

**News Broadcasting response to Ofcom consultation:
*Modernising the BBC's Operating Licence***

News Broadcasting welcomes the opportunity to respond to Ofcom's consultation on *Modernising the BBC's Operating Licence*.

News Broadcasting is home to the recently launched TalkTV, as well as speech and music radio services including talkSPORT, talkRADIO, Times Radio and Virgin Radio. Our radio stations have an audience of 10.6 million monthly listeners in the UK.¹

The BBC as an institution is central both to audiences and the UK's wider media and creative ecosystem. It benefits from an unrivalled audience share, content portfolio and funding model, and enjoys the widest distribution of any UK radio broadcaster - enabling a 49% share of UK radio listening hours (this increases to 74% within speech radio).² 6.6 billion programmes were streamed on iPlayer in 2021/22 and 73% of people in the UK watch BBC TV in a week on average – more than any other TV or SVOD provider. The BBC's multiplicity of brands and platforms (such as BBC Online, iPlayer and BBC Sounds) enables it to extensively cross-promote its programmes and services to a global weekly audience of 492 million.³

Robust regulation of the BBC should promote a framework whereby the BBC is able to use its advantageous position for the benefit of innovation and plurality in the UK broadcasting ecology. The Operating Licence is a key mechanism for ensuring performance and accountability; however, News Broadcasting believes that the current Operating Licence fails to set a high enough bar in holding the BBC accountable to its duties on market impact, distinctiveness, public value and transparency. This review gives Ofcom the opportunity to address these issues.

News Broadcasting has experienced the direct consequences of these weaknesses present in the current framework, whether in seeking to capitalise on growth in the podcast market; launching ambitious news and current affairs channels Times Radio and TalkTV; expanding free-to-air radio coverage of sporting events via talkSPORT and talkSPORT 2; or offering new choice in music radio via Virgin Radio. In each case, we have examples of our efforts to introduce diversity in journalism and entertainment being unduly constrained by BBC behaviour in ways that could be easily remedied through a strengthened Operating Licence.

The current Operating Licence does not adequately hold the BBC to account on its performance, neglecting to scrutinise or sanction failures to meet agreed quotas. Nor does it guarantee much-needed transparency concerning the BBC's plans and expenditure. Moreover, the loss of numerous, and specific conditions following the replacement of the BBC Trust service licence regime, has created an environment of ambiguity which has enabled changes to service remits outside of appropriate regulatory scrutiny, such as to BBC Radio 5 Live and Sports Extra. Regrettably, our experience has been that this has led to

¹ RAJAR 4 week reach, Q1 2022

² BBC R4 & R5 (inc Extra and Sports Extra) and speech stations (LBC GB news, talkRADIO, talkSPORT & talkSPORT2, Times, BBC R4 & R5) RAJAR Q1 22

³ BBC Annual Report and Accounts, 2021/22

BBC behaviour which has made a negative contribution to the distinctiveness of its services and led to harm to independent broadcasters.

Against this backdrop, we are concerned by Ofcom's current set of proposed revisions to the Operating Licence which could weaken the framework, providing the BBC with even greater flexibility. While we agree with Ofcom's assertion that the BBC faces competition from global players in video in particular, this is a challenge being faced by all media owners, and we do not think it is a sufficient justification for a weakening of the regime, especially given there are markets where the BBC's market impact is demonstrably significant already. This review is an important opportunity to enhance the BBC's performance, while balancing market impact concerns.

If implemented in their current form, these proposals would serve to dilute requirements on the BBC. Numerous relaxations, such as on quotas for news & current affairs provision and specialist programming, could serve to limit the BBC's unique public value by failing to protect at-risk content and high-quality, original journalism. In respect of iPlayer and Sounds, the proposed Operating Licence omits to enshrine existing principles regarding distinctiveness and collaboration. Rather than stepping up Ofcom's own intervention powers, ill-defined transparency requirements are proposed by way of mitigation for the much greater flexibility being granted to the BBC.

It is not only the interests of UK audiences but the health of UK broadcasting that stands to lose out. Indeed, Ofcom's focus on enabling the BBC's transformation and sustainability comes at the cost of neglecting to consider the role the Operating Licence must play in protecting against negative effects on competition from the BBC's activity. The proposed Operating Licence does little to provide clarity and certainty for competitors concerning the scope of iPlayer, Sounds, 5 Live or Sports Extra, nor does it place any additional performance quotas or conditions to mitigate against the market impact of these services.

A revision of the Operating Licence presents a prime opportunity for Ofcom to address inherent and recurrent issues, and ensure the BBC fulfills its potential. The prize is creating a solid framework from which the BBC steps-up as the positive force it can be: one which engages openly and transparently with industry on its plans; opens up the benefits of its platforms to commercial and independent content providers; comprehensively evaluates the market impact of its activity; and leaves space for competitors to thrive - for the benefit of audiences, licence fee payers and a competitive media sector as a whole.

Our key recommendations - made throughout the responses - can be summarised as follows:

- 1. The reinstatement or introduction of clear scope descriptions for BBC services, including iPlayer, Sounds, Radio 5 Live and Sports Extra - safeguarding the distinctiveness of these services and providing much-needed certainty for competitors.**
- 2. In parallel, enhancing the qualitative and quantitative conditions applied to these services - creating robust performance expectations for distinctiveness, high quality news journalism and specialist programming against which the BBC's performance can be objectively measured.**

3. **Upgraded arrangements for the measurement of BBC performance, including publishing evidence justifying any breaches.**
4. **Additional transparency requirements, including publishing greater detail on expenditure, technology, audience data and materiality assessments.**
5. **Greater accountability for the BBC on issues of market impact, including publishing changes to its services which may impact on competition, especially in areas where the BBC has a position of market power.**
6. **Strengthened requirements for the BBC to work in partnership with commercial broadcasters such as by hosting and signposting to relevant third party content, particularly in relation to iPlayer and Sounds.**

Responses to specific consultation questions

Question 1: What are stakeholder views on how Ofcom should assess and measure BBC performance?

