

Review of the BBC's Royal Charter
Response of British Sky Broadcasting

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Executive Summary

Part 1 – Remit, Scope and Funding of the BBC

- The starting point for the review of the BBC’s Charter should be to establish clearly the BBC’s overall remit and then to determine the scope of its individual services within that remit. There is a general recognition that the previous broad formulation of the BBC’s remit is inadequate. Sharpening up the BBC’s remit would both enhance its public service broadcasting output and provide greater certainty for commercial operators. Whilst the Green Paper’s stated desire to define the BBC’s remit with more rigour is to be welcomed, the Green Paper does not, in fact, achieve its goal of giving the BBC a “*clearer, tighter remit*”. (See section 1 of Part 1.)
- Whilst the five purposes that the Green Paper proposes for the BBC appear appropriate, they are nonetheless very broadly drawn. As a result, the BBC will be able to claim that virtually any programme meets at least one of these purposes. Notwithstanding the ease with which these purposes may be met, the Green Paper concedes that some of the BBC’s programmes and services need not fulfil any public purpose. In order to ensure that the BBC is given a “*clearer, tighter remit*” the new Charter should require every BBC programme to fulfil at least one of these specified purposes. (See section 1 of Part 1.)
- The Green Paper lists five specific characteristics, at least one of which must be met by every BBC programme. Under the Green Paper’s proposals, therefore, the BBC may produce programmes which meet no public purpose and are merely “*engaging*”, a characteristic which could be said to be met by any programme that is viewed. The Green Paper refers to other attributes, including excellence and distinctiveness, but the hierarchy between the five purposes, the five characteristics and these other attributes is unclear. Although the Green Paper correctly recognises the need for the BBC’s programmes to be distinctive, “*distinctiveness*” itself does not appear to be one of the five prescribed characteristics which should be displayed by every BBC programme. (See section 1 of Part 1.)
- It would not be an appropriate use of the licence fee for the BBC’s services to be indistinguishable from those of commercial operators. The BBC’s remit must, therefore, require each of its programmes, and its channels and services taken as a whole, to be distinctive from those provided by the commercial sector. There are a number of ways in which distinctiveness can be achieved. The proposed new service licences must set out in detail the way in which each BBC service will be distinctive. (See section 1 of Part 1.)
- The Green Paper suggests that the BBC should not compete aggressively to take audiences away from, and should not engage in bidding wars (for “*expensive foreign imports*”) with, “*terrestrial channels*”. The Green Paper’s proposals for scheduling and acquisitions should be extended to all channels, not just terrestrial channels, thus ensuring best use of the BBC’s resources. (See section 1 of Part 1.)

- A commitment on the BBC's part to be distinctive would be strengthened, and its contribution to public service broadcasting enhanced, if it were to prioritise its resources in areas where viewers' needs are not being adequately met and forbear from particular activities where it is clear that they are merely replicating what the commercial sector is providing. There should be a mechanism for regular review of the BBC's services to determine the extent to which they are, or are not, meeting needs that are unmet elsewhere. (See section 1 of Part 1.)
- The Green Paper has proposed a sixth purpose for the BBC of "*building digital Britain*" which, like the other purposes, is couched in broad terms. In the extreme, it could be interpreted as sanctioning an extension of the BBC's activities into almost any area using digital technology. This is not consistent with the Green Paper's commitment that the new Charter will "*set out the limits of [the BBC's] mandate*". (See section 2 of Part 1.)
- The Green Paper asks whether the BBC should be at the "*forefront*" of developments in digital technology. Given the strong potential for early investment by the BBC to crowd out private investment and to distort the development of emerging products and services, any attempt by the BBC to lead developments in technology should only be permitted if Ofcom determines that it would not result in a significant lessening of competition or risk of foreclosure. (See section 2 of Part 1.)
- Under the "*building digital Britain*" purpose, the Green Paper envisages that the BBC will take a "*leading role in the process of digital switchover*". Any State-funded intervention to facilitate digital switchover must satisfy certain key principles enumerated by the European Commission, in particular the principle of technological neutrality. The obligation proposed for the BBC, "*to replicate in digital [terrestrial] form 'substantially the same coverage as in analogue'*" would not satisfy the principle of technological neutrality since it would favour one means of transmission, DTT, over others such as cable and satellite. The other switchover-related tasks envisaged for the BBC, such as playing a co-ordinating role in Switchco and providing assistance to help the vulnerable cope with switchover, must be undertaken in a technology (including platform) neutral manner and in accordance with the State aid rules. (See section 2 of Part 1.)
- Once the BBC's overall remit has been clearly established, it is necessary to determine the scope of its individual services within that remit, to maintain an environment in which private investment may flourish and businesses may operate with certainty. The Green Paper proposes that each service should have a service licence "*that gives it a clear, distinctive form and remit*". Whilst the concept of service licences is to be welcomed, it is not appropriate for the licences to be developed by the BBC Executive Board. The service licences should codify the general statements of intent in the Green Paper about the types of programming that the BBC should provide (such as "*more original programming (not repeated or bought-in)*"). Service licences must be subject to full public consultation before adoption and must operate within a framework of regular review, with

appropriate sanctions for failure to comply. (See section 3 of Part 1.)

- Extensions to service licences, for example “*taking advantage of completely new platforms*”, must be subject to an adequate approvals process. Service licences must, therefore, include the means of distribution or delivery that are covered by the licence, and any proposed extension to those means must be subject to a full, independent approval process. Distribution on new platforms should not be permitted if this would result in a significant lessening of competition or risk of market foreclosure, as determined by Ofcom. (See section 3 of Part 1.)
- The Green Paper proposes that, when assessing whether to authorise new services or extensions to existing services, the Trust will determine whether the “*public value*” outweighs the market impact. By the BBC’s own admission, a test based on public value will “*in the end...come down to a judgement*”. Neither the Green Paper nor the BBC has produced a workable definition of “*public value*” that will result in something more than merely a “*broad justification for what the BBC does*”. (See section 3 of Part 1.)
- Rather than relying on the nebulous concept of “*public value*” to determine whether the BBC should engage in certain activities, our preferred approach, which is mooted by the Green Paper, is to specify “*a threshold beyond which the market impact of a service ... be deemed completely unacceptable*”. The Trust should assess whether the new or amended service proposal meets the BBC’s public purposes, is an appropriate use of the licence fee and is sufficiently distinctive from commercial offerings. If the Trust is satisfied that this is the case, Ofcom should conduct an independent market impact assessment. If Ofcom finds that the proposal risks foreclosing a new market or significantly lessening competition, then the new service should not go ahead. (See section 3 of Part 1.)
- As far as the funding of the BBC is concerned, the next phase of Charter Review needs to scrutinise not only the costs of all proposed activities, but also the potential for efficiency gains. Government should adhere to European requirements for the funding of public service broadcasting, namely a clear and precise remit for the public service broadcaster, independent national monitoring of the fulfilment of the PSB remit, and proportionate funding with a legal mechanism to prevent over-compensation. For the reasons already set out, the proposed public service remit of the BBC is not sufficiently well-defined. The requirement for independent national monitoring cannot be fulfilled by the Trust, as it is not independent, being the BBC’s “*sovereign body*” and the “*guardian of the BBC’s strength and independence*”. (See section 4 of Part 1.)
- The requirement for proportionate funding means that the funding of the BBC cannot exceed the costs of its public service activities. In order to avoid, among other things, the substantial inefficiencies that resulted from the previous licence fee settlement, the activities of the BBC should be specified in far greater detail than they have been

in the Green Paper, and properly costed. The NAO should play a key role in any value for money assessment of the BBC's existing services as well as in any calculation of the level of licence fee required to discharge the BBC's public service functions. The BBC should be obliged to prioritise resources, by reducing or closing some services if it wishes to launch new ones. (See section 4 of Part 1.)

- There is presently no formal, independent mechanism to prevent over-compensation. Each publicly-funded service should have its own published annual budget, and the appropriate portion of the licence fee should be ring-fenced for that service. Services should undergo an independent annual review as against the BBC's overall remit and as against service licences, with the NAO determining whether the service is spending the minimum amount necessary to deliver its remit. (See section 4 of Part 1.)
- The level of the licence fee should not be fixed for more than five years, which will assist in ensuring that the level of funding is properly calculated. There should, therefore, be a mid-term review to consider the appropriate level of funding for the second half of the Charter period. If such a review is to consider new funding mechanisms and long term alternatives to the licence fee, the possibility of implementing these sooner than the end of the Charter period in 2016 should not be discounted. (See section 4 of Part 1.)
- The Green Paper proposes an interim review, towards the end of switchover, of the case for plurality and whether any public funding should be distributed more widely beyond the BBC. The case for plurality of public service broadcasting should be kept under review and the Secretary of State should retain the flexibility to order an earlier review, if deemed necessary. (See section 5 of Part 1.)

Part 2 – Governance and Regulation of the BBC

- Governance and regulation are not synonyms. Governance involves the arrangements which ensure that an organisation is effectively managed on behalf of its members/owners; regulation involves the specification and enforcement of rules across a particular sector. Defects in the regulation of the BBC cannot be remedied by adjustments to the governance of the BBC (and *vice versa*). (See section 1 of Part 2.)
- There have been almost universal calls for reform of the arrangements for governance and regulation of the BBC, with particular emphasis on the need clearly to distinguish the separate functions of governance and regulation. (See section 2 of Part 2.)
- The Green Paper eschews such a clear distinction and effectively perpetuates the current conflation of the functions of governance and regulation. By proposing a new BBC Trust to be responsible for "*oversight*" (a term which encompasses both governance and regulation) and a new Executive Board to be responsible for

“*delivery*”, the Green Paper seeks to clarify the distinction between the governance and management of the BBC, rather than clarify the distinction between the governance and regulation of the BBC. Whilst this clarification of the distinction between the governance and the management of the BBC is welcome, it does not address material shortcomings in the current regulation of the BBC. (See section 3 of Part 2.)

- The Green Paper states that the BBC Trust will be “*the sovereign body*” for the BBC and “*the guardian of the BBC’s strength and independence*”. Thus, the BBC Trust will be “*cheerleaders*” for the BBC, just as the Governors have been to date. Despite recognising the conflict of one group of people being both “*cheerleaders*” and “*objective assessors*” of the BBC, the Green Paper proposes that the BBC Trust should assume all the regulatory functions which currently reside with the BBC Governors. (See section 4 of Part 2.)
- The Green Paper suggests that regulation of the BBC by Ofcom would not be desirable as Ofcom is Government-appointed. Yet, the BBC Trust will, in effect, also be Government-appointed. The other reasons put forward by the Green Paper for rejecting regulation of the BBC by Ofcom demonstrate that the Green Paper takes insufficient account of the difference between governance and regulation. In practice, the Green Paper concludes that Ofcom should not regulate the BBC because it would not be appropriate for Ofcom to govern the BBC. (See section 5 of Part 2.)
- For the reasons put forward by many other parties, including Ofcom and the OFT, independent regulation of all aspects of the BBC is warranted. Furthermore, such independent regulation of the BBC’s publicly funded activities is necessary in order to comply with the European Commission’s guidance on the application of State aid rules to public service broadcasting. As “*the guardian of the BBC’s strength and independence*”, the BBC Trust will not be sufficiently independent to regulate the BBC. (See section 6 of Part 2.)
- Even if all the regulatory responsibilities of the BBC Governors were not to be transferred to Ofcom, certain specific activities should be so transferred. For example, the Green Paper recognises that complainants (such as the BBC’s private sector competitors) need to have fair and equal access to a transparent and objective complaints procedure. Yet, instead of introducing such a procedure, the Green Paper proposes that complaints must be submitted to the Executive Board itself and, in difficult cases, to “*the guardian of the BBC*”, the BBC Trust. This proposal perpetuates the inconsistency between the current arrangements and the first principle of natural justice: nobody should be a judge in his own cause. (See section 7 of Part 2.)
- During Parliamentary debates on the then Communications Bill, the Government was adamant that *ex ante* competition powers were needed in the broadcasting sector. Such powers were included in section 316 of the Communications Act in respect of commercial broadcasters. The Green Paper now proposes, however, that, contrary to

the advice of Ofcom and the OFT, such *ex ante* competition powers are not required in respect of the BBC. Thus, the Green Paper adopts the untenable position that, uniquely in the broadcasting sector, the BBC should be subject to *ex post* competition powers but not *ex ante* competition powers. (See section 8 of Part 2.)

