

Ofcom: BBC performance

Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic member of the Centre, who retains responsibility for its content.

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CCP Response to Ofcom's consultation on its regulation of BBC's performance in delivering on its mission and public purposes

1. Question 1 (Licence)

1.1 Public service media (PSM) must be given the flexibility to adapt to the rapid changes in technology and audience needs. The Council of Europe has therefore recommended that PSM be enabled to adapt to the dynamic environment with a mix of content and services.¹ Ofcom's proposal to issue one overall operating licence to the BBC rather than separate ones for each currently existing service is therefore a sensible approach. A single licence that covers a list of services that is provided by the BBC and updated regularly, would give the BBC more flexibility to adapt over the licence period than a series of separate licences. The decision to eliminate qualitative requirements from the licence is a good one that helps to draw the line between Ofcom's regulatory function and the editorial and strategic decisions that should be independently made by the BBC and its board.

1.2 Holding the BBC to account through a fine however, is problematic. The BBC is accountable to the public and that owns the airways that it uses. Fining the BBC, which is funded by licence fee payers, and for that money to go into the treasury to be managed by the government, as proposed in point 3.2, is not a logical mechanism. Such a penalty is more suited to the commercial market in which private capital is at stake and the incentive to comply rather than pay a penalty would be high as paying would diminish returns for owners or shareholders. It is not suitable as an accountability mechanism and has the potential only to reduce the BBC's capacity to fulfil its purposes. In the case of the BBC, accountability should not be conceived of in terms of monitoring compliance with rules and potential penalties as incentives for compliance. Instead accountability should be thought of as a social relationship between the institution and a forum, in this case the UK Public.² In this relationship is that the institution gives

¹ See the Council of Ministers *Declaration of the Committee of Ministers on Public Service Media Governance* 15 February, 2012 and the *Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance* 15 February, 2012.

² See Bovens, M. (2007). 'Analysing and assessing public accountability. A conceptual framework'. *European Law Journal*, 13: 447–68 and for earlier version that is open access <https://dspace.library.uu.nl/bitstream/handle/1874/234842/Analysing+and+Assessing+Public+Accountability1.pdf?sequence=1>.

information to the forum through which the forum can make a judgement and assessment.

1.3 Frameworks for the provision of this information are crucial and the CoE recommendations in relation to PSM accountability reflect this by focusing on defining the purposes and remit for which the institution should be accountable and clear means through which the institution will inform the public.³ The mechanisms of review and reporting in a transparent manner proposed by Ofcom are much more suited to establishing an accountability relationship between the BBC and the public. Ofcom's role in facilitating this is clear in the proposal and should not be muddied by the inappropriate use of monetary penalties. In an accountability relationship, the forum may have formal or informal ways of sanctioning the institution, and in the case of the BBC the public can act on its assessment of the BBC through feedback, through its behaviour as an audience, and ultimately by voting or party platforms and politicians that have particular stances towards the BBC.

2. Question 2 (Public purpose 1)

2.1 The high level purposes outlined under this public purpose are in line with what should be expected from a PSM. They are precise enough to fulfil the intention of the requirement for a defined remit under EU state aid rules⁴, while still maintaining sufficient flexibility for the BBC. Ofcom has sensibly proposed not to continue the obligation previously set by the BBC Trust that the BBC achieve a certain level of "click throughs" as this is an audience behaviour measure over which the BBC can have little influence. Ofcom rightly notes in paragraph 4.42 that is only an imprecise proxy for whether the BBC has provided adequate links from third parties. Such a requirement would also risk encouraging the BBC to lean towards "clickbait" content from third parties rather than content that is more in line with its purposes and quality standards. It is also appropriate that Ofcom intends to allow the BBC flexibility in terms of covering sport in news and Parliament, as outlined in paragraph 4.43, as Ofcom setting requirements in this area may risk editorial interference.

³ See *Recommendation CM/Rec(2012)* articles 28-30.

⁴ See *Communication from the Commission on the application of State aid rules to public service broadcasting* 2009/C 257/01.

