

How Ofcom regulates the BBC: A review – consultation

ITV plc response

Summary

The BBC is the cornerstone of UK PSB, benefiting the UK culturally, democratically and economically as part of the wider PSB system. But as Ofcom has acknowledged in its statement concluding its *Small Screen: Big Debate* process, the PSB system is facing profound challenges and urgent reforms are needed if it is to thrive in future.

The BBC is not immune from these challenges. In this context, we therefore recognise Ofcom and the BBC's desire for a regulatory framework that is more flexible and more focused on audience outcomes. And we share the aspiration for a PSB system fit for a digital age. As such, we support the broad direction of travel that underpins Ofcom's areas of focus for its review of the BBC's regulatory framework – and its comparable work in relation to the framework for the other PSBs more broadly, as set out in Ofcom's *Small Screen: Big Debate* statement.

At the same time, it is right to expect that the regulatory framework for the BBC takes into account its multi-billion-pound public funding settlement and its resulting duties to maximise its distinctiveness and to minimise the BBC's impact on the wider market. The unique scale of the BBC's public funding means it cannot be given unfettered discretion in determining its own regulatory framework and performance measures.

We are concerned that Ofcom's proposed approach – to move to a more BBC-led Operating Licence regime focused solely on public value – could risk inadvertently decreasing the BBC's distinctiveness and increasing the BBC's impact on the market due to the BBC's apparent focus on delivering reach, share and volume of viewing at the expense of other outcomes.

The BBC's approach has been allowed to develop in part because the current system of BBC regulation (and Ofcom, in its articulation of its proposed scope for this review) has attempted to decouple how the BBC is held to account for the delivery of its mission from how the BBC's market impact is assessed. But this distinction is artificial. It is the BBC's approach to defining its strategy, its articulation of 'public value', its editorial strategy and the practical ways in which it delivers these that determines the scale of the impact it has on the wider market. Ofcom needs to involve itself in issues which may appear editorial in nature – because they have a profound effect on the BBC's market impact

It is not inherently problematic for the BBC to pursue scale and popularity in reaction to audience fragmentation and changing behaviours (especially amongst younger viewers). However, the key challenge for Ofcom is examining how the BBC is choosing to meet this challenge, and the impact these choices are having on the wider market. For instance, expanding iPlayer consumption might be viewed as a legitimate response to declining linear viewing. But if, as seems to be the case in part, it is being increased through acquisitions such as *The Fresh Prince of Bel Air* or *Pokémon*, at the expense of investment in original and distinctive UK content, then there are questions to be answered. Similarly, BBC Three's

consumption might well be increased simply via a direct transfer of linear share from rival channels if it returns to air as planned.

Given this, it is vital that Ofcom – under the more fluid and BBC-led regime it envisages – ensures that it does not inadvertently encourage the BBC to conceive of success purely on the basis of the scale of its viewing (e.g. crude audience share metrics) or its broad-brush appeal to younger viewers, but takes a more nuanced view of what content is delivering that consumption, the distinctiveness of that content, and the extent to which viewing has been achieved at the expense of others in the market.

This is particularly important as the BBC is increasingly looking to build scale to compete with major global players. This global focus can often, when coupled with the BBC's extensive public funding, have serious implications for its UK competitors and partners.

Allowing the BBC more flexibility whilst at the same time ensuring that its market impact will be minimised will mean resetting expectations about what 'good' performance looks like for the BBC in an age of extensive competition. Some declines in the sheer volume of viewing are to be expected in a world of near-infinite choice – and should be viewed as a sign of the benefits of competition rather than an under-performing BBC.

In designing a more BBC-led approach to the Operating Licence, Ofcom will need to ensure that the BBC is required to carry out an assessment of the distinctiveness that its proposed Operating Licence will deliver, and the competitive impact that it will have. The BBC's proposals should be subject to public scrutiny given its public funding. Ofcom will also need to be sure that the BBC has pursued alternatives that reduce its impact on the wider market [38].

It will also be crucial to improve the extent to which the BBC provides meaningful information about its future plans to the public. Its current approach, through its annual plan, provides insufficient clarity and detail about its intentions even in the coming year, let alone over the longer term. It also tends to focus on headline initiatives rather than its more detailed plans for delivery, where much of the market impact can be hidden.

Ofcom should consider what tools it needs to ensure that it can properly examine the BBC's proposals in a timely and evidenced manner – and what actions it can take in the event the BBC fails to protect the wider market. It will also need to be more inquisitive about the distinctiveness of the BBC's content – a core aim of the current Charter – where we believe there has been insufficient scrutiny to date.