One of Ofcom's three key ambitions for a new BBC Operating Licence is "increased transparency to hold the BBC to account" (consultation, 4.15.c). However, the proposals in our view do little in practical terms to address a number of pressing issues present in the current Operating Licence. Specifically, the proposed Licence appears to lack teeth in holding the BBC to account for performance breaches, neither does it ensure meaningful transparency regarding the BBC's activity, nor does it promote frequent and open engagement between the BBC and stakeholders on planned changes to its services which may impact on competition. Furthermore, the scope and performance expectations of key BBC services remain ill-defined.

Clarifying the scope and performance conditions of key services

Following the replacement of the BBC Trust service licence regime with a single, slimmed down Operating Licence, historic qualitative conditions and key detail explaining individual services' remits and distinguishing characteristics were omitted. The effect was a widespread reduction in the distinctiveness conditions and qualitative commitments attached to BBC services. As a result, **when compared with the aspirations of the new BBC Charter and Framework Agreement, the current Operating Licence sets an unsatisfactorily low bar for the distinctiveness and performance of BBC services. An environment of ambiguity and mission creep on the part of services has prevailed,** whereby the remits of 5 Live and Sports Extra have become increasingly unclear and new BBC online services and streams have been created outside of any defined Operating Licence framework.

For example, the current Operating Licence omits important provisions previously introduced by government, under the BBC Trust, to ensure distinctiveness on the part of both 5 Live and Sports Extra. Provisions lost in relation to 5 Live include parameters concerning the BBC's areas of live sports coverage, such as a requirement for 5 Live to "cover sports not widely accessible on UK radio." Instead, the current Operating Licence contains only three conditions for 5 Live, one of which is to provide live commentary of 20 sports per year.

Despite this performance low bar set by the current Operating Licence, and the public interest in the BBC providing access to a broad range of sports, the BBC failed to meet this quota in 2020/21. While a good number of sporting events did go ahead despite the pandemic which could easily have been covered on 5 Live, the BBC referenced Covid-19 as a justification for the live sports quota breach.⁴ In our view, this does not meet the expectations set by the Framework Agreement on publishing evidence on how the BBC has met its performance measures,⁵ nor was there any apparent sanction⁵ to prevent a future recurrence.

Furthermore, in achieving its coverage of 20 sports, the BBC has attempted to make the sport of football as played by men to be a different sport as to the sport of football as played by women. To us (and we anticipate the vast majority of observers), football is one sport. It is also classified as such on the BBC Sport website. Attempting to characterise it otherwise depending on the gender of who is playing the sport seems incorrect.

The current Operating Licence also fails to delineate the scope of BBC services in the interests of protecting and promoting competition, enabling BBC activity outside of the remits of services as previously agreed by the BBC Trust service licence regime. Compelling evidence of this comes from 2018 and 2019, when the BBC began to make significant moves in relation to coverage of cricket on radio, notably with its acquisition of the exclusive radio rights to the Indian Premier League (IPL) for 2019 and 2020. We understand from the BBC Executive Complaints Unit (ECU)'s own response to our concerns that the IPL rights were acquired specifically for broadcast on Sports Extra (as well as BBC Online).⁶ This contravenes historic restrictions laid down by the historic BBC Trust service licence for the channel that it should act solely as an overflow service for existing rights, rather than being used as an "outlet for which the BBC would bid for rights against commercial broadcasters."⁷

Disappointingly, the proposed Operating Licence in its current form does not rectify the lack of clear remits and performance conditions for specific services such as 5 Live and Sports Extra. Moreover, despite incorporating the BBC's online services, the proposed Operating Licence fails to provide clear parameters or any specific quotas on Sounds or iPlayer. Instead, the only conditions proposed are broad requirements relating to, for example, ensuring news & current affairs programmes are easily discoverable and providing a broad range of output and original UK content (proposed Licence, 1.3; 3.2).

This is particularly problematic given the pressing need to ensure the BBC's online activities are underpinned by clear public value and a commitment to promoting healthy competition. We have experienced repeated instances to the contrary, such as when the BBC responded to the development of talkSPORT 2's cricket offering by launching a new live audio service, *The Cricket Social*, which acted as a 'spoiler' for talkSPORT's official radio coverage of the overseas tours during the winters of 2018/19, 2019/20 and 2020/21. Given the BBC's lack

⁴ Events that went ahead during this period and which the BBC chose not to cover included: Darts - World Championship; Sailing - Americas Cup; Skiing - World Ski Championships; Motor Racing - Le Mans; Bowls - World Championship; Judo - World Judo Championships.

⁵ Framework Agreement, Article 14(5)

⁶ BBC Director of Editorial Policy and Standards response to Wireless, 27 September 2019

⁷ BBC Trust, BBC Radio 5 live Sports Extra Service Licence

of official rights and the availability of official, free-to-air live coverage on talkSPORT 2, *The Cricket Social* exhibited a glaring shortfall in distinctiveness and provided no incremental public value to licence fee payers.

