2009, the Executive recognised this concern and indicated that, as well as continuing to work with its existing partners, it would take steps to work with the broader industry, including the DTG, in developing the Canvas core technical specification. Many stakeholders agreed that this was an appropriate way for the joint venture partners to keep industry stakeholders abreast of the development work. Some raised concerns as to the nature and scope of engagement, querying whether industry consensus would be required before Canvas can be launched.
- 4.15. The DTG has also responded to the new demands created by Canvas by broadening its membership to include a wider base, such as ISPs, relevant to the development of the Canvas specification.
- 4.16. Many stakeholders, and in particular the DTG, informed the Trust that a key concern was to ensure that sufficient technical information was released by the Canvas joint venture partners so that manufacturers had visibility of the technical requirements Canvas would expect them to adopt and also so that they could plan and resource their own development schedules accordingly.
- 4.17. Other stakeholders were also concerned that they would have an opportunity to influence the choices made in developing the core technical specification, particularly if the Canvas joint venture proposed to select particular proprietary solutions to support the core technical specification. Several stakeholders also queried whether the core technical specification would be compatible with European and global standards. One noted that licence fee payers' interests and the public interest will be harmed by the joint venture partners pursuing a core specification that differs significantly from that adopted pursuant to the DTT process. The Trust is of the view that effective industry engagement goes a significant way to addressing these concerns.
- 4.18. Some stakeholders also expressed concern that the choice of three manufacturers as "innovation partners" to help develop the initial phase of set-top boxes had not been undertaken in a fair or transparent manner. This meant that, having been, in their view, rejected as innovation partners it was even more critical that they obtain timely access to relevant technical information to facilitate adoption of Canvas. The Trust agrees that openness is important in this context and considers that both publication of the core technical standard and engagement with industry is key to addressing this issue. Further,

stakeholders that consider that they have been adversely affected by any action by the Executive in this respect might pursue this by way of a Fair Trading complaint to the BBC.

- 4.19. In responding to the Provisional Conclusions, stakeholders supported the objective on industry engagement and publication of information. However, many suggested that the conditions and expectations proposed were insufficient to achieve these objectives. Many stakeholders were concerned that the process of engagement between the Canvas joint venture and wider industry had not, to date, been effective. Several argued that there needed to be more meaningful engagement between the putative Canvas joint venture partners and the DTG than had occurred to date. Several stakeholders, including the DTG, said the process of engagement should not be governed by the choice of launch date and that the launch date should be set once effective engagement had been completed.
- 4.20. Other stakeholders called on the Trust to require that the Canvas joint venture set out a roadmap and timetable for the engagement process. Several others argued that the Trust should make BBC participation in Canvas conditional on the immediate release of the Canvas technical specification.
- 4.21. The Trust has considered these stakeholders concerns. It notes strong representations made by joint venture partners that adoption of Canvas by a wide range of manufacturers is considered essential to the success of Canvas. Indeed, as many stakeholders explained to the Trust, there is no obvious incentive for the Canvas joint venture to withhold technical information from manufacturers: the success of Canvas will be to a large extent dependent on widespread adoption by a range of manufacturers. Nevertheless, there was widespread concern from other stakeholders that, to date, that there has been insufficient disclosure of and engagement over relevant Canvas technical information.
- 4.22. Whilst the Trust notes that other proposals for IPTV standards are being developed by individual entities and groups of industry stakeholders, the Trust is not aware of a proposal for development of an IPTV standard of similar breadth to the Canvas proposition. It is clear to the Trust that Canvas is a complex technical proposition and that stakeholders have competing interests as to the components that should be included in the core technical specification. Whilst the Trust fully accepts and supports the objective that the Canvas joint venture be as transparent as possible and engage where feasible with stakeholders, it is also aware that achieving engagement may pose challenges for all parties.
- 4.23. It is clear that manufacturers require early access to the Canvas core technical specification. This will enable manufacturers to develop the capability to support Canvas but also to ensure that there is no fundamental divergence between the Canvas joint venture and other industry initiatives on IPTV. Many stakeholders argued that even if the technical specification is in draft form this would enable them to commence required development work. The Trust is not sympathetic to the joint venture partners' concern that it could cause a delay to the product launch by introducing an eight-month lead time for releasing the technical specification. The specifications should be substantially ready within eight months of the envisaged launch date; conversely, if the specification is likely to remain a work in progress for several months, then the product is unlikely to launch in the current calendar year. Further, many stakeholders articulated to the Trust that even if some elements of the technical specification are works in progress, they would prefer to gain access to this information now in order to facilitate planning and resourcing. Nonetheless, the Trust is mindful of representations suggesting that a phased approach to publication of technical specifications and engagement with industry would be more practicable than a single deadline.

- 4.24. Some stakeholders had a specific concern that the Canvas joint venture would select a DRM supplier without engaging with industry on this selection. Whilst the Trust accepts that the choice of DRM is a commercial decision for the joint venture, it believes that it is important that the joint venture partners take account of potential stakeholder concerns in relation to the choice of DRM. Therefore the Trust expects that the Canvas joint venture will engage on its DRM choice as part of its wider industry engagement.
- 4.25. Reiterating the BBC's responsibility to endeavour to minimise the negative competitive impacts (where it is possible to do so without compromising the delivery of the Public Purposes), acknowledging the strong stakeholder feedback that the proposed conditions on engagement could be strengthened, and taking into account the developments since the closure of the public consultation, the Trust has decided that it is necessary to modify the conditions relating to this issue.
- 4.26. BBC participation in Canvas will now be subject to the following conditions:
- First, this approval is conditional upon completed component documents of the Canvas core technical specification, to the extent not done so already, being released no later than 20 working days from publication of the Trust's Final Conclusions. Further developments or refinements to the core technical specification must be published by the BBC on its website as they are completed and no later than eight months prior to launch of the first wave of set-top boxes.
  - The Trust remains of the view that it is not appropriate to make approval of Canvas conditional on the Canvas joint venture achieving industry consensus on each material component of the core technical specification. However, the Trust expects the Executive to participate in the joint venture on the basis that the core technical specification will be developed with wide industry engagement and to achieve industry consensus for it if possible.
  - The Executive's Additional Statement of 26 July 2009 explains that the Canvas requirements have been submitted to the DTG in order to be progressed with industry input. To the extent that the DTG is unwilling or unable to host working group discussions on any material component of the core technical specification, the Trust expects the Canvas joint venture partners to arrange stand alone working group sessions to allow stakeholders to comment on the relevant element.
  - The putative Canvas joint venture partners published on 28 May 2010 a "roadmap" detailing the process and timetable for publication and engagement on the core technical specification. This roadmap can be read in full here: [www.projectcanvas.info](http://www.projectcanvas.info). The Trust has reviewed the roadmap and understands that the putative Canvas joint venture partners intend to work with industry stakeholders to develop the core technical specification. The Trust places a high degree of importance on the continuation of that process and has strong expectations that the core technical specification will be developed with industry engagement.
- 4.27. The Trust expects the BBC to ensure that the Canvas joint venture follows the roadmap as to the development work to be accomplished on the core technical specification and timetable for its completion and that due account will be taken of the views expressed by industry as part of that engagement process.

