



# **Modernising the BBC's Operating Licence**

**Virgin Media O2 response**

**21<sup>st</sup> September**

**Non-Confidential response**

## EXECUTIVE SUMMARY

Virgin Media O2 welcomes the opportunity to respond to the Ofcom Consultation (“the Consultation”) regarding the proposed modernisation of the BBC’s operating licence.

As the mid-point of the BBC’s current charter period approaches, Virgin Media O2 believes that it is the right time for Ofcom to review its regulation of the BBC. Since the current licence was put in place more than five years ago, there have been significant developments in the sector, not least in audience viewing habits and the number and types of services providing content to those audiences. Although linear broadcasting remains the main way in which many consumers consume content, over the past five years the industry has seen a huge increase in the popularity and availability of on-demand platforms, whether these be traditional broadcaster “players” (such as iPlayer and ITV Hub) or subscription services (such as Netflix and Amazon Prime). As the industry evolves, it is important for Ofcom to ensure that the BBC operating licence remains fit for purpose and enables the BBC to meet its statutory duties and obligations.

Virgin Media O2 acknowledges the need for the BBC to be able to adapt to the changing landscape and that it should be given a degree of flexibility in how it operates in order to meet the needs of its audience and their consumption preferences. However, first and foremost, this must be driven by the need to ensure that it continues to satisfy its Public Purpose, its Mission and other obligations.

When reviewing Ofcom’s proposals in the round, they appear to meet the objectives set out in the consultation and we do not have any specific issues with the majority of what has been proposed. However, we believe that a key element has been overlooked. Specifically, whilst the Consultation considers discoverability of BBC content, there is little consideration of *availability*. This should be a key aspect of any consideration of the BBC’s operating licence. The BBC is a universal service, paid for and owned by the British public. It therefore follows that the BBC’s content and services must be available to as wide a range of consumers as possible, and via a range of means<sup>1</sup>. Indeed, this is reflected in its Public Purposes<sup>2</sup>. In our view, the current and proposed operating licence provide insufficient safeguards in this regard. We believe that this shortcoming can be addressed by the inclusion of an explicit universality condition. We expand on this view in the sections below.

Whilst acknowledging the need for affording the BBC a degree of flexibility in order to meet audience needs in an ever-changing environment, there must be limits to that flexibility. As is mentioned throughout the consultation, the main role of the BBC is to fulfil its Public Purposes and its Mission to entertain, educate and inform audiences. The aim of the BBC, even a BBC which wishes to become a ‘digital first’ organisation, should not be to compete with established SVOD services. Whilst there is not necessarily an issue, per se, with the BBC looking to evolve towards becoming a digital provider, the motivation for such an evolution must be to ensure it can maintain adherence to its formal obligations. In its recent Public Interest Test consultation, the BBC discussed the need to attract a younger audience to iPlayer alongside the desire for iPlayer to increase its library of archive content. However, as we highlighted in our response to that consultation, there

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<sup>1</sup> We note that the BBC itself is explicit in its acknowledgement of universality and has frequently emphasised the scope of its reach (see for example the BBC submission to the DCMS Committee Enquiry into the Future of Public Service Broadcasting, available at <https://committees.parliament.uk/writtenevidence/6637/html/> )

<sup>2</sup> Article 6 of the Charter; Public Purpose 3

was little evidence of a clear plan around how such an increased library of content would attract a younger audience other than simply by being present. In updating the terms of the operating licence, Ofcom must ensure that it is able to give the BBC flexibility but also hold it to account and ensure it does not lose sight of its Mission and Public Purposes.

A major part of the BBC's Mission is to ensure that it has a breadth of content available, and that content serves a diverse audience. However, we are concerned with the lack of reference made throughout the consultation to platforms that host the BBC's content and the fact the focus of the consultation appears to be on the type of content the BBC delivers and not on the variety of delivery mechanisms for such content, beyond discussion of broadcast vs online. Any discussion around both the availability and discoverability of BBC content must go hand-in-hand with consideration of how this content is made available across multiple platforms, including traditional pay TV platforms. In order to truly satisfy its obligation to ensure its content is as widely available as possible, the BBC must ensure that iPlayer can be hosted by and incorporated into other platforms. This inclusion will allow consumers to access BBC content in the same way in which they access other on-demand content. Having to access iPlayer by leaving their TV platform adds an additional step and may be a barrier for those customers who are unable, or do not wish to, access content in this way. It also runs counter to what is, essentially, the BBC's universality requirement.