Measurement of the BBC's performance will benefit naturally from the enhanced clarity about what is expected of it: issues such as the creation of *The Cricket Social*, as well as in relation to the BBC's sports rights acquisitions, could readily and easily be addressed through relevant revisions to the Operating Licence providing clarity regarding the scope of the BBC's online services. Beyond committing itself to robust ongoing scrutiny of the BBC's published plans and delivery, Ofcom should have an emphasis on securing specific detail against which the BBC can be held accountable. Particular emphasis should also be placed on robustly interrogating and sanctioning failures to adhere to existing quotas.

Recommendations:

- **Reinstatement of a clear scope description for Sports Extra, including**
 - an explicit statement that Sports Extra is a live commentary overflow service, designed to exploit already held rights which were originally acquired for the primary purpose of enabling live coverage on 5 Live;
 - a prohibition on Sports Extra acquiring its own sports rights or being used as a vehicle to restrict commercial radio access to sports rights
 - a prohibition on Sports Extra carrying programming which is not live commentary; and
 - assurance that Sports Extra cannot be used to fulfil Service Licence obligations relating to 5 Live.
- **Reinstatement of a clear scope description for 5 Live which safeguards its news coverage and provides clarity on its commitment to distinctive coverage:**
 - enhanced commitments to providing coverage of minority and underexposed sports; and
 - enhanced commitments to original journalism and high quality news.
- **Equalising the quantitative conditions applied to each BBC service via an increase to the number of conditions for services such as 5 Live and Sports Extra.**
- **Introduction of a clear scope description for BBC Sounds and adding qualitative conditions to secure distinctive output and high quality public service programming and content.**
- **Upgraded arrangements for the measurement of BBC performance, to include:**
 - Ofcom to publish evidence justifying any breaches of Operating Licence conditions; and
 - tracking usage of promotional space and airtime.

Enhanced transparency requirements

Far from reinstating or introducing clear scope descriptions and quotas, it is concerning that the proposed Operating Licence actively plans to *remove* quotas in

many areas and replace them with much more general conditions that afford the BBC a problematic level of flexibility. For example, Ofcom proposes to replace quotas on BBC network radio for specialist programming with a condition to provide a wide breadth of output, supported by transparency requirements.

We agree that the BBC should be subject to heightened scrutiny in areas where it has greater flexibility. But where transparency requirements are proposed in lieu of quotas these merely require the BBC to commit to and report publicly on its delivery (consultation, 5.10) – functioning as a temporary "patch" without addressing the root causes of ambiguity and scope creep concerning key services.

Further, the general transparency requirements in relation to the BBC's plans and changes under each of its Public Purposes (consultation, 5.7-5.10) will not guarantee the level of detailed information required by stakeholders in order to meaningfully assess and engage with the BBC's plans. In many places, they merely require the BBC to set out its planned hours of output – without committing the BBC to publishing meaningful detail which would help mitigate impacts on competition, such as: its expenditure; the rationale behind changes to its services; technology development roadmaps; and, audience data across all of its platforms. We set out further thoughts on expanding transparency requirements for the BBC's sports rights acquisitions in response to Question 4.

Further-reaching reporting requirements could serve to avoid repetition of BBC activity such as when the BBC upgraded its non-exclusive UK radio rights to the ICC Cricket World Cup 2019 in England to exclusive rights in March 2019. Taken together with the BBC's acquisition of the IPL rights, these moves effectively locked-out talkSPORT 2's ability to schedule any summer cricket on commercial radio during 2019, extinguishing any competitive attempts to establish a new outlet for radio cricket commentary and innovate on behalf of listeners. But in neither instance did the BBC provide forewarning of its plans, publish details behind the decisions taken, or engage with us until we had submitted concerns directly.

Despite its intentions, the proposed Operating Licence also falls short of delivering much-needed improvements in how the BBC engages with stakeholders on changes to its plans. The Charter commits the BBC to observing "high standards of openness and [seeking] to maximise transparency and accountability," publishing the details of important decisions taken by the BBC Board, and outlining significant changes to the BBC's activities in its Annual Report.⁸ However, there are currently no clear minimum expectations governing the BBC's engagement with industry. Rather, its de minimis interpretation of the Charter principles has often resulted in vague or unforeseen announcements without necessary prior engagement with interested parties. This was evident in the BBC's recent unilateral decision to switch off 5 Live on Medium Wave no later than December 2027, cutting across an established agreement with the rest of the radio industry as part of the Digital Radio and Audio Review that a phased timeline would be jointly developed - with significant potential cost and audience implications for commercial broadcasters.⁹

⁸ Royal Charter, Article 12 & 37

⁹ <https://www.bbc.co.uk/mediacentre/speeches/2022/digital-first-bbc-director-general-tim-davie>

Recommendations:

- **Transparency proposals should include requirements for the BBC to publish:**
 - **how news and sport budgets are deployed;**
 - **disaggregated commissioning spend on BBC Sounds and other BBC podcast output;**
 - **tech roadmaps, learnings (including audience feedback) and research from development of online services; and**
 - **data for online and podcast listening for radio services across all platforms.**
- **The BBC should also be subject to agreed protocols concerning:**
 - **undertaking robust cost benchmarking against independent channels**
 - **advancing partnerships with commercial players; and**
 - **radio sports rights acquisition and expenditure.**
- **Enhanced measures to guarantee frequent, proactive and transparent engagement by the BBC with stakeholders on its future plans and strategy, such as developing an agreement on minimum expectations governing stakeholder engagement.**