- 4.28. Nevertheless the Trust accepts that the development of the Canvas technical specification is complicated and that in due course there may be further issues in relation to the release or engagement of technical information required. The Trust requires that the Executive will ensure that the principles set out here will be complied with in relation to any significant new issues which emerge during the development of the technical specification. The Executive is required to report to the Trust every three months from the date of this approval, until six months after launch, on progress with engagement and any material changes or potential risks to delivery against the roadmap.
- 4.29. If the Trust is not satisfied that the Canvas joint venture is engaging with industry in a manner consistent with the Trust's condition and expectation set out above, the Trust will firstly seek to understand the reasons for a failure to comply. If the Trust decides that the BBC was able to satisfy these conditions but has not, then the Trust may seek removal of the BBC from Canvas.

## Cost

- 4.30. The Provisional Conclusions noted the inherent uncertainty of predicting the cost of developing a new technology and therefore the uncertainty of predicting whether the cost to the BBC of participating in Canvas was estimated realistically. The Trust proposed as a condition of approval of the BBC's participation that, if the annual cost of the BBC's involvement in Canvas exceeded or was expected to exceed the stated cost by more than 20 per cent in any one year, the Executive would need to obtain Trust approval for the expenditure beyond 20 per cent. This was intended to allow the Executive more latitude, in recognition of the cost uncertainty and complexity of the project, than the normal 10 per cent ceiling on variance before further approval is required.
- 4.31. The Trust received feedback from a putative Canvas partner pointing out that the Executive had proposed to bear the financial risk if it provided back-end services to Canvas and that the Trust's proposed condition might make that commitment unworkable. The proposal that the BBC bear the financial risk in back-end services has now been dropped. The Trust's understanding is that the provision of back-end services will be contracted to an external supplier. The cost of these services will be borne by the joint venture (and the risk of further contribution split equally between the joint venture partners). That is the basis on which this approval is given and the Trust therefore sees no impediment to a cap on the amount the BBC can spend in respect of Canvas without seeking the further approval of the Trust.
- 4.32. The Trust received no other submissions suggesting that a 20 per cent cap on discretionary cost increases was too constraining on the Executive's participation in Canvas. Nor that the 20 per cent threshold was excessive. The Trust understands that the Canvas joint venture is likely to publish a revised budget in the next few weeks. The Trust has been informed that the overall cost to the BBC of participating in Canvas will not increase (indeed, due to the addition of putative joint venture partners to share the overall costs, it may even decrease). The revised budget may approach the phasing of each tranche of costs differently. On the basis that the aggregate cost to the BBC will not change, the Trust has decided to maintain the condition that the annual cost of the BBC's involvement in Canvas shall not exceed the estimated cost of £24.7 million over a 5 year period by more than 20 per cent in any one year.
- 4.33. The Trust received further submissions from three stakeholders regarding the size of Canvas's proposed marketing budget. As explained in Section 3, in relation to market

impact, the Trust considers the marketing budget for Canvas to be comparable to the promotional spend for other TV platforms. In the Trust's view, the value for money of the BBC's contribution to the planned marketing spend by Canvas is consistent with the Trust's overall assessment of value for money in the PVA. The fulfilment of public value in the BBC's investment in Canvas necessitates not just that the platform is launched but that it reaches a wide audience. This facilitates the consumption of BBC content on the platform as well as the broader public purpose of delivering the benefits of digital technology. Effective promotion is, in this case, an important aspect of delivering the Public Purposes. The BBC's contribution to Canvas's marketing spend is pro rata: as the number of partners in the Canvas joint venture increases the BBC's share of total spend will fall. The Trust understands that this has already happened.

## Free-to-air always

- 4.34. The BBC exists to serve the public interest and to promote the Public Purposes through the provision of output supplied via television, radio and online services. Provision of BBC content free-to-air is a central part of these objectives. The PVA found the combination of features contemplated by Canvas in a single subscription-free product was perceived to be of value to licence fee payers. It also identified access to free-to-air on-demand content by way of a high quality user experience without contract or subscription as a factor necessary to safeguard and optimise public value.
- 4.35. The Trust remains of the view that there should always be an ability to access the Canvas platform on a subscription-free basis given the public value ascribed to preserving a free to air point of access for content on DTT (the "free to air" principle). By this the Trust means that third parties adopting the Canvas core technical specification and UI should not be able to charge for use other than the one-off cost of purchasing the set-top box (or other device) and other services required (such as broadband connection) to access the platform. Such third parties can, however, charge for additional services that they opt to support via the platform consistent with the principle of openness and business model neutrality governing Canvas.
- 4.36. The Provisional Conclusions accordingly proposed a condition on the BBC's participation in Canvas that access to the platform for consumers should always be free to air – i.e. it should not be necessary for licence fee payers to pay a subscription simply to use the Canvas platform (without premium content). This approval is given on the understanding that, and is conditional on, the understanding that users will always be able to access Canvas free-to-air, except those additional pay services that third parties might opt to provide via the Canvas platform. The BBC is not authorised to participate in Canvas unless it ensures that the free-to-air principle is enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Accessibility and usability

- 4.37. The PVA recognised the value in going beyond building a core technical specification in order to impose a discipline on the user experience, one which conforms to best practice in terms of accessibility to users. It also noted that accessibility and usability of the UI for consumers was a factor necessary to safeguard and optimise public value.
- 4.38. The Trust considers accessibility and usability to be important elements of the public value in Canvas and a way in which it delivers the Public Purposes. However, the MIA found that

there were potential adverse market impacts of requiring that manufacturers conform to such standards and in requiring that they adopt a mandated UI if licensing the Canvas brand. The Trust addresses stakeholder concerns about mandating the UI under 'Platform operators' access to Canvas below and in Section 3.

