



How Ofcom regulates the BBC's impact on competition

Proposals for changes to guidance and requirements

Virgin Media O2 response

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Non-Confidential response

EXECUTIVE SUMMARY

Virgin Media O2 welcomes the opportunity to respond to the Ofcom Consultation (“the Consultation”) regarding how Ofcom regulates the BBC’s impact on competition.

Ofcom plays a key role in regulating the BBC, ensuring fair and effective competition is protected in the UK media market. Virgin Media O2 has previously expressed the belief that, as audience and viewing habits change, the BBC should have the ability to adapt in order to meet such needs. However, as the UK media market, and the BBC within it, diversifies to meet the needs of its audience, and video on-demand and streaming services become more prolific, it is vital Ofcom adapts the way in which it regulates the BBC, specifically in regard to how any changes planned by the BBC may impact fair and effective competition. It is also important that the BBC remains focussed on satisfying its Public Purposes and its Mission. In the most recent PIT, the BBC made numerous references to the development of SVOD services, how they are changing viewing habits of audiences and how it is vital for the BBC to be given the ability to adapt to such changes. However, the role of the BBC is not to compete with the variety of SVODs within the market but to meet the needs of its own audience and educate, inform and entertain. Ofcom must ensure the BBC is does not lose sight of of this.

Having reviewed the consultation, we welcome a number of the proposals made, specifically those which focus on increased transparency, detail and communication regarding any proposed changes by the BBC. We also welcome proposals to provide more detailed guidance on Ofcom’s role in the assessment of the impact on competition. However, we hold significant concerns with other key elements of the consultation – in particular, the potential changes to the process via which changes proposed by the BBC are classified and assessed. The proposed removal of steps (and therefore safeguards) in the existing assessment process and the introduction of subjectivity and greater discretion for the BBC, and for Ofcom when assessing proposed changes, is troubling. It is important that those likely to be affected by the BBC’s actions have full visibility of changes proposed by it and are able to hold both the BBC and Ofcom to account. For the reasons that we set out in this response, we urge Ofcom to reconsider its proposals to introduce more flexibility and discretion into the assessment process.

We are also concerned that the consultation appears to be focussed on the competitive impact on content providers and other broadcasters. While we acknowledge the criticality of examining the effect of the BBC’s actions on these stakeholders, we believe that Ofcom must also consider the impact on distributors of the BBC’s content and services, including traditional TV platforms.

GUIDANCE, COMMUNICATION AND TRANSPARENCY

Throughout recent consultations and PITs, we have raised concerns with a number of factors related to the way in which the BBC has approached the process. Looking at the recent PIT relating to the expansion of BBC iPlayer, for instance, we were disappointed at both the detail and quality of the analysis presented, concerns echoed by Ofcom. As much as viewing habits are changing, and audiences are able to access a seemingly infinite number of content providers, the BBC still forms a fundamental part of how audiences consume content and, therefore, any changes made are likely to have a significant impact on others in the media market – not only those providing content, but also those distributing the BBC’s services. This fact must be acknowledged by both the BBC and Ofcom.

Therefore, it is vital that the BBC not only engages with the relevant stakeholders but does so in an open and productive way. We understand the expressed desire for the BBC to be able to adapt to changes in the market and have a certain amount of flexibility. However, platforms such as Virgin Media O2 work to advanced timeframes and, therefore, any changes must take that into account. We would welcome, therefore, steps by the BBC to publicise any planned changes to its public services in advance, increasing both the transparency and consistency on how these plans are made public. We would also welcome further clarification from Ofcom with regards to the scope of the updated guidance; are the planned updates limited to changes to the nature of BBC services and/or the content contained within them or does Ofcom plan to apply this to changes to the format and technical parameters of the services? Virgin Media O2 strongly believes that the guidance and assessment process should extend to both; technical changes can have as significant an impact on competition as those made to content.

