

## **RADIOCENTRE RESPONSE TO OFCOM CONSULTATION: HOW OFCOM REGULATES THE BBC'S IMPACT ON COMPETITION (FEBRUARY 2023)**

### **SUMMARY**

1. Radiocentre welcomes the opportunity to feed into Ofcom's consultation on its regulation of the BBC's impact on competition (the Consultation). However, we have serious concerns with Ofcom's analysis of the BBC's position in audio and ultimate conclusion that "changes that only affect BBC Sounds are unlikely to have a significant impact on the listening share – and therefore the revenues – of domestic competitors, and so do not expect a significant risk of crowding out." These concerns are of particular importance given Ofcom's assessment that "many of the changes the BBC may make in audiovisual and audio for the remainder of the Charter period will relate to the execution of its online strategy."
2. The BBC holds an extremely privileged position due to the scale and type of funding it receives, its unrivalled broadcast network and cross-promotion opportunities. It has been able to use these advantages, unavailable to its commercial competitors, to retain a dominant market position in radio with around a 50% share of audience. This is well ahead of other UK radio providers (and far in excess of its audience share in TV of around 28%).
3. Alongside commercial radio, the BBC continues to play an important role in the UK radio and audio sector and remains one of the leading broadcasting organisations. Its best and most distinctive content is unrivalled in range and quality while being highly valued by listeners. Many of its services and programming would simply not be possible to provide on a commercial basis. Still, not all of its radio content and services are truly distinctive, with its popular music services exhibiting the greatest level of crossover and duplication with commercial radio during peak times.
4. Now is a particularly important moment for BBC regulation, with the government currently undertaking its Mid-Term Review of the BBC Charter and a new Operating Licence for the BBC expected to come into force in April 2023. Alongside this, a government review of BBC funding is expected later this year. We will continue to engage with Ministers and officials in the Department for Digital, Culture, Media & Sport on this important process.

## THE BBC'S IMPACT ON COMPETITION IN THE AUDIO SECTOR

5. In Section 3 of the Consultation document<sup>1</sup>, Ofcom sets out its “*general views on the BBC’s position in the audiovisual and audio sectors and the risk that changes to the BBC’s services in these sectors might harm competition.*”<sup>2</sup> In this section we set out our material concerns with Ofcom’s decision to publish such an assessment, as well as with the substance of its general view.
6. We are concerned that Ofcom’s analysis is highly theoretical, lacks evidential underpinning or economic analysis and was not undertaken with the input of relevant stakeholders; it is clearly not a robust piece of analysis on which to draw any inference.
7. Moreover, we note that Ofcom has never undertaken a competition assessment in the audio sector following a change in the BBC’s service offering (despite numerous calls from industry to do so). As a result, it has not had the opportunity to robustly test either the BBC’s approach to assessing competitive impact or to develop its own thinking on the most appropriate way to undertake an assessment of competitive impact in the audio sector.
8. While Ofcom asserts that “*the views presented ... do not replace or change the process which the BBC and Ofcom must carry out when assessing a proposed change to a BBC public service*”<sup>3</sup>, it is naive not to expect this to become the de facto benchmark against which the BBC justifies any and every change in its services in future.
9. Below we set out in more detail our concerns about Ofcom’s approach, both in terms of the process we believe Ofcom ought to adopt given its public law duties and – without prejudice to our concerns around process – on the substance of the ‘general view’ that Ofcom has published.

### Process issues

10. As Ofcom is aware, the launch of new radio stations or streams on BBC Sounds without Ofcom requiring the BBC to undertake a public interest test (PIT) is the subject of ongoing judicial review proceedings. Radiocentre’s view, as pleaded in those proceedings, is that such new stations constitute new public services. We note with surprise that Ofcom appears to have made an assessment of the BBC’s impact on competition prior to the judgment in those judicial review proceedings and prior to the conclusion of this consultation. In particular, the assumption by Ofcom that any changes limited to BBC Sounds are likely to pose a low risk of “crowding out” domestic commercial providers (as set out in 3.39 to 3.43 of the Consultation document) such that no PIT is required.
11. We are concerned that this apparent pre-judgment of the materiality of any change to BBC Sounds, thereby fettering the role of Ofcom at the materiality stage of the assessment, may be at odds with Ofcom’s obligation to conduct a fair consultation (in line with the principles enshrined in *R v London Borough of Brent, ex p Gunning*). If Ofcom has already drawn a conclusion as to the likely impact of BBC Sounds on competitors, this raises the question as to whether the mind of Ofcom is still open to change. Consultation is meaningless if the decision-maker’s mind is already made up; in order to be lawful, the decisions arising from the

