



# How Ofcom regulates the BBC's impact on competition

Sky Response

February 2023

## Introduction

In its review of BBC regulation, 'How Ofcom regulates the BBC' ("June review"),<sup>1</sup> Ofcom observed that an increase in competition from global players means that all UK public service broadcasters ("PSBs"), including the BBC, must adapt to ensure that they meet audiences' needs. Sky does not dispute that the market is changing in the face of increasing global competition. However, this affects the entire market and, unlike other UK broadcasters, the BBC benefits from a range of privileges (including guaranteed funding, prominence, a strong brand name, mass audience recognition, etc.) with its 'special status' as the UK's only publicly funded PSB. Therefore, market changes do not necessarily justify giving the BBC further flexibility to make changes to its public services by reducing the level of oversight which Ofcom has over the BBC.

The increase in global competition arguably reinforces the importance of Ofcom ensuring that the BBC is complying with the regulatory framework, a key role of which is to protect fair and effective competition in the UK. This is especially pertinent during the current cost-of-living crisis, as commercial PSBs and other commercial broadcasters strive to compete against the BBC. It is important that Ofcom does not prioritise the BBC's desire for greater flexibility over Ofcom's duties to protect fair and effective competition, and to hold the BBC to account.

As Ofcom is already aware,<sup>2</sup> Sky has been disappointed by the level and nature of the BBC's engagement in relation to previous BBC public interest test ("PIT") consultations (i.e., iPlayer, BBC Three, iPlayer II). Sky welcomes Ofcom's recognition of the fact that the BBC needs to be more transparent and engage more effectively with stakeholders. Sky therefore supports Ofcom's proposed amendments to its guidance for assessing the impact of proposed changes to the BBC public service activities ("Guidance"),<sup>3</sup> which aim to increase transparency and improve stakeholder engagement by the BBC. In particular, Sky supports:

- a new requirement on the BBC to publicise planned changes to its public services; and
- further guidance on:
  - how the BBC should set out information about its planned changes;
  - how the BBC should engage with stakeholders and Ofcom;
  - what the BBC should include in its PIT consultation; and
  - the materiality assessment process more generally.

However, Sky does have concerns about:

1. Ofcom's proposal to amend its Guidance to provide flexibility for Ofcom to decide whether it is necessary to undertake a consultation at the initial stage of its assessment of a proposed change to the BBC public services;
2. Ofcom's recommendation to Government to amend the Framework Agreement so that Ofcom is able to approve a proposed material change to the BBC's public services without conducting a competition assessment, if it agrees with the BBC's analysis and the BBC has effectively engaged with stakeholders; and

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<sup>1</sup> Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/239176/How-Ofcom-regulates-the-BBC.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/239176/How-Ofcom-regulates-the-BBC.pdf).

<sup>2</sup> As per Sky's following submissions: Sky's response to the BBC PIT consultation on proposals for BBC iPlayer dated February 2019; Sky's response to the BBC PIT consultation on a new BBC Three channel dated April 2021; and Sky's response to the BBC iPlayer PIT consultation dated August 2022.

<sup>3</sup> Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0027/99414/bbc-public-service-activities.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0027/99414/bbc-public-service-activities.pdf).

3. Ofcom's view that – at this point in time – no changes to BBC iPlayer would be considered material, regardless of the circumstances.

## Ofcom should consult at the initial assessment stage

As a change to its Guidance, Ofcom proposes additional flexibility to consult with third party stakeholders as part of its initial assessment of a proposed change to the BBC's public services. Instead of routinely consulting with third parties on:

- (i) materiality (i.e., whether the change may have a significant impact on fair and effective competition); and
- (ii) what further assessment may be required,

Ofcom proposes to have the flexibility to decide whether a consultation at the initial assessment stage is necessary.

Sky agrees that it will typically not be an efficient use of time and resource for Ofcom to consult on materiality where the BBC has already determined that a change is material. However, it is essential that Ofcom continues to consult at the initial stage where the BBC has concluded that the change is not material. It will be important for Ofcom to gather stakeholder views before deciding whether it agrees with the BBC. This is the approach Ofcom took in 2022 when assessing the BBC's proposal to increase the amount of archive content on BBC iPlayer.<sup>4</sup> Sky does not consider that such consultation would cause undue delay to the implementation of the BBC's proposal (assuming that Ofcom confirms the change is not material). Further, any adverse impact to the BBC of a few weeks' delay will be far outweighed by the benefit of Ofcom gathering a range of potentially contrasting stakeholder views to consider alongside the BBC's conclusions.

In addition, it is essential that, well in advance of reaching and consulting on its provisional view, Ofcom seeks feedback from stakeholders on:

- **Whether the BBC has complied with its requirements to be transparent and consult effectively**

As noted above, in the past the BBC has not been sufficiently transparent or given stakeholders the opportunity to engage meaningfully about proposed changes to its public services. While Sky welcomes the proposed new measures to address these concerns, if Ofcom does not consult with stakeholders at the initial assessment stage, then it will be more difficult for Ofcom to accurately assess whether the BBC has been transparent and given stakeholders the opportunity to engage meaningfully.

