

OFCOM'S APPROACH TO BBC REGULATION – COMPETITION (PROCEDURES AND GUIDANCE)

OVERVIEW

1. In December 2016 Ofcom published four consultations that outline its procedures for dealing with competition concerns arising from BBC activity. These documents set out the tools they plan to use to protect fair and effective competition in the various different circumstances listed below.
 - Assessing the impact of proposed changes to the BBC's public service activities
 - Assessing the impact of the BBC's public service activities
 - The BBC's commercial activities
 - Distribution of BBC public services
2. The procedures, requirements and guidance within these documents will ultimately form part of Ofcom's Operating Framework for the BBC. This document represents Radiocentre's response to all four of these documents.

EXECUTIVE SUMMARY

- **Background and market context**
3. Commercial radio is a strong supporter of independent regulation for the BBC and welcomes Ofcom taking on this role, with a BBC Unitary Board responsible for governance functions. However, it should be clear that Ofcom will take the lead on all regulatory matters.
 4. Ofcom's ability to enforce changes on the BBC where significant competition concerns arise (and impose penalties if necessary) sends an important message about the seriousness of these issues. These powers will be especially important in dealing with competition concerns in markets like radio, where the BBC has a high market share and the risk of a negative market impact is greater.
- **Materiality**
5. The various processes outlined for dealing with competition concerns all rely to some extent on a judgement that the changes are 'material'. This is a reasonable starting point, but the criteria should always be flexible enough to appreciate that a small matter for the BBC may be very significant for others in a particular market.
 6. Previously the BBC and the BBC Trust have tended to consider a significant or material change to be a very high threshold, rarely taking into account the major impact of the BBC in domestic markets where it has a very high share such as radio, where it accounts for 54% of listening, 58% of revenues and the majority of broadcast spectrum.
 7. While some of Ofcom's procedures and guidelines do acknowledge this, it is by no means clear and consistent. Therefore we ask Ofcom to provide reassurance that the Operating Framework and BBC policies will take into account the relative size and strength of the BBC in a particular market.

- **Assessing the impact of proposed changes to the BBC's public service activities**
8. It is important to have a specific process that can deal with changes to BBC services and the procedures outlined appear sensible, but could be improved in some key areas.
 9. As well as explicit requirements to take into account the relative size and strength of the BBC in radio and audio, there should be greater scrutiny of BBC projects at an early stage to avoid potential competition issues and an assurance the third parties will be able to refer matters to Ofcom if issues are not considered material by the BBC Board.
 10. In order to try and understand how a BBC competition assessment (BCA) procedure might apply in practice we have provided examples of potential market impact issues in radio and would welcome further discussion with Ofcom on how such cases would be dealt with in future.
 11. The BCA process itself seems reasonable, but we would emphasise the need for Ofcom to conduct its own research and analysis and engage with interested parties, rather than relying too heavily on BBC.
- **Assessing the impact of the BBC's public service activities**
12. Until now the BBC's regulatory regime has not been well equipped to deal with the competition concerns as a result of the cumulative impact of ongoing BBC services. Therefore the introduction of a new BBC competition review (BCR) mechanism is a welcome development.
 13. Overall the process for carrying out such a review appears to be relatively sound and sensible. However there is no explicit requirement to take into account issue that might be significant and material in smaller markets, where the BBC footprint is greater (like radio). This should be addressed as it is inconsistent with the requirements highlighted in the BCA process.
 14. In addition greater clarity is required regarding the time period under consideration for a BCR, which should be flexible enough to consider changes over a long period (including prior to the current Charter), as well as the range of powers available to Ofcom as part of any determination (including a requirement to withdraw a service if necessary).
- **The BBC's commercial activities**
15. The BBC's commercial activities are currently of less direct interest for commercial radio, although there will need to be further clarification on some issues. The proposed trading and separation requirements should be reviewed to prevent directors sitting on the board of both the BBC and commercial subsidiaries, while future transfer pricing arrangements should be subject to particular scrutiny.
 16. It is also important that Ofcom operates a robust process for assessing the impact of changes to commercial services in future – and that this process is able to respond to issues raised by third parties and in smaller markets. We provide some examples of potential competition issues with commercial services in radio and audio that may require such an assessment in future.
- **Distribution of BBC public services**

17. The specific requirements and guidance over the distribution of BBC public services is also an area with limited direct impact on UK commercial radio. However it would be helpful to understand whether Ofcom considers these requirements to have implications for the availability of BBC audio streams and BBC Local Radio services on local DAB multiplexes.