- 4.39. In the Provisional Conclusions, the Trust noted that Canvas would incorporate a number of accessibility and usability features, though not all of these would be available at launch. The Trust indicated its provisional view that it is important that these user experience features become a reality if the full public value of the Canvas proposals is to be realised. The Trust expressed an expectation that the accessibility and usability features should be incorporated into Canvas within 12 months of launch and proposed a condition of the BBC's participation in Canvas that the Executive should report to the Trust within 12 months on the realisation of these ambitions.
- 4.40. Responses to this issue broadly fell into three categories.
- First, some industry stakeholders were highly critical. They stated that mandating the UI for Canvas was anti-competitive and unnecessary to bring the benefits of IPTV to DTT and that the accessibility features were too onerous.
  - Secondly, the Executive and some of the Canvas joint venture partners reaffirmed their commitment to the accessibility features but questioned whether they could be implemented within 12 months. The Executive indicated that it was focused on meeting some accessibility standards by seeking to ensure that Canvas would support plug-in assistive technologies, rather than building end-to-end accessibility support within the Canvas specification.
  - Thirdly, stakeholders raised specific issues regarding the details of accessibility. The RNIB welcomed the Trust's condition on accessibility but insisted that unless text-to-speech capability was a mandated requirement, the accessibility features would be inadequate for blind and vision-impaired users. The Audience Council for Wales queried the availability of Welsh content and the Audience Council for Northern Ireland asked about subtitling, signed and audio-described content.
- 4.41. The Trust addresses concerns about mandating the UI under 'Platform operators' access to Canvas below and also in Section 3. The accessibility provisions are, however, an element of the UI and core technical specification and so it is appropriate to note that the Trust found the proposals on accessibility to be part of what makes Canvas a quality and distinctive proposition, and so contribute to overall public value.
- 4.42. Given that the Executive built its application for approval in part on the Canvas joint venture partners' commitment to the accessibility proposals, the Trust is concerned by the apparent lack of clarity over the timing of integration of accessibility support into Canvas set-top boxes.
- 4.43. Regarding text-to-speech support, the Executive, on behalf of the Canvas joint venture, does seem to be focusing on enabling this functionality via assistive plug-in technology. This would enable blind and partially-sighted consumers to use laptops, mobile phones or other devices in conjunction with Canvas boxes to operate the box with text-to-speech support. The Trust asked the Executive for further information on this aspect of its proposal, and in considering this issue generally it has had due regard to the relevant statutory equality duties.

- 4.44. The Executive informed the Trust on 29 March 2010 that designing Canvas to support peripheral text-to-speech plug-ins would meet the needs of blind and partially-sighted users while avoiding the creation of legacy issues with Canvas boxes that might occur if text-to-speech were integrated into the box. It also said that, while it would be too costly for manufacturers to have to support text-to-speech in all Canvas boxes, Canvas might be able to work with manufacturers to encourage the supply of at least some Canvas boxes with integrated text-to-speech functionality.
- 4.45. The RNIB told the Trust on 14 April 2010 that plug-in technologies are not widely adopted and are likely to prove an expensive solution of no practical value to many vision-impaired users. It also questioned who would develop the applications that would need to run on peripheral devices in order to operate Canvas boxes. With regard to integrating text-to-speech into Canvas boxes, the RNIB was concerned that legacy issues were more likely to arise if only some Canvas boxes were text-to-speech enabled, as opposed to integrated text-to-speech support being a part of the Canvas standard for all boxes. The RNIB argued that text-to-speech capability was part of the minimum necessary specification to ensure best practice on accessibility.
- 4.46. While noting the cost implications for manufacturers, the Trust remains of the view that accessibility and usability are important aspects of the public value and Public Purpose case for Canvas. The Trust considers that it is reasonable to expect the BBC as a public service broadcaster to deliver the features contemplated by the application.
- 4.47. The Trust accepts that some of the accessibility features described in the proposal were put as no more than future ambitions for the joint venture (and took this into account in the PVA). The Trust also accepts that peripheral devices such as text-to-speech-enabled mobile phones may not be a relevant solution in the short term for many blind and partially-sighted users, but may prove to be an acceptable solution for some early users of Canvas. And, longer term, peripherals may become a commonly-used text-to-speech solution as the adoption of smartphones and netbooks becomes more widespread. So the Trust accepts that support for text-to-speech peripherals are at least part of the solution to meeting the needs of blind and partially-sighted users.
- 4.48. This approval is conditional upon the accessibility and usability features contemplated by the proposal being incorporated into the core technical specification and / or UI as appropriate in accordance with the statements made in the proposal and, in any case, as soon as is reasonably practicable.
- 4.49. Further, taking account of the RNIB's views, the Trust considers that it is incumbent on the BBC to encourage the Canvas joint venture not just to develop the application programming interface that will enable peripheral devices to interact with Canvas set-top boxes but also to ensure that applications are available for a good range of the operating systems that will be used by such devices.
- 4.50. Given that the use of peripherals is unlikely to meet the needs of all blind and partially-sighted users, at least in the short to medium term, the Trust also considers it is incumbent on the Executive to encourage the Canvas joint venture to ensure that there is an integrated solution available. The Trust notes that text-to-speech capability is increasingly included as a standard feature in many consumer electronics products (for example, the iPhone and the Amazon Kindle). Long term, the Trust would expect the Canvas joint venture to follow this practice. The Trust accepts that it is a significant challenge to provide this at the launch of what will already be a very innovative technology targeted at a relatively low price point.

The Trust considers, therefore, that it is not economically justifiable or proportionate to mandate that all Canvas boxes should provide integrated text-to-speech support from launch, particularly in circumstances where the Trust's Equality Impact Assessment has shown that Canvas overall is expected to confer positive benefits on blind and partially sighted people. But the Executive should encourage some manufacturers to offer an integrated solution within 12 months of this approval.

- 4.51. BBC participation in Canvas will accordingly be subject to a review by the Trust, 12 months after launch, of the implementation of the accessibility and usability features by Canvas. At this stage, the Trust will conduct a further assessment of whether integrated text-to-speech capability should be mandated in the future as a condition of the BBC's continued participation in Canvas.
- 4.52. The way in which the UI and electronic programme guide will be operated is a key concern for stakeholders and for the Trust. The way in which information is presented and signposted is important for users. The proposal explains that the Canvas joint venture will not seek to impose editorial controls beyond requirements imposed upon it by law.
- 4.53. The Trust appreciates the importance of applying minimal editorial controls from the perspective of stakeholders who wish to provide services via the Canvas platform. One stakeholder also indicated that such controls might impact browsing ability and functionality. However, the PVA noted an appetite on the part of users and stakeholders for information that guided them as to the content available via Canvas. It also identified appropriate content safeguards (in addition to parental controls) through use of guidance and signposting to be a factor necessary to safeguard and optimise public value. The Trust agrees that it is not appropriate for the Canvas joint venture to impose editorial controls on content beyond those required by law, but also considers that it is important to provide information to enable users to understand context and to make informed choices about the suitability of content. The Provisional Conclusions noted that Freeview signposts some content and that such an approach might add value to the Canvas proposition.
- 4.54. The Trust received support for signposting from the BBC audience councils but otherwise received little comment on this proposal.
- 4.55. This approval is conditional upon the BBC participating in the joint venture on the basis that the Canvas joint venture will provide appropriate information and signposting to enable users to make informed choices about the suitability of content wherever possible. The Trust will review the effectiveness of signposting at the same time as accessibility and usability.

