

How Ofcom regulates the BBC Wireless response – September 2021

Non-confidential version

Summary

1. In Wireless' view, the new BBC regulatory framework has not lived up to its initial promise within the initial years of the Charter period. This response sets out recommendations to address this, achieving increased distinctiveness and public value on the part of its services, avoiding ambiguity and mission creep, and fostering a climate of industry partnership and market awareness.
2. Our recommendations can be summarised as follows:
 - A proposal that Ofcom's review should incorporate a specific focus on the BBC's radio and audio activities, including its spoken word audio output, reflecting the BBC's substantial audience share and engrained structural advantages within the audio market.
 - Expanded descriptions of the scope of each BBC service to provide additional clarity as to the unique distinguishing characteristics and expected remits of each individual BBC service, and including the incorporation of online services such as BBC Sounds within the Operating Licence framework.
 - An equalisation in the total number of quantitative conditions applied to each BBC service within the Operating Licence.
 - Addition of qualitative conditions to the Operating Licence (or reintroduction of historic commitments that existed under the BBC Trust framework) to secure distinctive output and high quality public service programming and content.
 - Defined responsibilities for the BBC to ensure that promotional space and airtime within BBC services is used responsibly and for the extension of public value.
 - Enhanced transparency in specific areas of output and expenditure.
 - Upgraded arrangements for the measurement of BBC performance, to include tracking usage of promotional space and airtime, pushing back against the BBC making competitive comparisons and above all placing emphasis on market intelligence (including submissions by independent providers) and feedback from licence fee payers.
 - Fundamental revision to BBC complaints handling procedures – including handing over responsibility to Ofcom rather than expecting BBC to be able to police itself in relation to important areas of its operations.
 - Proposals to improve the processes for assessing the competitive impact of changes to the BBC's UK Public Services (and for reducing the likelihood of negative effects), such as enhanced disclosure and transparency requirements, renewed emphasis on industry partnerships, development of new pro-competition protocols, signposting of third party content via BBC services and introducing more effective arrangements for the handling of regulatory complaints.

Responses to consultation questions

Question 1: Do you agree with the proposed scope of the review of BBC regulation as set out in this document? If not, please explain the areas where you think changes should be made.

3. The vision for the current BBC Charter period was set out by government in 2016, in a report entitled “A Broadcaster of Distinction”. The resulting Royal Charter and Framework Agreement outlined a new responsibility for the BBC to embrace distinctive content and creative risk-taking, with Ofcom tasked with “[seeking] to increase the current requirements on the BBC as a whole to secure the provision of more distinctive output and services”¹. The new framework also included measures to manage the BBC’s competitive impact, and to encourage industry partnership.
4. In Wireless’ view, the BBC regulatory framework has not lived up to these promises within the initial years of the Charter period. The failure of the Operating Licence to provide clarity on the remits of key services, including new online services, coupled with the deletion of important historic conditions, has created ambiguity and mission creep. Coupled with failures of market awareness and engagement by the BBC, and a general reticence by Ofcom to intervene in relation to BBC activities, this has given rise to distinctiveness and delivery deficits across key areas of BBC output.
5. The BBC is a valued UK institution. At its best, its services deliver significant value, contributing to a wider ecosystem of creative innovation which benefits viewers and listeners. This consultation is an important opportunity to ensure that the BBC fulfils its potential - working in tandem with independent provision to ensure that UK audiences are served effectively.
6. Ofcom places the current consultation against the backdrop of its ‘Small screen: Big Debate’ review of Public Service Media. This review has focused on TV and video streaming services and so it is important that perspectives from the radio and audio markets are not neglected. As Wireless has frequently noted in its response to relevant BBC consultations, the BBC enjoys a significant share of UK radio and audio. Specifically, of all the sectors in which the BBC operates, it is within spoken word audio that it enjoys its largest market share – exceeding 75% of radio listening according to RAJAR² and operating the UK’s most popular podcast app according to recent research by the Reuters Institute of Journalism³.
7. Spoken word audio is a uniquely important component of the wider audio market, providing a major contribution to the provision of news and current affairs, as well as arts, cultural and sporting content and factual content. It is distinguished from music radio not just by its specific product characteristics, but also by its bespoke production inputs (e.g. talent and sports rights) and individual digital distribution considerations (e.g. consumption via audio apps, social media channels, podcasts and smart speakers – as well as continued reliance on FM, AM and DAB channels).
8. **Recommendation:** Wireless proposes that Ofcom’s review incorporates a specific analysis of the BBC’s radio and audio activities, introducing measures that take account of the BBC’s substantial audience share and engrained structural advantages within this important sector. This should include a specific focus on the BBC’s spoken word audio output, examining the extent to which the BBC’s extensive offering and market presence

¹ DCMS, ‘A BBC for the future: a broadcaster of distinction’, May 2016; BBC Framework Agreement, December 2016

² RAJAR Q1 2020.

