

NMA Response to Ofcom Consultation Paper

Holding the BBC to account for the delivery of its mission and public purposes

The News Media Association represents the national and regional news media industry- a £5 billion sector read by 48 million adults every month in print and online. However, the industry is facing challenges as it adapts its business model and deals with new global competitors for the revenue that underpins its investment in journalism.

The industry is facing the challenge of global commercial competitors such as Google and Facebook, but the BBC remains a formidable competitor through its licence fee funded, as well as commercial operations.

The BBC's new Charter and Framework agreement continue to give the BBC Board a very wide discretion to determine the BBC's creative remit, set its strategy and allocate budgets. How Ofcom balances its role in holding the BBC to account for the delivery of its missions and public purposes with its role in ensuring fair and effective competition will be crucial to the BBC's commercial news media competitors.

As Ofcom acknowledges, its own approach is fraught with consequences for the commercial sections: its particular focus upon BBC distinctiveness and requirements for new content, or its requirements for the BBC to maintain or increase certain content for certain audiences in certain areas, all have a negative impact upon its commercial competitors. Even Ofcom considers it difficult to model how the BBC will interpret and implement Ofcom's requirements and what impact that will have upon its commercial competitors. It is therefore helpful for Ofcom to invite commercial news media to inform Ofcom of any potential negative market effects.

Ofcom's proposed focus upon BBC's provision of news and current affairs (Public Purpose One: to provide impartial news and information to help people understand and engage with the world around them) and nations and regions (Public Purpose Four: to reflect, represent and serve the diverse communities of all the UK's nations and regions) could have particular impact upon independent commercial news media organisations that compete with the BBC licence fee funded activities.

The BBC's recently published Annual Plan discloses its proposed expansion of its publicly funded services news services at local, regional, national and international level. These will bring it into direct competition with commercial news media operations' including the areas that the NMA has previously highlighted to Ofcom as being of particular concern to its members and their international, regional and local operations.

The BBC acknowledges that these are new initiatives- or ones that re- invent, re-vitalise, refresh- which it justifies by reference to its mission and public purposes and Ofcom's draft operating licence, in particular in respect of Public Purpose 1 and Public Purpose 4. BBC initiatives under Public Purpose 5 (to reflect the United Kingdom, its culture and values to the world) are of particular relevance to national news media companies. Information about the proposals is dotted around variously in the

report, under the public purposes, contribution to distinctiveness with reference to Ofcom's draft operating licence, the BBC's list of 12 strategic priorities and BBC governance.

The BBC's proposals could have adverse effects and raise questions of potential negative market impact upon the commercial news media companies with which it competes for audience. Under public purpose 4, the BBC highlights its regional and local agenda, (including but exceeding the NMA/BBC partnership proposals), which the BBC intends to pursue at greater depth, greater breadth and through greater investment under the new Charter than before.

Most notably, the BBC Annual plan refers to its recent announcement of its greatest increase in investment for decades in Northern Ireland and outlines its proposals for expansion of its local news operations, in direct competition with the commercial local news media. Yet no mention is made of any public interest test. This must be a matter of real concern to commercial regional and local news media operators. We hope that Ofcom will scrutinize the BBC's initiative with reference to its competition oversight of the BBC not just by reference to its oversight of the BBC's delivery of its mission and public purposes as to whether audiences in England, Scotland, Wales and Northern Ireland are 'well served' or its particular strictures for how this to be achieved for Northern Ireland under the draft operating licence and conditions.

The BBC Annual Plan also refers to the BBC's greatest investment in Wales since the 1940s, without mention of any evaluation of its effect upon the local media. Its plans for English regions also illustrate its new drilling down to regions and localities in direct competition with the local news media companies 'core print, online and mobile services. The BBC Annual Plan describes its plans for new coverage of regional politics, new coverage of mayors and the enhanced powers of mayoral authorities, increasing its focus on local politics across all platforms, development of new services to attract new audiences, with specific content, short form news, more video, new radio formats for news in the regions, improved local digital services aimed at weekly breakfast commuters, new investment in investigative journalism for local radio stations, use of new media. The BBC's proposals for personalization, including making it simpler to search for news by reference to towns and cities and location based will also draw it into new competition with local and regional commercial news media.