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<sup>1</sup> [How Ofcom regulates the BBC’s impact on competition: Proposals for changes to guidance and requirements](#), Ofcom, November 2022

<sup>2</sup> Para 3.1, *Ibid.*

<sup>3</sup> Para 3.7, *Ibid.*

consultation will need to address the concerns raised by respondents rather than simply rubber-stamp the proposals set out in the consultation.

12. As part of its duty to conduct a fair consultation, Ofcom is also required to provide sufficient information on its proposals to permit an intelligent response. We are concerned that the flaws in Ofcom's analysis (identified below at paragraphs 14-44) provide an unreasonable and unsound basis for the proposals (which in turn restrict respondents' ability to address the consultation questions).
13. Taken together, we are concerned about the integrity of the consultation process. We submit our responses to the consultation questions below but wish to preface this with the issues raised about the way in which the consultation is being conducted.

### Substantive issues

14. Notwithstanding the above procedural concerns, below we engage with the substantive elements of Ofcom's proposed approach and the stated 'starting point' for the competition impact assessment of changes to the BBC services.
15. Even on its own terms, we believe that Ofcom's analysis is fundamentally misconceived and an inappropriate foundation on which to draw such material inferences about the effect of the BBC's behaviour on the UK audio market and on investment decisions by commercial rivals. More specifically, we will consider that:
  - The prominent reliance on market shares of audio listening hours, as set out in the Consultation document, is overly simplistic. Not only do aggregate market shares and aggregate market share changes tell you little about competitive rivalry, Ofcom appears to make overly simplistic assumptions about how changes in listening share affect advertising revenues which are not borne out in practice. **Aggregate market shares of audio listening hours are therefore inappropriate for the analysis Ofcom seeks to undertake:** they are not capable of supporting strong inferences on 'crowding out' of investment by commercial rivals. Ofcom should consider a more detailed analysis of closeness of competition to fully appreciate the impact of specific changes to BBC services on highly differentiated commercial rivals.
  - In focusing on crowding out alone, Ofcom adopts too narrow a conception of the potential adverse impacts on fair and effective competition.
  - Ofcom's definition of crowding out is too restrictive and does not capture the impact of BBC behaviour on marginal investment decisions or the displacement of investment.
  - Ofcom's approach in this context is dissonant with the approach of UK regulators (for example, Ofcom itself, the CMA and others within the Digital Regulation Cooperation Forum) to assessing and acting on the concerns of new technologies and to tech regulation.
  - By undertaking separate analysis for the audiovisual and the audio sector, Ofcom ignores the question of whether the BBC enjoys some 'conglomerate' or 'portfolio' synergies that generate a spill over of competitive impacts across the two areas. This is increasingly relevant given the move to online services and increase in the use of data for targeted service proposals, but in any event reflects the BBC's unique position in the UK media landscape having extensive operations across both sectors.