³ Reuters Digital News Report 2021

achieves high levels of distinctiveness and public value and is structured to avoid negative effects on independent offerings.

Question 2: Do you agree with the proposed approach to reviewing the BBC Operating Licence? If not, please explain why.

9. The introduction of the BBC Operating Licence significantly reduced the distinctiveness conditions and qualitative commitments attached to BBC services. This followed a decision to replace the previous BBC Trust service licence regime with a single, slimmed down Operating Licence that omitted historic qualitative conditions and key detail explaining individual services' remits and distinguishing characteristics.
10. Focusing on speech radio, the Operating Licence omitted important provisions previously introduced by government and / or BBC Trust to ensure distinctiveness on the part of 5 live and 5 live sports extra. The deletion of these conditions was not mitigated by the introduction of any new or enhanced distinctiveness measures – for instance in relation to news and sports coverage or new online services.
11. Provisions lost in relation to 5 live included:
 - Core missional statements, which had historically introduced focus in respect of 5 live's remit (*"All 5 live news programmes should clearly reflect the BBC's mission to provide the best journalism in the world"*)
 - Safeguards to secure key public service programming on 5 live, such as investigative reporting (*"The service should give a broader perspective on current affairs through original and investigative journalism"*)
 - Measures to maintain the public service character of 5 live's peaktime output (*"The weekday peak hours at breakfast and evening drivetime should comprise high-quality news programming covering the main news agenda of the day"*)
 - Parameters concerning the BBC's radio sports rights strategy and areas of live coverage focus (such as a requirement for 5 live to *"cover sports not widely accessible on UK radio"*)
12. Provisions lost in relation to 5 live sports extra included:
 - Clarification that 5 live sports extra should act solely as an overflow service for existing rights (*"5 live Sports Extra should exploit sports rights owned by the BBC that cannot be accommodated by BBC Radio 5 live or Radio 4 Long Wave."*)
 - Clarification that 5 live sports extra cannot mount its own sports rights procurement efforts (*"However, it should not provide an additional outlet for which the BBC would bid for rights against commercial broadcasters."*)
 - A prohibition on providing other forms of programming (*"It should offer commentary based coverage of all the events and matches it covers."*)
13. Wireless highlighted the likely impact of these relaxations in the BBC regulatory framework in its responses to relevant Ofcom consultations. Our submissions recounted the context which gave birth to these provisions, citing relevant audience research and evidence of the likely counterproductive impacts. For instance, in respect of 5 live sports extra, measures originally introduced as conditions of the Secretary of State's statutory approval of 5 live sports extra in 2001 were subsequently validated by the BBC Trust in the context of a 2015 decision not to approve an extension in its remit. This regulatory decision was supported by relevant market analysis.
14. Ofcom's approach also gave rise to significant inconsistencies. For instance, the Operating Licence contains only three regulatory conditions for 5 live (75% news,

extensive elections coverage, and, live commentary of 20 sports per year - we note that the BBC only delivered 16 sports in 2020/21), each of which was present in the historic BBC Trust service licence. 5 live sports extra is not subject to any regulatory conditions at all. This compares with sixteen regulatory conditions for BBC One Television, nine for Radio 1 and ten for Radio 2 – despite the BBC’s lower market shares and risks of negative market impacts in the TV and music radio sectors.

15. Rather than a reduction in regulatory conditions, the new BBC Charter and Framework Agreement had appeared to pave the way for the introduction of enhanced distinctiveness requirements – such as to address skewed perceptions of 5 live as a sports radio station by boosting popular awareness of its news commitment (an issue that had previously been identified by the BBC Trust). In particular, Part 2 of Schedule 2 of the Framework Agreement stated:

"In imposing the regulatory conditions in the first Operating Licence, Ofcom must seek to increase the current requirements on the BBC as a whole to secure the provision of more distinctive output and services. In particular, Ofcom must-

- *have a presumption against removing any of the current requirements which would result the provision of less distinctive output and services;*
- *consider the case for increasing the current requirements in areas where the BBC has exceeded those requirements or where this would support the provision of distinctive output and services;*
- *consider the case for setting requirements in areas where an improvement in performance would secure the provision of distinctive output and services;*
- *consider the need for the BBC to reflect, represent and serve audiences taking into account the needs of the diverse communities of the United Kingdom's nations and regions."*

16. The result of these changes has – in Wireless’ view – been to create an environment of ambiguity and mission creep on the part of individual services. 5 live and 5 live sports extra’s remits are no longer as clearly defined, and new online services and streams have been created by the BBC outside of any defined operating licence framework.
17. Wireless has seen no evidence that these circumstances have been conducive to distinctiveness and public value; rather they have resulted in ambiguity and uncertainty for independent providers such as ourselves, undermining efforts to build constructive partnerships with the BBC around areas of mutual opportunity and creating administrative burdens as we grapple with the impact of BBC mission creep and seek to understand the permitted parameters of BBC activity through engagement with Ofcom.
18. As we set out in our response to Question 5 of this consultation, developments such as BBC Sounds, certain sports rights acquisitions, and the creation of linear streams such as the Cricket Social and Squad Goals, have all exhibited shortfalls in distinctiveness and public value justification, which could readily and easily be addressed through relevant revisions to the Operating Licence.
19. Wireless proposes the following measures as outputs of this review:
20. **Recommendation – Expanded descriptions of the scope of each BBC service:** Highlighting the specific characteristics that make it unique, ensuring clarity concerning the remit of services such as 5 live sports extra, and providing clear parameters for online services such as BBC Sounds.