Furthermore, the current level of discretion afforded to the BBC in respect of where and how it delivers its content and services gives it the ability to influence and, potentially, distort the TV landscape (for example by being selective in which platforms it allows to carry iPlayer). Moreover, its apparent ambition for the iPlayer to become a platform in its own right gives the BBC an incentive to use that discretion in a way that may be detrimental to others.

To address this issue, we believe that requirements relating to the delivery of BBC content must be extended to third party platforms to ensure that as wide an audience as possible is able to easily discover and access BBC content. This is best achieved by incorporating a universality condition into the revised licence.

While the BBC aspires to iPlayer becoming a 'destination', it does not need to do so in order to satisfy its Public Purposes and Mission. In fact, creating an environment where iPlayer essentially becomes a walled garden environment detracts from the BBC remit to make its content as widely available as possible. Our desire to see BBC content made available and discoverable across multiple platforms is not one which should come as a surprise to Ofcom and is in fact reflected in Public Purpose 3: *"The BBC should provide high-quality output in many different genres and across a range of services and platforms which sets the standard in the United Kingdom and internationally. Its services should be distinctive from those provided elsewhere and should take creative risks, even if not all succeed, in order to develop fresh approaches and innovative content."* Also, within the consultation, Ofcom references how the BBC can explore innovation in the ways in which it provides content, including the *"use of third-party platforms...for example through YouTube."* Although this reference to third-party platforms is welcome, Virgin Media O2 believe it is vital this is expanded upon to explicitly reference legacy TV platforms which appear to have been ignored.

Virgin Media O2 understands the proposals that look to move certain aspects of the operating licence away from quotas, either by replacing them entirely or making them more flexible. As a concept, we do not object to this change, and we share the belief that the priority should be for

content to serve the audience and meet the BBC Mission rather than simply meeting quotas. However, as we expressed in our response to the recent BBC PIT, as the BBC looks to attract audiences to iPlayer it must take care to avoid simply providing content based on popularity and ensure that it continues to meet its Mission. This concern extends to the notion of service neutrality. Once again, we do not have an issue with the concept of service neutrality but there must be controls in place to ensure this concept is not open to misinterpretation. It should not allow the BBC to pick and choose where its content is made available and potentially exclude established TV platforms from its content and functionality. Not only would this exclusion impact hosting platforms, it is also something which may impact consumers. Those that do not, or are not able to, access iPlayer, and simply consume BBC content via traditional linear services, should not be excluded from BBC content that has been placed directly and exclusively to iPlayer. A similar concern exists in respect of consumers who access iPlayer via TV platforms. This method of access does not require consumers (from their perspective) to go 'online' – instead, it appears to them simply as another feature of the TV platform service. Depriving established TV platforms of iPlayer would thus also deprive consumers who have no other means of accessing it.

Although we acknowledge limited content can be made available as online only, allowing this notion to permeate into large quantities of BBC content could be an unintended consequence of service neutrality and should be prevented. The BBC should not be able to use service neutrality to invest in online content at the expense of linear broadcasting.

Whilst we agree that Ofcom is right to look to increase the reporting requirements within the operating licence, and to hold the BBC to account and ensure there is transparency around how the BBC is meeting its Public Purposes and satisfying its Mission, we are concerned that this does not necessarily prevent damage to the TV landscape, particularly if Ofcom only becomes aware of issues 'ex post'. For instance, if reporting/transparency from the BBC demonstrates platforms' access to iPlayer is being withheld or is subject to onerous conditions, this would mean that the market has potentially already been distorted – and, critically, consumers were already being prevented from accessing BBC content in the way in which they would normally access such content and the consumer harm had already taken place. Therefore, we would look to Ofcom to ensure steps were in place to avoid such an occurrence. An explicit universality licence condition, as we set out above, would reduce this risk considerably.