### **Aggregate market share analysis is overly simplistic**

16. Ofcom is well aware that market shares are a crude indicator of the degree of competition in a market. This is particularly true in this case for several reasons, as set out below.
17. First, shares of audio listening hours are only an imperfect proxy for investment decisions. Not all hours of listening can be equally monetised by commercial rivals: listening by certain demographics (e.g. 15-34 year olds), platforms (e.g. listening on connected devices providing richer audience data) or to certain categories of audio content (e.g. mainstream popular music-led services) generate proportionately more revenues – and hence incentive to invest – than other listening hours. As such, the loss / gain of certain ‘types’ of listening hours may have a disproportionately large impact on the competitive position of commercial rivals.
18. Second, the presentation of audio listening shares in Table 2<sup>4</sup> does not reflect the realities of market segments and of closeness of competition for advertisers and consumers between different types of audio content and between providers of these different types of audio content. To give one example, given Ofcom’s focus on investment decisions by commercial rivals: the list of audio content providers contained within Table 2 includes business models as diverse as advertising funded, subscription, freemium, and unit pricing, with revenue generated from either consumers directly or from advertisers; asserting that each percentage point of listening share across these business models is equivalent from an investment perspective is deeply flawed. We consider that Ofcom would achieve a much richer and more meaningful assessment of the competitive impact of changes to BBC services by assessing the closeness of competition of different commercial rivals and, more specifically, the content produced by them (as well as their attractiveness to advertisers).
19. Third, Ofcom overestimates the extent to which different audio services are substitutes rather than complements. For example, Ofcom relies – in part – on survey data suggesting that BBC Sounds listeners use an average of 4.5 online services in total compared to 1.9 services for non-BBC Sounds listeners.<sup>5</sup> This is likely to overestimate the extent of competition between services because:
  - Some content may only be available on BBC channels (linear radio or on-demand), so the BBC would internalise any lost listening; BBC Sounds is essentially a monopolist for listeners interested in that content.
  - Even where the same content is available from other competitors, Ofcom has no way to know whether consumers consider those 4.5 channels as complements (e.g. one for podcasts, one for linear radio listening, one for music streaming, etc.) rather than actual substitutes. In this regard, we note that the figures Ofcom quotes are composite numbers aggregating survey responses to separate questions for different categories of content (i.e., radio, online music, podcasts, and audiobooks). The very fact that the survey was designed to segregate different types of audio content is consistent with a view that it is not meaningful to lump highly differentiated types of listening together as Ofcom has done in its market share analysis.<sup>6</sup>
  - To the extent that those channels are used as substitutes, it is conceivable that consumers have one preferred platform or one preferred platform for each type of audio content – e.g.

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<sup>4</sup> Page 21, [How Ofcom regulates the BBC’s impact on competition: Proposals for changes to guidance and requirements](#).

<sup>5</sup> Para 3.41 (c), Ibid.

<sup>6</sup> [Ofcom Audio Survey 2022 Questionnaire, March 2022](#) and [Ofcom Audio Survey 2022 Full Data Tables](#)

where they build their playlists and keep tabs of podcast episodes they have listened to – with the other channels providing only a weak competitive constraint.

20. Finally, we note that Ofcom presents separate data in Table 2 for the 15-34 audience segment and concludes that the BBC's market position with this demographic is worse than for all adults. For the reasons articulated above about the limitations of making inferences from crude aggregate market shares, we do not believe these data in and of themselves permit strong inferences to be drawn about the potential for the BBC to have adverse impacts on commercial rivals by, for example, modifying its service proposition to target this demographic. Nonetheless, one plausible explanation of any difference in patterns of consumption for this demographic, relative to all adults, is that the commercial sector is better able to satisfy this audiences' listening demands. If this is true, then Ofcom should be more – not less – concerned about the potential for the BBC to crowd out commercial rivals.
21. In summary we consider that Ofcom has and continues to fall short on carrying out a sufficiently detailed market definition and closeness of competition analysis, with the result that its subsequent analysis of aggregate market share data is at best misdirected and at worst deeply misleading.

#### **Too narrow a conception of adverse impacts on fair and effective competition**

22. While we agree with Ofcom that crowding out is a form of competitive impact that it should be concerned about, we believe that solely focusing on this form of adverse impact is too narrow given a proper understanding of the meaning of 'fair and effective competition' and given Ofcom's statutory duties.
23. Ofcom's stated objective in broadcasting markets to achieve – for consumers – "*a plurality and choice of a wide range of providers and producers competing fairly for audience*".<sup>7</sup> This implies that Ofcom's conception of competition should not solely focus on whether changes in BBC public service activity materially reduce revenues for certain commercial rivals, but also on ensuring that the range of content and content providers in UK broadcasting markets is as broad as possible.
24. In order to do that effectively, Ofcom must consider the impact of the BBC's behaviour on the mix of content and the providers supplying that content. This requires a more sophisticated analysis than a simple examination of aggregate listening shares of all audio. Moreover, it is not possible to ensure a plural mix of content and content providers by focusing assessments on competitive impact on changes to revenue alone; the differential in yield across different types of audio content production is an important consideration, too.
25. In addition, by focusing its analysis on only the largest rivals to the BBC, Ofcom appears to assume that competition – and the impact of the BBC on competition – from smaller players is not worthy of its consideration. This is an error: smaller rivals are also capable of providing material levels of competition, especially within niche or narrow segments of audio content, and thereby contributing to a more diverse and plural range of content providers. Creating a competitive landscape where smaller commercial stations are unable to develop and thrive reduces innovation and the incentives for new broadcasters to enter the market(s) ultimately harming audiences.

