



BritBox Materiality Assessment

Response to Ofcom's provisional decision



1 Introduction

Sky welcomes the opportunity to comment on Ofcom's preliminary decision as to whether the BBC's proposed involvement in BritBox represents a 'material change' to the BBC's commercial activities. We consider stakeholder consultation to be an important part of the process set out in Ofcom's guidelines¹ and to be appropriate in this case given the regulatory framework, complex web of relationships potentially affected and lack of transparency (including the fact that key relationships between the parties are yet to be determined).

1.1 Ofcom must take a precautionary approach to its first phase review

Ofcom's task in this initial phase is to undertake a forward-looking assessment of whether there is a *significant risk* that the BBC's shareholding in BritBox and role as principal content supplier *may* distort the market or create an unfair competitive advantage, as a result of the relationship with the Public Service. Furthermore, Ofcom only has 6 weeks to carry out the assessment.

This assessment cannot therefore be expected to be an in-depth examination of the issues, but rather one that seeks to identify areas of potential concern for further examination. As Ofcom's guidance notes, it "*will not be carrying out any substantive assessment at this stage*".²

If risks are identified, then Ofcom must undertake a trading and separation assessment, focusing on whether the BBC's involvement is *likely* to distort the market or create an unfair competitive advantage for BritBox. If no risks are identified, then the BBC is free to proceed without further interference or review.

Accordingly, the threshold for Ofcom deciding that a risk is a "significant risk" warranting further investigation must be low. Also, Ofcom's principal duties to further the interests of citizens and consumers require it to take a precautionary approach to potential risks. This is particularly the case as the sector is at a critical juncture, with the growth of streaming platforms and decline in consumption of linear broadcasting.³

1.2 Ofcom does not have sufficient information to undertake its assessment

This approach has two further consequences:

¹ Paragraph 5.22 *et seq.* of Ofcom's requirements and guidance "The BBC's commercial and trading activities: requirements and guidance", dated 11 February 2019 (the 'Ofcom Requirements'). Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0016/134350/statement-bbc-commercial-trading-activities.pdf

² Paragraph 5.25 of the Ofcom Requirements.

³ In Q1 2019, 47% of UK homes (13.3mn) subscribed to at least one of Netflix, Amazon, NOW TV or Disney Life. Meanwhile, linear broadcasting consumption has fallen by 49 minutes per day since 2012. Ofcom, 'Media Nations Report 2019' (pp.3 and 59). Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0019/160714/media-nations-2019-uk-report.pdf



- Ofcom must base its decision on fact, not speculation or assumptions unsupported by evidence; and
- the burden is on the BBC to provide sufficient information to enable Ofcom to make that assessment.

It is for this reason that Ofcom's procedures state that part of this first phase is to determine whether the BBC has provided sufficient information for Ofcom to make its assessment.

As set out in more detail below, Ofcom does not appear to have sufficient information to make its preliminary assessment and therefore to make a finding of materiality. For example, we understand that the BBC has not disclosed to Ofcom:

- how much of its content will be exclusive to Britbox;
- whether it intends to renew existing agreements for distribution of its commercial content (such as those with UKTV, Sky, Netflix and Amazon) and therefore the extent to which BBC content will be available elsewhere;
- whether content that is released early to BritBox will continue to be made available in iPlayer;
- which other services it expects to qualify under the proposed early release policy;
- how revenues from the service will be divided between content providers and shareholders; or
- how the BBC will "*connect viewers between BritBox ...and BBC iPlayer as they search for the content they wish to view*" or otherwise promote BritBox.⁴

The answers to these questions are crucial to any understanding of the nature of the BBC's involvement and the likely impact that BritBox will have on the market.

Ofcom ought to have requested more detailed information from the parties instead of taking a decision (i) that it had sufficient information and (ii) to authorise the venture without it being subject to further scrutiny.

1.3 BBC proposals may give rise to a significant risk of market distortion or unfair competitive advantage

In the absence of this information, based on Ofcom's identified concerns, there is a risk that the proposals give rise to a significant risk that the BBC's proposals may distort the market or create an unfair competitive advantage, as a result of the BBC's relationship with BritBox, sufficient to justify a substantive assessment by Ofcom.