Considering competition for the benefit of audiences

Intrinsic to the BBC's ability to deliver for audiences is the provision of distinctive services which provide clear public value and promote a vibrant and competitive UK broadcasting sector. As such, **it is imperative that the Operating Licence is regarded as a key mechanism in creating the conditions for the BBC to play a positive role in domestic competition, rather than the Licence and competition regulation being considered as "separate processes" (consultation, 5.9).**

A new Operating Licence represents a prime opportunity to address shortcomings in the current framework for regulating the competition impact of the BBC's Public Services. Yet nowhere does the proposed Operating Licence seek to hold the BBC to account on its Charter responsibilities in this area, such as avoiding adverse impacts on competition and having regard to promoting positive impacts in the wider market.¹⁰ Instead, Ofcom's transparency proposals and its protocols for the BBC making changes to its services both focus exclusively on how the BBC delivers for audiences. For example, where quotas are absent for the BBC's service-neutral and online delivery, the proposed Licence's transparency measures are to require the BBC to "publish with its Annual Plan the steps it plans to take to provide for audiences." With regard to publishing changes to its plans, the BBC will currently only be required to publish "changes that meaningfully alter how it delivers for audiences" (consultation, 5.8-5.9)."

We strongly support greater transparency by the BBC regarding changes it plans to make to its services, but do not see merit in restricting these requirements only to changes which appear to impact directly on audiences. Rather, the BBC setting out changes which may

¹⁰ Under the Charter, the BBC's market impact responsibilities include not only seeking "to avoid adverse impacts on competition which are not necessary for the effective fulfilment of the Mission and the promotion of the Public Purposes" but also to have "regard to promoting positive impacts on the wider market." It requires the BBC to make "important decisions (and reasons behind them and a summary of the evidence that supports them) concerning changes to the creative remit, work plan and material changes." Finally, it commits the Board to considering proposals for material changes and assessing "both the public value and impact on competition of such proposals." Royal Charter, Articles 11(2), 12(2), 20

also impact on competition would ensure that negative effects on competition can be identified by Ofcom and industry stakeholders through a process of objective scrutiny. Moreover, much as the proposed Licence requires the BBC to set out how it plans to deliver for audiences (consultation, 8.14), the BBC should be required to set out how its plans will promote positive impacts in the wider market - whether through greater industry collaboration or more robust evaluation by the BBC of the market impact of its activity.

Such measures would have mitigated the harmful impacts on talkSPORT's audience numbers resulting from the BBC's untransparent moves in relation to crickets rights acquisitions. Proper forewarning of the BBC's plans could also have prevented the BBC from unilaterally deciding to switch off 5 Live on Medium Wave by December 2027 - an announcement in May 2022 which was allegedly "in line with a proposed industry-wide exit from the platform," but in reality was made without prior consultation with key stakeholders. This ran contrary to the BBC's commitment, as part of the government's Digital Radio & Audio Review, to develop an industry-aligned joint plan for the phased retirement of AM services.¹¹

Underpinning our concerns are the fundamental flaws within the current framework for assessing the competitive impact of the BBC, whereby the BBC is not only allowed to make its own determination on whether a change is "material" (and therefore qualifies for further review), but is able to do so without publishing its materiality assessments. Given the inherent conflicts of interest this model of self-regulation is clearly problematic.

Requiring greater transparency from the BBC on details regarding important changes to its services - whether material or not - which may impact on competition would afford far greater clarity, certainty and protection both for audiences and competitors. Even if changes do not subsequently undergo a materiality assessment process, such an approach would ensure the opportunity for stakeholders to meaningfully engage with the BBC on any concerns.

Recommendations:

- **Where Ofcom has judged that specific quotas should not apply, the BBC should be required to:**
 - **set out how its plans will have regard to promoting positive impacts on the wider market (in areas where it has a significant market share);**
 - **publish changes to its services (whether material or non-material) which may have an impact on competition.**
- **Improved processes for assessing and intervening in relation to the competitive impact of changes to the BBC's Public Services, including:**
 - **a requirement for the BBC to publish its materiality assessments and details behind Board decisions on changes (whether material or non-material);**
 - **a lower threshold for Ofcom intervention on BBC competition matters in areas where the BBC has a significant market share (for example in the UK speech audio market).**

¹¹ <https://www.bbc.co.uk/mediacentre/speeches/2022/digital-first-bbc-director-general-tim-davie>

Question 2: Do you agree with the proposals for Public Purpose 1? If not, please explain why.

A core tenet of the BBC's first Public Purpose is that the BBC "should offer a range and depth of analysis and content not widely available from other United Kingdom news providers, using the highest calibre presenters and journalists."¹² **In practice, this means the BBC should be showing best-in-class journalism, focusing on "core" news and sustained by a wealth of original stories and newsgathering. It also means that the BBC must be held to account in providing content that is distinctive from what is available outside the BBC, and collaborating with independent players in showcasing and signposting to external material.** The proposed Operating Licence must go further in both these areas to ensure the BBC's contribution to a high quality, plural UK news media landscape.

Safeguarding original and distinctive BBC news provision

As part of the general reduction in scope descriptions and conditions attached to individual BBC services in the process of moving from previous the BBC Trust regime, the current Operating Licence omits important historic provisions regarding the BBC's news provision.

For example, the previous BBC Trust service licence for 5 Live set out that the station should "give a broader perspective on current affairs through original and investigative journalism" and that its "news programmes should clearly reflect the BBC's mission to provide the best journalism in the world [...] Regular in-depth analysis, documentaries and specials should be used to bring original stories to air and provide scope for in-depth investigative journalism."¹³ Nowhere is the spirit of this commitment to original, distinctive news provision reflected in the existing or proposed new Operating Licence - indeed, Ofcom's proposed objective for "high-quality, in-depth and relevant news and current affairs" makes no mention of these aspects (proposed Licence, Objective P1(1)).