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<sup>7</sup> For example, para 2.12, [Ofcom's proposed plan of work 2023/24](#)

### **Ofcom does not fully capture the risks of crowding out**

26. Below we set out various ways in which Ofcom fails to capture fully the risks that BBC investment decisions crowd out investment decisions by commercial rivals. This matters particularly to the UK audio sector given the BBC has both multi-year certainty over its funding stream and funding (investment) scale which commercial rivals cannot match.

#### *The definition of crowding out is too bounded*

27. Ofcom states that “*crowding out will not occur in all cases where a change to BBC public services leads audiences to switch to BBC services away from commercial rivals. What matters is whether a change to BBC services causes the reduction of commercial providers’ revenues and profits to such an extent that these providers significantly reduce their investment in new or existing services*”.<sup>8</sup>

28. We are concerned that this approach risks overlooking instances of crowding out that results in materially slower growth (instead of a decline) of the revenues or profits of commercial rivals. To the extent that these are correlated to audio listening metrics, crowding out may result even when the proposed change to BBC services results in a slower decline (rather than an overall increase) of the BBC’s aggregate listening share (and conversely a slower growth of the share of commercial rivals).

#### *Ofcom’s approach overlooks the impact on marginal investment decisions*

29. Ofcom’s approach focuses on whether commercial rivals “significantly reduce their investment”. This approach risks missing marginal investment decisions, where commercial rivals are contemplating potential investments. For example:

- A proposed change that weakens the case for a new investment may lead the commercial rival to forgo the opportunity.
- A proposed change that raises the cost of input to commercial rivals can result in lower output than would have otherwise eventually resulted from the same investment (absent the BBC change). This would weaken the competitive position of commercial rivals, in that a certain scale of investment would produce a lower quality level for the intended audio service.

#### *This approach overlooks the potential displacement of commercial investments*

30. This approach also overlooks the effect of proposed changes to BBC services on the investment mix. This is not about reducing the overall quantum of investment, but rather re-directing investment by commercial rivals towards audio services that are not (or are relatively less) affected by the proposed change to BBC services. This can reduce the overall competitive position of commercial rivals, as they end up investing in services that are arguably a ‘second-best’ choice, were it not for the proposed changes to BBC services.

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<sup>8</sup> Para 3.11, [How Ofcom regulates the BBC’s impact on competition: Proposals for changes to guidance and requirements](#)

31. In a similar fashion, Ofcom’s assumption that global players are less affected by changes to BBC audio services may be a too simplistic *prima facie* working assumption. While the proposed BBC changes may indeed be unlikely to undermine the commercial viability of these global players, they may still have a material impact on the decisions by global players to create content in the UK or targeted to UK audiences.

*This approach risks overlooking impacts in other parts of the supply chain*

32. The BBC is clearly a prominent creator of audio content. Changes to its services can have a material impact on the incentives to invest in content production in the UK or audio services with a UK focus. We are concerned that Ofcom seems to relegate this prospect to a footnote without much additional guidance.<sup>9</sup> A proper assessment of the competitive effects across the UK audio supply chain from changes to its audio services would more effectively support the continued development of UK creative industries and the small but fast-growing audio production sector.

*This approach ignores the cumulative effect of new services*

33. The BBC has previously proposed significant numbers of new services on BBC Sounds across a broad spectrum of genres. Ofcom's analysis of each individual new service on the basis of crowding out means that no single new service is likely ever to hit the requisite threshold of competitive impact, especially if Ofcom treats all audio as one ‘market’. The cumulative effect of large numbers of new online services – which is understood to be the BBC's strategy for reaching younger listeners – needs to be assessed on a cumulative basis (just as under the merger control regime in the Enterprise Act 2002 multiple acquisitions in a short period of time are not assessed individually but together<sup>10</sup>).

