



How Ofcom regulates the BBC's impact on competition: proposals for changes to guidance and requirements

Consultation response

22 February 2023

1. Introduction

1.1 Summary of the BBC's position

The BBC is focussed on delivering our Mission and Public Purposes for all audiences. Since 2017 the media market in the UK has changed significantly with new global players, more consumer choice and increasingly more services offered online. Ensuring regulation both holds the BBC to account whilst enabling the BBC to innovate and deliver great value to all audiences is critical.

Overall, we think that the regulatory system for assessing and managing the BBC's impact on competition has worked well over the first half of the Charter period. There have been improvements to the processes and procedures over the past five years on all sides, as the BBC, Ofcom and stakeholders have worked with a new regulatory regime. But the current system has too much of a linear focus, and can take too long in a highly competitive market place. This sometimes leads to licence fee payers losing out, and stopping the BBC deliver value at pace.

We think there are opportunities for the regulatory process to be more flexible, to conclude more swiftly, and to take account of the global nature of the media market – and the dynamic impact that has on competition in the UK. Speed is key to innovation, particularly in digital technologies, and where the BBC needs to deliver on consumer expectations – in order to fulfil our Mission and Public Purposes. We want to avoid unnecessary regulatory delays which reduces audience value.

We welcome the opportunity to respond to Ofcom's consultation – which addresses some of these issues. We have responded to Ofcom's specific proposals and observations in this document. We have also submitted evidence to the Government's Mid Term Review which is also looking at the BBC's regulatory regime – including issues around competition.

We agree with Ofcom in their overall assessment of the media market – and the BBC's place in it – and make some detailed suggestions in relation to both linear services and audio. We welcome Ofcom's market segmentation approach and assessment, which we consider to be very helpful. To that end we believe that specific changes could be made to the regulatory framework to allow the BBC to make changes more quickly if it is clear those changes are in a segment of the market where the BBC is unlikely to be able to have a significant adverse impact on competition.

We also agree with Ofcom's conclusion that there should be more flexibility in approach to competition assessments; and Ofcom's previous recommendation to government that a new UK public service should not automatically be regarded as a material change requiring a Public Interest Test. Both of these changes could relieve regulatory burdens and speed up decision making which would deliver improved audience value.

We also welcome Ofcom's recognition of the significant and valuable work the BBC has undertaken to improve how public value is assessed.

The BBC agrees with the principle that Ofcom set out in their consultation – that the BBC should positively engage with stakeholders. The BBC engages with stakeholders

regularly on a range of issues, including our plans and priorities, as well as partnership. We have worked closely with the NMA on local news partnerships (including the Local Democracy Reporting Service, the News Hub and the Shared Data Unit), commercial radio on Radioplayer, and the PSBs in a variety of areas.

Over the Charter period the BBC has improved how we engage and communicate with stakeholders, and in our overall transparency – including responding to feedback from Ofcom. We welcome Ofcom’s support of this approach in updating their guidance.

We fully accept that the BBC should be held to account, and we are rightly the most regulated media organisation in the UK. However we think that adding an additional specific regulatory requirement on the materiality assessment process that is likely to predominantly impact the BBC’s non-material changes – i.e. changes that will not have a market impact – is disproportionate. We are concerned about Ofcom introducing new regulatory burdens with no evidence that the BBC has not met its existing obligations or there is any harm to fair and effective competition.

Whilst we agree with the principle of what Ofcom is seeking to achieve in their proposed changes to the Trading and Separation Requirements guidance in relation to secondary content sales, we think that Ofcom needs to look again at the precise wording to ensure that the guidance is both clear and workable.

The rest of this document responds to Ofcom’s consultation and proposals in detail. We would be very happy to discuss, or provide any further information which Ofcom may find helpful.

2. Ofcom's general views on the BBC's position in the audiovisual and audio sectors

We welcome Ofcom's analysis of the BBC's position in the audiovisual and audio sectors, and the implications this has for how Ofcom regulates the BBC's impact on competition.

2.1 Ofcom's general approach

We agree with Ofcom's observation that crowding out is the right market harm for it to focus on in the context of assessing the potential for a change to BBC services to have a significant adverse impact on fair and effective competition.

However, overall we would note that there is more evidence to suggest that the market has often responded to BBC changes with additional investment, innovation and creativity, than there is to support the view that changes to BBC services have had a negative crowding-out impact. This is, of course, the nature of competition.

Our investment in technology and the creative industries has always fuelled innovation, grown new markets, and created whole new creative ecologies. In 2007, when BBC iPlayer was launched, it was one of the first to market, a trailblazer and market maker for many of the streaming platforms that followed by acclimatising audiences to this mode of consumption. Ofcom should be able to take into account the ability for the BBC to crowd-in as well as crowd-out commercial activity when assessing the probability that a change to BBC services would have an impact on fair and effective competition. The ability of a public intervention to catalyse market growth and investment is recognised in other sectors – such as green investment – where an institution with a public service remit can take decisions that a commercial business would be unable to, de-risking and reducing the cost of an activity over the longer term.