21. **Recommendation – Expanded descriptions of the scope of each BBC service:** An equalisation in the number of quantitative conditions applied to each BBC service (but not to be achieved via the deletion of conditions unless these no longer perform a useful function in capturing key areas of current performance and output).
22. **Recommendation – Addition of qualitative conditions to secure distinctive output and high quality public service programming and content:** These should include material commitments to providing coverage of minority and underexposed sports and high quality news via services such as 5 live which benefit from strong AM / FM and online distribution, significant budgetary resources, wide availability and sizable audience reach.
23. **Recommendation – Defined responsibilities for the BBC to ensure that promotional space and airtime within BBC services is used responsibly:** This recommendation takes account of the BBC’s considerable advantages in terms of multi-platform distribution and cross-promotional power.
24. We make further recommendations in response to subsequent questions which also complement these proposed changes to the Operating Licence (and which could also be reflected in further amendments to the Operating Licence).

Question 3: Do you have any views on how to measure the BBC’s performance?

25. In 2020/21, the BBC breached over 10% of the conditions in its Operating Licence - a very significant indicator of deficient performance. As noted in paragraph 14 of this submission, this included a failure to meet 5 live’s 20 sport quota in respect of live sports coverage. In its Annual Report, the BBC stated that it had “provided evidence to Ofcom that licence breaches are a result of Covid-19 and that we have taken reasonable endeavours to continue to deliver the mission and public purposes.”
26. Wireless disagrees that the circumstances of the pandemic justify this breach of one of the few Operating Licence conditions that applies to 5 live, especially given the low bar for performance that this condition establishes in practice. For context, a previous Annual Plan published by the BBC was able to refer to 5 live (together with 5 live sports extra - which should not in any event acquire its own live commentary rights) covering “over 50 different sports from men’s and women’s football to cycling”⁴.
27. We therefore request that, in the interests of accountability and transparency, Ofcom publish the evidence supplied by the BBC justifying this performance failure.
28. By comparison with 2019/20, sports which were dropped from receiving live coverage appear to have included a number of minority sporting events, sports that were set to feature in this year’s Tokyo Olympic and Paralympic Games, and events featuring women’s participation. Many of these events have also been particularly adversely affected by the pandemic, facing threats to participation, media coverage and financial sustainability. There would have been a clear public service justification in protecting coverage of these events - to the extent that they (or substitute events) were successfully staged during the period in question.
29. Furthermore we note the following sports that did go ahead during this period that the BBC could easily have covered on 5 live.

Darts - World Championship and various other events went ahead
Sailing - Americas Cup

⁴ BBC Annual Plan 2017/18, July 2017

Skiing - World Ski Championships
Auto Racing - Le Mans
Basketball - NBA Finals
Moto GP
Baseball - MLB season
Dakar Rally
Bowls - World Championship
Judo - World Judo Championships
Badminton - World Tour Finals
Archery - World Indoor Champs
Ice Skating - World Figure Skating

30. Wireless makes the following recommendations for how measurement of BBC performance could be enhanced:
31. **Recommendation – accountability against an upgraded Operating Licence:** Measurement of the BBC’s performance will benefit naturally from the enhanced clarity about what is expected of it, as proposed in response to Question 2. Once these improvements are implemented, Ofcom should commit itself to robust ongoing scrutiny of the BBC’s published plans and delivery, with an emphasis on securing specific detail against which the BBC can be held accountable. Particular emphasis should be placed on robustly interrogating and sanctioning failures to adhere to agreed quotas, such as in the example outlined above.
32. **Recommendation – requirements for enhanced transparency in specific areas of output and expenditure:** We propose enhanced transparency and disclosure in key areas of BBC output, including areas where the BBC enjoys significant market positions, to ensure delivery of value for money for licence fee payers. This should include breaking out how news and sport budgets are deployed, as well as commissioning spend on BBC Sounds and other BBC podcast output. The BBC should also be tasked with undertaking robust cost benchmarking against independent channels.
33. **Recommendation – tracking usage of promotional time:** Our response highlights the BBC’s ability to deploy its leading TV, radio and online outlets in cross-promotional service of its own content and services. We propose annual reporting by the BBC of how this promotional time is deployed, including tracking the volume, frequency and audience reach of signposting efforts for relevant independent content provided by third parties. This reporting should include commentary explaining how BBC cross-promotion and third party signposting activity is structured along core public service lines.
34. **Recommendation – Pushing back against competitive comparisons:** A specific area of beneficial change would be for Ofcom to refuse to entertain the BBC making competitive comparisons with commercial broadcasters in reporting on its performance (for instance in its Annual Plans and Reports).
35. For example, if 5 live makes a claim that it has or will broadcast more exclusive Premier League football than any other broadcaster, this should be discounted by Ofcom as a

relevant marker of performance, recognising it instead of an indicator of the BBC's financial advantages in the area of free-to-air radio sports rights. Ofcom should instead seek robust accountability from the BBC for the resulting public value outcomes, and market sensitivity with which the activity has been conducted.