- Due to the flexibility permitted to the BBC under its Fair Trading Commitment and the fact that this Commitment is not subject to external scrutiny or enforcement, the Commitment does not ensure that the BBC trades fairly. In future, therefore, the scope of the Fair Trading Commitment should be extended to include the BBC's public services and the terms of the Commitment should be approved, and enforced, by Ofcom. Such an approach could be used to ensure a consistent application of *ex ante* competition powers to the BBC as well as its commercial competitors. (See section 9 of Part 2.)
- The Green Paper proposes that Ofcom will carry out market impact assessments in respect of new services but that the BBC Trust will, itself, carry out market impact assessments in respect of enhancements to existing services. In practice, the BBC Trust will not have access to the information it needs in order to be able to carry out such assessments. Indeed, it would be wholly inappropriate for the BBC to have such detailed information about its commercial competitors. Accordingly, Ofcom should, as it has proposed, carry out all market impact assessments in respect of the BBC. (See section 10 of Part 2.)

Part 1 – Remit, Scope and Funding of the BBC

1. The overall remit of the BBC

- 1.1 The starting point for the review of the BBC’s Charter should be to establish clearly the BBC’s overall remit and then to determine the scope of its individual services within that remit.¹
- 1.2 The Green Paper indicates a desire to define the BBC’s remit with more rigour than in the past.² This is to be welcomed, since it is generally accepted that the previous broad formulation of the BBC’s remit, which is contained in the extant Charter and Agreement, is inadequate.³
- 1.3 For example, following the approval given by the Secretary of State to BBC Online in 1998, which was drafted in broad terms, BBC Online expanded from being a provider of “*a strong mix of news, education and programme linked sites*”⁴ into an extensive content portal providing content over 33 broad genres. In his review of BBC Online, Philip Graf recommended that “[t]he remit and the strategic objectives, which guide BBC Online, should be **more clearly defined** around public purposes and/or programme-related content and should be clearly communicated to the public and the online marketplace”.⁵ (Emphasis added.)
- 1.4 Similarly, the Independent Panel chaired by Lord Burns proposed that “*the new Charter should **require the BBC to focus clearly** on its core PSB purpose and the areas where it can generate value for audiences in addition to that provided by the rest of the market*”.⁶ (Emphasis added.)
- 1.5 Thus, a clear remit for the BBC is needed to ensure that the BBC’s activities are appropriately focused so as to enhance its public service broadcasting output and also to provide certainty to commercial operators.⁷ For the reasons

¹ Paragraph 1.9 of “*Review of the BBC’s Royal Charter: A strong BBC, independent of Government*” (“Green Paper”) recognises that: “[i]t is not enough to say that everything the BBC does, being funded by the public, must constitute public service broadcasting”.

² The Green Paper begins by confirming that Government “will give [the BBC] a clearer, tighter remit” (Summary, page 4).

³ See, for example, paragraph 1.7 of the Green Paper; Independent Panel on BBC Charter Review, Emerging Themes, section 3; and Ofcom Review of Public Service Television Broadcasting, Phase 1, citing concerns about “*derivative formats, aggressive scheduling, competition for acquired programming and a balanced schedule in peak viewing hours*”, at paragraph 5.

⁴ BBC letter to DCMS dated 9 October 1998, page 4.

⁵ Report of the Independent Review of BBC Online, page 8.

⁶ Emerging Themes, paragraph 3.7.

⁷ In its second submission to Ofcom’s public service broadcasting review, Sky commented that there is scope to obtain more, higher quality public service broadcasting output from the BBC through a greater focus of resources on public service broadcasting. Sky also commented that more, higher quality public service broadcasting output could be obtained through the potential for greater efficiencies within the BBC (see Sky’s response to Ofcom Review of Public Service

explained below, however, the Green Paper does not achieve its stated goal of giving the BBC a clearer, tighter remit.⁸

Purposes

- 1.6 When committing to “*sharpen up the BBC’s remit*”,⁹ the Green Paper states that it will introduce five purposes for the BBC: these are sustaining citizenship and civil society; promoting education and learning; stimulating creativity and cultural excellence; reflecting the UK, its Nations, regions and communities; and bringing the world to the UK and the UK to the world.¹⁰
- 1.7 Each of these purposes may be appropriate for the BBC, but they are very broadly drawn. As a result, the BBC will be able to claim with ease that virtually any programme meets at least one of the purposes. The BBC has given examples of programmes which fulfil the public values that it has set out and which are similar to the Green Paper’s five purposes. Thus, it claims that “*Changing Rooms*” contributes to “*cultural and creative value*” and “*Dr Who*” contributes to “*social and community value*” on the grounds that it will “*reflect multi-cultural life in the 21st Century*” merely because “[*t*]he casting of Mickey, the hapless, long-suffering boyfriend of Rose, the Doctor’s assistant, provides a major role for an actor from an ethnic minority background”.¹¹
- 1.8 In light of the ease with which it can be claimed that content meets at least one of the five purposes, it might be assumed that any programme or service which **failed** to fulfil any of these (broadly defined) purposes should **not** be undertaken by the BBC, yet even this is not the case. Although it is proposed that “*all BBC services should strive to fulfil the full range of public purposes*”, the Green Paper concedes that “[*n*]ot every individual programme (or piece of internet content) will always fulfil such a purpose - although the vast majority should”.¹² The Green Paper offers no explanation as to why, having set out these broad purposes (which, as is demonstrated above, virtually any programme could be deemed to have fulfilled), it should then be acceptable for the BBC’s programmes not to meet at least one of them.

Television Broadcasting Phase 2 Report, December 2004). We comment on the need to ensure that the BBC is as efficient as possible in section 4, *post*.

⁸ See footnote 2, *ante*.

⁹ Green Paper, page 5.

¹⁰ Paragraph 1.17 of the Green Paper. The sixth proposed purpose, that of “*building digital Britain*”, is addressed in section 2, *post*.

¹¹ The BBC’s response to the DCMS consultation “*Review of the BBC’s Royal Charter*” at pages 16 and 25. We are not, in this submission, seeking to argue that it is inappropriate for the BBC to broadcast “*Dr Who*” but that this explanation provided by the BBC demonstrates that the proposed public purposes are not at all stringent.

¹² Green Paper, paragraph 1.20.

- 1.9 In order to ensure that the BBC is given “*a clearer, tighter remit*” which has been promised by the Green Paper,¹³ the new Charter should require **every** BBC programme to fulfil at least one of the five specified purposes. Furthermore, the new Charter should require that, in aggregate, the BBC’s programmes actually meet the full range of purposes and do not merely “*strive*” to meet that requirement.

Characteristics

- 1.10 In delivering these purposes, the Green Paper proposes that BBC content should display certain characteristics (i.e. it should be high quality, challenging, original, innovative, and/or engaging).¹⁴ Whilst conceding that each individual BBC programme need not meet any of the specified purposes, the Green Paper suggests that “*every programme should display at least one of the [five prescribed] characteristics*” (emphasis in original).¹⁵ Accordingly, in practice, a BBC programme need not meet any of the purposes but may still fall within the BBC’s public service remit if it is merely “*engaging*” (which seems to be a characteristic that is so subjective as to be virtually meaningless, since any programme that is viewed can claim to have “*engaged*” someone).
- 1.11 Somewhat confusingly, the Green Paper refers to a number of other attributes (e.g. excellence and distinctiveness) in addition to the five specified purposes and the five prescribed characteristics.¹⁶ The hierarchy between the purposes, the characteristics and these other attributes is unclear. In particular, although the Green Paper correctly recognises the need for the BBC’s programmes to be distinctive, “*distinctiveness*” itself does not appear to be one of the five prescribed characteristics which should be displayed by every BBC programme.¹⁷
- 1.12 The Green Paper further qualifies these obligations when it states that the BBC’s programmes “***should be excellent, distinctive and entertaining***” and that “[i]n delivering public purposes, therefore, BBC content ***should aim to follow Ofcom’s suggestion that it be of high quality; challenging; original; innovative; and engaging***”.¹⁸ As a result of the conditional language used, it appears that even further latitude will be conferred on the BBC as the requirement for every programme to display at least one of the prescribed characteristics is not clearly stated to be mandatory.

¹³ See footnote 2, *ante*.

¹⁴ Paragraph 1.19 of the Green Paper.

¹⁵ Paragraph 1.20 of the Green Paper.

¹⁶ Paragraph 1.19 of the Green Paper: e.g. wide availability, excellence and distinctiveness.

¹⁷ Although it appears from the Green Paper that “*excellent*” and “*distinctive*” are not standalone characteristics, they are, seemingly, **deemed** to be met if **any one** of the five prescribed characteristics is met. See the summary of the Green Paper’s key proposals, at page 9, which states that “*every programme should display at least one of the **above [five] characteristics of excellence and distinctiveness***”. (Emphasis added.)

¹⁸ Green Paper, paragraph 1.19.

- 1.13 For the reasons stated above, the Green Paper does not achieve the tighter remit that it promised. In order to do so, a clear hierarchy between the purposes, characteristics and other attributes, such as “*distinctiveness*”, must be established.

Distinctiveness

- 1.14 In practice, it would not be an appropriate use of the licence fee for the BBC’s programmes to be indistinguishable from those of commercial broadcasters. The Green Paper rightly acknowledges this in its confirmation that the BBC should “*support the types of programmes ... that commercial broadcasters don’t tend to commission*”¹⁹ and “*complement what is available on commercial channels*”.²⁰ Thus, the BBC’s remit must require each of its programmes, and its channels and services taken as a whole, to be ***distinctive*** from those provided by the commercial sector. The BBC itself recognises that it should aim for distinctiveness “*both in the sense of offering something different from other broadcasters in **kind** (for example, a broader range of subjects or the inclusion of genres which are not offered by others) and in the sense of offering something different in **degree** (for example, documentaries which have had the benefit of longer periods of research and preparation)*”.²¹
- 1.15 There are a number of ways in which distinctiveness can be achieved, even in relation to services such as news which are required to be impartial (and thus, by definition, cannot distinguish themselves by adopting a particular slant). As Richard Lambert said in his review of BBC News 24:

*“The Governors’ responsibility is to spell out the ways in which they want the channel to be distinctive. Rather than relying on the series of general assertions on which the Government gave its approval to the channel in 1997, the Governors should be setting measurable targets. Examples might include audience reach, regional coverage, and the balance between headline news, detailed reporting and scheduled programmes.”*²²
(Emphasis added.)

- 1.16 After publication of the Lambert review of BBC News 24, the Secretary of State reiterated that:

“the BBC should provide us with public service channels that are distinctive from commercial channels. I see no reason why News 24 should be any different. Richard Lambert’s report has persuaded me that the BBC Governors need to deliver a clearer remit for News 24, one that

¹⁹ Paragraph 1.22 of the Green Paper

²⁰ Paragraph 1.23 of the Green Paper.

²¹ BBC Response to the Green Paper, May 2005, page 30. Emphasis in original.

²² Independent Review of BBC News 24 by Richard Lambert, paragraph 8.5.

*will produce a high quality public service rolling news service whilst at the same time develop [sic] a distinct identity for the channel, setting it apart from other 24 hour news services”.*²³

- 1.17 general requirement that the BBC’s programmes, channels and services be distinctive from those of commercial broadcasters will be insufficient, on its own, to ensure genuine distinctiveness, since at one level any programme could be said to be distinctive (for example, by being shown at a different time.) The Green Paper confirms that “[e]very BBC service would be held to a detailed service licence”.²⁴ To ensure that the requirement of distinctiveness is meaningful, these proposed new service licences must (among other things) set out in detail the way in which each individual BBC service will be distinctive (see section 3 below).

Scheduling and acquisitions

- 1.18 Within the overall theme of distinctiveness, the Green Paper comments that the BBC should adopt a:

*“public service approach to scheduling – not competing aggressively to take audiences away from PSB content on **other terrestrial channels**, but seeking to offer a complementary schedule that offers the widest possible choice for audiences”.*²⁵ (Emphasis added.)

In the same vein, the Green Paper states that the BBC:

*“should stay out of bidding wars for expensive foreign imports except where is it clear **that no other terrestrial broadcaster** would show all the programmes or films in question, or that the acquisition would clearly contribute to a public purpose”.*²⁶ (Emphasis added.)