We welcome Ofcom's commitment to continue to monitor market developments, as the level of competition faced by the BBC is only likely to increase over time. It will be necessary for the BBC to continue to evolve its services rapidly in response to evolving market dynamics and to innovate to deliver our digital first plans. Ofcom should have particular regard to different audience segments, where competition is fiercer and where the BBC faces the greatest challenges in delivering our Value for All strategy (e.g. younger audiences) as well as monitoring the overall market position. Ofcom should also monitor adjacent markets which are continuing to exert pressure on the media sector such as ad tech. We are supportive of Ofcom's continued publication of its market reports which are helpful in bringing data and intelligence from across the sector to provide a holistic picture of market performance.

It would be very helpful if Ofcom encouraged other providers to sign up for industry currencies (such as BARB and RAJAR) to allow for greater transparency across the sector. The BBC, Ofcom and other stakeholders rely on these data currencies when assessing the potential market impact of changes to BBC services. Therefore, ensuring all providers are captured accurately by these data sources can improve the robustness of these assessments. For example, the BBC's recent materiality assessment of changes to online local news services relied on industry standard Ipsos IRIS data. However, BBC analysis found that several local news publishers were excluded or inconsistently

captured in this data, meaning the calculated impact of the market impact of BBC changes was likely to have been overstated.

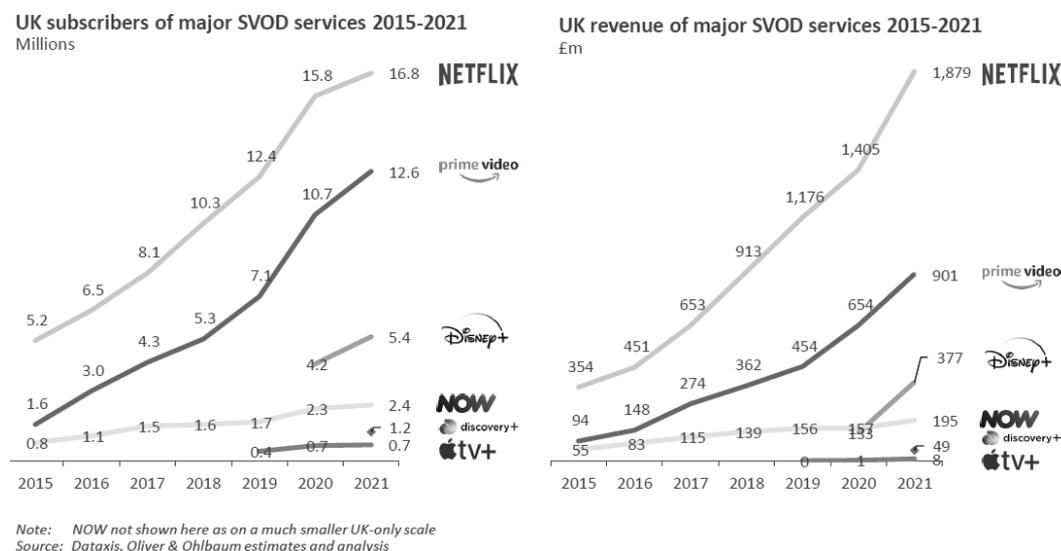
Finally, we would note that in all cases Ofcom retains the ability to undertake a BBC Competition Review (BCR) where it is concerned that existing UK Public Services are having a significant adverse impact on fair and effective competition. Ofcom has twice considered carrying out a BCR – in relation to BBC radio sports rights acquisition¹ and the market position on BBC Sounds.² While in neither case did Ofcom consider it necessary to proceed to a full BCR, it remains an ex-post regulatory tool at Ofcom’s disposal should legitimate concern about BBC competition impact arise.

2.2 Audiovisual services

We welcome Ofcom’s observations on the audiovisual market. We agree with the competitive dynamics outlined between linear channels, video-on demand services and adjacent services, such as YouTube and Facebook video sharing platforms. Below we set out our views on video on-demand and broadcast linear channels.

2.2.1 Video on-demand (VOD) services

We agree with Ofcom’s depiction of competition in the VOD market that both domestic and global providers are required to continually invest in and innovate their online services to maintain their current viewing share. The BBC and other domestic BVODs have faced sustained competition from SVODs who, until the recent cost-of-living crisis, have experienced continual growth in UK subscribers and revenues.



Source: O&O analysis on global SVOD streamers for BBC Policy, September 2021.

BBC iPlayer competes with VOD players on various aspects of its service – price of access, quality of experience (platform and content delivery) and content catalogue. Quantity and exclusivity of content are defining features that audiences use to distinguish and select VOD services. Global players tend to have higher spending power

¹ [Consideration of a request from Wireless Group Media \(GB\) Limited for Ofcom to launch a BBC Competition Review](#), Ofcom, December 2018.

² [Statement: Market position of BBC Sounds](#), Ofcom, November 2021.

than domestic players and greater ability to extend content rights across multiple territories meaning that global SVODs can compete more effectively on content catalogue than domestic BVODs whose content investment is restricted by advertising revenues or – in the case of the BBC – the licence fee.

