

REVIEW OF THE BBC'S ROYAL CHARTER

Response of British Sky Broadcasting (Sky)

The DCMS recognises that its December 2003 consultation document “Review of the BBC’s Royal Charter” “*marks the start of an open and wide-ranging process of consultation and review*”, and Sky welcomes the opportunity to participate in this process. In this response, Sky has focused on certain issues which it considers require early consideration within the Charter Review framework.

A critical element of the Charter Review process (of which the Ofcom public service broadcasting review is a fundamental part) will be the definition of the BBC’s public service role. A clear definition of public service provision is essential, not only to guarantee value for money for the licence fee payer, but also to ensure that commercial operators are able to run their businesses with confidence and to plan effectively for the future. The BBC must operate within a clear public service remit, determined following appropriate public consultation, against which its channels and services may be independently assessed. This response expands upon this point, in addition to addressing the other matters that Sky believes merit early consideration.

1. How should the BBC respond to the development of new technologies and to changing viewing and listening habits?

- 1.1. The consultation document states that “*the Government is seeking views on the opportunities that a changing broadcast environment might offer the BBC, the threats it might pose and how the BBC might have to change to cope with them*”¹, on the basis that it is “*reasonable to expect that technology will change more over the next ten years than it has in any decade since the BBC was established in 1926*”.² The consultation document does not explain the basis for this expectation, which may not be well-founded given, for example, the considerable changes since 1926. Indeed, as the consultation document recognises, very significant changes in technology and viewing habits have taken place in the seven years of the current Charter period, including widespread take-up of the internet and mobile telephony and the launch of digital television. In considering how the BBC should respond, in the future, to the development of new technologies and to changing viewing and listening habits, it is salutary to consider the BBC’s reaction to the considerable technological changes that have taken place in the recent past.
- 1.2. The BBC is first and foremost a broadcaster. Its core purpose should therefore be broadcasting and its publicly funded activities should always be directly related to its core purpose as a broadcaster. Experience has shown, however, that the BBC tends to expand the scope of its activities to the greatest extent possible.

¹ Paragraph 20 of the consultation document.

² Paragraph 16 of the consultation document.

For example, since the approval granted by the Secretary of State for BBC Online in 1998, it has developed from a provider of “*a strong mix of news, education and programme linked sites*”³ into an extensive content portal providing content over 33 broad genres. The BBC has also expanded the amount and range of information available in each content genre. Such expansion has far exceeded the scope for BBC Online contemplated in the BBC’s application to the Secretary of State for approval of the service.⁴

- 1.3. The apparent ability of BBC Online to expand its content services without any control acts as a deterrent to commercial operators establishing websites, whether advertising funded or on a subscription basis. The presence of BBC Online increases the risks associated with online investments, where only a limited number of different online services may be sustainable. The existence of BBC Online, or the risk that it may expand to establish a service rivalling a commercial service, will act as a deterrent to third parties launching online content services – particularly in view of the BBC’s significant advantages of being free from commercial constraints and able to advertise such services through extensive cross-promotions on its TV and radio services.⁵
- 1.4. There appears to be an assumption on the part of the BBC (and possibly also Government), that the BBC should make its public services available over as many delivery methods and to as many devices as possible, as early as possible. Experience shows that the BBC does not wait until new methods of broadcasting are well-established, but instead seeks to deliver content whilst such new methods are still developing and to expand into areas going beyond broadcasting activities. For example, the BBC provides free broadband content to Internet Service Providers (“ISPs”) and has developed software to deliver versions of its online content to mobile telephones and Personal Digital Assistants (“PDAs”). The use of broadband⁶ to deliver the BBC’s content was not contemplated by the approval of the BBC’s online services in 1998. The use of broadband by the BBC is potentially damaging to the emergence of commercial services since the provision of video content online is a new service still at an early stage of development. Equally, in relation to the provision of content to mobile phones and PDAs, any possible justification for the BBC delivering content funded by the licence fee using mobile technologies, particularly 3G mobile, will be outweighed by the risk of crowding out commercial investments in content services.

³ Page 4 of BBC letter to DCMS dated 9 October 1998.