Enshrining originality and distinctiveness in a new Operating Licence is crucial in ensuring that the BBC focuses its efforts on providing impartial coverage and breaking new stories. Otherwise, the BBC's services risk becoming generic or straying into areas already well served by the independent market, such as opinion-led comment, general entertainment and personality / celebrity culture. This is also true of the BBC's podcast offering.

Given the low bar set by the current Operating Licence, it is disappointing that in many areas Ofcom's proposals serve simply to retain the status quo, rather than to enhance the BBC's news and current affairs output. For example, the requirements on iPlayer and Sounds to make news and current affairs programmes available and easily discoverable on BBC iPlayer and BBC Sounds (proposed Licence, 1.3.1-1.3.3) do not actually constitute new requirements on the BBC's news provision on these platforms. Likewise, Ofcom's proposal simply to "retain quotas to ensure that the BBC continues to provide a substantial amount of news and current affairs across its TV and radio services" (consultation, 6.2.3) does nothing

¹² Royal Charter, Article 6

¹³ http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/radio/2016/5live_apr16.pdf

to remedy the existing Licence's absence of qualitative or quantitative conditions related specifically to securing high quality and distinctive journalism.

Of further concern are aspects of the proposed Operating Licence that serve to weaken requirements on the BBC to provide high-quality, original news content. For example, Ofcom proposes to remove the condition on the BBC News channel to provide more international and local/regional news than other UK news channels (consultation, 6.32). It also proposes to replace daily and weekly news and current affairs quotas which apply to a number of radio services including BBC Radio 1, 1Xtra, 2, 6 Music and Asian Network with annual quotas (consultation, 6.25). News is inherently topical and the BBC's coverage of breaking news stories is a core part of its public value; creating annual quotas means that big news moments (such as the death of the late Monarch) could contribute disproportionately to the BBC meeting its quotas. The result could be audiences receiving less news during other periods of the year. Further, we do not consider that Ofcom's proposed mitigation of requiring each service to provide news bulletins at intervals throughout the day (consultation, 6.27) guarantees a commitment to consistent, original news gathering and provision over the course of a year.

In any event, we agree that these relaxations should not apply to 5 Live and Sports Extra. 5 Live should at all times remain a news-led service, particularly during its breakfast and drive time programmes. Any dilution of this would result in further erosion in 5 Live's distinctiveness and materially undermine its delivery of public value.

Although not applicable to news, replacing the specialist music quota for Radio 1 with an annual quota (consultation, 6.25) will have a similar effect of effectively reducing requirements on the BBC and risks Radio 1 becoming a more generic music service that duplicates commercial stations' playlists.

Recommendations

- **Introduction of qualitative and/or quantitative conditions related to securing specifically high quality and distinctive journalism across the BBC's services.**

Promoting market collaboration in relation to iPlayer and BBC Sounds

Under the Charter, the BBC is required to "work collaboratively and seek to enter into partnerships with other organisations, particularly in the creative economy, where to do so would be in the public interest," and to "ensure that its partnerships are fair and beneficial [...] and, in particular, that partners are given due attribution and recognition, including in the branding and promotion of the output and services created or distributed."¹⁴ **Beyond its statutory responsibilities, the market position of services like iPlayer and Sounds confers on the BBC a responsibility to support independent broadcasting, as well as an opportunity to generate enhanced value for licence fee payers by signposting high quality programming from outside of the BBC. The new Operating Licence needs to set a benchmark for collaboration as, in our view, the BBC is playing a limited, inconsistent role in supporting the health of the wider UK media ecology.**

¹⁴ Royal Charter, Article 13(2)

BBC Sounds is a major intervention which draws upon the BBC's market position, technology resources, cross-promotional reach and content portfolio to create an audio product that only the BBC could offer. It is now one of the most used audio products in the UK, with a sizeable lead over other UK broadcaster and audio publisher apps - reaching more than twice as many weekly podcast listeners as commercial radio sites and apps such as Global Player, Radioplayer & TuneIn combined.¹⁵

However, with the exception of some limited independent podcast acquisitions, the failure until now to integrate independent audio content into Sounds on a large scale has meant that the platform has served as an effective walled garden, preventing commercial broadcasters from sharing in the benefits of BBC Sounds' audience scale and technological capabilities. Indeed, Wireless's efforts to engage with the BBC in 2019 on listing our own content in Sounds were ultimately frustrated by the BBC's retraction of its formal invitation to join the platform.¹⁶

Similarly with iPlayer, the BBC has a role to play in enabling commercial broadcasters to benefit from its on-demand reach, and lending its strong negotiating position to helping forge relationships with the major streaming platforms. Traditional broadcast viewing is increasingly vulnerable to the rise of subscription video on-demand services. But in contrast to other UK broadcasters, the BBC is unique in its ability to rival the content budgets and audience penetration of the large global streaming platforms.¹⁷ According to its own figures, the BBC reached 492 million people globally each week in 2021 - more than both Netflix and Disney combined. This is helped in large part by iPlayer, which had 6.6 billion programmes streamed in 2021-22.¹⁸

A new Operating Licence therefore has a role to play in compelling the BBC to deliver on its duties on collaboration. The proposed Operating Licence lacks measures in this area. Given the BBC's significant market share in the speech audio market, the BBC could be required as part of the Operating Licence to open Sounds up to third party content from independent broadcasters, to become an effective distribution partner for the wider industry. This would help the BBC to deliver on its Charter commitments to the market, as well as providing a significant benefit to its audiences in displaying an even wider array of original content.