The BBC has previously noted concerns over vertical integration, with several global SVODs (e.g. Amazon, Apple) having adjacent platform and device businesses with the opportunity to leverage their position in adjacent markets and to self-preference (e.g. preinstallation of own apps, SVOD trials offered as a complementary benefit). Not only does this competitive advantage increase pressure on domestic BVODs, it also allows global players to cross-subsidise SVOD content investment from other business areas. For example, content spend as proportion of global SVOD revenue was 206% for Amazon Prime Video and 894% for Apple TV+ in 2021 (analysis by O&O for BBC).

BBC iPlayer needs to adapt simply to keep pace with the market, so the BBC can continue reaching audiences and delivering on its mission and public purposes, not necessarily to gain market share. We therefore welcome and endorse Ofcom's view that specific changes to BBC iPlayer are unlikely to have a significant crowding out impact on competitors as any changes in viewing are, first, expected to come from other BBC (linear) services and, second, any increased viewing from commercial providers to be widely dispersed across multiple VOD players. Evidence from the BBC iPlayer II PIT suggested that the highest rate of diversion in viewing time, in response to increased BBC iPlayer catalogue, would come from Netflix rather than domestic BVODs.

2.2.2 Linear audiovisual services

In its discussion of linear audiovisual services, we have presumed Ofcom is referring to broadcast television channels (e.g. BBC One, ITV1 or Channel 4) rather than online linear streams of audiovisual content (e.g. FAST channels or live streams of sports or news on the BBC website).

Ofcom sets out the scale of the BBC portfolio's share of viewing in the context of all audiovisual viewing and notes that they "expect that a change to the BBC's linear services may have the potential to have a bigger impact on domestic competitors, and so could pose a higher risk of crowding out than changes to iPlayer." Although Ofcom also notes that the introduction of BBC Three and BBC Scotland "have not added significant viewing share, suggesting that it may be difficult in practice for the BBC's linear services to gain significant viewing at the expense of commercial providers".

We think it is important to note that most of the BBC portfolio's share is delivered by just BBC One and BBC Two. In January 2023, BBC One accounted for about 65% and BBC Two about 20% of BBC broadcast viewing. While both BBC One and BBC Two attract large audiences and deliver value by offering a wide range of popular and high-value British content, the BBC also operates a number of smaller channels with more niche content offerings and smaller audiences. These channels (including BBC Three, BBC Four, BBC News, CBBC, CBeebies, etc.) are all smaller than many commercial channels. In January 2023, ITV1, ITV2, ITV3, ITV4, Channel 4, E4, Channel 5 and UKTV Drama had larger viewing shares than BBC News, the next largest BBC channel after BBC One and BBC Two. Several of the BBC's channels are focused on meeting specific

audience needs, including the provision of UK language services, where cost and smaller audiences are likely to make these uneconomical for commercial players.

We think that Ofcom should consider the heterogeneity of BBC linear services, including their reach, target audiences and potentially competitor set when considering the risk of crowding out. The robustness of the broadcasting sector and the ability for linear channels to retain audiences, shown by the experience of BBC Scotland and BBC Three should also be factored into this risk assessment.

However, we also agree with Ofcom’s observation that “audiences are increasingly moving their viewing online, and the BBC’s strategic focus is on developing its digital services, so it seems less likely that the BBC will seek to make significant changes to its linear services that risk crowding out.”

It is also clear, given the current requirements of the Agreement, that if the BBC wants to launch a new broadcast TV channel this would require a PIT as it would be a new UK Public Service, regardless of what the market evidence referenced above suggest on substantive likely impact.

2.3 Audio services

We welcome and broadly agree with Ofcom’s observations on UK audio services and the nature of the dynamics between the BBC and commercial providers in both the linear radio broadcasting and online-only audio providers.

2.3.1 Online-only audio services

We appreciate Ofcom’s pragmatic approach to assessing BBC Sounds-only services, which acknowledges competitive conditions to be challenging and the presence of sizable global competitors providing online-only services that are close substitutes to BBC Sounds (e.g. Spotify, Amazon Music, Audible, Apple Music, Apple Podcasts) in addition to smaller UK providers. The BBC’s recent materiality assessment of changes to BBC Sounds showed the market for UK on-demand audio is dominated by Spotify in terms of reach, particularly for under-35s, accounting for 57% of weekly reach of audio services for 16-34s.

2.3.2 Broadcast linear radio services

Again we have assumed that Ofcom is referring to traditional broadcast radio (analogue and DAB) when referring to linear audio services, rather than online linear streams or listening to live radio on BBC Sounds.