It is crucial that the BBC's regulatory framework adapts to the challenges arising from rapid market and consumer changes. This will help ensure that the BBC can continue to play a central role in a diverse and plural system of public service media, and the UK's wider creative economies. It is equally important that the reformed regime better holds the BBC to account for the distinctiveness of its content and the impact it has on the market. Such accountability need not be at the expense of delivering the BBC's mission and purposes, and might even improve outcomes for UK licence fee payers, citizens and consumers.

Response to consultation questions

Question 1: Do you agree with the proposed scope of the review of BBC regulation as set out in this document? If not, please explain the areas where you think changes should be made.

The BBC is the cornerstone of UK PSB, benefiting the UK culturally, democratically and economically as part of the wider PSB system. But as Ofcom has acknowledged in its statement concluding its *Small Screen: Big Debate* process, the PSB system is facing profound challenges and urgent reforms are needed if it is to thrive in future.

The BBC is not immune from these challenges. In this context, we therefore recognise the changes in the market that drive Ofcom and the BBC's desire for a regulatory framework that is more flexible and more focused on audience outcomes. And we share the aspiration for a PSB system fit for a digital age. As such, we support the broad direction of travel that underpins Ofcom's areas of focus for its review of the BBC's regulatory framework – and its comparable work in relation to the framework for the other PSBs more broadly, as set out in Ofcom's *Small Screen: Big Debate* statement.

At the same time, it is right to expect that the regulatory framework for the BBC takes into account its multi-billion-pound public funding settlement and its resulting duty to minimise the BBC's impact on the wider market. The unique scale of the BBC's public funding means it cannot be given unfettered discretion in determining its own regulatory framework and performance measures.

We are concerned about the lack of opportunity for formal input from stakeholders beyond this initial consultation on the scope. The effectiveness of the regulatory framework for the BBC is likely to hinge on the detail of its design. Should any changes to the BBC's regulatory framework be considered, we believe that these should be subject to public consultation.

Our main concern about the structure of Ofcom's proposed review is that it tries to maintain the current separation of public value – the BBC's delivery of its mission and purposes – and market impact. This makes it difficult to address the problems arising under the current system, such as the lack of scrutiny of the impact that the BBC's editorial approach to increasing use of the iPlayer is having on the wider market (in contrast to the scrutiny that was given to its proposals for more structural reforms, such as the expansion of content windows and box sets).

We are also concerned that Ofcom's proposed approach – to move to a more BBC-led Operating Licence regime focused solely on public value – could risk inadvertently decreasing the BBC's distinctiveness and increasing the BBC's impact on the market due to the BBC's apparent focus on delivering reach, share and volume of viewing at the expense of other outcomes. We explore this in more detail in answer to questions 2 and 5 below.

Question 2: Do you agree with the proposed approach to reviewing the BBC Operating Licence? If not, please explain why.

Question 5: Do you agree with the issues we have identified with the processes for assessing the competitive impact of changes to the BBC's UK Public Services? If you consider there should be changes to these processes, please set out what these are and, if possible, provide any relevant evidence.

The current system of BBC regulation (and Ofcom, in its articulation of its proposed scope for this review) attempts to decouple the delivery of the BBC's mission from the BBC's market impact. But this distinction is artificial. It is the BBC's approach to defining its strategy, its articulation of 'public value', and the practical ways in which it puts these into operation on the ground that determines the scale of the impact the BBC has on the wider market. It is this artificial separation that results in many of the challenges that Ofcom – and other stakeholders – have identified with the current system of regulation.

Take the BBC Operating Licence. The BBC Charter appears to view this only as a tool that enables Ofcom to ensure the BBC fulfils its Mission and promotes the public purposes, to secure the provision of distinctive output and services, and to ensure that audiences in Scotland, Wales, Northern Ireland and England are well served. Viewed through this lens only, Ofcom's proposals to give the BBC greater discretion over how it does this are perfectly sensible – and align with its proposals for such changes for all PSBs.

But this approach ignores the fact that conditions within the Operating Licence also protect competition. For example, a requirement to broadcast news in peak on BBC One not only ensures that content with high public value is broadcast when most people are watching live, it also protects the wider market by ensuring the BBC cannot instead use that slot for ratings-chasing content. Indeed, many of the current Operating Licence quotas have almost nothing to do with the BBC's mission - but were imposed by the BBC Trust to mitigate market impact. In proposing to allow the BBC to sweep away such quotas, protections for the wider market will inevitably be reduced.