⁴ The BBC itself effectively recognises that it has taken advantage of the fact that the approval was broadly drafted. Its Director of Technology and New Media recently said “*Have we gone further than the consent permitted? Well, no, but then we do acknowledge that the consent, written as it was in the infancy of the dot.com revolution, was couched in very broad terms*”. Speech to the Westminster Media Forum on 4.11.03. See: www.bbc.co.uk/pressoffice/speeches/stories/highfield_westminster.shtml

⁵ Such advertising is in effect unique, since only the BBC has access to promotional airtime on its channels.

⁶ Sky notes that the term “broadband” does not benefit from a comprehensive and universally accepted definition. The term should, in future, be clarified, particularly in the context of approvals and remits for BBC services.

- 1.5. The BBC may consider that its involvement in new technologies is acceptable on the basis that it will encourage take up of new services.⁷ There should, however, be no assumption that the BBC is better placed to encourage take up of new services than the commercial sector. Where there are public policy grounds for encouraging take up of a new service, such as broadband, then the better approach would be for Government to put in place the conditions that will enable investment to take place and competition to flourish. Involvement by the BBC is likely to distort competition and deter investment, particularly where there is uncertainty as to the scope of its activities. In certain circumstances, there may be a public policy imperative in asking the BBC to use its considerable cross-promotional power to encourage take up of new technologies such as digital television (on a platform neutral basis) or broadband. Any promotion by the BBC of such new services/technologies should, however, be on a generic basis. There should be no automatic assumption that the only way to harness the power of BBC cross-promotion is to allow it to launch and promote its own new services.
- 1.6. Given the scope for considerable damage to the commercial sector resulting from the involvement by the BBC in new and emerging technologies, there should be no assumption on the part of the BBC or of the Secretary of State, that the BBC should be involved in such new technologies. If at the time of seeking approval for a new service, such as the BBC Online application in 1998, the BBC does not contemplate delivery of its services over a particular technology (as was the case with broadband), then any approval given by the Secretary of State should not be assumed to extend automatically to that technology. The adoption of that new technology should be subject to a further approvals process.
- 1.7. Given the evidence that the BBC has expanded its services into technologies which were not originally contemplated during relevant approvals processes, it is important that approvals for new services are tightly drafted and subject to stringent conditions. The detailed, prescriptive nature of the approvals for BBC3 and the Digital Curriculum form an appropriate model for any future approvals (or modifications of existing approvals).
- 1.8. In addition to an assumption that the BBC should respond to the development of new technologies by seeking to adopt them as early as possible, there also appears to be an assumption that the BBC's public services should be made available free (at the point of delivery and/or consumption), even where business models for the delivery of content via new or emerging technologies have not yet

⁷ See for example BBC document *Review against the terms of the 1997 and 1998 approvals for the BBC's online services*, at page 65, which refers to the BBC "encouraging take up" of broadband. See also speech given by the BBC's Director of New Media and Technology at the Westminster Media Forum on 4.11.03, at which he said: "I know many of you would also say that we have a responsibility to drive the uptake of new technologies. I totally agree..... I can safely say we will continue to push in this area and educate potential new users of the Internet and for that matter any other technology that is key to the creation of digital Britain. But it is by providing the 'must see' content and services by these new technologies that we will make a real difference to the UK's digital future".

See: www.bbc.co.uk/pressoffice/speeches/stories/highfield_westminster.shtml

fully developed. Thus, the BBC currently provides free broadband content to UK ISPs. The effect of this is to limit the extent to which other broadband content providers can exploit broadband technologies – content providers are unlikely to be able to sell their content to distributors if comparable content is available free of charge from the BBC. It is unlikely that an ISP would purchase broadband news or sport content, for example, from a provider such as Sky, if such content is freely available from the BBC.

1.9. In terms of provision of broadband content, the BBC has claimed that:

“The BBC is working to ensure that its compelling content exploits the potential of broadband for users, encouraging take up, without significant additional distribution costs.”⁸

1.10. The cost of bandwidth can, however, be significant and increase incrementally based on the number of subscribers to a service. Where there are marginal costs, provision of content should only be made available through the BBC’s commercial arm, BBC Worldwide, on the basis of a business model that would be sustainable by a commercial operator. Where there are no (or low) marginal costs, there should not be a presumption that this entitles the BBC to make its content available free, unless a similar business model would be fully sustainable by a commercial operator.