- 1.19 These commitments to “*public service scheduling*” and to restraint in bidding for foreign acquisitions are significant steps in ensuring that the BBC remains distinctive. The Green Paper offers no explanation, however, as to why these restrictions on the BBC’s scheduling and acquisitions should apply **only** where the competing broadcaster is a terrestrial channel (presumably this means an analogue terrestrial channel), but by implication should not apply where the BBC is competing against a non-terrestrial channel. A Government policy which effectively condones the BBC using public money to take audiences away from, or engage in bidding wars with, non-terrestrial channels would seem to involve the Government favouring some commercial broadcasters (i.e. those

²³ DCMS press release entitled “*Tessa Jowell Adds New Conditions to BBC News 24*”, dated 5 December 2002.

²⁴ Green Paper, page 11.

²⁵ Green Paper, paragraph 1.23.

²⁶ Green Paper, paragraph 1.24.

broadcasting via analogue terrestrial) over others (e.g. those broadcasting via satellite and/or cable). Such an approach has the potential to distort competition both in relation to television advertising (since the scheduling obligation will protect the audiences of analogue terrestrial channels but not satellite and cable channels) and in relation to content acquisition (since a terrestrial channel which wishes to acquire particular content will not face competition from the BBC when bidding for that content).

- 1.20 The scope of the Green Paper’s proposal for acquisitions should, therefore, be amended so that, in the case of “*expensive foreign imports*”, the BBC bids only when no other UK broadcaster (terrestrial or otherwise) has bid or wishes to bid. In this way, the BBC’s resources will be appropriately targeted at content that viewers would not otherwise be able to see.

Forbearance

- 1.21 A commitment on the BBC’s part to be **distinctive** would be strengthened, and the BBC’s contribution to public service broadcasting enhanced, if it were to **prioritise** its resources in areas where viewers’ needs are not being adequately met. With this end in mind, the Green Paper suggests, appropriately, that the BBC should:

*“support the types of programmes ... that commercial broadcasters don’t tend to commission”.*²⁷

- 1.22 The corollary to an obligation on the BBC to prioritise its resources in areas where viewers’ needs are not being met, is an obligation to **withdraw** resources from areas where viewers are well served. Again, with this end in mind, the Green Paper suggests that the BBC should:

*“consider withdrawing from some activities if it becomes clear they are no longer adding any value to what the commercial market would provide”.*²⁸

- 1.23 The BBC has, in the past, tended to withdraw from particular activities only when effectively required to do so.²⁹ The BBC has admitted as much. During a hearing of the Select Committee on the BBC Charter Review, the Chairman of the BBC Governors stated:

*“Withdrawing is not something the BBC does voluntarily”.*³⁰

²⁷ Paragraph 1.22 of the Green Paper.

²⁸ Paragraph 8.2 of the Green Paper. This paragraph of the Green Paper actually suggests that the BBC “*may wish to consider withdrawing*”, thus indicating yet again the tremendous latitude that may be conferred on the BBC.

²⁹ For example, following the Independent Review of BBC Online and the exhortations of Philip Graf, the BBC closed certain websites.

³⁰ Response to question 41 on 15 March 2005.

When asked whether the BBC had ever withdrawn voluntarily, the Chairman of the BBC Governors stated:

“No”.³¹

- 1.24 Whilst the Green Paper’s suggestion that the BBC should **consider** withdrawing from certain activities is certainly a step in the right direction, it will not be sufficient to ensure distinctiveness on the part of the BBC. The BBC should, therefore, be subject to an **express duty** to forbear from particular activities where it is clear that they are merely replicating what the commercial sector is providing.³² There should, in addition, be a mechanism for regular review of services to determine the extent to which they are, or are not, meeting needs that are unmet elsewhere.³³

2. Building digital Britain

- 2.1 The Green Paper has proposed a sixth purpose for the BBC of “*building digital Britain*” which, like the other purposes, is couched in broad terms. It includes “*helping to bring the benefits of digital services to all households and providing high quality content to drive take-up of those services*” and “*taking a leading role in the process of digital switchover in television*”.³⁴ The sixth purpose could, therefore, be interpreted as sanctioning an extension of the BBC’s activities into almost any area using digital technology.³⁵ Thus, the broad nature of this sixth purpose is not consistent with the Green Paper’s commitment that the new Charter will “*set out the limits of [the BBC’s] mandate*”.³⁶
- 2.2 The other five purposes proposed for the BBC (cited in paragraph 1.6 above) can be seen as ends in themselves. Using digital technology is more appropriately couched as a **means** for the BBC to achieve the other five purposes, rather than an **end** in itself. Thus, instead of specifying “*building digital Britain*” as a standalone purpose for the BBC, a preferable approach would be to add an appropriate reference to the digital environment in the other

³¹ Response to question 42 *ibid.*

³² As provision by the commercial sector changes over time and viewer needs develop, the audience research which the Green Paper proposes that the Trust should carry out could assist in determining areas of unmet need and areas in which the BBC’s services are not distinctive from those provided by the commercial sector.

³³ The OFT suggests, on page 6 of its response to the Green Paper dated 2 June 2005, that there should be an “*explicit requirement*” on the BBC to consider withdrawing from some public service activities and that “*a review of the justification for existing services should be undertaken at specified intervals, according to similar criteria to new service applications ...*”.

³⁴ Page 47 of the Green Paper.

³⁵ It could be interpreted as sanctioning a move away from content towards hardware provision, which would be a radical departure from the BBC’s recent past.

³⁶ Paragraph 1.8 of the Green Paper.

purposes (e.g. “*informing ourselves and others...through appropriate use of digital technology*”).³⁷

2.3 The Green Paper asks specifically whether the BBC should be at the “*forefront*” of developments in technology, including digital television.³⁸ Yet the Green Paper suggests that Government research has only found that the public “*think [the BBC] should keep up with developments in technology*”.³⁹ There is, of course, a material difference between “*keeping up*” with developments on the one hand and leading such developments on the other. Given the strong potential for early investment by the BBC to crowd out private investment and to distort the development of emerging products and services, any attempt by the BBC to lead developments in technology should be subject to especially rigorous market testing by Ofcom and should only be permitted if there is no significant lessening of competition or risk of foreclosure.⁴⁰ Where there is any doubt about the effect of the BBC’s activities, for example, because products and services are in their infancy and it is difficult to predict how the relevant market will develop, there should be a presumption against precipitate involvement by the BBC.

2.4 The Green Paper also envisages that, under the “*building digital Britain*” purpose, the BBC will take a “*leading role in the process of digital switchover in television*”.⁴¹ The Green Paper proposes five distinct tasks for the BBC: (i) replicating analogue coverage in digital terrestrial, (ii) developing alternative reception options, (iii) playing a co-ordinating role, (iv) providing information on switchover and (v) helping the most vulnerable to cope with switchover.

2.5 Any State-funded intervention to facilitate digital switchover must satisfy certain key principles, as enumerated by the European Commission, including the following:

*“Member State policy interventions should be **transparent, justified, proportionate and timely** to minimise the risks of market distortion.*

...

*Member State policy interventions should also be **non-discriminatory and technologically neutral.**”⁴² (Emphasis in original.)*

2.6 An overriding principle, therefore, is that the activities of the BBC in connection with digital switchover must not favour a particular technology.

³⁷ The Trust and Ofcom would need to determine whether the use of digital technologies is appropriate in particular circumstances, in terms of its impact on competition, use of funds, and whether it involves a sustainable business model.

³⁸ Green Paper, question 4.

³⁹ Green Paper, page 47.

⁴⁰ See section 3 below on Ofcom’s role in respect of new and extended BBC services.

⁴¹ Green Paper, page 47.

⁴² Communication on the transition from analogue to digital broadcasting, COM 2003 541 final, 17.9.2003, page 4.

Any allocation of funds to such activities will need to comply with European State aid rules, in particular the requirements that the aid (i) does not exceed what is necessary to perform the activity in question and (ii) does not affect the development of trade to an extent contrary to interests of the Community.⁴³

- 2.7 The first switchover-related obligation proposed by the Green Paper is to “*replicate in digital form “substantially the same coverage” as in analogue (around 98.5% of households)*”.⁴⁴ In practice, it appears that the BBC is to be given State funding to replicate current analogue terrestrial coverage in digital terrestrial. The Green Paper states that:

“ ... *BBC services should continue to be available as widely **terrestrially** as the analogue service is today, as well as being available on cable, satellite and the developing DSL services*”.⁴⁵ (Emphasis added.)

Such an approach would not satisfy the requirement of technological neutrality, since it would clearly favour one means of transmission, DTT, over others such as satellite and cable.⁴⁶

- 2.8 The Commission’s recent decision, approving the grant of aid in Austria, stated:

“*Whereas the notified measure **initially favoured digital terrestrial television, the Austrian authorities have, during the notification process, modified the measure subsequently in order to promote the digitisation of all broadcasting transmission networks (terrestrial, cable and satellite)**. Notably, during the notification procedure, the authorities decided to remove an envisaged measure on the specific funding of the roll-out of DVB-T (Digital Terrestrial Television) infrastructure from the notified scheme*”.⁴⁷ (Emphasis added)

- 2.9 In the circumstances, the proposed obligation on the BBC to build out the DTT network using State funds clearly merits careful scrutiny by the European Commission.

- 2.10 The second proposed switchover-related obligation is to “*develop alternative reception options*”. The meaning of this obligation is unclear. The Green Paper comments that “*we would like to see the BBC continue to promote the development of a free digital satellite service*”.⁴⁸ The meaning of this phrase is

⁴³ Articles 86 and 87 of the EC Treaty. We address issues of funding in more detail in section 3 below.

⁴⁴ Green Paper, Box 2.1 on page 51.

⁴⁵ Box 2.1 on page 51.

⁴⁶ As a result, competition will be distorted in relation to television advertising (since those broadcasters with guaranteed access to DTT capacity will benefit from greater audiences than would otherwise be the case) and in relation to the provision of network services.

⁴⁷ Decision of the European Commission of 16 March 2005, Digitalisierungsfonds.

⁴⁸ Green Paper, Box 2.1, page 51.

also unclear. The BBC's cross-promotions of digital services have, to date, focused heavily on Freeview whilst omitting any express reference to the free satellite service on which all of the BBC's channels are already available. The BBC's failure to inform viewers of the almost universal availability of its channels in digital form on freesat has contributed to the perception, highlighted in the Green Paper, that "*many people are concerned that they cannot easily receive the BBC's new digital channels on a free-to-view basis*".⁴⁹ This issue could be resolved by requiring the BBC to act in a platform neutral manner by, among other things, promoting Freeview and freesat a consistent fashion.⁵⁰

2.11 As far as the BBC's proposed co-ordinating role in Switchco is concerned, we note that "*one of the main tasks of this organisation will be to increase people's awareness of switchover*" through a "*significant communications campaign*".⁵¹ The BBC is also to be required to provide "*information on switchover*" in its own name. Both the BBC and Switchco must be subject to an obligation to act in a platform neutral manner in relation to the provision of such information.

2.12 The final proposal is that the BBC should help implement and pay for schemes to help the vulnerable cope with switchover. Any schemes for equipment subsidy must be technology (including platform) neutral and must be notified to the European Commission under the State aid rules. It is noteworthy that the Commission approved Austrian subsidies for reception equipment purchased by low-income consumers only once the package of aid (which "*initially favoured digital terrestrial television*") had been modified so as to be platform neutral.⁵²

3. The scope of the BBC's individual services

3.1 As mentioned in paragraph 1.1 above, the starting point for the review of the BBC's Charter should be to establish clearly the BBC's overall remit and then to determine the scope of its individual services within that remit. Having considered above the Green Paper's approach to the BBC's overall remit, we now consider the scope of the BBC's services.

Service licences

3.2 In order to maintain an environment in which private investment may flourish and businesses may operate with certainty, the scope of the BBC's services must be clearly prescribed. The Green Paper acknowledges this when it

⁴⁹ Green Paper, page 50.

⁵⁰ The OFT has called for a "*set of rules ... to cover the types of competition scrutiny required to take account of the BBC's unique status and not adequately covered by general competition law, such as: ... (ii) a duty to promote services in a platform neutral manner; ... (iv) rules to prevent undue cross-promotion of BBC services ...*". (Page 7 of the OFT's response to the Green Paper, dated 2 June 2005.)