### **Dissonance with broader regulatory approach to tech regulation**

34. In its advice to government on the establishment of a pro-competitive regulatory regime for digital markets, the Digital Markets Taskforce noted that *“the lack of effective competition ... is often the result of specific market features like network effects, economies of scale or unequal access to data”*, with the Taskforce also concerned about firms *“building ‘ecosystems of complementary products and services around their core service, insulating [them] from competition.”*<sup>11</sup> The Taskforce also noted that *“digital markets are fast-moving, and the issues arising within them are wide-ranging, complex and rapidly evolving.”*<sup>12</sup>
35. The implication of the concerns of the Digital Markets Taskforce (and, indeed, a key part of the rationale for a new regulatory regime for digital markets) is the concern that markets can shift very rapidly, entrenching market positions and thereby limiting the incidence and effect of competition over the long-term.

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<sup>9</sup> Footnote 3 (page 6), Ibid.

<sup>10</sup> This was the approach the CMA took in e.g., Bauer Media Group merger inquiry (March 2020) and Motor Fuel / Shell (September 2015). It also mirrors the approach the CMA takes in merger situations where a party acquires control of another through multiple share transactions (see Section 29(1) of the Enterprise Act 2002).

<sup>11</sup> Para 3, [A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce](#)

<sup>12</sup> Para 2.11, Ibid.

36. Ofcom recognises that audio listening is moving from traditional ‘offline’ radio to online radio listening (live and catchup) and other digital media. In this sense, changes that have a detrimental competitive impact on commercial rivals’ online radio prospects may have a disproportionate crowding out effect. This is because the effect of the proposed changes would be to cement and protect the BBC’s current dominant position. In addition, the BBC’s unique funding position means that it has greater ability to take risks in a nascent market where there is more uncertainty about the effectiveness of business models and the potential for commercial payback.
37. We note that – while the absolute level of listening shares in online radio and digital audio formats (podcast and streaming) is currently much smaller than linear radio – the relative position of the BBC vis-a-vis its domestic commercial rivals, who are likely to be much closer competitors to the BBC in the online space, seems to reflect the same position as in the linear radio space (with the BBC about twice as large as its main rivals). When the proposed changes to BBC Sounds make it especially difficult for commercial rivals to establish and consolidate their online presence, the competitive impact may have a disproportionate impact on dynamic competition.
38. We are also concerned that Ofcom is (mistakenly) importing its view of the role of global tech giants in audiovisual sectors into the UK audio sector, where the market conditions are fundamentally different. We believe it is a category error to assume that the BBC is anything other than the dominant provider of audio services to UK consumers currently or to assume that the BBC would never be in a position to leverage its position in linear audio broadcasting into BBC Sounds (particularly as this is its publicly stated strategy).

#### **Ofcom’s separation of audiovisual and audio sectors ignores ‘conglomerate’ or ‘portfolio’ effects**

39. The BBC is clear that its ‘Digital First’ strategy is to build *“a digitally led public service media company of [global] scale ... [with] fewer brands overall, and ... more activity [consolidated] behind a simple, single brand in the UK.”* Tim Davie, Director General of the BBC, has said that *“digital offers a huge opportunity to unlock more audience value but it requires big organisational change: a radical overhaul of how we use data, a heavyweight world-class tech team, new operating models, new creative solutions and ideas.”*<sup>13</sup>
40. Ofcom’s separate focus on audiovisual and audio markets ignores the BBC’s unique position as a provider of a range of services across both markets within the UK, with a well-recognised brand and installed audience base, unique and unparalleled ability to cross-promote its services within its ecosystem, and – increasingly – its ability to generate unique and valuable insight on audience behaviour based on the data it captures from its single sign-in requirement across its services.
41. This position potentially allows the BBC to leverage its market position in audiovisual into audio (and vice versa). In particular, as the BBC benefits from ever more data from viewers / listeners with single sign-in, it is reasonable to expect, for example, that:
  - One service may act as a ‘flywheel’ to other services within both its audiovisual and audio offer. Listeners and / or viewers of the flywheel service are then more likely to remain within the BBC eco-system while using other services, making it more difficult for commercial

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<sup>13</sup> [Leading the UK into digital, speech by the Director-General of the BBC, Tim Davie, at the Royal Television Society, 7 December 2022](#)



providers to compete on the merits of their service. When a change to the BBC's service offer directly affects the competitive position of the flywheel service, the other BBC services indirectly benefit from the momentum generated by the flywheel service.

