



Neutral Citation Number: [2023] EWHC 1977 (Admin)

Case No: CO/4651/2020

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/08/2023

**Before :**

**MR JUSTICE JULIAN KNOWLES**

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**Between:**

**THE KING ON THE APPLICATION OF  
RADIOCENTRE LIMITED**

**Claimant**

**- and -**

**OFFICE OF COMMUNICATIONS**

**Defendant**

**-and-**

**BRITISH BROADCASTING CORPORATION**

**Interested  
Party**

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**Timothy Otty KC, Emma Dixon and Isabel Buchanan** (instructed by **Mishcon de Reya**) for  
the **Claimant**

**Tristan Jones and Hollie Higgins** (instructed by the **Office of Communications**) for the  
**Defendant**

**Monica Carss-Frisk KC and Natasha Simonsen** (instructed by the **BBC**) for the  
**Interested Party**

Hearing dates: **15-16 November 2022**

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 10 Augusty 2023 by circulation to  
the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Julian Knowles:**

“Radio, what’s new ?  
Radio, someone still loves you”

Queen, ‘Radio Ga Ga’, 1984

## **Introduction**

1. The BBC recently celebrated its centenary. Over the years its output has broadened to encompass services which Lord Reith could never have imagined.
2. This case concerns Radio 1 Dance (R1D), a BBC offering devoted to dance music. It is only available online via the BBC Sounds app(lication) and associated BBC Sounds website. It is not broadcast via DAB, FM, LW, AM, or anywhere else on the electromagnetic radio spectrum. The BBC launched it in October 2020. It had been planned for some time, but the COVID pandemic delayed its launch.
3. The Defendant’s Skeleton Argument describes R1D as follows (at [1]):

“R1D was intended by the BBC to bring together its dance music content, which would otherwise be spread across various mainstream BBC radio stations and other BBC offerings (such as podcasts or music mixes). Accordingly, anything played on R1D is either a repeat, a ‘simulcast’ (meaning that it is broadcast simultaneously on R1D and elsewhere), or content which is not broadcast but is otherwise available online via the BBC Sounds website or app.”

4. One issue at the heart of this case is whether R1D is, by reason of only being available online, not a UK Public Service (UKPS) for the purposes of the BBC’s broadcasting regulatory framework. I will explain in a moment what UKPSs are.
5. The Claimant is the industry body for commercial radio, working on behalf of over 50 stakeholders who operate over 300 licensed radio stations across the UK, representing more than 90% of commercial radio in terms of listening and revenue. It provides UK commercial radio with a collective voice on issues affecting the way that radio stations operate, working to secure the best environment for growth and development of that medium.
6. Major members of the Claimant include Global Media & Entertainment Ltd (Global) and Bauer Consumer Media Ltd (Bauer). The Claimant is concerned about the commercial impact of R1D on its members’ businesses. In opening the Claimant’s case, Mr Otty KC said that :

“... it is common ground that the BBC enjoys a privileged, unique position as a publicly-funded organisation, with the freedom not to need to make money to survive. It also

enjoys significant competitive advantages due to its brand, prominence and status as an organisation funded by the licence payer.”

7. I do not dissent from this general assessment. The BBC is an Interested Party to this claim.
8. The Defendant, the Office of Communications (Ofcom), is the statutory regulator and competition authority for the UK communications industries, including radio and television. It was established by the Office of Communications Act 2002, and has the functions set out in the Communications Act 2003.
9. As described on the Claim Form, the decision challenged (the Decision) is:

“Decision of Ofcom dated 23 September 2020 not to require the BBC to conduct a Public Interest Test (‘PIT’) in relation to its proposal to launch Radio 1 Dance on BBC Sounds”
10. On 22 November 2021 Mostyn J granted the Claimant permission to apply for judicial review of the Decision on two grounds (Grounds 1 and 2 below). Ofcom maintained the Decision on 16 October 2020 and 11 December 2020.
11. Following an exchange of pleadings, and following an oral hearing, on 31 March 2022 Foxton J granted various applications to amend, and permission to the Claimant to add two further grounds of challenge (Grounds 3 and 4).
12. On behalf of the Claimant, Mr Otty therefore advanced the following four grounds of challenge:
  - a. Ground 1: Ofcom erred in law, acted irrationally and/or failed to take into account mandatory considerations, in finding that R1D, notwithstanding the many features it shares with other BBC radio services listed as discrete UKPSs, did not amount to the carrying out of an activity as a new UKPS simply because it was not broadcast on DAB. The Claimant describes this as the ‘main issue’ (Skeleton Argument, [2]);
  - b. Ground 2: Ofcom’s secondary conclusion that R1D did not involve a material change to an existing UKPS was flawed on mandatory relevancy grounds;
  - c. Ground 3: Ofcom’s decision involved a breach of procedural fairness and a failure to ensure effective engagement with the commercial radio sector contrary to criteria Ofcom had itself set for its own decision making; and
  - d. Ground 4: Ofcom’s decision involved a material error of fact and further flaws on mandatory relevancy grounds, having regard to the BBC’s intentions for R1D and its content, and the BBC’s approach to engagement with commercial stakeholders.
13. As I will develop, there is an overlap between Grounds 2 and 3 on the one hand, and Ground 4 on the other.
14. In Section 7 of its Claim Form, the Claimant seeks the following relief:

- a. an order quashing the Decision;
  - b. a declaration that R1D is a new UKPS;
  - c. a declaration that the launch of R1D amounted to a material change within the meaning of Clause 7(7)(b) of the BBC's Framework Agreement (as to which, see below);
  - d. an order requiring Ofcom, in relation to the launch of R1D Dance: (i) to consult with the Claimant and its Members; (ii) to direct the BBC to carry out a Public Interest Test (PIT); and (iii) to carry out a BBC Competition Assessment;
  - e. further or other relief;
  - f. costs.
15. I have full transcripts of the hearing which I have consulted when writing this judgment. The papers run to thousands of pages. The Claimant's lengthy Skeleton Argument contains 99 footnotes referencing the papers in micro-detail. There are also substantial Skeleton Arguments from the other parties. The context is not straightforward. All of this means the case has taken some time to resolve.
16. In this judgment I will refer to a witness' first and second witness statements as, eg, Rowsell 1, Rowsell 2, etc. The evidence is heavily footnoted, however I have generally not cited footnotes where I have quoted portions of the evidence.

### **Legal and policy framework**

17. Before turning to the factual background, I think it is helpful to describe the legal and regulatory landscape. This was not really in dispute, although its interpretation was, in particular in relation to Ground 1.
18. The key legal instruments are, first, the Royal Charter (the Charter) (Cm 9365), which is the constitutional basis for the BBC, and was granted by Her late Majesty The Queen in December 2016. (There have been a number of different Charters over the years: the current one expires at the end of 31 December 2027).
19. Second, the *Framework Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation* (Cm 9366) (the Framework Agreement), which is required by Article 53(1) of the Charter:

“A ‘Framework Agreement’ is an agreement between the BBC and the Secretary of State which contains a statement to the effect that it is a Framework Agreement made for BBC Charter purposes.”

20. The Framework Agreement goes into further detail on a number of areas set out in the Charter. The opening paragraphs of the Framework Agreement explain the background:

“(1) The BBC was first incorporated, for a limited period of time, by a Royal Charter granted on 20<sup>th</sup> December 1926. Subsequently, further Royal Charters were granted to the BBC to continue its existence as a corporation. The most recent of these Charters (‘the 2006 Charter’) was granted on 19th September 2006 and provides for the continuance of the BBC for a period ending on 31st December 2016 (‘the current Charter period’).

(2) The Secretary of State is applying to Her Majesty for the grant of a further Charter (‘the 2016 Charter’) for the continuance of the BBC for a further period ending on 31st December 2027 and which makes provision for the process of transition from the 2006 Charter to the 2016 Charter to begin before the end of the current Charter period.

(3) The 2006 Charter is complemented by an Agreement (‘the 2006 Agreement’) made by a Deed between the Secretary of State and the BBC dated 30th June 2006 (and amended by further Deeds dated 23rd March 2010, 11th February 2011 and 13<sup>th</sup> September 2011).

(4) Among other things, the 2006 Agreement confers, by virtue of section 198 of the Communications Act 2003 (‘section 198’), certain regulatory functions, and related powers and duties, on the Office of Communications.

(5) The 2016 Charter contains provisions, particularly Article 53, about the concept of a Framework Agreement.

(6) It is appropriate that the 2006 Agreement should be revoked and replaced by a new Agreement which will be a Framework Agreement for the purposes of the 2016 Charter and make suitable provision to complement the provisions of the 2016 Charter, including provision for the purposes of section 198.

(7) This Agreement has been prepared with the cooperation of the Office of Communications. The Office of Communications shall be consulted should any future amendments to this Agreement affect their functions in respect of the BBC.”

21. The Framework Agreement was amended in 2022. The 2016 version was the one in force at the time of the Decision with which I am concerned.

22. The key policies are: (a) the BBC's 'Policy on material changes to the BBC's public service activities and commercial activities', dated 7 August 2017 (the BBC Policy); and (b) Ofcom's 'Assessing the impact of proposed changes to the BBC's public service activities', dated 29 March 2017 (the Ofcom Policy). Their combined effect is set out below.
23. I return to UKPSs. The BBC is permitted to carry out the provision of UKPSs in accordance with the Charter and Framework Agreement.
24. Articles 7(1), (2) and (3) of the Charter provide:

“7. The activities of the BBC

(1) The only activities that may be carried out by the BBC are -

- (a) provision of the UK Public Services;
- (b) provision of the World Service;
- (c) non-service activities;
- (d) through commercial subsidiaries, commercial activities;
- (e) trading activities; and
- (f) the specified activities.

(2) The activities referred to in paragraph (1) must be carried out in accordance with the terms of this Charter and the Framework Agreement.

(3) The UK Public Services must fulfil the Mission and promote one or more of the Public Purposes and consist of -

- (a) the existing services specified in the Framework Agreement; and
- (b) any activity aimed primarily at users in the United Kingdom involving the provision of output supplied by means of -
  - (i) television, radio and online services; or
  - (ii) similar or related services which make output generally available and which may be in forms or use technologies which either have not previously been used by the BBC or which have yet to be developed.”

25. The ‘Public Purposes’ are defined in Article 6, and include such things as: to provide impartial news and information to help people understand and engage with the world around them; to support learning for people of all ages; and to show the most creative, highest quality and distinctive output and services.
26. Clauses 6 and 7 of the Framework Agreement define what the UKPSs are (emphases added):

“6. Introduction

The BBC must determine whether an activity is to be carried out as a UK Public Service, a non-service activity, a trading activity or a commercial activity.

7. UK Public Services

(1) The UK Public Services must fulfil the Mission and promote one or more of the Public Purposes *and consist of the services specified by or under Schedule 1.*

(2) The BBC must comply with the regulatory conditions in an operating licence set under Clause 13 in providing the UK Public Services.

*(3) The BBC may carry out an activity as a change to a UK Public Service or as a new UK Public Service in accordance with this Clause provided that the activity falls within paragraph (4).*

*(4) An activity falls within this paragraph if it is aimed primarily at users in the United Kingdom involving the provision of output (which may include output provided by other organisations) supplied by means of-*

*(a) television, radio and online services; or*

*(b) similar or related services which make output generally available and which may be in forms or use technologies which either have not previously been used by the BBC or which have yet to be developed.*

(5) The BBC must prepare and publish a policy setting out how it will consider material changes to the UK Public Services, including whether or not a change is potentially material, and how it will consult with interested persons where appropriate. The policy must set out the assessment it will carry out and the procedures it will follow. Such assessments and procedures must be proportionate to the nature of the change.

*(6) The BBC may only make a material change to the UK Public Services where-*

*(a) the BBC has carried out a public interest test on the proposed change;*

*(b) the BBC has determined that the public interest test is satisfied; and*

*(c) Ofcom determine that the BBC may carry out the proposed change.*

*(7) For the purposes of this Clause, a material change means –*

*(a) the carrying out of any activity as a new UK Public Service; and*

*(b) any change to a UK Public Service which may have a significant adverse impact on fair and effective competition.”*

27. The existing UKPSs are listed in Part 1 of Sch 1 to the Framework Agreement (the UKPS List):

“List and description of the UK Public Services

(1) The BBC must maintain and publish a list of the UK Public Services setting out the name of the service, the type of service and a brief description of the service.

(2) The list on the date on which this Agreement is made must consist of the services listed in paragraph 2.

(3) A material change to the UK Public Services (see Clause 7) may require the list to be amended.

## 2. Existing services

(1) As television services designed for audiences across the UK-

(a) BBC One: a mixed-genre channel, with versions for Scotland, Wales and Northern Ireland and variations for English regions and the Channel Islands, providing a very broad range of programmes to a mainstream audience;

(b) BBC Two: a mixed-genre channel, with versions for Scotland, Wales and Northern Ireland, carrying a broad range of programmes for a mainstream audience, but with



a particular focus on factual programmes, innovative comedy and drama;

(c) BBC Four: a channel providing an intellectually and culturally enriching alternative to mainstream programming on other BBC channels;

(d) CBeebies: a channel providing a range of programming to educate and entertain very young children;

(e) CBBC: a mixed-schedule channel for pre-teen children;

(f) BBC News: a rolling news channel providing news, analysis and other informational programmes;

(g) BBC Parliament: a channel providing substantial live coverage of debates and committees of the UK's Parliaments and Assemblies, and other political coverage; and

(h) BBC Red Button: interactive digital content including news and other information, both freestanding and in support of the other linear services but also providing an access and navigation point for non-linear BBC content.