⁵¹ Green Paper, page 52.

⁵² See paragraph 2.8, *ante*.

confirms that the new Charter will “set out the limits of [the BBC’s] mandate”.⁵³

3.3 In this regard, the Green Paper proposes that:

*“each service needs to be defined by a licence that gives it a clear, distinctive form and remit”.*⁵⁴

The Green Paper suggests, however, that the individual service licences will be developed by the BBC’s Executive Board.⁵⁵ If this proposal were to be adopted, then the BBC would be the only regulated entity in the UK (and quite possibly elsewhere) which enjoyed the privilege of drafting what were, in effect, its own specific service authorisations.

3.4 The BBC has already produced annual Statements of Programme Policy.⁵⁶ The channel descriptions within these Statements of Programme Policy appear so anodyne that, in the case of the BBC’s television channels, they have been described as being “virtually interchangeable”.⁵⁷ Based on this past practice, therefore, industry may gain little or no certainty as to the scope of the BBC’s services from the service licences which the BBC will, itself, draft.

3.5 The Green Paper specifies a number of general statements of intent about the types of programmes the BBC should support. For example, the Green Paper suggests that the BBC should:

*“support the types of programmes ... that commercial broadcasters don’t tend to commission.”*⁵⁸

*“complement what is available on commercial channels ... [avoid] derivative formats ... [and seek] to offer a complementary schedule.”*⁵⁹

*“Provide more original programming (not repeated or bought-in) than any other broadcaster; [support] local and regional programming ... [and] stay out of bidding wars ... ”.*⁶⁰

⁵³ Paragraph 1.8 of the Green Paper.

⁵⁴ Green Paper, page 89.

⁵⁵ Page 11 of the Green Paper.

⁵⁶ These statements are in large part taken up with lists of particular programmes to be broadcast in the relevant year. It is crucial for a commercial operator to be able to plan for the medium and long term, which is why the service licences must do more than simply contain lists of up and coming programmes.

⁵⁷ The Guardian, 9 May 2005.

⁵⁸ Paragraph 1.22 of the Green Paper.

⁵⁹ Paragraph 1.23 of the Green Paper

⁶⁰ Paragraph 1.24 of the Green Paper.

These general statements should be translated into clear (and, where appropriate, measurable) obligations in service licences if they are to be effective. For example, the statement that the BBC should provide more original and less acquired programming should be implemented via an obligation in the service licences for those BBC channels that broadcast acquired programming to achieve certain quotas for commissioned programming. There is already precedent for such quotas in the BBC's Statements of Programme Policy ("SOPP").⁶¹ In light of the new commitment to provide more original programming, the levels of the quotas in the current SOPPs should be increased.

- 3.6 The draft service licences must be subject to full public consultation before they are adopted. Furthermore, the service licences must operate within a framework of regular review and appropriate sanctions must be in place for failure to comply with a service licence. As is explained in section 6 of Part 2 below, in order to comply with European rules on State aid, a mechanism must be introduced "*to ensure effective supervision of the fulfilment of [the BBC's] public service obligations*"⁶² and the body which is entrusted with performing that task must be "*independent*" from the BBC.⁶³ It is clear that, as the BBC's "*sovereign body*", the BBC Trust will not be sufficiently independent from the BBC to discharge this role. The regular review of compliance with these service licences (and the application of sanctions in the event of breach) should be carried out by Ofcom, as it discharges this function in respect of all other UK broadcasters.

Extensions to services

- 3.7 Any **extension** of the BBC's services, for example: "*taking advantage of completely new platforms or means of delivering programmes*",⁶⁴ must be subject to an adequate approvals process. The approval for BBC Online, which was granted by the Secretary of State in 1998, was drafted in such broad terms that extensions to the service did not require further approval, thus giving BBC Online *carte blanche* to expand into an extensive content portal. The original approval did not specifically address the distribution platforms or technologies to be used for the new service, and the BBC subsequently delivered its online content to mobile telephones and personal digital assistants, without the effect of such use having been properly considered as part of the approval process.
- 3.8 In order to ensure that any such extensions to BBC services are subject to the approvals process, the service licences will need, among other things, to set out

⁶¹ The 2005/2006 SOPP for BBC1, for example, required that 70% of total output should be commissions, rising to 90% in peak time.

⁶² Paragraph 42 of the communication from the Commission on the Application of State aid rules to public service broadcasting (2001/C 320/04).

⁶³ *Ibid.*

⁶⁴ Page 89 of the Green Paper.

clearly the means of distribution or delivery that are covered by the licence. Any proposed extension to these means would be a significant amendment to the service licence requiring a full, independent approval process. In essence, distribution on “*new platforms*” should not be permitted if this would result in a significant lessening of competition or a risk of market foreclosure, as determined by Ofcom, irrespective of any perceived “*value*” of the new activity.

- 3.9 In the case of proposed “*new means of delivering programmes*”, it should not be presumed that the BBC should make such programmes available “*free*”⁶⁵ at the point of delivery and/or consumption, particularly where business models for these new means of delivery are not yet fully developed.⁶⁶ At the very minimum, where there are marginal costs associated with delivery via such new means, the content should only be made available on the basis of a business model that would be sustainable by a commercial operator. When determining whether an activity should be undertaken by the BBC itself or through its commercial arm, we agree with the OFT’s view that the provision of services by the BBC for a commercial return “*should be kept to a bare minimum, given the scope for the market to provide such services without giving rise to the problems ...that arise from their proximity to the BBC’s publicly funded operations*”.⁶⁷

“Public value”

- 3.10 The Green Paper proposes that, when assessing whether to authorise new services or extensions to existing services, the Trust will determine whether the “*public value*” outweighs the market impact of a new or extended service.⁶⁸ In relation to proposals for new services, Ofcom will conduct a market impact assessment which the Trust will take into account in determining whether the “*public value*” of the service outweighs any impact upon competition. In relation to extensions or material changes to services, which could potentially have a more significant impact upon competition than a proposed new service, the Trust will conduct the market impact assessment itself, notwithstanding its lack of overview of the industry and its inability to call on the vast amounts of data and information that Ofcom has readily available. (See sections 6 and 10 of Part 2 below.)
- 3.11 In its document entitled “*Building Public Value*” the BBC states that it exists to create public value. It considers that public value is:

⁶⁵ Licence fee funded television services are not “*free*” as reception depends upon payment of the licence fee.

⁶⁶ Provision by the BBC “*free*”, for example, in relation to broadband content would be likely to crowd out private investment in broadband content and/or to distort competition with commercial operators.

⁶⁷ Page 6 of the OFT’s response to the Green Paper, dated 2 June 2005.

⁶⁸ A limited role would remain for the Secretary of State in respect of oversight of the process.

*“the best yardstick for evaluating the BBC’s future contribution. It can be defined in much greater detail than it has been in the past. Moreover, although no single numerical calculation is either possible or desirable, we believe that a number of objective methods of measurement and assessment are feasible. Public value should not be seen as a broad justification for what the BBC does but as a practical test that can be applied by the BBC itself, by its Governors and by the public, to decide what it should do – and how well it does it”.*⁶⁹

3.12 The BBC does not explain how “*public value*” has been defined in the past, and to Sky’s knowledge, in the 11 months since publishing “*Building Public Value*”, the BBC has not produced the more detailed definition of “*public value*” which it claims is possible.⁷⁰ Nor has it set out in detail the objective methods of measurement and assessment that it considers feasible and that will turn the concept of “*public value*” into a practical test. There are clear difficulties in (a) defining and (b) measuring “*public value*”, as is recognised in “*Creating Public Value*” by Mark H. Moore, the academic text in which the concept of “*public value*” was apparently first postulated. Specifically, Mr Moore states that:

- “*public value... is an abstract concept*”;⁷¹
- “*there are many different standards for measuring public value, and none alone is up to the task*”;⁷² and
- “*... analytic techniques such as program evaluation and benefit–cost [sic] analysis have an important role to play in helping managers locate and recognise the creation of public value*”.⁷³

To date, neither Government nor the BBC has adequately specified such “*analytic techniques*”.

3.13 Notwithstanding the absence of sufficient detail about the meaning and application of “*public value*”, the Green Paper “*welcomes and endorses*” the idea, whilst at the same time making a request for further development of the “*public value test*”.⁷⁴ It is highly likely that any definition or test of “*public*

⁶⁹ Building Public Value, page 8.

⁷⁰ A passage in section 1.2 of the BBC’s document entitled “*Building Public Value*” is headed “*Defining Public Value*”. While it arguably puts forward a framework for a definition, it does not put forward a workable definition as such.

⁷¹ Creating Public Value: Strategic Management in Government, Mark. H. Moore. Page 21.

⁷² *Ibid.*

⁷³ Page 73. At its most anodyne, this text states that “*... public managers share responsibility with other officials ... for deciding what would be valuable to produce with public resources and for actually producing what they agreed would be valuable to produce*” (page 189). Clearly to be of any benefit, the concept of “*public value*” must do more than indicate that some things produced with public funds have value.

⁷⁴ Green Paper, paragraph 5.23.

value” that is developed will be too subjective (the very concept of value being essentially subjective in nature) and incapable of proper measurement. In its paper entitled “*Building Public Value*”, the BBC acknowledged that its assessment of this concept would involve:

*“complex, judgemental issues and assigning monetary value [would] be difficult and sometimes impossible”.*⁷⁵

- 3.14 Furthermore, during an oral hearing before the House of Lords Select Committee on the BBC Charter Review, the Chairman of the BBC Governors stated:

*“The public value test will attempt to create some sense of what public value might be created. This is work in progress. In the end it will come down to a judgement.”*⁷⁶

During the same hearing, the BBC’s Director General stated that:

*“... the idea of a calculus, an algorithm, which you could crank through which would come up with an answer is not achievable. It is not just apples and oranges but very large numbers of different fruit and some of the things you are talking about will be, to some extent, subjective judgements”.*⁷⁷

It is clear, therefore, that the BBC’s adoption of “*public value*” and the Green Paper’s endorsement of the concept have not lead to any meaningful clarification of the scope of the BBC’s services.

- 3.15 These shortcomings in the concept of “*public value*” would be further compounded if the task of assessing “*public value*” were to be handed entirely to the BBC Trust, a body which will be “*the sovereign body in relation to the BBC*”. (See section 14 of Part 2 below.) Not only is any definition or test of “*public value*” likely to be subjective, but any assessment of “*public value*” by the BBC Trust will also not be perceived as being carried out in an objective manner.
- 3.16 The concept of “*public value*” will not, therefore, be the “*best yardstick*” for evaluating the BBC’s future contribution, and there is a serious risk, as foreseen by the BBC, that it will constitute nothing more than “*a broad justification for what the BBC does*”.⁷⁸ Rather than relying on the nebulous idea of “*public value*” to decide whether the BBC should engage in certain activities, the starting point should be a clearly defined remit and scope for the BBC, within

⁷⁵ Section 4.1 of Building Public Value.

⁷⁶ Answer to question 65.

⁷⁷ Answer to question 66.

⁷⁸ Building Public Value, page 8. See paragraph 3.11 above.

which all activities must fall. There should then be a clear and independent approvals process for new services and changes to existing services.

- 3.17 Our preferred approach, which is mooted by the Green Paper, is that the new Charter should specify “*a threshold beyond which the market impact of a service ... be deemed completely unacceptable*”.⁷⁹ Such an approach would be far simpler and more effective than the proposed balancing exercise to be undertaken by the Trust. We would therefore propose that the Trust’s role, in respect of proposals for both new services and extensions/amendments to services, would be to test whether the new or amended service meets the BBC’s public purposes, whether it can be operated within budget (including by reprioritising spend away from other areas in a manner that maximises the BBC’s contribution to public service broadcasting) and, in particular, whether the service would be sufficiently distinctive from commercial offerings. Only if the Trust is satisfied that this is the case, should the new service be passed to Ofcom to conduct an independent market impact assessment. If Ofcom finds that the new or revised service risks foreclosing a new market or significantly lessening competition, then the new service (as proposed by the BBC) should not go ahead, irrespective of any claimed “*public value*”.