2. Publicly funded services and functions: In what way should the BBC’s services differ from those of commercial public service broadcasters and other purely commercial broadcasters in order to add value? To what extent should the BBC provide “something for everyone”?

2.1. The many debates about the nature and scope of the BBC’s publicly funded activities, from the perspective of both licence fee payers and competitors, will continue unless the BBC’s remit is clearly defined. In return for its access to the licence fee funds, the BBC must operate under a clear public service remit, determined following appropriate public consultation, against which its programmes and services may be measured to determine those it should provide, and those it should not.

2.2. Under this overarching public service remit, the BBC’s services should not be indistinguishable from services that would be provided by the private sector. Services such as acquired movies and game shows on the BBC’s channels, and fantasy football games on the BBC’s website, merely replicate what is available from commercial operators. They are not distinctive simply by virtue of their provision by the BBC. The fact that such programmes and services are generally popular with a large number of people is not sufficient justification for their provision by the BBC at public expense.

⁸ *Review against the terms of the 1997 and 1998 approvals for the BBC’s online services*, BBC, page 65.

- 2.3. Whilst it may be appropriate for the BBC to aspire to “*provide something for everyone*” (particularly where “everyone” funds the BBC by virtue of the licence fee), this is not an end in itself. The BBC’s objective should be to provide something that is distinctive and falls within a clear public service remit.
- 2.4. The need for the BBC’s services to be distinctive from those provided by the commercial sector has been recognised in recent approvals given by the Secretary of State to new BBC services. Indeed an early application for approval for BBC3 was rejected on the basis that the proposals were “*not distinctive enough*”.⁹ There is no logical justification for requiring only **new** channels and services to operate under specific conditions designed to ensure that they are sufficiently distinctive and merit public funding. Every BBC TV channel and radio station (analogue as well as digital) and the BBC’s other public services (e.g. BBC Online, BBC Digital Curriculum) should therefore have a specific remit and a set of measurable criteria, determined following appropriate public consultation, against which it will be judged on a regular basis.¹⁰
- 2.5. The Secretary of State’s approval for BBC3, for example, was for a channel delivering “*a mixed schedule of programmes, embracing drama, entertainment, news, current affairs, education, music, the arts, science and including coverage of international issues*”, subject to conditions including:
- that programming must be of a consistently innovative and risk taking character with 80% of the service’s output (in terms of hours) consisting of programmes specially commissioned for BBC3 and genuinely new to television;
 - that 25% of the service’s output (in terms of hours) must be commissioned from the independent sector and that at least one quarter of the BBC3 programme budget must be spent on independent productions; and
 - that 90% of programme hours for the service must be allocated to programmes made in the EU/EEA, for first showing in the UK and that such programmes will account for around 90% of BBC3’s expenditure on programmes, with 33% of BBC3’s eligible budget produced from outside the M25 from 2004-5.
- 2.6. The remit and conditions for BBC3 are sufficiently broadly drawn that there can be no suggestion that Government is setting schedules. On the other hand, the

⁹ In relation to the BBC Digital Curriculum the Secretary of State attached a total of 18 conditions to the approval “*to make it [the service] distinctive from....services provided by the commercial sector*” - DCMS press release of 9 January 2003, “Tessa Jowell Gives Approval to BBC Digital Curriculum”. In relation to BBC3, approval was given subject to “*a series of stringent conditions guaranteed to create a channel that is ‘genuinely distinctive, genuinely public service and genuinely innovative’*”. DCMS press release of 17 September 2002, “Tessa Jowell Gives Approval to BBC3”.

¹⁰ Sky notes that each BBC television channel and radio station has its own remit, as published in the BBC’s Statements of Programme Policy 2003/2004 (see www.bbc.co.uk/info/statements2003). These remits are not, however, subject to public consultation nor subject to any distinctiveness test.

remit and conditions appear to be sufficiently tightly drafted that they should ensure that the channel will deliver what it is supposed to deliver in return for public money. If it is possible to determine a workable remit and conditions for channels such as BBC3, it is possible to do so for all of the BBC's channels, including BBC1 and BBC2.