BACKGROUND

18. Commercial radio welcomes Ofcom taking on responsibility for regulating the BBC, in order to provide genuinely independent oversight of BBC activities for the first time. The BBC Trust system, which has been in place since 2006, was an improvement on previous arrangements (and made a number of positive interventions) but its structure was fundamentally flawed.
19. The 2016 Charter Review provided an opportunity to reconsider this and replace the Trust regime with independent regulation that could hold the BBC to account more effectively. Radiocentre, along with many other stakeholders, communicated these arguments to Government throughout the Charter Review process and to the independent review of BBC regulation, chaired by Sir David Clementi. Therefore we were pleased when he published his recommendations and these were accepted by Ministers.
20. We welcome Ofcom's approach to assuming these responsibilities as it seeks to develop the new 'Operating Framework', but have some concerns about the way in which the division of regulatory responsibility between Ofcom and BBC Unitary Board will work in practice. The BBC Board will play an important role in governance as well as assessing impact, performance and distinctiveness of BBC services initially, but Ofcom must set the framework and take the lead on all regulatory matters.

MARKET IMPACT OF THE BBC

21. Ofcom is correct to state that the main competition concerns that will result from a change to BBC services will be a risk of a) crowding out commercial activity; and/ or b) the risk of harming competition elsewhere in the supply chain. Such competition concerns are likely to be particularly acute in markets where the BBC already has a large presence, such as radio.
22. The BBC retains an extremely high share of the overall radio market at 54% and accounts for 58% of UK radio revenues (£717m in licence fee income¹). This is unusual in any market and much higher than the BBC's share of other media, leading to the potential for a greater market impact. While we accept that much of the BBC's radio output is of high quality, this dominant market share is unsurprising given the significant advantage it has in broadcast spectrum (owning four out of five national FM stations, including the only two national FM pop services Radio 1 and Radio 2). This structural and legacy advantage has also been re-enforced by the mass market proposition provided by its main music radio services at peak times. Currently too much of the public service content featured on BBC music radio is broadcast in off-peak hours and has little impact on most of the audience.
23. Therefore we were pleased that the Government appeared to recognise these arguments during the Charter Review process and specifically included some key considerations that should be applied to Radio 1 and Radio 2 in future. These include a focus on promoting UK talent, particularly new UK acts; ensuring music output is more distinct from those of other broadcasters, taking into account number of plays not just size of playlist at both peak listening and other times; and increasing the amount of news, information, current affairs and social action issues, particularly at peak listening time².

¹ Ofcom Communications Market Report 2016

² BBC Agreement – schedule 2, clause 2(3)

24. Implementing these and other important changes should help ensure that the BBC provides more distinct and valuable services, while limiting the negative impact on the commercial sector, which depends on audiences to raise advertising revenue and remain sustainable in an increasingly competitive market. This view was also supported by the Government independent review of market impact and distinctiveness, which found that a shift in positioning of BBC radio content (away from mainstream content appealing to 25-44 audience) could reduce the BBC's audience share and have a positive net market impact. It estimated that this could increase commercial ad funded radio income by £22m to £38m a year (and possibly rising to £28m and £47m a year by the end of the next charter)³.
25. It is important that all elements of the new Operating Framework are broadly consistent with the new approach outlined in the BBC Charter and Agreement and reinforce the emphasis on distinctiveness and minimising market impact wherever possible. Therefore we would expect the regime for assessing market impact and competition concerns to be especially sensitive to any changes that might affect the radio market.

