



Radiocentre Submission to Ofcom

Consultation: How Ofcom Regulates the BBC

September 2021

Overview

Ofcom's regulation of the BBC should be able to evolve in order to reflect significant changes in UK media and consumption. Any changes should be underpinned by clear principles of improving transparency, accountability and the delivery of the BBC's Public Purposes.

We welcome Ofcom's proposal to broaden the scope of the BBC Operating Licence to explicitly include online services such as BBC Sounds. The remit of these services and their role in delivering the BBC's Public Purposes must be articulated clearly.

The regulation of BBC radio should be approached differently to television. The BBC has a dominant position in radio with a 50 per cent market share and a significant funding advantage. This is not the case in television where the BBC has a 28 per cent share and is challenged by major international streaming platforms.

Quantitative targets are the clearest and most objective means to hold BBC radio services to account. There are 39 requirements set by Ofcom for BBC radio services in the current Operating Licence, 32 of which have a specific target attached to them. These are vital in supporting distinctiveness of music output on services like Radio 1 and Radio 2, as well as speech content on BBC Local Radio.

The loss of clear targets risks diluting BBC public service output and having a negative impact on commercial services. Our analysis suggests the cumulative loss of revenue could be at least £300 – £311 million to commercial radio through to the end of the current Charter Period.

Ofcom's competitive impact regime should reflect the BBC's dominance in audio. This should lead to adoption of the principles being applied to digital platform regulation through the Government's proposed 'pro-competition regime' enforced by the Digital Markets Unit.

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Executive summary

1. Radiocentre welcomes Ofcom's review of BBC regulation. We agree that the rapid evolution of the UK's media landscape has highlighted the need for changes to the BBC's Operating Framework.
2. It is important that regulation gives the BBC sufficient room to innovate and respond to competition from international video-streaming platforms, while ensuring that its activities provide a distinctive offering for licence fee payers and do not crowd out commercial broadcasters.
3. However, the market context in the UK audio sector is different to that in the wider audiovisual market. The BBC remains the dominant provider of radio services in the UK with 50 per cent of all radio listening. With its guaranteed licence fee funding, the BBC continues to occupy a privileged position in the UK media landscape that is much more marked in audio.
4. We have concerns that – in audio – Ofcom's proposed approach is likely to lead to less competition and a less plural ecosystem, given the dynamic impact of the BBC's activities on the commercial sector's ability to reach audiences and innovate.
5. We believe Ofcom currently does not utilise some of the tools at its disposal to regulate other sectors (for example, Ofcom's use of data, its intervention approach, and stakeholder participation), that could help it analyse and intervene against potential adverse impacts on fair and effective competition from the BBC's activities. Given this is still a reasonably novel function for Ofcom, it would appear to be a good time to assess Ofcom's structures, which Radiocentre believe should be adapted to take a more direct and targeted role in managing the impact of BBC's audio services.
6. This is particularly the case given Ofcom's concerns that (a) the BBC is not as transparent as it should be and (b) the BBC's ability to assess competitive impact is not sufficiently developed, and for which it has no obvious incentive to correct.
7. These themes are explored in more detail in response to the specific consultation questions posed by Ofcom but are summarised below.

Radio is different: The UK audio market has not evolved in the same way as the audiovisual market in recent years

8. Entry by international audiovisual platforms such as Amazon Prime, Disney+, HBO and Netflix has eroded the BBC's historic position in UK television and challenged the ways that the BBC reaches its audience. Audio markets, on the other hand, are less globalised and the BBC has always had a significant market share and faced less direct competition.
9. Live radio listening is expected to remain the dominant form of audio consumption into the 2030s. As a result, the BBC is still by far the dominant provider of audio content in the UK and is likely to remain so for the foreseeable future. This means that the approach Ofcom takes to regulation of the BBC in audio markets should be much more sensitive to the unique impact of the BBC on competition in these markets, even more so given the BBC's privileged funding position and its competitors' reliance on advertising.

10. Given its dominant audio market position and unique funding, any relaxation of quotas and obligations on the BBC could potentially enable it to further crowd out commercial radio output.

A deregulatory approach risks adverse competitive impacts in the UK audio market

11. The changes being considered by Ofcom would inevitably constitute a significant relaxation of BBC regulation, and thus provide far too much flexibility to enable BBC radio and audio services to prioritise audience reach over distinctiveness and the delivery of its public purposes. The BBC does not need to maintain or grow its market share by sacrificing its distinctiveness, it should not be allowed to escape its current obligations to pursue audience numbers in a market where there are high quality, Ofcom-licensed providers that already serve those audiences.

12. The proposed changes will have a dynamic impact on competition in the UK audio sector, with adverse effects lasting well into the future. The BBC's activities can have two sorts of competitive impacts on the commercial sector:

- (i) a direct impact on audiences if BBC content crowds out commercial content instead of creating public value; and
- (ii) an indirect impact (given the two-sided nature of broadcasting markets) on commercial radio's ability to fund current and future programming, since audience levels affect commercial broadcasters' advertising revenue.

13. We commissioned bespoke consumer research and modelling to consider the impact on the commercial radio and audio sector from different regulatory scenarios, as well as the associated impact on consumer choice. We tested two scenarios to illustrate the potential impact on the development of BBC services. The evidence from this analysis clearly suggests that fewer restrictions on BBC content would harm commercial radio listening, with an associated impact on revenues and viability. Because the BBC's new services in these scenarios would only crowd out commercial content, they would lead to a reduction in listening options available to consumers and be a net loss to the UK's audio ecosystem.

14. Specifically, we found that the loss of clear targets followed by measures to drive audiences to Radio 1 and Radio 2 would lead to a significant drop in commercial radio listening time, translating to a £44 million pa loss in revenues by the end of the current Charter Period in 2027 (a cumulative loss of £192 million by then). Crucially, this amounts to around 27 per cent of modelled revenues for the main competitor stations, which could become uneconomic as a result. In addition, we found that a drive from the BBC to launch new online radio services would have a direct negative impact on commercial radio listening, leading to a £50 million pa loss in revenues by the end of the Charter Period in 2027 (a cumulative loss of £215 million by then).

15. Looking ahead it will be important to tailor Ofcom's regulatory approach to different activities, especially because of the different evolution of audiovisual and audio markets. In the audiovisual sector, greater reliance on qualitative targets might provide the BBC with a degree of flexibility to help it adapt to the challenge of international platforms and video-on-demand services. In the audio sector, where the BBC remains dominant (and new entry from global tech and media giants is less likely), quantitative targets are important to ensure the BBC delivers public value and that it does not crowd out commercial content.

Quantitative targets continue to play a vitally important role

16. Our analysis of the performance of BBC radio against quotas shows that although services typically meet the requirements, in a significant number of cases this provision has either fallen closer to its quota or it consistently only just delivers against the quota. For example, the BBC's provision of speech content on BBC Local Radio declined from 73 per cent in 2014/15 to 64 per cent in 2020/21, a steep decline arguably halted only by a 60 per cent local speech quota.
17. This is a clear indication that quantitative targets are an important and effective means of regulating the BBC, and also that in the absence of such quantitative targets, the BBC's behaviour would change. A move away from quantitative (quota-based) regulation towards a more qualitative approach is therefore likely to result in a shift away from the public value content that quotas are designed to support, including news, documentaries, distinctive music, arts and religious programming.
18. Rather than see the wholesale removal or dilution of quantitative targets, we would argue for greater transparency from the BBC and a reform of quotas so that they better support performance, while also driving distinctiveness and limiting duplication of commercial services. Quotas can be effective in ensuring the BBC radio serves its audiences, but only if performance is properly measured, for example by including clear objective measures of distinctiveness and commercial duplication.
19. Whatever the nature of the targets and regulatory conditions on BBC services, Ofcom must also be alive to the potential for gaming of regulation which undermines its intended purpose, particularly in the audio market where the BBC is dominant. For example, the BBC should not be able to meet its Licence obligations through content that exists solely online (for example, on BBC Sounds), or during off-peak hours.

Ofcom lacks the external input and tools to effectively assess the BBC's competitive impact

20. We are concerned that Ofcom is already unable to assess the BBC's competitive impact effectively – and that this situation could deteriorate further – due to the limits on its regulatory powers and the way in which it has so far chosen to exercise its duties.

- **Limited data and stakeholder participation**

21. Ofcom has repeatedly taken the BBC to task for its lack of engagement with the public and commercial stakeholders regarding changes to its activities¹ – but has not addressed these concerns through sanctions or enforcement action. We agree that the BBC Operating Licence should require greater transparency and more effective reporting about the BBC's plans and performance.

¹ Ofcom Annual Report on BBC

22. However, we are concerned that the oversight framework proposed by Ofcom may not prompt sufficient transparency from the BBC regarding its decision-making, nor does it necessarily give Ofcom sufficient recourse should they fail to do so.

23. While the BBC's Annual Plan could give Ofcom and other stakeholders some useful information about the BBC's planned activities, this information would fall short of what is needed to assess the competitive impact of planned activities and changes to existing activities. To date, the Annual Plan has been far from transparent and clear on what the BBC will be doing in the year ahead. This is acknowledged by Ofcom in the consultation, where it notes that it *'has consistently raised issues about the BBC's transparency'* (para 3.6).

24. The Annual Plan (at present) does not include significant quantitative measures of impact or performance measurement that Ofcom could review; the BBC's Annual Report does not give sufficiently detailed measures of impact to assist Ofcom. Examples of impact measures that would be helpful to Ofcom include: spending on cross-promotion and marketing of the BBC's services; survey data on audience perceptions of distinctiveness; and data on content overlap between BBC programmes and commercial broadcasters.

25. Ofcom's proposal does not outline any mechanism to allow stakeholders to input into Ofcom's review of the BBC's commitments, nor into Ofcom's Annual Report on the BBC. While Ofcom says it is concerned about a lack of engagement with stakeholders it does not propose any major changes to facilitate increased engagement. By contrast, oversight bodies in other jurisdictions (e.g. Germany's Deutschlandradio Radio Council) allow for direct stakeholder participation in public interest assessments of public radio programming, including competitive impact.

26. It is also far from clear that the BBC will have particularly strong incentives even to maintain existing levels of transparency, particularly in a regulatory environment where it has more freedom to occupy spaces already well served by commercial players.

- **Assessment of competitive impact within properly defined markets**

27. The approach that the BBC takes to both the market definition and competitive assessment is significantly less robust than it ought to be given the BBC's dominance in the UK audio market and its privileged and unique funding position.

28. We are also concerned Ofcom adopts a less rigorous approach to assessment of competitive impacts in its regulation of the BBC than it does in other regulatory contexts. For example, the BBC Sounds consultation response had no formal market definition, assuming implicitly that the whole UK market for audio is relevant (with part of the analysis focused on online radio). We consider a more robust approach to market definition is key to the assessment of the effect of the BBC's conduct and strategies on competition.

- **Intervention approach**

29. We also worry that Ofcom is pursuing a deregulatory approach despite concerns that the existing regulatory regime may be insufficient to ensure transparency and adequate performance measurement on the part of the BBC. Ofcom's proposal to step in only when the BBC's plans raise serious concerns could lead to a bias against intervention.

30. For example, since launching Sounds in 2018, the BBC has made 15 significant changes (including 7 that go beyond the original blueprint for Sounds) without assessing their competitive impact. Even if these changes were non-material when looked at individually, taken together they have had an impact on commercial providers, but have nonetheless avoided effective scrutiny.

- **Regulators are, in general, becoming more – not less – concerned about the economic characteristics of digital markets and platforms**

31. Ofcom's proposals cut across recent regulatory trends, including by Ofcom itself. The BBC is a dominant platform in some areas of the UK media landscape. It merits platform-like oversight and regulation in those areas.

32. Regulators in the UK and overseas increasingly recognise that platforms raise competition concerns because of their economic characteristics, such as their strong economies of scale and network effects; a data advantage for incumbents; the power of consumer defaults; and barriers to multi-homing.

33. The BBC exhibits many of these characteristics in the audio space. It has also extended its dominance in radio into audio streaming, where BBC Sounds is a leading platform for podcast and music content. Thanks to generous licence fee funding and its cross-media proposition, the BBC is able to cross-promote Sounds across media, channels and programmes, cementing its dominance as a platform provider for audio content.

34. The BBC's regulatory framework should recognise that the BBC is a dominant platform in audio and seek to address the consequences of this dominance like other regulators are doing.

Introduction

35.Ofcom has requested evidence and information as part of its review of BBC regulation. This document is the submission in response from Radiocentre and its member companies.

About Radiocentre

36.Radiocentre is the industry body for commercial radio. We work on behalf of over 50 stakeholders who operate over 300 licensed radio stations across the UK and represent more than 90 per cent of commercial radio listening and revenue. We perform three main functions on behalf of our members, including: promoting the benefits of radio advertising, ensuring advertising on commercial radio complies with content rules, and providing a collective voice on policy issues which affect the way that the sector operates.

37.We are therefore responsible for producing and submitting this response to Ofcom's consultation on how it regulates the BBC, on behalf of the UK commercial radio sector.

Scope of this submission

38.This submission sets out the position of the commercial radio industry in response to the questions posed by Ofcom in its consultation document regarding its regulation of the BBC. It also provides detailed evidence and analysis developed from bespoke research we have commissioned in some main areas of interest, including:

- How the BBC might behave in the event that regulation of audio services was relaxed in the way that Ofcom is proposing (and the potential impact);
- How the approach to regulation of the BBC has developed over time including the role of quotas in driving the BBC's performance; and
- What lessons can be learned from other industries regarding the approach to regulation and likely outcomes

39.While there is inevitably a degree of overlap in our response, we seek to address each consultation question in turn and set out our reasons why we think that it would be a mistake to for Ofcom to move away from setting clear regulatory conditions for BBC radio and audio services.