- 2.7. The performance of every publicly funded BBC channel and service should be assessed against its remit and conditions on a regular basis, not less than once every two years, by an independent body, preferably Ofcom (see response to question 5 below). Where the channel or service has not operated within its remit or has not satisfied relevant conditions, then it should be required to remedy any such failure within a published timescale. Persistent failure to operate within the scope of the remit and conditions should result in approval for the channel or service being withdrawn. Given that such channels and services are funded with public money, this should not be seen as a Draconian step, but a recognition that the BBC must operate within limits in return for its receipt of public funds.
- 2.8. It is also important to recognise that the remit and conditions attached to different BBC services will need to evolve over time, in response to changing market conditions. A requirement which may have been appropriate when a service launched (e.g. to provide a minimum number of hours of a particular programme genre) may no longer be necessary five years later (if such programmes are now being produced in sufficient quantity/quality by commercial channels). At each review point, Ofcom should therefore consider whether any changes to the remit/conditions of a specific BBC service are required. Where proposed changes are non-trivial, Ofcom should consult publicly before making its final decision or recommendation.
- 2.9. In the event that the BBC wishes to introduce changes to the remit of a particular channel or service, or to provide a service via different technologies not contemplated in the original approval, then it should be required to apply for a variation to the remit and conditions, subject to public consultation. It is important for industry to have certainty about the activities of the BBC. As mentioned above, there is a tendency for the BBC's activities to "creep" outwards and for the BBC to interpret the scope of its approvals very broadly. In order to ensure that competition and investment can flourish, the BBC should not be able to extend its activities beyond the express scope of any approval or remit. Any such extension of the BBC's activities risks harming competition and also (if the extended activities replicate what is already provided by the commercial sector) undermining the basis on which the BBC is permitted to use public funds, namely to provide services that are distinctive from services provided on a commercial basis.

3. Commercial services: Do you think the BBC should continue to run commercial services alongside its licence fee-funded services? If the BBC should continue to run commercial services, how should we ensure that the relationship between the public and commercial services is fair to the BBC's commercial competitors? Should there be any limits on what the BBC is allowed to do commercially and, if so, what should those limits be?

3.1. The BBC should only be able to continue to run commercial services alongside its licence-fee funded services subject to certain important provisos. First, the justification for the BBC running commercial services must be to maximize its exploitation of the licence fee for the benefit of licence fee payers. This means that the commercial services must extract additional value from the BBC's publicly funded services. It does not mean that the BBC should operate services exploiting the BBC brand simply because it has value (for example, by launching a telephony service branded "BBC Talk"), nor that it should operate commercial services which do not exploit the BBC brand, just because they may have synergies with other BBC commercial activities.¹¹ Commercial services must always therefore be related to the publicly funded services. Second, such services must be operated subject to satisfactory conditions and within certain parameters to ensure that they do not distort competition, for example through cross-subsidy. (As the second question in this section recognizes, it is important that the relationship between the public and commercial services is fair to the BBC's commercial competitors.) Third, such services must be subject to satisfactory external scrutiny.

3.2. The consultation document states that:

"The BBC's commercial policy guidelines and fair trading commitment, drawn up and enforced by the BBC Governors, are designed to ensure that commercial activities within the BBC comply with competition law, support the BBC's core purpose as a public service broadcaster and do not involve cross-subsidies from public funds".¹²

3.3. The BBC's commercial policy guidelines and fair trading commitment are currently inadequate mechanisms for controlling and scrutinising the BBC's commercial activities. The fair trading commitment states that the BBC's commercial activities will be conducted at arm's length from publicly funded services, and provides that key commercial activities will "normally" be pursued through an entity or entities that are clearly separate from the main part of the BBC.¹³ It goes on to provide, under the heading "Transparency", that transactions between the BBC and key commercial ventures will be conducted through contracts or service agreements for all goods and services supplied, and that separate independently audited accounts will be produced "where a separate

¹¹ For example, BBC Worldwide recently acquired a publisher of consumer magazines such as Focus and Living History, and contract titles such as Waterstones Books Quarterly and HMV Choice (see BBC Worldwide press release of 24.02.04).