MATERIALITY

26. Our main concern regarding matters of market impact and competition are that Ofcom procedures and BBC policy may set the bar too high for radio-related issues to be considered 'material' or 'significant' in the context of its overall activities, so that changes to radio services are left for the BBC Board to determine without sufficient independent oversight.
27. Major changes, such as launching new radio stations or commercial services, should be fairly easy to identify and categorise as material, as we would expect such a change to be considered as a new UK Public Service. Ofcom rightly states that changes of this magnitude will always be deemed material and so will require further assessment.
28. However it will be much more challenging for the BBC and Ofcom to assess changes of a different sort – particularly to digital and online services – where the impact of which may be less obvious at first. Determining whether changes of this nature are material and meet the criteria in the Agreement (that it '*may have a significant adverse impact on fair and effective competition*'⁴) will be a very important test for the new framework. If this assessment is not capable of considering the impact on small markets (or subsets of these markets) it risks being a retrograde step providing less external oversight.
29. When considering changes to services it will of course be appropriate to examine the impact on others operating in the market in question; any financial implications; novelty; and duration. These were all factors taken into account by the BBC Trust under the old regime when considering 'significance' of a change. That said one of the weaknesses of this system was that it did not always appear to consider the scale of impact in a particular market, which means that very few cases in radio and related areas were ever considered to meet the threshold.
30. This issue was a matter that Radiocentre raised with the BBC Trust on a number of occasions in the past when considering its processes. Moreover an independent report commissioned by the

³ O&O/ Oxera report 'BBC television, radio and online services: An assessment of market impact and distinctiveness' (Feb 2016)

⁴ BBC Agreement – clause 7(7)

Trust also found that this challenge is compounded by the fact that the BBC too often focuses on its relative size and strength compared to global technology companies (such as Netflix, Apple, Amazon) so *'may underestimate its impact in some of the domestic markets in which it operates; for example, radio'*⁵. We would urge Ofcom to consider this risk and adapt its procedures and guidance to avoid such issues reoccurring in future.

⁵ Fingleton Associates report 'Fair Trading Policy Review: A report for the BBC Trust' (April 2015)

ASSESSING THE IMPACT OF PROPOSED CHANGES TO THE BBC'S PUBLIC SERVICE ACTIVITIES

31. Overall the procedures and guidance for assessing the impact of changes to BBC services appear to provide a sensible framework for the future. This is unsurprising given that many of these processes were outlined in the BBC Charter and Agreement and are simply being transposed and codified into a more formal assessment procedure. However there are a number of important points of detail that need to be clarified.
 - **BBC public interest test**
32. As noted above, the way in which materiality and significance of a change is assessed will be crucial to the success of the new framework. Therefore, we were pleased to see Ofcom emphasise the need for the BBC to take into account that a relatively small scale investment could have a very substantial market impact (for example a change to radio or online apps) when considering if issues should be subject to a public interest test (para 4.9).
33. In addition Ofcom proposes several actions to mitigate the risk of material changes being made by the BBC without sufficient external oversight under the proposed system. These include requiring the BBC to consult with relevant operators in a sector, publish a work plan and outline strategic priorities and to keep Ofcom apprised of 'pipeline developments'.
34. However, it is not enough for Ofcom to simply receive general information about pipeline developments and strategy. These proposals should be strengthened further in order to ensure the new framework is a genuine improvement. This could include consideration of more robust scrutiny of proposed changes or new services at an early stage, using a 'peer review' process in order to try and identify any possible issues and concerns before they are launched.
35. As part of this process industry experts would be recruited onto a panel and review proposed plans, reporting to the BBC Board on the potential impact of a change and/ or any pitfalls. This could take place in advance of the BBC's own public interest test process and help inform judgements on materiality and public value. The information and report from the peer review panel would also provide useful independent evidence for Ofcom, which should have full visibility of all changes, whether the BBC considers them significant or not.
36. The specific steps that the BBC will then be required to take as part of a public interest test process appear reasonably well defined. We particularly welcome the emphasis on further engagement with interested parties from this point and commercial radio operators will be happy to engage with the BBC on this process in order to inform its insight of the radio and audio market. However it would be unreasonable to expect stakeholders from the commercial sector to disclose financially sensitive information to the BBC, particularly given the role of its board in setting strategy and the fact that a number of its members will be responsible for operational decisions.
37. Therefore we are concerned that para 4.17 appears to suggest that third parties should not assume that Ofcom will provide a second opportunity to raise issues. Given that it may not always be possible to provide detailed evidence in support of an issue to the BBC (especially due to potential commercial sensitivity), it is vital that stakeholders are able to refer a matter to Ofcom for further consideration. Consequently we would welcome clarification that third

parties will always have the opportunity to raise concerns with Ofcom if the BBC Board decides a matter is not material.