36. Recommendation – Continued emphasis on market intelligence and audience

insight: Ofcom should continue to obtain input in the form of:

- Proactively seeking feedback from independent providers operating in the sectors that the BBC is present in.
- Bespoke audience research focused on key areas of focus in relation to the BBC's delivery of public value and distinctive output.

Question 4: Do you agree with our proposed scope of the review in relation to content standards? If not, please explain why.

37. Based on our own experience of the BBC's complaints procedures, Wireless believes that it is impractical and improper for the BBC to police itself in relation to important areas of its operations, in particular where there is a matter which relates to a competitor. We believe that these arrangements require fundamental revision – including handing over responsibility to Ofcom.
38. It is Wireless' view that given the inherent conflicts of interest and systemic lack of transparency in the current framework, the current process will never be able to fully garner the public's confidence. Support for this view comes from the Naga Munchetty case (BBC Breakfast, BBC 1, 17 July 2019) – which highlighted the conflicting and contradictory objectives that are typically at play within the BBC in considering complaints made against it.
39. News UK - Wireless' parent company - found the process around its complaint regarding *The Murdoch Dynasty* documentary to be lacking. The way the complaint was handled raised a number of serious issues about the 'BBC First' process and the Executive Complaints Unit's (ECU) ability to respond to competitor concerns in an impartial and timely manner.
- News UK submitted its complaint on 27 August 2020, within the required 28 days after the broadcast of the last programme of the series.
 - News UK's complaint was dismissed by the ECU on 20 October 2020.
 - News UK responded to request a full review of the complaint on 9 November 2020 on the basis that the response from the ECU failed to address numerous points made in relation to BBC Editorial Guidelines.
 - On 19 August 2021, nearly a year after News UK's first complaint was made, and nine months after the request for a full review was requested, the full review response partially upheld News UK's complaint.
40. News UK had the resource to question the BBC's initial wrong decision. A smaller organisation, or individual may not have the ability to challenge the BBC. In addition, we believe consideration should be given to how the BBC treats contested subject matter while a complaint is being considered. For the eleven months that News UK's complaint was under consideration, the BBC continued to make the documentary available on its iPlayer service to UK citizens, without any note that the subject matter was under investigation. It continued to profit from syndication of the programme and its content to other territories.

41. We have offered further comments relating to regulatory complaints handling in response to the next question - at paragraphs 63 and 64.

Question 5: Do you agree with the issues we have identified with the processes for assessing the competitive impact of changes to the BBC's UK Public Services? If you consider there should be changes to these processes, please set out what these are and, if possible, provide any relevant evidence.

Context – overall awareness of the impact of BBC activities

42. Wireless has had regular engagement with the Ofcom competition team involved in assessing the competitive impact of the BBC. The team is technically proficient and knowledgeable. However it does not appear to us to have been equipped with the mandate and resources required to conduct the proactive monitoring and investigation work needed to ensure appropriate control over the BBC's activities.
43. A key example of this followed our September 2018 request that Ofcom initiate a BBC Competition Review into the BBC's radio sports rights practices, which Ofcom declined to take forward on grounds that "the way in which the BBC acquires radio sports rights does not appear to have changed materially since the BBC Charter came into effect in December 2016". Ofcom stated that it would "track the future acquisition of radio sports rights by the BBC and Wireless".
44. Wireless profoundly disagreed with this conclusion - not least given the abundant evidence of new BBC acquisition practices that had followed relaxations in the regulatory framework and also the evolving market dynamic characterised by the launch of talkSPORT 2 earlier in 2016.
45. In addition to engaging with Ofcom, our own interactions with the BBC have exposed gaps in the BBC's awareness of its market position, as well as shortcomings in identifying and mitigating the impact of its actions on independent offerings and overall choice. These interactions have encompassed issues such as radio sports rights, the development of BBC Sounds and creation of additional linear audio streams
46. As we have outlined, the BBC has a particularly significant position in the UK audio market, with a profoundly significant share of spoken word audio production and consumption. The BBC's inherent structural advantages in maintaining this lead include the following:
- **Established listening share:** The BBC is the largest radio broadcaster in the UK, with a 50% share of UK radio listening, and an annual radio content budget of around £550m. This enables it to include the UK's most popular radio networks in BBC Sounds, and affords it the ability to bolster its audience share by running internal promotions to an engaged audience of 34m weekly listeners⁵.
 - **Heightened listening share within speech radio:** Within the speech radio market, the BBC's share of listening exceeds 75%⁶.
 - **Ad free model and impact on availability of promotional inventory:** The BBC benefits from a revenue model which does not require the insertion of advertising interruptions – both removing a potential consideration barrier for listeners, increasing the inventory available for internal cross-promotion and also conditioning audiences to expect ad-free content from other providers.