- To the extent that consumers value a one-stop shop, a change in audiovisual services will affect the competitive position of audio services that sit within the same ecosystem (e.g., benefitting from a single sign-in process, better targeted suggestions for further engagement with the services and opportunities to cross-promote across services / channels within the BBC ecosystem), and vice versa.
42. As more audio listening shifts to online channels and as the BBC becomes more adept at harvesting data from audiences' choices, Ofcom should also consider the potential for portfolio effects, that is how changes to BBC services in one market only (for example, the effect on audio markets of changes to the BBC's audiovisual offer) can affect the competitive position of other BBC services which are related, for example by being part of the same eco-system or targeted at the same demographics.
43. The BBC's distribution strategy to deny third party services native access to its content, thereby forcing audiences to consume BBC content solely within its ecosystem, will act to reinforce any portfolio effects. In this regard, we note that the BBC only last month removed the ability for listeners to consume its radio stations in the Radioplayer app, forcing the app to deep-link to BBC Sounds instead.<sup>14</sup>
44. On a similar note, analysing (or failing to analyse) each individual change on BBC Sounds masks the cumulative effects of large number of new stations (or other content types) collectively making BBC Sounds an increasingly attractive platform for online consumers of content, across both audio and audiovisual. Ofcom's approach risks underestimating the impact of proposed changes to an individual station when the competitive position of the BBC Sounds portfolio is greater than the sum of its component parts (stations, podcasts and other forms of audio content).

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<sup>14</sup> [RadioToday article on changes to Radioplayer that now deep-link BBC services](#), 27 January 2023

## CONSULTATION QUESTIONS

**Q1. Do you agree with our proposals to:**

- a) place a requirement on the BBC to publicise its planned changes to public services?**
- b) provide further guidance on how the BBC should set out information about its planned changes? If not, please explain which changes, if any, should be made to the guidance and where appropriate, provide relevant evidence supporting your view.**

45. Increasing the levels of transparency required by the BBC when planning changes to its services, is a positive change, and appropriate for a large public service broadcaster in receipt of significant licence fee funding. We broadly welcome Ofcom's specific proposal to enhance the requirements on the BBC to provide stakeholders with sufficient information about planned changes to its public services activities. We would, however, like to see this go further and propose that the BBC instigate a short, targeted consultation process as part of all materiality assessments.

46. The move to greater transparency would also benefit from the inclusion of explicit details on what the BBC is expected to incorporate in its communication with stakeholders. For example, we would propose a requirement to include essential details such as how the BBC has defined the market. Without this, it is impossible for Ofcom or industry stakeholders to form a clear view of how appropriately the market has been defined and, therefore, whether any market share or other market impact assumptions are reasonable.

47. Concerning consistent communication with stakeholders, we agree that this should, in part, be achieved with a regularly updated dedicated page on the BBC's website, and we strongly advocate for this approach. Whilst discussions with the BBC can sometimes provide useful, additional background to this process, less formal engagement, in whatever form it takes, should not be a substitute for clear and transparent written information published in the public domain.

48. Ofcom will be aware that Radiocentre considers that a PIT should be required on the launch of any new public service on BBC Sounds. This is the subject of the judicial review on which judgment is awaited.