3. Question 3 (Public purpose 2)

3.1 The high level purposes outlined under this public purpose are in line with what should be expected from a PSM. They are precise enough to fulfil the intention of the requirement for a defined remit under EU state aid rules⁵, while still maintaining sufficient flexibility for the BBC. Considering the decline of quality educational programming for children and young people the proposed requirements for specific investment in UK content for children is a good one, especially as it does not appear to create additional burden, by reflecting recent output rather than imposing higher targets. The same is true for the emphasis on increased prominence for arts and music programming. Especially with young people increasingly consuming content online and the move towards online formats for educational content, Ofcom's proposal not to set quotas for formal education programming is entirely appropriate.

4. Question 4 (Public purpose 3)

4.1 It has been widely noted that the focus on "distinctiveness" as fundamental to the BBC's purposed that came out of the last Charter renewal process is highly problematic.⁶ It is a vague notion that has roots in concerns about how the BBC related to commercial broadcasters rather than notions of the value and benefits to the public. Ofcom rightly acknowledges the complexity and subjectivity of delivering distinctiveness, and in its proposed objectives seems to have limited the obligations that would arise in achieving distinctiveness to investing in at risk genre's and UK content. Ofcom needs to tread a careful line here between dealing with this awkward notion that has been set out in the Charter and not overly interfering in BBC's content or helping to relegate it to boringness or unpopularity. By allowing the BBC to report on how it offers the broad variety and increased UK content and how it serves diverse audiences, it seems Ofcom has managed to tread that line.

4.2 The one objective in which Ofcom's interpretation is in relation to the level of risk-taking and innovation. Firstly Ofcom's proposal that the BBC should reduce the number

⁵ See *Communication from the Commission on the application of State aid rules to public service broadcasting* 2009/C 257/01.

⁶ See for example Goddard, P. (2017) 'Distinctiveness' and the BBC: A new battleground for public service television? *Media Culture & Society* Article first published online: February 16, 2017 or Enli, G. (2016) *The Nordic experience demonstrates why 'distinctiveness' downgrades the debate about the BBC* at <http://blogs.lse.ac.uk/mediapolicyproject/2016/04/19/the-nordic-experience-demonstrates-why-distinctiveness-downgrades-the-debate-about-the-bbc/>.

of long-running series is misguided, unfounded, and an inappropriate objective for a regulator to set. Such things should be left to the BBC and its board as editorial and strategic decisions. Long-running series that remain popular with the public can be highly important contributors to social cohesion, national and community identity, and the location for the negotiation of norms and values in society. A recent review of research on the effects of entertainment content provides convincing evidence that even that kind of content can influence people's levels of social trust, fear of crime, views on law enforcement and civil liberties, stances on gender and equality issues, all of which can be important shapers of political preferences.⁷ The importance of long-running entertainment and factual programmes that have become themselves trusted and valued institutions for the public should not be by default eliminated simply because they are long-running. The intention to wind down long-running series seems more about reducing the competition such series pose to commercial broadcasters than actually serving the needs of the public. The second problematic aspect of Ofcom's interpretation of the risk and innovation aspect of distinctiveness is its lack of acknowledgement that risk and innovation often result in failure. This should be clearly mentioned in the elaboration of this objective so that when the BBC is reporting on how it has been working to deliver on this accounts of programmes or services that never gained audience or received negative reactions or in other ways failed are accepted as the results of taking risks and innovating rather than as inefficiencies or wastage.