Whilst we welcome steps to encourage transparency and a more open dialogue between stakeholders and the BBC, it is essential that any such engagement contains both the relevant level of detail required in order for stakeholders to make a substantial assessment of any proposals and also that appropriate lines of communication remain open to provide stakeholders adequate recourse if it is felt any analysis does not fully address any potential impacts of the proposals. Although the consultation clearly sets out improved guidance to encourage transparency, we are concerned with the language used regarding this part of the process. Ofcom sets out its expectations that the BBC will engage with stakeholders and, where appropriate, consider whether it should adjust its proposed change. We believe this guidance does not adequately address concerns of stakeholders when it comes to changes proposed by the BBC; it appears to afford the BBC a wide margin of discretion. This is particularly concerning when considered in the context of Ofcom's recommendation to Government to change the definition of a 'material' change so that new public services are not automatically considered to be material¹. Any open communication between stakeholders and the BBC can only function properly if there is a genuine belief feedback will be taken on board and changes made. The proposed guidance appears light in this regard, allowing the BBC to give tacit acknowledgement to the concerns of stakeholders without the necessity to make changes following the raising of such concerns. As the regulator, Ofcom must ensure any proposals made by the BBC are fully analysed and a detailed and thorough process is undertaken.

Specifically in relation to any future PITs undertaken by the BBC, we welcome the improved guidance suggested by Ofcom on its minimum expectations for what a PIT should include. We believe the expectations set are reasonable, however we also believe it is important that if it is not possible for take-up forecasts to be provided, there should at least be attempts made to provide stakeholders with some form of data that will allow adequate analysis to take place. Without this data, it is impossible for stakeholders, or the BBC for that matter, to assess whether or not any change is material.

Overall, we welcome the proposed changes to the guidance and believe it is a step in the right direction. We welcome more detail and an improved dialogue with the BBC, and it is positive to see

¹ Consultation, paragraph 2.17 (iii)

Ofcom promoting that. However, we do not believe Ofcom has addressed the key points raised above and must develop its guidance to firm up its expectations of the BBC.

THE ROLE OF OFCOM

As regulator of the BBC, Ofcom plays a vital role in both ensuring that it satisfies its Public Purposes and Mission and also protecting all other stakeholders from changes the BBC may make that could distort the market and negatively impact fair and effective competition. However, we also appreciate the role Ofcom plays in balancing such protection with the desire to allow the BBC to adapt and innovate.

With this in mind, we appreciate Ofcom's proposals to provide more detail on the role it plays in assessing the materiality of any proposed changes. However, we have significant concerns with the way in which Ofcom is proposing to change its approach to future proposals made by the BBC. In looking to give itself an increased level of discretion and flexibility, we believe that Ofcom is at risk of seriously tilting the balance in favour of the BBC and removing significant protection and oversight for stakeholders. It is vital that all proposed changes to the BBC are only introduced following a rigorous assessment process and the addressing of any competition issues. If anything, stakeholders require additional assurances about the BBC's plans and behaviour, not a dilution of the existing approach to assessment. We urge Ofcom to reconsider its proposals.

The consultation is, in some ways, contradictory when looking at the current and proposed regulatory framework. On the one hand, Ofcom appears to acknowledge, as it did in its June review, that there is not currently a need to alter the current framework in any direction. This would appear to suggest that Ofcom believes the current status quo is working well. However, the consultation goes on to outline proposals that would provide Ofcom with the flexibility to allow changes proposed by the BBC to take place purely based upon the outcome of the BBC PIT. For many reasons, we hold significant reservations around this proposed change.

It is important that any changes made within the industry, especially those made by such a significant, regulated player in the market as the BBC, are only allowed to happen following due process. The fact that some competition assessments may be time consuming and resource intensive should not be a determining factor in whether or how assessment takes place, allowing a material change to take place without such an assessment is not appropriate. In essence, it appears the proposed increased "flexibility" given to Ofcom would result in the BBC "marking its own homework" and putting through any changes it feels necessary. We do not believe that it is appropriate to replace the formal assessment process with more informal, direct engagement with impacted stakeholders and strongly urge Ofcom to reconsider. If Ofcom chooses to proceed with this aspect of its proposals, it must provide more guidance and make it clear what such engagement looks like. This must not be an informal process where stakeholders are not clear on the nature of the process, if it will be consistent and what Ofcom plans to do if it receives significant push back regarding the proposals. This simply cannot be left as an informal "plan" that is not fully established and documented by Ofcom.

