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Satellite & Cable Broadcasters' Group

Review of the BBC's Royal Charter

Submission from the Satellite and Cable Broadcasters Group

Executive Summary

The Review of the BBC's Charter provides a timely opportunity to re-evaluate its value and to redefine its role within today's increasingly competitive and converged multi-channel environment. In particular, this process must address the creative and commercial impact it has on thematic broadcasters in the satellite and cable sector.

Cable and satellite broadcasters operate in an extremely competitive and volatile environment, delivering choice and innovation to viewers without privileged access to spectrum or public funding.

The impact of the BBC on the cable and satellite channel sector is very significant. In recent years it has also been unpredictable, characterised by expansions into commercial and pay-TV activities that were never previously within the BBC's remit or experience.

The Satellite and Cable Broadcasters' Group (SCBG) therefore urges that during the process of Charter Review the BBC's role is scrutinised within the context of British broadcasting as a whole, and the secondary market in particular, with a view to:

- **establishing remits and responsibilities for the BBC that are appropriate for today's multi-channel environment**
- **defining a role for the BBC that takes into account its commercial impact on other consumer services and**
- **regulating the BBC's activities so that the private sector can make investment decisions on the basis of certainty.**

Furthermore, in recognition of the BBC's role within the broadcasting ecology at large, not as a stand-alone institution, the SCBG would emphasise that principles of transparency and fair competition be applied to its structure and governance as well as its remit.

Introduction

The Satellite and Cable Broadcasters' Group (SCBG) is the trade association for satellite and cable programme providers. Its members are responsible for more than 70 channels in the UK and in addition broadcast many more services from the UK to continental Europe and beyond. SCBG members collectively broadcast hundreds of thousands of hours of programming each year, though most channels remain highly targeted with audience shares ranging from less than 0.01% to 2% of digital viewers.

Satellite and cable broadcasters operate in an extremely competitive and volatile environment without the privileged access to scarce Government-controlled spectrum or must-carry status that is afforded to terrestrial networks. They are therefore unable to attract mass advertising revenues, and do not benefit from universally levied public funding - as the BBC does - with its substantial licence fee.

Instead, satellite and cable broadcasters depend entirely on their own programming investments and marketing initiatives to attract and keep audiences across a range of different broadcasting platforms. Our viability depends on an ability to adapt technological developments, respond directly to audience preferences and quickly absorb commercial pressures.

With the advent of digital technology 50% of all UK homes now subscribe to multi-channel television. Satellite and cable broadcasting offers viewers a wider variety and choice of channels, genres and programmes than all the terrestrial broadcasters combined. In all genres of programming – children and youth, art and music, news and documentaries, films and entertainment, sport, education, and ethnic culture – there has been an explosion of choice.

The development of multi-channel has also changed the way people watch television, giving viewers more control over the content they and their families watch, bringing them freedom to view in a way that suits their own interests and lifestyle. The majority of satellite and cable channels are thematic services, providing for individual tastes and interests, whether minority or mainstream. Sophisticated navigation software makes it relatively simple for most viewers to manage their viewing efficiently and to find what they want to watch. The growth of PVR technology will further empower viewers by allowing them more control over the scheduling of their viewing.

The incredible growth of digital TV as well as the emergence of new interactive and specialist services is the result of innovation by the satellite and cable sector. Investments pioneered by this sector include services such as interactive news and sports, home shopping and even on-screen individual health advice. In these areas the BBC has been very much a follower. Indeed, its efforts to catch-up with the commercial market often result in significant distortions without the evidence of market failure that would ordinarily justify their presence.[1]

The future of the BBC is crucially important to the satellite and cable sector, and to its ability to continue delivering increased choice and value to consumers. Although satellite and cable broadcasting is one of the fastest growing areas of the UK communications industry, its constituents are mostly small and medium-sized companies that are acutely sensitive to the actions of the larger players in the market. If the consumer benefits brought by the satellite and cable industry are to continue to develop, the BBC's role in the UK broadcasting ecology must be better defined, better understood in terms of the impact that the BBC has on investment incentives across the sector, and better controlled.

The value of the BBC

The Charter Review should focus on the BBC in its present context, its value therein, and its direction and subsequent market impact over the period of the Charter. It should establish what current and potential future BBC activities, considered within the output of the communications industry as a whole, justify and will continue to justify compulsory public funding. In so doing, the Government must consider for each activity the impact on the market, the extent to which there is an economic market failure and to the extent there is found to be a market failure the analysis must also consider the duration of time for which it is expected that there will continue to be a market failure in the absence of the BBC.[2]

The BBC can and should continue to play an important role within the broadcasting landscape. It can contribute to democracy, education and culture across the diverse regions of the UK. Its privileged status should enable it to take creative risks that can then be exploited to the benefit of all players in the markets as well as consumers. Furthermore, its public service channels should

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[1] BBC News 24, BBC 3, many of the elements of BBCi's Online service (in particular their online games service) and the supply of BBC News services to mobile phones are good examples of this habit of entering markets where there is already significant commercial investment and no economic evidence of market failure.

[2] In most cases market failures are a time-specific concern. Intervention can actually serve to extend the duration of the market failure through reducing commercial operators' incentives to invest.

provide a benchmark not only in terms of creative leadership and trust but also in training and diversity.