In the medium term, traditional radio (analogue and DAB) will continue to be an important platform for BBC services and reaching audiences. Around 25% of radio listening takes place in-car. The most common in-car audio activity is listening to live radio on AM/FM (54% of people), followed by listening live radio via DAB (47%).³

Live radio audiences are transitioning online, with some audiences shifting their listening behaviour to online-only audio providers (i.e. music streaming, podcasts, audiobooks) and others continuing live radio listening over IP. Listening to live radio services

³ Ofcom Technology Tracker, 2022.

currently makes up about 60% to 65% of listening on BBC Sounds. Evidence from the Ofcom Technology Tracker 2022 survey suggests that a proportion of individuals already listen to live radio, podcasts and stream music via their mobile phone or via in-car infotainment systems with integrated streaming ability. Similarly, according to RAJAR, audiences are increasingly accessing live radio through IP at-home with smart speakers now accounting for 25% of live radio listening.

We anticipate that in-car and at-home streaming will increase – particularly amongst younger audiences – and for end-user devices support access to both live radio over IP and online-only audio on-demand streaming services. Therefore, we are likely to see increasing (and increasingly direct) competition between live radio services and online-only audio platforms as users increasingly access both type of audio from the same device (e.g. mobile device, smart speaker, in-car infotainment system) and these audio segments converge.

The BBC competes in both segments of the audio market, through provision of its BBC radio stations and the BBC Sounds product. We would welcome further guidance from Ofcom in how it plans to deal with these challenges and how this changes its approach to regulating the BBC's linear and on-demand audio services as these sectors become increasingly integrated.

2.4 Other areas

In its document Ofcom set out its views in relation to the audiovisual and audio sectors, noting that the majority of BBC activity and spending is directed towards these services and that these sectors have generated the most activity in relation to market impact assessment.

However, we would like to take this opportunity to make some observations on these other areas of BBC activity, including online news, education, sports, and other BBC output and services. Our general view is that these BBC services are unlikely to have a significant adverse impact on competition. However, this will, of course, depend on the nature of the proposed changes to BBC services and the market dynamics within that specific sector.

We recognise that the market conditions and therefore the impact of BBC services will vary across international, UK-wide, national, regional and local segments. For example, in assessing the proposed changes to BBC online local news provision in England, we recognised that the BBC is a significant provider in this market and that the challenges faced by commercial news publisher (e.g. transition from print to online consumption and impact on revenue streams, third-party intermediation) are exacerbated for smaller players within a local market.

Additionally, we consider that it is also important to note that proposed changes to BBC services are motivated by how we can better fulfil our Mission and Public Purposes, rather than the potential impact that a change will have on our competitors.

3. Ofcom's proposed changes to the guidance underpinning BBC competition regulation

3.1 Engagement with Ofcom and stakeholders during the materiality process

3.1.1 Ofcom's proposals

Ofcom has made various proposals to amend its requirements and guidance with regard to the BBC's approach to carrying out materiality assessments.

Ofcom proposes to introduce an enforceable requirement to ensure that the BBC informs stakeholders about planned changes which are likely to be subject to an assessment of materiality, including those that are likely to be non-material changes (as are the significant majority):

The BBC must publicise proposed changes to its public service activities in sufficient detail, and in sufficient time, to enable stakeholders to comment during an assessment of materiality by the BBC.

Ofcom is also proposing that its guidance should clarify its expectations of how the BBC should communicate its plans to stakeholders in the following way:

We would expect the BBC to explain what the change consists of, to allow stakeholders to comment on any concerns they have regarding the potential impact of the BBC's plans on competition.

One way in which the BBC can do this is through its annual plan, which the BBC is required to publish. The BBC's annual plan should give third parties a good understanding of the areas where important strategic thinking is taking place, and the changes to its services that the BBC is planning in order to deliver on its strategy, in sufficient detail to enable comment and debate. This should allow the BBC to engage with interested parties to identify which proposals might be material.

When the BBC develops plans outside the normal timescale for inclusion in the annual plan, it should use an alternative, consistent means of communication to enable potentially affected parties to easily access the relevant information.

Ofcom is also proposing to amend its guidance as follows:

The BBC should make reasonable efforts to seek dialogue with parties who may be affected by the change as part of its consideration of whether the change is material. We would expect the BBC to explain how it has engaged with stakeholders, and taken account of this engagement, as part of any materiality assessment.

The BBC should ensure that it is easy for stakeholders to raise concerns with the BBC – for example, by having a dedicated and monitored email inbox which stakeholders could use to get in touch with the BBC.

Ofcom is proposing to give greater clarity to stakeholders regarding how non-material changes are assessed:

We expect the BBC to engage appropriately with us to keep us apprised of its developments. As part of this engagement, when the BBC conducts a materiality assessment and finds a proposed change to be not material, we expect the BBC to send the materiality assessment to Ofcom for review. We consider this to be good practice.

3.1.2 *The BBC's response*

The BBC fully agrees with Ofcom's observations on the importance of transparency in relation to changes to UK Public Services. Transparency is enshrined in the Charter as one of the BBC's general duties. The Charter is also clear on transparency in relation to changes to UK Public Services, i.e. that the BBC's Annual Plan should include "any material changes to the UK Public Services and commercial activities".⁴ We have also responded positively to Ofcom's observations in its annual reports on the BBC in relation to transparency, and provided even greater transparency in response to that encouragement.