These combine with its intentions to attract new, wider mobile and online audience (those with lower incomes, women, young, across mobile, desktop etc) its plans for BBC online, and how it intends to attract and retain them and engage them for longer on the BBC's websites and apps, in addition to personalization of BBC News – also have a potentially negative effect upon its commercial competitors. Ofcom has dual regulatory responsibilities, as public purpose and competition watchdog, to ensure the BBC really does ensure that its audience's 'onward journey' to its commercial competitors sites – which the BBC itself recognizes as crucially important to those other platform providers.

Thus, Ofcom should ensure that the draft operating licence requires the BBC not merely to make 'adequate links to others' sites, but actually to showcase and attribute commercial news providers' material, by citing the full title of local, regional or national newspaper for example, whenever used-on air or online- and the BBC should continue to be under a duty to drive more traffic to their sites. The BBC and Ofcom should monitor, measure and publish the BBC's compliance with these conditions. Ofcom could strengthen the BBC's obligations and its monitoring obligations to ensure that they are fulfilled without undue difficulty to the BBC, since the BBC introduced polices to require newspaper attribution and its Annual Plan sets out its additional commitments to highlight content from other providers and to drive click throughs to other sites. It would also be helpful if Ofcom imposed a stronger obligation than merely 'adequate' links.

At international level (Public Purpose 5) the BBC aspires to increase of its audience to a 200 million weekly reach by 2022. It sets out its proposals for the 'single biggest expansion of publicly funded World Service, since the 1940s, irrespective of any potential upon UK commercial media operations and their trusted independent journalism. The BBC also outlines how it intends to maximise its commercial income from its commercial activities, including growing BBC World, and exploiting its licence fee funded material, building recognition and reach of the BBC brand and delivery of commercial returns. The BBC's direct competition with UK commercial news operators aimed at international audiences, funded by advertising is clear. The BBC's Annual Plan sets out its pitch as to how its commercial news services 'provide access for advertisers to a global audience'.

The BBC however, has yet to set out how it will discharge its competition obligations under the Charter, which make Ofcom's proposals for holding the BBC to account for delivery of its mission and public purposes even more difficult to assess.

Despite its emphasis on re- invention of the BBC and the litany of new initiatives to deliver the public purposes, surprisingly, the BBC's Annual Plan suggests that the BBC only intends to carry out one public interest test, for the launch of the new TV channel in Scotland. It is silent on Northern Ireland.

Indeed, the BBC has yet to publish any of the policies by which it will discharge its competition responsibilities under the Charter. The governance section of the Annual Plan simply tables all the BBC policies of crucial importance to commercial news operators – as competitors and potential partners- that have yet to be drawn up and published. The BBC has yet to publish consultative or final proposals as to how it intends to conduct the public interest tests that are so crucial for its commercial competitors. Its consultation document asking for views on the proposal for the new TV channel is itself somewhat sparse.

The BBC has yet even to publish consultative or final policies as to how it will decide whether or not it is making a 'material change' to its public service activities or to its commercial service activities, that might trigger such a public interest test or Ofcom competition scrutiny.

The NMA notes the BBC's somewhat slight references to its competition and market impact obligations in the BBC's Annual Plan. In describing its plans to fulfil its duty to seek to avoid unnecessary adverse effects upon competition and promote positive market impact, the BBC barely acknowledges that its actions can have any negative effect:

6.5. Market impact Description The BBC plays a crucial role in the UK media and broadcasting market. In addition to serving audiences directly by providing content and services, it can contribute to the market more broadly, for example by promoting competition, supporting supply chains and encouraging sector-wide innovation. Whilst the BBC recognises that there are risks that it may be viewed as stifling commercial activity or harming competition, it is possible equally that the BBC's activities can be seen as promoting commercial activity by increasing people's interest in and familiarity with new technology, helping to stimulate demand for services that competition can then also provide.