Unfortunately, the separation of 'public value' from market impact in the BBC's regulatory framework means such a relaxation in protections for the market will not be addressed by the current framework for protecting competition, as the impact will mainly arise incrementally. The reality is that the hundreds of changes required to deliver a BBC-led Operating Licence – and the editorial strategy that underpins it – will have just as much (if not more) impact on the BBC's competitors as a new service, or a significant change to an existing service. But the BBC's current approach to assess strategic changes as a series of smaller individual proposals, coupled with Ofcom's reluctance to be drawn into issues it regards as editorial in nature, means how the BBC chooses to deliver its strategy will not be subject to impact assessment in the same way as any major set piece changes.

Whilst in theory the regulatory framework allows for the retrospective assessment of such impact, in practice Ofcom has appeared reluctant to launch reviews of the retrospective impacts that have resulted from changes to the BBC's entire operations or that have arisen mainly as a result of the BBC's editorial decision-making.

We are also concerned that even where Ofcom does take steps to address market impact concerns, the BBC appears incentivised to reduce the effectiveness of the measures put in

place. For instance, we had significant concerns about the BBC's proposed expansion of the iPlayer. [REDACTED].

[REDACTED] In particular, the BBC is clearly pursuing an increase in the volume of iPlayer viewing among younger audiences as a desired outcome in and of itself resulting in them spending significant amounts of licence fee money on the acquisition of content, such as *The Fresh Prince of Bel Air* and *Pokémon*, rather than investment in original and distinctive UK content. Such decisions may be 'editorial' in nature but they also have a profound impact on the commercial market – driving up the price of such content and reducing the levels of viewing to competing services (such as ITV Hub) [REDACTED].

[REDACTED].

In designing a more BBC-led approach to the Operating Licence, Ofcom will need to ensure that the BBC is required to carry out an assessment of the distinctiveness that the Operating Licence proposed by the BBC will deliver, and the competitive impact that it will have. The BBC's proposals should be subject to public scrutiny given its public funding. Ofcom will also need to be sure that the BBC has pursued alternatives that reduce its impact on the wider market [REDACTED].

Acquired US content

It is relevant in the current context to specifically raise the question of the BBC acquiring popular US content in the market, often for large sums. ITV is particularly concerned that (a) the Licence Fee generally should not be used to buy US content and (b) by bidding for popular US content, the BBC uses the licence fee to raise prices for its commercial competitors and simply acquires viewing share in ways that the market can do perfectly well.

Receipt of the Licence Fee ought to come with obligations to commission and acquire distinctive UK content rather than make US acquisitions. Otherwise the Licence Fee is simply being used to buy share of viewing from commercial broadcasters. This is the very opposite of the BBC proposition that the Licence Fee is the venture capital for the UK creative industries and a key support for distinctive commissioning.

Our general concern in this area has been heightened by the BBC announcement recently that it had acquired the rights to the "*hotly anticipated new drama*", *Gossip Girl*.¹ For the avoidance of doubt, it is a new series not a new drama. Indeed, there was significant commercial interest in this series which follows on from the hugely popular first series of *Gossip Girl* which secured average audiences of over 500,000 when it aired on ITV2 between 2007 and 2012.

ITV was approached earlier this year when the 'reboot' was first announced, as the logical home of a title that had been so popular on our network previously. We were quickly told that our initial bid [REDACTED] was significantly below other offers. [REDACTED].

¹ [BBC Press Release](#), 2 July 2021

Forward Visibility

It will also be crucial to improve the extent to which the BBC provides meaningful information about its future plans to the public. Its current approach, through its annual plan, provides insufficient clarity and detail about its intentions even in the coming year, let alone over the longer term. It also tends to focus on headline initiatives rather than its more detailed plans for delivery, where much of the market impact can be hidden.

Ofcom also needs to consider what tools it needs to ensure that it can properly examine the BBC's proposals in a timely and evidenced manner – and what actions it can take in the event the BBC fails to protect the wider market. It will also need to be more inquisitive about the distinctiveness of the BBC's content - a core aim of the current Charter - where we believe there has been insufficient scrutiny to date.

Question 3: Do you have any views on how to measure the BBC's performance?

We are broadly in agreement with Ofcom's desire to see a more nuanced and insightful way of assessing the performance of the BBC – and other PSBs – in meeting their objectives. As consumption shifts from linear towards on-demand and content preferences change as technology and audience behaviours evolve, so too should the ways in which objectives are set and PSBs held to account for their delivery. But the unique scale of the BBC's public funding means it cannot be given unfettered discretion in determining its own regulatory framework and performance measures.