## **Content providers' access to Canvas**

- 4.56. Canvas is designed to be open to content providers who can satisfy the minimum technical criteria to join the platform and pay access charges set by the Canvas joint venture. Various of the putative Canvas joint venture partners have argued that the success of the platform will be dependent on attracting a wide pool of content.
- 4.57. In the Provisional Conclusions, the Trust made clear that the scope of any approval of Canvas would not extend to a business model predicated on anything other than a cost recovery basis. However, recognising that some content providers had expressed concern over the potential terms for access to the platform, the Trust proposed to make this principle a condition of the BBC's participation in Canvas. Specifically, the objects and shareholders' agreement of the Canvas joint venture would be required to stipulate that:

content providers would be charged on a cost recovery basis; entry controls in terms of technical and content standards would be minimal; access would not be bundled with other products or services; and listing on the EPG and UI would be awarded in a fair, reasonable and non-discriminatory manner.

- 4.58. Most stakeholders were supportive of the principle of open access to the Canvas platform and agreed with the approach undertaken by the Trust in relation to the conditions imposed. However, a number of stakeholders – particularly smaller content providers – expressed concern that listing policy for the non-linear element of the Canvas EPG might give prominence to PSBs, called for clarity regarding listing fees and information as to the ability to target content on a regional basis. A few stakeholders were concerned that the potential use of a flat fee structure to support access charges could raise entry barriers for smaller providers. One stakeholder suggested that the Trust reserve the right to reassess the BBC's participation in the joint venture if access costs effectively excluded a large number of providers. Another asked that content providers are able to restrict information disclosed to the Canvas joint venture unless at the most aggregated level. Some content providers were concerned to ensure that they would be able to charge for their content.
- 4.59. The specific design of the charging structure for access to Canvas is a matter for the joint venture to decide operationally in accordance with the principles set out in its articles of association and shareholder agreement. In addition, the Trust considers that issues of prominence on the EPG can be addressed by reference to the policy for fair, reasonable and non-discriminatory access. Beyond that, as the Trust discussed in the Provisional Conclusions, Ofcom and DEMOL have jurisdiction in relation to the listing of linear content.
- 4.60. In the Provisional Conclusions, the Trust made clear that the scope of any approval of Canvas would not extend to a business model predicated on anything other than a cost recovery basis. However, recognising that some content providers had expressed concern regarding the potential costs and terms of access to the platform the Trust proposed to make the following principles a condition of the BBC's participation in Canvas:
- the joint venture may develop ways in which to recover operational costs but, for the avoidance of doubt, any such activity will be charged to third parties on a "cost recovery" basis only;
  - entry controls in terms of technical and content standards will be minimal;
  - access will not be bundled with other products or services; and
  - listing on the electronic programme guide and UI will be awarded in a fair, reasonable and non-discriminatory manner.

The Trust remains of the view that these principles should be a condition of the BBC's participation in Canvas. Accordingly, the BBC is not authorised to participate in Canvas unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture

## **Platform operators' access to Canvas**

- 4.61. In the Provisional Conclusions, the Trust noted that the proposal to mandate a single UI for Canvas formed part of the public value case for the proposal. The PVA identified value in imposing a discipline on the user experience and mandating a simple and accessible design.

Accessibility was discussed above in relation to the issues arising from the proposed high standards for people with accessibility needs. However, the PVA noted a general challenge for users in navigating both linear and on-demand content and that the UI/EPG element of the proposal might be particularly relevant to the ability of users to access the full range of services available. The PVA also identified, separately to accessibility and usability, that access by way of a high quality user experience without contract or subscription was a factor important to safeguard and optimise public value. Accordingly, in the Trust's view the UI forms part of the facilitation of service delivery and contributes to the BBC's sixth Public Purpose by delivering the benefits of digital technology to all users.

- 4.62. As part of its assessment, the Trust acknowledged that mandating a UI and linking adoption of the UI to the licensing of the Canvas trademark could create negative as well as positive market impacts. The negative impacts included the potential stifling of innovation and competition in UI design. Platform operators might simply adopt the Canvas package since they would not be able to license the Canvas trademark if they proposed to use a bespoke UI. Manufacturers might be inhibited from developing a competing UI. The MIA noted that operators would not be able to adapt the look and feel of the overall Canvas UI with an equivalent degree of freedom to Freeview. However, it also acknowledged that the mandated elements of the UI would be thin and that operators would be able to develop the look and feel of underlying pages to differentiate their offerings. Further, the Trust understood that, since the core technical specification for Canvas would be published, it would be open to manufacturers and platform operators either to adopt the Canvas core technical specification and the UI or (if they preferred) to develop their own UI with the Canvas core technical specification.
- 4.63. The Trust considered it important that the Canvas joint venture should operate so as to ensure that the potential negative impact of mandating the UI would be minimised as far as is possible. The Trust proposed in the Provisional Conclusions that the BBC's participation in the joint venture be conditional on the objects and shareholders' agreement of the joint venture stipulating that the Canvas core technical specification would be made available on a fair, reasonable and non-discriminatory basis, and that the Canvas trade mark, for those eligible to license it, would be made available on a cost recovery basis.
- 4.64. The Trust also encouraged the joint venture to explore whether there could be more flexibility in the design of the front page of the UI – to allow some co-branding and a customisable button for platform operators and ISPs using Canvas.
- 4.65. In the consultation on the Provisional Conclusions, some stakeholders continued to express concern about mandating the UI, maintaining that it was unnecessary to the objectives of the proposal and that it did not have public value. One stated that the point had not been adequately researched by the Trust. Others welcomed the approach taken by the Trust in requiring fair, reasonable and non-discriminatory access to the technical specification. However, they wanted more flexibility in the UI than the Provisional Conclusions appeared to demand; some made their support contingent on greater clarity over the process of industry engagement. Some noted the technical difficulties that might be encountered by the joint venture if it assumed responsibility for operation of the UI and queried its ability to meet this challenge. One stakeholder asked for more clarity over how a fair, reasonable and non-discriminatory approach would be applied in this context. Others suggested that an independent third party should manage the UI.