We welcome Ofcom's clarifications to the guidance which reflect what we do today, including sharing non-material assessments with Ofcom, which we started in good faith when the new regulatory arrangements were set up. We understand the importance of stakeholder engagement and think the updated guidance is helpful. Our only observation is that it is probably not helpful for Ofcom's approach to be so granular as to specify the mechanics of how we should work with stakeholders through dedicated email boxes and webpages.

The area where we do have significant concerns is introducing a new enforceable requirement on the BBC about how we conduct materiality assessments, and in particular, linked to non-material changes, which by their nature are very small.

It is worth recapping the BBC's approach to materiality. Since the start of the Charter Period the BBC has carried out 31 materiality assessments. Of these, 25 related to changes to the BBC's public services (i.e. UK public services or non-service activities) and six to changes to the BBC's commercial activities.

In four cases, the BBC decided that a Public Interest Test was required. These decisions led to the Public Interest Tests for BBC Scotland in 2017, BBC Three channel in 2020, and BBC iPlayer in 2022.⁵ In only one case – the proposed BBC iPlayer changes in 2018 – Ofcom disagreed with the BBC Board's decision that the change was not material and directed the BBC to carry out a PIT. Therefore, only 16% of materiality assessments related to a change that was in fact material.

In all other cases (97%), Ofcom has agreed with the BBC's decision on whether the change was material or not based on the analysis and evidence prepared by the BBC. Ofcom has never suggested that the BBC has made changes to its services that were

⁴ [Charter](#), clause 63.

⁵ The fourth case related to the proposed expansion of the BBC's audio portfolio. While the BBC Board decided that these changes were material and would require a Public Interest Test, these plans were cancelled in 2020 due to the impact of the coronavirus pandemic on advertising markets and therefore the PIT was never launched.

material and where there had not been a materiality assessment based on appropriate evidence and analysis. Each of these materiality assessments was shared with Ofcom as a matter of best practice. We have often answered further questions or carried out further analysis to aid Ofcom in their consideration of these materiality assessments.

As we set out in Annex 1, since the start of the Charter Period, the BBC has highlighted potential changes to UK Public Services and non-service activities in its Annual Plan and, when such proposals fell outside of the Annual Plan reporting cycle, has used other approaches such as speeches, blog posts, press releases, etc to flag changes to the wider market. Indeed, the BBC has gone significantly further than the requirement set in the Charter to include “any material changes” and has also identified those potential changes for which the BBC thinks it is likely it should carry out materiality assessments. Therefore, 26 of the 31 assessments were ultimately of non-material changes.

The BBC has also demonstrably engaged with stakeholders throughout the Charter period, but particularly more so since Ofcom raised issues of stakeholder engagement and transparency in its annual reports on the BBC. In particular, we have kept Ofcom apprised of our detailed and at times lengthy engagements with relevant stakeholders about all the materiality assessments we have carried out in the past few years including those for the BBC Three channel, the BBC Sounds Radio 1 Relax stream, BBC iPlayer further content availability, extending our online local news in England, and BBC Sounds on-demand speech and music changes (both the trials and the final proposals).

In considering Ofcom’s proposals for a new requirement, it is critical to note that the Charter and Agreement are explicit that it is for the BBC in the first instance to assess the potential materiality of changes to the UK Public Services, non-service activities and commercial activities.⁶ The Agreement clearly sets out the definition of a material change to the BBC Public Services:

- a material change means –
- (a) the carrying out of any activity as a new UK Public Service; and
- (b) any change to a UK Public Service which may have an adverse impact on fair and effective competition.⁷

Ofcom’s role is clearly set out also. It is for Ofcom to carry out a competition assessment of material changes following a BBC PIT and that if Ofcom considers that the BBC is making a material change without carrying out a PIT, it can direct the BBC to stop carrying out the change and to carry out a PIT.

Therefore, it is, under the scheme set out by the Charter and Agreement, for the BBC to make its own judgment on what material it includes and to bear the risk of it proving insufficient.

In summary, the BBC has fully complied with or exceeded its requirements under the Charter, Agreement, Ofcom’s requirements and guidance, and the BBC’s policy for material changes including its obligations around transparency. Ofcom has not

⁶ See [articles 20\(4\), 20\(5\), 36 and 37 of the Charter](#); [and clauses 7-9, 16-18 and 23-25 of the Agreement](#).

⁷ [Agreement](#), clause 7(7)

presented any evidence suggesting that harm to competition is occurring because of shortcomings in this area.

Ofcom's general duties as set out in the Communications Act 2003 are explicit that "regulatory activities should be ...targeted only at cases in which action is needed".⁸ Ofcom's own regulatory principles state that "Ofcom will operate with a bias against intervention, but with a willingness to intervene promptly and effectively where required" and "Ofcom will always seek the least intrusive regulatory methods of achieving its objectives".⁹

In the absence of any evidence of harm or need, it is difficult to see how Ofcom's proposal for a new requirement is consistent with its statutory duties and own regulatory principles. Given the BBC has met its obligations, and exceeded them in some cases, whilst continuing to be more transparent we think this requirement is not proportionate, and in any event we believe the updated guidance will be sufficient to ensure the BBC continues to be transparent and engage effectively with stakeholders.