Question 1 – Scope of the review

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

40. When considering the question of scope, it is important to take into account not only Ofcom's regulatory powers and duties and their purpose but also the broader context. This includes the timing and interaction of this review with other processes, the different market context for radio compared to TV, the BBC's dominance in UK radio and current regulatory thinking on supporting competition in markets where there is a dominant operator.

Main themes and scope of the review

41. On the direct question of the proposed scope of the review as set out by Ofcom, we broadly agree with the approach and that it is appropriate to consider its duties across all relevant areas of BBC regulation – specifically as this relates to regulating performance, content and competition.

42. We particularly welcome the focus on transparency and engagement when considering these duties. As Ofcom notes, the BBC's unique funding model through the licence fee means that it has unique responsibilities on transparency and accountability. However, despite this responsibility there would appear to be a persistent issue with the BBC articulating its plans clearly and reporting on performance.

43. This has been evident in the BBC's behaviour in the radio and audio sector, for example with the lack of transparency around the BBC Sounds service. Despite the fact that BBC Sounds is considered as the heart of the BBC's audio strategy, there is very little financial information or even audience data available publicly. This would appear to be attributable, at least in part, to the fact that BBC Sounds is not currently treated in the same way as other standalone BBC services, either as a service in the BBC Operating Licence or a UK Public Service subject to regulatory conditions and scrutiny.

44. The resulting absence of transparency makes it particularly difficult to regulate performance effectively, creating a situation where the BBC appears to be able to 'mark its own homework'. In addition, it can undermine or weaken processes designed to assess the impact of the BBC on competition if there are numerous incremental changes made to BBC services, without the necessary transparency and consultation with stakeholders to help understand and assess cumulative impact. Once again, the development of BBC Sounds and the addition of new functionality and services on this platform has been a case in point².

² https://www.ofcom.org.uk/__data/assets/pdf_file/0020/216371/radiocentre.pdf

45. We would also challenge Ofcom's assessment of the BBC's Annual Plan as being a good example of where the BBC has demonstrated greater transparency. While it is true that the BBC does include some broad statements and headlines on its plans to deliver its Mission and Public Purposes, in the case of its radio services most of these statements are simply descriptions of programming initiatives or a reflection of conditions already outlined in its Operating Licence.
46. With regard to the other themes of the review, we agree public value should be made more central to how Ofcom assesses the BBC's performance and impact. However, the interaction between competitive impact and public value needs greater emphasis. Otherwise there is a risk that the concept of public value is considered in isolation, and only as a performance measure, when it is also a crucial way of assessing the distinctiveness of BBC services and their impact on competition (since more distinctive programming is less likely to crowd out commercial output). This is especially important when considering BBC services that are most similar to those offered by the commercial sector, whether that is pop music services like Radio 1 or Radio 2 or online services available on BBC Sounds.

Relationship to other regulatory processes

47. The proposed timing of this review and its interaction with other processes is also a matter of concern. While we appreciate that the full consultation will not be launched until the Performance Assessment and Periodic Review have been published, it does not seem appropriate that the new Operating Licence could be published and adopted before the mid-term Charter review is concluded.
48. The BBC Charter (clause 57) states that the mid-term review is when the Government will take the opportunity to consider the governance and regulatory arrangements of the BBC³. The Government's White Paper that preceded the Charter also described the mid-term review as a 'health check' and an opportunity to consider the effectiveness of the core changes regarding governance and regulatory reforms⁴.
49. Therefore, it is clear that Government designed a process, agreed with the BBC and endorsed by Parliament, which envisaged that the mid-term review would be the forum to assess BBC regulation and make any necessary changes. While the Government will of course take into account information and any relevant reviews carried out by Ofcom, this does not imply that Ofcom should present significant changes to the Operating Licence or competition powers as a fait accompli before the mid-term review has completed its own work and analysis.

3 http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf

4

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

The market context for audio

50. We are also concerned that Ofcom's articulation of the market context in which it is undertaking this review is too narrow. Specifically, the repeated references in its consultation document make it clear it builds largely or solely on analysis of changes in audiovisual markets (e.g. repeated references to 'Small Screen, Big Debate'), underplaying very meaningful differences in the development of the UK audio market compared to related audiovisual markets and the role of the BBC in television compared with audio.

51. We accept of course that the advent of much greater competition in television followed by the entry of international audiovisual platforms such as Amazon Prime, Disney+, HBO and Netflix has eroded the BBC's historic dominance of UK television and challenged the ways that the BBC reaches its audience. Average audience reach for TV fell by nearly 10 per cent between 2015 and 2020 from 92 per cent to 84 per cent for all TV and from 81 per cent to 71 per cent for all BBC channels. This trend has also had an inevitable impact on average viewing hours, with a decline of 23 per cent for all TV and 29 per cent for BBC services between 2010 and 2019 following the arrival of global streaming services including Netflix (2012) and Amazon Prime (2014).

52. Radio is different. The UK audio market has not evolved in the same way as the audiovisual market in recent years. Radio reach and consumption has remained much more robust than TV, as has the BBC's position within it. While radio is also facing its own forms of digital disruption and competition, the reality is that audio markets are less globalised. Live radio listening still currently accounts for over 70 per cent of all audio listening (MIDAS)⁵ and is expected to remain the dominant form of audio consumption into the 2030s.

53. As a result, the BBC remains the dominant force in radio and audio in the UK and is likely to remain so for the foreseeable future. Examples that illustrate the BBC's dominance in radio and audio are outlined below.

- Market share - The BBC accounts for around a 50 per cent share of all radio listening in the UK, compared to a 28 per cent share in television. Its precise level of audience share has fluctuated but it has remained over 50 per cent on an annual basis for more than 20 years, since the current RAJAR methodology was introduced in 1999. This is especially notable given that under UK and EU competition case law, market shares above 40 per cent are prima facie evidence of dominance.
- Funding – The BBC spent around £745m on its UK radio services in 2019⁶. This is far in excess of what any of its competitors are able to invest in audio and 20 per cent more than the entire commercial sector revenue combined. This funding gap grew even further in 2020 (to 37 per cent) as commercial radio revenues dropped due to the impact of the pandemic. This is in stark contrast to the TV market where the BBC's expenditure does not dominate, giving commercial operators space to compete.

⁵ https://www.rajar.co.uk/docs/news/MIDAS_Spring_2020.pdf

⁶ Ofcom Communications Market Report

- Spectrum and distribution – The BBC has benefited from a significant and long-term advantage due to its access to the most valuable broadcast spectrum. It owns four out of five national FM stations, including the only two national FM pop services Radio 1 and Radio 2. It has sought to duplicate this structural and legacy advantage on broadcast platforms to its distribution online through BBC Sounds, so that it becomes the leading UK platform for radio, podcast and music content.
- Cross promotion – It enjoys huge marketing and cross promotion power across TV, radio and online. The scale and nature of this cross promotion is unjustified and inappropriate given that much of its focus is on content or services with little or no public value. While there have been some small steps towards improving transparency on cross promotion there are no clear limits in place, despite the scale of the BBC’s cross-media proposition and its role in cementing its dominance. In addition, the promotion of significant services such as BBC Sounds has not been assessed despite an estimated monetary value of BBC Sounds cross-promotion of £364 million (66 per cent of UK radio advertising revenue).

54. We therefore believe Ofcom needs to take adequate account of the persistent structural advantage that the BBC enjoys in the audio market, and the significant differences in the development of the audio market relative to the audiovisual market. Adopting this bespoke approach to audio would not prevent any necessary changes to the regulation of the BBC’s audiovisual services, if that was deemed necessary to help the BBC address the challenges it faces. However, it would help to maximise the benefits for radio listeners by underpinning the public value required by BBC radio services, while supporting distinctiveness from commercial services. This in turn should also provide an opportunity to limit any negative competitive impact.

Regulating market dominance

55. The proposals included as part of this initial consultation would appear to cut across recent regulatory trends, including by Ofcom itself. For example, the Government is currently considering a range of measures to regulate the activities of online platforms, to respond to competition concerns raised due to their economic characteristics and market dominance. This includes consideration of ex ante powers and obligations on platforms as part of its pro-competition regime for digital markets.

56. As Ofcom will be aware, a new Digital Markets Unit (DMU) within the Competition and Markets Authority (CMA) will be responsible for addressing both the sources of market power and potential harms from the exercise of market power through this approach. This is based on the judgment that early intervention prevents lasting damage to competition, especially in rapidly-evolving digital markets. Among other powers, the DMU will be able to designate digital firms with entrenched market power and create codes of conduct for them.

57. The BBC exhibits many of the same characteristics as the dominant online platforms in the audio space. As a result, it merits platform-like oversight and regulation in those areas of dominance. The BBC’s regulatory framework should recognise this and seek to address the consequences, as other regulators are doing.

58. Specifically, Ofcom should consider introducing rules for activities where the BBC dominates. For example, changes to certain BBC activities / services could automatically trigger a BBC Competition Assessment (BCA), regardless of whether the BBC believed they met the materiality threshold. Changes in certain other additional areas / services could also require pre-notification (with specific details required around purpose, planned investment, etc.). Further details on this and other alternative regulatory approaches to addressing the BBC's impact on competition are outlined in response to Question 5 below.

59. The alternative is to wait until evidence of harm can be proven. This seems to have been Ofcom's approach in some areas of BBC regulation to date. For example, when considering the impact of BBC Sounds it concluded that it had not yet had a significant adverse impact, therefore no further action was required. Yet this approach risks being much more detrimental to audiences and competitors if it requires businesses demonstrate harm and services to become unviable before some form of regulatory response can be considered, by which time it may be too late to act against the BBC's entrenched dominance and support healthy competition. Pre-emptive regulatory action will always be more effective to ensure fair and effective competition.

Question 2 – Ofcom’s approach

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

60. The BBC Operating Licence should not be set in stone and Ofcom is right to examine ways for it to evolve. We are encouraged by aspects of Ofcom’s approach, including the recognition of the importance of online services for delivering the BBC’s public purposes for audiences. However, its proposal to dilute or remove current public service obligations risks having a negative impact for audiences and competitors, which could be compounded by an over-reliance on the BBC to set and police its own targets.

61. The net result of this proposed approach, when combined with the BBC’s requirement for universality and serving all audiences, is that it risks creating an environment where the BBC has no significant limits on its activities but has an incentive to grow reach. Given the BBC’s market share and other structural advantages it enjoys in the audio sector, this is both a poor outcome for transparency, accountability and public value for audiences, as well as being harmful to commercial operators.

Approach to online services

62. There are some elements of Ofcom’s proposed approach to reviewing the BBC Operating Licence which we welcome. We agree that there is limited recognition of online services in the current Operating Licence and that these need to be explicitly included. This has been a major weakness in the current regulatory structure for some time and has undermined both performance measurement and assessment of the BBC’s impact on competition.

63. As noted above, the fact that BBC Sounds is not treated in the same way as other standalone BBC services by Ofcom’s operating framework has led to an unusual and unjustified lack of transparency for a service that has been described as being at the heart of the BBC’s audio strategy. Its inclusion in an updated version of the Operating Licence provides the opportunity to provide a clear articulation of its remit and the role it plays in delivering against the BBC’s public purposes. This must include details of the content and features it may carry with a clear set of regulatory conditions, including greater oversight of changes to or additions to existing online services.

64. We also agree with the principle that the BBC needs to continue to deliver for all audiences, however they consume the BBC’s content, and that the BBC should be held accountable for how it meets the needs of these audiences. Once again, the broadening of the scope of the Operating Licence to cover online services more appropriately should help to support this approach. Although the BBC should not be able to meet its licence obligations through content that exists solely on BBC Sounds, or during off-peak hours given the material adverse competitive impact on the commercial sector.

Approach to quotas

65. While Ofcom's approach to the scope of the Operating Licence is encouraging, we remain deeply concerned about other aspects of the proposals, which could undermine these proposed improvements and fundamentally weaken the framework for assessing the BBC's performance, distinctiveness and impact on competition. In particular, we do not believe that a wholesale shift away from quotas or quantitative measures across all BBC services would be in the interests of licence fee payers or the health and diversity of UK radio. Moreover, such a move could cause significant and long-term damage to commercial competitors.
66. Unless such changes are handled carefully, with different approaches between sectors such as radio and television, there is a risk that moving ahead with this change across all BBC output and services could enable it to fundamentally change the nature of its services at will. This combination of a lack of transparency and even less direct regulatory oversight, could lead to BBC services duplicating more of the output of commercial operators – rather than producing distinctive output – and taking a greater share of the available audience in the process.
67. The alternative approach to quotas being proposed by Ofcom through a combination of changes to the BBC Operating Licence and expectations within the BBC's Annual Plan is not entirely clear. When outlining the case for some of the changes in a speech given to the Westminster Media Forum on February 2021, Ofcom Director Kevin Bakhurst gave the strong impression that Ofcom would not be setting quotas in future. Instead it would be for the BBC to set targets with Ofcom only assuming a broad level of oversight⁷.
68. Yet the consultation document also appears to indicate more of a hybrid approach to setting and assessing licence obligations with a mix of quantitative and qualitative requirements. While it does confirm that Ofcom's regulation will move away from primarily requiring compliance with quotas, it also sets out the case for finding the right balance between requirements to help support distinctiveness. Indeed, it says explicitly that *'this means the licence will continue to include quotas alongside qualitative requirements'*⁸.
69. In taking forward this approach, it will be crucial for Ofcom to determine which quotas are most valuable and effective – and in which areas of the BBC's activities these should apply. For the reasons outlined above, regarding the BBC's dominance in audio and developments in the audio market, it is clear that the continued and targeted use of quotas across BBC's radio and audio services would continue to benefit the services and their audiences.