**Q2. Do you agree with our proposals to put in place more guidance about how stakeholders and the BBC should engage during the assessment of materiality by the BBC?**

49. We agree with the addition to the guidance outlined in paragraph 4.21 in the Consultation document. The proposals provide a measured and sensible approach for the BBC during the assessment of materiality of a proposed change.
50. In addition to providing stakeholders with sufficient information, it is important that the BBC ensures that stakeholders have sufficient time to consider the impact of any new changes proposed by the BBC. Our experience has often been of limited information provided, making it difficult to reach an informed judgement, combined with short timescales (that do not take account of holiday periods such as Christmas).
51. For example, in a letter to the BBC and Radiocentre with regard to the BBC's materiality assessment of Radio 1 Relax, Ofcom noted that "While we have reached a view that Radio 1 Relax is not a material change, we have concerns about how the BBC assessed materiality of the stream. In particular, we do not think it engaged sufficiently with stakeholders or properly considered the impact of the proposed change on competitors, specifically commercial radio. Furthermore, the method for estimating the take-up of Radio 1 Relax could have been improved."<sup>15</sup>
52. Where stakeholders are likely to wish to provide detailed evidence to support concerns with a proposed change, the timescales set by the BBC should be reasonable and allow for flexibility where necessary. Moreover, building on Ofcom's proposal (in relation to Question 1), we recommend that the onus would not only be on stakeholders to provide evidence and analysis, but also on the BBC as part of its obligations to share sufficient detail of proposed changes and evidence to back up their materiality assessments in sufficient time to enable stakeholders to comment.
53. Stakeholders may also understandably be cautious of sharing evidence with a direct competitor who may gain strategic or commercial insight into their business. In certain circumstances, it may be necessary for Ofcom (or another entity) to intermediate evidence as a neutral third party.
54. It is critical that the BBC genuinely engages with the evidence and analysis brought forward by respondents rather than pay lip service to the consultation exercise. We recommend that Ofcom sets out clear expectations on the BBC to include a reasoned response to stakeholders' concerns which states how it has modified its original proposals or why it has considered those concerns unjustified.
55. It is also unclear what recourse is available to stakeholders (or Ofcom) should the BBC not adhere to Ofcom's guidance for engaging during a materiality assessment. Ofcom should review a suitable remedy for this scenario.

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<sup>15</sup> [Letter from Ofcom to the BBC and Radiocentre on the materiality assessment of Radio 1 Relax](#), 26 July 2021

**Q3. Do you agree with our proposals to include further guidance on what the BBC should include in its public interest test consultation?**

56. We welcome the fact that Ofcom is providing the BBC with further guidance on what the BBC should include in a PIT consultation. A PIT ensures much greater transparency and scrutiny for a proposal from the BBC. It ensures that stakeholders have the opportunity to respond in detail on the substance through a formal consultation process, both as part of the PIT and a BBC Competition Assessment (BCA) by Ofcom. It is partly for this reason that we do not support Ofcom's recommendation to Government, which would provide even greater discretion on whether to conduct a BCA or shorter assessment following a PIT, potentially reducing the scope of stakeholder input, consultation and oversight when the BBC launches a new service.
57. In terms of future BBC PIT consultations, paragraph 4.25 of the Consultation document sets out what Ofcom would expect this to include at a minimum, namely:
- *a clear description of the change including identification of the content or functionality that is new;*
  - *a firm indication of the scale of the changes;*
  - *the target demographic(s);*
  - *where possible, take-up forecasts of new content or functionality; and*
  - *timescales for implementation of the change.*
58. The proposed new list of requirements for a PIT consultation is a step in the right direction. However, the BBC should be expected to include a more comprehensive minimum set of information with any PIT consultation. We would like to see the following added to the guidance:
- A clear market definition and detailed analysis of the market impact on consumers and competitors;
  - Any views raised by stakeholders on the perceived impact of the proposed changes; and
  - Expected changes to audience engagement and/or listening hours as a result of the proposed change
59. Clarifying and enhancing Ofcom's expectations for any BBC PIT consultation is a helpful change, but it is important to note that in practice the PIT process is seldom employed. As we set out in response to question four (below) the limited depth and scope, and the opacity of the materiality assessment carried out by the BBC in determining whether a PIT is required means that it is very rarely triggered.