BritBox is intended by the parties to be a 'milestone' venture delivering a structural change to the market by creating a new joint home for the most watched television

⁴ 'Full stream ahead for BritBox in UK as ITV and BBC sign agreement', 19 July 2019. Available at: <https://www.bbc.co.uk/mediacentre/latestnews/2019/britbox-agreement>



content in the UK. Together, the BBC and ITV represent over 58% of share of viewing to linear channels and 75% of viewing of BVOD.⁵ That Ofcom can determine the proposals are not “material” in such circumstances is surprising without any certainty as to the scale of the proposition or evidence that such risks will not arise.

Sky considers the proposals give rise to a *significant risk* that the BBC’s activities relating to BritBox *may* distort the market or create an unfair competitive advantage as a result of:

- undue discrimination in favour of BritBox as a result of the application of the ‘qualifying criteria’ for early access to public service programmes under proposed changes to the BBC programme release policy;
- lack of clarity in Ofcom’s provisional decision regarding the extent and impact of explicit or ‘de facto’ exclusivity granted to BritBox in relation to BBC content, whether or not as a result of information shared between the BBC’s public service and commercial operations, or the shared membership of their executive boards;
- absence of any assessment as to the risk or impact of cross-promotion of BritBox by the BBC; and
- potential loss of public value resulting from the BBC’s proposals.

Each of these reasons is set out in further detail below.

Sky further notes that Ofcom’s provisional decision relies on its view that it has the power to step in and act should the BBC’s involvement in BritBox result in distortion of the market or the creation of an unfair competitive advantage. This approach is, however, flawed. It is not sufficient or appropriate for Ofcom to rely on *ex post* enforcement action when considering the materiality of a proposal as part of an *ex ante* regulatory framework. If this were the case, then, absent an explicit statement by the BBC that it intended to breach the requirements, no proposal would ever be found to be “material”: the application of Ofcom’s requirements would ensure that such risks did not arise. This is not consistent with the framework put in place under the Charter. Sky notes that the (non-exhaustive) list of factors to be taken into account by Ofcom does not include the application of the requirements.⁶

Ofcom’s initial assessment must focus on the risks and how likely such risks are to arise based on the information available. Identified risks cannot be dismissed on the basis of future ‘ex post’ enforcement action.

⁵ BBC+ITV+UKTV: BVOD = 75.39%, linear = 58.14%. BARB data, July 2019. Available at: <https://www.barb.co.uk/bvod-services/aggregate-viewing-time-by-broadcaster-group-4-weeks-open/>

⁶ ‘The BBC’s commercial and trading activities: requirements and guidance - statement on modifications to Ofcom’s requirements and guidance’, 11 February 2019 (para.5.28). Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0016/134350/statement-bbc-commercial-trading-activities.pdf



2 Sky's concerns

2.1 Programme release policy – 'qualifying criteria'

Sky agrees it is important that the BBC is "open to releasing content early to *any service which can deliver against the policy's broader objectives*", and that the 'qualifying criteria' for early access to BBC content under proposed changes to the programme release policy should not be a "rigid set of rules" and that the BBC ought to "consider alternative proposals which also further these objectives." However, Sky is concerned about the limited scope of the qualifying criteria, as currently drafted, in particular:

- there is no justification for restricting the opportunity for early access to SVOD services only;
- which services could ever expect to qualify, other than BritBox;
- feasibility of early access being granted on 'fair, reasonable and non-discriminatory' terms; and
- interpretation and application of criteria (b) and (d).

2.1.1 There is no justification for restricting early release to SVOD services

Sky is concerned that under proposed changes to the programme release policy, early access to BBC content will be restricted to SVOD services only without justification. This means that more widely accessible services, like the BBC's own UKTV channels and catch-up services, and TVOD (rental or 'to keep') services, could never qualify. As a result, the BBC is potentially denying itself additional sources of revenue, as well as providing a criterion that naturally favours BritBox.