(2) As radio services designed for audiences across the UK-

(a) Radio 1: principally a popular music service aimed at young audiences, with a commitment to the best new music, but also containing significant speech output;

(b) 1Xtra: a service of contemporary black music, with a focus on new and live music, alongside significant speech output for young audiences;

(c) Radio 2: a service providing a broad range of popular and specialist music, and speech output including news, current affairs and factual programming;

(d) Radio 3: a service centred on classical music, alongside other music and art forms and speech output, and with a strong focus on live and specially recorded music;

(e) Radio 4: a speech-based service including news, current affairs, factual programmes, drama, readings and comedy;

(f) BBC 4 Extra: a speech-based service offering comedy, drama and readings, mainly from the BBC archive;

(g) BBC Radio 5 live: 24-hour coverage of news and sport;

(h) BBC Radio 5 live sports extra: a part-time extension to BBC Radio 5 live providing additional live coverage of sporting events;

(i) BBC 6 Music: a service of popular music outside the current mainstream, together with speech output which provides context for that music; and

(j) BBC Asian Network: a service bringing a wide range of news, music and factual programming to audiences of British Asians.

(3) As television and radio services designed primarily for audiences in particular parts of the UK-

(a) BBC Radio Scotland: a radio service available throughout Scotland, with a mixed schedule of music and speech output;

(b) BBC Radio nan Gaidheal: a radio service of programming in the Gaelic language in Scotland;

(c) BBC Radio Wales: a radio service available throughout Wales, with a mixed schedule of music and speech output in the English language;

(d) BBC Radio Cymru: a radio service available throughout Wales with programming in the Welsh language;

(e) BBC Radio Ulster and BBC Radio Foyle: a radio service with a mixed schedule of music and speech output, in which BBC Radio Ulster is available throughout Northern Ireland except that at certain times BBC Radio Foyle is provided instead to audiences in the western parts of Northern Ireland;

(f) BBC Local Radio: a number of local radio services for audiences in different parts of England and the Channel Islands, providing a mixture of music and speech output; and

(g) BBC Alba: a mixed-genre television channel for Gaelic speakers and those interested in the Gaelic language and culture, provided by the BBC in partnership with MG Alba.

(4) As online services designed for users across the UK, BBC Online: a comprehensive online content service, with content serving the whole range of the BBC's Public Purposes and including the BBC's news and sports websites, BBC iPlayer and BBC Three for younger adult audiences."

28. Therefore, reflecting Article 7(3)(b)(i) of the Charter, the UKPS List draws a tripartite distinction between radio services, television services and online services.
29. Clause 8 of the Framework Agreement defines the PIT, referred to in Clause 7(6)(a):

“8. Public Interest Test

(1) The BBC must be satisfied that -

(a) the proposed change to the UK Public Services contributes to the fulfilment of the Mission and the promotion of one or more of the Public Purposes;

(b) it has taken reasonable steps to ensure that the proposed change has no adverse impact on fair and effective competition which is not necessary for the effective fulfilment of the Mission and the promotion of the Public Purposes;

and

(c) the public value of the proposed change justifies any adverse impact on fair and effective competition, (‘the public interest test’).

(2) In carrying out the public interest test, the BBC must consider the scale and likelihood of any public value relative to the scale and likelihood of any adverse impact on fair and effective competition. It is recognised that the determination will require qualitative assessments to be made and that direct comparison of factors relating to public value and factors relating to risks to fair and effective competition may not be possible.

(3) Where the public interest test is satisfied and the BBC would like to implement the proposed material change, the BBC must publish the proposed change and send a copy to Ofcom.”

30. Clause 9 addresses material changes and the procedure for making such changes:

“9. Material changes

(1) Where the BBC has published a proposed change, Ofcom must assess whether the change is a material change.

(2) Where Ofcom decide that a proposed change is a material change, Ofcom must notify the BBC and proceed to make a determination under Clause 11 having carried out a competition assessment under Clause 10 or a shorter (less than 6 months) assessment which considers the elements of Clause 10(3)(a) to (d). Ofcom must act expeditiously and must normally commence an assessment immediately. They may only delay the commencement of an assessment where there are reasonable grounds to do so.

(3) Where Ofcom has notified the BBC that they do not consider that a proposed change is a material change, the BBC may carry out the proposed change.

(4) Where a period of six weeks has elapsed since the publication of the proposed change, and Ofcom has not notified the BBC as to whether it considers the proposed change is a material change, the BBC may carry out the proposed change.

(5) Where Ofcom consider the information published by the BBC under Clause 8(3) does not enable them to carry out an assessment, they must, as soon as possible, require the BBC to provide such additional information as may be necessary.

(6) Where Ofcom consider that a change to the UK Public Services is a material change and the BBC has failed to publish the proposed change, Ofcom may direct the BBC-

(a) to carry out a public interest test and, if the test is satisfied, publish the proposed change; or

(b) to stop carrying out the change in accordance with such directions as Ofcom consider appropriate.”

31. Clause 10 is headed ‘Competition Assessment’ and provides that Ofcom may carry out a competition assessment of a proposed material change to the UKPSs.

32. Clause 11 (‘Determination by Ofcom’) provides:

“(1) Where Ofcom considers that a proposed change published by the BBC under Clause 8(3) is a material change, Ofcom must determine –

(a) the BBC must reconsider any element of the public interest test or the BBC must follow such further procedures, as Ofcom consider appropriate;

(b) the BBC may carry out the proposed change to the UK Public Services;

(c) the BBC may carry out the proposed change in accordance with such modifications to the service, or subject to such conditions, Ofcom consider appropriate; or

(d) the BBC may not carry out the proposed change.

(2) Ofcom may only reach a determination under paragraph(1)(c) or (d) following a competition assessment under Clause 10.”

33. Drawing the threads together, therefore, under the Framework Agreement, the BBC may carry out an activity as a change to an existing UKPS, or as a new UKPS, provided that the activity falls within the description at [7(4)] of the Framework Agreement. There is no dispute that R1D falls within [7(4)].
34. However, the BBC may only make a *material* change to the UKPSs (as defined in [7(7)] of the Framework Agreement) where (a) the BBC has carried out a PIT; (b) the BBC has determined that the PIT is satisfied; and (c) Ofcom determines that the BBC may carry out the proposed change.
35. Thus, if the BBC wished to begin broadcasting a new TV station across the UK, that would, by virtue of [7(7)(a)] and [2(1)] of Sch 1 to the Framework Decision, be a material change (because it would be a new UKPS, television stations being exhaustively listed in [2(1)] of Sch 1), and so the PIT would have to be satisfied by virtue of [7(6)(a)] (and if relevant, 7(6)(b)).
36. On the other hand, if the BBC and Ofcom decide that a proposed change is not material, then no PIT is required.
37. The central issue in relation to Ground 1 is whether R1D is a radio service. If it is – as the Claimant says that it is – then it is a material change because it would then be a new UKPS (radio services also being exhaustively listed, in [2(2)]), and the PIT would have to be satisfied. If it is not – as Ofcom and the BBC maintain, because it is only available online, and is not broadcast on the electromagnetic radio spectrum – then it is not a new UKPS, and the PIT would not need to be satisfied (unless [7(7)(b)] was engaged as being a material change to an existing UKPS which affects competition as there set out. Ofcom and the BBC maintain that R1D is not a material change to an existing UKPS caught by Clause 7(7)(b): this is the subject of Ground 2).
38. Ofcom’s Policy requires the BBC to consider, in the first instance, whether a proposed change to its public service activities is ‘material’. The Policy states:

“Materiality assessment by the BBC

4.6 The BBC must initially assess whether any change to its public service activities is material and, as such, requires it to undertake a public interest test.

4.7 The Agreement is explicit that the introduction of a new UK Public Service will always be deemed “material” and therefore subject to a public interest test as set out below.

4.8 The BBC may also propose changes to public service activities which are not ‘new’ UK Public Services (ie, which are new non-service activities, or changes to existing UK Public Services or non-service activities). To determine whether these proposed changes are ‘material’, the BBC is required to consider whether the change ‘may have a significant adverse impact on fair and effective competition.’

4.9 In reaching a view on this, we would expect the BBC to look at factors such as novelty, duration, usage and scale in assessing what falls into this category. We would be wary of reliance on artificial financial thresholds, as this is likely to vary between sectors, and there is a danger of not appreciating that a small matter for an organisation of the BBC’s scale may be large for some others in a particular market. We would expect the BBC to set out in its policy how it will assess materiality in further detail.”

39. In relation to what amounts to the carrying out of an activity as a new UKPS, the BBC Policy provides that ‘any proposed new [UKPS] that is not covered by [the UKPS List] would be regarded as a material change’ ([2.18]). The Ofcom Policy explains that new UKPSs are ‘identifiable services supplied by means of television, radio, online or via newer technologies [...] which would have fallen to be listed in [the UKPS List] had they existed at the time it was produced. There is no *de minimis* threshold whereby small new services are exempt’ (footnote 19). The Ofcom Policy also notes that, ‘the introduction of a “new UK Public Service” should be reasonably easy to identify’ ([4.33]).
40. In reaching a view on whether a change may have a significant adverse impact on fair and effective competition ([7(7)(b)] of the Framework Agreement), and thus be a material change, [2.18]-[2.19] of the BBC Policy states:

“2.18 ... In reaching a view on category (b) changes, the BBC will want to understand the likelihood and scale of any adverse competitive impacts net of any positive impacts. To inform this, the BBC will normally take into account a range of factors, including:

- Investment scale (eg what is the incremental level of investment associated with the proposal, both in absolute terms and relative to comparable commercial operators?);

- Distinctiveness (eg how will the proposal differ from commercial services and to what extent is usage likely to be complementary or substitutional?);
- Novelty (eg is the activity taking the BBC into a wholly new market, or significantly expanding its presence in a nascent market?);
- Duration (eg whether the proposed change is permanent; see paragraph 2.5);
- Usage (eg what is the expected change in usage and market share of the service associated with the proposal?; and/or does the proposal change the target audience/s of the service?); and
- Whether there are competitors that are likely to be significantly affected by the change?

2.19 The market context in which the BBC operates will have a direct bearing on judgements about whether a proposal is likely to have a significant adverse impact on fair and effective competition. As part of this, it will be relevant to look at the likely impact of the proposed change on competitors and the supply chain.”

41. The BBC does, where appropriate, take account of the views of third parties in reaching a decision on materiality. Paragraph 2.21 of the BBC Policy states:

“2.21 The BBC will take account, where appropriate, of the views of third parties in reaching a decision on materiality. The BBC’s Annual Plan will reference potentially material changes to the UK public services that the BBC intends to make over the coming year. The BBC may also use other mechanisms to engage interested parties on proposals (See Annex 1).”

42. More generally, Article 12 of the Charter provides that the BBC must observe high standards of openness:

“(1) The BBC must observe high standards of openness and seek to maximise transparency and accountability.

(2) The BBC must ensure that the following are made public as soon as possible –

...

(b) important decisions (and reasons behind them and a summary of the evidence that supports them) concerning changes to the creative remit, work plan and material

changes to the UK Public Services, non-service activities, and commercial activities; ...”

43. Where the BBC considers a change material, the BBC Board will carry out a PIT. If the PIT is met and the Board wishes to proceed, the BBC will publish the proposed change and send a copy to Ofcom for its consideration.

44. On whether the PIT is met, the BBC Policy says at [2.6]-[2.7]:

“2.6 ... The PIT will only be met if the BBC Board is satisfied that a proposal will generate sufficient public value to justify any adverse impact on competition which it is unable, via reasonable steps, to avoid.

2.7 If the PIT is met and the BBC Board decides to proceed, the BBC will publish the proposal and send a copy to Ofcom.”

45. Paragraphs 2.8 – 2.14 of the BBC Policy are headed ‘Ofcom’s role’:

“2.8 Ofcom has a role to protect fair and effective competition when the BBC proposes material changes to its public service activities. It has published its own procedures and guidance as to how it will fulfil this role. Ofcom’s proposed steps are referenced in this document where necessary to explain the end-to-end process for the consideration of material changes.

2.9 Ofcom will consider whether or not a proposed change is material, and notify the BBC of the outcome of that assessment. If Ofcom has not notified the BBC within six weeks of the proposal being published, or if Ofcom has notified the BBC that they do not consider that the proposed change is material, the BBC may proceed with the change.

2.10 If Ofcom considers the proposed change is material, it will conduct either a full competition assessment or a more limited, shorter assessment of the proposal.

2.11 The outcome of Ofcom’s assessment will be a determination to: (i) send the proposed change or elements of the proposal back to the BBC for reconsideration; (ii) allow the change to proceed; (iii) require modifications or conditions to be made before the change proceeds; or (iv) find that the BBC may not proceed with the proposed change. Ofcom may only block a change or make it conditional on modifications following a full competition assessment and not a shorter assessment. Ofcom is required to reach a determination within six months.