38. In addition we thought it might be helpful to outline the sort of potential market issues that can arise in radio, so have provided some examples of issues that have been raised in recent years (as well as some issues that may arise in future) regarding BBC radio and audio services (see **Fig 1**, below). We would welcome further discussion with Ofcom on how it anticipates such cases would be dealt with under the new regime.

Fig 1: Examples of potential market impact issues in radio

Changes to the nature and/ or format of a radio station

- **5 Live Sports Extra (2015)** – The BBC proposed extending the station schedule (from being an ‘overspill’ service) offering a regular daytime schedule. The BBC Trust said that such a change could be significant and so would require a PVT. The proposal was withdrawn.
- **Radio 7 to Radio 4 Extra (2011)** – The BBC proposed a change to the radio station name and output (removing children’s content). This was approved by the BBC Trust and implemented without formal public consultation or Ofcom advice.

Digital products and services

- **BBC Playlister/ BBC Music app (from 2013)** – Provides users with the ability to tag songs broadcast on BBC radio and listen to them via streaming platforms (Deezer, Spotify and YouTube). Also provides access to recommended tracks and playlists, as well as exclusive video and audio content. No public consultation or BBC Trust approval was sought for the launch or subsequent changes.
- **R1 iPlayer channel (2014)** – A branded Radio 1 section within iPlayer featuring a range of music-related audio-visual content. The BBC Trust said that this service did not represent a significant change, so would not require a PVT.
- **BBC iPlayer Radio expansion (2012/ 2014)** – This BBC-only radio aggregator exists alongside the cross-industry service provided by Radioplayer (and other providers such as TuneIn). Its mobile app relaunched in 2012 with a new interface, apparently in competition with Radioplayer but with much greater marketing effort. In addition the catch-up and download function was extended to 30 days in 2014 following BBC Trust approval.
- **Digital radio ‘pop up’ services (from 2014)** – The BBC has launched several temporary radio service in recent years, mainly covering events or specialist music genres (Olympics, country, jazz, 50s) and considered launching services in areas well-catered for by the market (dance, 80s). The BBC Trust gave approval for the BBC to launch several such stations each year with no requirement on genres.

Future developments

- **BBC music discovery service**⁶ – The BBC has outlined plans to provide its own music streaming service which would make tracks available in full for 30 days after they had been broadcast on the BBC (assuming appropriate music licensing agreements are agreed)⁷.
- **BBC radio personalisation**⁸ – Greater personalisation of BBC radio content was proposed by the BBC during the Charter Review process, using digital technology to build a bespoke radio schedule.

- **Ofcom assessment and procedure**

39. Ofcom’s initial assessment process for considering a change outlined by the BBC (p.17) seems reasonable and highlights the correct areas of consideration. Namely whether Ofcom has sufficient information; a process for ensuring third-party comments are considered; and whether the change is material. We would stress once more that there is a significantly greater risk of market impact of changes in radio and online, where the BBC has a very strong presence. Therefore this must be a key part of Ofcom’s assessment of materiality, not only the BBC’s.
40. There are no specific changes that we would propose to the BCA or shorter assessment procedure as described (p.21). We would simply emphasise the importance of drawing upon a wide range of expertise when reviewing these matters, including third parties operating in the relevant market, as well as providing an opportunity for stakeholders to appeal to Ofcom directly if the BBC believes a matter is not material.
41. In addition we would want to avoid shorter assessments being used to rubber stamp changes that may be significant, either because the BBC has spent a long time considering issues as part of a public interest test or if Ofcom resources don’t allow a full BCA. While we appreciate that this is not the intention, this may be a risk when considering what Ofcom believes to be some of the relevant factors for choosing a shorter assessment (para 4.36).
42. We also welcome the clarity provided on the high standards of market research used by BBC as part of any assessment that it undertakes – and assurance that Ofcom will conduct its own independent analysis where appropriate.
43. In terms of Ofcom’s ability to set out determinations at the end of a BCA, these would appear to be the right range of options – namely to go ahead, not go ahead, proceed with changes, re-run part of public interest test. In addition we are pleased that there will be the ability to impose a penalty on BBC for non-compliance. Radiocentre has long supported the introduction of sanctions on the BBC for poor performance or breach of regulatory requirements. We hope that these will act as a further incentive to ensure compliance in future.