This, in turn, will make it more difficult for Ofcom to assess the BBC's published PIT accurately and objectively and to decide: (i) whether the proposed change is material; (ii) whether to carry out a full BBC competition assessment ("BCA") or shorter assessment; or (iii) if the Framework Agreement is amended as per Ofcom's recommendations to Government (see below), whether to undertake its own independent assessment, rather than rely on the BBC's assessment.

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<sup>4</sup> Available at <https://www.ofcom.org.uk/consultations-and-statements/category-3/review-proposed-increase-archive-content-on-bbc-iplayer>.

- **Early views on the BBC's final published PIT**

In Sky's experience, it is not until the BBC publishes its PIT assessment to Ofcom that stakeholders typically see the full scale and scope of its proposals. This includes any related research, which the BBC usually either conducts alongside its stakeholder consultation or withholds from publication. Additional information contained in the BBC's final PIT assessment may give rise to additional comments and concerns from stakeholders. Stakeholders should therefore be afforded an early opportunity to provide representations to Ofcom on the contents of the BBC's PIT assessment.

- **Whether Ofcom should undertake a full BBC competition assessment BCA or shorter assessment.**

Early stakeholder feedback will be an important input into Ofcom's decision on whether to undertake a BCA or shorter assessment. In the absence of early feedback from third parties, Ofcom's only input will be BBC's own assessment, which as noted may be flawed for a range of reasons.

It would also be more efficient if Ofcom were to formally gather stakeholder views prior to consulting on its preliminary decision. This would minimise the risk of Ofcom having to potentially revisit its assessment of a proposal in the light of additional information received later in the process.

When Sky raised the above points on a call with Ofcom on 8 September 2022, Ofcom noted that its door is always open and stakeholders, including Sky, are welcome to make representations to Ofcom at any point during the PIT process. While this has provided some reassurance, Sky remains of the view that Ofcom should proactively consult or at the very least invite stakeholder feedback at the initial stage, in order to gather views from a range of interested parties. Both the BBC and stakeholders would benefit from a clear statement in the Guidance around the circumstances in which Ofcom would engage with interested parties at the initial stage and the focus of such engagement.

## Ofcom should conduct its own competition assessment before approving any material change

Under the Agreement, Ofcom is required to undertake a BCA or shorter assessment where the BBC considers a change to be material (and has therefore undertaken a PIT). In the June review, Ofcom recommended that Government should amend the Agreement to give Ofcom more flexibility to determine how and when to undertake competition assessments. Ofcom has recommended that it should be able to approve a change without conducting a competition assessment if it finds that: (i) the BBC has appropriately assessed in its PIT both the competition impacts and the public value of the proposed change; (ii) the BBC has effectively engaged with stakeholders and appropriately taken account of their concerns; and (iii) any remaining competition impacts are justified.

While this recommendation has already been made to Government and does not form part of the current consultation, Sky takes this opportunity to emphasise that it does not support this recommendation for the reasons set out below:

- **It will be challenging for Ofcom to objectively review the BBC's analysis without undertaking its own separate assessment**

It is unclear how Ofcom would satisfy itself that the BBC has appropriately assessed the competition impacts of a proposed change, without undertaking its own independent assessment. If Ofcom does not undertake its own assessment then it will be wholly reliant on the BBC's data and analysis. Ofcom would at the very least need to closely interrogate and test the BBC's approach and analysis, which may in practice prove to be no more efficient than carrying out its own separate assessment.

- **Ofcom may be more likely to agree with the BBC's assessment**

If Ofcom did not undertake its own separate assessment, there is the risk that it would be more inclined to agree with the BBC's findings. This is especially concerning given that the BBC's findings may be flawed if it fails to engage effectively with stakeholders and, in any event, by the inability of third parties to submit confidential information to the BBC. In addition, confirmation bias means that the BBC is more likely than not to reach a conclusion which supports its proposed changes.

Given the inherent issues with the BBC's own PIT analysis, it is essential that Ofcom carries out its own independent assessment. Furthermore, dispensing with Ofcom's initial consultation would provide an additional layer of risk as Ofcom may consequently be unaware of stakeholder concerns about the BBC's consultation process and final published PIT.

To ensure sufficient oversight over proposed changes to the BBC's public services, it is important that Ofcom both consults/invites stakeholder views early on and undertakes its own review before approving any changes to the BBC's public services.

## Future changes to BBC iPlayer could be material

In its consultation document, Ofcom sets out its view of the BBC's current position within the audio-visual and audio sectors in order to give the BBC and stakeholders more clarity about how Ofcom is likely to approach consideration of BBC competition impacts.

Sky notes that Ofcom's view of the BBC's current position within the audio-visual sector is expressed as being "*no more than a starting point*" for any future competition assessment. Sky agrees that assessments of the BBC's impact on competition in the audio-visual sector should be made on a case-by-case basis (and certainly not by reference to a snapshot of the BBC's position in the market as at Autumn 2022). For example, in the current cost of living crisis, if viewers were to start turning away from paid-for content in favour of "free" content from the BBC, then this could quickly make Ofcom's current view of the market outdated.

As regards Ofcom's current view of the BBC's position, while Sky agrees that a change to the BBC's linear channels could be material, Sky does not agree with Ofcom's view that no change to BBC iPlayer would – at this point in time – be considered material, regardless of the circumstances. A change to BBC iPlayer could well be material depending on the nature of the change (e.g., if the BBC started aggregating third party content within BBC iPlayer).

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