Although the consultation suggests Ofcom would only approve a change without a competition assessment "*if we agree with the BBC's analysis, and the BBC has effectively engaged with stakeholders*", it is not clear what criteria it would use to determine if it agreed with the BBC's

analysis nor how Ofcom plans to measure what constitutes “effective engagement” and what this may look like. There is also the suggestion that BBC changes may be approved following a shorter assessment. Again, we do not believe this is an appropriate way for Ofcom to be approaching material changes and we request Ofcom reassess these proposals and focuses on its role as regulator of the BBC, ensuring it continues to impose a rigorous assessment process.

When assessing potential changes, and the impact they may have on competition, it is vital that both the BBC and Ofcom consider such impacts in the round. We believe that the impact on the secondary rights market must be explicitly considered when assessing materiality and there should be an obligation placed upon the BBC to not adversely impact the value of this market in any changes it chooses to make. This is something we do not believe has been suitably considered in previous PITs conducted by the BBC and again when Ofcom has assessed materiality.

Regarding the two most recent changes made to BBC iPlayer, we have been frustrated by the way in which these changes have seemingly been allowed without adequate consideration of the issues raised by stakeholders. We are therefore very disappointed when reviewing Ofcom’s thoughts on the market currently and how it views potential changes to iPlayer moving forward. The assumption appears to be that, due to the number of on-demand services available in the market, any change to iPlayer will not be a material one. As we have illustrated in our responses to both of the recent PITs, we believe that such a high-level, broad-brush assumption is fundamentally flawed and does not adequately take into account audience behaviour. That Ofcom holds such a view is concerning. As the popularity, and publicity afforded to, broadcaster on-demand players increase, viewers are becoming more likely to move away from traditional Pay TV platforms as they consume free content in this way. As viewing habits change, it is short sighted to believe that any impact will be minor and spread evenly across a range of competitors. Almost immediately following the outcome of the most recent PIT, the BBC has placed iPlayer front and centre of its TV offering, every series and event is advertised primarily as “available on BBC iPlayer” rather than its linear counterpart and audiences are pushed more and more to accessing content via the BBC’s own streaming service. The same can be said of ITV since the launch of ITV X, so much so that it is often hard to differentiate between content that will be shown on linear channels or solely via the on-demand service. As much as we understand and appreciate the needs of the BBC to be innovative and agile, it is difficult to be comfortable with the notion that any future iPlayer changes will not be material and therefore “waived through” without any kind of regulatory oversight.

Furthermore, there is no distinction made between the type of changes the BBC could make. The BBC has the potential to make changes regarding both the content it holds within its services and also the functionality and specification of them. We believe both would be material, as mentioned previously, and any changes that involved technological development would have a significant impact on platforms such as ours. This type of change simply cannot be made overnight and involves significant planning and cost. Therefore, both Ofcom and the BBC must take this into consideration and platforms should not be disadvantaged by the BBC’s desire to be flexible and agile.

Therefore, we strongly oppose any attempts by Ofcom that would allow changes to be made by the BBC without being subject to a robust regulatory assessment. Without appropriate regulatory

oversight, including appropriate assessment and the taking into account of the views of stakeholders, there is a significant risk of regulatory failure.

CONCLUSION

We understand it is important for Ofcom to periodically review its guidance regarding the BBC and competition. Virgin Media O2 welcomes some of the proposals made within the consultation, specifically those which look to increase both the detail and transparency provided by the BBC. We also appreciate Ofcom providing more guidance on the role it plays in the assessment of materiality.