⁵ RAJAR Q1 2020 / BBC Annual Plan 2020/21

⁶ 78.4% - RAJAR Q1 2020

- **TV and online reach:** The BBC's share of television viewership is 30%⁷, whilst its website is the most widely accessed UK media website in the UK, which coupled with the absence of a requirement to incorporate advertising, gives it an unrivalled cross-promotional platform for its radio and audio products – such as BBC Sounds.
 - **News resources:** The BBC has an unrivalled network of domestic and international news bureaux, providing it with access to extensive news audio material to incorporate into new audio content products on connected listening devices.
 - **Unrivalled broadcast distribution:** The BBC benefits greatly from having the widest broadcast distribution of any UK radio broadcaster, with its national radio services all reaching 97.5% of the UK population via DAB, compared with 92% and 83% for services delivered via the two commercial DAB multiplexes. The BBC also has access to a privileged allocation of national FM frequencies, providing ubiquitous availability for its live services of a nature which is unavailable to independent providers.
47. These factual aspects of the BBC's market position highlight the extent to which it benefits from pre-existing resource and structural advantages that create a de facto likelihood of market impact from new services, if these are not appropriately designed. The potential for disproportionate harm is particularly great in new digital growth sectors, such as connected listening and on-demand audio.
48. Despite this important context, the BBC has consistently advanced a market evaluation model which focuses on large technology platforms based internationally. We have also identified a tendency to conflate markets such as television (where the BBC competes with large pay-TV and SVOD providers) with audio (where it is the lead player and its competitors deliver their content to licence fee payers on a free-to-air basis).
49. This disregard for applicable competitive contexts leads in turn to failures by the BBC to tailor its public purpose activities towards ensuring the best overall outcome for the market and for audiences. Wireless agrees that the growth of global technology platforms poses significant strategic and policy questions for all broadcasters. However, we do not believe that this justifies harmful BBC behaviour. It also does not negate the BBC's responsibilities to forge partnerships with independent broadcasters and to ensure that all of its services exhibit distinctiveness. Rather, the BBC has the opportunity to help safeguard the future of UK radio and audio production by collaborating on the UK's regulatory and policy response to these platforms.
50. In fact, from the perspective of a UK audio provider, the BBC is the media and technology 'giant' with the greatest impact on independent provision and the opportunities for commercial innovation. It enjoys an unrivalled audience share, deploys promotional practices which favour its own products, and is at liberty to launch and operate services according to different financial rules, unconstrained by the commercial considerations that bind independent providers. The BBC's structural advantages create a de facto likelihood of market impact, particularly in relation to new digital services.
51. An example of this is BBC Sounds - a major intervention by the BBC, which draws upon its market position, technology resources, cross-promotional reach and content portfolio to create an audio product incomparable with the offerings of independent broadcasters.

⁷ Source: BARB, four week share Total BBC (week of 13 Sep – 19 Sep 2021)

Development of BBC Sounds

52. In its submissions to Ofcom's current review of BBC Sounds, Wireless has highlighted the various ways in which BBC Sounds is perpetuating an unequal playing field in UK audio. BBC Sounds has established itself as an effective walled garden, giving rise to clear deficits in diversity, choice and competition. BBC Sounds is now one of the most used audio products in the UK, exhibiting features, device interoperability, personalisation and data usage practices that are beyond the capability of independent providers. The product's technical advantages have been combined with a scale of free-to-air spoken-word UK audio content that only the BBC could offer.
53. Given the BBC's own lack of self-awareness in relation to BBC Sounds, and failure to execute partnerships with independent providers in relation to this product, it is crucial that it is met by a regulator with a clear grasp of market realities. In this context, Wireless was disappointed with market analysis that accompanied Ofcom's recent initial assessment of BBC Sounds. Weaknesses in the market insight presented by Ofcom included:
 - A failure to take any account of the BBC's superior access to AM, FM and DAB broadcast distribution channels in explaining differences in the demographic profile and share of listening which is via online platforms between the BBC and commercial providers.
 - Comparing the BBC's overall scale against commercial radio 'in aggregate', rather than recognising the industry's more fragmented composition which comprises two larger players (Global and Bauer), Wireless, and a long tail of independent operators, each with very different portfolios, strategies and priorities.
 - Limited research to establish accurate counter-factual scenarios for what would have occurred in a specific market (in this example, the UK podcast advertising market) in the absence of a large-scale, publicly-funded operator (i.e. the BBC)
 - The failure - by Ofcom's own admission - to separate out speech and music radio when considering the effect of BBC Sounds on competition, citing a lack of data to make such an assessment (and despite Ofcom's evidence gathering powers as a competition regulator).
 - Very limited analysis and data gathering from the BBC to quantify the extent of cross-promotional support enjoyed by BBC Sounds.
 - Evidence of Ofcom having conflated evidence of market participation with assumed commercial viability.
54. Ofcom's failure to use its powers to develop appropriate market insights resulted directly, in Wireless' view, to a failure by Ofcom to make an informed assessment of the competitive effect of BBC Sounds in the context of its ongoing review. In turn, this results in Ofcom having no reasonable grounds to believe that BBC Sounds is not having a significant adverse impact on fair and effective competition.
55. Fundamentally, it results in Ofcom failing to recognise what should be apparent to even the most casual observer - namely that the pursuit by the BBC of a distribution strategy that uniquely and disproportionately favours its own services will inevitably fail to achieve the optimum outcome for consumers.