In determining how the BBC's performance in delivering its mission and purposes should be addressed, Ofcom also needs to consider the incentives its performance measures (and wider statements on the BBC's performance) put in place, and the implications of that for competition. Otherwise the risk is that Ofcom might inadvertently push the BBC to take steps that can only be damaging for the wider market.

A good example of this is the concept of reach, which Ofcom suggests (para. 3.19) as a potential measure of success. On the face of it, it is clearly right that the BBC's public funding means it should offer something to all licence fee payers. And as such, Ofcom has encouraged the BBC to pursue scale and popularity in the face of audience fragmentation and changing behaviours (especially amongst younger viewers).

But Ofcom has not sufficiently scrutinised how the BBC is choosing to meet this challenge, and the impact of these choices on the wider market. It is the pursuit of reach, share and volume of viewing among younger viewers that appears to have driven the BBC's proposals to relaunch BBC Three as a linear channel. Indeed, the BBC states as much in its Annual Plan:

“Bringing BBC Three back to broadcast will help make sure our programmes reach as many young people as possible...”²

² <http://downloads.bbc.co.uk/aboutthebbc/reports/annualplan/annual-plan-2021-22.pdf>

More tellingly, it is the pursuit of reach, share and volume of viewing that seems to have led to the BBC quietly increasing the volume of acquired (non-UK) content such as *The Fresh Prince of Bel Air* and *Pokémon* on the iPlayer.

Reach and volume/share as goals (or performance measures) seems to have incentivised the BBC to reduce its focus on distinctiveness, to decrease investment in new UK content in order to compete with commercial providers for the rights to acquired content (in some cases paying significantly more than makes sense commercially), and to expand the size of the iPlayer well beyond its own commissioned content in an apparent attempt to ‘appeal to younger viewers’ as Ofcom has urged it to do. We are not aware that the BBC’s apparent strategy to increasingly acquire non-UK content to drive reach has been subject to any regulatory (or public) scrutiny and yet it will have a profound impact on both the BBC’s delivery of its Mission and purposes, and on the wider market.

Reach, share and volume of viewing alone should not be a primary objective for the BBC. As the government observed when reviewing the BBC’s Charter and Agreement in 2016:

“...with the BBC enjoying 33 per cent market share in television, 54 per cent market share in radio and the third most popular UK online service, commissioning editors should ask first and foremost “is this programme sufficiently innovative and high quality?” and not “where will this feature in the ratings figures in the next week or month?”³”

Unfortunately, there is little sign that the current system has incentivised such an approach – and, indeed, signs that the BBC is pursuing reach, share and volume at the expense of other outcomes, notably distinctiveness. For the avoidance of doubt, and as the Government observed during the last Charter Review:

*“This is not an argument that the BBC should cease to be popular. The BBC can only be successful if it continues to reach and provide public value to all nations, regions and communities in the UK. The BBC has demonstrated time and again that it can be both popular and distinctive. It would be hard to imagine other broadcasters making the same volume and variety of high-quality public service programmes such as *The Great British Bake Off*, *Wolf Hall*, *Planet Earth*, *Doctor Who* and *The Archers*. These programmes are loved all across the UK. This is, however, an argument that popularity itself must not be the primary measure of success for the BBC. We expect much more from our BBC than that.⁴”*

Given these trends, it is vital that Ofcom - under the more fluid and BBC-led regime it proposes - ensures that it does not inadvertently encourage the BBC to conceive of success purely on the basis of the scale of its viewing (e.g. crude audience share metrics) or broad-brush appeal to younger viewers, but takes a more nuanced view on what content is

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524863/DCMS_A_BBC_for_the_future_linked_rev1.pdf

⁴ *ibid*

delivering that consumption, the distinctiveness of that content, and the extent to which viewing has been achieved at the expense of others in the market.

This is particularly important as the BBC is increasingly looking to build scale to compete with major global players. This global focus can often, when coupled with the BBC's extensive public funding, have serious implications for its UK competitors and partners.

Allowing the BBC more flexibility whilst at the same time ensuring that its market impact will be minimised will mean resetting expectations about what 'good' performance looks like for the BBC in an age of extensive competition. Some declines in the sheer volume of viewing are to be expected in a world of near-infinite choice – and should be viewed as a sign of the benefits of competition rather than an under-performing BBC.

Question 4: Do you agree with our proposed scope of the review in relation to content standards? If not, please explain why.

No comment.

Question 6: Do you have any concerns about the regulatory framework for the BBC's commercial activities that are not being considered in the review of BBC Studios?

No comment.