2.12 If the BBC does proceed with a change it will be the same as that published in all substantive respects and will be implemented in so far as possible in accordance with the timeframes indicated in the published proposal.

2.13 The BBC will keep Ofcom apprised of developments that may lead to material changes, including in the Annual Plan each year and in regular discussions.

2.14 The following sections provide guidance on the procedures, typical timescales and approach that the BBC will generally adopt when considering material changes to the BBC's public service activities."

46. If the BBC does not publish the proposed change and proceeds in the absence of a PIT, but Ofcom concludes that the change is, in fact, a material change, Ofcom may direct the BBC as follows (see Framework Agreement, [9(6)]):

"(6) Where Ofcom consider that a change to the UK Public Services is a material change and the BBC has failed to publish the proposed change, Ofcom may direct the BBC-

(a) to carry out a public interest test and, if the test is satisfied, publish the proposed change; or

(b) to stop carrying out the change in accordance with such directions as Ofcom consider appropriate."

47. Paragraph 4.33 of the Ofcom Policy states:

"Materiality

4.33 In relation to materiality, the introduction of a 'new UK Public Service' should be reasonably easy to identify. The situation is more complex for other changes, where we will consider whether they 'may have a significant adverse impact on fair and effective competition'. A non-exhaustive list of factors we may take into account when assessing the potential significant adverse impact of a change include:

- the indication of a possible adverse impact on fair and effective competition (we will consider at a high level the factors set out in our guidance on our analytical approach at Section 5);
- whether fair and effective competition may be adversely impacted rapidly or irreversibly, for example in a small or new market;

- how similar the BBC proposal is to commercial offerings that currently exist or are likely to emerge;
- the incremental costs associated with the proposed change in absolute terms and relative to comparable commercial operators (while by no means determinative, the significance of any adverse impact is likely to be greater if costs are higher, all other things being equal);
- whether the BBC is entering into a new or embryonic market area (while there can be substantial value in the BBC pioneering new types of service, there may also be particular concerns about impact in emerging areas);
- whether there are competitors (or an individual competitor) that are likely to be significantly affected by the change.”

### **The facts in more detail**

48. Filling in a little bit more of the detail, the BBC launched R1D on 9 October 2020. Along with recognised radio services such as Radio 1Xtra, R1D is a ‘spin-off’ from, or brand extension of, Radio 1. Like Radio 1Xtra, R1D has a 24 hour a day, seven days a week linear schedule of content. ‘Linear’ here refers to the continuous broadcasting of programmes on one station or channel following a schedule determined by the broadcaster. It is live at the time of broadcast (though a catch-up facility may be available), and is to be contrasted with on-demand (non-linear) services such as podcasts, where the listener calls the programme up as and when.
49. In bare outline, the Claimant says that R1D is a new radio service, and so the BBC was bound to conduct a PIT because that meant its introduction was a material change to the BBC’s UKPSs.
50. Mr Otty said that R1D is presented and accessed on the dial of BBC Sounds in a way similar to (the Claimant would say indistinguishably from) the BBC’s radio services – properly so-called - which are also available there; it is included in the BBC Sounds list of ‘Stations & schedules’ in a way which the Claimant says is indistinguishable from other radio services; it has an ‘utterance’ for smart speakers that is used in the same way as for other radio stations (eg, ‘Alexa, play Radio 1 Dance ...’); it has programmes and presenters; and, of course, it has the word ‘Radio’ in its title.
51. Mr Otty said that all of this shows that R1D is a radio service for the purposes of the broadcasting regulatory regime even though it is not accessible via DAB, FM, etc.
52. Ofcom and the BBC say it is not a radio service, because it is only available online and is not broadcast. It therefore forms part of BBC Online for the purposes of Sch 1 to the Framework Agreement, and is not a new UKPS so as to have required

a PIT. (I will say more later about [7(7)(b)] and whether R1D was a material change because of its effects on competition in relation to Ground 2).

53. The following are what strike me as key points of the evidence.
54. The BBC historically provided two BBC iPlayer offerings: (a) iPlayer TV; and (b) iPlayer Radio. The latter offered a live stream of BBC radio services, off-schedule episodes of BBC Radio programmes, and off-schedule podcasts.
55. In 2018 the BBC launched BBC Sounds as a replacement for iPlayer Radio and BBC Music. The latter was a dedicated website and app providing access to music preview clips, recordings of live sessions and music playlists. BBC Sounds brought together all of the BBC's radio, music offerings and podcasts in one place, accessible online and through the BBC Sounds app.
56. The BBC (and Ofcom) concluded that the launch of BBC Sounds was not a 'material' change to the UKPSs, in that it did not constitute a new UKPS, but fell within BBC Online, and the bringing together of existing content and introduction of new functionality was not expected to have a significant adverse impact on competition. There was no challenge to these decisions.
57. Christopher Rowsell, the BBC's Controller of Regulation in the Policy Department, said in Rowsell 1, [34], that BBC Sounds and its amalgamation with BBC Music was part of the BBC's ongoing commitment to reinvent itself for a new generation of listeners, and to bring together the BBC's live and on-demand radio, music and podcasts into a single personalised product. At [35] and [40]-[41] he said:

"35. The Sounds Phase 1 materiality assessment concluded that (a) the proposal to combine iPlayer Radio and BBC Music did not constitute a new UK Public Service; (b) the bringing together of existing content and certain functionality from iPlayer Radio and BBC Music and the addition of new functionality (such as personalised discovery and continuous play) was BAU [business as usual]; and (c) increasing the volume of off-schedule podcasts and off-schedule music mixes was not a material change as it was not expected that it may have a significant adverse impact on fair and effective competition. In particular, as regards point (a), we concluded that BBC Sounds was not a new UK Public Service because it would form part of BBC Online, which is one of the existing UK Public Services under Schedule 1 to the Agreement and therefore represented a change to that existing service.

...

40. ... the BBC's materiality assessment for BBC Sounds was subsequently shared with Ofcom. Ofcom agreed with the BBC that the proposals for BBC Sounds did not involve

a material change and therefore Ofcom did not direct the BBC to carry out a PIT.

41. BBC Sounds was officially launched in October 2018, so has been available for three years. It brings together all of the BBC's radio, music and podcasts in one place with more than 80,000 hours of audio on the app, website or voice activated devices and makes it easier for listeners to discover and enjoy more content from the BBC by giving users a more relevant and personalised experience.”

58. Mr Rowsell said that the BBC had long been aware of the need to appeal to younger and more diverse audiences and has been encouraged to respond to this need by Ofcom. In November 2018, following the launch of BBC Sounds, the BBC began to consider expanding its audio portfolio to appeal to this target market. Early proposals included a range of options, including broadcast radio stations, DAB brand extensions and online streams. A brand extension or spin-off is a way for a broadcaster to leverage its well-known brands, eg Radio 1Xtra is a brand extension of Radio 1.
59. Specifically in relation to R1D, Mr Rowsell explained in Rowsell 1, [42]-[45]:

“Origin and development of Radio 1 Dance

42. To understand the reasons for the inception of R1D, it is important to note that it has been a consistent theme of Ofcom's annual reports that the BBC needs to do more to attract younger listeners and those from underserved communities, such as the BAME community. In its annual report for 2019, Ofcom noted that it still had the concerns it had expressed the previous year (2018) regarding the BBC needing to take ‘significant further steps to engage young people’ and improving ‘how it portrays the whole of UK Society’. That said, Ofcom also recognised that the BBC had taken some steps to address these issues, which included the launch of BBC Sounds.

43. Attracting younger and more diverse listeners has therefore been, and indeed remains, a key area of focus for the BBC in the delivery of its Mission and Public Purposes (as defined in the Charter). This can be seen from the references in the BBC's recent annual plans to the prioritisation of younger and more diverse audiences and how this will be achieved. For example:

(a) The BBC's annual plan 2017/2018 refers to ‘reinventing audio through a refreshed radio product’ and to doing “for audio over this Charter what iPlayer did for video-on-demand in the last”. This ultimately led to the proposal for BBC Sounds in 2018.

(b) In the annual plan for 2018/2019, the BBC noted that ‘as part of our ambition to reinvent radio for a younger generation, we will continue to review our services to address changing audience needs as well as maximising public value for licence fee payers’.

(c) The BBC's annual plan for 2019/2020, it was noted that ‘This year our aim is firmly to establish Sounds as the best place to listen to all BBC audio - music, podcasts, and radio. We want to add new content, further improve the user experience, and grow reach and time spent with the service. A major part of our focus is on new formats and podcasts that will bring us new users. We want to accelerate the development of new series, new voices and new formats that can really cut through - in particular with younger audiences’.

44. The origins of the R1D stream (the ‘R1D Stream’) should therefore be considered in this context of prioritising younger and underserved audiences, and the BBC's ambition to reinvent its audio offering and provide new formats to attract them. The R1D Stream did not, therefore, start off as a project in its own right, but initially started as one element of broader changes to the BBC's overall audio strategy.

45. As early as November 2018, there were proposals underway to refresh the BBC's audio strategy. The proposals broadly fell into two categories:

(a) The first category was proposals to create new DAB brand extensions, which would involve the creation of new UK Public Services and would therefore require a PIT.

(b) The second category was proposals which might need to be assessed for materiality (if they were not business as usual changes) and would therefore require a PIT if they were changes that ‘may have a significant adverse impact on fair and effective competition’. This included proposals for a number of ‘internet stream[s]’.”

60. The BBC has always accepted that the creation of any spin-off or brand extension would involve the creation of a new UKPS and require a PIT, provided that the new station was broadcast on DAB (Rowse 1, [47]).
61. In April 2019, the BBC commissioned MTM (a market research and media strategy firm) to conduct research to assess the appeal of some of these options. The research concluded there was interest in a specific dance offering, and it estimated listener figures for a broadcast radio station focusing on dance music (Rowse 1, [66]).

62. By the end of 2019, the BBC had decided to progress the proposal for an online stream for dance music, in order to address the concerns raised by Ofcom about underserved audiences in the short term, while conducting the PIT process for its broader audio proposals. Mr Rowsell said at [46]-[49] of Rowsell 1:

“46. The Charter and Agreement sets up a clear scheme which distinguishes between television, radio and online services. This is clear in the Charter from Articles 7, 13 and 63. The list of existing UK Public Services contained in Schedule 1 of the Agreement sets out four categories of services. The broadcast services are set out in subparagraphs (1), (2) and (3) of the list of existing services. Respectively these are the UK-wide TV services (BBC One, BBC Two, BBC Four, CBeebies, CBBC, BBC News, BBC Parliament and BBC Red Button); the UK-wide radio services (Radio 1, 1Xtra, Radio 2, Radio 3, Radio 4, Radio 4 Extra, Radio 5 Live, Radio 5 Live Sports Extra, BBC 6 Music and BBC Asian Network); and the regional/national television and radio services (BBC Radio Scotland, BBC Radio Nan Gàidheal, BBC Radio Wales, BBC Radio Cymru, BBC Radio Ulster and BBC Radio Foyle, BBC Local Radio and BBC Alba). These services are also described in the Agreement as the UK Public Television Services and the Principal Radio Services, whereas the BBC’s online offerings are clearly grouped in subparagraph 4 (as described above).

- (i) 47. Therefore, we were always aware that any brand extensions on DAB (ie, new broadcast radio stations) would constitute a new UK Public Service and require a PIT, since all other similar radio stations, eg, Radio 1Xtra, Radio 4 Extra and 6 Music are listed as separate UK Public Services under the Agreement. This is consistent with our approach to the launch of the new BBC Scotland and BBC Three broadcast TV channels.

48. Our view in relation to the online stream brand extensions was that they would form part of BBC Online as an expansion of BBC Sounds rather than be UK Public Services in their own right. This is consistent with the treatment of the online BBC Three service listed as part of BBC Online in the list of UK Public Services. It is also consistent with the BBC iPlayer PIT in 2019, where it was clear that the significant expansion of the availability of programmes on BBC iPlayer did not make iPlayer a new

UK Public Service and that even the much expanded BBC iPlayer remained part of BBC Online.

49. By the end of 2019, the overall strategy was to conduct a PIT in relation to the DAB brand extension plans. However, given that the PIT process takes at least 9-12 months, the decision was taken to innovate within BBC Sounds by introducing online streams - including the R1D Stream - ideally by April 2020. This would enable the BBC to attract the underserved audiences identified by Ofcom and address the concerns it had raised in the shorter term.”

63. On 8 November 2019, Jonathan Wall, Controller of BBC Sounds, emailed the Head of Product at BBC Sounds, Lloyd Shepherd, outlining an ‘Idiots guide’ to the proposed changes to BBC Radio:

“Ok Idiots guide –

jp [James Purnell, the BBC’s Director of Radio and Education] has asked Tony Pilgrim from r4 to lead on project Oslo (in honour of Norway radio going from 4 stations to 15!) Tonys main job i think is to get a range of DAB stations into a BBC board paper in Dec so that we can crack on with a PIT. For what its worth i think the timescale is ridiculously fast for such an important piece of work and i will be suggesting we aim for a Feb BBC board.