3.2 Engagement during the PIT process

Ofcom proposes to strengthen its guidance to describe more precisely what information it expects the BBC to set out as part of its PIT consultation, with the following additional text:

[...] At a minimum, we would expect any BBC PIT consultation to include:

- a clear description of the change including identification of the content or functionality that is new;
- a firm indication of the scale of the changes;
- the target demographic(s);
- where possible, take-up forecasts of new content or functionality; and
- timescales for implementation of the change

3.2.1 The BBC's response

We welcome Ofcom's clarity regarding the information it considers the BBC needs to set out as part of its PIT consultation. We agree with nearly all the points Ofcom makes, and indeed have included nearly all this information in the consultations we have carried out as part of the PIT processes.

However, we do not think it will be possible or helpful to provide take-up forecasts of new content or functionality. Usage forecasts are at the heart of the market impact analysis central to the PIT process. As such it would not typically be completed at the time we were launching a PIT. We think it would be unhelpful to publish untested figures for take-up. Additionally we consider that other stakeholders are sufficiently sophisticated to make their own assumptions based on their expert knowledge of the sector to make meaningful representations at what is only the very first stage of the PIT / BCA process.

⁸ [Communications Act 2003](#), 3(3)(a).

⁹ [Regulatory Principles](#), Ofcom

3.3 Adding flexibility for Ofcom to decide whether consulting on materiality is necessary following a BBC PIT

Ofcom is proposing that it should have flexibility to decide whether a consultation is necessary at the initial assessment stage, i.e. immediately after the BBC has published its PIT and at the start of the Ofcom stage of the process.

3.3.1 The BBC's response

We welcome Ofcom's proposals. We support any changes that make the process regulatory approval process quicker, more proportionate and more efficient.

3.4 How public value should be considered within the competition framework

We welcome Ofcom's additions to its guidance on how the BBC conducts its assessment of public value through the PIT process. Ofcom has set out additional guidance in respect to:

- Identifying the public value that the change will deliver
- Identifying which audiences are likely to benefit from the public value generated
- The additional public value created by the change
- The period during which public value will be delivered; and
- How certain types of impact from changes to BBC services could generate significant public value

We provide comment on three of these areas below. With regards to those audiences that are likely to benefit and the period during which public value will be delivered, we agree with Ofcom's proposals in these areas and have no further comment.

3.4.1 Identifying the public value that the change will deliver

We agree with Ofcom that, as a mission-led organisation, the BBC's Mission and Public Purposes are central to the BBC's creation of public value. We welcome Ofcom's recognition of the work we have been undertaking as part of the ongoing development of measurement of Public Value. In particular the addition to the guidance at paragraph 5.26 of the 'aspects of public value' that follow the framework the BBC has developed alongside the Institute for Innovation and Public Purpose at UCL.¹⁰ We are continuing to develop our application of this framework through our PITs.

3.4.2 The additional public value created by the change

In each of its PITs to date the BBC has assessed the additional public value created by the change in relation to BBC services. We have also made assessments on the broad

¹⁰ Mazzucato, M. Conway, R. Mazzoli, E. Knoll, E and Albala, S. (2020). [Creating and measuring dynamic public value at the BBC. UCL Institute for Innovation and Public Purpose](#), Policy Report, (IIPP WP 2020-19).

impact of value generated by other providers – see for recent example section 4.5.4 of the BBC Three PIT and section 5.10.2 of the BBC iPlayer II PIT.¹¹

We welcome Ofcom’s statement recognising the challenges that assessing third party public value generation can bring:

[Ofcom] recognise the challenges for the BBC in assessing public value generated by other broadcasters, and so our intention is not for the BBC to assess – or quantify – the public value of each commercial provider. Rather, we would expect it to consider the additional public value a proposed change would provide, over and above the services currently available (from the BBC and others), and to describe this as part of its public value assessment.

We would further note that Ofcom should recognise that the BBC is constituted to deliver Public Value through the delivery of its Mission and Public Purposes which is the core of everything we do. This is distinct from the majority of third parties that do not have this explicitly in their constitution. In that vein we also welcome Ofcom’s comments around the value delivered through distinctiveness and will be building this more clearly into our future assessments.

3.4.3 How certain types of impact from changes to BBC services could generate significant public value

The BBC’s Mission and Public Purposes are a core part of its constitution but as a primarily content led organisation we can only deliver on the Mission and Public Purposes if audiences are consuming our content. While the BBC is continually developing its content and services to ensure they are distinctive and appeal to underserved audiences. Attractive underserved audience remains a challenge and is something we aim at address through our *Value for All* strategy.

Connecting with underserved audiences, as well as our core audience, is critical we therefore agree with Ofcom’s comment that:

changes that are directly linked to addressing the challenges the BBC faces in continuing to connect with audiences, and which are strongly linked to the delivery of its Mission and Public Purposes, have the potential to generate significant additional public value, both today and in the future.

