



# **Proposed Changes to the BBC iPlayer**

Response to Ofcom's Call for Evidence

## 1 Executive summary

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Ofcom's BBC Competition Assessment ("BCA") of the changes proposed to the BBC's iPlayer is a significant undertaking, and the first major review of the BBC's public service activities under the new regulatory framework overseen by Ofcom. It is therefore essential that Ofcom follows its procedures and conducts a robust and comprehensive assessment of the BBC's proposals and procedures to demonstrate to all interested parties the effectiveness of the regime.

Ofcom's announcement that it intends to complete this BCA in half the 'standard' time does not give stakeholders confidence that its assessment will be sufficiently robust or comprehensive. A 10-day period for responses to this call for evidence has exacerbated that view.

This is particularly the case when the BBC's Public Interest Test ("PIT") process was fundamentally flawed by its failure to consult appropriately with interested parties, as it is required to do, as a result of its refusal to adequately define the proposed changes to the iPlayer.

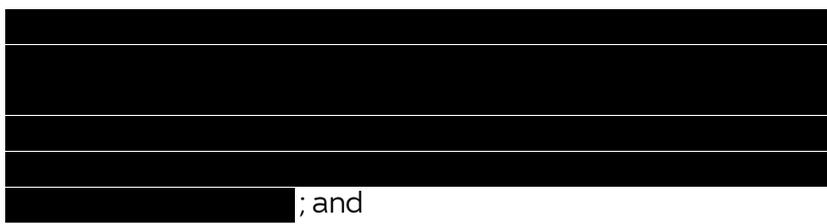
The BBC continues to obfuscate by making 'indicative' proposals, and asking Ofcom to approve unrestricted, and unregulated future growth in the service as part of a '*level playing field*' for the Licence Fee funded BBC.

Ofcom's first task must be to define the scope of the changes being assessed. Having done so, Sky is relying on it to consult further with stakeholders to obtain views on their impact on the market or send the proposals back to the BBC to re-take the PIT and allow the BBC to consult with industry.

In the short time Ofcom has allowed for stakeholder views on the PIT, Sky makes the following points in addition:

- The BBC's assessment of the public value of the proposals fails adequately to address their overall cost to the BBC and the impact that will have on its core Mission and Public Purposes. It is self-evident that the proposals will reduce the money available to the BBC to create new public service programming at the same time that the BBC pleads poverty over its ability to meet its obligations elsewhere;
- Any description of the proposed changes to the iPlayer should include planned functionality changes as these may have a material impact on any competition concerns as well as the likelihood of the proposals at driving increased viewing;
- Having accepted that the proposals constitute a material change likely to have a material adverse impact on fair and effective competition, Ofcom should conduct a thorough assessment of all

relevant theories of harm and should not dismiss theories of harm by reason of expediency or before receiving stakeholder views or evidence. Even then, Ofcom is under a continuing duty to protect fair and effective competition and must properly assess the risks of each theory before approving the proposals;

- If approved, the proposals increase the BBC's incentives to favour its iPlayer app over other forms of distribution, including Sky's integrated service. Whilst the BBC seeks to neuter any concerns over distribution by stating that the expanded content will be available across platforms distributing the BBC iPlayer, Sky notes that
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  - Second, the wide availability of BBC public service content, outside of the BBC's iPlayer app would mitigate the potential competition concerns identified and should be considered as part of this BCA.

The availability of subsequent regulatory processes relating to distribution of BBC content does not remove Ofcom's duty to consider the risks now.

## 2 The importance of Ofcom's BCA

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### 2.1 The BBC represents a significant state intervention

Given the potential impact of changes to key BBC services such as the iPlayer, it is critical that such proposals are subject to the highest degree of regulatory scrutiny before implementation.