- 4.66. A number of stakeholders were also concerned that conditional access should be integrated into the specification so as to enable the provision of services for which consumers could be charged.
- 4.67. Regarding flexibility in the design of the front page, the BBC Executive responded that the concept of co-branding (perhaps extending to a small front button that links to content of those subsidising the box) is an agreed principle among the partners but that they were working through the business rules and technical feasibility of such solutions. Several stakeholders were keen to develop potential co-branding opportunities with the Canvas joint venture and were keen to explore how this would be developed. Several ISPs were concerned that the proposed approach of linking co-branding to the subsidy of set-top boxes was unworkable in practice.
- 4.68. As discussed above, with reference to accessibility and usability, the Trust concluded that mandating the UI was an important aspect of both the public value created by Canvas and the delivery of the BBC's Public Purposes. While, as set out in the Provisional Conclusions, the Trust has identified some potential negative market impacts from the mandating of a single UI, the Trust's assessment concludes that the public value of the approach sought by the Canvas joint venture outweighs these impacts. Furthermore, the Trust has concluded that mandating the UI is necessary to deliver the BBC's Public Purposes (in particular, the sixth Public Purpose regarding delivering the benefits of digital technology to all users).
- 4.69. The Trust has identified a number of negative competitive impacts that may arise from mandating the UI, namely disincentives to manufacturers to develop competing UIs and to platform operators who wish to access the Canvas trade mark. Consistent with the CIP, the BBC must ensure that the negative competitive impacts have been minimised to the greatest extent possible without compromising the delivery of the BBC's Public Purposes. The Trust considers that mandating the UI is necessary to deliver the Public Purposes achieved by Canvas; however, to minimise the negative competitive impacts that arise from this, the Trust believes that the Canvas joint venture could offer some flexibility, allowing operators to develop around the UI to differentiate their offerings, always provided that such flexibility does not compromise the delivery of the BBC's Public Purposes.
- 4.70. The Trust believes that the approach set out by the Canvas joint venture, which will undertake the detailed design of the UI but allow individual content suppliers the opportunity to design the look and feel of their own pages, allows the UI to deliver the public value and Public Purposes while also permitting content providers a degree of flexibility within the parameters set by the Canvas joint venture. The Trust is satisfied that the mandated UI conforms with the CIP and delivers public value.
- 4.71. With regard to some stakeholders request for clarity around the degree of flexibility that might be available on the UI, as was made clear in the PVA (see, in particular, paragraphs 1.3.32 and 5.4.48 - 5.4.68 of the PVA), some flexibility on the UI may be desirable but this must not compromise the core principles of usability and access to be delivered via the UI. As explained at paragraph 4.68 above, the Trust considers that the UI has public value and is necessary for the delivery of the Public Purposes. The Trust considers that allowing third parties some flexibility, such as a "front page button" as suggested, is consistent with the PVA requirement that the core principles of usability and access to be delivered via the UI should not be compromised and that permitting a front page button would not compromise the delivery of the Public Purposes. The Trust expects that, any agreed approach in relation to this area is consistent with the fair, reasonable and non-discriminatory condition for access by content providers identified below.

- 4.72. One stakeholder asked for clarification as to whether fair, reasonable and non-discriminatory access would be available to all industry operators - that is including manufacturers, not just platform operators. The Trust confirms that its understanding of the open nature of the core technical specification is such that it shall be available to all industry operators including manufacturers. The Trust expects the fair, reasonable and non-discriminatory principle to apply to all those seeking to license the core technical specification.
- 4.73. With regard to the establishment of conditional access services to support paid-for content services, this is a commercial decision for the providers of such services and for manufacturers. The BBC Executive has made clear that the delivery of such services can sit alongside the Canvas technical specification. The Trust considers that the level of integration of conditional access in the technical specification is a commercial decision for the Canvas joint venture.
- 4.74. Approval is made on the understanding that the Canvas joint venture will be governed by the following principles:
- the Canvas core technical specification will be made available to third parties on a fair, reasonable and non-discriminatory basis; and
  - the Canvas trade mark will be made available to those third parties eligible to license it on a cost recovery basis.
- 4.75. The BBC is not authorised to participate in Canvas unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.
- 4.76. When the Canvas joint venture pursues flexibility on the UI by permitting co-branding on the front page of the UI or similar, the opportunity to take advantage of such flexibility must be consistent with the fair, reasonable and non-discriminatory condition identified above.

## Syndication

- 4.77. The MIA noted as an area of potential risk that Canvas might create a disincentive for joint venture members to syndicate their owned content. In the Provisional Conclusions, the Trust considered concerns expressed by a number of stakeholders over the potential for Canvas to create disincentives for its members to syndicate their content. In forming its view the Trust took account of the analysis in the MIA and commissioned from Frontier Economics. The Trust provisionally concluded that it is not presently clear that Canvas will create a disincentive to syndicate content relative to the counterfactual provided that the Canvas joint venture partners do not exchange any commercially sensitive information especially in relation to their syndication policy. To address stakeholder concerns, the Trust proposed to carry out and publish a review of the effects, if any, of Canvas on the Canvas joint venture partners' incentives to syndicate their content to other platforms. This would take place twelve months after launch. In addition, the Trust provisionally concluded that, in accordance with requirements of competition law, the BBC's participation in Canvas should be conditional upon there being safeguards in place to prevent any sharing of strategy on syndication between the competing members of the Canvas joint venture.
- 4.78. The Trust also considered whether Canvas would create a disincentive for PSBs to syndicate content to smaller or new platforms. Again, the Trust's assessment finds that Canvas will not directly alter existing incentives to syndicate, but the Trust recognises that the scale and scope of Canvas may make it harder for smaller platforms to achieve the scale to make

syndication viable for content providers. The MIA identified and assessed the negative impact of Canvas on smaller platforms due its scale and scope. The Trust considers that it is not possible to minimise this negative market impact without compromising the delivery of the Public Purposes.

- 4.79. Separately, the Trust has received and considered privileged legal advice on the incentives for the Canvas joint venture members to syndicate to other platforms from a competition law perspective.
- 4.80. In the consultation following the Provisional Conclusions, several stakeholders raised concerns that Canvas would disincentivise its members from syndicating content to alternative platforms. These concerns can be grouped into three main categories:
- Firstly, that Canvas will exacerbate existing concerns in relation to the BBC's syndication of content and in particular that associated with the iPlayer.
  - Secondly, that Canvas would lead to the commercial PSB's favouring the DTT platform and disincentivise PSBs from syndicating content to other platforms. Further, it was argued that Canvas may have similar effects to Project Kangaroo which generated competition concerns for the Competition Commission. In particular, one stakeholder argued that Canvas could emerge as a vehicle to promote tacit collusion among the Canvas joint venture partners.
  - Finally, whether the Trust could take a final decision on approval prior to completing its review of BBC syndication policy and, that clarification was needed over how the proposed review of the effects of Canvas, including potential remedies, on syndication would be implemented.
- 4.81. Regarding the BBC's incentives to syndicate, several stakeholders said Canvas could exacerbate existing issues they face in gaining access to BBC content and that any Trust approval should take into account the broader context of syndication of BBC content. Sky stated that BBC content should not be bundled with the BBC iPlayer. Virgin said that the joint venture partners did not adopt a platform neutral approach and by way of example cited the failure of the BBC to advertise the fact that the iPlayer was available on Virgin. IP Vision argued that Canvas approval should be linked to the separate Trust review of BBC syndication policy.
- 4.82. The Trust has in place a syndication policy intended to ensure fair and non-discriminatory distribution of BBC content. The review of the BBC's syndication policy, which the Trust has already commenced, will examine the concerns relating to the BBC's approach to syndication and will conclude later this year. If the Trust's review unearths problems in the BBC's practice, or shortcomings with the policy, these will be addressed, as appropriate, at that point. But for present purposes, there is no reason (other than the fact of certain complaints) for the Trust to consider that the syndication policy is flawed and that it will not do its job. The Trust expects the BBC to comply with the syndication policy and its participation in Canvas does not alter the BBC's obligations under the policy.
- 4.83. Regarding the incentives of commercial PSBs, concerns that they would be disincentivised to syndicate to other platforms were raised by Sky and Virgin. Virgin argued that Canvas would enable PSBs to generate greater advertising revenue due to the fact that PSB viewing share would be higher on Canvas relative to other platforms. It said the greater prominence likely

to be afforded to PSBs on the Canvas EPG relative to other channels would underpin this incentive.