In addition, Ofcom proposes a requirement to make content easily discoverable on iPlayer and Sounds (proposed Licence, 1.3.2-1.3.3). However, given existing concerns regarding the BBC's cross-promotion of its own services, prominence for the BBC's own content on its online services should not come at the expense of promoting positive impacts on competition by signposting to relevant services from independent providers via its platforms and channels. Tellingly, in the proposed Licence the requirement on BBC Online to "provide adequate links to material provided by third parties" (1.2.3), is absent in respect of iPlayer and Sounds (nor is this decision mentioned explicitly in Ofcom's consultation).

¹⁵ Enders Analysis, *Podcasts gain momentum* (2021). Sounds reached 40% of listeners vs. 17% for commercial radio.

¹⁶ More promisingly, in June 2022 the BBC and Wireless successfully entered into a short-term agreement to list *Stories of our times*, a daily news podcast from the Times and Sunday Times, in Sounds for a limited trial period. We hope that this trial paves the way for a more responsible approach by the BBC.

¹⁷ Amazon Prime video invested more than £1 billion in the UK on TV, movies & live sport since 2018. Netflix's annual UK content spend is \$1 billion. By contrast, the BBC's total annual content budget across TV, radio and online is about £2.3bn, with spend on TV content about £1.6bn of this.

¹⁸ BBC Annual Report and Accounts, 2021/22

Moreover, the proposed Licence does not protect against iPlayer and Sounds becoming even more closed off for audiences and other competitors in future. Without clear scope descriptions for iPlayer and Sounds, the BBC may be able to increasingly produce content exclusively for these services. Sounds is becoming more of a walled garden, with the BBC recently making new episodes of popular shows including *Desert Island Discs* and *Friday Night Comedy* only available on Sounds first.

Recommendations:

- **Retention of weekly news and specialist music quotas.**
- **Requirement for the BBC to make important programming available to audiences online should oblige the BBC to signpost relevant external news, current affairs and specialist programming where relevant.**
- **Extension of the general requirement to "provide adequate links to material provided by third parties" to iPlayer and Sounds, in parallel with BBC Online.**
- **Strengthened requirements for the BBC to work in partnership with commercial broadcasters, including by the introduction of specific collaboration and market impact requirements in relation to Sounds & iPlayer, whereby the BBC should:**
 - **ensure adequate opportunities for including third party audio content on these services; and**
 - **have a formal signposting role in enabling audiences to discover third party UK audio and streamed video content, using the full range of BBC media and editorial platforms.**

Question 3: Do you agree with the proposals for Public Purpose 2? If not, please explain why.

News Broadcasting does not have any comments on Ofcom's proposals regarding Public Purpose 2 at this time.

Question 4: Do you agree with the proposals for Public Purpose 3? If not, please explain why.

The BBC's third Public Purpose centres on providing output in many different genres, that is "distinctive from those provided elsewhere and should take creative risks, even if not all succeed, in order to develop fresh approaches and innovative content." Despite this, **the proposed Operating Licence adds no distinctiveness provisions in relation to iPlayer or Sounds, and puts specialist and at-risk programming on network radio and TV at risk through the introduction of general conditions without necessary quotas on the amount, frequency or nature of the BBC's specialist programming.** The proposed Licence also preserves the unequal performance quotas and transparency requirements across individual services, and does not fully recognise the role of all the BBC's acquisitions in ensuring distinctiveness and public value.

Securing distinctiveness in the BBC's online services

Much as the proposed Licence lacks clear scope descriptions or additive performance quotas for iPlayer and Sounds, it also omits important aspects relating to distinctiveness for these services. Central to Public Purpose 3 is that the BBC's "services should be distinctive from those provided elsewhere and should take creative risks, even if not all succeed, in order to develop fresh approaches and innovative content."¹⁹ Yet nowhere in Ofcom's proposed objectives for Public Purpose 3 are distinctiveness or creative risk-taking mentioned,²⁰ and the same is true for the specific quotas relating to iPlayer and Sounds (proposed Licence, 3.2). Rather, Ofcom's proposed requirements for Public Purpose 3 merely maintain the status quo for iPlayer and Sounds: providing a broad range of output, and commissioning titles from independent producers (proposed Licence, 3.2).

For BBC Online, only one high-level condition is proposed: that the BBC must "take steps to reach, serve and engage with all audiences, including experimenting with innovative forms of delivery where appropriate" (proposed Licence, 3.3). This goes no way to addressing issues where BBC content has not only lacked distinctiveness but actively duplicated on competitors' content, such as when the BBC launched *The Cricket Social* as spoiler coverage to talkSPORT 2's commentary of overseas England cricket tours during three consecutive winters from 2018-2021, despite not holding the official rights.

Instead of placing specific distinctiveness conditions on the BBC's online services, Ofcom is proposing to rely on a transparency requirement which involves the BBC telling Ofcom why it thinks its plans are distinctive, and reporting on its own performance against this (proposed Licence, 3.14.1; 3.15.1). This does not make for objective or robust scrutiny; rather perpetuates the shortcomings of an existing system that enables the BBC to both set and mark its own homework.