We consider the addition to the guidance at 5.28 is therefore helpful for both the BBC and stakeholders in understanding the ongoing need for the BBC to develop its services.

¹¹ See <http://downloads.bbc.co.uk/aboutthebbc/reports/consultation/bbcthreepit/bbc-three-pit-submission.pdf> and <https://downloads.bbc.co.uk/aboutthebbc/reports/consultation/bbcoplayerpitii/bbc-iplayer-pit-statement.pdf>

4. Ofcom’s proposed changes to its requirements and guidance on the BBC’s commercial activities

4.1 Ofcom’s review of BBC Studios

Between 2019 and 2022, Ofcom has carried out a very thorough review of the interaction between BBC Studios and the BBC public service.

We welcomed Ofcom’s finding that that Ofcom was satisfied with the BBC’s approach to the exchange of information, our commercial governance structure and its reporting arrangements which ensure that there is appropriate separation between the public service and BBC Studios, and the approach to charging BBC Studios for the use of the BBC brand.

We have taken very seriously the concerns that Ofcom raised relating to the current approach to some of the BBC’s secondary content sales and some errors in relation to the supply and pricing of goods and services. We set out how we were responding to these concerns in a letter from the Chairman of the BBC’s Fair Trading Committee to Ofcom which has been published as part of this consultation process. We are implementing the processes we describe in that letter and will keep Ofcom up to date on our progress.

4.2 Secondary content sales

Ofcom is proposing to make a small amendment to the rules relating to transfer pricing as they relate to the public service supplying content or IP to BBC Studios for secondary exploitation.

B.5 Requirement B.3 does apply to the supply of content / IP for secondary exploitation by the Public Service to the Commercial Subsidiaries. The Public Service must ensure that the value it receives from the Commercial Subsidiaries is at least equivalent to the revenue the Public Service could have earned if the content/ IP for secondary exploitation was sold to a third party i.e. in line with the opportunity cost principle as set out in B.12.

4.2.1 The BBC’s response

We understand the principle that Ofcom is intending to implement with this provision. That is, that when it distributes content where the BBC Public Service controls the IP, BBC Studios should do so on terms that are carried out in accordance with normal market principles and at arm’s length and on commercial terms. We welcome Ofcom’s intention to provide greater clarity with regard to the application of this principle.

However, we are concerned with Ofcom’s proposed drafting of this condition. As currently drafted we do not understand how we – or indeed anyone – would be able to demonstrate that “the value ... is at least equivalent to the revenue [it] could have earned if ... it was sold to a third party”. First, this is clearly a hypothetical test, and it is not clear how the BBC would be expected to demonstrate compliance with a test framed in this way. Television programmes are not commodities with an easily pro-rata’d transfer price.

A large part of their value is determined not merely by their cost but by qualitative factors, such as the reputation of key creative talent involved, the intuition of commissioners as to whether a show will be a hit, competition from other commissioners, etc. Second, the BBC is not required to distribute its content through third parties and it is therefore not clear how Ofcom envisages the BBC would build up the evidence base that might be required. Third, it is inappropriate for the test to be that the value is “at least equivalent”. In a normal market one would expect to find prices or received value for a given service to be along a range. The BBC should be able to show that it is acting in line with normal market principles and on commercial terms that are comparable, but should not be restricted from entering into the same range of deals that a third party would be able to taking into account the different trade-offs that may be present in any given case.

We suggest Ofcom reconsider the drafting of this condition so that the agreed intention is achieved without the problems of practicability identified above. We will be happy to discuss further.¹²

4.3 Transfer pricing

We welcome Ofcom’s acknowledgement of the improvements that the BBC has made to its project management procedures, training and assurance processes and the importance of the work carried out by the BBC’s Internal Audit team.

Ofcom is proposing to introduce a new requirement allowing it to direct the BBC to undertake a review of its transfer pricing processes to ensure any further concerns are identified promptly:

Where directed by Ofcom to do so, the BBC must carry out a review of its internal controls and accounting processes to ensure they are adequate and enable the BBC to comply with our requirements with regard to the supply of goods and services as set out in Section B.

4.3.1 The BBC’s response

We consider that this is an appropriate and proportionate regulatory proposal. We also welcome Ofcom’s observation that it does not anticipate directing the BBC to undertake a review until these changes have had a chance to bed down and take effect.

The BBC will continue to review, monitor and improve its processes through our management oversight, ongoing internal audit regime, and annual independent Fair Trading assurance.

¹² A minor drafting note. It would avoid the need to renumber conditions B.5-B.35 if the new condition was made B.4A as is standard drafting practice in legislation and other Ofcom regulations such as the Operating Licence. This will help avoid confusion and will avoid the need to review and amend multiple pieces of internal guidance.

4.4 Proportionality of the regulatory requirements

As part of Ofcom's review, the BBC asked Ofcom to consider appropriate materiality thresholds for the transfer pricing requirements. We note that for the year ended 31 March 2022, the SLAs relating to PSB services to Studios accounted for £111m, representing 8.8% of Studios reported operating costs of £1,253m.

