



# **BBC iPlayer Competition Assessment**

Response to Ofcom's second consultation



# 1 Sky's concerns in relation to distribution

---

## 1.1 Parity of content availability

Sky welcomes Ofcom's statement that Ofcom expects that the BBC (and platforms) "should focus on ensuring that consumers benefit from being able to watch a full range of BBC content **in the way they want to**, across a variety of platforms". (Emphasis added.)

Ofcom further states that "to a large extent, the incentives of the BBC should be aligned with platform operators", with the implication that this alignment will deliver the objective set out above. We do not agree with this statement. It is evident that a key incentive facing the BBC is to retain viewers as far as possible within a BBC walled garden service, whereas a key incentive of platform operators is to enable them easily to choose among all the content available on their platforms. These incentives are fundamentally at odds. The incentives of platform operators are consistent with Ofcom's objective of ensuring that consumers benefit from being able to watch a full range of BBC content in the way they want to; the BBC's incentives are not.

We have already documented examples of the BBC acting on its incentives to favour its own services over those of platform operators like Sky. There is a significant risk that the iPlayer first strategy, of which the present proposals are a part, will lead to an increasing number of such examples over time, to the detriment of consumers and other PSBs.

Ofcom proposes to accept the BBC's proposal subject to conditions and guidance. This guidance provides an ideal opportunity for Ofcom to indicate to the BBC that it expects that there should be parity of content availability across the iPlayer and other platform services, such as Sky's integrated on-demand service (subject to the usual conditions such as clear attribution, reasonableness of cost etc.). This would be a good way of achieving Ofcom's expectation that consumers are able to benefit from being able to watch a full range of BBC content "in the way they want to".

Accordingly, we consider that Ofcom should include a statement to this effect as part of its guidance when approving the BBC's proposals.

In the consultation Ofcom argues that it does not need to do this because such concerns can be addressed within the existing regulatory framework governing distribution of BBC services and content. Whilst this is in principle correct, application of the distribution framework to discrimination by the BBC in favour of the iPlayer would likely be a difficult and time-consuming exercise. Guidance by Ofcom to the BBC about its expectations as part of the current approval process would be an effective way of reducing the likelihood of platforms needing to complain about the BBC's actions under the distribution framework, requiring significant resources to be devoted to the investigation and resolution of such a complaint.



## 1.2 Availability of functionality

Ofcom's proposed guidance focuses on the distribution of iPlayer content, whereas concerns may also arise in relation to iPlayer functionality. As Ofcom acknowledges in its 'assessment and conclusion' relating to distribution:

*"If the disparity between what is available on the standard BBC iPlayer app and what is available on bespoke services (such as Sky's integrated service) were to widen, then this could potentially affect competition. However, this would depend on the specific facts and circumstances, e.g. the level and extent of **content and functionality withheld** etc)." (Emphasis added)*

Accordingly, Ofcom should amend its guidance to clarify that it applies not only to iPlayer content, but also to iPlayer functionality.

## 2 The process followed

---

### 2.1 The importance of the BCA

As previously noted by Sky, the BBC's public ownership, funding method, remit and scale mean that it has the potential to have a significant impact on both the interests of UK television viewers and competition in the UK TV sector. In light of this, it is critical that proposed changes to key BBC services are subject to an appropriate degree of regulatory scrutiny.

The BBC Competition Assessment ("BCA") plays a key role in Ofcom's oversight of the BBC and its activities, both in terms of reviewing the BBC's assessment of the public value of its proposals and assessing any adverse impact of the proposals on fair and effective competition.<sup>1</sup>

Ofcom is also required to review the procedures the BBC has followed in carrying out its public interest test ("PIT").<sup>2</sup> This aspect of the BCA is important to ensure that the BBC has taken appropriate measures to understand the scale and likelihood of any market impacts, and to ensure that stakeholders have been given sufficient opportunity to comment meaningfully on the BBC's proposals at an early stage.

Ofcom's BCA of the BBC's proposed changes to the iPlayer is a significant undertaking, and the first major review of the BBC's public service activities under the new regulatory framework overseen by Ofcom. It is therefore essential that Ofcom follows its procedures and conducts a robust and comprehensive assessment.

Within the context of the BBC's current iPlayer proposals, this is important in terms of protecting against consumer harm and the crowding out of competing services.

---

<sup>1</sup> Clause 10(3) of the Framework Agreement.

<sup>2</sup> As required by Clause 10(3)(a) of the Framework Agreement.



