

OFCOM

Consultations on the regulation of the BBC



February 2017

Introduction

1. In advance of becoming the first external regulator of the BBC in April 2017, Ofcom is undertaking a series of consultations covering the operating framework it is developing which will cover performance, content standards and competition as they relate to the regulation of the BBC. Global welcome the opportunity to contribute to this important consultation process.
2. Global is one of the leading media and entertainment groups and is the UK's biggest commercial radio company and home to the country's biggest commercial radio brands Capital, Heart and Classic FM. Together with Capital XTRA, LBC, Smooth, Radio X and Gold, these brands reach 24 million people every week on the radio, 10 million unique users every month on Global's digital platforms and six million people on Global's social media channels.
3. Global responded in some detail to the Government's consultation on the BBC's Charter renewal. Whilst we don't intend to repeat all of the arguments made in that response, the context it set out around how the BBC operates with regards to its relationship with the commercial sector remains highly relevant to the consultations Ofcom is undertaking.
4. We would like to reiterate the point that the BBC's 54% share of the radio market brings with it a real responsibility to ensure that BBC radio services, especially Radio 1 and Radio 2, offer the most distinctive, market enriching content, especially during those day parts with the largest audiences.
5. We were pleased to note that Government recognised the need to improve the distinctiveness of Radio 1 and 2, the need for transparency around cross promotion and the need to avoid adverse market impacts.
6. Global strongly advocated separating the functions of governing and regulating the BBC and stated that, in our opinion, Ofcom was the appropriate body to take on an external regulation role. We therefore welcomed the decision that a new unitary BBC Board would be established and that Ofcom would be given the necessary powers to operate effectively as an external regulator.
7. We firmly believe that clearly defined processes and measurable outcomes are the most effective methods to ensure that the BBC fulfils its public purposes and look forward to contributing to further consultations on these areas.
8. This submission will cover the following consultations as they impact on Global and the commercial radio industry more generally:
 - a. Assessing the impact of the BBC's public service activities
 - b. Assessing the impact of proposed changes to the BBC's public service activities

- c. The BBC's commercial activities
- d. Distribution of BBC public services

Assessing the impact of the BBC's public service activities

9. We agree with Ofcom's assessment that it is important that the BBC are able to innovate, which might have a central role in stimulating demand for services or encouraging wider innovation. We also welcome the acknowledgement that it is all too easy, given the scale of the BBC's operation, to potentially stifle the market.
10. It is helpful that the Agreement recognises that material changes apply to all new services (clause 7) as there have been instances where the BBC have launched new services, such as Playlister or a new Radio 1 video channel, without consultation or approval from the BBC Trust.
11. It is also beneficial that Ofcom recognises the issue of incremental changes to services over time (1.11) as otherwise there is the potential for developments to fall between both routes of approval.
12. We note Ofcom's ability to conduct a BBC competition review (1.9) but would want to ensure that there is a very clear definition of how 'significant' (1.10) is used in this context. Without this, we would be concerned as to the BBC's interpretation of what may or may not constitute a 'significant' change, something the radio industry and the BBC have disagreed on in the past. In the context of a competition review, definitions of whether something is "significant" or "material" must relate to the impact of the BBC's activity on other operators and be proportionate to the size of the market concerned. These definitions cannot relate to whether the changes or the services are significant or material in the context of the BBC's overall activities, or even in the context of a BBC service as a whole. A small change for a large operator such as the BBC can be significant and have a material impact on other players, especially in radio where the BBC enjoys such a large audience share.
13. We would be keen to understand how Ofcom will evaluate the justification of a service in public value versus competition terms (2.6).
14. We would question the assertion made in paragraph 3.8 that 'activities that create a larger amount of public value, for example because they attract high audiences, may have a larger impact on fair and effective competition'. Whilst this may be straying into service licence and distinctiveness territory we would like to make the point that real public value content does not often equate to high audiences, populist programming and activities do. By way of an example in radio the launch of a Radio 1 Youtube channel offers little in the way of public value given it replicates the content provided by the commercial sector. So in this instance, a large audience was sought, adding little public value content, whilst creating unnecessary competition with the commercial sector.

15. We are pleased that the real commercial impact of the BBC is recognised in paragraph 3.12. From within the BBC, it would be easy to forget that every intervention could have a potential negative impact on the bottom line of its commercial rivals so it is reassuring to see this issue reflected so clearly here.
16. A huge challenge for the sector however will be to provide evidence to this effect, as stated in paragraph 4.4. We will all struggle to prove an impact on our businesses or audiences from a service that doesn't yet exist. Based on past experience we will be able to state what we think the impact might be. The system will therefore need to allow for evidence of this nature to be recognised when considering whether or not to initiate a BBC competition review (BCR).
17. The timeline for the full BCR process as outlined is 12 months, with the first stage taking 6 weeks to determine whether there are justifiable grounds for a BCR. Whilst the timescale for the initial decision is to be welcomed, some of the later stages feel overly long. We appreciate the workload that comes with undertaking such reviews but given the restrictions placed upon the BBC during this time a shorter timeframe would be preferable. The proposed provisional view (4.32), for example, feels like an unnecessary step which adds three and a half months to the process. We would welcome a more directive approach from Ofcom on its conclusions.
18. The proposals would appear to be thorough and systematic but with enough flexibility for Ofcom to respond appropriately. Our concerns are therefore limited to understand the criteria used to define and evaluate what is 'significant' and how that 'justifies' in the context of adverse impact.