Government oversight

- 3.18 The Green Paper proposes giving the Secretary of State a procedural oversight in the case of new services. Some form of oversight of the approvals process is essential, both to engender confidence in the process on the part of the BBC and industry, and to encourage the Trust and Ofcom to do the best possible job. Rather than involve the Secretary of State in this process, however, we would propose a statutory appeal to an independent body, namely the Competition Appeal Tribunal (CAT), on both judicial review grounds and on the merits. The CAT is already empowered to hear appeals from persons affected by decisions of Ofcom which use Broadcasting Act powers for a competition purpose,⁸⁰ and it clearly has the expertise to consider such appeals fairly and rigorously. The appeals process would be available to “*persons aggrieved*” by decisions of the Trust (i.e. determining that the service is within the BBC’s remit) and by Ofcom’s market impact assessments. “*Persons aggrieved*” could, therefore, include the BBC (where the market impact was found to be too great for the service to proceed) or competitors to the new service (where the market impact was found to be acceptable).

Performance measurement

- 3.19 The Green Paper proposes that the “*purposes and characteristics should form the basis of a new, more rigorous system of regulation and performance*

⁷⁹ Green Paper, paragraph 5.43.

⁸⁰ Communications Act 2003, section 317(6).

measurement".⁸¹ It is not, however, clear how purposes which need not be met by individual programmes and characteristics that can be met merely by being "*engaging*" can form the basis of any system of regulation and performance measurement.

- 3.20 An effective system of performance measurement is needed to ensure that the BBC operates within its public service remit and would involve (i) instituting regularly scheduled reviews of performance (rather than *ad hoc* reviews at times considered appropriate by the Governors) and, importantly, (ii) effective sanctions for failure to comply.

4 Funding

Level of funding

- 4.1 The next phase of Charter Review will assess the appropriate level of funding for the BBC. It needs to scrutinise not only the costs of all proposed activities but also the potential for efficiency gains. In particular, it should assess the scope for the BBC to redeploy resources between its existing services to fulfil more effectively its public service remit (for example, reprioritising money currently spent on Hollywood movies into additional programming for underserved elements of the viewing population).
- 4.2 Government must adhere to European requirements for the funding of the BBC in determining the future level of the licence fee. The Commission has recently summarised the conditions under which State financing of public service broadcasters may be justified.⁸² These are:
- (i) a **clear remit** for the public service broadcaster which "*needs to be as precise as possible so as to allow other operators to plan their activities*";⁸³
 - (ii) **independent national monitoring** of the fulfilment of the PSB remit;
 - (iii) **proportionate** funding: financing must not exceed the costs of the public service (which must be determined on the basis of separate accounts as required by the Transparency Directive⁸⁴) and there should be a legal mechanism to prevent over-compensation.⁸⁵

⁸¹ Green Paper, paragraph 1.21.

⁸² Public service broadcasting and state aid – frequently asked questions, MEMO/05/73, 3.03.2005.

⁸³ *Ibid*, page 2.

⁸⁴ Commission Directive 80/723/EEC, as amended by Commission Directive 2000/52/EC.

⁸⁵ In addition, the broadcaster must not distort competition more than necessary to fulfil its remit and commercial activities must be carried on according to market conditions.

- 4.3 As far as condition (i) is concerned, we have set out in section 1 above the reasons why the proposed public service remit of the BBC is not defined in the Green Paper with sufficient precision to allow other operators to plan their activities. In relation to the requirement in condition (ii) for independent national monitoring of this remit, the proposed Trust does not fulfil the requirement of independence. We expand upon the reasons why the Trust is not sufficiently independent in section 6 of Part 2.
- 4.4 Condition (iii) requires that the funding of the BBC must not exceed the costs of its public service activities. The activities of the BBC must be specified in far greater detail than they have been in the Green Paper before they can be properly costed. In this regard, it is difficult to see how Government can commence the next phase of Charter Review, in which it will assess the funding needs of the BBC, since the public service activities of the BBC have not yet been clearly determined.
- 4.5 The forthcoming assessment of funding must, in any event, be much more rigorous than the one that took place in 1999, when the Davies Review said:
- “The fact that we are recommending some additional revenue for the BBC over the next seven years implies that we think **they deserve it.**”⁸⁶*
- 4.6 It is not sufficient to allocate a sum of money to the BBC for a broadly defined purpose, such as “*expansion into new digital services*”⁸⁷ without reference to specific activities, as happened in the 2000 licence fee settlement. In the Independent Review of BBC Online, Phillip Graf commented that:
- “The licence fee settlement in 2000, and the extra funding granted to the BBC at that point, led BBC management to give great legitimacy to reach as a key service goal. This followed from their belief that BBC Online had a role to play in helping to drive digital take-up and in countering the digital divide. This role is largely self-appointed and has yet to be sufficiently tested for delivery or appropriateness as a legitimate role for a single public service broadcaster.”⁸⁸*
- 4.7 The lack of parameters for the BBC’s activities in the previous licence fee settlement resulted in unwarranted expansion by the BBC as it sought to spend the money it had been granted. It also resulted in substantial inefficiency, as is evidenced by the BBC’s current cost cutting exercise. The next settlement should, therefore, avoid these problems by properly specifying and costing the activities that the licence fee is to cover. It should also include an obligation on the BBC to prioritise its resources – i.e. to reduce or close some services if it

⁸⁶ The Future Funding of the BBC: Report of the Independent Review Panel, July 1999.

⁸⁷ Green Paper, paragraph 4.18.

⁸⁸ Report of the Independent Review of BBC Online, page 9.

wishes to launch new ones. This is by far the most effective means to drive efficient allocation of resources.

- 4.8 The Green Paper confirms that Government will take independent advice on a range of issues, including the value for money of the BBC's existing services, but contains no other detail on how the level of the licence fee will be determined. The National Audit Office should play a key role in any value for money assessment of the BBC's activities, and also in any calculation of the level of licence fee required to discharge the BBC's public service functions. The fact that, following the 2000 licence fee settlement of RPI + 1.5%, the BBC has relatively recently been able to "*find*" annual cost-savings of £355m (from 2008) - amounting to 12.7% of 2004 licence fee income - demonstrates that the last licence fee review was not sufficiently rigorous, with the result that the BBC's current funding is not proportionate.
- 4.9 It is important to note that, even if the level of the licence fee were held flat throughout the next Charter period, the BBC would continue to enjoy steady growth in its total income as a result of the natural increase in the number of households (and before taking into account any improvements in the rate of licence fee evasion). Forecasts from the Office of the Deputy Prime Minister predict that the number of UK households will increase by 0.7% per year over the next 10 years. Other things being equal this should result in an *annual* increase of £22m in the BBC's licence fee income - a cumulative rise of £225m per year by 2016.
- 4.10 In order to ensure that funding is proportionate there must be a "*legal mechanism to prevent over-compensation*".⁸⁹ At present no formal, independent mechanism exists in respect of the BBC. Each publicly-funded BBC service should have its own published annual budget, and the appropriate proportion of the licence fee should be **ring-fenced** for that service. Each service should undergo an independent annual review as against the BBC's overall public remit and against the relevant service licence. As part of this review, the National Audit Office should determine whether the service is fulfilling its remit as efficiently as possible (i.e. spending the minimum amount necessary to deliver the specific published remit of that service). Where savings are identified because a BBC service (or an administrative department) is not operating efficiently, consideration should be given to reducing the licence fee in subsequent years, thus ensuring that the over-compensation does not continue. It should not simply be assumed that any such savings are available for the BBC to deploy elsewhere as it thinks fit, as this would not be consistent with the State aid rules since the funds granted by the State would be in excess of the amount actually required to discharge the BBC's public service activities.

⁸⁹ See Public service broadcasting and state aid – frequently asked questions, MEMO/05/73, 3.03.2005, page 3.

- 4.11 In addition to the mechanism described above to ensure the BBC operates efficiently and is not over-compensated, a rigorous and transparent process is required for the reallocation of funds between different BBC services in accordance with changing priorities. If the BBC wishes to increase the budget of an existing service, or spend public money on a new service, it should indicate which current areas of expenditure will be cut in order to fund the proposed changes. Only where it can be clearly demonstrated that reprioritising spend from one BBC service to another would materially improve the BBC's overall public service delivery, should the Trust be able to remit the proposed changes to Ofcom for consideration of the impact upon competition.
- 4.12 In these circumstances, expansion of existing services or proposals for new services would not require an increase in the licence fee or the total amount of funding available to the BBC. This should help to ensure that the BBC remains focused on the best way to deliver its public service remit, through the discipline of having to identify areas from which to withdraw (as envisaged in the Green Paper⁹⁰), prior to expanding into new activities.

Mid-term funding review

- 4.13 The Green Paper proposes a further review of alternative funding mechanisms during the next Charter period and before the end of digital switchover. There should be a review of funding, but this should take place no later than five years into the new Charter, irrespective of progress towards switchover. In such a rapidly changing environment, the level of the licence fee should not be fixed for more than five years at a time, and there should be a mid-term review to consider the appropriate level for the second half of the Charter period. This will assist in ensuring that there is no over- (or under-) compensation, by providing an opportunity to review efficiency and public service delivery, and calibrate the level of BBC funding accordingly.
- 4.14 If the mid-term review is to consider new funding mechanisms and long term alternatives to the licence fee, the possibility of implementing these sooner than the end of the Charter period in 2016 should not be discounted. For example, if the review concludes that there is an urgent need to share the licence fee amongst other broadcasters in order to secure wider public service delivery, it would be perverse, and possibly too late, to have to wait another five years before changes could take effect.

Collection of the licence fee

- 4.15 The BBC argues that it should retain exclusive use of the licence fee because of the importance of the direct link between the BBC and the licence payer. It is therefore surprising that the BBC is so circumspect about its relationship with TV Licensing, which describes itself as "*the trading name used by the BBC's*

⁹⁰ Green Paper, paragraph 8.2.

agents who collect the licence fee on their [sic] behalf'.⁹¹ The BBC's name does not appear on the TV licence itself, and there is no mention of the BBC and its services in the numerous advertisements targeted at non-payers. A more explicit link between the BBC and licence fee collection would improve accountability by focusing the public's attention on what the BBC does with their money and whether it delivers value for money.

5 The wider system of public service broadcasting

- 5.1 The Green Paper proposes that, as well as the interim review of alternative post-2016 funding models, there should be a review of the case for plurality; Channel 4's longer term position; whether any public funding should be distributed more widely beyond the BBC in order to sustain plurality and competition in public service broadcasting; and how any such distribution might take place. It is proposed that this review should take place towards the end of switchover.
- 5.2 We agree with the Green Paper's conclusion that Channel 4 has no immediate need for an additional stream of funding, as is confirmed by Channel 4's recent results. Despite increased competition and rising multi-channel penetration, in 2004 Channel 4 managed to increase its overall share to 9.8% (up from 9.6% in 2003). In addition, Channel 4 recorded significant revenue growth in 2004, with group turnover up 9.3% from £769.6m in 2003 to £841.4 million.
- 5.3 As far as plurality is concerned, the Green Paper asks specifically whether the case for a plurality of publicly-funded broadcasters should be kept under review. If there is to be State funding for public service broadcasting which is intended to generate programming that the market, left to itself, would not provide, then there should be a plurality of recipients of such funding. Such a plurality would have an important role to play in maintaining and strengthening the quality of public service broadcasting in the UK. We agree, therefore, that the case for plurality of publicly-funded broadcasters should be kept under review.
- 5.4 In terms of the timing of such a review, the Green Paper proposes that it should take place towards the end of switchover. Sky has commented that Ofcom's predictions for the impact of the future decline in value of analogue spectrum are overstated. Accordingly, the proposed timing of the review would seem reasonable, but we agree with the suggestion that the Secretary of State should retain the power to order an earlier review if he or she should deem it necessary.