The BBC is the principal public service broadcaster in the UK and represents a significant state intervention into the broadcasting sector. The BBC is funded by a mandatory licence fee of £154.50 each year which, subject to some exemptions, is payable by every UK household watching linear or catch-up TV. In 2017/18, the Licence Fee provided the BBC with £3.8bn of guaranteed revenue, which it supplemented with other revenues from commercial ventures and investments, to bring its total revenue to over £5bn. The BBC enjoys a number of other regulatory benefits, including prominence for its linear channels within electronic programme guides and privileged access to spectrum. The BBC's linear channels attract around 28% viewing share<sup>1</sup> while it reports having a 15% share of on-demand viewing.

The BBC's public ownership, funding method, remit and scale mean that it has the potential to have a significant impact on both the interests of UK television viewers and competition in the UK TV sector. The BBC's special status justifies the additional regulation to which it is subject beyond the rules applicable to the commercial public service broadcasters and commercial broadcasters. This regulation is set out in the BBC Charter, Framework Agreement and Ofcom's Operating Framework. It is in this context that Ofcom directed the BBC to carry out a PIT in respect of its iPlayer proposals, and that Ofcom has launched a BCA and the present consultation.

### 2.2 The BCA is a key aspect of Ofcom's oversight of the BBC and its activities

The BCA is a key aspect of Ofcom's oversight of the BBC and its activities, in particular Ofcom's duty to protect fair and effective competition<sup>2</sup> and comprises:

- a) a review of the procedures the BBC has followed in its Public Interest Test ("PIT") (including the BBC's consultation with third parties);
- b) a review of the BBC's assessment of public value;

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<sup>1</sup> BARB data.

<sup>2</sup> In addition to Ofcom's general duty to further the interests of citizens and promote competition under the Communications Act 2003, the BBC Charter also requires Ofcom to set requirements in the BBC's Operating Framework to protect fair and effective competition in the UK in relation to material changes to public service activities proposed by the BBC (Article 46(5) of the BBC Charter).

- c) Ofcom's own assessment of whether the changes that would result from the BBC's proposal would have an adverse impact on fair and effective competition; and
- d) a concluding assessment of whether the public value of the proposal justifies any adverse impact it may have on fair and effective competition.

Where Ofcom decides that a proposed change is a material change, Ofcom "must proceed to make a determination [...] having carried out a competition assessment [...] or a shorter (less than 6 months) assessment".<sup>3</sup>

The full six-month BCA provides an opportunity for Ofcom to carefully assess both the public value and the potential competition impacts of the BBC's proposals before deciding whether the BBC may proceed.

The BCA is also key to clearly defining the BBC's public service remit and ensuring compliance with EU state aid rules. In this regard, the European Commission states that:

*"The definition of the public service mandate by the Member States should be **as precise as possible**. It should leave **no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not**. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.*

*Clear identification of the activities covered by the public service remit is also **important for non-public service operators, so that they can plan their activities**. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance". (emphasis added)<sup>4</sup>*

As demonstrated below, the BBC is seeking a broad approval to develop the iPlayer without regulatory scrutiny and without boundaries. Such an approach is not compatible with Ofcom's Operating Framework or state aid rules.

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<sup>3</sup> Clause 9(2) of the Framework Agreement.

<sup>4</sup> Articles 45 and 46, Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01).

### 3 The BBC's PIT process was flawed

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#### 3.1 The BBC failed to consult properly on clearly defined proposals

Ofcom's role in scrutinising the BBC's proposals is even more important given the BBC's failings in its own consultation process earlier this year. As outlined in Sky's response to the BBC's consultation,<sup>5</sup> the paucity of information provided by the BBC made it impossible for stakeholders to comment meaningfully on their likely impact on fair and effective competition, or their public value.

As Ofcom noted when finalising the framework for regulating the BBC's impact on competition:

*"We noted that, when carrying out its public interest test, we expect the BBC to consult interested parties to understand and assess the scale of market impacts associated with its proposals. We made clear our expectation that third parties would engage 'effectively' with the BBC's work at this stage, and that the information shared by the BBC should be sufficiently detailed to allow stakeholders to understand a proposal fully and provide constructive input."*  
(emphasis added)

It was apparent at the time the BBC 'consulted' stakeholders that it had failed to meet this expectation.