⁶ BBC report ‘British Bold Creative’ (Sept 2015) - p.74

⁷ <http://www.bbc.co.uk/news/entertainment-arts-38076030>

⁸ BBC report ‘British Bold Creative’ (Sept 2015) - p.73

ASSESSING THE IMPACT OF THE BBC'S PUBLIC SERVICE ACTIVITIES

44. We welcome the introduction of a new process for assessing the potential impacts of BBC's ongoing public service activities, to be known as a BBC competition review (or BCR). Until now the regulatory regime has been ill-equipped to deal with competition issues arising from a series of incremental changes to BBC activities or significant changes to market conditions. These issues are likely to become increasingly important in future, as it is more likely that the BBC will seek to make a series of incremental changes to its services rather than a major intervention such as the launch of new TV channels or radio stations.
45. Overall the procedures and guidance for assessing the impact of BBC services, including the three-phases of a BCR, appear to provide a sensible framework for the future. However there are a number of important points that require clarification and consideration.
- **Materiality assessment and initiating a BCR**
46. Our main concern with the BCR process (similar to the BCA process, above) is that a series of incremental changes or market conditions in radio will not be considered to be 'material' in the context of its overall activities. As a result it could prove difficult for changes in the radio and audio sector to trigger the BCR process and meet the minimum threshold outlined in the Agreement, that it has reasonable grounds to believe that a public service activity '*may have a significant adverse impact on fair and effective competition*'⁹.
47. This concern is compounded by the fact that Ofcom says that it will specifically consider the scale of apparent impacts when considering whether to carry out a BCR. As part of this it goes on to say that it will generally consider take-up (audience reduction/ substitution); impact on commercial revenues and profitability; and public value, among other factors.
48. These requirements for assessing materiality and initiating a BCR would appear to present a relatively high threshold, especially for sectors like radio that may not be considered to have the same scale and impact as television and online services. However, as noted above, given size of BBC in the UK radio market it is also vitally important that the BBC and Ofcom appreciates that a small matter for an organisation of the BBC's scale may be large for some others in a particular market.
49. In considering the BCA process and BBC public interest test this issue is at least acknowledged by Ofcom. It refers specifically to the potential impact of changes in radio and online apps, where a relatively small scale investment could have a very substantial market impact. However there is no such assurance or guidance outlined within the BCR process.
50. This position would seem inconsistent and should be rectified. Ofcom should state explicitly that it will take into account the context of the particular market in question when reaching a view on whether to initiate a BCR, in order to avoid the situation where a significant or material change is overlooked. Otherwise it would appear that Ofcom will risk developing two separate processes in parallel, where one (a BCA) is able to take into account relatively small changes that could have a significant impact on a given market, but another one (a BCR) will not.

⁹ BBC Agreement – clause 7(7)

51. Even if such a change can be incorporated into the procedure for initiating a BCR it is still not entirely clear to us what sort of changes would be within scope of a future review. Clearly much of this work will need to be done on a case-by-case basis and will be outlined explicitly within the proposed scoping document prior to the BCR getting underway. However it is crucially important for third-parties to understand the nature and extent of evidence that may be required initiate this process, especially given the important role of third parties in requesting a BCR (alongside Ofcom’s own-initiative enquiries).
52. In order to try and explore the sort of potential market issues that might arise as a result of cumulative service changes in radio and audio we have provided some examples of issues that could arise based on our experience of competing with the BBC in recent years (see **Fig 2**, below). We would welcome further discussion with Ofcom on how it anticipates such cases would be dealt with under the new regime.

Fig 2: Examples of cumulative service changes in radio

There have been several changes to nature, format and target audience of radio services in recent years that have caused competition concerns for commercial radio – both relating to individual BBC services and combined impact.