7 <https://www.broadcastnow.co.uk/bbc/bbc-to-get-to-set-own-quotas/5157327.article>

8 Para 3.20, p.11

70. While we appreciate that some quotas may be gameable and are not always a good indicator of consumer satisfaction or public value, in radio and audio they continue to serve an important purpose. Moving away from this approach and allowing the BBC to decide how it meets the conditions of the Operating Licence could give excessive discretion to the BBC, potentially narrowing the range of choice for audiences and leaving them worse off. Moreover, giving greater weight to qualitative over quantitative requirements is no less subject to gaming, as it adds a greater measure of subjectivity to performance measurement that risks undermining trust as well as effectiveness in Ofcom's regulation of the BBC.

71. As we have noted, in considering the application of regulatory conditions to BBC services both now and in future, Ofcom must also be clear that the BBC should not be able to meet its licence obligations through content that exists solely on BBC Sounds or at off-peak hours. For quotas and commitments to be meaningful they must apply to the largest and most popular services, so that the associated public value content is actually reaching audiences in a significant way. This is also vital given the material adverse competitive impact on the commercial sector if BBC output duplicates the content of commercial services at peak times.

Approach to the BBC's role

72. The available evidence and concerns raised by Ofcom regarding the BBC's past behaviour, especially its lack of transparency, create real concerns regarding the effectiveness of the proposed regulatory framework in the future. In particular, we would question the suggested role of the BBC and its ability to fairly and objectively set its own plans, measure its own performance and give a fair picture of the competitive landscape through its Annual Plan and Annual Report, as part of the proposed reporting cycle.

73. While the BBC's Annual Plan is useful as an outline of the BBC's planned investments and activities for the year, it is often insufficiently detailed to be able to properly assess what is likely to emerge in practice and the likely competitive impact. For example, the 2020/21 Annual Plan says (p. 23): *'we will refresh our broadcast services and continue to evolve BBC Sounds, delivering more value to all audiences'*. This gives a hint of the direction of travel but little more. It does not provide full (or indeed any) details of new services or innovations planned for the Sounds platform, or any detailed information on the nature of these services, the audiences they will be seeking to serve, their content proposition or the way in which they will be delivering additional public value.

74. Further examples from the 2020/21 report include reference to *'Distinctive editorial moments will feature across our schedules'* (p.28). Again, a hint followed by some broad examples of relevant content, but not enough to tell how the BBC will aim for distinctiveness. This vague approach also applies to the BBC's specific commitments for the year (p. 55 ff.): there are many promises (e.g. regarding distinctiveness) but no metrics or responses to concerns raised by Ofcom or third-party stakeholders.

75. In addition, the Annual Plan gives Ofcom and external stakeholders some visibility over the BBC's affirmative achievement of its targets and mission ('how we will do / measure what we're supposed to do') but very little over its negative performance ('how we will make sure we don't do what we're not supposed to do'). Similarly, the BBC's Annual Report includes some performance measures regarding quotas, albeit lacking in detail, and binary yes / no answers to qualitative targets.

76.Perhaps most concerning of all is the BBC’s track record regarding its own additional quotas and performance measures as captured in its Annual Plan, referred to formerly as ‘additional BBC commitments’. In the first BBC Annual Plan (for 2017/18) these commitments were set out in some detail alongside the Operating Licence conditions for each service. However, they have been gradually watered down year on year and in some cases disappeared altogether, often replaced by a broad narrative description and statements or assertions regarding the delivery of the public purposes.

77.Consequently, the current BBC Annual Plan for 2021/22 provides a strange and occasionally confusing mix of quantitative conditions (mainly carried across from the BBC Operating Licence), along with references to specific programming or events. It includes very few additional measurable conditions for how public value or distinctiveness will be delivered by individual services. A high-level illustration of some of the shift in commitment on BBC radio services is provided in Figure 1 below.

78.This shift in the focus and content of the Annual Plan in a few short years has meant its role in holding BBC radio services to account has been weakened. This experience does not give us great confidence that the Annual Plan can serve as a tool to set meaningful requirements, without the backstop of regulatory conditions set by Ofcom through the BBC Operating Licence.

Figure 1: Examples of how BBC Annual Plan commitments have been diluted

	BBC Annual Plan 2017-18 Additional BBC Commitments	BBC Annual Plan 2021-22 BBC Commitments
Radio 1	Editorial focus on its key audience of listeners aged 15-29	No specific age target
	More distinctive mix of music that comparable providers, with a <u>daytime</u> playlist that features a greater range of songs	A distinct music mix compared to commercial music radio stations
Radio 2	More distinctive mix of music that comparable providers, with a <u>daytime</u> playlist that features a greater range of songs	A distinct music mix compared to commercial music radio stations
	Editorial focus on listeners aged over 35	No specific age target
1Xtra	Supporting UK artists in daytime with a minimum level of 35%	In daytime, at least a third of the music will come from UK artists
	At least half of the UK music in daytime will be new	An intention that at least half of this will be new

6Music	30% new music in daytime	Will champion new and alternative music from the UK and beyond
Asian network	Younger British Asian audience	No specific age target

Source: BBC Annual Plan

Modelling the potential consequences of Ofcom's approach

79. To help illustrate why it is right for BBC radio and audio services to be regulated, and the potential consequences of a continued relaxation in the approach to regulating the BBC, we have considered what the BBC's provision could look like were restrictions removed. Our modelling draws on bespoke consumer research and provides an illustration of what this could mean for the commercial sector and thus the associated impact on consumer choice.

80. Notwithstanding the general observations above, we accept that the BBC faces a challenging remit; it is expected to reach all audiences while delivering unique and innovative content which represents the UK and creates public value. This is a difficult task in a world where consumers have greater access to content and more choice than ever before. Across all media – audio, television, and online – the BBC is competing for consumers' time with better funded services and has seen some audiences decline in recent years.

81. So it is perhaps unsurprising that the BBC is increasingly focused on its need to serve all audiences. This has been exacerbated by the fact that younger audiences have been the first to adapt their consumption habits, they have been the first to move to over-the-top (OTT) services, such as Netflix, as a substitute for BBC television, and have been quick to adopt audio streaming services such as Spotify (although as noted elsewhere the pace of change has been different, with radio demonstrably more robust than TV). In audio, the BBC's more recent response has been to launch BBC Sounds and a number of online stations which target younger demographics, but also bring the BBC's content offer more directly in line with that of the commercial sector.

82. Rather than seeking to compete for audience with global services, and focus on young audiences to protect its longer term relevance, the BBC should focus on what it was originally designed to offer: quality British content which reflects the diversity of our country and, crucially, is complementary to the services offered by the commercial sector.

83. We believe that the BBC places undue focus on capturing young audiences and maximising its reach, rather than providing content which truly adds value to the UK audio ecosystem. In response to Question 3 we look at how the regulation of BBC audio has been used to ensure that the BBC remains focused on delivering public value, and how this has changed over time. In this part, we consider how the BBC might choose to respond were it not restricted by the quota-based regulation which currently exists. In short, a BBC 'without limits', which can offer whatever content mix it sees fit – in the context of existing incentives to maximise its reach and attract young audiences.

84. To do this we have produced a model and developed two scenarios to examine how listening might change were the BBC to adapt its content mix, following the relaxation of quota-based regulation. Under such increasingly light-touch regulation, we expect that the BBC would pursue audiences currently served by other providers, so as to increase its reach and better deliver against its remit to 'serve all audiences'. Naturally, this is likely to involve targeting audiences currently served by the commercial sector, who also happen to be a younger demographic than those currently listening to the BBC.

85. We tested two scenarios to illustrate potential BBC service developments. The scenarios are designed to present a narrative and explanation of potential plausible changes; our modelling then quantifies what this could mean for listening and associated revenues of the commercial players, allowing us to conclude on what the impact might be both the commercial sector and the associated impact on consumer choice. Our modelling is based on bespoke nationally representative consumer research (with 3,009 respondents), which asked respondents about their current listening habits and how they would expect their habits to change in future, were the BBC to change its content offer. The scenarios we have considered are as follows:

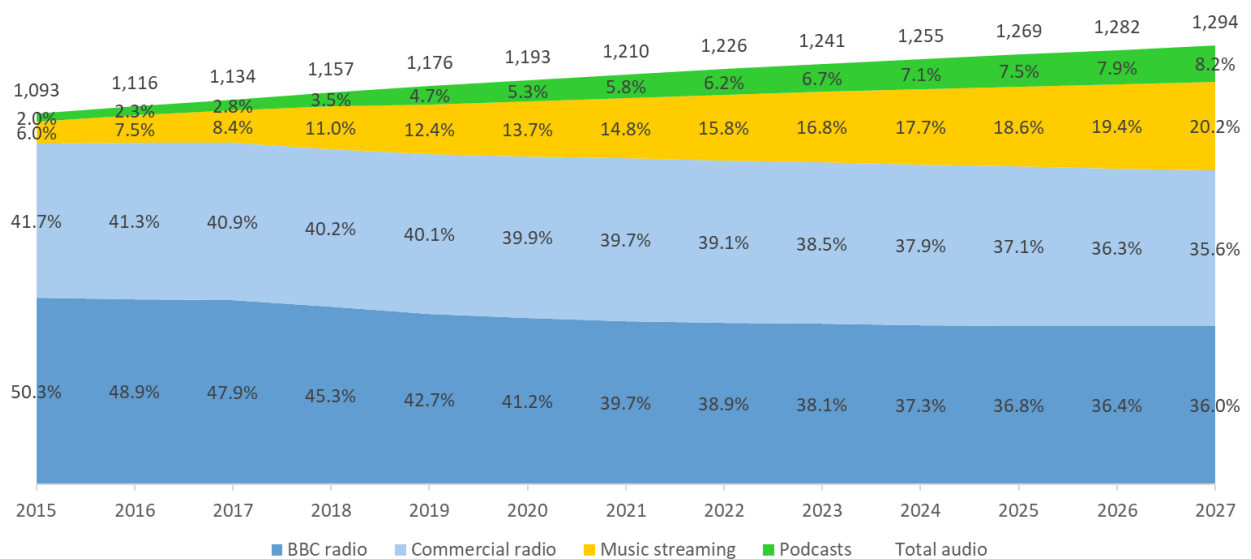
- **Base case:** the continuation of recent trends in each type of listening. Ignoring any potential impact of the COVID-19 pandemic – since we expect habits to return to 'normal' as people have returned to work and to their offices
- **Scenario 1 – Changes to BBC Radio 1 and 2:** we asked respondents how their listening habits would change if Radio 1 and 2 were to become more like the commercial broadcasters, focusing on popular chart hits
- **Scenario 2 – Launch of more new stations:** we asked respondents how their listening habits would change if the BBC launched further online-only speciality stations like Radio 1 Dance and Radio 1 Relax – these might be in other genre such as rock or country, similar to those provided by the commercial sector

86. Our modelling of these scenarios combines the findings from our consumer research with historic industry data on listening (from RAJAR/MIDAS) and revenue data (from public sources, where available). We produced a base case, informed by historic growth rates, and then used the findings from our survey to illustrate how the mix of listening would likely change under each of the scenarios set out above. We also considered the impact of the changes on revenues. Clearly the commercial sector relies on advertising revenues, which are closely linked to both the audience level and the profile of the audience.

87. In this section we have set out the findings of our research for each scenario in turn. The scenarios involving changes to the BBC’s service offer are set against the base case. Our base case is a continuation of recent trends in listening based on historic compound annual growth rates (CAGRs⁹); for total listening, and indeed total radio listening within it, the long-term trends are fairly stable and predictable. We revised down historic growth rates for new media (i.e. for podcasts and streaming) to reflect typical adoption curves for new technology/formats. The adjustments to podcasts and streaming growth rates were made by taking a long-term view of the decline in radio listening and the relatively stable total audio consumption, where podcasts and streaming listening make up the difference.

88. We built this up for each age group in turn, before combining to provide an overall view of how listening might develop by type. In doing so, we considered all relevant forms of listening, including traditional radio, online radio, podcasts, and audio streaming services. We also segmented radio (which includes both broadcast and on demand) by content provider, since we are interested in the relative performance of BBC vs commercial listening. When considering the relative shares of radio listening taken by the BBC and the commercial sector, we continued recent BBC and commercial-specific trends to 2022, before applying overall radio trends to both for later years, where there is more uncertainty.

Figure 2: Base case: Historic and forecast listening by type, total weekly hours, millions, 2015-2027



Source: RAJAR, MIDAS, FlyResearch, ONS, Radiocentre

⁹ Historic data is the best approach to informing our base case forecast. Asking consumers how their listening might change in future is difficult at present since, with audience measurement suspended, the current baseline is unknown. In our modelling we ignore the potential impact of COVID and use forecasts for 2020 and 2021. Asking consumers how their listening behaviour would change in the event adjustments to the BBC’s services remains useful, since we apply the changes in their reported listening to our modelled measured listening.

89. The base case shows a steady increase in total listening time across radio, podcasts and streaming services; growth in total listening time is more subdued due to the steady decline in 'other listening' (not shown in our modelling) – which includes formats in long-term decline, such as CDs and downloads.

90. To estimate the impact on revenues, we have applied a yield to commercial listening. Obviously listening does not translate to revenue for the BBC, since it is publicly funded, but changes in commercial listening have a direct impact on the ability of commercial broadcasters to generate income and fund their services. To do so, we have used historic yields, which we have forecast to increase steadily at a rate of 2.2 per cent per year, in line with the 2015-19 CAGR. We have applied the average yield for all demographics. In our scenarios, we have assumed an annual yield growth of 2.0 per cent; fractionally lower than the base case to reflect a slight decline in the appeal of commercial radio as it becomes less differentiated from the BBC's services.