Concentrating on Sounds and Brand extensions. And not requiring a PIT.

The plan is - To launch Dance ... in April ... Not forgetting we want to also do the Glastonbury pop up again in June.

We then aim to do a 2nd wave of probably more ... ‘station streams’ in the dial in the Autumn.

What are Dance ...

So take Dance as an example - the content would consist of these elements -

Live simulcast of the 2 or 3 dance shows per week on r1.

Taped Reversions of the above.

Music mixes that are of the dance genre

Some archive Dance shows

And some new OD first dance shows that will be played overnight on r1 or 6 music etc, but are really being made to add content to this Dance channel.

All of the above plays to the line of what we can do without regulatory change.

They would be a Sounds first embryonic version of a bigger DAB and Sounds station that would come after a PIT.

So they need to feel like stations and thus be 'in the dial' i think, even though its not full on live radio.

My suggestion is we should let Ben Chapman and Chris K to work together to decide how technically this will work, how it appears on Sounds, Etc. An editorial team will be appointed early new year to decide on the scheduling etc.

As i said, if Dance are ... the first 2 of at least ... it goes back to that other point you raised about how busy do we want this already busy dial to be.

...

And Brand extensions - editorial and product to have Dance up and running in April.

So going back to the very first question - its probably right to have a target date in of april 23 to aim for.

Hope that makes it bit clearer amidst the swirling noise."

64. As I shall come to, the Claimant places particular weight on this email, which it says shows that all along the BBC was planning its dance stream to feel like a radio station, and that it was always the BBC's plan to create content specifically for R1D, albeit that content would be broadcast elsewhere.
65. In his witness statement of 19 May 2022, Mr Wall explained this email as follows (at [11]-[14]):

"11. Although we were at an early stage, I had by this point spoken to one of my regulatory colleagues regarding what might be permitted without regulatory approval and she had explained the relevant framework, although there had been no formal advice or approval from the BBC's regulatory team at this stage. I was therefore considering what options were available within this framework as regards the format, structure, and content of the Radio 1 Dance stream (R1D Stream) which would enable the curation of digital content for BBC Sounds in line with the BBC's broadcast strategy.

12. What would be permitted from a regulatory perspective is, however, only one part of the process. Another part of the process is understanding what can actually be done at a technical level. That's where Mr Shepherd comes in, whose role as Head of Product meant that he was responsible for



bringing ideas for BBC Sounds to life. It was therefore important that I kept him informed of any plans floating around as nothing would be possible until the product team was on board. It was also important to bring the product team into the loop early on, as setting up a new product like the R1D Stream is by no means an overnight process, taking weeks rather than days.

13. In that context, this email was intended simply to bounce around some ideas and to bring Mr Shepherd up to speed on what I was thinking the R1D Stream might look like. A fundamental part of that was making clear to Mr Shepherd that I was envisaging the stream as a schedule of output, rather than a music mix or a podcast. There are differences between the three and where they are placed within the BBC Sounds app is also different. For example, for consistency, output that is presented in a timed schedule is placed on the Sounds dial (although listeners can in practice listen to content on R1D from any time slot according to their preference).

14. I accordingly made clear to Mr Shepherd that I envisaged R1D feeling like a station and appearing in the Sounds dial (albeit it would comprise of existing content and clearly would not connect the listener to a live radio station such as Radio 1 or 2), along with other schedules of output, rather than being accessed somewhere else in the app. However, I suggested to Mr Shepherd that we let certain team members work on '*how technically this will work, how it appears on Sounds, etc*' and noted that an editorial team was to be appointed a couple of months later."

66. Following media reports in *The Times* in late November 2019 about the BBC's plans for online spin-offs of its radio stations, on 27 November 2019 the Claimant wrote a detailed letter to Ofcom setting out some concerns. The letter began:

"I am writing to you regarding the BBC's reported ambition to launch a number of new radio stations in attempt to grow its audience and compete directly with existing commercial radio services (BBC woos listeners with radio spinoffs, *The Times*, 23 November 2019).

I appreciate this report does not constitute a specific proposal (although the BBC has not refuted any of these claims) so I would be grateful if Ofcom could help to clarify the position and urgently confirm what communications it has had with the BBC about the starting of new services or amending of existing services. In the meantime I wanted to be very clear at this early stage of the position of UK

commercial radio should such formal proposals be brought forward by the BBC.”

67. On 28 November 2019 Mr Wall sent an email to James Purnell, reporting back on a conversation he had had with Siobhan Kenny, the Claimant’s CEO. Mr Wall wrote to Mr Purnell:

“It reminds me of the noise we will create on dance in Sounds in April. And that we cant be seen to do things in a cloak and dagger way. Eg Lorna, if we are making new OD shows for both channels, we need to work out where they get played out overnight on our networks. We cant be housing them on local radio for example.

We need to stick to a clear story of creating content we want to make for our existing stations and yet packaging for Sounds.”

68. Mr Wall addressed this email in his witness statement at [15]-[18]:

“15. The second email that Radiocentre has placed its own interpretation on is an email from me to various individuals at the BBC on 28 November 2019. I had just had a call with Siobhan Kenny from Radiocentre, which had taken place in light of an Article in *The Times* dated 23 November 2019 regarding the BBC’s plans to expand its audio portfolio that I explained had ‘thrown [the] cat amongst the pigeons’.

16. I noted to the team that commercial radio’s reaction to the Article reminded me of ‘the noise’ we were likely to create by launching R1D. I then went on to explain that we could not be seen to be doing things ‘in a cloak and dagger way’ by which I meant that we needed to ensure that our plans for R1D were carried out properly and in accordance with both the letter and spirit of our regulatory obligations.

17. By way of example, I referred to the treatment of any new on demand dance shows. I also referred to such new dance shows in my 8 November 2019 email to Mr Shepherd. I explained in these emails that we would be playing any such new shows overnight on network radio, for example Radio 1, before they would then be played on R1D, rather than first playing the new shows overnight on local radio. The latter option was never our intention as we wanted these shows to be very much part of and owned by the Radio 1 brand. It was important therefore that they were played on Radio 1 first.

18. This email shows that actually what I was saying was that we had to do this properly, otherwise we were clearly going to upset commercial radio. Linked to that, I finished

my email by saying that we needed to *'stick to a clear story of creating content we want to make for our existing stations and yet re packaging for sounds.'* The message being conveyed to my colleagues here was that we needed to stick to what we had laid out and be clear, consistent, and transparent about it, as we were going to have to tell the story of R1D on future occasions."

69. In December 2019, the Claimant met with Ofcom to discuss its concerns. Following that meeting, on 19 December 2019, Siobhan Walsh, Director of Content Policy at Ofcom who took the Decision that is challenged in these proceedings, explained to Ms Kenny that Ofcom did not yet know the BBC's full plans and so could not comment on whether any radio extensions would amount to a new UKPS. Ms Walsh reassured Ms Kenny, however, that Ofcom would 'of course, consider this carefully when the BBC puts its plans to us'.
70. On 11 January 2020, Mr Rowsell emailed BBC colleagues and under the heading 'Sounds only services' noted that the 'Sounds-only Dance proposal [is] based on existing permissions' but that the BBC would 'need to assess where these [services] start becoming "online radio stations" and what the implications of this are for materiality and competition. Quite quickly they are going to be up against limit of the permissions.'
71. On 26 January 2020, Mr Rowsell sent a further internal email on this topic. Under the heading 'outside the PIT' he wrote 'Launch of Dance (and possibly others) on Sounds if – and only if – entirely based on linear catch-up or music mixes and off-schedule podcasts within limits set in approved 2018 materiality assessment. On this basis Dance will launch in April.' He noted that he would take Ofcom through the proposals at a meeting on 11 February 2020.
72. The next day, on 27 January 2020, Bauer wrote to the BBC explaining that they did not have clarity on the 'rumoured launches' and stating that commercial radio had a 'keen interest' in properly understanding the BBC's plans. On 19 February 2020, the Claimant wrote to the BBC again noting a lack of transparency, and requesting further information.
73. These interventions by commercial radio are important, because one of the complaints in this case (under Ground 3) is that there was procedural unfairness because of, at bottom, a lack of transparency by the BBC. But I think the chronology shows that from an early stage commercial radio was aware – albeit perhaps only at a high level – of the BBC's plans for a dance stream.
74. Further to this, on 24 February 2020, Mr Wall wrote to Ms Kenny. He stated that the BBC was:

"... going to be using curated streams on Sounds to group together content that would already be on the platform so that it makes it much easier for listeners to navigate and discover it. We are planning to have a Radio 1 Dance stream to curate our current and archive dance content ... Whilst this is part of our business as usual activity we are happy to

keep you abreast of those plans as they develop out of courtesy and to be as transparent as possible”.

75. He explained that (in the BBC’s view), ‘[o]rganising existing content effectively on our own app’ would not amount to a material change; but that ‘streams on Sounds that go beyond curating existing content’ will be subject to consultation and the ‘established regulatory framework’ will apply.
76. On 26 February 2020, Mr Wall published a public blog post which stated that the BBC was working on ‘bringing some of our existing specialist music content to listeners in new streams on Sounds’ because the BBC considered it important that young persons could ‘easily listen to their favourite BBC content outside of the traditional, and often multi-genre, linear schedules. The first of these will be a Radio 1 Dance stream. [...] This isn’t about us creating new dance content for Sounds as we aren’t. What we are doing is bringing together the brilliant existing dance programmes we have and making it really easy for current and new listeners to find them by putting the stream in the Sounds dial’. It was said that R1D would launch in the spring.
77. On 2 March 2020, Ms Kenny wrote to Ofcom to express concerns about the BBC’s plans. She reiterated that commercial radio was concerned about the fact that the BBC appeared to have ‘taken the view that much of this new content does not meet [the materiality threshold] or has tacit approval from Ofcom as a result of previous materiality assessments’. Ms Kenny specifically sought Ofcom’s view on ‘the distinction that the BBC is drawing between “brand extensions” of existing radio services (that it seems to accept would be material and require a [PIT]) and music mixes or “curated streams” of existing radio services (that it claims would not)’. Ms Kenny observed that the distinction was not clear and did not seem relevant in terms of market impact and materiality.
78. Later that day, Kevin Bakhurst (of Ofcom) responded to Ms Kenny. He explained, as regards R1D, that Ofcom had asked the BBC for further detail:

“Thank you for your letter and for calling earlier. I have spoken to our legal team here and they confirmed that it is general practice when we find a proposal to be ‘not material’ that we do not publish the outcome, the detailed analysis and the workings - although we sometimes do that by exception. This has generally been accepted as being proportionate and reasonable and clearly we do the requisite work in these cases.

In the case of BBC Sounds Phase 1, you have raised some questions over what we found to be not material. In these circumstances - and as you know we always want to be as transparent as possible - I have asked the team to draw up the main proposals included in Phase 1 that we found to be not material.

Further - on the questions you raised on the BBC's proposed Radio 1 Dance stream - our team is having ongoing

discussions with the BBC over the next phase of BBC Sounds and I have asked them to make sure that we are given further and clearer detail on what this proposed stream looks like in order to see if it is captured by our original consideration of Phase 1.

Lastly - I would confirm my offer that my team and I are happy to come to a future Radiocentre Board meeting to hear any thoughts or concerns over the future of BBC Sounds from your members directly.”

79. On 19 March 2020, Mishcon de Reya, the Claimant’s solicitors, wrote to Ofcom. Its letter expressed concern that no detailed information had been provided as to what R1D would consist of, and that the Claimant was concerned that it was a new UKPS. This letter referenced the correspondence between the Claimant, Ofcom and the BBC earlier in the year.
80. On 20 March 2020 (ie, just before the first COVID lockdown) the BBC confirmed internally that the launch of R1D would be delayed by at least two to four weeks. By 30 March 2020, the BBC was working towards a launch of R1D at the end of May 2020.
81. That timetable slipped again as the health crisis unfolded, however. Mr Rowsell said at [52] of Rowsell 1:

“52. However, in late March 2020, the first national lockdown in response to the Covid-19 pandemic was announced, and this had a major impact on the BBC's audio portfolio extension plans. In particular, the planned PIT consultation for the DAB stations was paused (it was later announced publicly that the BBC was no longer planning to launch DAB extensions), and the launch of the R1D Stream was delayed by at least 2-4 weeks. Shortly after, a decision was taken in April 2020 to place plans for the launch of the R1D Stream on hold indefinitely, out of a concern that dance would be ‘too provocative’ to launch given the impact of lockdown on commercial radio (this decision was subsequently confirmed publicly in the BBC's annual plan for 2020/2021).”

82. Mr Purnell described events over this period in Purnell 1, [8]-[15]:

“8. Throughout 2020, I was in regular direct contact with commercial radio regarding, amongst other things, the BBC’s plans to expand its audio portfolio, including the plan to launch DAB brand extensions and dedicated online-only streams on Sounds.

9. In my experience, in order to be transparent with players in commercial radio about its plans, the BBC will often disclose matters that have not yet been announced publicly

and are otherwise commercially confidential. The BBC's plans to launch DAB brand extensions in 2020 are an example of this. On the other hand, the online-only streams, including R1D, had been announced publicly, for example by Jonathan Wall (Controller of BBC Sounds) in a blog post dated 26 February 2020.