Restricting potentially qualifying services in this way is inconsistent with the BBC's duty to make its content widely available⁷ and its aim "to be satisfied that early release at 12 months will secure *enhanced public value* beyond that which is provided by the market when content is released at 18 months." Clearly, public value is enhanced when content is made as widely available as possible. Ofcom should therefore assess the BBC's rationale for this restriction or require the criterion to be broadened to include all business models.

2.1.2 There is no certainty as to the services that would qualify for early release

Ofcom states "[i]t is expected that BritBox will qualify for early access to the BBC commissioned content" under proposed changes to the programme release policy.

⁷ The BBC has a general obligation to make the UK Public Services widely available. 'BBC Agreement' (cl.61) Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584329/57965_Cm_9366_Print_1.pdf



On the one hand, it is not clear to Sky why this should be the case given that BritBox will be controlled by ITV, a wholly commercial entity whose purpose is to deliver value to its shareholders. It is not clear how ITV and/or BritBox (as described) would have "a corporate strategy designed specifically to invest in and support the ... PSB ecology as a whole".

On the other hand, Ofcom's statement and the nature of the 'qualifying criteria' indicate that BritBox's qualification has been predetermined (and indeed logic dictates that this has driven the changes to the policy).

Sky's concern is that the criteria have been designed in such a way that no other existing service could ever expect to qualify. Ofcom gives no other examples of qualifying services. This is significant because (i) supposedly objective criteria that could only be met by BritBox cannot be considered to be 'fair, reasonable or non-discriminatory', and (ii) such criteria would clearly give rise to a significant risk that the BBC's involvement in BritBox may distort the market or create an unfair competitive advantage.

Ofcom ought to obtain further information as to how the criteria would operate, which services the BBC expects to qualify (in addition to BritBox, if any), and what information it will publish in relation to decisions applying the criteria. Such matters are appropriately carried out as part of a trading and separation assessment.

2.1.3 The application of the early release criteria risks causing greater uncertainty

The BBC is reported to have said that "compliance [with the criteria] may be a matter of degree, and certain elements of the overall Programme Release Policy may be more or less important depending on the circumstances of the case." By giving itself such a broad discretion, the BBC creates unnecessary market uncertainty and a significant risk of further distortion by applying the same criteria in different ways to different parties. It is important that the BBC clearly states how it will determine which services will qualify for early access in practice. The need for clarity is reinforced by the risk that the BBC could decide that BritBox is the only qualifying service - there is no value in having a fair, reasonable and non-discriminatory process where there is only one player in the market.

In addition, criteria (b) and (d), are drafted in such a way as to create further uncertainty. More specifically, the terms "greater" in criterion (b) or "material" in criterion (d) allow further subjectivity and prevent service providers from being able to judge whether their services might qualify. The term "appropriate" should suffice in both instances to serve the public interest.

As regards application of the criteria, we note that the BBC intends to have a specific team to assess any requests and this team will include "senior group employees" with no representation from its commercial subsidiaries. Given the degree and significance of cross board directorships within the BBC and the fact that, depending on the circumstances, directors can 'hold office' rather than constitute employees, it is important that this team explicitly excludes any senior group employees or directors with interests in the BBC's commercial subsidiaries.



2.2 How much BBC content will be exclusive to BritBox?

It is unclear whether and, if so, how much BBC content would be exclusive to BritBox. If a significant amount of BBC content were reserved to BritBox there is a significant risk of distortion of the market and/or unfair advantage to the new venture as a result of that content ceasing to be widely available. Concerns about exclusivity are reinforced by uncertainty about the actual number of BBC titles that will be available for early access and/or BritBox will decide to licence, and also the possibility of cross-promotion of BritBox from BBC iPlayer (see below).