However, as we have highlighted, we have significant concerns with the changes Ofcom has proposed regarding competition assessments and the approval of BBC changes. We believe that Ofcom has an obligation as the regulator to ensure that fair and effective competition is protected, and the BBC is not allowed to simply make the changes it deems appropriate without the appropriate regulatory scrutiny.

Finally, this consultation looks to address the response of the BBC since Ofcom's review of BBC Studios last year. Ofcom is specifically looking to address issues it found in relation to both secondary content sales and transfer pricing. As with other proposals within the consultation, we welcome any steps taken by Ofcom to hold the BBC to account and ensure that it is meeting its regulatory obligations. As Ofcom itself points out, there should be no circumstances in which BBC subsidiaries gain a competitive advantage and it is therefore correct for the regulator to step in if this were to be the case. However, once again we have considerable concerns around the proposals made by Ofcom and how it is looking to update its guidance. Ofcom must hold the BBC to account, especially in areas in which concerns have previously been flagged. The proposed updates to the guidance give the impression that the BBC will be once again allowed to 'mark its own homework' and we would urge Ofcom to be much more robust in these key areas. We would also encourage Ofcom to ensure any future assessment and monitoring of these areas is done in an open and transparent manner and not simply between the BBC and Ofcom.

CONSULTATION QUESTION RESPONSES

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

Question 1: Do you agree with our proposals to:

a) Place a requirement on the BBC to publicise its planned changes to public services?

Virgin Media O2 believes it is right for Ofcom to set a requirement on the BBC to publicise all changes to its public services.

b) Provide further guidance on how the BBC should set out information about its planned changes?

Virgin Media O2 believes it is important that the BBC sets out information on any planned changes that would impact industry in advance and in detail.

If not, please explain which changes, if any, should be made to the guidance and where appropriate, provide relevant evidence supporting your view.

Question 2: 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?

Virgin Media O2 welcomes any guidance from Ofcom regarding how the BBC should engage with stakeholders during any materiality assessment. However, we believe any such guidance should be expanded to include requirements for the BBC to actively engage with any feedback given by stakeholders and to not simply dismiss it.

Question 3: Do you agree with our proposals to include further guidance on what the BBC should include in its public interest test consultation?

Virgin Media O2 welcome further guidance from Ofcom which outlines its expectations on what the BBC should include in any future PIT. However, we once again believe this guidance should go further and contain an obligation for the BBC to consider and assess any impact its changes may have on the secondary rights market.

Question 4: Do you agree with our proposals to provide more detail in our guidance about the materiality assessment process?

Virgin Media O2 welcomes further transparency from Ofcom regarding the materiality assessment process.

Question 5: 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?

As mentioned in the main body of our response, we have significant concerns with the proposed changes. It is vital that any changes made by the BBC are only allowed following a rigorous assessment process. Changes made by the BBC, whether to linear or on-demand content, have the potential to have significant impacts on the rest of industry and should not simply be “waived through” on the basis of the BBC’s own assessment. Furthermore, we would urge Ofcom to ensure that it, along with the BBC, explicitly takes into account any impact on the secondary rights market when assessing materiality.

Question 6: Do you agree with our proposals to add further guidance on our expectations for the BBC’s public value assessment?

Question 7: Do you agree with our proposal to make it clear that the transfer pricing rules apply when the public service is supplying content or IP for secondary exploitation?

Virgin Media O2 welcomes looking to update and improve its guidance in this area. However, we believe this must be much more robust than what is suggested, and Ofcom must hold the BBC to account in an open and transparent manner.

Question 8: Do you agree with our proposal to add a requirement that allows Ofcom to direct the BBC to undertake a review of its internal controls and accounting processes to ensure they are adequate and enable the BBC to comply with the transfer pricing requirements?

Virgin Media O2 welcomes the proposal for the BBC to undertake reviews of its internal controls. However, once again we believe that Ofcom has an obligation to ensure that these reviews are carried out in conjunction with the regulator and a robust process and timeframe is made clear. Any review must also be transparent rather than simply existing solely between Ofcom and the BBC.