**Q4. Do you agree with our proposals to provide more detail in our guidance about the materiality assessment process?**

60. Ofcom rightly notes<sup>16</sup> the uncertainty of stakeholders regarding how non-material changes are assessed. The materiality assessment process is a crucial first phase of the regulatory process for many proposed changes to BBC services. The opaque nature of the process should be improved, in parallel with the proposed new obligation for the BBC to share its materiality assessment with Ofcom for review.
61. Given the broader emphasis on BBC transparency, we think that the BBC should be required to publish, or at the very least share with key stakeholders, its materiality assessment at the same time that it is shared with Ofcom. We recognise that there would be a need for the BBC to redact particularly sensitive market information from a published materiality assessment, or to share certain details under an NDA.
62. We have made repeated calls for increased transparency over the BBC's materiality assessment process. Stakeholders should also be able to challenge what they view as an incorrect or incomplete materiality assessment; something they clearly are unable to do under the current setup where materiality assessments are not shared. This change would ultimately strengthen the credibility and reliability of these assessments.
63. Unfortunately, there remains a fundamental risk that the less robust materiality assessment process may not capture competitive impacts that would be identified by a PIT consultation which provides deeper, more robust analysis and stakeholder involvement. Given the former is a trigger for the latter, there is a prospect that a less comprehensive desk-based analysis will fall short of providing the scrutiny required and fail to deliver the necessary oversight of a PIT consultation.

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<sup>16</sup> Para 4.31, Ibid.

**Q5. Do you agree with our proposal for additional flexibility for Ofcom to determine whether it is necessary to consult on materiality following a PIT in which the BBC has determined the change is material?**

64. We agree that flexibility around this approach, in order to avoid unnecessary duplication and delays, is a sensible change in cases where it is determined by Ofcom that a BCA will follow.
65. However, in cases where Ofcom considers that a shorter assessment should follow a BBC PIT, we do not think that missing this consultation stage is appropriate. In this instance, the opportunity for an early engagement process with stakeholders which may provide alternative analysis or evidence will be lost.

**Q6. Do you agree with our proposals to add further guidance on our expectations for the BBC's public value assessment?**

66. Our views on the proposals outlined in question six are mixed. We welcome, for example, the proposal<sup>17</sup> for Ofcom to set out in the guidance its expectation that the BBC considers the additional public value of its proposal – crucially, the requirement for the BBC to *“clearly articulate how a proposed change contributes to the distinctiveness of the BBC.”*<sup>18</sup>
67. There is no doubt that articulating the link between public value and distinctiveness should be an important factor in evaluating changes proposed by the BBC, and we agree with Ofcom's conclusion that *“If the BBC were to propose to make changes to its services that rendered these services less distinctive, it is likely that this would create less additional public value, thereby making adverse impacts on competition harder to justify.”*<sup>19</sup>
68. We are, however, concerned by the proposals around reaching new audiences outlined in paragraphs 4.52-4.55 of the Consultation document. First, underserved audiences and those that the BBC struggles to reach appear to be conflated. This is an important distinction; it is understandable that the BBC should focus on the former. The latter may already be well served by other content providers; therefore, any changes by the BBC aimed at these audiences are likely to have a detrimental impact on these incumbent providers.
69. We also have serious concerns with the final proposal from Ofcom that, *“In considering the public value associated with a proposed change, it may therefore be appropriate for the BBC to consider how the proposed change contributes to the BBC's long-term sustainability – for example, through reaching audiences currently not well served by the BBC, or by increasing positive awareness of the BBC brand among harder-to-reach audiences.”*<sup>20</sup>
70. The relatively ambiguous nature of the new language in paragraph 4.55 seemingly gives the BBC carte blanche to make changes aimed at any harder-to-reach audiences – most likely younger demographics – supported by promotional activities and programming budgets not available in any way near a similar scale (or without significant loss of profits) to domestic competitors in radio and audio.
71. We are concerned that the current wording suggests that the BBC may be justified in utilising its extensive cross-promotion opportunities across TV, radio and online, in addition to investment in PR that is related to the positive awareness of the BBC brand among these audiences. Ofcom should amend this proposed new guidance with language that provides a clearer scope for the BBC and not result in changes and campaigns that could unfairly impact on commercial competitors.

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<sup>17</sup> Para 4.48, Ibid.

<sup>18</sup> Para 4.47, Ibid.

<sup>19</sup> Para 4.47, Ibid.

<sup>20</sup> Para 4.55, Ibid.

## **ABOUT RADIOCENTRE**

Radiocentre is the industry body for commercial radio. We work on behalf of more than 50 stakeholders who represent over 90 per cent of commercial radio in terms of listening and revenue.

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