Ofcom has informed Sky that it believes the BBC's minority shareholding ensures it is not incentivised to provide significant volumes of content to BritBox on an exclusive basis. Ofcom could not say, however, whether the allocation of subscription revenue derived by BritBox was split in any other way so as to incentivise exclusivity. The limited shareholding would only be relevant to any profit made by the venture. Alternative revenue sharing arrangements could form part of a content licensing arrangement between BBC Studios and BritBox. Under normal circumstances, those arrangements would not fall to be reviewed by Ofcom under its trading and separation requirements but are clearly linked to the BBC's involvement in BritBox.

As noted above, Ofcom cannot assess the materiality of the proposals without all relevant information. If it does not understand the content supply arrangements, it cannot make assumptions about the BBC's incentives.

In circumstances where the BBC has announced that "[m]any of these [new BBC public service programmes] will be exclusive to UK viewers through BritBox..." and that ITV and the BBC intend to build "a distinctive library of content as existing licence agreements with other players expire", it is incumbent on Ofcom to ensure it understands the extent to which BBC content will be available outside BritBox in order to understand its impact on the market and before Ofcom approves the proposals.

Such an approach (BritBox exclusivity for BBC content) would represent a change in strategy as a result of the BBC's participation in BritBox – to date, content has been sold to a variety of pay TV services, including through its UKTV subsidiary



Sky would expect Ofcom to understand whether the BritBox arrangements would likely impact the availability of content via the BBC's existing pay TV services. Absent such information, Ofcom would not be in a position to determine the materiality of the proposals.

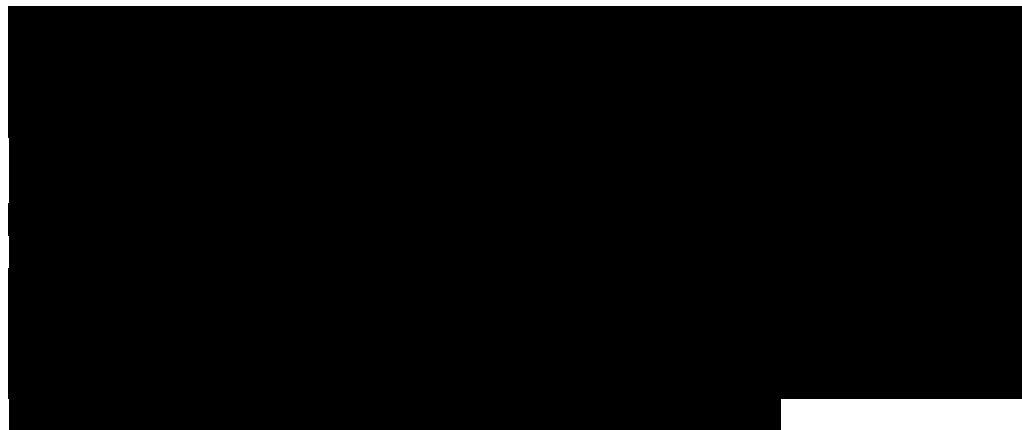
2.3 Cross-promotion from BBC iPlayer to BritBox

Sky is concerned about the BBC's failure to address the issue of cross-promotion from BBC iPlayer to BritBox. The BBC clearly has an incentive to direct viewers from iPlayer to BritBox and has indicated that it intends to do so:



*“Both ITV and the BBC will support the launch of BritBox with a **high-profile marketing and promotional campaign** and will also look at **how best to connect viewers** between BritBox, ITV Hub and BBC iPlayer as they search for the content they wish to view.”⁸ (emphasis added)*

How audiences get to BritBox will be a key determinant of its success in drawing audiences away from other services. Cross-promotion from the iPlayer, or linear services, which enjoy a significant share of viewing, as a result of the privileges derived from the BBC’s public service remit and licence fee funding, would be a significant advantage for any new service that are not available to other services, including the BBC’s existing commercial services such as the UKTV channels.



Ofcom must understand whether the BBC intends to cross-promote BritBox in this or any other way and should state whether such promotions would trigger a new materiality assessment. Ofcom’s failure to require the BBC to disclose its cross-promotion strategy, and its decision not to defer its assessment until the strategy is determined, are significant failures and undermine its procedure.