⁹¹ TV Licensing website - <http://www.tvlicensing.co.uk/index.jsp>

6. Conclusion on remit, scope and funding

- 6.1 Although the Green Paper recognises the need to “*sharpen up*” the remit of the BBC, its proposals are inadequate to maximise the BBC’s public service broadcasting output and to provide sufficient certainty for commercial operators. We set out above the steps that should be taken to bring the BBC’s remit into focus, including requirements for all BBC programmes to meet at least one public purpose and to be distinctive from those provided by the private sector.
- 6.2 The scope of the BBC’s activities will be determined and controlled through the proposed service licences and the procedures for approving new or extended services. It is important that service licences are subject to public consultation and that they codify the statements of intent contained in the Green Paper about the programming the BBC should support. Reliance should not be placed on the nebulous concept of “*public value*” to determine whether a new or extended service should proceed, and we have proposed a workable alternative.
- 6.3 Until the remit and activities of the BBC are properly determined, the extent of the funding required to fulfil that remit and those activities cannot be established. The level of funding should not be set for more than five years, and a review of funding should, therefore, take place before the end of digital switchover.

Part 2 - Governance and Regulation of the BBC

1. Terminology

- 1.1 A precursor to detailed consideration of the governance and regulation of the BBC is the definition of the relevant terms. With this in mind, Ofcom has drawn a distinction between, among other things:

“regulation: for example the rules, codes and regulations which would normally apply, in varying degrees, to all players in the industry – for example, competition rules, environmental laws and – in this case – programme codes”; and

“governance: the arrangements which any large organisation should have established to ensure that it is effectively managed and governed on behalf of its key stakeholders ... ”.⁹²

- 1.2 The BBC has recognised that:

“Governance is not the same as regulation. Governance is about stewardship. Stewardship of the money. And stewardship of the public interest. This is the difference between the BBC Governors and Ofcom. Ofcom has no responsibility for anybody’s money”.⁹³

- 1.3 The BBC’s Chairman of Governors has also confirmed that:

“All my experience at Board level in the public and private sector has lead me to this understanding: governance is not the same as regulation. Regulation is about post facto policing of rules – quotas, guidelines, codes and so on. Governance is not about regulation – although ensuring regulatory compliance is part of the job”.⁹⁴

- 1.4 The Green Paper, itself, includes in a “list of 11 principles for the reform of governance structures” the objective that the system:

“... [be] clear about the distinction between governance and regulation ... ”.⁹⁵

⁹² Paragraph 6.9 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition for Quality, dated 8 February 2005.

⁹³ BBC press release dated 29 June 2004 entitled “BBC launches its vision of the future and manifesto for action”.

⁹⁴ CBI conference on 8 November 2004.

⁹⁵ Box 5.2 of the Green Paper (page 68). The OFT has, in its response of 2 June 2005 to the Green Paper, also noted that regulation is a “distinct” issue from governance.

- 1.5 Thus, it is widely understood that governance and regulation are not synonyms and that, as a consequence, defects in the regulation of the BBC cannot be remedied by adjustments to the governance of the BBC (and *vice versa*).

2. The need for change

- 2.1 As well as being widely understood that governance and regulation are not synonyms, it is widely accepted that the present governance and regulation of the BBC need to be improved.⁹⁶ For example, the Independent Panel, chaired by Lord Burns, stated that:

*“[t]here is ... a high degree of consensus that the current system of governance and regulation at the BBC is unsustainable, and reform – perhaps radical reform – is required”.*⁹⁷

- 2.2 In its Phase 3 Report on Public Service Television Broadcasting, Ofcom noted that:

*“...clarifying the separate roles of governance and regulation of the BBC should be a central objective of the Charter Review process”.*⁹⁸

- 2.3 In light of these and other comments, the Green Paper noted that:

*“[t]here are calls from both the public and broadcasters for reform of the arrangements for governance and regulation [of the BBC]”.*⁹⁹

and the Green Paper ultimately concluded that:

*“[t]he system needs reform.”*¹⁰⁰

3. The Green Paper’s proposals

- 3.1 Despite the wide acceptance that the present governance and regulation of the BBC need to be improved and despite the imperative to be “*clear about the distinction between governance and regulation*”,¹⁰¹ the Green Paper eschews

⁹⁶ The BBC, itself, has acknowledged that: “... *public expectations of scrutiny and accountability are greater today than in the past and the BBC recognises that its system of governance must change significantly if it is to retain full public confidence over the next Charter period*” – Building Public Value, page 23.

⁹⁷ Page 3 of Lord Burns’ letter to the Secretary of State dated 27 January 2005.

⁹⁸ Paragraph 6.4 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition For Quality, dated 8 February 2005.

⁹⁹ Section 5 of the Green Paper (page 64).

¹⁰⁰ Paragraph 5.6 of the Green Paper.

¹⁰¹ Box 5.2 of the Green Paper (page 68).

such a clear distinction and effectively perpetuates the current conflation of these functions.

- 3.2 Instead of clearly defining and separating the roles of governance and regulation of the BBC, the Green Paper introduces the terms “oversight” (which encompasses both governance and regulation) and “delivery” and states that:

*“[t]he central principle behind any new governance structure should be increased differentiation and separation of two different sets of functions – those relating to oversight and those relating to delivery”.*¹⁰²

- 3.3 Although there is an acknowledged need for reform leading to a clear distinction between governance and regulation, the Green Paper proposes only a “new governance structure” rather than new structures for governance and regulation.

- 3.4 In respect of the proposed new governance structure, the Green Paper seeks:

*“[a] clearer separation of function ... between the part of the BBC that devises and delivers strategy and whatever body is given the task of holding it to account for performance”;*¹⁰³

and the means for doing this is:

*“... to replace the Board of Governors with a new BBC Trust (a working title), with ultimate responsibility for the licence fee and for upholding the public interest in the BBC. The Trust would assess the performance of the BBC’s services, and approve high-level strategy and budgets. It would devolve issues of day-to-day management and delivery to a separately-constituted Executive Board”.*¹⁰⁴

- 3.5 In effect, therefore, the Green Paper seeks to clarify the distinction between the governance and management of the BBC, rather than clarify the distinction between the governance and regulation of the BBC.

- 3.6 On the issue of regulation, the Green Paper concludes that:

“For the time being, regulatory responsibilities should be divided between Ofcom and the BBC Trust in the same way that they are currently divided

¹⁰² Paragraph 5.12 of the Green Paper.

¹⁰³ Section 5 of the Green Paper (page 64).

¹⁰⁴ Section 5 of the Green Paper (page 64). As the Executive Board it is to be tasked with “day-to-day management” and not “holding [the BBC] to account for performance”, it is somewhat incongruous for the Green Paper to propose that a significant minority of non-executives should form part of the Executive Board (paragraph 5.27). As non-executives, these individuals would not be involved in day-to-day management. Their presence on the board merely seems to blur the distinction between governance and management.

*between Ofcom and the BBC Governors. ... We propose to leave the arrangements as they are for five years before reviewing them”.*¹⁰⁵

3.7 Thus the Green Paper effectively proposes no change to the regulation of the BBC. Specifically, the Green Paper proposes to retain the responsibility for governance and some of the responsibility for regulation of the BBC within one body, the BBC Trust.¹⁰⁶

3.8 For the reasons explained below, the Green Paper’s proposals fail to address almost all of the flaws which have been identified in respect of the regulation of the BBC.

4. Perpetuation of conflicting roles

4.1 With regard to the proposal to draw a clearer distinction between the governance and management of the BBC, the Green Paper confirms that the current approach to governance of the BBC (even with the amendments proposed in the BBC’s document entitled “*Building Public Value*”):

*“... gives the Governors too much flexibility to involve themselves in almost any area of management”;*¹⁰⁷

and the solution to this problem is for:

*“... the boundaries of the Trust’s involvement in strategic and financial decisions [to] be clearly set out”.*¹⁰⁸

4.2 This proposal to draw a clearer distinction between the governance and management of the BBC (and to exclude those charged with governance from day-to-day management decisions) undoubtedly has some merit. It does not, however, eradicate the key conflict of interest which the BBC’s Governors currently experience.

4.3 When considering the need for reform, the Green Paper confirms that:

*“[i]t is inherently difficult for one group of people to be convincing both as cheerleaders for the BBC and as objective assessors of its performance”;*¹⁰⁹

and that the Governors:

¹⁰⁵ Page 11 of the summary to the Green Paper.

¹⁰⁶ The remaining responsibility for regulating the BBC already resides with Ofcom.

¹⁰⁷ Paragraph 5.16 of the Green Paper.

¹⁰⁸ Paragraph 5.29 of the Green Paper.

¹⁰⁹ Paragraph 5.7 of the Green Paper.

*“... have also accepted that there is some tension between the two broad roles that they are being asked to fulfil”.*¹¹⁰

- 4.4 Despite recognising this key problem, the Green Paper proposes not only that the BBC Trust will carry out the distinct functions of governance and regulation of the BBC but also that:

*“[t]he Trust will act as the sovereign body in relation to the BBC ...”;*¹¹¹

*“... there is only one, clear sovereign body ... [which] will make the Trust a powerful advocate for the public interest and able to safeguard the BBC’s independence ...”;*¹¹²

*“[u]ltimately, the Trust will still be responsible for upholding the strength and independence of the BBC itself”;*¹¹³ and

*“[the Trust’s] structure should establish it as the guardian of the BBC’s strength and independence – a buffer between the Executive and any external Government or commercial pressure”.*¹¹⁴

- 4.5 Thus, the Green Paper expressly acknowledges that the BBC Trust will be “*the sovereign body*” for the BBC and “*the guardian of the BBC’s strength and independence*” – i.e. the BBC Trust will be “*cheerleaders for the BBC*”,¹¹⁵ just as the Governors have been to date. The Green Paper, therefore, implicitly acknowledges that the approach that it is putting forward for the governance and regulation of the BBC will perpetuate the current conflict between the Governors’ role as cheerleaders for the BBC and their role as regulators.

- 4.6 The most high-profile events of recent times, which have highlighted the conflict of interest described above, were assessed during the independent inquiry conducted by Lord Hutton in 2003. Lord Hutton reached the following conclusions in respect of this conflict:

“The Governors were right to take the view that it was their duty to protect the independence of the BBC against attacks by the Government ...”.

“The view taken by the Governors, as explained in evidence by Mr Gavyn Davies, the Chairman of the Board of Governors, that they had to rely on the BBC management to investigate and assess whether Mr Gilligan’s

¹¹⁰ Paragraph 5.8 of the Green Paper.

¹¹¹ Paragraph 5.26 of the Green Paper.

¹¹² Paragraph 5.32 of the Green Paper.

¹¹³ Paragraph 5.48 of the Green Paper.

¹¹⁴ Paragraph 5.50 of the Green Paper.

¹¹⁵ See paragraph 4.3 *ante*.

source was reliable and credible and that it was not for them as Governors to investigate whether the allegations reported were themselves accurate, is a view which is understandable. However this was not the correct view for the Governors to take ...”.

“... rather than relying on the assurances of BBC management, I consider that the Governors themselves should have made more detailed investigations into the extent to which Mr Gilligan’s notes supported his report”.

*... the Governors are to be criticised for themselves failing to make more detailed investigations into whether this allegation reported by Mr Gilligan was properly supported by his notes and for failing to give proper and adequate consideration to whether the BBC should publicly acknowledge that this very grave allegation should not have been broadcast”.*¹¹⁶

4.7 As these quotes demonstrate, the independent inquiry conducted by Lord Hutton highlighted the conflict which arises when, in the words of the Green Paper, “one group of people [seeks to be] both ... cheerleaders for the BBC and ... objective assessors of its performance”.¹¹⁷ Lord Hutton acknowledged in his Report that the Governors were “right to take the view that it was their duty to protect the independence of the BBC” and that their decision not to investigate the complaint against the BBC was “understandable” because the Governors were cheerleaders for the BBC and thus sought to defend it. Nevertheless, Lord Hutton concluded that this decision not to investigate was “not ... correct” because the Governors were also the regulators of the BBC and had a duty to ensure that its news reporting was accurate. Thus, due to their conflicting roles as cheerleaders and regulators, the Governors were placed in an invidious position.

4.8 In a statement to the House of Commons on Lord Hutton’s report, the Prime Minister said:

*“[t]he report itself is an extraordinarily thorough, detailed and clear document. It leaves no room for doubt or interpretation. We accept it in full”.*¹¹⁸

Yet, despite the careful analysis by Lord Hutton of the structural deficiency in the current governance and regulation of the BBC, the Green Paper proposes to perpetuate this flaw when it replaces the BBC Governors with the BBC Trust. It is, of course, acceptable for the body which is tasked with the governance of

¹¹⁶ Paragraph 467(2)(v) of the Report of the “Inquiry into the circumstances surrounding the death of Dr David Kelly C.M.G.” by Lord Hutton dated 28 January 2004.