Individual service changes

- **Radio 1** – Over a number of years the audience for Radio 1 grew significantly in age groups that were outside its target demographic (16-29 year olds). Some of this was due to changing radio audiences, but it was also a result of programming decisions, music choice and marketing. These decisions raised major competition concerns as this expansion in Radio 1’s audience was partly at expense of commercial radio.
- **Radio 2** – Radio 2’s audience grew significantly in age groups that were outside its target demographic (over 35) and at the lowest end of this market. This was also result of programming decisions, music choice and marketing, raising major competition concerns given the expansion in Radio 2’s audience was partly at expense of commercial radio.
- **Radio 3** – Radio 3 has adopted a number of programming changes and marketing techniques that were pioneered by its only commercial competitor, Classic FM. While many of these changes were relatively small when considered in isolation, they appeared to put Radio 3 in more direct competition with a commercial service, causing competition concerns.

Combined service changes

- **BBC Radio** – As noted elsewhere in this document, the BBC has an extraordinarily high share of the UK radio market. It is unusual for a single organisation to retain a 54% share of a market (by audience) and 58% of industry revenues. The combined impact of its radio services clearly represents a very significant intervention – and may well raise competition concerns.

- **Radio 1/ Radio 2** – Changes in Radio 1 and Radio 2 over the last 20 years have led to Radio 1's audience getting older and Radio 2 focussing on a much younger audience. The combined impact of these changes was a strong growth in 25-44 listeners, the demographic most important to advertisers on commercial radio. Considering these changes together could raise concerns over competition.

- **Conducting a BCR**

53. Once Ofcom has agreed to initiate a BCR the actual process of conducting such a review seems fairly clear (as outlined on p.16-17). It obviously makes sense for Ofcom to gather as much information as possible from the BBC itself and from third relevant parties in the manner suggested. In addition it is reasonable to request a detailed BCR submission from the BBC to explain the public value of a particular activity.
54. As part of this evidence gathering process we welcome the emphasis on the high standards of market research used by the BBC as part of any assessment that it undertakes. It is very important that the BBC is able to demonstrate due diligence and thorough analysis of a service (and how it may have changed over time), rather than simply providing a partial justification. We also welcome the assurance that Ofcom will conduct its own independent analysis where appropriate.
55. The only other specific point that we would raise regarding the scope and conduct of a BCR itself relates to the time period under consideration by such a review. While it is clear that this procedure is designed to examine the potential competition concerns of incremental changes of a shift in market conditions over time, it would be helpful to understand over what period such changes will be considered.
56. When outlining the process for undertaking a competition review the BBC Agreement states that '*Ofcom must assess whether the public value of the service justifies any adverse impact (both current and future) on fair and effective competition*'¹⁰. This description – along with the fact that most of Ofcom's powers under the Charter and Agreement will not commence until April 2017 – could be read to imply that any competition review will be unable to consider changes before the introduction of the new framework. However we would argue strongly that a BCR should be flexible enough to consider incremental changes that have taken place over a number of years (including prior to the current Charter period), as these may have an important bearing on changing the character, value and impact of a service.

- **Concluding a BCR**

57. The process of concluding a BCR and Ofcom reaching a determination appear fairly well defined and would appear to be a reasonable reflection of the structure outlined in the Agreement. Where there are additional proposals, such as the consulting with the BBC and interested parties on provisional findings, these would seem to be sensible improvements to the process that should make the introduction of any remedies or modifications as smooth as possible.

¹⁰ BBC Agreement – clause 12(3)

58. We note that the most likely outcome of a BCR will be to determine that the BBC may a) continue to carry out the activity or b) carry out the activity with modifications or conditions. However we also understand that the sorts of modifications or conditions required are difficult to outline in detail as they will be highly dependent on the case and nature of harm involved. For that reason we would also support Ofcom having the ability to ask the BBC to withdraw a service entirely as part of such modifications. This power would obviously only be reserved for the most severe cases, but it should feature explicitly as an option at the end of a BCR process and it does not appear to at present.
59. This clarification on Ofcom's powers of determination would ensure that Ofcom has a full range of regulatory options at its disposal. This is crucial for the future of this framework and will be reinforced by the fact that these powers are enforceable as 'specified requirements' and backed up by possible penalties as set out in Article 49 of the Charter.