Further, while the BBC has now provided Ofcom with indicative volumes of programmes that it expects to make available over the next three years (if its proposals are approved), it explicitly resists regulatory restrictions on the volume of additional content or duration of availability, stating that:

*"We believe that the current regulatory approach, based on setting arbitrary limits, has become outdated in a fast-changing market. It leads to unnecessary restraints on our ability to deliver what our audiences expect.*

*Instead, we think the BBC should be free to operate on a level playing field with our competitors – shaped by audience need, and within the very real constraints of the BBC's budget and the rights we can acquire in the market".<sup>6</sup>*

The BBC's rejection of any limitation being placed on the expansion of the iPlayer (either in terms of volume or type of content, duration of availability,

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<sup>5</sup> Sky's response to the BBC iPlayer Public Interest Test Consultation was provided to Ofcom under cover of an email dated 18 February 2019 and is annexed to this response.

<sup>6</sup> Paragraphs 38-39 of the BBC's PIT submission.

or functionality changes) not only undermines the BBC's own assessment of the impact of the proposals (since it contemplates increasing the volume of content available to respond to market changes and has not assessed the impact of doing so<sup>7</sup>), but also results in continued uncertainty for stakeholders as to the size and nature of the iPlayer. It therefore remains impossible for stakeholders to comment on the impact of the BBC's proposed changes.

If Ofcom limits its assessment to the BBC's indicative volumes, then any approval of the BBC's proposals should also be limited to such indicative volumes, with any further expansion requiring further approval, if material.

### **3.2 Functionality changes should also be consulted on**

Similarly, Ofcom's BCA should include an assessment of the BBC's proposals to make functionality changes to the iPlayer since these may be integral to the overall proposition and will have an impact on usage and viewing. Given the absence of any detail about the BBC's planned future functionality changes, either in the PIT consultation or the PIT submission, it will be necessary to require the BBC to set out its functionality proposals in detail. This will enable Ofcom and stakeholders to understand the impact of the BBC's proposed functionality changes and assess their impact on viewing and on those distributing BBC content, like Sky.

Fundamentally, the BBC, as a public service broadcaster, must be required to present sufficiently detailed proposals to Ofcom and stakeholders to enable meaningful engagement and fulfilment of its obligation to consult interested parties as appropriate,<sup>8</sup> and to ensure compliance with state aid rules. So far, the BBC has failed in this regard and Ofcom should not endorse such an approach to changes to the BBC's public services.

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<sup>7</sup> Paragraphs 40-41 of the BBC's PIT Submission.

<sup>8</sup> Clause 7(5) of the BBC Framework Agreement.

## 4 The BBC's proposals raise potential concerns

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### 4.1 The BBC's proposals have the potential to impact fair and effective competition

The BBC is proposing to make more content available on iPlayer, for longer, moving away from its current permitted 30-day catch-up model to a service that, potentially, is not subject to any restrictions on the volume or type of content, nor the duration of availability.

Contrary to the BBC Board's view that its expanded iPlayer proposals are not material, Ofcom is unequivocal in its view that the BBC's proposals may have a significant adverse impact on fair and effective competition and would therefore constitute a "material change" to the BBC's UK Public Services. Ofcom has reached this view on the basis that the BBC's current proposals are even larger in scale, longer in duration and more far-reaching than the BBC's previous short-term proposals, which Ofcom also considered to be material.

The BBC's iPlayer proposals raise potential concerns, both in relation to public value and market impacts. The issues raised are not straightforward. This is apparent from the number and variety of stakeholder responses to the BBC's consultation, and the BBC's lengthy PIT submission and volume of supporting documentation and analysis, and Ofcom's own analysis.