One area that we believe is lacking from the consultation, and should be included, concerns when the BBC makes changes to aspects of its services, such as iPlayer. When looking to evolve or otherwise make changes, it is vital that the BBC engages and consults with industry ahead of any such changes taking place. This is important to ensure that the various platforms that host BBC content can prepare for any changes in good time and continue to meet the needs of their audiences.

Overall, Virgin Media O2 does not have major objections to the principles expressed within this consultation. We believe that it is important for the BBC operating licence to evolve in line with changes across industry and allow the BBC the relevant scope and flexibility to meet the ever-changing needs of its audience and their viewing habits. However, we feel it is essential that this evolution is not done in such a way that excludes or otherwise inhibits the platforms which host BBC content. In order to satisfy the requirement to make content as widely available as possible, the

BBC, and by extension Ofcom, must ensure it is accessible across platforms and not just via the BBC's own services. Therefore, we would look to Ofcom to ensure such provisions are made explicit in any proposed changes to the operating licence.

## **2. CONSULTATION QUESTION RESPONSES**

Please see below for our response to the specific questions in the Consultation.

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

Virgin Media O2 clearly believes that Ofcom should be responsible for assessing and measuring BBC performance and ensuring that the BBC is held to account if it is not meeting its Public Purposes and Mission. Aside from our view about universality set out above, the plans laid out within this consultation do appear to meet these objectives in the round. However, as mentioned above, we do have concerns that measures could be applied after consumer harm has already occurred and we would urge Ofcom to ensure this is not allowed to happen. Furthermore, we note the desire of the BBC to not be subject to unnecessary delays when attempting to execute its plans. Whilst we understand the desire to be flexible, the BBC must be held to its Public Purposes and Mission and any changes it makes should first be subject to scrutiny from the regulator and industry.

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

Overall, Virgin Media O2 does not have any major concerns with the proposals made by Ofcom with regard to news and current affairs and it is correct that the regulator would look to introduce requirements in this area that cover BBC online and on demand services. However, as we have mentioned within this response, we believe the availability points within these proposals should be extended to third party platforms, including legacy pay TV.

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

Overall, Virgin Media O2 does not have any major concerns with the proposals made by Ofcom with regard to content aimed at supporting children with their learning and it is correct that the regulator would look to introduce requirements in this area that cover BBC online and on demand services. However, as we have mentioned within this response, we believe the availability points within these proposals should be extended to third party platforms, including legacy pay TV.

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

Virgin Media O2 does not have any major concerns in regard to the proposed changes regarding quotas and service neutrality. However, we are of the view that this must be closely monitored by Ofcom in order to ensure that certain services are not prioritised over others. In its quest to become a digital first organisation, the BBC must not be allowed to exclude traditional linear audiences by placing an emphasis on iPlayer only content. It must also ensure that content is made available to as wide an audience as possible and not place barriers in the way of traditional TV platforms when it comes to the access to BBC content and services.

### **Question 5: Do you agree with our preliminary view on the BBC's request to change Operating Licence conditions 2.21 and 2.32 for BBC Four, including our proposal to remove BBC Four's peak**

**original productions quota and set the 'all hours' quota at 65% instead of 60% as requested by the BBC? If not, please explain why.**

Virgin Media O2 does not have any comments in response to this question.

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

As a public service broadcaster, the BBC has a responsibility to reflect the diversity of its audience and the regions it serves. Therefore, Virgin Media O2 understands the proposals made by Ofcom in this area and does not have any further comments to add.

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

Overall, Virgin Media O2 understands the proposals made by Ofcom and that the current BBC operating licence requires updating. It is right that the licence should reflect the current landscape and allow the BBC the flexibility to adapt to the changes that have occurred since 2017. However, this flexibility must be considered in relation to the Public Purposes and Mission which must guide how the BBC operates. Whilst incorporating BBC online services, Ofcom must ensure that any changes made to the operating licence takes into consideration the need for BBC content to reach the widest audience and must not solely focus on BBC services. Ofcom should look to safeguard audiences by allowing them the same ease of access to BBC content across third party platforms. If Ofcom were to allow the BBC to create a walled garden environment around its content, this would contradict its Public Purposes and lead to consumer harm.