10. My engagement with commercial radio included a number of meetings and calls with Siobhan Kenny, who was at the time the Chief Executive of Radiocentre. I believe that I had a very collaborative working relationship with Ms Kenny and indeed with commercial radio more broadly. I had known Ms Kenny for many years by the time she started working at Radiocentre and we were in regular contact with one another regularly in our respective roles.

11. We always knew that the launch of any DAB brand extensions would require the BBC to carry out a public interest test (PIT) and therefore to consult commercial radio. Accordingly, around the start of March, we began to arrange calls with various key players in commercial radio to let them know that we would soon be launching a consultation. These calls included me briefing Ms Kenny, as well as individuals from Global and Bauer (two other major players in the commercial radio sector). My contact was additional to that being made by other colleagues, such as Jonathan Robertshaw (Senior Head of Strategy-Audio at the BBC) and Jonathan Wall.

12. The intention of those calls was mainly to focus on the DAB brand extensions given it was these plans that required a PIT. As noted above, by this time, the BBC had formally announced its intention to launch a number of curated online-only streams and had confirmed that R1D would be the first of these. I was therefore prepared also to talk about our plans for BBC Sounds.

13. My call with Ms Kenny took place on 30 March 2020. Between scheduling the call and it taking place, the UK government announced the national lockdown, which had a very detrimental impact on commercial radio. I circulated internally a summary of our call, which set out that Ms Kenny and I had discussed 'the plight of commercial radio'. This was a reference to the impact of the lockdown on the radio advertising market, which meant that revenues had been badly affected. As such, Ms Kenny and I ended up using this call to explore how the BBC could support commercial radio.

14. Following this, I was in regular contact with Ms Kenny about how the BBC could help commercial radio, for example we had a further call on 3 April, were in follow-up correspondence after that, and then had another call on 21 April 2020. Indeed, on 12 May 2020, I sent an internal email and noted that we had been speaking to Ms Kenny regularly and I also met with her on 15 July 2020.

15. In my email of 12 May 2020, I noted the steps we had taken to support commercial radio, which at point 1 referred to pausing our proposal for a PIT on further brand extensions and at point 2 as pausing our previously announced proposal to launch R1D on Sounds. I believe I told Ms Kenny that we had taken both of these steps during our call on 21 April 2020, as recorded in a note I circulated following that call. I note that my summary also records that I told her that the audience context and Ofcom imperative would not disappear – ie, the need for the BBC to evolve its audio offering was still going to exist after the lockdown - but that we would let her know before announcing anything further.”

83. In an internal email dated 21 April 2020, Mr Purnell described a call he had had with Ms Kenny:

“Amicable call.

...

PIT/Radio 1 Dance - I said we'd paused but that the audience context and Ofcom imperative wouldn't disappear. I said we'd come back before announcing anything.”

84. According to the Claimant, in May 2020 the BBC was saying internally that R1D would launch at the end of May but did not tell the Claimant. In fact, that did not happen.
85. Following the easing of some lockdown restrictions in or around May 2020, the BBC decided to proceed with some preparatory work for the R1D online stream. To that end, in June and July 2020 the BBC conducted an assessment of the materiality of the proposed change. The process is described in Rowsell 1, [53]-[73] and Rowsell 2, [15]. The conclusion of that assessment was that the proposal would not be a material change to the UKPSs. He concluded at [73]:

“73. Given all of the above we concluded that the launch of the R1D Stream did not constitute a material change as:

(a) It represented a modest development as a stream within BBC Sounds, enhancing discovery and navigation of the BBC's existing Dance content;

(b) Our analysis suggested that listening would be taken from a range of sources and that the likely impact on commercial radio would be to divert between 0.02% and 0.03% of its total listening hours to the BBC;

(c) If R1D were to achieve a high impact (ie, Scenario 2) [ie, listening figures equivalent to Heart Dance], it would take up to 0.82% of Heart Dance hours; and

(d) This very low level of impact would not amount to a significant adverse impact on fair and effective competition and would have no significant impact on commercial radio's financial performance or incentives to invest."

86. By June 2020, internal BBC documents showed a R1D launch around September was being planned.
87. On 29 June 2020, an internal BBC email stated that Mr Purnell's 'inclination' was to 'hold off until September and engage Ofcom and commercial radio at that point. The rationale being that this avoided a long summer of objections and lobbying'. The Claimant places considerable emphasis on this email in particular in relation to Ground 3 and parts of Ground 4.
88. Later that day, Mr Rowsell emailed BBC colleagues that the BBC's materiality assessment (the BBC MA) for R1D be sent to Ofcom before the summer break, and setting out certain options for the timing of engagement with the industry.
89. In response, the following day, Mr Robertshaw, Senior Head of Strategy, recommended that the BBC should speak to commercial radio 'in say Sept[ember]' and tell Ofcom that 'we are going to talk to commercial radio ahead of any public announcement'.
90. On 1 July 2020, Ofcom met with the BBC. Ofcom's note of that meeting records that the BBC told Ofcom that R1D would 'not involve any new content' and that Ofcom asked the BBC to 'set out its engagement with third parties' in its materiality assessment and had been told by the BBC that 'it would engage with stakeholders and reflect this in the [materiality assessment]': see Walsh 2, [24(1)].
91. Mr Rowsell's evidence is that during this meeting he told Ofcom that the BBC would 'probably pre-brief commercial radio before the launch of the R1D Stream [ie, after the materiality assessment] but that we already knew their position [...] and that we therefore doubted whether earlier engagement would provide any further illumination'. Mr Rowsell states that 'Ofcom seemed to accept this approach': Rowsell 1, [85]; and see similarly Rowsell 2, [20]; and his email to Jonathan Robertshaw on 3 July 2020.
92. On 30 July 2020, Mr Purnell gave a webinar in which he explained that the BBC would not proceed with brand extensions but would 'innovate within Sounds'; he did not mention R1D on this webinar.



93. Later that day, Mr Purnell informed Ms Kenny that the BBC would not be proceeding with its plans to launch DAB brand extensions but would be ‘innovating within Sounds’. Mr Purnell’s recollection is that he also ‘expressly referred to the BBC’s intention to launch R1D’ but he acknowledges that he ‘cannot recall precisely’ what he said: Purnell 1, [17]-[19].
94. There is a divergence here between Mr Purnell’s tentative recollection and what Ms Kenny recalls of this conversation. She is adamant that at no point was R1D mentioned, and that if it had been, she would have (a) pressed Mr Purnell for further detailed information; and (b) immediately informed the Claimant’s Board (neither of which she did): Kenny 1, [16]-[18]; Kenny 2, [7]-[10].
95. Mr Otty said I did not need to resolve this apparent conflict, but also invited me to prefer Ms Kenny’s evidence as it is unequivocal and consistent with the Claimant’s (alarmed) reaction when it was told in September 2020 that R1D was to launch (as set out below). It is, in any event, common ground that Mr Purnell did not give the Claimant any details about the R1D service on this occasion.
96. The following day, on 31 July 2020, the BBC submitted its materiality assessment to Ofcom. This said: (a) that R1D would be based on existing content and was not intended as a vehicle for new or exclusive content; (b) that the BBC had concluded that R1D was not a new UKPS nor a material change to an existing UKPS; (c) that the BBC was communicating with stakeholders to make them aware of the planned launch; and (d) that it had already engaged with the Claimant to make it aware that the BBC would be making ‘brand extension streams within Sounds’: see [1], [3], [8], [10], [12], [18], [20], [22], [33] of the materiality assessment, and Rowsell 1, [53]-[74]. I should quote [12] of the assessment:

“12. The BBC is communicating with stakeholders to make them aware of the planned launch of the Radio 1 Dance stream. In July 2020, we confirmed publicly that the BBC is not planning to launch DAB extensions. Instead, we noted that the BBC is focusing on innovating its audio offering within BBC Sounds. The BBC has also engaged with Radiocentre to make them aware that the BBC intends to create brand extension streams within Sounds. The launch of the Radio 1 Dance stream is planned for October 2020, and this will be announced in late August.”

97. On 14 August 2020, Mr Ball of Ofcom wrote to Ms Buxton at the BBC in order to enquire about the BBC’s engagement with third parties. In particular, Ofcom asked the BBC whether it had had any engagement with industry since stating (in May 2020) that plans for R1D were on hold. I should quote this email in full as it is central to the Claimant’s argument under Ground 3:

“Thank you for the BBC’s materiality assessment of the proposed Radio 1 Dance stream on Sounds. We have had an initial discussion, and have some questions about the nature of the BBC’s engagement with third parties on the proposals.

The issue of third party engagement is of particular importance for us in this case. Significant concerns have previously been raised in connection with this change by third parties, with Ofcom as well as the BBC. We think it is important that there is effective engagement with the commercial radio sector in particular before these plans are confirmed.

It would be helpful if you could provide further detail on the engagement that you have had with third parties since the stream was first announced in February this year, including the concerns that have been raised with you by the commercial radio sector, and how you have taken those into account in shaping the proposals and reaching a view that they are not a material change.

The BBC's annual plan for 2020/21 stated that the plans for the Radio 1 Dance stream were on hold, so we would be keen to know if you have had any further engagement with industry since then and, if so, what concerns have been raised and how they have been taken into account by the BBC.

In addition to the above, it would be helpful if you could provide us with the full MTM survey report that you refer to in the materiality assessment.

I will let you know if we have any further questions on the materiality assessment.”

98. Following receipt of this email, the BBC made plans to discuss R1D with Global and Bauer in early September 2020. On 14 August 2020 Mr Rowsell emailed colleagues:

“This is what we said in the MA [at [12], which I quoted earlier]:

The BBC is communicating with stakeholders to make them aware of the planned launch of the Radio 1 Dance stream.

In July 2020, we confirmed publicly that the BBC is not planning to launch DAB extensions. Instead, we noted that the BBC is focusing on innovating its audio offering within BBC Sounds. The BBC has also engaged with Radiocentre to make them aware that the BBC intends to create brand extension streams within Sounds. The launch of the Radio 1 Dance stream is planned for October 2020, and this will be announced in late August.

I think we just need to unpack this a bit:

- Restate exactly what we said in Annual Plan, ie, on hold but under review
- Where did we announce this in July. Can we source and provide detail.
- For the Radiocentre discussion - note date / attendees, eg, James P, Siobhan K, etc.
- Have we had any further approaches from Global, Bauer, etc. at any level on this? Has there been any other engagement with them since July announcement - if so and wasn't raised that is pertinent."

99. On 16 August 2020 Mr Robertshaw emailed Mr Rowsell and others:

"July was James' RTS speech. Cc-ing Laura on that

Haven't had Global or Bauer engagement since. We were planning to in early Sept.

I spoke to Will at Global after the original pre Covid announcement. His main point was that he considered this to be a radio station and wanted to know how it was subject to regulatory review. He didn't share any other specific concerns (though generally didn't think the BBC needed to do more radio for young audiences)"

100. On 26 August 2020, the BBC then replied to Ofcom setting out its past and planned engagement and stating that 'On 30 July James Purnell [...] spoke with Siobhan Kenny of Radiocentre to let her know that we were not planning to launch DAB extensions, but would proceed with the creation of streams within Sounds, including Radio 1 Dance'. (These emails form part of the basis of the Claimant's Ground 3; as I have noted there is a dispute about this specific conversation).
101. On 8 and 11 September 2020 Mr Robertshaw informed Bauer and Global that R1D would launch in October.
102. There then followed, in September, various communications between Ofcom, the BBC and the Claimant.
103. On 14 September 2020, the BBC wrote to Ofcom to inform them that Mr Robertshaw had discussed R1D with both Global and Bauer but that those parties 'didn't have anything specific to say about our proposal or impact on them. The clear message that we got from each was that it was a concern about the process and transparency/regulatory principle.' That evening, hearing of these discussions with Bauer and Global, the Claimant asked the BBC about plans for R1D.

104. On 15 September 2020, the BBC spoke with the Claimant and subsequently noted that the Claimant was particularly concerned about process and transparency and the fact that R1D was a new radio station which would compete with commercial offerings.

105. The same day, Mishcon de Reya wrote to Ofcom expressing concern about the plans for R1D and the alleged lack of consultation. Its letter complained that the BBC had not engaged with relevant stakeholders about R1D and that in particular commercial radio did not have:

“... detailed knowledge as to the content, format, tone, music/speech ratio, exact genres, age of music, profile of presenter (if any) or any other pertinent information about the Radio 1 Dance stream, despite its clear potential to affect competition to the detriment of the commercial radio sector”.

106. Mishcon de Reya urged Ofcom engagement with the BBC on R1D:

“Radiocentre's members have no doubt that this new service is intended to win listeners from the dance channels currently offered by the commercial radio sector and will presumably be supported by the full range of marketing and cross-promotion opportunities uniquely available to the BBC, such as BBC One TV. The BBC is engaging in activity which will have an adverse effect on competition. Ofcom must step in. These developments require the arguments, both legal and economic, in relation to the BBC's proposals to be debated in public through a proper consultation process as anticipated by the BBC's Charter and Agreement.