¹¹⁷ Paragraph 5.7 of the Green Paper.

¹¹⁸ Hansard, 28 January 2004, Col. 337.

the BBC to champion the BBC and seek to protect its strength and independence (as is the case today). A body which has such a responsibility should not, however, also be tasked with regulating the BBC.

5. No basis for rejecting regulation by Ofcom

5.1 As is noted in section 3 above, the Green Paper concludes that the regulatory responsibilities which currently reside with the Governors should be transferred to the BBC Trust, rather than Ofcom. The initial reason canvassed in the Green Paper for rejecting any additional regulation of the BBC by Ofcom is that:

*“... an external Government-appointed regulator such as Ofcom may in fact be more inclined than the Governors to act in a way that it imagines Government would wish”.*¹¹⁹

5.2 The Green Paper seeks to contrast this position when it states that:

*“Members of the Trust would be appointed by the Crown (as the Governors are now) ...”*¹²⁰

The reasoning seems, therefore, to be that regulation by the BBC Trust is to be preferred to regulation by Ofcom because Ofcom is Government-appointed whereas the Trust is not.

5.3 This purported distinction between Government-appointment and appointment by the Crown is illusory and has not existed for over three hundred years.¹²¹ The Green Paper subsequently concedes that the BBC Governors are, and the BBC Trust will be, Government-appointed when it states that:

*“[a]t present, the BBC is ultimately accountable to Government and Parliament through the Charter In addition ... the Queen appoints the Chair and Governors on the advice of the Prime Minister ...”;*¹²² and

*“... the Trust model ... makes sure there is only one Government-appointed Chair”.*¹²³

¹¹⁹ Paragraph 5.18 of the Green Paper.

¹²⁰ Paragraph 5.24 of the Green Paper.

¹²¹ The very first page of the seminal text on the English constitution states that: *“At the Revolution, the arbitrary rule of the Stuart kings finally gave way to parliamentary government, with ministerial responsibility. Such a change portended the subjection of future kings to the will of Parliament ...”*. (Chapter 1, Volume 1 of *“The Constitutional History of England”* by Sir Thomas Erskine May – Sixth Edition, 1878.)

¹²² Paragraph 5.62 of the Green Paper.

¹²³ Paragraph 5.32 of the Green Paper.

5.4 Thus, the claim that regulation by the Trust is preferable to regulation by Ofcom because Ofcom is Government-appointed (and thereby more inclined to act in a way it imagines Government would wish) is fallacious as the Trust will be similarly Government-appointed.

5.5 Further reasons provided in the Green Paper for rejecting regulation by Ofcom are that:

“Given its range of responsibilities across the commercial sector, it may be difficult for Ofcom to devote itself fully to upholding the public interest in BBC services and programmes, in defending the independence of the BBC itself or in satisfying the need for direct accountability to licence fee payers”; and

“Significant organisational change would be needed if it were to be entrusted with the guardianship of the BBC – Ofcom is not at present responsible for the direct oversight of public spending on the scale represented by the licence fee”; ¹²⁴

5.6 When considering these reasons, it should be remembered that regulation and governance are not synonyms: functions of regulation include *“policing of rules”* whereas functions of governance include *“stewardship of the money”*.¹²⁵ The Green Paper’s reasoning, cited above, demonstrates yet again that the Green Paper takes insufficient account of the difference between governance and regulation. Activities such as *“defending the independence of the BBC”*, *“the guardianship of the BBC”* and *“oversight of public spending”* amount to governance not regulation. In essence, therefore, the Green Paper argues that Ofcom should not regulate the BBC because it would not be appropriate for Ofcom to govern the BBC.¹²⁶

5.7 The Green Paper presents no credible reasons why the regulatory (as opposed to the governance) functions which currently reside with the BBC Governors should not be transferred to Ofcom. The reasons why such functions should be transferred to Ofcom are briefly rehearsed in the sections below.

¹²⁴ Paragraph 5.18 of the Green Paper.

¹²⁵ See section 1 *ante*.

¹²⁶ In order to seek to bolster its conclusion that Ofcom should not be given additional regulatory responsibilities in respect of the BBC, the Green Paper then states: *“[w]e note that Ofcom agrees with this view in its PSB Phase 3 Report”* (paragraph 5.18 of the Green Paper). This statement is misleading. Whilst, in its Phase 3 Report, Ofcom agrees that it should not be given governance responsibilities in respect of the BBC (such as acting as its guardian and defending its independence), it expressly concludes that the regulatory functions which currently reside with the BBC Governors should be transferred to Ofcom. (Chapter 6 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition for Quality, dated 8 February 2005.)

6. The need for independent scrutiny

6.1 In its evidence to the House of Lords Select Committee on the BBC Charter Review, Ofcom suggested that, if one were to assess regulation on a quantitative basis, Ofcom could be viewed as undertaking 75% of the regulation of the BBC, with the Green Paper proposing that the remaining 25% (which is currently undertaken by the Governors) being transferred to the BBC Trust.¹²⁷

6.2 Ofcom has, in its Phase 3 Report on Public Service Television Broadcasting and its written and oral evidence to the House of Lords Select Committee on the BBC Charter Review, put forward compelling reasons as to why it should have sole responsibility for regulating the BBC.¹²⁸ It is not necessary to restate all these reasons here. It is, however, worth highlighting the principle that:

*“[w]hile **governance** mechanisms may vary between players, depending upon their individual circumstances, it is less and less possible or desirable to think about the **regulation** of individual participants in the sector in isolation from the environment in which they operate”.*¹²⁹
(Emphasis in original.)

6.3 Although the BBC’s unique nature may well justify an idiosyncratic approach to its governance, the BBC should be regulated by the industry regulator, Ofcom, in a consistent fashion with all other participants in the industry.

6.4 There are two further reasons, which have not been canvassed by Ofcom, as to why the regulatory functions of the BBC Governors should be transferred to Ofcom rather than the BBC Trust. First, the Green Paper states that:

*“[t]he Trust will have access to all the information it requires in order to carry out its functions”.*¹³⁰

6.5 In practice, in order properly to regulate the BBC, the BBC Trust will need access to substantial amounts of information about the rest of the broadcasting sector (particularly if it is going to carry out market impact assessments – see section 10 below). Ofcom currently has extensive information gathering powers but the BBC Trust would apparently have no such powers. It would not be appropriate for the Government to seek to impose a legal obligation on commercial broadcasters to disclose confidential information (including commercially sensitive information) to the BBC Trust, i.e. the “*sovereign body*”

¹²⁷ Response by Stephen Carter, Chief Executive of Ofcom, to question 434 on 6 April 2005.

¹²⁸ See Section 6 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition for Quality, dated 8 February 2005 and Part 2 (d) of Ofcom’s Written Evidence.

¹²⁹ Paragraph 6.3 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition for Quality, dated 8 February 2005.

¹³⁰ Paragraph 5.26 of the Green Paper.

of a competitor, which will be tasked with setting “*overall objectives*” for the BBC and approving “*strategies*”.

6.6 In the circumstances, therefore, unlike Ofcom the BBC Trust will not have access to the information needed for it to be able to discharge its regulatory functions.

6.7 The second additional reason for transferring the regulatory functions of the BBC Governors to Ofcom is that the European Commission has confirmed that Member States must implement a “*mechanism to ensure effective supervision of the fulfilment of ... public service obligations*”.¹³¹ The Commission has also confirmed that:

*“The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking”.*¹³²

6.8 The Green Paper acknowledges that the BBC Trust will not be independent from the BBC: it will be the BBC’s “*sovereign body*” and will be “*the guardian of the BBC’s strength and independence*”. The BBC Trust will, therefore, be the champion of the BBC. As such, it is not appropriate for the BBC Trust to be tasked with holding “*individual BBC services to specific service licences that prevent any significant change in their character*”,¹³³ as is proposed in the Green Paper.

6.9 Whilst the Trust can discharge governance functions, such as “*stewardship of the money*” and act as the BBC’s champion, it will, as a consequence of taking on those roles, not be sufficiently independent to discharge regulatory functions, such as holding the BBC to its new service licences. That function, together with the BBC Governors’ current regulatory responsibilities, should be transferred to Ofcom.

7. Absence of a fair and objective complaints procedure

7.1 The principles of good governance which are specified in the Green Paper emphasise the need to provide:

*“... adequate protection for those outside the corporation who may be affected by the BBC’s activities (principally, although not confined to, its private sector competitors)”.*¹³⁴

¹³¹ Paragraph 42 of the Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04).

¹³² *Ibid.*

¹³³ Summary of the Green Paper (page 7).

¹³⁴ Box 5.2 of the Green Paper (page 68).

7.2 The Green Paper also emphasises that:

“[i]n future, complainants need to have fair and equal access to a transparent, objective process, with the BBC Trust acting as final arbiter in difficult cases”.¹³⁵

7.3 It appears, therefore, that, in the first instance, complaints must be submitted to the Executive Board itself. Ultimately, but only “*in difficult cases*”, a complaint may be submitted to the BBC’s champion (i.e. the BBC Trust).

7.4 Thus, far from providing access to a fair and objective complaints procedure, the Green Paper proposes an approach in which the BBC will be both defendant and judge in respect of complaints over issues where the regulatory responsibility currently resides with the BBC Governors (such as the accuracy and impartiality of its news coverage and the enforcement of the BBC’s Fair Trading Commitment). This approach manifestly fails to satisfy the first principle of natural justice: *nemo iudex in causa sua*.¹³⁶

7.5 Ofcom’s written evidence to the House of Lords Select Committee on the BBC Charter Review sets out (i) the areas in which Ofcom has a regulatory role in relation to the BBC¹³⁷ and (ii) the areas in respect of which the Governors currently act as regulators.¹³⁸ There is no legitimate reason for maintaining this distinction. In respect of all these areas, every other broadcaster in the UK is subject to external regulation and aggrieved viewers and competitors are able to submit complaints to an independent regulator. The basic tenets of natural justice should apply in respect of all the BBC’s activities in the same way that they do in respect of the activities of commercial broadcasters.

8. The case for *ex ante* competition rules

8.1 In addition to its failure to introduce a fair and objective complaints procedure, the Green Paper proposes to persist with the current inconsistent approach to *ex ante* and *ex post* competition rules. In respect of the latter, the Green Paper states:

“Ofcom is the sectoral competition regulator for broadcasting and has the same Competition Act powers over the BBC as it does over any other broadcaster”.¹³⁹

¹³⁵ Precursor to question 10 of the Green Paper (page 12). See also the Principal Functions of the BBC Trust in box 5.5 of the Green Paper (page 73).

¹³⁶ Nobody is allowed to be a judge in his own cause. See Chapter 8 of the Second Edition of “*Judicial Review*” by Michael Supperstone QC and James Goudie QC.

¹³⁷ Paragraphs 4 to 10 of Ofcom’s written evidence to the House of Lords Select Committee on the BBC Charter Review.

¹³⁸ Paragraph 11 *ibid*.

¹³⁹ Paragraph 5.35 of the Green Paper.

8.2 This statement is probably an oversimplification. As Ofcom has noted:

“[t]he application of Competition Act powers in relation to the BBC is not necessarily straightforward. Specifically, there is a potential lack of clarity over whether the BBC is an ‘undertaking’ for the purposes of competition law, and whether ‘abuse’ can be established given that the BBC does not have an intent to exploit its position in order to make profits”.¹⁴⁰

8.3 The OFT echoes these views in its response to the Green Paper in which it states:

“... although general competition law certainly applies to the BBC’s activities, it may not be sufficiently tailored to the unique position of the BBC to enable competition authorities to investigate some conduct that undoubtedly has the potential to harm competition”.¹⁴¹

8.4 Accordingly, the Green Paper should not be quite so sanguine in respect of the application of *ex post* competition law to the BBC. Nevertheless, on the basis that *ex post* competition law does apply to the BBC and can be enforced by Ofcom and the OFT, the Green Paper states:

“We fully support this position. It makes no sense to duplicate expertise in this area”.¹⁴²

8.5 In respect of *ex ante* competition rules, Ofcom noted in its Phase 3 Report on Public Service Television Broadcasting that there is:

“[a]n inconsistent approach to the application of competition law – Ofcom has a much wider tool kit of powers that it can use with its commercial licensees than it has for the BBC”.¹⁴³

Ofcom proposed, therefore, that:

“...the approach to competition issues should be the same across the sector – with the BBC subject to the same ex ante rules as are the commercial broadcasters. This would allow Ofcom to intervene promptly in the event of a possible threat to competition, and ensure a consistent

¹⁴⁰ Paragraph 3.11 of Ofcom’s Response to the Green Paper, dated 8 June 2005.