THE BBC'S COMMERCIAL ACTIVITIES

60. Radiocentre's primary interest in the BBC competition framework relates to its involvement in radio and audio services in the UK, and the potential for this to crowd out or harm competition. Therefore our main focus is on the development of what are considered to be UK Public Services and associated non-service activities. As a result we do not consider the requirements and guidance on regulating the BBC's commercial activities to be especially relevant to commercial radio at this stage.
61. That said we acknowledge the need for a strong framework to address any potential competition concerns arising from such commercial activities, particularly given the risk of public funding being used to subsidise or benefit these activities in a way that distorts competition or gives the BBC an unfair competitive advantage. In addition the BBC may well look to develop its commercial activities in radio, audio and related areas in the coming years, which could well raise competition concerns for companies operating in the UK radio sector.

• Trading and separation requirements

62. We agree with Ofcom's assessment of the potential competition concerns that could arise from the BBC's commercial activities. Broadly speaking these are characterised as BBC subsidiaries being given an unfair advantage as a result of their relationship with the BBC public service activity, for example by gaining access to BBC assets, products or services at a preferential rate or seeing ongoing losses subsidised.
63. In order to address this Ofcom is required by the Agreement to establish 'trading and separation rules' which would appear to cover the range of concerns that are likely to arise from BBC commercial activities. However we have some concerns about how an operational separation between the BBC and its subsidiaries will work in practice and how this will be enforced. While some exchange of information will be necessary it will be very difficult to argue that such entities are truly separate if they are run and managed by current BBC directors or even former staff. Indeed such 'cross-directorships' have been criticised in the past by parliament as undermining the arm-length relationship between the BBC and commercial subsidiaries¹¹, while the BBC Trust has also acknowledged that these arrangements create the potential for conflicts of interest and dilute the principle of separation.

¹¹ Culture, Media and Sport Select Committee report 'BBC Commercial Operations' (March 2009)

64. Transparency and fairness over the supply of goods and services and transfer pricing will also be vital to ensure confidence in the process. As a result Ofcom should place an even greater emphasis on BBC commercial activities paying the market rate unless it is absolutely unavoidable. Goods and services that have been funded by the licence fee – particularly intellectual property rights to BBC programmes – are likely to generate significant interest amongst other commercial entities for further exploitation, especially online. It would be unfortunate if the BBC was to limit such activity.
65. There may also be a case to consider a more prescriptive and regulated rate of return on the BBC's commercial subsidiaries being set by Ofcom, rather than the requirement outlined at present that the BBC should monitor the market norms and assess what commercial rate of return is appropriate.
- **Assessing material changes**
66. It is not only important to ensure there are clear requirements in place to minimise competition concerns arising from the relationship between the BBC and its commercial subsidiaries, but also to have a procedure that will provide independent external oversight when there are changes to BBC commercial activities.
67. While it is difficult to predict exactly what sort of changes might occur in the coming years it is clear that technical innovation and relatively low barriers to entry are likely to mean that new or different services could be offered by the BBC online and using digital technology. This background, along with the fact that the BBC commercial services in the radio and audio field are relatively limited, mean that we will want to be reassured that this is a process that will be as robust as possible.
68. The proposed structure outlined seems reasonable overall. However we would suggest that third parties are also permitted to raise initial concerns about changes to commercial activities (rather than relying only on Ofcom and/ or the BBC to initiate the process based on their assessment of what is a material change). While it is welcome that Ofcom will consider third party comments as part of its Stage 1 assessment we believe that there should also be flexibility for issues to be raised by external organisations in the first place.
69. As noted in the previous sections of this response, the crucial issue when deciding on whether to proceed with such an assessment will be determining materiality in the first place. We have a particular concern that changes affecting the radio and audio market could be considered to fall short of the definition of a substantial or material change. Therefore, while we were pleased to see that Ofcom states that its assessment will depend on the proposal and context and will take into account whether competition may be adversely impacted in a small market (para 4.28), we would welcome further clarification that radio will receive due consideration.
70. BBC commercial activities in radio and audio are relatively limited at present, but we have provided some examples of the sort of issues that could conceivably arise, based on recent statements and announcements from the BBC and its activity in other areas (see **Fig 3**, below). We would welcome further discussion with Ofcom on how such cases might be dealt with in future.