Ofcom's guidelines state that a full BCA is more likely to be appropriate "[w]here a proposal raises large, complex and/or particularly contentious issues, potentially involving a number of interested parties and ways in which there may be an adverse impact on fair and effective competition".<sup>9</sup> The BBC's iPlayer proposals clearly meet these criteria, with competition concerns raised across the industry by broadcasters, VOD providers, platforms and production companies. Ofcom has rightly decided to launch a full BCA on the basis that "we do not consider a shorter assessment would be appropriate as we have already identified a number of potential competition concerns in our 2018 BBC iPlayer Materiality Assessment, which require fuller assessment".

### 4.2 The BBC's proposals could have a significant impact on public value

There are a number of questions and concerns raised by Sky and other stakeholders in relation to the public value of the BBC's proposals, to which the BBC has failed to provide an adequate response. In particular, it remains unclear exactly how the BBC plans to fund its proposals and what impact this may have on public value, particularly in terms of the direct costs to the BBC

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<sup>9</sup> 'Assessing the impact of proposed changes to the BBC's public service activities: Ofcom's procedures and guidance', published on 29 March 2017.

of securing the additional rights necessary, and the indirect costs comprising the loss of value to BBC Studios of content that was previously available for licence to third parties but which is no longer available, or the loss in value of those rights as a result of their extended availability on the iPlayer. It is critical that Ofcom explores these unanswered questions to ensure a thorough review of the public value of the BBC's proposals.

Whilst the BBC merely notes that the additional costs of acquiring rights for iPlayer will be met from future cost savings, no attempt is made to quantify those costs, or justify the additional benefit that the proposals provide against spending those cost savings on new programming or in some other way to benefit licence fee payers.

Furthermore, the BBC has failed to add to those costs the commercial revenues likely to be lost as a result of extended availability of content via the iPlayer. Sky recently entered into a commercial agreement with BBC Studios to distribute certain archive BBC box sets to its pay TV customers.

[REDACTED]

[REDACTED] It is therefore highly probable that the BBC's proposals would lead to a reduction in commercial revenues for the BBC, notwithstanding BBC Studios' commercial objectives. Ultimately, BBC Studios is owned and controlled by the BBC and implements the BBC's overall strategy. It does not act on an independent basis.

#### 4.3 Ofcom's BCA must address all potential harms identified

Ofcom has identified five potential ways that competition may be adversely impacted by the BBC's proposals. While Sky agrees that Ofcom has appropriately defined the potential harms, Sky is concerned that Ofcom only intends to focus its assessment on the first two potential harms (*'Impact on rivals' viewing reduces investment'* and *'Less BBC content on other platforms'*), as being the *"more plausible and significant risks"*, and does not plan to address the other three potential harms identified (*'Reduced Value of Secondary Rights'*; *'Unfairly favour BBC Studios'* and *'Restriction of Access'*) unless evidence of such potential harm is supplied by stakeholders.

Such an approach, at the outset of the BCA, appears arbitrary. Whilst Ofcom should not have to investigate all theories of harm, however remote; if it has identified potential risks, then it has a duty to investigate those risks. This is particularly the case where the BBC has limited stakeholder engagement to date in the manner described above, and where Ofcom has allowed a very short period to call for evidence.

Under Ofcom's stated procedures, stakeholders would have expected to have had a considerable period to consider clearly defined proposals as well as up to 6 weeks during which Ofcom considered the materiality of the

proposals before deciding to launch a BCA. The current process has avoided those steps.