- 4.84. The Trust considered whether Canvas would disincentivise other PSBs from syndicating content to other platforms as part of the work supporting the Provisional Conclusions. The Trust commissioned Frontier Economics to consider this issue and also sought privileged legal advice on potential competition concerns. It was not always clear from the stakeholder submissions to what extent concerns over the incentives of PSBs to syndicate content are the result of PSB involvement in Canvas or a more general concern over PSBs favouring the DTT platform as a whole.
- 4.85. The Trust continues to believe that it is not presently clear that Canvas will create a disincentive to syndicate content to third parties, including Sky and Virgin. The Trust has not seen any evidence to suggest that the loss of potential viewing from approximately 50% of UK households is likely to be counterbalanced by potentially enhanced growth in advertising revenue resulting from the increased take-up of Canvas. As discussed in the Provisional Conclusions, Canvas will not, as an open platform, be able to control the viewing choice of households and therefore cannot determine the revenue impact resulting from seeking to grow penetration of the Canvas platform relative to other platforms.
- 4.86. One stakeholder argued that the Canvas joint venture may be able to exploit new advertising models or usage data which would provide PSBs with an incentive to favour Canvas over other platforms. In addition to the arguments set out above, in the Trust's view new advertising models may emerge over the next few years but the business models, as Virgin admits,<sup>11</sup> are uncertain and unproven. Hence the impact, if any, of such models on the incentive to syndicate is, in the Trust's view, best tested robustly once those models have been designed and implemented. Indeed, this would be true, even if Canvas were to have a larger impact on other platforms than the modelling estimates. If the Canvas EPG is, as expected, configured similarly to the Freeview EPG, it is difficult to see how Canvas will alter incentives for PSBs in relation to linear content.
- 4.87. Regarding implementation of the review of the effects of Canvas on syndication, the Trust recognises that the nascent state of the market for non-linear content delivered to TV and the rapid changes in technology make ongoing scrutiny of syndication necessary. In particular, the Trust would be concerned if a third party was not able to gain access to syndicated content, without objective justification, from a joint venture partner in Canvas as a result of that member's investment in Canvas. If the conduct of one or more partners in the Canvas joint venture was deemed to be anti-competitive, then such a matter would need to be pursued with the relevant competition authority.
- 4.88. The Trust will carry out a review, 12 months after the launch of Canvas, of the effects, if any, of Canvas on the incentives of the joint venture members to syndicate their content to other platforms.
- 4.89. This approval is also conditional on there being safeguards in place as soon as reasonably possible after approval to prevent any sharing of strategy on syndication and other

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<sup>11</sup> Most stakeholders who discussed the advertising market also argued that the scale, scope and success of emerging models are difficult to predict.

commercially sensitive information between the competing members of the Canvas joint venture.

## Cross Promotion

- 4.90. Virgin has expressed concern to the Trust in relation to the ability of the BBC and other PSBs to cross promote Canvas. Virgin argues that Ofcom's code on cross promotion relates to analogue households and not digital households. As a result the BBC and other PSB may cross promote Canvas to the detriment of other platforms such as Virgin.
- 4.91. Virgin is correct that the Ofcom code only applied to promotion in analogue households. However, the BBC is also subject to its own code of conduct in relation to cross promotion which extends to digital TV platforms and services. The Trust will enforce this code. If any stakeholder is concerned that the BBC will cross promote Canvas to the detriment of other platforms it will be able to bring a complaint to the BBC under the fair trading regime. Moreover, as noted in the MIA, the Trust's view is that syndication of content is likely to result naturally in the objective promotion of content by the other PSBs.
- 4.92. In addition, in so far as the BBC's cross-promotion activities are concerned the Trust will consider this alongside its review of syndication to satisfy itself that the Code is working effectively in relation to any issues created by Canvas.

## Access to Canvas for ISPs

- 4.93. In the Provisional Conclusions the Trust set out that any proposed quality standards for ISPs delivering content via the Canvas platform should be set at a minimum level so as to ensure that technical standards do not become a high barrier to entry. The Trust stipulated that such controls should be fair, reasonable and non-discriminatory so as to maximise the potential public value in breadth of content choice and so as to minimise potential market distortion in respect of ISPs. Further, the Trust stated that it does not consider that any such control can or should properly be linked to a particular network feature or service.
- 4.94. Stakeholders broadly agreed with the Trust's approach in this area. Concern was expressed as to whether the broadband delivery infrastructure could support the flow of content that Canvas would generate. It was also suggested that Canvas should work with the ISPs to minimise distribution costs. The Trust considers that the joint venture has already given and will continue to give attention to these matters – through strategies such as the use of Push VOD to manage demand and the application of multi-casting. The fact that the Canvas joint venture now includes at least two ISPs and the DTG membership is also open to ISPs should also help facilitate an approach designed to minimise the cost impact on ISPs.
- 4.95. In the PVA, the Trust discussed the concern that the ability of Canvas to deliver content to a satisfactory quality in any specified geographic area is to a large extent dependent on the network capability available in that area. The Trust hopes that the process of network upgrade undertaken by the main operators will mitigate these issues. However, consumer demand for Canvas (with the consequent demand for improved access speeds) can only have a positive impact on the incentives of network operators to make such investment.
- 4.96. Approval is accordingly made on the understanding that the Canvas joint venture will be governed by the following principles:

- quality standards for ISPs delivering Canvas will be set at a minimum level; and
  - applied in a fair, reasonable and non-discriminatory manner.
- 4.97. The BBC is not authorised to participate in the Canvas joint venture unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.

## Legal compliance

- 4.98. The Trust noted in the Provisional Conclusions that the BBC would be permitted to participate in Canvas only on the understanding that the joint venture would comply with all applicable laws including, but not limited to, competition and state aid law. The Trust has taken independent legal advice on both state aid and competition issues.