BBC acquisition of cricket rights

56. Since 2018, the BBC has made significant moves in relation to coverage of cricket on radio – acting beyond the agreed scope and remit of 5 live sports extra. The BBC's actions included acquiring the radio rights to the Indian Premier League (IPL) previously held by talkSPORT 2, and upgrading non-exclusive rights for the 2019 Cricket World

Cup to exclusive rights. These actions have had a significant adverse impact on fair and effective competition by harming talkSPORT 2's ability to achieve a commercially viable service through creation of a commercial platform for free-to-air radio cricket coverage following its launch in 2016.

57. In August 2019, Wireless referred related concerns about these cricket rights acquisitions to the BBC's Executive Complaints Unit (ECU), noting that these moves appeared to constitute a direct response to efforts by Wireless to expand the scope of cricket coverage on talkSPORT 2. The ECU's response in October 2019 contained substantive flaws which in Wireless' view resulted in the ECU reaching incorrect conclusions. The response also revealed glaring absences of transparency concerning relevant practices designed to minimise the potential for the BBC's activities to have undue negative competitive impacts.
58. The ECU response effectively confirmed that these rights were acquired for use by 5 live sports extra and BBC online – with insufficient use by 5 live as would ordinarily justify a new acquisition. The press announcement for the IPL rights acquisition also exclusively referred to these two services⁸. In relation to 5 live sports extra, these acquisitions therefore directly contravene historic regulatory restrictions which we have summarised above in paragraph 12 of this submission.
59. In relation to BBC online, the ECU response stated that the IPL rights were acquired "*in line with BBC Sport's strategy of providing live coverage across a range of services, including online*". However, Wireless is not aware of any operating or regulatory mandate for the BBC's online services to acquire their own audio rights. The established mechanism for the BBC's online platforms to carry audio sports coverage is to simulcast the BBC's public radio services – with acquisitions led by the relevant BBC service.
60. The ECU response also disclosed other rights acquisitions by 5 live sports extra and BBC online without approval to a change in operating remit. A claimed justification was that these are for "*generally lower profile sports*" (although 'low profile' is not a description that could credibly be applied to cricket). The ECU's response indicated that these acquisitions followed the transition from BBC Trust to Ofcom regulation that took place between 2016 – 2017, as well as post-dating regulatory decisions to decline requested changes in 5 live sports extra's remit in 2011 and 2015.
61. In relation to materiality, the ECU response included evidence of a significant increase in 5 live sports extra broadcast hours, with IPL and Cricket World Cup coverage contributing to 5 live sports extra broadcasting 868 hours of output in Q1 of 2019/20. This would extrapolate to 3,472 hours on an annual basis – materially higher than the annual total in each of the previous three years. This is before factoring in the volume of additional output associated with the new Cricket Social service detailed below.
62. Wireless considers this evidence of the BBC acquiring sports rights specifically for 5 live sports extra (and BBC online) to constitute a substantial change in its remit, the market impact of which has not been properly assessed. Wireless would not wish to deny the BBC an opportunity to consider changes to service remits, however it is legitimate for us to expect that such proposals would be properly defined and scrutinised in accordance with Ofcom's procedures for '*Assessing the impact of proposed changes to the BBC's public service activities*'.
63. As well as revealing the BBC's flawed understanding of the wider market context in which it operates, our review of the ECU response highlighted clear shortcomings in the framework for addressing regulatory complaints. In turn these failings have prompted us

⁸ BBC Website, 'IPL 2019: BBC to broadcast ball-by-ball commentary', March 2019
<https://www.bbc.co.uk/sport/cricket/47668026>

to query the BBC's ability to exercise any form of regulatory oversight of its own operations. In particular:

- **Reliance on BBC Sport representations:** Although the ECU response stated that its findings were subjected to “review from staff in the Legal, Regulation and Economics teams”, Wireless was able to discern limited evidence of objective scrutiny being applied to the justifications offered by the BBC Executive in support of their actions. Instead, the ECU response almost entirely offered the BBC's internal representations as constituting the ECU's own findings. For example, the decision used language such as “The ECU understands” in discussing sports rights market norms, statements which in the context of the response relied entirely on representations from the BBC Sport team.
- **Decision maker not a competition or subject matter expert:** The decision maker responsible for the ECU response was the Director of Editorial Policy and Standards, despite our complaint not constituting an editorial or standards matter. Whilst we gather that this may be in line with BBC complaints handling procedures, it led us to identify that appropriate independent competition and subject matter expertise was not applied to our complaint.
- **Involvement of BBC Regulation team:** The ECU's investigation was described as having been carried out by the BBC Regulation department – almost certainly a conflicted party. We query whether certain of the functions of the BBC Regulation team means that it is incentivised to ascribe a clean bill of health to the BBC's operations in the face of scrutiny. In addition, we query whether another of this team's functions is to support the BBC's public lobbying efforts to be subject to less regulation. If either objective forms part of its duties, it would indicate that the BBC Regulation team is not suitably independent to provide a fair and objective investigation of our complaint (or indeed any such complaint).
- **No communication with Wireless:** Despite offering to do so, at no point during the ECU's investigation was Wireless invited to provide additional factual representations or to comment on the internal submissions made by the BBC which subsequently formed the ECU's own findings. Had we been invited to do so, we would have been able to point out the factual errors and clear failings of understanding concerning the wider commercial marketplace that the BBC operates exposed by the BBC's internal submissions.
- **Contemporaneous ECU decision reversed by BBC Executive:** According to contemporaneous press reports, at the time that he was acting as the decision maker on our Complaint, the Director of Editorial Policy and Standards was also responsible for investigating comments on BBC Television by the presenter Naga Munchetty. The findings of this investigation were subsequently publicly overturned by BBC's Director General and the ECU's role was made the subject of public criticism. This public repudiation of ECU decision-making gives rise to concerns as to validity of its response to the Wireless complaint, and also as to the independence of ECU decision making from BBC management.
- **Lack of transparency as to the BBC's sports rights procurement procedures:** There was frequent reference in the ECU response to the BBC's procedures in relation to sports rights acquisitions. The ECU asserted that these procedures “are designed to ensure there is due consideration of any risk of market distortion” and that for the Cricket World Cup rights amendment “further advice was sought beyond what was required under the procedure”. However there was no disclosure as to the content of these procedures in the ECU response, and these documents remain non-transparent to third parties. This makes it challenging for Wireless as an independent broadcaster to understand BBC's operating parameters. The evidence

of our complaint is that these procedures failed to protect the BBC from making acquisitions which were harmful and unjustified. This indicates that the procedures may not be fit for purpose.

- **Lack of transparency concerning change of procedure resulting from our complaint:** Whilst not disclosing the content of the BBC's sports rights procedures, the ECU response nevertheless revealed that our complaint and the subsequent ECU investigation had prompted these procedures to be revised. This is on the basis that the BBC's conversion of its Cricket World Cup rights from non-exclusive to exclusive was subject to a lower level of approval than the original acquisition. This raises important questions as to how the BBC goes about assessing and approving different categories of proposed rights acquisitions – and further highlights an absence of BBC transparency.

64. In summary, the ECU response did not bear the hallmarks of an objective, robust and transparent adjudication. Instead it read as a defence argument, prepared in haste, and relayed by an investigation team with neither the expertise nor the incentive to challenge the account given by the BBC Executive. In the absence of independent, qualified verification, the requirements for normal regulatory adjudication were not met.

BBC development of new linear audio services

65. In parallel with these rights acquisitions, the BBC responded to the development of talkSPORT 2's cricket offering by launching a new live audio service, "The Cricket Social", which acted as a 'spoiler' for official radio coverage of the overseas tours during the winters of 2018/19, 2019/20 and 2020/21. This new service was launched outside of any internal or external regulatory approval process.
66. The Cricket Social provided live contemporaneous discussion amongst "the stars of Test Match Special" relating to matches to which talkSPORT held exclusive live radio commentary rights. It benefited from significant exposure on the BBC's broadcast channels, through the BBC Sports website and mobile apps, and via BBC official social media accounts.⁹ Given the BBC's lack of official rights and the availability of official, free-to-air live coverage on talkSPORT 2 featuring similar presenter talent, it provided limited obvious incremental public value to licence fee payers.
67. [REDACTED]
68. Taken together with the BBC's previous conduct in the area of radio cricket coverage, Wireless notes a pattern of significant competitive activity, with no indication of the BBC engaging in any kind of assessment of the materiality of its actions. At no point has the BBC consulted on plans, set out proposed scope and parameters, undertaken an assessment of market impact or sought to weigh the public value justification.
69. Subsequent to the Cricket Social, the BBC has launched a further new linear sports audio stream (a live EFL service called "Squad Goals") for a sporting event to which talkSPORT, not the BBC, holds the official national radio rights. Unlike the Cricket Social, Squad Goals is available on BBC Sounds. Squad Goals has as part of its objectives a goal of providing a platform for new on-air talent but at its heart it consists of contemporaneous coverage and live score updates from EFL matches.
70. Whilst many BBC local radio stations have localised radio rights to their local EFL clubs' matches, Squad Goals is a national stream which replicates the official scoreflash and around-the-grounds output provided by talkSPORT and talkSPORT 2 as the EFL's official radio partner. As with Cricket Social, Squad Goals functions as an effective 'spoiler' for