5. Question 5 (Public purpose 4)

5.1 This is another public purpose that is somewhat problematically established in the Charter by the inclusion of the requirement to "accurately and authentically represent". Authenticity is a highly subjective characteristic and one that any regulator would be hard pressed to measure. In the Charter this aim of authenticity is applied to "the lives of people". In its elaboration of the high level objectives for this purpose, Ofcom's proposal exacerbates the problem initiated in the Charter by extending this objective of authentically portraying to "audience groups from the nations and regions" (4.109.1) and to "the diverse communities of the whole of the UK" (4.128.3). Audience groups, nations, communities are not homogenous or static. There could be no end to debates as to what constitutes an authentic culture or identity of any group or community. In its interpretation of this public purpose and setting of high level objectives towards

⁷ Delli Carpini, M. (2017). "The Political effects of entertainment media." In *The Oxford Handbook of Political Communication* Oxford University Press.

fulfilling that purpose there is no need for Ofcom to further emphasize the misguided use of the notion of “authentic” portrayal applied in the Charter to the lives of people by further applying it to groups. Wisely, this quality does not seem to be carried through in the proposals for performance assessment and measurement, beyond perhaps using audience research to assess people from various groups are satisfied and feel they are being well served and represented. This is the most that could be done in terms of assessment and it would be better for the high level objectives to be only to “represent and portray” these various groups. It is sufficient that Ofcom understands and assumes that representing and portraying the country’s nations and diversity in conjunction with the other high level objectives will result in the authentic portrayal of the lives of people in the UK called for in the Charter.

6. Question 6 (Amending the operating licence)

6.1 No comment.

7. Question 7 (Approach to performance measurement)

7.1 Ofcom’s propose approach centred on flexibility in general makes sense as it would not be appropriate to impose highly rigid measurement systems over such a long period of time. Three things should be noted however. Firstly, the establishment of an associated suite of indicators for each public purpose and for each of TV, Radio and Online as set out in 5.14 could be too granular and strict. In the previous sections Ofcom seems to have acknowledged that some of these purposes are complex and subjective, avoiding setting prescriptive limits or requirements and emphasizing the role of BBC’s own reporting of its achievements in these areas. Several of the objectives outlined under the purposes in the preceding sections are also ones that will need to be met over longer periods of time and across services rather than separately by each service on an annual basis. There is also the potential for overlap across purposes in what would contribute to achieving them. An approach based on an extensive suite of indicators for each service for each purpose would seem to undermine the approach that Ofcom has proposed so far in terms of its interpretation of the purposes and the aim of having a flexible approach to measurement. This should be reconsidered.

7.2 Secondly, the principle of comparability to other PSBs and commercial content and services should not be part of Ofcom’s approach to measurement. This mistakenly

accepts the view that the BBC's worth must be regarded in terms of the impact it has on the commercial sector and what the commercial sector might be providing. The specific value and function of public service media in democratic societies has been established within the EU and within the Council of Europe, which the UK is not leaving, and at a wider international level.⁸ The BBC's performance should be measured against its remit and purposes and the extent to which it is providing value and benefit to the public, not in relation to comparability with commercial content and services.

7.3 Finally, the proposal to produce annual research reports seems excessive and unnecessary, as well as not well suited to assessing some of the objectives that are more long term. While it makes sense and would be in the spirit of the accountability relationship with the public that mentioned in answer to Q1 for Ofcom to facilitate the distribution of as much the information to the public, it is not necessarily needed or helpful for all of the in-depth qualitative audience research and other means that Ofcom suggests for assessing performance to be done each year. This risks placing an unnecessary regulatory burden on Ofcom and pressure on the BBC to demonstrate performance too frequently, thereby limiting its options for setting longer term, more ambitious goals. Ofcom should consider producing a report on the quantitative and already reported elements on an annual basis, such as spending on UK content and hours of production in the regions, while scheduling the full scale research reports including all of the data indicatively illustrated in Figure 1 at paragraph 5.17 every two or three years.

8. Question 8 (Proposed framework)

8.1 This framework seems adequate and fit for purpose.

9. Question 9 (Setting and amending performance measures)

9.1 No comment.

⁸ See Council of Europe's *Recommendation No. R(96)10 of the Committee of Ministers to the Member States on the Guarantee of the Independence of Public Service Broadcasting* and Council of Ministers *Declaration of the Committee of Ministers on Public Service Media Governance* 15 February, 2012; the EU's *Communication from the Commission on the application of State aid rules to public service broadcasting* 2009/C 257/01.