Furthermore, the BBC states in its outline of general duties in relation to commercial activities, that it does not intend to publish forthcoming material changes to commercial services in the BBC's Annual Plan if they 'raise issues of commercial confidentiality.' This is potentially a very wide loophole.

The BBC has also yet to publish consultative or final proposals on its Distribution policy – will these provide opportunities for the commercial media or only benefit the BBC. It has not yet published any consultative or final proposals for its Partnership policy to discharge its partnership obligation- will these reflect a genuine partnership, or will the ‘partner’ simply be regarded as supplier, with all contracts to the benefit of the BBC and all burdens upon the ‘partner’, which no doubt the BBC would then suggest was justified by reference to the BBC’s stewardship of public money, should the partnership involve any element of licence fee funding.

The NMA therefore trusts the Ofcom is now reviewing its proposals for holding the BBC to account for delivery of its mission and public purposes with reference to the BBC’s Annual Plan and the totality of its proposals, across its public purposes. In particular, the Annual Plan must be reviewed through the perspective of Ofcom’s functions in relation to competition and avoidance of negative market impact upon the BBC’s commercial competitors. As regional news media companies have made clear to Ofcom ‘small decisions can have major impacts’. They have also stressed the importance of the interaction of the proposals with Ofcom’s competition jurisdiction and powers over the BBC. The BBC’s governance policies, procedures and their timelines are all yet to be revealed. The NMA stresses that Ofcom’s powers to consider competition concerns including those raised independently of BBC complaints procedures will be crucial safeguards for the commercial news operators. Ofcom’s powers to conduct ad hoc reviews will also be important.

The NMA has always stressed the necessity for clearer definition and improved control over the BBC’s public service activities. It had suggested that the new operating licence ought more precisely define the BBC’s public service activities, set boundaries, delineate management responsibilities, clarify budgets. The draft Licence specifically states that it does not set BBC programme or service strategies or budgets. Ofcom’s decision not to involve itself in BBC creative decision-making, innovation, service strategies and budgets in assessing the BBC’s delivery of its mission and public purposes might have some impact upon assessment of BBC transparency and accountability and could be relevant to oversight of potential market impact and competition.

Ofcom’s consultation suggests the introduction of one operating licence, stripped back to enforceable regulatory responsibilities, enabling review of one, several or all services, obligations to carry out two in depth reviews and ad hoc reviews, to check BBC compliance and delivery of its mission and public purposes. This would replace the previous system of separate BBC service licences, with accrued regulatory and other restrictive strictures, each of which had to be reviewed at least once during the Charter period. The previous system did not provide sufficiently rigorous oversight, but we hope that Ofcom’s proposal will not result in laxer definition of services and less scrutiny. The industry would be concerned if the proposed new approach resulted in less BBC accountability and fewer effective controls over the BBC’s licence fee funded activities, rather than more. The BBC must strictly justify its licence fee funded activities by precise reference to the BBC Charter and Framework Agreement. It ought not be allowed to expand its activities without strict scrutiny, as this would adversely affect the independent commercial news media. Ofcom’s proposed flexibility might in practice, as it hopes, enable more coherent and comprehensive examination and assessment of the BBC’s activities. For example, news provision spans several public purposes, including Public Purposes One, Four and Five, and it may be helpful for Ofcom to group and consider all relevant services and all relevant public purposes. However, the NMA would be concerned if Ofcom’s approach allowed the BBC to conduct licence fee funded activities that were not adequately justified by its mission and public purposes, simply because Ofcom considered such activities insignificant when assessing a combination of services or judging the BBC’s delivery of its mission and public purposes as whole. This would be particularly damaging to the BBC’s commercial news operator competitors, particularly at regional and local level, where the BBC’s non-compliant service might have some negative market impact upon the BBC’s commercial news media competitors.

The NMA has no objections to Ofcom's proposed use of its powers to set enforceable measurable regulatory conditions on the BBC's public services through the BBC's operating licence, provided that the conditions set do not have an adverse market impact upon the BBC's commercial news media competitors.