More broadly, it is important in terms of setting a precedent for how Ofcom will conduct future BCAs and, consequently, how the BBC will conduct future PITs.

## 2.2 The BBC's procedural failings

Sky has previously expressed its significant concerns about the BBC's failure to clearly define its proposed changes to the iPlayer in the BBC's Public Interest Test Consultation ("PIT consultation") and its subsequent Public Interest Test submission ("PIT submission").<sup>3</sup> The BBC's failure to clearly define its proposed changes to the iPlayer made it impossible for stakeholders to comment meaningfully on their likely impact.

It is only now – over five months following publication of the BBC's PIT consultation in January 2019 – that stakeholders have clarity on the scope of the proposed changes that are the subject of the present BCA, namely the 'indicative' changes outlined in the BBC's PIT submission.<sup>4</sup>

While Sky welcomes this clarity (and the fact that Ofcom is not proposing to approve unlimited iPlayer expansion, as requested by the BBC), Sky is concerned that this clarity has come from Ofcom, rather than the BBC. Ofcom is effectively compensating for the BBC's failings by defining the proposals on behalf of the BBC, rather than sending the proposals back to the BBC to reconsider. This undermines any incentive for the BBC to clearly define the scope of any future proposals to change its public services. Ofcom's approach could, in fact, encourage the BBC to make its future proposals as broad and vague as possible, and to present varying iterations of its proposals to stakeholders and to Ofcom, in the expectation that Ofcom will ultimately approve at least some significant elements of them. Such behaviour would be an abuse of process, resulting not only in uncertainty for the sector, but also unnecessarily wasting the resources of stakeholders and Ofcom in reviewing poorly-defined and/or ever-evolving proposals.

Sky is also concerned that clarity on the scope of the proposals has only been provided to stakeholders at the same time as Ofcom is consulting on its provisional conclusions, and only a few weeks prior to the intended publication of Ofcom's final decision (which Ofcom has indicated will take place in August pursuant to Ofcom's accelerated timeline). By adopting this approach, Ofcom runs the risk of failing to ensure that stakeholders have sufficient time to properly review and respond to the consultation within the four-week consultation period. It also gives the impression that final approval of the proposals is a 'done deal' and that raising objections at this stage is futile.

## 2.3 Ofcom has failed to hold the BBC to account for its procedural failings

While Ofcom acknowledges that "[i]t would clearly be preferable for the BBC to ensure that there is sufficient, transparent information on its proposals in any PIT consultation

---

<sup>3</sup> See: Sky's response to the BBC's PIT consultation provided to Ofcom under cover of an email dated 18 February 2019; and Sky's response to Ofcom's Call for Evidence provided to Ofcom under cover of an email dated 13 May 2019.

<sup>4</sup> Figure 16 of the BBC's PIT submission and sections 2.9-2.12 of Ofcom's consultation.



so that stakeholders can comment meaningfully on them”, Ofcom does not propose to require a reconsideration of the present PIT. Instead, Ofcom considers that it is “important in the context of these Proposals to take a pragmatic approach to the process issues given the risk of the BBC falling behind viewers’ expectations”.

Describing a meaningful BBC consultation process as being “preferable” suggests that Ofcom does not consider this to be an essential component of the regulatory process. This view is inconsistent with Ofcom’s own guidance which states that:

*“When carrying out a public interest test, the BBC should, as a minimum, seek to understand and assess the scale of market impacts associated with its proposals. This will require understanding how their proposals are likely to impact people and existing or potential future market players. **It will also require the BBC to consult with interested parties**”;*

*“[Engagement with interested parties] should also be **sufficiently detailed** to allow third parties to **understand the proposal fully** and to be able to **provide constructive input**”; and*

*“If we are not satisfied that the BBC has undertaken a robust, thorough analysis and engaged with interested parties in a **reasonable, transparent** manner, the proposal may be sent back to the BBC to reconsider”.*<sup>5</sup> (emphasis added)

Ofcom’s proposal to take a “pragmatic approach” risks setting a dangerous precedent for the approval of future proposals to be expedited on the basis of market developments and perceived audience expectations, notwithstanding serious BBC process issues. Further, such approach undermines the BBC’s incentive to ensure that it consults in a reasonable, transparent manner in relation to future proposals.

The BBC is required to present sufficiently detailed proposals to Ofcom and stakeholders, in order to enable meaningful engagement and fulfilment of its obligation to consult interested parties as appropriate,<sup>6</sup> and to ensure compliance with state aid rules. The BBC has failed in this regard and Ofcom should not endorse such an approach to changes to the BBC’s public services.