Assessing the impact of proposed changes to the BBC's public service activities

19. The entire role of the BBC outlined at 1.8 – 1.10 is entirely dependent on the its assessment of what constitutes 'material'. Our concern is that the BBC's understanding of the world in which we operate is such that what may be deemed immaterial to them has the potential to have a real impact on the commercial sector.
20. We are concerned that the BBC may be tempted to deem any new or fledgling service not to be significant and therefore triggering the public interest test. Given the relatively small scale of radio the danger is that the BBC wouldn't consider any changes to be 'material', something that we saw with the previous system. As noted above, we believe it is critical that definitions of materiality and significance reflect the market in which the service operates and with full regard to the market impact of the change. Small changes at the BBC can have a big impact on commercial operators especially in radio where the BBC enjoys such a dominant position.
21. We would want to see a tightly defined policy from Ofcom on how 'material' changes will be determined (2.6 and 4.3) and are pleased to note that Ofcom retains the ability to require the BBC to improve on its proposed methodology

in this regard. We would suggest that there could be additional step where the BBC seek informal feedback from Ofcom on proposed changes as part of its own internal assessment at this stage to ensure that both the BBC and Ofcom employ consistent definitions of materiality.

22. It is very easy for the BBC to make grand statements about its plans for new services but it is not appropriate for any proposal to be in the public domain in advance of going through the proper due process. For example, the BBC announced its Music Discovery proposals as part of its response to the Charter Review which was then proven entirely premature given the concerns later raised by the radio and music industry of the potential impact on both markets.
23. We would want to see further clarification on how and when the BBC would 'consult interested parties' during the development phase of ideas (4.2.a)
24. The word material is again being used but without any further information on what Ofcom's definition is or whether it adopts the BBC's criteria. We would question whether a lack of resources to enable a response from Ofcom within six weeks however is the best method to determine whether the BBC can proceed with an idea (4.2.d)
25. The proposed flexibility and Ofcom's ability to be more responsive within the process is to be welcomed (4.2.e) but the timescale for a full competition review still appears overly long given these changes are likely to be within technical areas where the speed of change can be rapid.
26. It is important that the system does not encourage the BBC to make a constant stream of minor amendments to services to avoid undertaking a public interest test (4.8). The BBC have employed the technique of making many incremental steps in the past such as the launch of Playlister, which developed into the BBC Music App which in turn may lead to the development of a music streaming service.
27. We understand that it is important for the BBC to be able to trial activities but again, it is important that these trials are treated in the same manner and using the same processes as fully developed proposals (4.11). An example where this did not happen was the creation of BBC Synphinity. BBC Radio 3 and a company called 100 Shapes collaborated to create "*a classical music discovery app, giving you expertly selected collections of classical music from the BBC's unparalleled output of live performances – and some interesting, often surprising information about the composers and tracks.*" This was quietly launched, despite appearing to be almost identical to and therefore in direct competition with a new classical music streaming service that we had launched.
28. We welcome the increased transparency around BBC planning and strategy but would ask for some clarity around what is expected of the BBC in terms of engagement with commercial radio where there are plans which might impact us (4.12). We realise this might run slightly counter to the point made earlier

about announcing unapproved proposals. The differential being the level of finality with which previous ideas have been presented versus the ability for the sector to provide feedback on the potential market impact to inform the BBC's thinking on what might constitute 'material' in that instance.

29. On reaching a public interest test it is encouraging to see that the BBC will have to consult with interested parties and that there is some responsibility on industry's part to engage in return (4.15 - 4.17)
30. We are broadly content with the stages of assessment and Ofcom's proposed factors to determine significant adverse impact, as outlined at 4.33 but would repeat our concern that it is very difficult to provide evidence of impact when the service doesn't yet exist and to provide anything with a fortnight, as proposed, will be a real challenge (4.31). Self-evidently, it is not always possible to provide hard evidence of the impact of something that has not yet happened, but it cannot be the case that Ofcom only intervenes once the damage has been done, by which time it will be too late.
31. The assessment procedures appear flexible, responsive and appropriately thorough. As above, the addition of a provisional view seems extraneous, especially when it offers the BBC the opportunity to make further modifications to the proposals. There needs to be a point where Ofcom can make a judgement and instruct the BBC as to the decision, without the potential for changes and second guessing.

The BBC's commercial activities

32. Whilst there are no commercial activities relating to radio at present, the system needs to be future proofed to ensure that any proposals for a new service or an amendment to an existing activity which might have a potential impact on the commercial radio industry are appropriately assessed.
33. We would argue that, given the disproportionate share of the radio market the BBC holds that, any attempt to commercialise radio or related activities would result in a significant impact on the commercial radio sector.
34. It is therefore reassuring to note that Ofcom are automatically consulted on changes relating to commercial activities.

Distribution of BBC public services

35. The BBC's duty to minimise market impact is general not specific and whilst the distribution agreements have no direct impact on commercial radio at present the system should be future proofed. Ofcom must consider the competitive impact of the BBC's distribution strategy on other broadcasters, as well as its impact as between platforms. We would give two specific examples where ensuring this is essential.

36. The local DAB network is shared by commercial and BBC radio. The withdrawal of the BBC from the network, in whole or in part, would have disastrous consequences for the sector as a whole.
37. Secondly, in developing new technologies to deliver BBC radio on new devices, including for example connected cars, the BBC should be working with the rest of the sector on common standards not in isolation. Commercial radio worked with the BBC on UK Radioplayer only for the BBC to launch iPlayer Radio, which only contains BBC stations, immediately afterwards. This should not happen in-car.