¹² See paragraph 27 of the consultation document.

¹³ See page 6 of the BBC's Fair Trading Commitment.

commercial subsidiary has been formed". It further provides that where the BBC's commercial activities require the use of BBC programmes, facilities, resources or other inputs, fair prices will be negotiated which take proper account of the cost of provision of such inputs and states:

*"We would not **normally** expect such prices to be out of line with the prevailing market price for similar inputs, and in no cases will we establish prices which are below the relevant cost of producing the good or service"*.¹⁴ (Emphasis added.)

- 3.4. These commitments fall far short of measures sufficient to enable proper scrutiny of the BBC's commercial activities and therefore provide no guarantee that the BBC is trading fairly, for several reasons.
- Arm's length relationships: The fair trading commitment only requires "key" commercial activities to be "normally" pursued through entities separate from the "main part" of the BBC. Commercial operators have no means of assessing whether a commercial activity is "key" for these purposes, and no guidance is given as to the circumstances in which such activities are not required to be pursued through separate entities. Moreover, the generally accepted interpretation of an "arm's length relationship" goes beyond mere separation of activities. A commitment to arm's length relationships must include a requirement for arm's length contractual terms. This does not mean only that the charges for use of BBC inputs must be fair (which is dealt with separately – see below), but also that other contractual terms (for example, relating to liability) are of a type that would be negotiated at arm's length between unrelated entities.
 - Transparency: The commitment to transparency does not involve a commitment to publish, but only an obligation to produce separate audited accounts where a separate commercial subsidiary has been formed. It is difficult to see how this contributes to transparency in the normal sense of the word, meaning transparent to the public. Where there is a relationship between the "main part" of the BBC and its commercial activities, there must be greater transparency of the terms of that relationship. Moreover, a commitment to greater transparency should extend beyond the BBC's commercial activities to the whole BBC. In addition to publishing a report and accounts on an annual basis, the BBC should be subject to similar disclosure rules to those applied to publicly listed companies, such as a requirement to publish financial reports on a quarterly basis. After all, the basis for greater disclosure requirements for listed companies is the fact that investors have chosen to buy shares in such companies. In the case of the BBC, the licence fee payers are akin to shareholders, with the important difference that they do not choose to pay the licence fee but (if they own a television) are obliged to do so.

¹⁴ See page 7 of the BBC's Fair Trading Commitment.

- Fair prices: A commitment that charges for use of BBC programmes and other inputs will not “normally” be out of line with prevailing market price is insufficient to ensure that prices will be fair. Furthermore, there is little information on how a fair price is to be determined. The commercial policy guidelines add little to this issue, stating that prices “*should not be significantly out of line with the market context where there is a directly comparable external market for the input in question*”.¹⁵ In terms of determining the market price, the commercial policy guidelines provide that “*for substantial supply contracts, evidence of prices prevailing in the external market should be presented from time to time, either through benchmarking exercises or market testing...*”. Such studies are to be subject to audit by the BBC’s Fair Trading auditors. These commitments are not sufficiently precise and are not far-reaching enough to ensure that prices will be fair. Phrases such as “not **normally** out of line” and “not **significantly** out of line” are subjective and unclear. Benchmarking is only required for “**substantial**” supply contracts but no definition is given of “substantial”. Referring only to a “**directly** comparable” external market makes it more likely that no such external market will be found to exist. In short, the fair trading commitment and commercial policy guidelines are insufficient to ensure that the BBC’s commercial activities will not involve cross-subsidy from publicly funded services or distort competition.
- Scrutiny: Compliance with the fair trading commitment and commercial policy guidelines is monitored by a sub-committee of the Board of Governors – the Fair Trading Compliance Committee – and is considered by an external firm of auditors. Complaints are considered by the Fair Trading Compliance Committee. The current scrutiny of the fair trading commitment is inadequate. Little comfort can be derived from the statement of the Governors in the BBC’s annual report and accounts, which is as follows:

*“The Governors consider that the policies contained in the BBC’s Fair Trading Commitment are consistent with the requirements of the Royal Charter and the accompanying Agreement. Through the FTCC, they have gained reasonable assurance that the system of controls and procedures designed to ensure that these policies are applied throughout the BBC has been operating effectively throughout the year”.*¹⁶

The opinion of by the Independent Fair Trading Auditors goes no further, stating only that:

*“In our opinion the BBC has established and has applied a system of internal controls which provide reasonable assurance that it has complied with its Fair Trading Commitment for the year ended 31 March 2003.”*¹⁷

¹⁵ See paragraph 3.19 of the BBC’s commercial policy guidelines.

¹⁶ BBC Annual Report and Accounts 2002/2003, page 69.

¹⁷ *Supra*, page 70.

- Responsibility for determining whether the BBC has complied with the fair trading commitment, and for handling complaints about fair trading, should be handed to Ofcom with redress available where complaints are rejected. As an independent regulator with no role in “championing” the BBC, Ofcom is much better placed than the Governors to consider objectively whether the BBC’s fair trading obligations have been met. Moreover, handing responsibility for considering complaints to Ofcom will result in greater transparency and procedural safeguards. An example demonstrates the failings, in terms of transparency and duty to provide reasoning, of the Board’s consideration of fair trading complaints. The BBC’s summary of fair trading complaints for 1 June to 31 August 2002 states that The History Channel wrote to the Chairman “*seeking clarification of the relationship between the BBC and UKHistory following the announcement of the proposed launch of UKHistory by UKTV*”. Although the details are sketchy, it would appear that The History Channel was seeking information on the price at which the BBC had made its history programming archive available to UKTV to enable it to launch a dedicated history channel in direct competition with The History Channel. The BBC response was as follows:

“The Chairman considered the points made by Mr Metzger and was confident that the BBC has not, and has no intention of making licence fee funding, or any other direct or indirect subsidy available to UKHistory, UKTV or Flextech.

UKHistory is funded entirely by UKTV, a joint venture between BBC Worldwide and Flextech. It operates separately from the BBC and BBC Worldwide provides programmes to UKTV on an arm’s length basis, which is regularly reviewed. The Chairman also confirmed that UKHistory would not be trailed on the BBC’s public service channels”.

- The BBC’s response therefore consisted of a series of statements, backed up with no evidence or reasoning, that there was no cross-subsidy and that programmes were supplied on an arm’s length basis. The complainant in this case had no means of determining the basis for these statements (for example, published accounts or details of a price benchmarking exercise) and no alternative redress, such as an appeal to an independent body.¹⁸

4. How should we pay for the BBC?

- 4.1. The question of how the BBC should be funded cannot properly be addressed until the scope of the BBC’s activities has been determined. The method and level of funding should be one that is consistent with the scope of the BBC’s

¹⁸ The lack of transparency would make a compelling complaint under general competition law to the OFT or Ofcom very difficult as the complainant would have no evidence to place before the competition authority.

activities in the long run and which avoids distorting incentives to invest on the part of third parties.

- 4.2. Once the scope of the activities of the BBC has been defined, and the appropriate (and proportionate) level of resources to carry out those activities has been determined, the debate should move on to considering the best method of providing of this funding. Sky has no preconceived view about whether or not the licence fee in its current form is the most appropriate solution, and would welcome an in-depth debate of the alternatives at a later stage in the Charter Renewal process.

5. How should the BBC be governed and regulated? Do you think that, in the regulation of the BBC, there is the right balance between the Governors and Ofcom?

- 5.1. A significant part of the BBC's activities is now subject to regulation by Ofcom under the Communications Act 2003 and there is no justification for not bringing the remaining matters within Ofcom's jurisdiction. All aspects of the BBC's activities should be subject to effective external regulation by Ofcom. Ofcom has access to far greater resources than the BBC Governors and, as the single regulatory body for the communications sector, should have sector knowledge and depth of expertise that the Governors cannot be expected to match. The Governors cannot act as expert and independent economic regulators of the BBC's activities at the same time as performing non-executive director functions. Moreover, in order to prevent potential distortions of competition, it is important that regulation of the BBC and commercial operators is consistent. Consistency will not be achieved where one regulator (the BBC Governors) does not operate under the same set of duties and responsibilities as the other.