However, the broadcasting environment has changed since the last Charter. The scope and increasing commercialisation (both in terms of its focus on ratings-based competition and in its ambitions to generate commercial income via its own commercial subsidiaries) of the BBC does not always serve the public interest in the new multi-channel environment.

Firstly, its massive investment of public money into new digital channels has not been justified by their distinctiveness, cost-effectiveness or public appeal. The forthcoming review of the BBC's digital channels must contain a clear commitment to defining objective criteria against which the services' future presence can be justified. It should not simply be about amending the terms of the channel's approval – where the channels have failed to meet their remit, or the channel no longer meets a market failure, the approval should be withdrawn.

Secondly, the BBC's position as a major commissioner, broadcaster and distributor of original programming in the UK has restricted competition for programme rights in the secondary market. New channels offering viewers choice and variety in genres such as arts, children's, comedy or documentary are often unable to bid fairly for programming because the BBC is warehousing content, or using its strong market position to insist on controlling secondary rights. The preferred partner status of BBC Worldwide and its close proximity to the commissioning and development processes has made it difficult for other "third parties"[3] to compete fairly for secondary exploitation. We welcomed the recommendation from the ITC Programme Supply Review for a detailed competition analysis of the secondary rights market, but remain concerned that there are currently no plans to act on this. Furthermore, we believe that licence fee payers' interests would be better served by a proper functioning market for secondary rights exploitation.

The UK secondary market is still maturing, and has developed enormously since the approval of the last BBC Charter – from 40 channels in 1996 to over 200 channels today and greatly increased levels of interactivity. Attempts to limit or calibrate the BBC's impact since then – for example in the approvals process for BBC Digital Services – have been piecemeal, inconsistent and lacked the necessary level of evidence and economic scrutiny. In particular,

[3] The BBC's Fair Trading Commitment as well as European rules on the use of State Aid requires that the BBC treat BBC Worldwide as it would any other third party. The situation whereby BBC Worldwide benefits from preferred partner status is not compliant with those obligations.

there has been little economic analysis of market failure and the extent to which the continued presence of the BBC in some markets actually causes market failure and/or the reason why the market failure continues to be a concern.

To fulfil the Government's stated desire that the organisation provide "venture capital for the creative industries" and to ensure compliance with both the Fair Trading Commitment and with European rules on the use of State Aid these important secondary market issues must be addressed.

Governance, regulation and constitution

It is neither reasonable in theory nor effective in practice for one body to be responsible to consumers both for managing and for regulating a publicly funded institution. In the case of the BBC, the conflict between these two roles has placed increasing strains on its governing body and is responsible for the regulatory capture identified by Lord Hutton. This is not the only example of the Governors failing in their duties to effectively regulate the BBC.[4]

The creation of Ofcom as an over-arching regulator for the communications industry provides an opportunity to relieve the BBC Governors of their regulatory role, for which they are not equipped or resourced[5], while maintaining their important position as independent public trustees to whom the executive management reports. The even-handedness and consistency that a single regulator provides will increase industry and public confidence in regulation and reflect the fact that broadcasting is now a single industry of many component parts including the BBC.

The SCBG further recommends that the Charter and Agreement, under which the BBC presently operates, is replaced by an Ofcom licence in common with all other public and private broadcasters. The terms of such a licence would protect the BBC's independence from Government and set a formula for its funding, as well as defining clear purposes and limits for its range of services and activities. In particular, the licence would empower Ofcom to

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[4] The continued failure of the BBC to meet its statutory obligations on commissioning from UK independent producers is a clear breach both of public law and the Charter, but it is not obvious that Governors have taken action to force the BBC to amend its commissioning strategy. In addition, a review of the BBC's Fair Trading Bulletin demonstrates the weakness of many of the BBC's defensive arguments in face of a complaint – however the Governors appear to accept these arguments with little questioning or independent scrutiny despite their ability to seek advice from external sources.

[5] The regulatory framework within which the BBC functions is more complicated from both a legal and economic standpoint than it was 10 years ago, yet the Board of Governors has not evolved to include specialists in competition law and economics. In addition, the Board does not have adequate resources to address the complex economic arguments that modern regulation requires. They are dependent on the resources of the management so it is unsurprising that there is regulatory capture.

regulate the boundaries between the BBC's public service and commercial activities. Where the BBC was permitted to continue to operate commercial channels, such as BBC World[6], Ofcom should be required to undertake regular benchmarking exercises to ensure compliance with the relevant prohibitions on cross-subsidy. The industry has little confidence in the system whereby the BBC's management undertakes the exercise and then seeks the approval of the findings by the Governors.

Under this proposal, Government and Parliament would remain ultimately responsible for the BBC and for the principal aspects of UK communications policy. But the Department of Culture, Media and Sport would no longer have responsibility for setting the level of BBC finance, approving both publicly-funded and commercially-funded new BBC services, mandating the BBC's promotion of new technology or appointing the BBC's Governors.

The radical decision to give the Bank of England independent powers has revolutionised public financial policy without reducing the Government's authority. An Ofcom licence, held on the public's behalf by the BBC's Governors, could sweep away the anachronisms of the Royal Charter and provide an independent regulatory system appropriate for the 21st century.

Accountability

The SCBG recommends that proper accountability for the BBC will be achieved by:

- **Bringing its regulation under Ofcom**
- **Ensuring transparent separation of its commercial activities from publicly funded activities**
- **Opening up its expenditures to full public scrutiny**

[6] Which is licensed by Ofcom.