Fig 3: Examples of potential competition issues with BBC commercial activities in radio/ audio

- **'Netflix style' subscription service for audio**¹² – The BBC has proposed the idea of a subscription based service for audio, initially outside of the UK. If it was to introduce or extend such a premium commercial service to the UK as well this could have significant market implications.
- **Music streaming service** – The BBC has broadly outlined its intention to expand its online music products (such as the BBC Music App). If it sought to do so commercially through a subscription service this would presumably be considered a new service and a material change that could have serious competition concerns in a sector that is already well provided for by the market.
- **BBC Studios (radio/ audio production)** – There is currently a relatively small market in the UK for independent radio production, with the BBC commissioning the majority of content (and few obviously parallels to the film and television sector). There is currently no case for extending the BBC Studios model to radio, by providing an opportunity to pitch to other broadcasters. Any such future move of this nature would be a material change to the BBC's commercial activities in radio.

DISTRIBUTION OF BBC PUBLIC SERVICES

71. The competitive impact of the BBC's distribution agreements is an area with limited direct impact on UK commercial radio at this stage. However we appreciate the importance of this issue, the need for clear principles and a robust framework to deal with complaints.

- **Proposed requirements and guidance**

72. We note that the Charter and Agreement impose various obligations on BBC relating to distribution – including that it must do 'all that is reasonably practicable' to ensure audiences can access its services – and that this could lead to potential competition concerns. The precise nature of these concerns and the specific areas of tension are difficult to predict at this stage but Ofcom is probably correct that they are likely to relate to either the BBC discriminating between platforms and distorting competition; offering restrictive or expensive terms for access to its content and limiting ability of platforms to compete; or declining reasonable requests to supply to third party platforms

73. Therefore we support Ofcom's role in ensuring fair and effective competition in this area and its proposal to introduce general requirements that will apply to the BBC's distribution arrangements. As outlined in para 3.31 these requirements mean that the BBC must offer public services to third parties where a reasonable request for supply has been made – and to do so on fair, reasonable and non-discriminatory terms. We also agree that this can only realistically be a starting point, particularly regarding what may or may not be considering 'reasonable' in this context.

74. Should a dispute arise between the BBC and a third party platforms we note that BBC has first responsibility to resolve complaints. Where an issue is not resolved it can then be escalated to

¹² <http://www.bbc.co.uk/news/entertainment-arts-38076030>

Ofcom, which can intervene where it identifies a 'material effect' on competition. As part of this analysis Ofcom highlights that specific risks and the relative size of a platform operator could be taken into account (para 4.7). This is welcome because, as noted elsewhere in this response, we believe that it is important for Ofcom's assessment of competition issues to be able to consider the impact of BBC activities on smaller markets such as radio and audio.

- **Areas for further clarification**

75. We have no detailed comments on the complaints process or the factors that Ofcom has said it will consider in any given case relating to a dispute over distribution (para 4.11-4.21). However it would be helpful to understand what (if any) Ofcom considers these requirements to have for the availability of radio and audio content in future. For example this framework would imply that the BBC is obliged to offer online streams of its free to air radio/ audio content to all platforms if requests are reasonable (in addition to iPlayer Radio, Radioplayer, TuneIn and similar aggregators of content), as well as any satellite and cable TV operators that wish to carry radio services.
76. We would also point out the importance of BBC Local Radio distribution continuing on local DAB multiplex platforms, using capacity that is reserved under the 1996 Broadcasting Act. This is not only consistent with the objective of doing all that is reasonably practicable to ensure audiences can access BBC services, but also a crucial factor in encouraging BBC and commercial operators to work together to grow digital radio and improve coverage. This partnership has enabled local DAB coverage to expand from around 66% to 90% over five years. We hope that these distribution arrangements will be strengthened further by the requirements Ofcom is putting in place.

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