The absence of any quantitative measures of distinctiveness, makes it challenging to arrive at an objective assessment of the BBC's performance on distinctiveness. In its most recent Annual Report, the BBC relied heavily on audience figures to justify its performance under Public Purpose 3 - an imperfect measure of distinctiveness. The same applies for Public Purpose 1, where the BBC focuses heavily on perceptions of the quality and impartiality of its news provision, at the expense of evaluating the extent to which its programming is "not widely available from other United Kingdom news providers."²¹

Recommendation:

- **Addition of new specific requirements on iPlayer, Sounds & BBC Online, mirroring essential requirements in Public Purpose 3, relating to securing services that are distinctive and that take creative risks to develop fresh and innovative content.**

Safeguarding against the dilution of specialist and at-risk programming

¹⁹ Royal Charter, Article 6

²⁰ [Proposed Licence](#), p11

²¹ BBC Annual Report and Accounts 2021/22

Ofcom is proposing to replace network radio and TV quotas for arts and religious programming, documentaries, social action campaigns, live or specially recorded performance, new music works, comedy and children's content with a more general condition simply to provide a wide breadth of output covering these genres (proposed Operating Licence, 3.4.3; 3.8.3). This is matched by a non-enforceable objective regarding "genres that are underprovided or in decline across public service broadcasting" (proposed Operating Licence, Public Purpose 3; Objective 2).

However, providing a broad range of output is not a guarantee of the distinctiveness or amount of content that will be provided to audiences. Indeed, in the absence of any specific quotas on frequency and length of programming, or any definitions of genre types, it is easy to foresee a scenario where the quantity and quality of the BBC's programming in these vital genres is reduced. For example, there is currently no detail on whether the proposed requirement could be satisfied by the BBC providing just one religious programme per week on any given service. Nor is there currently any protection against requirements on "culture" being loosely interpreted, for example by providing popular culture-based commentary shows rather than programmes concerning theatre and visual arts. Commercial broadcasters already provided a broad range of output; the BBC has a unique role and remit to provide specialist genres and this should not be diluted.

Recommendation:

- **Retention of specific quotas for network radio and TV relating to specialist and at-risk programming.**

Equalising performance quotas and transparency requirements across individual services

The proposed Operating Licence perpetuates the significant imbalances in the number and nature of qualitative requirements between individual BBC services. The most pronounced differences are between the BBC's TV and radio services. For example, for 14 conditions specific to BBC One, there are just five conditions attached to 5 Live in the proposed Licence.

Although Ofcom recognises that "covering a broad range of sports, including those which do not currently receive a great amount of broadcast coverage, sets the BBC apart from other providers and is core to the BBC's duty to serve all audiences" (consultation, 8.47), this does not translate into greater accountability for 5 Live in the form of qualitative performance quotas regarding its minority and underexposed sports coverage. While the proposed 5 Live condition for 75% news & current affairs coverage is retained, much of the rich detail in the previous BBC Trust service licence concerning what makes its news coverage valuable and distinctive has been lost.

These imbalances in the requirements on individual services extend to the proposed transparency requirements. For example, while the proposed Licence requires the BBC to report on its sports coverage on 5 Live, it contains no specific transparency requirements in relation to the BBC setting out its planned output for its sports coverage - let alone its minority sports coverage. Yet this nature of transparency requirement exists for each of the other UK Public Radio Services in relation to their specialist coverage (proposed Licence, 3.14.5).

The proposed Operating Licence also sets out a vague retrospective reporting requirement for 5 Live to publish "the number of sports it covered on BBC Radio 5 Live and hours of each sport covered on BBC Radio 5 Live during that year" (proposed Licence, 3.15.2). However, sports coverage is not defined as exclusively live coverage, and could be interpreted more broadly as, for example, chat shows. There is clear public value in 5 Live being news-led and providing live coverage of sports that would not otherwise receive airtime.

A timely and significant example of the BBC failing to take creative risks and embrace distinctive programming can be found in 5 Live's Monday evening scheduling. Although talkSPORT now owns the rights to Monday night live Premier League football (having lost the rights to Saturday evening matches to 5 Live), and although 5 Live has extensive live football commitments across other weeknights, the BBC network continues to broadcast *The Monday Night Club*, a football discussion and debate show. This scheduling decision represents a clear missed opportunity on the part of the BBC, and one which disregards its public service mission. Clear and robust quotas underpinned by clearly defined transparency measures are needed in order to ensure that the BBC does its best to serve audiences and avoid duplicative programming.

Beyond these specific areas, enhanced reporting and transparency requirements are needed for a number of areas such as BBC expenditure, tech roadmaps and listener data, as outlined previously.

Recommendations:

- **Equalisation in the number of quantitative conditions applied to each BBC service by increasing the number of conditions for services such as 5 Live and Sports Extra.**
- **Addition of qualitative conditions to secure distinctive output and high quality public service programming and content, including material commitments to providing coverage of minority and underexposed sports and high quality news via services such as 5 Live.**
- **Transparency requirements on the BBC to set out its planned output across individual services should be extended to minority sports coverage on 5 Live.**
- **Transparency proposals should include requirements for the BBC to publish:**
 - **how news and sport budgets are deployed;**
 - **disaggregated commissioning spend on BBC Sounds and other BBC podcast output;**
 - **tech roadmaps, learnings (including audience feedback) and research from development of online services; and**
 - **data for online and podcast listening for radio services across all platforms.**

Providing transparency around a broader set of BBC acquisitions

Under the proposed Operating Licence, the BBC will be required to set out the role that acquisitions will play in its plans to deliver distinctive output and services for audiences (proposed Operating Licence, 3.14.2. Ofcom is currently defining acquisitions in narrow

terms, as "programmes not commissioned by or for the BBC, but which are broadcast or made available on a BBC service" (consultation, p87). In our view this fails to consider the impact BBC's acquisitions of finite goods such as sports rights have on the distinctiveness and public value of the BBC's programming. This is evident in instances such as the BBC's acquisition of the exclusive radio rights to the Indian Premier League (IPL) for 2019 and 2020. Given the IPL had previously been broadcast on talkSPORT 2, and talkSPORT 2 submitted a bid to continue to broadcast the competition in 2019, no public value was created by the BBC outbidding talkSPORT 2 for these rights or by using public funds to acquire these rights exclusively. As such, proposals for greater transparency in how the BBC's acquisitions will play into its plans to deliver distinctive output and services for audiences should span the breadth of the BBC's acquisitions, including sports coverage rights.