- 5.2. The following matters in particular should be regulated by Ofcom:

- News: The BBC is not required to comply with the provisions of the Ofcom Standards Code concerning news impartiality or accuracy, or content of religious programming. These exceptions are anachronistic and there is no justification for their exclusion from Tier 1 regulation. There is no merit in an argument that bringing news impartiality or accuracy within Ofcom's jurisdiction will lead to political interference in news provision since other news providers (including the state-owned Channel Four) are subject to the same provision with no suggestion of political interference.
- Advertising and sponsorship: Sky notes that the "*standards objectives*" referred to in section 319 of the Communications Act 2003 concerning advertising and sponsorship are not applicable to the BBC.¹⁹ Although there is no paid-for advertising or sponsorship on the BBC's channels, there is a substantial number of promotions and cross-promotions for BBC services on its channels. These promotions should be subject to the rules preventing the

¹⁹ Section 319(2)(h) and (j) of the Communications Act 2003.

inclusion of misleading, harmful or offensive advertisements, and the enforcement of such rules should be the task of Ofcom rather than the Governors.²⁰ Furthermore, the “Rules on Promotions of Programmes, Channels and Related Services on Commercial Television”²¹ (which prevent, for example, analogue terrestrial broadcasters from giving an excessive amount of airtime to a particular channel and from promoting any specific digital platform or platform service provider) do not apply directly to the BBC. There is no justification for the exclusion of the BBC from such rules.

- Scrutiny and enforcement of the fair trading commitment: For the reasons set out above in response to question 3, it is not appropriate for the BBC’s compliance with its fair trading commitment to be dealt with by the Governors rather than Ofcom.
- Monitoring the BBC’s compliance with its overall public service remit and specific channel/service remits: As outlined above, each channel/service operated by the BBC should fall within an overall general public service remit, and each channel/service should also have a specific remit and a set of criteria against which its performance should be judged on a regular basis, at least once every two years. External scrutiny of the BBC’s new services is already an accepted part of the regulation of the BBC, with all new services subject to independent review around 2 to 3 years after they are launched.²² Such external scrutiny should be extended to all of the BBC’s services, not just “new” services. It is preferable for a single expert body to conduct such reviews, rather than setting up a series of *ad hoc* independent reviews, as has been the approach until now (with the independent review of BBC News 24 by Richard Lambert and the on-going independent review of BBC Online by Philip Graf). Ofcom should also be empowered to require the BBC to remedy any failure to comply with the remits and conditions attaching to a channel or service. Ofcom should also be able to recommend, as a last resort, closure of a non-compliant channel or service.
- Future approvals for new channels/services: Responsibility for approval of new services currently rests with the Secretary of State. Ofcom should have a formal role in relation to such approvals. New publicly funded services should only be launched in exceptional circumstances, where the Secretary of State and Ofcom are satisfied, in particular, that the BBC will not be able to fulfill its public service remit in the absence of the new channel/service and

²⁰ A recent example of misleading promotions occurred in relation to the “Monkey” series of promotions which ran on BBC1 and BBC2 referring to the BBC’s “six new digital channels”. The Advertising Standards Agency found on 10 March 2004 that posters in the same campaign referring to the six new channels were misleading because the channels had been available for some time and could not reasonably be described as new. Any complaint in relation to the misleading nature of the promotions on the BBC’s channels would have had to be addressed to the Governors rather than Ofcom. There is no logic for allowing complaints about the misleading nature of a poster to be addressed by an independent body, the ASA, whilst requiring complaints about the misleading nature of a promotion to be addressed to the Governors rather than Ofcom.

²¹ Adopted by the ITC in January 2002.

²² See DCMS Press Release 23 August 2003.

that any new channel or service will not distort competition to an appreciable extent. The launch of any new channels and services must, as with the Digital Curriculum and BBC3, be subject to detailed remits and stringent conditions which must be monitored by Ofcom on a regular basis.

Sky

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