Impact of changes to BBC audio services

91. For the scenarios which reflect changes in BBC services, we asked listeners how their existing habits would change in response to the adjusted services. To combine our survey findings with historic data, we retained our base case forecast for the total volume of listening. This is fairly stable over time (when 'other listening' is included, which we have not shown in our charts), and we do not believe that the changes to BBC services would have a material impact on how much time consumers allocate to audio services as a whole. We applied respondents' reported changes in the mix of listening to this forecast total volume of listening in the market – hence capturing how consumers reported their listening to different services would change, relative to each other.

92. In our survey, we did not set a timeline for the potential changes to BBC services. In modelling the outcomes, we have assumed a three-year timeline before consumers fully transition to their reported expected listening habits. This is to reflect the likely lead time on the changes to the BBC's services as well as the time taken for listener habits to adapt. These changes are in addition to the on-going market developments in the mix of radio, podcasts and streaming, as represented by our base case. Beyond that three-year adjustment period, we have forecast a continuation of current trends as per the base case for those years. We believe this is a conservative approach.

- **Scenario 1: Changes to BBC Radio 1 and 2**

93. This scenario represents a shift in the content focus for Radio 1 and Radio 2 towards more popular chart music, which is currently restricted by quotas. Currently, Radio 1 daytime is required to air 45 per cent UK music and 50 per cent new and emerging acts. As seen in our response to Question 3, the BBC's delivery against these quotas has reduced over time, in 2014/15, 61 per cent of Radio 1 daytime music was from the UK, compared to 51 per cent in 2020/21. Similarly, in 2014/15, 65 per cent of Radio 1 daytime music was new or emerging acts, compared to just 51 per cent in 2020/21. There is a clear direction of travel from the BBC, towards more mainstream content to help bolster audiences. In doing so, the quotas are increasingly acting as a binding constraint on the behaviour of the BBC.

94. As such, we believe that this scenario, which envisages a BBC without quotas, would see the BBC continue the current trend and further focus on more mainstream content which is already delivered to audiences by the commercial sector. In doing so, the BBC would be duplicating provision, failing to deliver public value, and threatening the viability of the commercial sector and the diversity it brings. To set up this scenario, we told respondents:

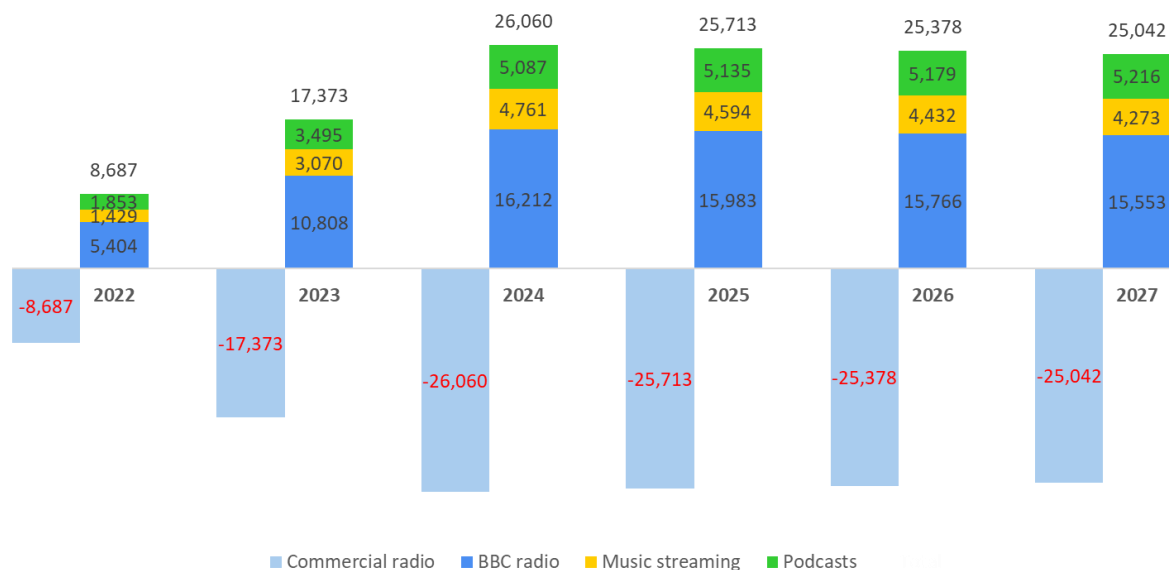
- As a publicly funded broadcaster, the BBC has a public service remit which places requirements on the type of content it can and can't air. Significantly, BBC music stations cannot play as much top chart music as the commercial sector.
- Imagine a scenario in which BBC Radio 1 and BBC Radio 2 had these restrictions removed.
- In this scenario these two stations are now able to play more of the top songs on the current UK Singles Chart, bringing their music output more in line with commercial stations like Capital and Kiss.
- The main differences then between BBC Radio 1 and Radio 2 and the top commercial stations would be the presenters on-air and the lack of ads on BBC radio.
- As BBC Radio 1 and BBC Radio 2 are broadcast via traditional means and online/in-app this change would be felt across all radio listening types.

95. Respondents were then asked how their listening would change, while being reminded of their reported current levels of listening – which were asked earlier in the survey. The estimated impact on listening is shown in Figure 3 below. This scenario results in the BBC gaining listening hours compared to our base case, with commercial radio losing out. The loss experienced by commercial radio is greater than the gain by the BBC, since radio as a whole ultimately loses listening hours to music streaming and podcasts which is unsurprising given the reduced diversity in UK radio content overall.

96. This occurs because there are two flows of listening, both into and out of BBC radio. The majority of listening is flowing into BBC radio from commercial radio, and to a much lesser extent from music streaming and podcasts, as consumers take up the BBC's more mainstream offer. However, some existing BBC radio listeners cease tuning in due to the changes, and this listening flows mainly into music streaming, but also to podcasts and commercial radio. Therefore, not only would this scenario harm commercial radio in lost listening, it would also harm radio listening as a medium.

97. Figure 3 shows the changes in listening under Scenario 1 compared to the base case. Since our modelling assumes that these changes do not have an impact on the overall volume of time people spend with audio content, the positive changes for the BBC, podcasts, and streaming listening net off against the negative impact on commercial radio.

Figure 3: Scenario 1: Difference in forecast listening by type to the base case, total weekly hours, 000s, 2022-2027



Source: RAJAR, MIDAS, FlyResearch, ONS, Radiocentre

98. The differences in listening set out above translate into a significant negative impact on the commercial sector. Using our estimates of commercial yields this translates into an annual fall in commercial revenues, compared to the base case, of £44 million per year by the end of the current Charter Period in 2027. This represents 6.8 per cent per cent of total radio advertising revenues forecast for 2027. The estimated cumulative loss of revenue for the commercial sector is £192 million up to the end of the Charter Period.
99. Crucially, the £44 million per year loss by 2027 also represents around 27 per cent of estimated revenues for the stations most likely to be effected – i.e. those the revised BBC offer would be competing most directly with: Kiss, Capital, and Heart. Radio stations typically operate on a margin of 20-30 per cent, with fixed costs accounting for around 70-80 per cent of revenues, giving little flexibility to respond to lost income. These stations could therefore likely become unviable due to the duplicative service from the BBC.

- **Scenario 2: Launch of more new stations**

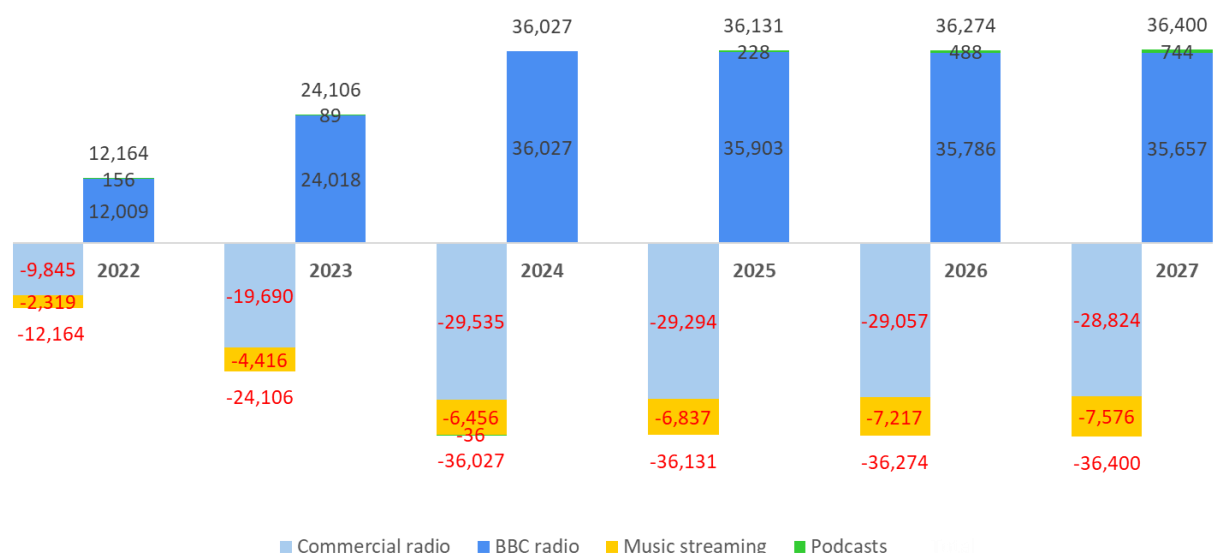
100. As with the previous scenario, Scenario 2 is motivated by observed BBC behaviour. The BBC has launched two new specialist spin-off stations, Radio 1 Dance and Radio 1 Relax, which are available online and via BBC Sounds. We understand that the BBC is considering launching further stations of this kind, which will target audiences in niches already well served by the commercial sector. It may be, therefore, that this scenario comes to fruition under the current regulatory regime, but we believe it is even more likely under a more relaxed approach to regulation. To set up this scenario, we told respondents:

- The BBC has recently launched two online-only speciality stations, BBC Radio 1 Dance and BBC Radio 1 Relax, on BBC Sounds (the BBC's online audio platform).
- The commercial radio sector currently provides a large number of speciality genre stations broadcast both via traditional means and online (the Absolute brand for example includes Absolute Classic Rock, Absolute Radio Country, and multiple decade-specific stations to name but a few).
- Imagine a scenario in which the BBC launched more of their own speciality stations catering for all major music genres (including 80s, 90s, Rock, Soul, Jazz, and R&B stations).
- These stations would be available online/in app on BBC Sounds and would not have any ads.

101. Respondents were then asked how their listening would change, while being reminded of their reported current levels of listening – which were asked earlier in the survey. The estimated impact on listening is shown in Figures 4 below. As with the previous scenario, this change results in BBC radio gaining listeners predominantly at the expense of the commercial radio sector. In addition, the BBC also gains some listening from music streaming as these new streams prove an attractive substitute to services such as Spotify for some respondents. Given there is no reason why an existing listener should logically decrease their listening to BBC radio services in this scenario the increase in BBC radio listening closely mirrors the decrease in commercial radio and music streaming listening.

102. While we would not expect this scenario to impact significantly on podcast listening, respondents did report very minor changes in this form of listening compared with the base case (this fluctuates slightly between positive and negative impact between years due to the demographic make-up of these respondents and population effects). This may reflect BBC listeners who anticipate spending more time on BBC Sounds as a result of the changes, and those who would be put off by further changes to the BBC’s online services.

Figure 4: Scenario 2: Difference in forecast listening by type compared to the base case, total weekly hours, 000s, 2022-2027



Source: RAJAR, MIDAS, FlyResearch, ONS, Radiocentre

103. The differences in listening set out above translate into a significant negative impact on the commercial sector. Using our estimates of commercial yields this translates into an annual fall in commercial revenues, compared to the base case, of £50 million per year by the end of the current Charter Period in 2027 – or a loss of 7.6 per cent of total radio advertising revenues forecast for 2027. This also represents a cumulative loss of revenue of £215 million to the end of the Charter Period.

- **The combined impact of Scenarios 1 and 2**

104. Of course, the BBC need not make these changes in isolation and, indeed, we believe it is likely to pursue both an increased focus on popular music on Radio 1 and 2, and the launch of more new stations as it seeks to attract increased audiences by duplicating the commercial offer. It is difficult to test such complex changes with consumer research, since it is hard for respondents to envisage how the changes in Scenarios 1 and 2 would interact in practice but, by way of illustration, we might assume that the combined impact could be between £69 and £72 million per year by the end of the current Charter Period – and between £300 and £311 million cumulatively by then. These ranges are based on the assumption that the combined impact might be one of the scenarios, plus 50 per cent of the other.

Question 3 – Measuring performance

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

105. Ofcom's proposal to move away from a system based primarily on the objective measurement of public service obligations creates significant risks for the BBC's performance, undermining the delivery of its public purposes in radio and audio. We agree that improvements in transparency and accountability are required to adequately measure the BBC's performance, yet Ofcom's approach appears to be a step backwards in this regard. Without clear quantitative measures of performance, no effective floor would exist to maintain standards of provision in the most important areas of its delivery against its public service mission.

Higher standards are required for BBC radio and audio

106. The BBC ought to be held to a higher transparency standard than it is at present, particularly in radio and audio. This is only reasonable given the level of dominance it retains in the audio market. As we have noted earlier it benefits from a combination of advantages over the commercial sector, with consistently high market share, significantly larger funding, stronger distribution and spectrum allocation, as well as extensive cross promotion.