¹⁴¹ OFT’s Response to the Green Paper, dated 2 June 2004.

¹⁴² Paragraph 5.35 of the Green Paper.

¹⁴³ Paragraph 6.20 of Ofcom’s Review of Public Service Television Broadcasting: Phase 3 Report – Competition for Quality, dated 8 February 2005.

*approach across the market. The BBC would then become explicitly responsible for compliance, and Ofcom for regulation”.*¹⁴⁴

8.6 Despite these well reasoned representations, the Green Paper concludes that:

*“We do not think that Ofcom should be given an additional, open-ended ‘ex ante’ power to ensure the BBC acts fairly – we believe that, as proposed, this would cut across the BBC Trust’s overriding duty to uphold the public interest in this area”.*¹⁴⁵

8.7 During parliamentary debates on the then Communications Bill, the question of whether *ex ante* competition powers were needed in the broadcasting sector was considered in some detail. The Government’s position, at that time, was summarised by the Broadcasting Minister as follows:

“Those who argue against clause 304¹⁴⁶ believe that the Competition Act is sufficient to protect against anti-competitive behaviour in broadcasting. That is a cause of fundamental disagreement. Under the prohibitions in the Competition Act – those prohibitions on which Ofcom would largely have to rely were its sector-specific powers to be removed – intervention would be allowed only if there was [sic] an abuse of a dominant position, or if agreements existed that appreciably prevented, restricted or distorted competition. We are concerned about cases in which markets should be opened up to greater competition but where the legal tests required by the Competition Act are not met. That is when the anorak expertise of the hon. Member for South Cambridgeshire becomes important. I shall attempt to explain why.

*The sector-specific powers contained in the Bill can be used to supplement those contained in the Competition Act. The Competition Act cannot be applied until the regulator has reason to believe that an enterprise has harmed the market by acting anti-competitively, or that the market has been harmed by existing agreements. As such, there are situations in which the use of sector-specific powers may be more effective, especially where advance action or action in a short time frame is required to ensure effective competition”.*¹⁴⁷

8.8 Thus, the Government was of the view that *ex post* competition powers alone would be inadequate in the broadcasting sector and that Ofcom should also have

¹⁴⁴ Paragraph 6.22 *ibid.*

¹⁴⁵ Paragraph 5.36 *ibid.*

¹⁴⁶ Clause 304 of the Communications Bill subsequently became section 316 of the Communications Act.

¹⁴⁷ House of Commons Communications Bill Committee (Standing Committee E) Nineteenth Sitting, 28 January 2003.

ex ante competition powers. Apparently, however, such powers are not required in respect of the BBC even though, as Ofcom has noted:

“[i]n the past, the BBC’s activities have been subject to competition investigations, and competition problems have been identified”.¹⁴⁸

Similarly, the OFT has noted that the BBC:

“... can ... produce outcomes that are uniquely damaging to effective competition and to commercially funded innovation on media markets, due to [its] unique scale, scope, status and ambition”.¹⁴⁹

8.9 The only reason given in the Green Paper for not providing Ofcom with the same *ex ante* competition powers in respect of the BBC as it has in respect of all other broadcasters is that:

“[t]his would cut across the BBC Trust’s overriding duty to uphold the public interest ...”.¹⁵⁰

8.10 Thus, the Green Paper is either proposing that:

- only *ex ante* competition powers (and not *ex post* competition powers) conflict with the BBC Trust’s duty; or
- it is acceptable to have such a conflict when any proposed intervention happens *ex post* but not when any proposed intervention would happen *ex ante*.

8.11 Both these propositions are untenable. It is appropriate for Ofcom to have the same *ex post* competition powers over the BBC as it has in respect of all other broadcasters. It is also appropriate for Ofcom to have the same *ex ante* competition powers over the BBC as it has in respect of all other broadcasters.

8.12 In its Response to the Green Paper, Ofcom has proposed a pragmatic way to resolve this issue. In order to ensure that there is a consistent approach to competition issues across the broadcasting sector, the scope and enforcement of the BBC’s Fair Trading Commitment should be modified.¹⁵¹ Ofcom’s proposal is considered further in section 9 below.

¹⁴⁸ Paragraph 3.11 of Ofcom’s Response to the Green Paper, dated 8 June 2005. In paragraph 3.10, Ofcom noted that: “[j]ust like other broadcasters, the BBC can behave in a way that raises competition concerns”.

¹⁴⁹ OFT’s Response to the Green Paper, dated 2 June 2005.

¹⁵⁰ Paragraph 5.36 of the Green Paper.

¹⁵¹ See paragraphs 3.16 *et seq* of Ofcom’s Response to the Green Paper, dated 8 June 2005. At present it appears that, not only is the BBC entitled to be a judge in its own cause, it is also entitled to set the competition rules in respect of which it will sit in judgement, as it drafts its own Fair Trading Commitment.

9. The Fair Trading Commitment

- 9.1 The Green Paper recognises two particular criticisms of the Fair Trading Commitment:

“...it is expressed in fairly general terms and some have argued that the Governors have not upheld it rigorously enough”.¹⁵²

Both of these criticisms are valid.

- 9.2 The Fair Trading Commitment and accompanying Guidelines are drafted in a manner that gives the maximum flexibility to the BBC. For example, where the BBC’s commercial activities require use of publicly-funded BBC inputs, page 7 of the Fair Trading Commitment provides that:

*“...fair prices will be negotiated which take proper account of the cost of provision of such inputs. We would not **normally** expect such prices to be out of line with the prevailing market price for similar inputs”* (emphasis added).

The caveat “*normally*” significantly dilutes the impact of this provision.

- 9.3 The Governors have been slow in updating their procedures to ensure due process in the consideration of complaints about the BBC’s commercial services. There is no published procedure for handling such complaints, which appear to be dealt with on an *ad hoc* basis. In the past, the Governors’ published reasons for rejecting complaints have been brief to the point of being meaningless, relying on self-serving statements from the BBC without reference to evidence. For example:

“The Chairman... 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”.¹⁵³

The Governors did not provide any reasons for the Chairman’s confidence.

- 9.4 In light of these deficiencies and the need to ensure a consistent application of *ex ante* competition rules across the sector (see section 8 above), Ofcom advocates a “*competition-focused Fair Trading Commitment ... which is subject to independent approval and oversight*”.¹⁵⁴ In essence, Ofcom’s suggestion, which is endorsed by the OFT, is that the BBC’s Fair Trading Commitment

¹⁵² Green Paper, paragraph 9.17.

¹⁵³ Summary of Fair Trading Complaints, June–August 2002.

¹⁵⁴ Ofcom response to the Green Paper, paragraph 3.16.

should be approved by Ofcom and any substantive complaints about alleged breach of that Commitment should be investigated and adjudicated upon by Ofcom.¹⁵⁵

- 9.5 Ofcom also proposes a further material modification to the Fair Trading Commitment. As the Commitment currently focuses on the BBC's commercial activities, it seems to be assumed that the BBC's public service activities cannot give rise to an anti-competitive effect. In practice, the two key areas in respect of which the BBC is most capable of having an anti-competitive effect concern (i) those of its activities which are publicly funded and (ii) the nexus between those publicly funded activities and the BBC's commercial activities.¹⁵⁶ At present, the BBC's Fair Trading Commitment does not adequately address these areas. It is, therefore, entirely appropriate that, as Ofcom has suggested:

*“[t]he scope of the Fair Trading Commitment should be widened such that it covers licence fee funded services as well as the BBC's commercial services”.*¹⁵⁷

- 9.6 In practice, the Green Paper actually canvasses the possibility of making the BBC's Fair Trading Commitment subject to Ofcom's approval and applying it “as a form of ‘ex ante’ regulation”.¹⁵⁸ As is noted in paragraph 8.1 above, the Green Paper concedes that it makes no sense to duplicate expertise in the area of *ex post* regulation. Clearly, it also makes no sense to duplicate expertise in the area of *ex ante* regulation. On the assumption that the BBC's Fair Trading Commitment is to be modified and applied in the manner of *ex ante* regulation (in order to remedy the deficiencies described in section 8 above), the industry regulator is clearly the appropriate body to apply and enforce such regulation.

10. Market impact assessments

- 10.1 The Green Paper states that:

“Whenever a proposal is put together for a new service, or the extension of an existing one, it should be submitted to ... a market impact assessment, to be conducted according to a standard formula agreed

¹⁵⁵ Section 3.17 of Ofcom's Response to the Green Paper dated 8 June 2005 and page 7 of the OFT's Response to the Green Paper, dated 2 June 2005.

¹⁵⁶ It has been said that: “[c]ross-subsidy, predation and self-preference (departure from fair trading obligations) are ... forms of anti-competitive behaviour for which the BBC has both the means – the licence fee – and the motive – output maximisation. They are also types of behaviour which are exceptionally difficult to detect without the ability on the part of the regulator or competition authority to build up information and expertise”. (M Cave *et al*, Regulating the BBC, at paragraph 6.2.)

¹⁵⁷ Paragraph 3.17 of Ofcom's Response to the Green Paper dated 8 June 2005. This paragraph also states that “[a] revised Fair Trading Commitment should be agreed ... following consultation”.

¹⁵⁸ Paragraph 9.18 of the Green Paper.

*between Ofcom and the BBC Trust, and to be conducted by Ofcom itself in the case of a new service”.*¹⁵⁹

- 10.2 Elsewhere, the Green Paper states that Ofcom’s role in respect of market impact assessments for changes to existing services will be limited to “*agreeing the terminology used*” with the BBC Trust.¹⁶⁰
- 10.3 As is mentioned in paragraph 6.5 above, there is a material practical issue with the BBC Trust carrying out market impact assessments in respect of proposed changes to existing services (even if it has agreed the “*terminology*” with Ofcom). In order genuinely to assess the impact of any proposal on the market, the BBC Trust would need to obtain a significant amount of commercially sensitive information from the BBC’s competitors. It would, however, be wholly inappropriate for the BBC’s competitors to divulge such information to the BBC’s “*sovereign body*”.
- 10.4 Furthermore, there is no sound basis for treating applications for new services and applications for changes to existing services in this different fashion. As Ofcom notes:

*“... [s]ignificant changes or repeated changes to existing services are not different in nature to new services, as to their impact on the market(s), competition and on predictability/certainty in the market. Ofcom believes that they should not be treated differently. In fact, if they are treated differently, there is a risk that the objectives of the market impact assessment regime – namely ensuring that the BBC’s market impact is limited to an acceptable level – could be circumvented by simply reclassifying a new service as a change to an existing service”.*¹⁶¹

- 10.5 In the circumstances, all applications for new BBC services and applications for changes to the service licences for existing BBC services must be subjected to a market impact assessment which will be carried out by Ofcom.

11. Conclusion

- 11.1 Despite the myriad calls for improvements to the regulation of the BBC, the Green Paper proposes to maintain the current approach, save for transferring the BBC Governors’ regulatory functions to the BBC Trust. For the reasons explained above, such a transfer will not remedy the current deficiencies with the regulation of the BBC.

¹⁵⁹ Paragraph 5.42 of the Green Paper.

¹⁶⁰ Summary of the Green Paper (page 11).

¹⁶¹ Paragraph 3.21 of Ofcom’s Response to the Green Paper dated 8 June 2005.

11.2 The Green Paper puts forward no credible reasons why the BBC Governors' regulatory functions should not be transferred to Ofcom.

11.3 Even if all the BBC Governors' regulatory functions were not to be transferred to Ofcom, certain specific activities should be so transferred:

- neither the Executive Board nor the BBC Trust should adjudicate on complaints about the BBC – in order to have a fair and objective complaints procedure, Ofcom should be the adjudicator;
- the terms of the BBC's Fair Trading Commitment should be approved, and enforced, by Ofcom; and
- Ofcom should carry out all market impact assessments in respect of the BBC.

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