As noted above, Ofcom ought to have first ensured it had sufficient information about the proposals, and particularly those aspects likely to generate significant risk of distortion or unfair competitive advantage. Whilst Ofcom has correctly identified cross-promotion as a risk, it has failed to follow this up with the BBC or understand the need for detailed investigation under a trading and separate assessment. This should be corrected before Ofcom reaches its final conclusions.

2.4 Potential loss of public value

Sky considers that uncertainty regarding the likely impact on PSB licensing, on BBC Studios’ licensing strategy and on third party access to BBC content, means the potential loss of public value could be significant. To the extent that the materiality assessment presents the only opportunity for Ofcom to comprehensively assess these impacts in the round, it is important that Ofcom does so before it makes its final decision.

⁸ ‘Full stream ahead for BritBox in UK as ITV and BBC sign agreement’, 19 July 2019. Available at: <https://www.bbc.co.uk/mediacentre/latestnews/2019/britbox-agreement>



2.4.1 Impact on PSB licensing

Neither Ofcom, nor the BBC, have addressed what impact the BBC's proposed involvement in BritBox will have on the availability of content on its existing PSB services. In particular, Sky would expect content licensed by BritBox in the early release window to cease to be available via the BBC's PSB outlets (i.e. its channels and iPlayer), as commercially it would not make sense to pay for content that is available free-to-air at the same time. This has the potential to reduce the availability of titles to licence fee payers, so it should form part of the BBC and Ofcom's assessments.

2.4.2 Impact on BBC Studios' licensing strategy

As noted above, it is unclear whether BBC Studios will continue to license BBC content as widely as it currently does, for example to its subsidiary, UKTV, to SVOD services such as Netflix and Amazon, or to Sky for its DTH platform and Now TV OTT service. Such distribution drives significant public value for the BBC public service through commercial revenues and greater brand awareness for BBC titles and content.

We understand Ofcom's position to be that the BBC is not incentivised to distribute its content exclusively to BritBox as a result of its 10% shareholding which means that it will not earn sufficient revenue from the venture to outweigh the benefits of a broad licensing strategy. As noted above, there are, however, licensing arrangements that could give BBC Studios a share of subscription revenue that might incentivise exclusivity. Absent Ofcom review of those arrangements, there is no way of knowing whether they have the potential to distort the market or create an unfair competitive advantage. Ofcom should therefore conduct a trading and separation assessment to understand the impact of these arrangements.



3 Concluding remarks

In the absence of evidence to the contrary, there is a significant risk that the BBC's involvement in BritBox may distort the market and/or provide BritBox with an unfair competitive advantage.

Uncertainty about the BBC's proposals means that Ofcom has not yet received sufficient information to be able to assess whether such risk is significant and therefore requires a more in-depth review. The assumptions underlying Ofcom's provisional conclusions are flawed and should be replaced with a fact-based analysis of the venture and the BBC's role in it.

The BBC's failure to provide sufficient information, and Ofcom's failure to require it of the BBC, is especially disappointing given Ofcom's recent findings that the BBC "*does not routinely explain planned changes in its public service activities in sufficient detail to potentially affected parties*";⁹ or engage substantively with stakeholders about its proposals (including in relation to iPlayer functionality).¹⁰

Given the potential for irreparable loss of public value and risks to the sector as a result of the BBC's proposals, it is all the more important that Ofcom holds the BBC to account and deliver on its intention to be more transparent.¹¹ Therefore, Ofcom should require the BBC to refine and clarify its proposals as part of a trading and separate assessment before approving the BBC's participation in BritBox.

Sky

August 2019

⁹ 'Ofcom's Annual Report on the BBC', 25 October 2018, p.4.

Available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0015/124422/BBC-annual-report.pdf

¹⁰ 'BBC iPlayer Competition Assessment: Final determination', 1 August 2019, para.4.15. Available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0029/159725/statement-bbc-iplayer-final-determination.pdf

¹¹ 'Ofcom's Annual Report on the BBC', 25 October 2018, p.4.

Available at: https://www.ofcom.org.uk/_data/assets/pdf_file/0015/124422/BBC-annual-report.pdf