107. In addition, it is important to remember that the volume of information published in the BBC's Annual Plan currently is linked to the fact that quantitative quotas exist. It would be incorrect to presume that the BBC would have the same incentive to publish the same amount or type of information if there was no regulatory imperative to do so. This is particularly the case if the regulatory regime is vague in what is expected of the BBC.

108. It is unclear precisely what data the BBC is going to be expected to produce in future, which is particularly concerning given the BBC's past lack of transparency. However, we agree with Ofcom that transparency is a crucial component of any effective regulatory regime, and believe that Ofcom should mandate that the BBC be transparent about its activities. Unfortunately, this does not appear to be the case at present or likely to be addressed in Ofcom's proposals. This approach is in stark contrast to Ofcom's supervision of other sectors (e.g. Royal Mail), where it relies on continuous provision and analysis of internal data on a confidential basis (see our response to Question 4 below).

109. There are several areas where Ofcom could do more and seek the publication of crucial data in radio that would drive performance and transparency, improving the output for audiences, while emphasising distinctiveness. While some quotas and conditions already exist in these areas we would argue that a stronger framework is required, instead of a lighter-touch approach as Ofcom appears to be proposing.

- Music overlap – Agreed industry measurement to assess the overlap of music tracks by daypart, between BBC services and competitive offerings, rather than selective quoting or cherry picking of data.

- Speech output – Proportion of content that is speech as well as the nature and intended impact of speech content across different BBC networks.
- Audience demographics – Consistent reporting on audience demographics (including average ages and listening to key dayparts) and the overlap between BBC services and commercial competitors.
- New and UK music – Greater transparency on proportions of new music, UK music and music that is both UK and new on BBC networks and services, as well as clearer articulation of strategy for supporting artists across these services.
- Cross promotion – Further transparency and disclosure of detailed information on cross promotion of BBC services, including clarity on the specific public value, duration and timing of promotions (where these are part of a linear broadcast or simulcast).
- BBC Sounds services – More effective regulatory oversight of new services available on the BBC Sounds platforms to ensure they are not crowding out the commercial sector. Requirement for clear articulation of public value need and consultation.
- Local output – Assessment of local news and speech content across all dayparts, not only focussing on peak time provision.
- Podcast metrics – Transparency on listening data and definitions associated with BBC podcasts, across all podcast platforms for BBC content. Details of investment on external talent. Focus on distinctiveness of podcast output not on number of episodes or volume.

110. This list is not exhaustive and only provides a snapshot of the additional ways in which the performance of BBC radio and audio could be measured to help drive better performance. In order to implement this effectively, each of these areas would of course need to be associated with clear targets and performance monitoring, in order to achieve the higher standards required.

Clear regulatory conditions ensure delivery of the BBC’s Public Purposes

111. In the context of Ofcom’s on-going consideration around how to regulate BBC audio, it is also useful to revisit existing regulation, considering why it was introduced and how effective it is in influencing BBC behaviour – and thus in supporting delivery of the BBC’s public purposes.

112. The BBC’s Public Purposes are defined in its Royal Charter. Charters have typically run for ten year periods, though the current Charter runs for 11 years, from December 2016 to December 2027. The Charter is drafted by the government of the time, influenced by evidence gathering, public consultations, focus groups, expert interviews, stakeholder engagement, and independent reports. As such, the contents of the Charter, and the BBC’s associated Public Purposes, evolve to reflect the changing role of the BBC in society. The approach to regulating the BBC can also change to ensure the BBC is appropriately held to account and continues to fulfil its mission and public service remit.

113. The table below illustrates how the BBC’s Public Purposes evolved between the 2007 and 2016 Charters. Prior to the 2007 Charter, there were no formal Public Purposes to align regulation to – instead, the objectives of the BBC were referenced indirectly through the Objects of the Corporation.

Figure 5: The BBC’s Public Purposes, 2007 and 2016

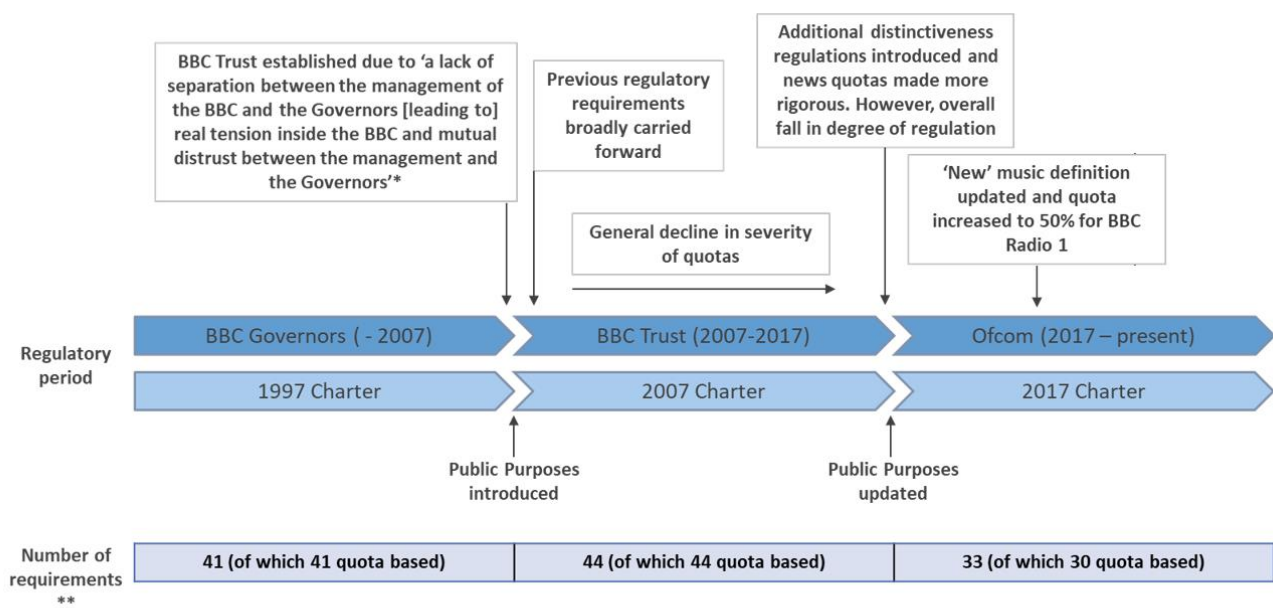
2007	2016
1. Sustaining citizenship and civil society	1. To provide impartial news and information to help people understand and engage with the world around them
2. Promoting education and learning	2. To support learning for people of all ages
3. Stimulating creativity and cultural excellence	3. To show the most creative, highest quality and distinctive output and services
4. Representing the UK, its nations, regions and communities	4. To reflect, represent and serve the diverse communities of all of the United Kingdom’s nations and regions and, in doing so, support the creative economy across the United Kingdom
5. Bringing the UK to the world and the world to the UK	5. To reflect the United Kingdom, its culture and values to the world
6. In promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television	

114. For the purposes of regulation, the main difference is an added emphasis on ‘distinctiveness’ in the third Public Purpose. Indeed, in its 2016 White Paper *A BBC for the future: a broadcaster of distinction* the government identified distinctiveness as the central factor that should characterise the BBC over the next 11 years.

115. Under the BBC Trust’s tenure and now Ofcom, regulation has been organised around these public purposes. The BBC Trust published individual service licences to regulate each BBC service (BBC One, BBC Two, BBC Radio 1, etc.), relating each condition to the Public Purposes. These service licences also defined the scope, aims, objectives, headline budget and other important features of each service. When regulatory duties passed to Ofcom they compiled (and updated) these multiple service licences into a single Operating Licence, which we discuss further below.

116. While regulatory responsibility and approach has changed over time, quotas have been the main tool used to control and monitor BBC content. The timeline below sets out a brief overview of the last three Charter periods, which have been under the regulatory oversight of the BBC Governors, the BBC Trust, and now Ofcom. It is clear that even prior to the BBC's first formal Public Purposes in 2007, quotas were an important mechanism to monitor the BBC's performance and ensure that the licence fee was being spent in a way which promoted public value. Since the BBC's purposes have been formalised in the Charter, quotas have continued to play a vital role in defining what the public should expect from the BBC, as well as industry stakeholders.

Figure 6: The BBC's Public Purposes, 2007 and 2016



Note: *<https://publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/166/16605.htm> **Across national services that have been consistently broadcast throughout this period, and excluding regulations that apply to all services (i.e. the majority of qualitative requirements relating to what is now the fourth Public Purpose)

117. BBC quotas have been used extensively by previous regimes and remain an important tool under Ofcom. With the updated Public Purposes coinciding with Ofcom's appointment as the BBC's regulator, Ofcom's first Operating Licence was tasked (by The Agreement) with introducing more regulation to ensure BBC services were distinctive. In the radio regulation space, notable examples of such regulation were the introduction of: 'broader range of music' quotas for BBC Radio 1 and Radio 2 and a quota for the number of different sports broadcasts on BBC Radio 5 live. Ofcom also deemed retaining previous BBC Trust 'new' music quotas essential to fulfilling this obligation.

118. Many quotas, such as those still used to ensure distinctive music output, have existed within the BBC's regulatory framework for decades and they still remain relevant today. When the BBC Trust expanded 'new' music quotas to BBC Radio 2, for example, they were intended to help stimulate creativity and cultural excellence, with the BBC Trust's Service Licence for Radio 2 stating the reasoning behind such quotas was ensuring 'its music programmes ... cover a wide range of genres', challenge 'listeners to experience the unfamiliar by providing a wide range of popular musical forms', and guarantee it broadcasts 'different music to that played on other radio stations'.¹⁰
119. In setting the first BBC Operating Licence, Ofcom also found that the majority of other quantitative requirements the BBC was already under should be kept in place, as they were still the most effective way of ensuring delivery against the Public Purposes. This logic remains true four years later, with the government's vision of the BBC – as set out in its 2016 White Paper – still relevant. Indeed, there has been little change in the traditional radio market, nor the BBC's objectives, and the importance of quotas remains, to provide a simple, measurable, means of holding the BBC to account and delivering public value.
120. Of course, the applicability of quotas varies by Public Purpose; the first three Public Purposes in particular are especially suited to quotas, and many are quantitative even if they lack specific quotas (e.g. obligations to provide news throughout the day). But out of 39¹¹ requirements across BBC radio services, 32 (82 per cent) have a specific quota attached to them – and the majority of requirements that are not enforced by quotas, relate to news provision.
121. This has been the *status quo* since even before the BBC Trust took responsibility for regulating the BBC, with quotas used as the predominant regulatory mechanism by the BBC Governors and generally set at higher levels than the quotas we have today. The longevity of such quotas is testament to their enduring usefulness. They provide a mechanism by which to transparently, fairly, and easily ensure BBC minimum provision, and to assess BBC performance against such minimum provision.

What do the quotas do?

In general, the quotas are designed to:

- Ensure a minimum number of hours of news are broadcast on BBC radio stations each week
- Ensure a minimum number of genres beyond music including documentaries, religious programming, arts programming etc, are broadcast on relevant BBC radio stations throughout the year
- Ensure a minimum provision of distinctive content, including in music
- Ensure the BBC supports UK artists and the UK creativity economy

¹⁰ https://www.bbc.co.uk/bbctrust/our_work/services/radio/service_licences/bbc_radio_2.html

¹¹ N.b. this number differs from the 33 given in our previous timeline since sub-requirements across news have been broken out here, whereas previously they were grouped to allow effective comparison

Qualitative measures are less effective and reduce scrutiny

122. As we have noted, we believe that qualitative metrics are less effective and likely to reduce the level of scrutiny of the BBC's activities. Several regulatory requirements of BBC radio are measured by qualitative metrics. These are generally those designed to satisfy the 4th Public Purpose, relating to diversity, audience portrayal, and representation commitments for the majority of BBC Services. Assessing delivery against these qualitative metrics is challenging – much more so than more measurable performance against quotas – and usually requires audience research. In Ofcom's third Annual Report on the BBC (2019/20)¹² Ofcom states that it assesses the BBC's performance against broad diversity obligations, both on and off screen, via:

- research commissioned by both Ofcom and the BBC to measure audience perceptions of how well the BBC represents and portrays the range of the UK's communities;
- the BBC's Annual Report and Accounts;
- the BBC's own Diversity Commissioning Code of Practice (DCCoP) and its annual Progress Report on its implementation of the DCCoP;
- Ofcom's annual Diversity and Equal Opportunities in Television and Radio report

123. Ofcom has acknowledged limitations in this approach and the BBC's use of consumer research. Clearly audience research is a valuable and effective tool to test audience perceptions, but it is not a substitute for measurable quantitative metrics where they are an option. This is highlighted by Ofcom itself, when it states in the 2019/20 Annual Report on the BBC that:¹³

It is our view that the metrics the BBC uses are too narrow (asking audiences to rate the BBC on reflecting their own lives, and relevant content) and too restrictive in terms of the demographics it uses to assess the metric (for example, only looking at adults aged 16+ to understand how well the BBC reflects the UK). Condition 2.44 in the Operating Licence states that the BBC should include audience satisfaction in the following areas:

- *how the BBC represents, portrays and serves diverse audiences;*
- *how the BBC reflects the whole of the UK population on screen and on air, with particular regard to first-run content across all genres; and*
- *how the BBC raises awareness of different cultures and viewpoints.*

At a time when the BBC's reach is declining, we are concerned that the BBC's current measure of audience satisfaction does not adequately identify all its underserved audiences. We encourage the BBC to consider a more holistic range of measures to understand audience satisfaction, in order to ensure that it provides output and services that meet the needs of all the UK's nations, regions and communities and achieves the Director-General's ambition for the BBC to connect with all audiences.