### State aid law

- 4.99. In the Provisional Conclusions the Trust noted that the BBC's participation in Canvas would need to be under conditions acceptable to a market economy investor. Therefore the Trust proposed the following conditions:
- *No subsidising by the BBC of joint venture partners.* The Trust considered that the BBC should be required to ensure that the funding and other arrangements for the participation of all other partners (especially public service broadcasters) in Canvas are such that it can be demonstrated that the Canvas joint venture partners are not being subsidised by the licence fee.
  - *Audit of the funds already spent by the BBC on IPTV related research and development.* The Executive's application states that such expenditure prior to October 2008 is not a pre-investment in Canvas because it represents the cost of general BBC research and development in relation to IPTV. In its Provisional Conclusions, the Trust stated that prior to formation of the Canvas joint venture, the Executive should appoint independent auditors to review these costs and confirm whether any of that sum ought properly to be allocated specifically to the development of Canvas and therefore shared among joint venture partners.
  - *Frontloading of BBC's contributions on behalf of the joint venture can only be carried out by the BBC in line with conditions acceptable to a market economy investor.* The Executive has stated that, in frontloading its investment on behalf of public service broadcasters that are members of the Canvas joint venture, it will act as a market economy lender. The Trust provisionally concluded that, in order to comply with the requirements of acting as such lender, the BBC should make the same loan (offered on commercial terms) available to all Canvas joint venture partners of the same creditworthiness, regardless of their status as PSBs or not.
- 4.100. Compliance with state aid law was an area of stakeholder concern. Sky considered that the proposals were unlikely to be compliant with state aid law. Virgin stated that an audit of R&D costs was required. Both Sky and IP Vision contended that the Executive's proposal to frontload its investment in the form of a loan to other public service broadcasters was inappropriate in principle and contrary to state aid law.

- 4.101. Three stakeholders raised doubts about the audit of the BBC's R&D costs. Arqiva and IP Vision contended that this would be an inadequate means of assessing the contributions. Another stakeholder contended that any re-allocation of funds arising from the exercise may put its participation in the project in question.
- 4.102. The Trust remains of the view that approval should be made subject to the conditions proposed in respect of subsidy and frontloading.
- 4.103. It is the Trust's understanding that any references to frontloading commercial PSB contributions to the joint venture are no longer relevant as all have declined to take-up the offer. In any case, the Trust is content that the condition imposed on the frontloading of the BBC's contributions sets an appropriate test in order to ensure state aid compliance – in particular, the stipulations that any loan made on this basis must be in line with the market economy investor principle.
- 4.104. The Trust regarded an audit as the most practicable and fair means to establish whether any (and is so how much) of the BBC's research and development expenditure should be allocated to its participation in Canvas, and therefore shared among the joint venture partners. Reflecting on the submissions received from stakeholders, the Trust determined that its settled view on these Final Conclusions needed to await the completion of the audit. The KPMG report concluded that all BBC expenditure incurred before 1 October 2009 could be characterised as generic research and development that is not directly attributable to IPTV and thus not allocated to the development of Canvas. As a result KPMG concluded that BBC expenditure prior to October 2009 should not be shared between the Canvas Joint Venture Partners. Having now considered the audit results, the Trust is satisfied that KPMG, an independent auditor, has produced a report which uses a reasonable methodology to allocate costs specifically to the development of Canvas.
- 4.105. However, while in no way critical of KPMG's work or the Executive's reliance on it, the Trust seeks a very high level of assurance that the BBC's participation in Canvas is compliant with state aid law. The Trust has therefore decided to impose an additional condition in order to ensure that the BBC receives full reimbursement from the Canvas joint venture for the BBC expenditure prior to 1<sup>st</sup> October 2009. Accordingly, before Canvas is launched, the Canvas joint venture shall reimburse the BBC in respect of its expenditure prior to October 2009 via:
- i) the purchase of all assets resulting from this expenditure at market value. The market value shall be determined by an independent valuer at the time of the purchase; and
  - ii) the reimbursement of any remaining expenditure (including appropriate interest) which did not result in any assets being created.

## Competition law

- 4.106. In the Provisional Conclusions the Trust noted that Freeview, Freesat and Canvas will be competing platforms and concluded that it is important to ensure that the BBC does not facilitate any inappropriate exchange of commercially sensitive information between them (for example, relating to marketing and promotional strategy). The Trust proposed that any approval of Canvas would be made conditional upon a requirement that the BBC should keep its interaction with Canvas operationally separate from its involvement with Freesat and Freeview.

- 4.107. Some stakeholders argued that such a degree of operational separation might be onerous and make it difficult to achieve any common benefits across the platforms. Whilst the Trust is sympathetic to this view, it remains of the view that this condition should be imposed as part of approval.
- 4.108. Sky argues that that the Trust's competition law analysis of the proposals is deficient in a number of respects. In particular, it contends that the Trust should obtain further competition law advice in relation to the incentives to syndicate.
- 4.109. The Trust has received and considered privileged legal advice to inform its view on the proposals' compliance with competition law. Having considered stakeholder comments and this privileged advice, the Trust is of the view that the proposals are compliant and, as noted above, requires as a condition of approval that the Canvas joint venture continue to comply with competition law.
- 4.110. In March 2010, the Canvas joint venture partners made a submission to the Office of Fair Trading (OFT) requesting an opinion on whether the joint venture constituted a relevant merger under the Enterprise Act 2002. The Trust continued its assessment of the Canvas proposals while the OFT considered the project, but postponed concluding the assessment pending an opinion from the OFT. The OFT concluded on 19 May 2010 that the Canvas joint venture does not qualify for investigation under the merger provisions of the Enterprise Act 2002. The Trust has taken account of the OFT's conclusion in reaching its own final decision.
- 4.111. In addition, the Trust has received a letter from the Jersey Competition Regulatory Authority (JCRA) indicating that the JCRA considered that Project Canvas may fall within the ambit of Jersey merger control law. In order to ensure that Project Canvas is compliant with this law, the Trust's approval of the BBC's participation in Canvas is conditional upon Canvas not being implemented in Jersey before receiving all the necessary approvals from the JCRA.