Please confirm as a matter of urgency that you will engage with the BBC and seek its confirmation as to the requirement for a PIT. The BBC intends to just press on and are preparing to launch in October, therefore there is no room for delay.

...

The commercial radio sector is rightly concerned that its ability to compete for listeners is not unfairly constrained by the BBC introducing new services without effective regulatory oversight.”

107. I now turn to events which led directly to the Decision.

108. On 16 September 2020, Ofcom held a meeting to consider the BBC MA. An internal paper had been prepared in advance of this meeting entitled ‘R1 Dance Stream: BBC materiality assessment’. The recommendation in the paper was as follows:

“1.1 The group is asked to agree to the team's recommendation that:

- the BBC's proposal to launch the R1 Dance stream, as set out in its July 2020 materiality assessment, is not a material change under the BBC Agreement;
- we write to the BBC immediately, explaining that we will not require a Public Interest Test (PIT) to be carried out in relation to the proposed launch of the R1 Dance stream.

1.2 The group is asked to consider whether we should also:

- publish a final determination on the BBC's materiality assessment, and potentially an announcement of our intended further work on BBC Sounds, before the launch of the BBC service in October; and
- undertake a scoping exercise for a more general piece of work about the impact of BBC Sounds on the market (see paragraph 2.27).”

109. Paragraph 2.1 said:

“In July this year, the BBC provided us with a materiality assessment for a R1 Dance stream, which it plans to launch in October. The R1 Dance stream will be a radio-like continuous streaming service available online-only. It will feature existing content from R1 and R1 Xtra and music mixes from BBC Sounds but no exclusive content. It will be 'radio-like' because much of the content will have presenters. It will also appear on the 'dial' section of BBC Sounds alongside other radio stations.”

110. Ofcom had two principal issues to consider: whether R1D involved the carrying out of an activity as a new UKPS (by virtue of being a radio service, rather than part of BBC Online); and whether it was a material change to an existing UKPS by reason of its effect on competition.
111. The paper did not directly address the first issue. Ofcom's position is that it did not need to, because the answer was obvious, namely R1D is part of BBC Online.
112. On the second issue, Ofcom agreed with the BBC's conclusion that R1D was not a material change to the UKPSs, finding that the stream brought together 'content that would be available on BBC Sounds, in any event' ([2.7(2))). Ofcom emphasised that R1D would feature existing content only, with no exclusive content and no new content: see, eg, [2.1], [2.7], [2.15]. As to stakeholder engagement, Ofcom recorded its understanding that the BBC had told the Claimant of its plans on 30 July 2020, and had later informed Bauer and Global,

reporting that the issues raised by those parties were wider concerns about transparency ([2.18]-[2.20]).

113. Mr Rowsell said at [101]-[102] of Rowsell 1:

“101. On 16 September, Siobhan Walsh rang me to confirm that Ofcom was in agreement that the R1D Stream was not material and that therefore a PIT was not required. By virtue of these proceedings, I have seen an Ofcom memo of the same date confirming this outcome. During the call, Ofcom noted again its concerns about the continued lobbying by commercial radio alleging a lack of transparency in the process. I explained that Global, Bauer, and Radiocentre seemed to be voicing that they were unhappy with the BBC’s plans, rather than raising any formal complaint. I noted that, in the past, stakeholders such as Wireless Group Limited have had concerns they have made their case, provided evidence, and explained what rules they think have been breached, whereas none of Global, Bauer, or Radiocentre had taken such an approach here, which I considered to be indicative of them not wanting to engage with the BBC on a substantive level.

102. I then had a follow up call with Ofcom on 17 September 2020, during which Ofcom confirmed that it would be publishing a letter on its website stating that it agreed that R1D is not material and therefore does not require a PIT. This letter was also to confirm, however, that Ofcom was mindful that there had been a number of incremental changes to BBC Sounds, that industry stakeholders had raised concerns about its impact, and that it would therefore be carrying out a public process to consider these issues. This letter was sent to me on 23 September 2020.”

114. In September 2020, the BBC engaged with stakeholders about the proposed launch, further to the engagement it had undertaken in the lead up to and during the development of R1D and other related audio proposals. See Rowsell 1, [76]-[88]; Purnell 1, [8]-[26]; and Wall 1, [19]-[21].

115. Mr Rowsell said at [76]:

“76. As I explain in paragraphs 28 to 30 above, the BBC Policy sets out the approach that is generally taken to industry engagement when conducting materiality assessments. As well as including details of potential material changes in the annual plans and communicating those changes publicly in other ways - such as Jonathan Wall's blog post from February 2020 (which I discuss in paragraph 51 above) and James Purnell's (Director, Radio

and Education) webinar interview on 30 July 2020 (which I refer to at paragraph 52 above), I am aware that the BBC regularly met with industry stakeholders throughout the development of the plans for the R1D Stream.”

116. In [28]-[30] he said:

“28. Annex 1 to the BBC Policy sets out the BBC's approach to stakeholder engagement when conducting materiality assessments and PITs. For materiality assessments, the BBC should ‘aim to include high level details of potential material changes to UK Public Services scheduled for the coming year in its Annual Plan. The BBC may also use other mechanisms to engage stakeholders on the proposals where appropriate - for example, by meeting with stakeholders and/or publishing material to inform stakeholders about proposals’.

29. It is for this reason, as well as being in the interests of openness and transparency, that the BBC takes a broad approach when it comes to including details of potential material changes in the annual plan. If a proposed change hasn't been included in the annual plan - for example because it only becomes apparent halfway through the financial year that a decision is going to require a materiality assessment - the BBC will also sometimes decide to communicate its plans by way of public announcements, blog posts and speeches. The BBC also publishes its monthly Board minutes once approved, so all decisions on materiality that are taken by the Board ultimately end up in the public domain. The materiality assessments themselves are not published as they are internal governance documents (and sometimes contain commercially sensitive information). Where a change is material, the BBC publishes a consultation document and, following that, a full PIT document.

30. In addition to publishing this information, when preparing the materiality assessments, our Strategy division (or the division responsible for the project itself) often meet stakeholders and inform them about our plans so that we can capture and take account of their high level views for the purposes of our assessment. The extent to which they engage with stakeholders individually depends on the nature of the materiality assessment and how interested stakeholders are likely to be in the proposals. However, the fact that we might initially consider that a proposed change would have a low impact on competitors does not mean that engagement does not take place. Where a change is material and a PIT is required, it would be my team that leads the

stakeholder engagement as part of the formal consultation process.”

117. On 17 September 2020, the BBC publicly announced that R1D would launch on 9 October 2020: see Rowsell 1, [89]. The announcement said;

“Radio 1 Dance will bring together Radio 1's rich slate of existing dance programmes into a dedicated stream on BBC Sounds, making it even easier for current and new listeners to find them. The stream will provide a second chance to hear the station's world-famous DJs and mixes from all corners of the globe, offering something distinctly different for music fans to get stuck into.”

118. Overall, of the BBC’s engagement with stakeholders, Mr Rowsell said at Rowsell 1, [90]:

“90. In my view, the extent to which we engaged with the industry on the BBC's plans to expand its audio portfolio, and then more specifically the launch of R1D, was proportionate and reasonable in the circumstances. None of the Charter, Agreement, or BBC Policy require us to conduct a consultation when carrying out a materiality assessment. Nevertheless, in this case we erred on the side of being open and transparent and kept commercial radio abreast of our plans, with a view to ensuring that any substantive concerns could be factored into our materiality assessment. We liaised with them after the materiality assessment had been sent to Ofcom but no one raised any substantive concerns, nor were they willing to engage with us in any meaningful way. Instead they simply commented more generally on the regulatory assessment of Sounds but did not communicate any specific harms that would be caused by R1D. We made absolutely clear that we were open to discussion with them, if they had any concerns they wished to raise. Had they come back with any compelling arguments then we would have fed these back to Ofcom, but they did not. In all the circumstances, I believe our engagement with the industry was reasonable and that they had ample opportunity to set out their views on R1D.”

119. In considering this, it is necessary to bear in mind that although the BBC is under Charter duties of openness and transparency, at the bottom it and the Claimant’s members are commercial competitors. Thus, whilst it may have to discuss its plans with those competitors in order to be transparent, it is also entitled to safeguard its legitimate commercial interests.
120. On 23 September 2020, Ms Walsh wrote to Mr Rowsell (copying in the Claimant) informing him of Ofcom’s decision. I will quote this letter in full as it contains the Decision challenged in this claim:



“Dear Chris,

Radio 1 Dance stream - materiality assessment

On 31 July 2020, we received a materiality assessment from the BBC, which sets out its proposal to launch the 'Radio 1 Dance stream', whereby it will bring together existing BBC dance genre content on BBC Sounds.

I am writing to let you know that, having reviewed the materiality assessment and the additional information you have provided, we do not require the BBC to conduct a Public Interest Test ('PIT') in relation to the proposal. This is because we consider the impact of the Radio 1 Dance stream on the market is likely to be small, particularly given it will be online only and will contain no new or exclusive content.

Notwithstanding this, we are mindful that there have been a number of incremental changes to Sounds, and that stakeholders in the commercial radio sector have serious ongoing concerns about its development. It is clear that Sounds is a vital part of the BBC's audio proposition, as highlighted in BBC's annual report for 2019/20 and in a speech by the Director General on 3 September, which indicate there are likely to be further changes to Sounds.

We therefore think that it is now the right time to consider the market position of BBC Sounds and so intend, through a public process, to seek evidence from stakeholders in relation to their concerns.

As part of this process, we will also be keen to better understand the BBC's strategy for Sounds. We intend this to be a focused exercise, which we expect to complete by the end of 2020.

Yours sincerely,

[Signed: Siobhan Walsh]”

121. After R1D launched there were protests from commercial radio about R1D's programming. Global wrote to Ofcom on 13 October 2020. It said that it appeared that R1D was operating as a new service, with live, exclusive and new content and a prominent position on the Sounds dial alongside the BBC's main linear radio services. Global asked Ofcom to take a fresh decision on materiality.
122. On 16 October 2020, Ofcom replied to Global in the following terms:

“Dear Ashley,

## BBC Sounds

Thank you for your letter of 13 October setting out your concerns regarding the Radio 1 Dance stream on BBC Sounds.

On Wednesday we published our Call for Evidence on BBC Sounds. We think this is the right time to take stock of BBC Sounds and how it is affecting the market. One aspect of that work will be to consider whether there is, and has been, sufficient transparency around the content of BBC Sounds.

In that context, we will seek clarification from the BBC in relation to the content that it has made available on Radio 1 Dance, including whether it is adding any content to BBC Sounds as a consequence of launching the stream.

The most effective way of seeking clarification would be to provide the BBC with a copy of your letter. Could you please let me know whether you are happy for Ofcom to do this?

With regard to some of the points that you raise in your letter, I thought it might be helpful to note that it does fit with our understanding of the service that:

- it appears on the dial on the BBC Sounds app, between Radio 1 and Radio 1 Xtra;
- it is a 24-hour stream; and
- some of the content is simulcast from Radio 1.

We are keen to move ahead with our broader consideration of BBC Sounds, and are looking to form a view on any next steps by the end of the year. We therefore encourage you, as part of your response to our Call for Evidence, to provide us with evidence of how BBC Sounds has been causing harm to Global.

Yours sincerely,

[Signed] ”

123. There then followed work by a consultancy on behalf of the Claimant on R1D's output. Pre-action correspondence from Mishcon de Reya followed dated 9 November 2020. Ofcom replied on 20 November 2020, noting that it had requested further information from the BBC and confirming that if it transpired that R1D was 'significantly different to what Ofcom understood the proposal to be then Ofcom will take a new decision'.

124. On 25 November 2020, the BBC responded to Ofcom's request for information. The BBC acknowledged that in the course of preparing that response, it recognised that some music mixes were being broadcast on R1D before being played on Radio 1 but noted that they had been made available on-demand before being played on R1D: Rowsell 1, [108]-[109]:

“108. First, we confirmed that all of the content featured on the R1D Stream falls within one of four categories: content already available on Sounds; simulcasts of live shows on BBC radio networks; shows already broadcast on BBC radio networks; and archive content.

109. Following Radiocentre's Pre-Action Protocol Letter, I understand that the BBC conducted an urgent investigation to understand the veracity of Radiocentre's claims that some programmes were premiering on R1D. The conclusion of this investigation was that, although it was true that some music mixes were being streamed on R1D before being played on Radio 1, these mixes had in fact already been made available off-schedule in Sounds before being streamed on R1D, as part of the overall on demand content available to users. As such, they constituted content already available elsewhere on Sounds.”

125. Turning to the BBC's response in a little more detail, this took the form of responses to questions which Ofcom had posed, eg:

“[Ofcom question] 1. In its materiality assessment of the Radio 1 Dance stream, the BBC described Radio 1 Dance as a dedicated live stream of dance music that would include the following types of content:

- a. content that is already available on the BBC Sounds app (including Off- Schedule Music Mixes and Off-Schedule Podcasts);
- b. simulcasts of live shows on BBC radio networks;
- c. shows already broadcast on BBC radio networks; and
- d. archive content.