The NMA has previously supported the potential imposition of regulatory conditions upon the BBC, where the BBC would otherwise have justified potentially harmful expansion by reference to its remit under the Charter. For example, the NMA suggested the introduction of regional press content quotas upon the BBC, enabling a mutually beneficial approach, based upon partnership, rather than the BBC attempting to supplant the local media.

The NMA also supports Ofcom's imposition of a performance measurement framework, with granular performance measures, and the publication of an annual report on upon the latter and upon BBC's compliance with the regulatory conditions.

The NMA considers that Ofcom's powers to conduct in-depth reviews and ad hoc reviews will be very important under the new regime. We trust that they will be deployed with close consideration of the Ofcom's wider competition responsibilities as well. Ofcom's competition powers to consider complaints and concerns independent of the BBC will play a crucial role in avoidance of negative market impact upon the BBC's commercial competitors caused by BBC licence fee funded activities that it considers justified or required by the operating licence mission and public purposes.

As Ofcom recognizes, the broad provisions of public purpose 1 and Ofcom's high level objectives set out in 4.32 and the proposed regulatory conditions set out at 4.34.3, 4.35,4.37 of the consultation paper might all potentially result in activities that could have negative market impact upon the BBC's commercial news operator competitors. We also note that Ofcom does not intend to set limits upon the BBC's online news provision (4.41). The requirements relating to news and current affairs under public purpose 3 might also justify expansion of BBC news and information services, reflecting representing and serving the diverse communities of all the UK's nations and regions which affect its commercial news media competitors.

As set out above, the NMA supports the inclusion of a new express high – level objective on links to third party online material. However, we consider that the regulatory conditions ought to extend beyond BBC Online merely being obliged to provide 'adequate' links to others' sites. A stronger obligation should be imposed and enforced by Ofcom across BBC activities and services. We also suggest that the BBC should be obliged to showcase and attribute third party commercial news providers' material, by citing the full title of local, regional or national. For example, whenever the material is referred to or used by the BBC on air or online particularly, in radio and TV broadcast news bulletins, current affairs programmes, features and phone ins, any text broadcast or published and online. In addition, the BBC should continue to be under a duty to drive more traffic to NMA members' sites as trusted news publishers. We hope that the provision no doubt intended to deter links to fake news will not be used by the BBC to avoid making such links to trusted newspaper websites. The BBC ought not find these difficult to implement- it has already introduced polices to require newspaper attribution and its Annual Plan sets out its additional commitments to highlight content from other providers and to drive click throughs to other sites. The BBC and Ofcom should monitor, measure, publish and enforce the BBC's compliance with these conditions.

Ofcom's proposals for public purpose four and high level objective 4.109.1. 4.112.6 and news provision for local radio might adversely affect the local and regional news media. They might drive

the BBC to expand into areas occupied by the local and regional news media in print and online, including in the nations.

We note Ofcom's intention to consider the BBC's commitments in relation to Scotland, Wales and Northern Ireland (see above) as part of Ofcom's broader assessment of the BBC's published plans. We trust that the BBC's proposals for England will also form part of this broader assessment and their potential effect in respect of competition.

The NMA supports Ofcom's proposed separation out of the BBC's 'diversity' public purpose, from the BBC's nations and region public purpose. This will assist transparency and evaluation of the BBC's local and regional news activities.

In respect of Performance measures, the NMA supports Ofcom's requirements for the provision and publication of BBC granular performance measures.

The NMA notes that Ofcom intends to rely upon its current reports to measure consumption, to benchmark the BBC's performance and for other purposes. We refer you to the NMA's previous correspondence with Ofcom and its concerns about Ofcom's failure to take proper account of the local and regional news media. The NMA would welcome the opportunity to resume its discussions with Ofcom on this matter. We would be concerned if Ofcom's performance of its regulatory functions and its evaluation of the BBC were distorted to the detriment of the regional and local press.

The NMA notes Ofcom's intention that the operating framework and performance measures should be capable of evolution and amendment. It is important that these are subject to consultation requirements and that the BBC's commercial news media competitors should be consulted.