Ofcom considers that a materiality threshold would depend on the specific markets and the size of the specific operators which we aim to protect with our rules and that setting such a threshold would be speculative and could be inappropriate in those actual circumstances. Therefore, Ofcom is not proposing to set a materiality threshold. However, Ofcom has clarified that it would expect that the level of evidentiary and computational detail which the BBC applies in setting transfer charges is proportionate to the relative size of those charges.

4.4.1 The BBC's response

We welcome Ofcom's clarity that they would have lower expectations of the evidentiary and computational burden for transfer pricing arrangements for smaller transaction types.

For the avoidance of doubt, the BBC was never suggesting that these smaller SLAs should be exempt from all transfer pricing rules, but merely that the specific reporting and monitoring requirements could be reduced or that we could bundle these together.

The BBC having over 30 separate service level agreements between the BBC Public Service and BBC Studios, the significant majority of which have relatively low values and/or relate to business support type services (e.g. procurement, marketing, communications, etc.), many of which are merely a pass through of a proportionate share of a third-party supplier contract, and with individual values lower than 0.1% of BBC Studios' cost base. We cannot see any scenario in which these transactions could distort the market or create an unfair competitive advantage for BBC Studios.

We will work with the guidance that Ofcom has provided to establish a proportionate evidentiary and computational approach for these smaller transaction types.

Annex 1 – Transparency of UK Public Service materiality assessments

Issue	Transparency notes	Decision	Date of assessment
BBC Children's investment	British Bold Creative , 2015 Annual Plan 17-18 , p.11 Annual Report 17-18 , p.123 Media release , July 2017	Not material	April 2017
BBC Wales Charter Reinvestment	British Bold Creative , 2015 Annual Plan 17-18 , p.28 Annual Report 17-18 , p.123 Media release , June 2017	Not material	May 2017
BBC Scotland channel	Annual Plan 17-18 , p.27 Annual Report 17-18 , p.123 Annual Report 18-19 , p.148 Media release , February 2017	Material	May 2017
BBC Northern Ireland investment	British Bold Creative , 2015 Annual Plan 17-18 , p.29 Annual Report 17-18 , p.123 Media release , April 2017	Not material	July 2017
Live Sport Streaming	Annual Plan 17-18 , p.22 Annual Report 17-18 , p.123 Media release , November 2017	Not material	July 2017
BBC Ideas	British Bold Creative , 2015 Blog post , July 2017 Annual Report 17-18 , p.123	Not material	September 2017
Launch of BBC Sounds	Annual Plan 17-18 , p.23 Annual Report 17-18 , p.123 Annual Plan 18-19 , p.6	Not material	February 2018
BBC iPlayer 2018/19 extended availability	Annual Plan 18-19 , p.6 Annual Report 18-19 , p.148 Annual Plan 19-20 , p.35 Annual Report 19-20 , p.120	Not material	May 2018
BBC Sounds – phase 2 (streaming and aggregation)	Annual Plan 18-19 , p.6 Annual Report 18-19 , p.148 Annual Plan 19-20 , p.36 Extensive discussions with stakeholders	Not material	July 2018
Adjustment to BBC Scotland hours for access services	Annual Report 18-19 , p.148	Not material	March 2019
Own It App	Media release , November 2018 Annual Plan 19-20 , p.35 Annual Report 19-20 , p.120 Media release , September 2019	Not material	September 2019
BBC Sounds – phase 2 supplementary assessment	Annual Plan 19-20 , p.36 Annual Report 19-20 , p.120 Extensive discussions with stakeholders	Not material	November 2019
BBC Voice Assistant	Blog post , August 2019	Not material	January 2020

	Annual Report 19-20 , p.120 Blog post , June 2020		
BBC Classical Music Archive	Tony Hall speech , October 2018 Annual Report 20-21 , p.134	Not material	July 2020
BBC Sounds – Radio 1 Dance stream	Annual Report 20-21 , p.134	Not material	July 2020
BBC Three channel	Media release , March 2021 Annual Plan 21-22 , p.40 Annual Report 20-21 , p.134 Annual report 21-22 , p.145	Material	February 2021
BBC Sounds – Radio 1 Relax / Wellbeing stream	Annual Plan 21-22 , p.40 Annual Report 20-21 , p.134	Not material	March 2021
BBC Sounds on-demand speech and music trials	Annual Plan 21-22 , p.40 Annual report 21-22 , p.145 Online article , January 2022 (updated June 2022) DG’s Digital First speech , May 2022	Not material	December 2021
BBC iPlayer further content availability	Annual Plan 22-23 , p.43 DG’s Digital First speech , May 2022 Media release , May 2022	Material	April 2022
Extending online local news	Annual Plan 21-22 , p.41 Annual Plan 22-23 , p.35 Director Nations speech , April 2021 DG’s Digital First speech , May 2022	Not material	September 2022
BBC Sounds on-demand speech and music changes	Annual Plan 22-23 , p.44 DG’s Digital First speech , May 2022	Not material	February 2023