Has the Radio 1 Dance stream featured any additional types of content that do not fall under the above descriptions since its launch ?

[BBC Answer] No, all content featured on the Radio 1 Dance stream falls within the types listed in points a-d which the BBC described in its materiality assessment of the Radio 1 Dance stream.

Does the BBC intend the Radio 1 Dance stream to feature such content?

No”

126. Thus, in summary, in its response to Ofcom’s information request, the BBC stated that: all content on R1D was either existing Sounds content, simulcasts, shows previously broadcast or archive content; the programmes ‘Radio 1 Dance 24/7’ and ‘Radio 1 Dance Presents’ were simulcast with Radio 1 (at 4am on weekdays, and 2am on Saturdays, respectively) and then repeated on R1D; the programme ‘Radio 1 Workout Anthems’ was broadcast on Radio 1 (at 3am on Tuesdays) and then repeated multiple times on R1D; and, no programmes premiered on R1D.
127. On 1 December 2020, Ofcom asked the BBC whether certain programmes being played on R1D ‘were commissioned, created, designed or curated primarily for the purpose of being included in the Radio 1 Dance stream (rather than for inclusion in the Radio 1 programme)’.
128. In response, on 4 December 2020, the BBC replied:

“[Ofcom question] 1. In your response you explain that it is the BBC's strategy to ‘increasingly commission content that works for both linear and on-demand services, eg, on Radio 1 and on BBC Sounds’. In relation to each of the radio shows mentioned in your responses to our Questions 2 to 4, could you please explain the commercial and editorial considerations that led to these shows being commissioned, created, designed or curated, including whether they were commissioned, created, designed or curated primarily for the purpose of being included in the Radio 1 Dance stream (rather than for inclusion in the Radio 1 programme) ?

[BBC answer] The BBC does not consider that the distinction drawn by Ofcom in this question exists. Radio 1 content is available on the broadcast station and on BBC Sounds and is commissioned based on an editorial judgement on what will deliver audience value around a content proposition with an awareness of the potential ways it could be consumed (for example including live interaction on the linear broadcasts and not on an on-demand only music mix) but increasingly with the intention that it is suitable to be consumed on more than one platform. We are also not clear what is meant by commercial considerations in relation to the commissioning of content for the UK Public Services.

In the case of the Radio 1 Dance stream, consistent with the materiality assessment submitted to Ofcom in July 2020, the BBC is not commissioning content that will appear only on the Radio 1 Dance stream. In relation to the programmes referred to in your previous Questions 2 to 4, we noted each

programme's launch date when responding to the formal information request. All of these programmes predated the launch of the Radio 1 Dance stream.”

129. On 8 December 2020, Ofcom prepared a second paper on R1D. Paragraphs 1-3 stated:

“Recommendation

1. Ofcom explained in its letter to the BBC of 23 September 2020 that it did not consider the launch of the Radio 1 Dance stream on BBC Sounds was a material change. As a result of Radiocentre's Letter Before Claim of 9 November we have considered whether the actual Radio 1 Dance stream is significantly different to the proposal considered by Ofcom. For the reasons set out below the team's view is that the Radio 1 Dance stream is not significantly different to what Ofcom understood the proposal to be at the time that Ofcom reached the conclusion recorded in the letter of 23 September 2020.

2. The teams' recommendations are therefore that:

a. Ofcom should not re-consider whether the launch of the Radio 1 Dance Stream amounted to a material change; and

b. we should write to the BBC and Radiocentre (via its solicitors) explaining that Ofcom has reached the conclusions set out at paragraph 1 above.

3. We ask you to consider the team's recommendations (and the reasons for the same as set out in this paper) and to reach a view on:

a. whether the Radio 1 Dance stream is significantly different to what Ofcom understood the proposal to be at the time that Ofcom reached the conclusion recorded in Ofcom's letter to the BBC dated 23 September 2020; and

b. the next steps to be taken.”

130. Under the heading ‘Ofcom’s view on the BBC’s materiality assessment’, [16]-[18] of this paper stated:

“16. Ofcom considered that the proposed Radio 1 Dance stream was not a new UK Public Service, but rather a change to an existing UK Public Service, specifically the ‘BBC Online’ description listed in the list of UK Public Services maintained by the BBC. Ofcom therefore assessed whether this change may have a significant adverse impact on [fair and effective competition].

17. Ofcom considered that the change would not have such an effect for the reasons set out in an internal governance paper on the BBC Radio 1 Dance materiality assessment dated 16 September 2020. As part of that assessment:

a. Ofcom considered that the listening numbers to the Radio 1 Dance stream were likely to be low and that market data indicated it would have a small negative impact on overall listening to similar competitor specialist dance radio stations. This was on the basis of Ofcom's analysis of the research that the BBC submitted, the BBC's growth estimates and Ofcom's own industry data.

b. it was noted that the stream brought together content that would be available on BBC Sounds in any event.

18. The view reached by Ofcom was recorded in Ofcom's letter to the BBC dated 23 September 2020. Therein, Ofcom said, amongst other things, that we considered the impact of the Radio 1 Dance stream on the market 'is likely to be small, particularly given it will be online only and will contain no new or exclusive content'."

131. Paragraph 42 stated:

"We appreciate that BBC's schedules will continue to evolve and that when the BBC creates content it will have regard to the various channels which that content will be distributed through. When considering the BBC Materiality Assessment, Ofcom appreciated that going forward, the BBC would be creating and commissioning content with the existence of Radio 1 Dance in mind, although it would not be creating or commissioning programmes exclusively for the purposes of including them in the stream. This is consistent with what the BBC described as the aim behind the creation of Radio 1 Dance, ie, to seek to ensure that the way its content is distributed matches audience expectations about how content is made available. We also note that 'Radio 1 Dance' was an existing BBC brand."

132. On 11 December 2020, Ofcom wrote to Mishcon de Reya in response to its pre-action letter. At [6] Ofcom said:

"6. Having considered the issue in light of your Letter before Claim and the further information received from the BBC, Ofcom has reached the view that the actual Radio 1 Dance stream is not significantly different to what Ofcom understood the proposal to be at the time of its Materiality Assessment. Accordingly, it does not intend to revisit the Materiality Assessment."

## Submissions

### *The Claimant's case*

133. In relation to Ground 1, the Claimant contends that on a proper analysis the launch of R1D did involve the carrying out of an activity as a new UKPS because it is, in fact, a radio service for the purposes of the List in Sch 1 to the Framework Agreement. If the Claimant is right about that, there is no dispute that the launch of R1D would have been a material change under Clause 7(7)(a) of the Framework Agreement, and so should have triggered the carrying out of a PIT under Clause 7(6).
134. The Claimant contends that determination of whether R1D was an activity carried out as a new UKPS, requires a 'multi-factorial analysis'. It says the need for this approach follows from the language of Article 7(3) of the Charter, and Clause 7 and Sch 1 of the Framework Agreement, properly construed. It says it is further supported by the Ofcom Policy, [4.7].
135. In his oral submissions, Mr Otty put this aspect of his case as follows:

"The reasonable reader [of Sch 1 to the Framework Agreement] would conclude that the question of what is a radio service is to be answered as a matter of substance and approaching it as a matter of substance the reasonable reader would conclude that Radio 1 Dance was indeed a radio service. There are five factors which point to this. The first is that knowledge of the relevant background would embrace the predecessor regulatory regime, with its particular and express focus on substance and perception. The points I started with when dealing with the regulatory landscape as explained in our paragraph 29 of the statement of facts and grounds.

There is no reason to think anything changes from that point of view. Secondly, the reasonable reader would be aware of radio embracing both online radio and AM/FM and DAB radio. That is the relevant factual material I pointed to right at the outset again showing online ...

[There was then an intervention from me. Mr Otty continued]:

The reasonable reader is essentially having to ask and the court, through the prism of the reasonable reader, is having to ask the question: what is a radio service? A reasonable reader knowing the landscape as we know it today would know that radio embraces online radio, DAB radio, FM radio and digital. So that is important my Lord, we say, when one recognises, as the evidence shows, that online radio is the fastest growing sector of radio listening.

[I intervened again. Mr Otty then continued]:

... The third factor the reasonable reader would know, there is no definition [of radio] in the Charter or the Framework Agreement.

Fourth factor, this is picking up particularly on the purposive point made in the *English Bridge Union* case [which I will come to], the reasonable reader would know of the purpose of regulation to prevent the crowding out of the commercial sector. That is where the submissions I made earlier about the consequences of the BBC and Ofcom's position, we say are relevant. I started my submissions by saying the heavens would not fall if we were right. The heavens come much closer to falling if we are wrong. On that analysis it is open to the BBC to introduce unlimited numbers of activity, called television, called radio, brand them as such, launch them as such as happened here.

[Further intervention]

The final factor, the reasonable reader we respectfully submit looking at where Radio 1 Dance would naturally sit, having regard to all the features that I have made submissions about already, would say it sat much more naturally within radio service, an undefined term, than within online content service illustrated, I accept illustrated, by the non-exhaustive list we see in sub-paragraph 4 [of [2] of Sch1 to the Framework Decision] ...”

136. Ground 2 relates to the decision that R1D was not a material change to an existing UKPS. This ground relates to the other species of material change, in Clause 7(7)(b) of the Framework Agreement, namely the effect of a change on competition. Here, the Claimant’s principal complaint is that Ofcom erred in its decision of 23 September 2020 in finding, for example, that R1D would contain no new content and no exclusive content and that, therefore, its market impact was likely to be small. Paragraph 101 of the Claimant’s Statement of Facts and Grounds sets out a number of criticisms of Ofcom’s approach.
137. The Claimant’s essential point is that Ofcom failed to appreciate that R1D would not just transmit existing content, but would include content that was new, or would appear to listeners to be new. Hence, it is said Ofcom failed to give any or any proper consideration to relevant matters and/or that it misdirected itself.
138. In relation to Ground 3, the Claimant complains of procedural unfairness. It says that on 14 August 2020 Ofcom wrote to the BBC to say that it thought it was ‘important that there is effective engagement with the commercial radio sector in particular before these plans are confirmed’.



139. The point being made here by the Claimant is that Ofcom, having set this standard for itself, did not keep to it. It received replies from the BBC which, says the Claimant, shows that there had not been effective engagement by the BBC with commercial radio, but which satisfied Ofcom when it should not have been so satisfied.
140. Finally, in relation to Ground 4, the Claimant argues that Ofcom made two errors of fact; first, relating to the BBC's commissioning for R1D and that new shows would be created for broadcast on R1D but would be played overnight first on other stations to disguise their 'newness'. Second, Ofcom was kept in ignorance of what it says was the BBC's 'design of deliberately delayed engagement' with stakeholders. As I said earlier, there is an overlap between this ground, and Grounds 2 and 3.

#### *Ofcom's case*

141. In response, Mr Jones for Ofcom submitted as follows.
142. In relation to Ground 1, Ofcom's response is straightforward. It says the logical way of deciding whether R1D should have been treated as a new UKPS is to ascertain whether it falls within one of the existing UKPSs. If it does, then it did not have to be treated as new. If it does not, then it is new. That is why the BBC and then Ofcom decided that since R1D fell within BBC Online ([2(4)] of Sch 1 to the Framework Agreement). BBC Online was envisaged as a comprehensive online service, and was not comprehensively defined (unlike television services in [2(1)], radio services in [2(2)] and regional television and radio services in [2(3)], which do exhaustively list the relevant stations). It was a rolling expandable definition which could encompass new and future online only offerings as they were brought onstream.
143. The treatment of BBC Online as a single comprehensive service is readily understandable: it reflects the well-known trend over recent years for media content to be delivered less and less over traditional linear channels/stations, each with their own bounded content, and increasingly over internet-based platforms which bring together a range of different content. In that context, it makes sense to regulate online content in a more flexible way, rather than trying to ape the old method of listing out a bounded list of stations.
144. Regarding Ground 2, Ofcom says that the Claimant's case that it wrongly proceeded on the basis that R1D would not include new content ('new' here meaning not previously broadcast anywhere else) is 'hopeless' (Skeleton Argument, [39]). Ofcom knew that R1D would carry 'simulcasts', ie, content put out on R1D and elsewhere at the same time. Overall, Ofcom understood the facts.
145. In relation to Ground 3, Ofcom points out that the Claimant builds its case on an email (the 14 August 2020 email) which was sent to the BBC, and not to the Claimant, and therefore could not have founded any legitimate expectation of consultation on the part of the Claimant, which only obtained this email after these proceedings commenced.

146. Ofcom's case, in summary, is that the purpose of its 14 August 2020 email to the BBC was to obtain information from the BBC as to the extent of its engagement in order to inform Ofcom's own decision as to whether it had sufficient information with which to reach its own materiality determination, consistent with its *Tameside* duty of enquiry: see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065.
147. Having asked for information about the extent of the BBC's engagement, Ofcom then rationally determined that it had sufficient information to reach its own materiality determination. Further and in any event, it is (at least) highly likely that Ofcom would have proceeded to make the same Decision even had Ofcom insisted on the BBC following the procedure that the Claimant says it should have followed.
148. Finally, on Ground 4, and the alleged failure to inform Ofcom of the two facts which are said to have been critical to Ofcom's decision making. As to the BBC's intention regarding content, Ofcom has reviewed communications and concluded that the BBC's intentions were not different to those which had been communicated to Ofcom. As to the suggested delayed engagement, Ofcom did not proceed on the basis of a mistake. If Ofcom had known of the suggested delay, it would not have reached a different conclusion.