Sky also disagrees with Ofcom’s view that there is a “risk of the BBC falling behind viewers’ expectations” if Ofcom were to send the PIT back to the BBC for reconsideration. This concern is already dealt with by the Interim Directions which Ofcom has put in place to enable the BBC to proceed with a number of changes to the iPlayer, and which Ofcom considers “[strike] a proportionate balance between enabling benefits to audiences and mitigating the risks of any adverse impact on fair and effective competition arising from the interim changes, pending the completion of the PIT and any further competition assessment. The interim directions enable the BBC to innovate on and evolve its BBC iPlayer services during the regulatory process”.<sup>7</sup>

<sup>5</sup> Sections 4.15, 4.16 and 4.20 of Ofcom’s guidance, ‘Assessing the impact of proposed changes to the BBC’s public service activities’, dated 29 March 2017.

<sup>6</sup> Clause 7(5) of the BBC Framework Agreement.

<sup>7</sup> Paragraph 1.2 of Ofcom’s ‘Review of the BBC’s Materiality Assessment of Proposed Changes to the BBC iPlayer, Final Interim Directions’, dated 17 December 2018.



## 2.4 Ofcom should make a clear statement regarding the BBC's procedural failings

Sky notes that Ofcom is proposing to take a stronger stance in relation to the BBC's failure to address impacts on the public value generated by other broadcasters, in particular other PSBs' live TV and BVOD services. In respect of this failure, Ofcom states that not only has it previously raised this issue with the BBC, but also that:

*"[b]oth because of our own assessment of this issue and for pragmatic reasons, we do not consider that this is a matter that would lead us to reject the Proposals, but the BBC's failure on this element **is a matter we will take forward separately.**"* (Emphasis added)

While it is not clear what exactly "taking the matter forward separately" would entail, Ofcom should take the same approach in relation to the BBC's wider procedural failings.

Accordingly, if Ofcom is not minded to send the full suite of proposals back to the BBC to reconsider, it should, as a minimum, make a clear statement that the BBC's consultation process was inadequate and set out its expectations as to how the BBC will conduct any future public interest tests. In particular, Ofcom should make it clear that any future proposals will be sent back to the BBC if Ofcom is not satisfied that the BBC has engaged with stakeholders in a reasonable and transparent manner, notwithstanding public value and perceived audience expectations, or indeed any other "pragmatic reasons".

Finally, Ofcom should clarify precisely what action it intends to take in respect of the BBC's failure to address impacts on the public value generated by other broadcasters. This issue does not appear to be addressed in Ofcom's proposed conditions or guidance, or anywhere else in the consultation document.

## 2.5 The BBC's content and functionality proposals should be assessed together

Ofcom's proposal to approve the BBC's planned content changes is inconsistent with Ofcom's proposal to send the BBC's planned functionality changes back to the BBC. Ofcom states:

*"We consider that [...] stakeholders do not have sufficient transparency over these types of changes. For pragmatic reasons we do not propose to address the process issues created as part of this assessment. However, we do consider that functionality changes may, in principle, be material changes and the BBC should therefore separately assess their potential impact on competition and consider whether a regulatory process is required."*

While Sky agrees that the BBC has failed to provide stakeholders with sufficient transparency over functionality changes, and that these types of changes have the potential to be material changes, Sky disagrees with Ofcom's proposal to address the BBC's planned content and functionality changes under separate regulatory processes.



As previously noted, the BBC is planning to “reinvent” the iPlayer, turning it into a “*must-visit destination in its own right*”.<sup>8</sup> This ambition encompasses an expansion both in terms of content and functionality. Both aspects are integral to the BBC’s plans to re-invent and drive increased viewing of the iPlayer, and so their overall impact should be assessed together. By allowing separate, stand-alone assessments, Ofcom runs the risk of setting a worrying precedent for assessing and approving future changes to the BBC’s public services in a piecemeal manner, where parts of a proposal may individually be immaterial or pass the public interest test so as to gain Ofcom’s approval, but collectively they would not.

Accordingly, Ofcom should not approve the BBC’s content proposals until the BBC (and Ofcom, if applicable) have completed their assessment of the proposed functionality changes.

Sky

July 2019

---

<sup>8</sup> Speech by Director-General of the BBC, Tony Hall, to BBC staff in Birmingham on 11 January 2017 (<https://www.bbc.co.uk/mediacentre/speeches/2017/tony-hall-ny-message>).