As well as broadening its definition of dissatisfied audiences within condition 2.44, to take into account those who are less satisfied, the BBC could be much clearer on the steps it has taken or will take to improve these audiences' perceptions (condition 2.45). We expect the BBC to set out in its strategy how it will measure and evaluate audience perceptions in future.

¹² https://www.ofcom.org.uk/__data/assets/pdf_file/0021/207228/third-bbc-annual-report.pdf

¹³ Ofcom's Annual Report on the BBC 2019/20, p.68

124. Audience satisfaction is not the only area where this is the case. Ofcom also notes that although ‘the BBC has published more detail on representation and portrayal and its broader diversity related activities, [its] reporting could still be clearer and more comprehensive, and the impact of its actions is not yet fully measurable’.¹⁴
125. Allowing the BBC to define its research approach undermines Ofcom’s ability to regulate. The above reference from Ofcom’s 2019/20 Annual report on the BBC is not the first time Ofcom has raised concerns about the validity of the BBC’s approach. This was found to be an issue in the previous year as well, yet with the onus on the BBC to remedy it, and no clear implications if it fails to do so, subsequently there has been little change. As such, metrics which Ofcom has deemed inadequate remain in use and, because they do not sufficiently scrutinise the BBC’s performance, it has avoided the need to take steps to improve audience satisfaction amongst those who might be dissatisfied or underserved.
126. The relatively involved nature of qualitative research means that it may not be practical for Ofcom to design the research which the BBC should use to measure performance, but this clearly demonstrates the pitfalls of allowing the BBC to design its own approach. Not only can the BBC develop metrics to show it in the best possible light, it means interested stakeholders and Ofcom itself are either in the dark around the true nature of compliance or else are forced to conduct their own research. Also, while Ofcom can feedback on the validity of the approach, the process clearly takes too long and, in the meantime, Ofcom is unable to properly scrutinise the BBC’s performance and remedy any failure to deliver against its public purposes.
127. Other qualitative measures lack transparency and may be equally ineffective. These approaches to assessing BBC performance include the reliance on BBC reporting; there are also pitfalls with this. For example, under the current Operating Licence BBC Local Radio in England has commitments to:
- Provide news and information of particular relevance to the area and communities it serves at intervals throughout the day
 - Provide other content of particular relevance to the area and communities it serves
128. To assess compliance against this in 2019/20, Ofcom needed to seek evidence directly from the BBC through an information notice and stated, ‘compliance notes were provided for a sample of stations which provided information on how the station provided news and information relevant to its area’. This is another example of the BBC ‘marking its own homework’, with little transparency and, seemingly, little input from the regulator as to how performance against these commitments might effectively be measured. In this instance, a more effective approach would be:
- A more quantitative assessment of what constitutes delivery of these commitments – clearly articulated, assessed by Ofcom and publicly available
 - Published findings documenting the BBC’s performance against the commitments

¹⁴ Ofcom’s Annual Report on the BBC 2019/20, p.60

129. As a minimum, the 'compliance notes' should be made publicly available so that licence fee payers and other stakeholders can form an accurate view on how effectively the BBC is delivering against its objectives. The other local radio services throughout the nations and regions have equivalent commitments which are similarly hard to track performance against.
130. Quantitative metrics remain crucial to supporting Ofcom's ability to regulate the BBC. While qualitative metrics may be necessary to measure the BBC's performance against 'Purpose 4', it is clear that they are not without their limitations and quantitative metrics should be used wherever possible. Were Ofcom to move towards a more qualitative approach to regulation, the BBC could dilute its public service provision and Ofcom could find itself unable to respond to this quickly.

Quotas play a valuable role in influencing BBC radio output

131. While the BBC typically meets the requirements set by its quotas, for a significant number BBC delivery of the content in question has either consistently fallen closer to its quota, or it consistently only just delivers against the quota. This is a clear indication that the quotas are an important and effective means of regulating the BBC, and also that in the absence of such quotas, the BBC's behaviour would change. A move away from quantitative (quota-based) regulation towards a more qualitative approach is therefore likely to result in a shift away from the content types which the quotas are designed to support, and an associated decrease in public value that the BBC provides.
132. The BBC's main regulatory commitments and its performance against them are set out below – back to 2014/15. Note that in 2020/21 the BBC fell short on a number of commitments due to COVID-related factors, and we have no concern where this is the case.
- **News: BBC delivery has been relative stable**
133. For almost all radio services, the BBC's delivery against its quotas in news has been either consistently on the quota or falling towards the quota over time. In most areas the BBC, both historically and currently, only just delivers against its quotas in news, which illustrates that they are playing a role in ensuring that the BBC delivers news content and thus delivers against its public purpose to provide impartial news and information to the public.
134. The BBC's decision to deliver only the bare minimum of news content in most cases means that it has little scope to further reduce provision under the current regime. Though there is a clear declining trend for Radio 1 and Radio 2, where the number of hours of news provision was previously slightly above the quota, but has reduced to only just deliver against the quotas across the last three years. While the absolute change in news provision is small, this further illustrates the necessity of quotas for keeping the BBC to public service provision.

Figure 7: BBC performance against News quotas, 2014/15 – 2020/21

				2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20	2020 /21			
Purpose One: To provide impartial news and information to help people understand and engage with the world around them	Radio 1	Hours of news in daytime each weekday	Quota	1	1	1	1	1	1	1			
			Actual	1hr7	1hr6	1hr6	1hr3	1	1	1			
		Two extended news bulletins (one in peak) each weekday	Quota	N/A									
			Actual	✓	✓	✓	✓	✓	✓	✓	✓		
		Regular bulletins in daytime at weekends	Quota	N/A									
			Actual	✓	✓	✓	✓	✓	✓	✓	✓		
	1Extra	Hours of news in daytime each weekday	Quota	1	1	1	1	1	1	1	1		
			Actual	1	1	1	1	1	1	1			
		Two extended news bulletins each weekday	Quota	N/A									
			Actual	✓	✓	✓	✓	✓	✓	✓	✓		
		Regular bulletins in daytime at weekends	Quota	N/A									
			Actual	✓	✓	✓	✓	✓	✓	✓	✓		
	Radio 2	Weekly hours of news and current affairs	Quota	16	16	16	17 (3 in peak)	17 (3 in peak)	17 (3 in peak)	17 (3 in peak)			
			Actual	18	18	18	18 (3.5 in peak)	17 (3 in peak)	17 (3 in peak)	17 (3 in peak)			
		Regular bulletins	Quota	N/A									
			Actual	✓	✓	✓	✓	✓	✓	✓	✓		
		Radio 3	News throughout the day	Quota	N/A								
				Actual	✓	✓	✓	✓	✓	✓	✓		
	Radio 4	Hours of news and current affairs	Quota	2500	2500	2500	2500	2750	2750	2750			
			Actual	3358	3251	3364	3334	3394	3557	2983			
Daily reports of Parliamentary proceedings when Parliament is sitting		Quota	N/A										
		Actual	✓	✓	✓	✓	✓	✓	✓				
		Quota	75	75	75	75	75	75	75				

		% of output that is news and current affairs	Actual	75	75	75	76	76	76	78
		BBC Radio 5 live	Extensive coverage of local and general elections, elections to the devolved chambers, and regular coverage of European and international politics	Quota	N/A					
	Actual		✓	✓	✓	✓	✓	✓	✓	
	BBC 6 Music	Weekly hours of news	Quota	6	6	6	6	6	6	6
			Actual	5hr 50min	6	6	6	6	6	6
	Asian Network	Weekly hours of news and current affairs	Quota	-	24	24	24	24	24	24
			Actual	-	24	24	24hr 4min	24	22hr 50min	Not met

Note: orange denotes where quota delivery has been impacted by COVID-19

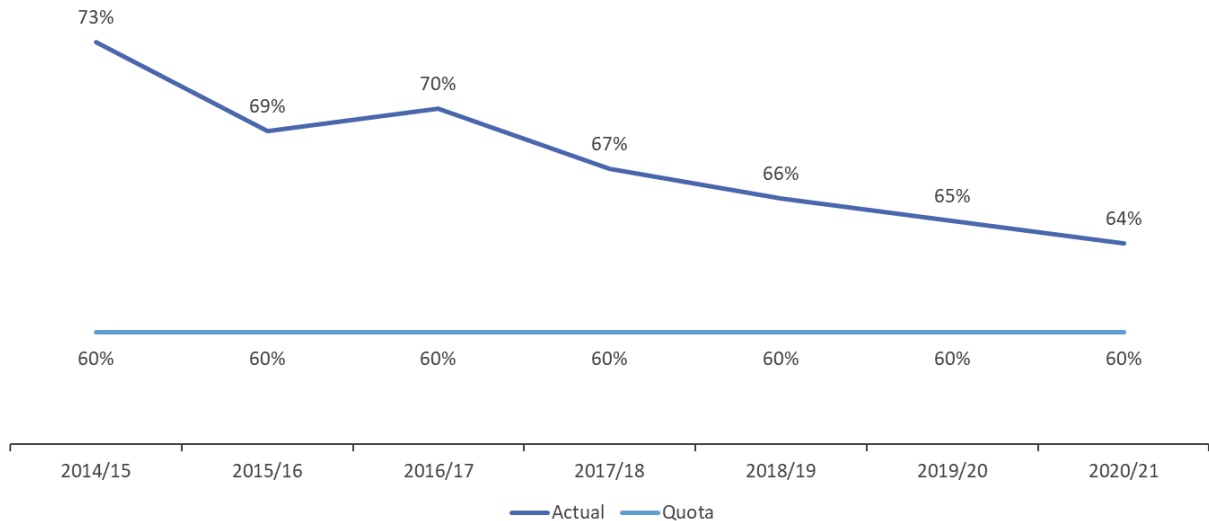
- Local speech content: the BBC has transitioned to more music content

135. A review of the BBC's performance against its quota for local speech content shows an alarming decline in provision. The quotas have been the same since 2007, set at 60 per cent; with local radio offering a major source of the BBC's speech content and helping it deliver against its requirements to serve all audiences and represent the nations and regions. In particular when the quota was introduced it was intended ensure local stations provided 'constantly updated, accurate, impartial and independent news and information on local, national and international matters ... offer listeners opportunities to contribute to the output and take an active part in their local communities' and encourage a shared sense of civic responsibility'.¹⁵ We have again considered performance against the quota from 2014/15, as shown in Figure 6, the BBC's provision of speech content on BBC Local Radio has declined from 73 per cent in 2014/15 to 64 per cent in 2020/21.

15

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/radio/radio_servicelices/localradio_servicelice_18dec2006.pdf

Figure 8: Percentage of daytime weekday output that is speech content on BBC Local Radio, 2014/15 – 2020/21



136. While recent performance is still above the quota, there is a clear downward trajectory with the BBC increasingly substituting local speech content for other types of content. In particular, this tends to be music content which duplicates provision by the commercial services and leads to a significant reduction in public value. Any steps to remove this quota would remove the minimum floor and likely hasten a further decline.

- **Documentaries and specialist programming: BBC delivery has been relative stable**

137. Within documentary and specialist programming the BBC typically over delivers against its quotas – in some areas the BBC has begun to deliver more in recent years; perhaps driven by its ambitions to dominate the podcast market, and the reusability of such programming as podcasts. Yet there are some areas where provision is typically only in line with the quota, so the BBC is delivering the bare minimum.

138. For Radio 1 and Radio 2 in particular, the number of hours of new documentary programmes is typically in line with the quotas, suggesting that these quotas are impacting on the BBC’s provision and that, in their absence, it would likely offer fewer hours – and increase focus on popular music programming, which helps to drive audiences. In other areas, hours of religious documentaries on Radio 4 has dropped towards the quota in recent years, while new documentaries on arts and cultural topics on Radio 3 have also fallen towards the quota.