Recommendation:

- **Expansion of transparency requirements regarding acquisitions²² beyond programme acquisitions to include sports coverage rights acquisitions.**

Question 5: Do you agree with our preliminary view on the BBC's request to change Operating Licence conditions 2.21 and 2.32 for BBC Four, including our proposal to remove BBC Four's peak original productions quota and set the 'all hours' quota at 65% instead of 60% as requested by the BBC? If not, please explain why.

The BBC has a unique role in providing specialist content not widely available elsewhere. As Ofcom sets out, proposals relating to turning BBC Four into a predominantly archive channel are contextualised by the BBC's plans to double its arts and music spend on BBC Two. While this in itself is not problematic, it would be concerning were these changes to set a precedent for allowing the BBC to reallocate budgets into different types of programming already well served by commercial broadcasters, such as sports or entertainment.

Question 6: Do you agree with the proposals for Public Purpose 4? If not, please explain why.

Given the nature of the BBC's position in the audio and speech radio markets, it is important that commitments to high quality and distinctive BBC services extend to its local radio stations. To best serve audiences and ensure clear public value, BBC local radio should focus on providing local news and journalism. Reducing the breakfast peak speech quota for local radio in England from 100% to 75% (proposed Licence, 4.40.2) runs counter to this. Instead, BBC local radio stations will be able to increase their music provision during these prime listening hours - without proper accountability for providing specialist music and live performances that distinguish them from commercial radio stations.

Though not of direct relevance to News Broadcasting, Ofcom's proposal to allow content made for BBC Sounds to count towards the BBC's delivery of the network radio production quota for the nations and regions constitutes an effective relaxation of requirements on the BBC in relation to its original production for the nations and regions (consultation, 9.19). The

²² Proposed Licence, 3.14.2

same applies for Ofcom's proposal to replace the non-news and non-current affairs quotas on the BBC's opt-out TV services for the nations with a condition to provide this output and transparency requirements (consultation, 9.59) as the BBC's nations channels will no longer be required to meet specific quotas for non-news and non-current affairs programming. We agree that existing news and current affairs quotas on the BBC's TV and radio services for the nations and regions should be retained, alongside speech quotas for the BBC's radio services for the nations (consultation, p65).

At this time, News UK has no comments on Ofcom's proposals regarding BBC transparency requirements on diversity, representation and portrayal.

Recommendations

- **Proposals to reduce the breakfast peak speech quota for local radio to be counterbalanced by requiring BBC local speech provision to focus on local news and music provision to include specialist and distinctive content.**

Question 7: Taken together, do you agree with the proposals for a new Operating Licence? If not, please explain why.

Ofcom's current set of proposed revisions to the Operating Licence represents a missed opportunity to enhance the BBC's performance. The proposals would dilute requirements on the BBC and diminish public value. They fail to achieve appropriate protections for at-risk content and high-quality, original journalism, as well as omitting to enshrine principles regarding distinctiveness and collaboration.

Instead of stepping up its intervention powers, Ofcom's proposals introduce ill-defined transparency requirements that allow the BBC to set and mark its own homework, creating clear conflicts of interest and creating the vague conditions.

The proposals neglect to consider the role the Operating Licence plays in protecting against negative effects on competition from the BBC's activity. The proposed Licence does little to provide clarity and certainty for competitors concerning the scope of iPlayer, BBC Sounds, 5 Live or Sports Extra, nor does it place any additional performance quotas or conditions to mitigate against the market impact of these services.

Our concern at the prospect of Ofcom taking a more relaxed approach to its regulation of the BBC is based on clear evidence that the BBC is not sufficiently un-conflicted in policing its own behaviour. Ofcom should not be loosening its performance regulation without clear evidence that the BBC is capable of acting responsibly to further public value and without harming other market participants.

Our key recommendations can be summarised as follows:

1. The reinstatement or introduction of clear scope descriptions for BBC services, including iPlayer, Sounds, Radio 5 Live and Sports Extra - safeguarding the distinctiveness of these services and providing much-needed certainty for competitors.

2. Enhancing the qualitative and quantitative conditions applied to these services - creating robust performance expectations for distinctiveness, high quality news journalism and specialist programming against which the BBC's performance can be objectively measured.
3. Upgraded arrangements for the measurement of BBC performance, including publishing evidence justifying any breaches.
4. Additional transparency requirements, including publishing greater detail on expenditure, technology, audience data and materiality assessments.
5. Greater accountability for the BBC on issues of market impact, including publishing changes to its services which may impact on competition, especially in areas where the BBC has a position of market power.
6. Strengthened requirements for the BBC to work in partnership with commercial broadcasters such as by hosting and signposting to relevant third party content, particularly in relation to iPlayer and Sounds.

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