⁹ See <https://www.bbc.co.uk/sport/cricket/45725890>

officially licensed independent free-to-air coverage, by weakening the audience pull to official coverage and thereby causing commercial harm.

71. In informal discussions with BBC management to try to understand the rationale for offering incremental linear streams, Wireless has been informed that the activity is considered as equivalent to talkSPORT also providing coverage of events to which the BBC has rights. This response conflates reporting on popular sporting events on an existing sports radio station with the creation and cross-promotion of a separate standalone live stream dedicated to cover an event for which the BBC does not hold live radio rights.
72. It also makes the basic error of comparing the justifications which might apply to a publicly-funded broadcaster, with those that apply to an independent broadcaster that has an imperative to generate commercial returns during a global pandemic.
73. By any reasonable objective assessment, the public value justification of deploying licence fee funds and BBC online platforms in support of such a service is limited, whilst the scope for harm via negative market impact to the official rights holder (particularly to a nascent, commercially funded, digital-only channel such as talkSPORT 2) should be abundantly clear.

Conclusions

74. Our experience has highlighted the shortcomings of current processes for assessing the competitive impact of changes to the BBC's UK Public Services. The examples we have provided evidence both the BBC's inability to develop a level of self-awareness or to seek independent, objective advice on the market impact of its audio operations, and also an unwillingness to submit voluntarily to appropriate regulatory oversight.
75. Regrettably, these sports rights failings, linear audio service developments and the failures of market engagement in relation to BBC Sounds can be seen as being closely linked. Had agreement been successfully reached at the outset of launching BBC Sounds to list independent channels such talkSPORT 2, then the BBC would have had even less impetus to provide duplicative event coverage to the listeners trapped in its walled-garden.
76. Unfortunately, in seeking to escalate concerns about such issues, we consistently come up against the complexity of the BBC regulatory framework, coupled with an absence of relevant precedents. The ability of independent providers to engage with such processes has also been complicated during the Covid-19 pandemic, which has had an unprecedented disruptive impact on commercial organisations.
77. [REDACTED]
78. Rather, our approach is a reflection of the resources required to raise complaints - and the cost benefit analysis which we have necessarily applied as a commercial broadcaster aware of the likelihood of formal complaints not being met with an appropriate response. Instead, we have prioritised engagement with Ofcom - specifically its review of BBC Sounds, as well as this consultation.
79. Currently, Wireless understands that the BBC has no active plans to list independent radio services on BBC Sounds, as we have been informed that BBC resources are finite and will be focused elsewhere. We consider this to constitute a missed opportunity for the BBC to have engaged positively with the independent audio sector in expanding the linear audio offering which it presents to licence fee payers.
80. **Recommendations:** We propose the following measures to improve the processes for assessing the competitive impact of changes to the BBC's UK Public Services (and for reducing the likelihood of negative effects):

- i. Annual disclosure of capital and operating costs for new projects and ventures such as BBC Sounds, to ensure accountability, competitive benchmarking and appropriate value for money.
- ii. Requirement for new BBC projects and proposals to incorporate industry partnerships from the outset, and to demonstrate that they are structured in such a way as supports value creation on behalf of independent providers.
- iii. Acknowledgement of heightened prospect of market impact and material changes resulting from new BBC spoken word audio services, on account of the BBC's audience share and market presence, and a prohibition on new services (such as linear speech audio streams) proceeding without explicit regulatory approval.
- iv. Specific published protocols and pro-competition responsibilities in relation to the BBC's engagement in the market for procuring scarce production inputs, such as sports rights (e.g. addressing matters such as editorial prioritisation, exclusivity and collaboration with independent providers).
- v. New responsibility for the BBC to engage with independent providers in developing aligned policy responses on behalf of UK broadcasting to global technology platforms.
- vi. Introduction of measures to signpost relevant independent content of relevance to licence fee payers – this could be focused on areas such as spoken word audio (covering genres such as news and sport) where the scope to foster public value is significant, and where the BBC has a very clear market position.
- vii. Improved arrangements to enable effective handling of regulatory complaints – taking account of the weaknesses highlighted in the BBC ECU's response to the Wireless cricket coverage complaint submitted in August 2019.

Question 6: Do you have any concerns about the regulatory framework for the BBC's commercial activities that are not being considered in the review of BBC Studios?

81. Wireless do not wish to raise any concerns at this time.

ENDS