Figure 9: BBC performance against documentary and specialist programming quotas, 2014/15 – 2020/21

				2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20	2020 /21	
Purpose Two: To support learning for people of all ages	Radio 1	Number of new documentaries	Quota	40	40	40	40	40	40	40	
			Actual	42	40	42	41	42	46	41	
	1Extra	Number of documentaries	Quota	-	40	40	40	40	40	40	
			Actual	-	42	40	42	43	47	47	
	Radio 2	Hours of arts programming	Quota	100	100	100	100	100	100	100	
			Actual	109	138	136	122	131	121	129	
		Hours of new documentaries	Quota	130	130	130	130	130	130	130	
			Actual	130	132	142	153	130	130	71	
		Hours of religious output covering a broad range of faiths	Quota	170	170	170	170	170	170	170	
			Actual	200	201	209	201	199	191	190	
	Radio 3	% of output that is live or specially recorded music	Quota	40	40	40	-	45	45	45	
			Actual	57	58	59	-	57	50	51	
		Number of live or specially recorded performances	Quota	400	400	400	-	440	440	440	
			Actual	621	638	611	-	501	942	336	
		Number of new musical works commissioned	Quota	20	20	20	-	25	25	25	
			Actual	35	44	31	-	32	40	50	
		Number of new documentaries on arts and cultural topics	Quota	30	30	30	30	35	35	35	
			Actual	49	50	52	41	38	42	41	
	Radio 4	Hours of original documentaries	Quota	350	350	350	350	375	375	375	
			Actual	413	419	392	388	403	484	428	
		Hours of original religious programming covering a broad range of faiths	Quota	200	200	200	200	200	200	200	
			Actual	227	230	227	226	225	203	201	
				Quota	520	520	520	-	10	10	10

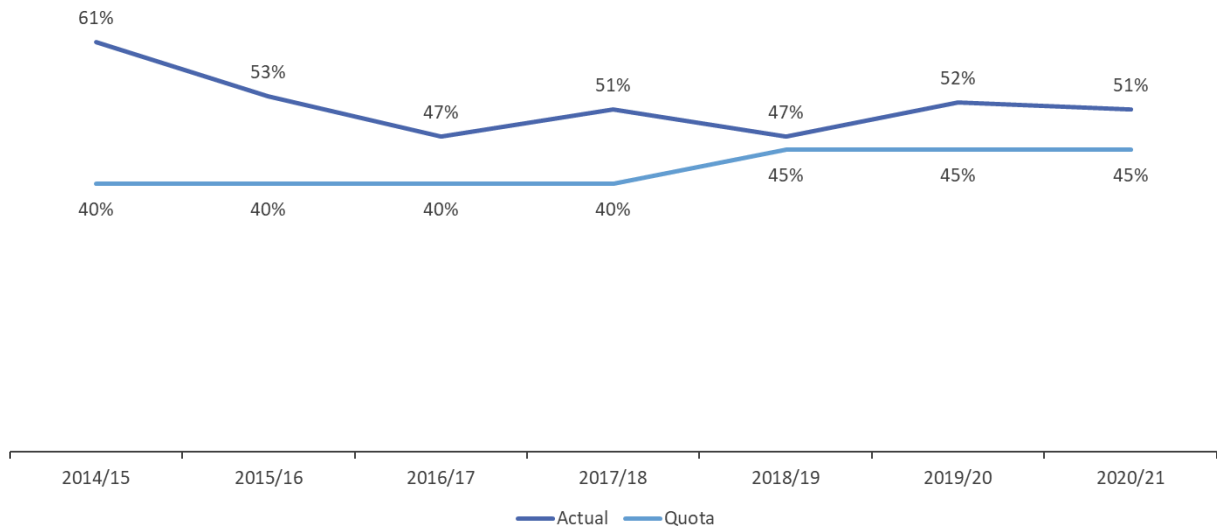
	BBC 6 Music	Hours of speech-based features, documentaries and essays ¹⁶	Actual	570	542	520	-	10	10	10
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Note: orange denotes where quota delivery has been impacted by COVID-19

- **Music output: the BBC has reduced use of both UK music and new acts**

139. The quotas around music output are designed to ensure the BBC delivers against its objectives to support the UK music industry and provides a platform to aid in the development of UK artists. This is achieved by restricting the extent to which the BBC can rely on established popular music – which is readily available from the commercial sector – and using quotas to ensure both UK acts and new acts receive a significant proportion of airtime. As can be seen in Figure 10, Radio 1’s use of UK music acts has declined since 2014/15 and the BBC is delivering just above the quota.

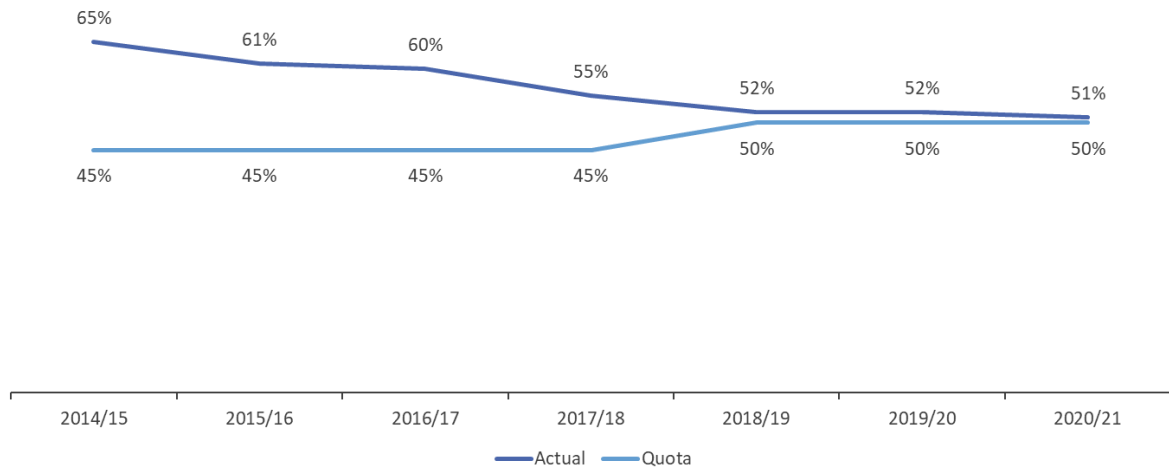
Figure 10: Percentage of music in daytime from UK acts, BBC Radio 1, 2014/15 – 2020/21



140. Similarly, looking at the performance of BBC Radio 1 against its quota for new music shows a steady decline in the share of airtime used to break new acts in daytime. Having given over 65 per cent of the daytime schedule to new music in 2014/15, that share was just 51 per cent in 2020/21 – one percentage point above the quota. This steady downward trajectory illustrates a clear preference for the BBC to offer less new music and more established content to help it drive audiences – while duplicating the existing provision of the commercial sector and undermining its role in providing public value.

¹⁶ Move from yearly to weekly quota

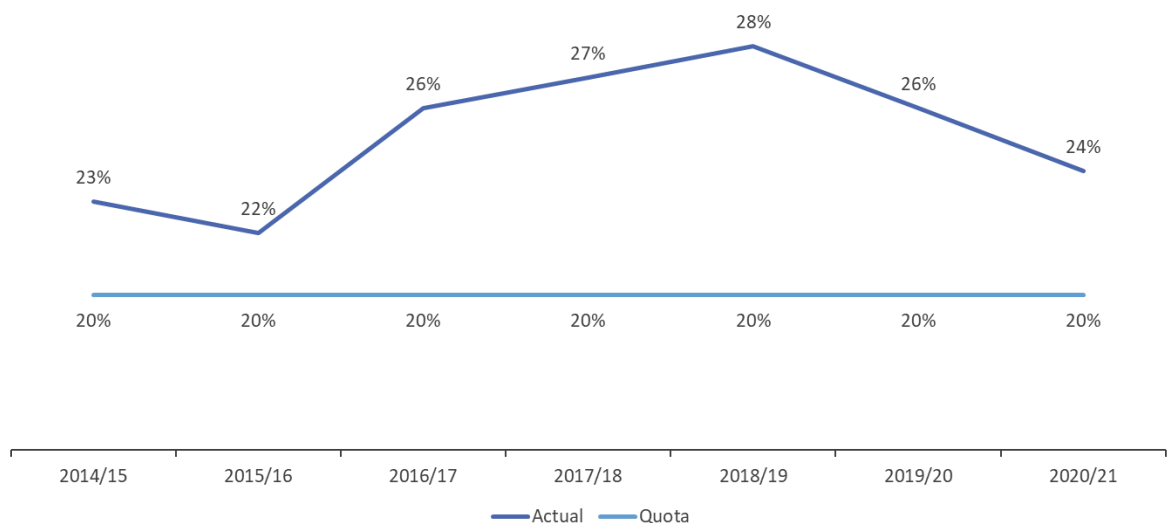
Figure 11: Percentage new music in daytime (with significant proportion from new and emerging UK artists), BBC Radio 1, 2014/15 – 2020/21



141. This is a clear indication that the BBC is reducing the share of the BBC Radio 1 schedule used for new and emerging acts. The current quota is acting as a floor to prevent the BBC from further erosion of its commitment. Without this floor it would further replicate the content and associated success of the commercial sector, which would be done at the expense of focusing on its role in supporting the music industry and the UK creative sector. There is, as can be seen from Figure 11, an argument to ratchet the quota up to historic levels to get the BBC back on track.

142. For Radio 2, the trend is less clear cut, but recently there has been a decline in the proportion of new music in daytime in recent years, from 28 per cent in 2018/19 to 24 per cent in 2020/21 – which shows that across Radio 1 and 2 the share of new music is in decline.

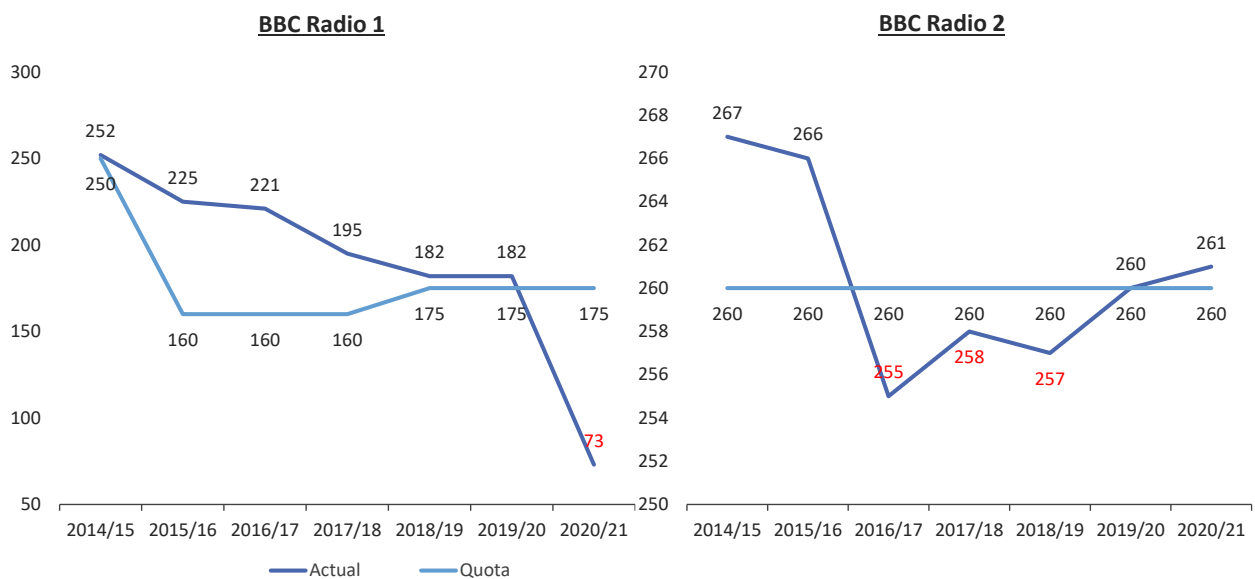
Figure 12: Percentage new music in daytime (with significant proportion from new and emerging UK artists), BBC Radio 2, 2014/15 – 2020/21



143. The BBC also has existing quotas around the number of hours of live music broadcast on Radio 1 and Radio 2. As shown on the chart below, the delivery of hours of live music on Radio 1 fell significantly between 2014/15 and 2019/20, following the quota being lowered from 250 hours, which the BBC just achieved in 2014/15, to 160 hours in 2015/16. Indeed, in 2018/19, following a rapid decline in live music on Radio 1, the quota was increased to 175 hours and the BBC delivered just above this in 2018/19 and 2019/20. Failure to deliver against the quota in 2020/21 was due to the impact of COVID-19.

144. The performance of BBC Radio 2 against its live music quota has been more mixed. Live music broadcast in recent years is well below the level seen in 2014/15 and just above the quota – following a period of three years between 2016/17 and 2018/19 when the quota was missed.

Figure 13: Live music quotas, BBC Radio 1 (sessions) and Radio 2 (hours), 2014/15 – 2020/21



145. We have not covered all of the Radio 2 quotas here since they are typically set much lower than the Radio 1 quotas and therefore have less of an impact on the BBC’s behaviour. Albeit, this in itself is a concern since the low Radio 2 quotas give the BBC flexibility to steadily shift its service offer towards that of the commercial sector, as it seeks to serve all audience and reach more young people.

146. Ultimately, we believe the BBC’s past performance against its quotas reveal a clear direction of travel as the BBC moves away from the types of content which offer the most public value and towards content which is already available from the commercial sector. If regulation of the BBC was made more qualitative, without a quota regime, there is a clear risk that the BBC’s stations will become even more similar to commercial radio. If they carry similar content, the main differences between the BBC and commercial stations will be the presenters and the lack of adverts broadcast on BBC – this will provide a clear advantage to the BBC and damage the commercial sector.

Question 4 – Content standards

- | |
|--|
| <p>4. Do you agree with our proposed scope of the review in relation to content standards?
If not, please explain why.</p> |
|--|

147. We have no specific comments regarding Ofcom's role in protecting audiences by ensuring BBC broadcast content complies with the Broadcasting Code and complaints handling procedures for audiences.

Question 5 – Competitive impact

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

Issues with current process

148. We agree with the issues identified as part of the consultation regarding the assessment of the competitive impact of BBC services. However, we also think that the process needs to change to provide more clarity to BBC, Ofcom and stakeholders on what is required. We recognise that the current process may be cumbersome and potentially duplicative for Ofcom and the BBC. But it is not obvious – given the lack of opportunities for stakeholders to engage in the process – that the same is true for third parties. Any changes to the process should not diminish the ability of third party stakeholders to interact with the process.
149. The underlying objectives of the current competitive impact process – to minimise significant negative impact of the BBC on fair competition – are meaningful and ought to be preserved. Ofcom should take particular care in taking any steps that amount to a deregulatory approach in this area, especially given some of the shortcomings that we would argue are already evident in the process.
150. For example, materiality assessments required from the BBC form a crucial element of the current regime in establishing whether a change in a service or the provision of a new service should be subject to further investigation. If a change is considered 'material' this is then usually followed by a Public Interest Test (PIT) undertaken by the BBC and can be followed by further more detailed examination by Ofcom through a BBC Competition Assessment (BCA) or a shorter assessment.
151. Given the importance of materiality assessments it is unfortunate that they are not only opaque but insufficiently strict or detailed in what analysis is required. As a result of this approach, numerous changes that are potentially material have gone unstudied, mainly because it is the BBC that is expected to initiate and carry out this process. In addition, the accumulation of several non-material changes can be material and this does not appear to be fully taken into account.
152. Moreover, as Ofcom has identified, the BBC is insufficiently transparent in general and in particular in its approach to changes to UK Public Services. This backdrop, along with the BBC's privileged and unique funding model, means that the quality of the BBC's assessment of its competitive impact is inadequate relative to any ordinary understanding of the concept, and weak compared to Ofcom's approach to competitive impact in other regulated areas.
153. In part because of the deficiencies identified above, the process is already weighed in the BBC's favour, and it is costly and difficult for stakeholders to protect their rights in the process. This is particularly true in those markets where the BBC's potential competitive impact is greatest such as radio and audio.