# 5. The Trust's Final Conclusions

- 5.1. The Trust's final decision is to approve, subject to conditions, the participation of the BBC in Canvas. The BBC's participation in Canvas is restricted by the scope of this approval and conditions set by the Trust, as detailed below.
- 5.2. This approval is conditional upon the completed component documents of the Canvas core technical specification, to the extent not done so already, being released no later than 20 working days from this final approval. Further developments or refinements to the core technical specification must be published by the Canvas joint venture as they are completed and no later than eight months prior to launch of the first wave of set-top boxes.
- 5.3. The Trust remains of the view that it is not appropriate to make its approval of Canvas conditional on the Canvas joint venture achieving industry consensus on each material component of the core technical specification. However, the Trust expects the Executive to participate in the joint venture on the basis that the core technical specification will be developed with wide industry engagement and to achieve industry consensus for it if possible. The putative Canvas joint venture partners published on 28 May 2010 a "roadmap" detailing the process and timetable for publication and engagement on the core technical specification. This roadmap can be read in full here: [www.projectcanvas.info](http://www.projectcanvas.info). The Trust has reviewed the roadmap and understands that the putative Canvas joint venture partners intend to work with industry stakeholders to develop the core technical specification. In addition the Trust has been informed by the Executive that it will publish its choice of digital rights management (DRM) shortly after the publication of this decision and will engage with industry on that choice.. The Trust places a high degree of importance on the continuation of that process and has strong expectations that the core technical specification will be developed with industry engagement.
- 5.4. The Trust understands that Canvas is likely to agree a revised budget in the next few weeks. The Trust has been informed that the overall cost to the BBC of participating in Canvas will not increase (indeed, due to the addition of putative joint venture partners to share the overall costs, it may even decrease). The revised budget may approach the phasing of each tranche of costs differently. On the basis that the aggregate cost to the BBC will not change, the Trust has decided to maintain the condition that the annual cost of the BBC's involvement in Canvas shall not exceed the estimated cost of £24.7 million over a 5 year period by more than 20 per cent
- 5.5. This approval is given subject to the "free-to-air principle", that users will always be able to access Canvas free to air, although they may be charged for:
  - additional pay services that third parties might opt to provide via the Canvas platform;
  - the one-off purchase cost of the device used to access the platform; and
  - any broadband subscription fees.
- 5.6. The BBC is not authorised to participate in Canvas unless it ensures that the free-to-air principle is enshrined in the objects and shareholders' agreement of the Canvas joint venture.

- 5.7. This approval is conditional upon the accessibility and usability features contemplated by the proposal being incorporated into the core technical specification and / or UI as appropriate in accordance with the statements made in the proposal and, in any case, as soon as is reasonably practicable.
- 5.8. This approval is conditional upon the Executive participating in the joint venture on the basis that the Canvas joint venture will provide appropriate information and signposting to enable users to make informed choices about the suitability of content wherever possible.
- 5.9. This approval is made on the understanding that Canvas will be governed by the following principles:
- the joint venture may develop ways in which to recover operational costs but, for the avoidance of doubt, any such activity will be charged to third parties on a "cost recovery" basis only;
  - entry controls in terms of technical and content standards will be minimal;
  - access will not be bundled with other products or services; and
  - listing on the electronic programme guide and UI will be awarded in a fair, reasonable and non-discriminatory manner.
- 5.10. The BBC is not authorised to participate in Canvas unless it ensures that that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.
- 5.11. This approval is made on the understanding that Canvas will be governed by the following principles:
- the Canvas core technical specification will be made available to third parties on a fair, reasonable and non-discriminatory basis; and
  - the Canvas trade mark will be made available to those third parties eligible to license it on a cost recovery basis.
- 5.12. The BBC is not authorised to participate in Canvas unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.
- 5.13. This approval is also conditional on there being safeguards in place as soon as reasonably possible after approval to prevent any sharing of strategy on syndication and other commercially sensitive information between the competing members of the Canvas joint venture.
- 5.14. Approval is accordingly made on the understanding that the Canvas joint venture will be governed by the following principles:
- quality standards for ISPs delivering Canvas will be set at a minimum level; and
  - applied in a fair, reasonable and non-discriminatory manner.
- 5.15. The BBC is not authorised to participate in the Canvas joint venture unless it ensures that these principles are enshrined in the objects and shareholders' agreement of the Canvas joint venture.

5.16. This approval is conditional upon Canvas complying with all applicable laws, including competition and state aid law. To ensure that the BBC's participation in Canvas complies with state aid and competition law, the Trust requires as a condition of approval that:

- there should be no subsidising by the BBC of joint venture partners;
- before Canvas is launched, the Canvas joint venture shall reimburse the BBC in respect of its expenditure prior to October 2009 via:
  - i) the purchase of all assets resulting from this expenditure at market value. The market value shall be determined by an independent valuer at the time of the purchase; and
  - ii) the reimbursement of any remaining expenditure (including appropriate interest) which did not result in any assets being created
- any potential frontloading of BBC contributions on behalf of joint venture partners must be in line with the market economy investor principle;
- the BBC must keep its interaction with Canvas operationally separate from its involvement with other free-to-air platforms, namely Freeview and Freesat;
- the Trust will consider the BBC's cross-promotion activities alongside its review of syndication to satisfy itself that the BBC cross-promotion code is working effectively in relation to any issues created by Canvas;
- that Canvas will not be implemented in Jersey before receiving all the necessary approvals from the Jersey Competition Regulatory Authority.

5.17. The Trust has made the BBC's participation in Canvas subject to a number of conditions, and proposes to review the implementation of certain of those conditions so as to satisfy itself that the BBC's ongoing participation is consistent with the terms of this approval. Approval of the BBC's ongoing participation in Canvas will, accordingly, be subject to:

- the Executive reporting to the Trust every three months from the date of this approval, until six months after launch, on the progress of industry engagement against the roadmap published on 28 May 2010 by the putative joint venture partners and any material changes or potential risks to delivery against the roadmap;
- a review by the Trust, 12 months after launch, of the implementation of the accessibility and usability features by Canvas;
- a review by the Trust, 12 months after launch, of the steps taken by the Canvas joint venture to provide appropriate information and signposting to enable users to make informed choices about the suitability of content wherever possible;
- a review, 12 months after launch, of the effects, if any, of Canvas on the incentives of joint venture partners to syndicate their content to other platforms. This review is separate to, and carried out independently of, the Trust review of its own syndication policy for the BBC.

- The Trust will consider the BBC's cross-promotion activities alongside its review of syndication to satisfy itself that the BBC cross-promotion code is working effectively in relation to any issues created by Canvas.
- 5.18. Should the Trust not be satisfied, following consideration of the reports and reviews provided for, that the BBC's participation in Canvas is consistent with the terms of this approval, the Trust will consider actions required, up to and including requiring the BBC's withdrawal from the joint venture.

# Annex I: Stakeholder meetings

The Trust met with the following stakeholders on one or more occasions during the assessment process:

Abbott Meade Vickers

Alcatel

AMV

Arqiva

Audience Council of England

Audience Council of Wales

Audience Council of Northern Ireland

Audience Council of Scotland

BBC Executive

Blinkbox

BlinkX

BSG

BT

Channel 4

Digital Television Group

Five

Freesat

Freeview

Graphite Films

Intellect

IP Vision

ITV

Joost

Krypton

Limelight

London Borough of Lambeth

LoveFiLM

Microsoft

Miniweb

Orange

Pace

Panasonic

Phom

RNIB

Rovi

Save the Kids TV

BSkyB

Sony

T Mobile

Talkback Thames

Talk Talk

Two Four

Tiscali

Top Up TV

UKTV

Viacom

Virgin

Vodafone

Voice of the Listener and Viewer