It is therefore incumbent on Ofcom to assess all potential harms with the same rigour, and in particular those in respect of which stakeholders have expressed concern. Ofcom should not limit its focus to a subset of potential harms on account of its desire to complete the BCA within a shorter timeframe. Such an approach would be contrary to Ofcom's duties as a regulator.<sup>10</sup>

#### **4.4 Ofcom must assess the risk of restricted access to BBC content**

Ofcom is not proposing to address potential concerns relating to platforms' access to BBC content as existing regulation already addresses these concerns. Such an approach to analysing the impacts of the proposed changes is wholly inappropriate and would result in Ofcom failing to meet its regulatory duty in conducting the BCA. Ofcom cannot allow the BBC to make the proposed changes without first understanding their impact. Ofcom should not rely on subsequent regulatory procedures to redress harms that should have been dealt with during the BCA.

The proposed enhancements to iPlayer both in terms of content and functionality, may further incentivise the BBC to favour its own 'standard' iPlayer app over bespoke solutions such as Sky's integrated PDL service. Indeed, changing the distribution of BBC content is at the heart of these proposals, with the BBC seeking to make the BBC iPlayer a "destination in its own right". Clearly there is a material risk that, if permitted, these proposals will impact the BBC's incentives to make its content available outside of its wholly owned iPlayer service.

While the BBC PIT submission states that "*the BBC will continue to seek to distribute the UK Public Services in full to any platform that meets the conditions of the Distribution Policy*",<sup>11</sup> Sky has long experienced (and continues to experience) significant difficulties gaining access to iPlayer content and functionality across all of Sky's platforms, as further described in Sky's responses to the BBC's PIT consultation and to the BBC's consultation on its distribution policy.<sup>12</sup> For example, the BBC currently refuses to allow Sky to include its catch-up content in its Sky Go and Sky Q apps, or to distribute UHD versions of the FA Cup final and Wimbledon tennis finals via satellite – preferring instead to restrict access to the BBC iPlayer.

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<sup>10</sup> See footnote 2 above.

<sup>11</sup> Page 83 of the BBC iPlayer PIT submission.

<sup>12</sup> A copy of Sky's response to the BBC's consultation on its Distribution Policy was provided to Ofcom under cover of an email dated 13 April 2018 and is annexed to this response for convenience. A full set of annexes to this document can be provided on request.

There is a real risk that the BBC's proposed expansion of iPlayer exacerbates these pre-existing issues. Accordingly, any Ofcom approval of the BBC's iPlayer proposals should be conditional on the BBC allowing platforms such as Sky's access to the expanded catalogue of content and enhanced functionalities and formats. The interests of Licence Fee payers are clearly best served by an approach that facilitates widespread access to the content intended and paid for by them, on the platforms and services on which they choose to consume it.

#### **4.5 Ofcom must assess the risk to external UK producers**

Ofcom is also proposing not to address the potential impact on external UK producers. Ofcom's decision not to address the impact on the value of secondary rights appears to be on the basis that Ofcom has not yet been presented with any evidence that competition in the production sector could be harmed. However, given the number of stakeholders raising concerns about this issue, it is essential that Ofcom investigate this potential harm in more detail, in particular the extent to which the uplift in payments being offered by the BBC (in return for the additional rights sought) will compensate for the inevitable loss in secondary rights revenues and any impact that might have on producers' ability to fully finance productions.

#### **4.6 Ofcom must assess the risk of the BBC favouring BBC Studios**

Finally, Ofcom should also include in its assessment the potential risk that the BBC's proposals increase the incentives on the BBC to favour BBC Studios when making commissioning decisions. Ofcom asserts that existing regulation already addresses this concern. However, as noted above in relation to distribution, it is important that Ofcom considers this concern as part of the current BCA. It is self-evident that the proposals will increase the BBC's incentives to commission programmes from BBC Studios to give greater control over distribution rights and reduce costs. Ofcom's BCA must assess whether this will result in adverse impacts on fair and effective competition such as to outweigh any associated public value. Only Ofcom has access to the necessary data to evidence such risks. It cannot abrogate responsibility to *ex post* regulation.

## Annex 1 - Sky's response to the BBC iPlayer Public Interest Test Consultation, February 2019

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## Annex 2 - Sky's response to the BBC's consultation on its Distribution Policy, April 2018

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