A competitive impact regime for UK audio

154. As we have noted, Ofcom should not adopt a deregulatory approach independent of the market context in which the BBC operates. Indeed, we believe Ofcom ought to consider an audio-specific regulatory framework for competitive impact given the UK audio market is still dominated by the BBC (as well as largely domestic) and subject to very different competitive dynamics to the audiovisual sector which are the focus of Ofcom's *Small Screen: Big Debate* consultation.

155. In its statement for 'Small Screen: Big Debate', Ofcom says, '*We are aware that many of the challenges we have highlighted for PSM TV content in this statement also apply to radio and audio*'. However, it chooses not to examine radio and audio market and audience trends to any meaningful extent in either 'Small Screen: Big Debate' or in its call for evidence on BBC regulation, referring to the ongoing DCMS 'Digital Radio and Audio Review'. This does seem to create a challenge for radio stakeholders and for Ofcom's consideration of next steps following its call for evidence.

156. This is important because it will shape Ofcom's full consultation on the BBC's Operating Licence in early 2022, as well as the Periodic Review and ultimately the Government's mid-term review of the Charter. Rather than waiting for this process to run its course, based on the incorrect assumptions regarding the pressures facing radio and audio being identical to the TV markets, we would suggest Ofcom takes steps now to take this broader context into account and introduce an improved competitive impact regime to deal with the BBC's dominant role in audio. As part of this the minimum would expect is:

- full disclosure of the BBC materiality assessment when considering changes to services or the addition of new services;
- a transparent competition analysis framework the BBC have to adhere to which includes the questions the BBC needs to answer;
- clear obligations on what 'meaningful consultation' consists of; what information the BBC needs to provide to stakeholders, and how much time they need to give them to respond;
- the ability for stakeholders to challenge what they view as an incorrect materiality assessment; and
- mandatory BBC Public Interest Tests (PITs) for certain changes, including the launch of new radio services such as BBC Radio 1 Dance, whether online or broadcast radio.

Lessons from other regulatory regimes

157. When assessing the effectiveness of its current processes for addressing the BBC's competitive impact, we would also suggest that Ofcom examines the scope for adopting augmenting or adapting its approach in line with other regulatory regimes. There are several themes that are worthy of consideration, a number of which will be familiar to Ofcom due to its own activities in these areas. These examples are not exhaustive and simply provide some elements of best practice (from telecoms, post, media and proposed online platform regulation) that we believe Ofcom could incorporate into its approach to regulating the competitive impact of the BBC.

- **Market definition and assessment**

158. Ofcom applies a far more rigorous approach to market definition in other regulatory areas than it does with the BBC. For example, in its telecoms regulation Ofcom is required specifically to focus on markets rather than technologies.

159. In practice this means that Ofcom must define relevant markets, then analyse each of those markets to see whether they are effectively competitive. Where an operator has significant market power (SMP) in a market Ofcom imposes appropriate regulatory obligations or remedies to address this. There are numerous examples across Ofcom's remit where this approach is evident, including the recent Wholesale Fixed Telecoms Market Review which sets out regulation of the fixed telecoms markets that underpin broadband, mobile and business connections¹⁷.

160. Similarly, Competition Act cases, market studies and mergers undertaken by the Competition and Markets Authority (CMA) always rely on a rigorous and robust approach to market definition and the assessment of competitive effects. The BBC would be subject to this standard were it ever a party to a conduct case or markets or mergers review (e.g., Project Kangaroo JV merger case), yet it is not for ongoing regulation of the BBC and its activities. This lack of rigour in analysing the effect on competition of the BBC's changes to its services creates uncertainty and a lack of accountability in terms of the BBC's own materiality assessments and Ofcom's response to those assessments.

- **Clear and detailed guidance**

161. A common feature in other aspects of Ofcom's regulatory work and that undertaken by other regulators, is the publication of detailed guidance on the approach to defining the market and the approach to assessing competitive effects. For example:

- Ofcom's guide to Assessment of Significant Market Power¹⁸
- CMA Market Definition Guidance¹⁹
- CMA Merger Assessment Guidance²⁰

162. To address concerns around a lack of transparency in materiality assessments, it is important that Ofcom outline the criteria for market definition and gives detailed guidance on the factors the BBC must take into account in assessing its competitive impact (since it effectively reviews the BBC's decisions on materiality anyway).

- **Data and transparency**

¹⁷ <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>

¹⁸ https://www.ofcom.org.uk/__data/assets/pdf_file/0028/86482/smpg0802.pdf

¹⁹ <https://www.gov.uk/government/publications/market-definition>

²⁰ [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

163. As we have noted throughout this response the BBC's lack of engagement and transparency is an issue that needs to be addressed by Ofcom across a number of areas. The extent of this issue and the persistence of the problem is surprising and is in contrast to its regulation of other industries such as Royal Mail.

164. The regulatory regime for Royal Mail combines public-service and commercial elements, which to some extent reflects the position of the BBC. Similarly, it is also subject to ongoing changes because it operates in a market that is rapidly evolving. The objective of the regime is to ensure that Royal Mail is free to innovate and bring products to market quickly, while ensuring that the essential characteristics of the universal postal service are maintained. In addition, the approach to monitoring involves conduct regular internal Ofcom analysis and review of the data in order to allow timely identification of potential areas of concern.

- **Stakeholder engagement**

165. As Ofcom identifies in the consultation document, lack of engagement from the BBC with stakeholders during the initial assessment and materiality process is a significant concern. In our experience the nature and extent of this engagement is often inconsistent and rarely meets the stakeholders' reasonable expectation of meaningful consultation. Ofcom has recognised this in recent correspondence with Radiocentre in relation to Radio 1 Relax.

166. By contrast, oversight bodies in other jurisdictions allow for direct stakeholder participation in public interest assessments of public radio programming, including competitive impact. For example, Deutschlandradio the German public radio broadcaster operates a public interest test ('three-step-test') similar to the BBC's. This procedure is used to determine whether what is being offered is a significant change from the existing offer agreed by the public service mandate of the broadcaster.

167. However, this differs from the process used for the BBC in that the oversight body (*Hörfunkrat*) explicitly incorporates third-party views through representation. This includes structured consultation and approval through a sub-committee of its Radio Council, which includes feedback and comment from regional chamber of commerce, internet association and other local officials²¹.

- **Pro-competition approach**

168. Government is currently consulting on a new pro-competition regime for digital markets²². Further analysis of this approach and its relevance to the competitive impact of the BBC is provided in the section below. This is similar to the ex-ante approach being adopted in other jurisdictions, including in Europe through the proposal for a Digital Markets Act, which is designed to limit the power of dominant online platforms to support fair and open digital markets²³.

²¹ <https://www.deutschlandradio.de/hoerfunkrat.2088.de.html#dreistufentest>

²² DCMS and BEIS, 'A new pro-competition regime for digital markets', July 2021

²³ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

169. In summary the UK approach will seek to address both the sources of market power and potential harms from the exercise of market power through an ex ante approach, enforced by a new Digital Markets Unit (DMU). This is based on the judgement that intervening later on in the process may reduce competition, especially in rapidly-evolving digital markets. Among other powers, the DMU will be able to designate digital firms with entrenched market power and create codes of conduct for them.
170. Ofcom will work closely with the DMU in relation to online and media content, media plurality and communications; even if the BBC is not designated, some of the criteria for designation and principles in the codes of conduct could helpfully be applied to the BBC. For example:
- changes to certain BBC activities or services could automatically trigger a BBC Public Interest Test (PIT), regardless of whether the BBC believed they met the materiality threshold
 - changes in certain other additional areas or services could require pre-notification (with specific details required around purpose, planned investment etc.).
171. In addition to the application of these principles there may well be other ways in which this proposed pro-competition regime for digital markets could help inform Ofcom’s approach to the BBC as the dominant player in the UK audio market. Therefore, we have provided some further analysis on the relevance of this specific initiative below.

Digital Markets Unit and ‘pro-competition’ principles

172. Government is currently consulting on a new pro-competition regime²⁴ and central to this approach is a Digital Markets Unit (DMU) within the Competition and Markets Authority (CMA). The DMU’s core purpose is ‘to promote competition (which includes promoting competitive outcomes) by addressing both the sources of market power and the economic harms that result from the exercise of market power’.
173. The DMU will seek to identify firms with ‘substantial and entrenched market power’ in at least one digital activity, which gives them a ‘strategic position’ where the effects of the firm’s market power are likely to be ‘widespread and significant’ (so that existing competition tools are insufficient). Users lack good alternatives and there is a limited threat of entry or expansion by other suppliers. Such firms will be designated as having ‘Strategic Market Status’ (SMS) and will be subject to the new pro-competition regime. This will include a Code of Conduct to shape the firm’s behaviour and prevent bad outcomes before they occur. The DMU may also impose Pro-Competitive Interventions (PCIs) that aim to open up digital markets to greater competition by addressing the causes of substantial and entrenched market power.

²⁴ DCMS and BEIS, ‘A new pro-competition regime for digital markets’, July 2021

174. Ofcom will work closely with the DMU in relation to online and media content, media plurality and communications; even if the BBC is not designated, some of the criteria for designation and principles in the codes of conduct could helpfully be applied to the BBC.
175. Firstly, the types of conduct that may be taken into account by the DMU include (as part of four criteria) whether the firm can ‘use the activity ... to extend its market power into a range of other activities’²⁵. This is where digital firms entrench and take advantage of their strategic position by creating an ‘ecosystem’ of accompanying products and services that expands into new markets and undermines their competitors.
176. This approach could be considered relevant to consideration of BBC Radio and BBC Sounds. Given the BBC has around 50 per cent market share in radio, it is important for Ofcom to be able to consider whether the BBC’s dominance in one area of activity might be leveraged into another. Ofcom should then be able to address this if it unfairly ‘tips’ competition in the BBC’s favour and where that is to the long-term detriment of its users.
177. Secondly, on the approach to the Code, it is proposed that the principles should ‘provide clarity and consistency, minimising complexity and burden on stakeholders’. It proposes a hybrid approach of setting high-level principles and objectives in legislation and giving the DMU powers to develop additional legally binding requirements. Through this approach, flexibility would be delivered by the DMU tailoring the requirements to each firm, SMS activity, and the specific behaviour and harm, using the evidence gathered during the SMS designation process.
178. In other words, it is not necessary to keep the Code itself vague or high level to provide flexibility or room for innovation by the regulated entity, but rather to design it closely around the firm and activity regulated, keep it under review and update it over time in response to shifts in the market and in the firm’s behaviour.
179. For enforcement purposes, it would specify changes in behaviour required to comply with the Code, and could include suspension, cessation or reversing of harmful behaviour. Interim orders would allow the DMU to intervene ‘before irreversible change occurs’ to address potential breaches that might cause immediate harm by pausing or reversing behaviour. This includes preventing action that might limit or mitigate any future remedial measures.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf

180. Meanwhile, pro-competitive interventions (PCIs) are designed to tackle entrenched market power in digital markets, where the market characteristics mean that competition problems are expected to persist over time and require ongoing and proactive oversight (rather than one-off interventions under existing CMA powers). Interestingly, the DMU would have the flexibility to start with smaller interventions and consider their effectiveness before implementing a more comprehensive set of remedies. It would then monitor, review and amend remedies to ensure they remain fit for purpose over time, subject to fixed review periods. PCI enforcement orders may apply for a fixed period, determined by the Digital Markets Unit, at the end of which they should be reviewed and either remain or be removed or modified. The DMU may also trial remedies and accept voluntary commitments.

181. In summary, while the competition concerns are on a different scale, we would suggest that elements of the policy development and regulatory thinking are useful to Ofcom's review, namely:

- with regards to ecosystems of services, the risks of leveraging market power into adjacent markets if this unfairly 'tips' competition and that is to the long-term detriment of users;
- a hybrid regulatory approach to principles based and rules based regulation, where certainty is provided through clear, precise and binding rules based on evidence from a thorough review of the firm and its activities, and flexibility is provided by the regulator monitoring and updating these rules over time; and
- structured and active stakeholder consultation by the regulator throughout the evidence-gathering phase and subsequent reviews, and the possibility for stakeholders to bring forward cases (of entrenched market power and persistent competition problems requiring continuing oversight).

Question 6 – Commercial activities

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

182. Ofcom's focus on the commercial activities of the BBC through BBC Studios has tended to centre only on its audiovisual activities. This is most likely a reflection of the fact that the core activity of BBC Studios in both audience and revenue is audiovisual content.

183. However, BBC Studios is also a relatively large producer of UK audio content, in terms of radio shows (e.g. News Quiz, Now Show, Dead Ringers) and a growing range of podcast output. As a result, it is possible that new commercial opportunities may develop in the future.

184. Ofcom should proceed with caution and not design or implement a permissive regulatory approach for BBC Studios that ignores audio content simply because it is a small part of its activity currently. This is particularly important given the structural differences between the audio and audiovisual markets in the UK noted in this submission, with the BBC continuing to dominate in audio.