#### *The BBC's case*

149. The BBC's response, as advanced by Ms Carss-Frisk KC, was as follows.
150. As to Ground 1, the Claimant's suggested 'multi-factorial' approach represents a wholesale attack on the regulatory framework established by the BBC Charter and the Framework Agreement. The language of the latter in particular is clear and admits of no such approach. Article 7 of the Charter explains that the UKPSs (amongst other things) consists of 'the existing services specified [in the Agreement]', and Sch 1 to the Framework Agreement sets out this list of existing services. A 'multi-factorial analysis', looking at factors such as whether the BBC offering in question has presenters, or is identifiable to the consumer as a separate radio service, is nowhere to be found in the test established by the BBC Charter and the Framework Agreement for assessing whether a UKPS is a new or existing one. Rather, to determine whether a service is an existing service one looks to the List in Sch 1 and asks whether an offering falls within one of the entries in the List. When that is done, R1D clearly falls within BBC Online and so is not a new UKPS. R1D is not broadcast by radio ([1(1) of Sch 1; or television ([2(2))]; and is not a service for a particular UK region ([2(3)]). It can only be streamed via BBC Sounds which is itself part of BBC Online. When BBC Sounds was introduced it was not suggested to be a new UKPS, and Ofcom's decision to that effect was not challenged.
151. As to Ground 2, the BBC says that given R1D's modest listening figures the Claimant has abandoned how this ground was initially pleaded (effect on competition) and re-cast it as a material error of fact by Ofcom, namely, that it wrongly thought R1D would have no new content. However, as pleaded in the BBC's Skeleton Argument at [27]:

“But Ground 2 as now formulated faces the major difficulty that Ofcom has already considered, investigated and dismissed the Claimant’s complaint that the R1D online stream operates differently in practice to how it was presented by the BBC (see the BBC’s Amended Detailed Grounds of Resistance [49]-[50] ... and Rowsell 1 at [105]-[118] ...”

152. As to Ground 3, this was initially pleaded as a claim that Ofcom had the power to require the BBC to carry out engagement. That is now conceded not to be the case, and it plainly does not.
153. The Claimant’s reformulated argument involves the contention that Ofcom’s email of 14 August 2020 in fact imposed a precondition on Ofcom itself: having specified that ‘engagement’ was important to it, Ofcom is said to have been precluded from giving its approval to the BBC MA unless presented with better evidence than that with which it was in fact provided with that suitable engagement had taken place. The BBC’s Skeleton Argument at [31] then gives a number of reasons why the re-formulated argument should also fail, including in [31(d)] that Ms Walsh of Ofcom explained in detail that Ofcom did not intend, by its 14 August 2020 email, to impose any kind of obligation on either the BBC or on Ofcom (Walsh 2 [8]-[22]). Rather, Ofcom was seeking to understand the nature of the BBC’s engagement, ‘so that we could take a view on whether that was sufficient in the circumstances to enable Ofcom to reach its own materiality decision’ (Walsh 2, [16]). Ms Walsh set out exactly what she understood about the nature of that engagement, and what she did not understand (Walsh 2, [19]-[20]).
154. Finally, on Ground 4, and the suggested two errors of fact, the BBC submits that its intention that R1D ‘feel like’ a new radio station and that it intended to make new content was always known and there was nothing surreptitious about what it did, and nothing inconsistent with what it did and what it told Ofcom. Second, there is no basis for inferring that the BBC sought to deny stakeholders an opportunity to respond to the proposal.

## **Discussion**

155. A great many points were made orally and in writing, and I have had to be selective in the ones that I cover, in order to keep this already long judgment to a manageable length. Failure to mention a particular point does not mean that it has been overlooked.

*Ground 1: did Ofcom err in concluding that R1D was not a new UKPS by virtue of only being available online via BBC Sounds ?*

156. Stripped to its essentials, Mr Otty’s argument was that R1D has a number of ‘radio-like’ features. I listed these earlier, eg, it has programmes; presenters; and has the word Radio in its title, and therefore, as a matter of substance, it is a radio service for the purposes of the List in Sch 1 to the Framework Agreement, and

was therefore a new UKPS; its introduction was a material change; and so a PIT should have been applied to it.

157. He said:

“So if we are right that Radio 1 Dance is to be properly characterised as a ‘radio service’ then it is not in this exhaustive list, it is therefore new, it is therefore a material change.”

158. In my judgment the answer to this issue depends on a straightforward analysis of the text of Sch 1 to the Framework Agreement – read as a reasonable reader would understand it - and then a comparison of that textual analysis with an analysis of how R1D is delivered to listeners.

159. When that is done, it is plain that R1D falls within BBC Online – a pre-existing UKPS that is not comprehensively defined, unlike those UKPSs in [2(1)]-[2(3)]. Because R1D is delivered online - and this is the crucial point – *only* online, in my judgment it is obviously an online service.

160. In fact, this is really an *a fortiori* argument. When BBC Sounds itself was introduced in 2018 it was accepted not to be a new UKPS because it was an online service, and that determination was not challenged. I set out Rowsell 1, [35] earlier, but for convenience will set it out again:

“35. The Sounds Phase 1 materiality assessment concluded that (a) the proposal to combine iPlayer Radio and BBC Music did not constitute a new UK Public Service; (b) the bringing together of existing content and certain functionality from iPlayer Radio and BBC Music and the addition of new functionality (such as personalised discovery and continuous play) was BAU [business as usual]; and (c) increasing the volume of off-schedule podcasts and off-schedule music mixes was not a material change as it was not expected that it may have a significant adverse impact on fair and effective competition. In particular, as regards point (a), we concluded that BBC Sounds was not a new UK Public Service because it would form part of BBC Online, which is one of the existing UK Public Services under Schedule 1 to the Agreement and therefore represented a change to that existing service.”

161. R1D is part of BBC Sounds and thus, it seems to me, cannot be a new UKPS either. The greater includes the lesser. It follows that I agree with the substance of Ofcom’s and the BBC’s argument in relation to this ground of challenge.

162. I begin my analysis with the proper interpretive approach to the Framework Agreement. There was broad agreement between the parties on this. I was referred to *R (English Bridge Union Ltd) v English Sports Council* [2016] 1 WLR 957, [32]:

“32. The claimant says that the approach to construing a Royal Charter should be analogous or closely aligned to the principles employed in construing a contract: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912g–913e, per Lord Hoffmann. By contrast Ms Kate Gallafent QC who appears on behalf of the defendant contends that the construction of the Royal Charter should be undertaken along the lines of construing a statute: see below para 34. In my view neither of those analogies is entirely apt bearing in mind the nature of a Royal Charter and the process by which it is produced. It is not a contract where attempting to discern the intentions of the parties in striking their bargain may play a significant role in interpreting the document. Unlike a statute, which is preceded by the publication of a Bill, there is not an enacting history behind the emergence of the terms of the document to potentially examine to assist in its construction. In my view the approach to establishing the legal meaning of a Royal Charter as a legal instrument is to seek to understand that which the document would convey to a reasonable reader with knowledge of the factual background of how it came into being, alongside its purpose and the purpose of the body which it incorporates. Such a meaning will not be contingent upon dictionary definitions of its individual words. What needs to be examined is the use of the words within the overall factual context and what a reasonable person with knowledge of that context would understand the meaning of the document to be. A Royal Charter incorporating organisations such as the defendant does not arise or exist in a vacuum. There will have been relevant circumstances surrounding the need for the Royal Charter to be granted and they will form part and parcel of a reasonable person’s understanding of the objects and powers as defined within the Royal Charter.”

163. I agree with Mr Otty that the question is one of substance and not form. I also agree with Ofcom that the logical way of deciding whether RID must be treated as a new UKPS is to ascertain whether it falls within one of the existing UKPSs. That is the key matter of substance to be considered. If it does, then it obviously does not have to be treated as new. If it does not, then it is new. That in turn depends on whether it is a radio service, a television service (it plainly is not), or an online service. The three forms of service are mutually exclusive.
164. At the end of the hearing I was provided by Ofcom with the OED definition of ‘radio’. In a post-hearing note in response, the Claimant made submissions that I should not have regard to a dictionary definition (see *English Bridge Union Ltd*, [32], to the effect that the meaning of a Royal Charter will ‘not be contingent upon the dictionary definitions of its individual words’) and, were I to do so, I would need to consider other sources also. I have not had regard to the dictionary

definition. However, I note the acceptance by the Claimant in [2] of its Skeleton Argument that RID is not broadcast on DAB and (footnote 3):

“DAB, which stands for ‘digital audio broadcasting’, is the transmission of digital sound over conventional radio channels.”

165. Mr Otty also said that the:

“... concept of a radio service is not defined anywhere in the [Framework] Agreement. There is no restriction of it to radio made available over DAB, AM FM or otherwise. The wording used by the BBC in its skeleton argument at paragraph 7 describing radio services as ‘broadcast radio stations’ appears nowhere in the Agreement.”

166. With respect to Mr Otty, I do not think he was entirely right. Clause 45 of the Framework Agreement deals with digital radio:

“(1) The BBC shall continue to use all reasonable endeavours to support the transition from analogue to digital radio.

(2) The BBC must use all reasonable endeavours to co-operate promptly and in good faith, with-

(a) commercial radio operators and holders of licences to provide radio multiplex services;

(b) any department of the UK Government involved in the planning or implementation of digital radio switchover; and

(c) any other persons notified to the BBC for the purposes of this clause by the Secretary of State.

(3) Following a notification to the BBC from the Secretary of State about the intention to set a digital switchover date, the BBC and the Secretary of State must make an agreement (for example, by amending this Agreement) covering the following areas-

(a) to ensure that substantially the same proportion of households in the UK that, at the date of this Agreement, receive BBC national radio services in analogue form by means of terrestrial broadcasting (that is to say, through a radio aerial in the home), can receive those services in digital form, subject to a full value for money assessment by the BBC;

(b) to ensure enhancements are made to the coverage of BBC local radio services in digital form, subject to value

for money, whilst continuing to provide the analogue local radio services in analogue form by means of terrestrial broadcasting where this provides value for money;

...”

167. Clause 75 defines ‘analogue form’ as being:

“such of the BBC’s principal radio services that are, at the date of this Agreement, broadcast by means of AM or FM in analogue form (whether or not they are also broadcast in digital form at that time)”

168. A later definition defines ‘broadcast’ as meaning, ‘broadcast by wireless telegraphy and wireless telegraphy has the same meaning as in the Wireless Telegraphy Act 2006.’ Section 116 of that Act provides:

“(1) In this Act ‘wireless telegraphy’ means the emitting or receiving, over paths that are not provided by any material substance constructed or arranged for the purpose, of energy to which subsection (2) applies.

(2) This subsection applies to electromagnetic energy of a frequency not exceeding 3,000 gigahertz that—

(a) serves for conveying messages, sound or visual images (whether or not the messages, sound or images are actually received by anyone), or for operating or controlling machinery or apparatus; or

(b) is used in connection with determining position, bearing or distance, or for gaining information as to the presence, absence, position or motion of an object or of a class of objects.”

169. Mr Otty said that one definition of ‘radio’ was ‘the broadcast of material to the public’; but that there was no definition of ‘broadcast’. Section 116 of the Wireless Telegraphy Act 2006 shows, again with respect, that Mr Otty was incorrect. ‘Broadcast’ - at least in that Act - means broadcasting using radio waves below a certain frequency.

170. All of these points, taken together, I think are strong pointers that a radio service is something which is made available wirelessly. An online only service is not so made available. It generally depends on physical infrastructure for its delivery.

171. Whilst it may not be a defined term, the expression ‘radio service’ has to be given *some* content or meaning, and it is to be contrasted with television services and online services. All other things being equal, the fact it is not broadcast, and these other points, would tend to point *away* from R1D being a radio service.

172. The nub of the Claimant's argument on this ground, I think, came out in this exchange between Mr Otty and myself:

“Me: It [ie, R1D] is not broadcast on FM, it is not broadcast on Long Wave, it is not broadcast on Medium Wave, not on DAB. In what sense is it radio?”

Mr Otty: We would respectfully submit, my Lord, that it is not clear as a matter of the English language, it is not a matter of judicial notice. It is common ground -- and I have given some of the statistics earlier -- that there is a concept of online radio. It is common ground that listening to radio online is the fastest growing area of the radio listening market. All of that, we respectfully submit, suggests that it can be a radio service even if it is only made available online. I will come to the detailed features in a moment, but that is only underscored, as a matter of evidence, and, we respectfully submit, common sense that once one factors in the ambition of the BBC on Day 1 that Radio 1 Dance should feel like radio; once one factors in the deliberate decision to place it on the dial alongside acknowledged radio stations so that it will feel like radio; once one factors in its linear nature; once one factors in its presenter content; once one factors in the fact that it operates in exactly the same manner on the Smart speakers as acknowledged radio services, so as a matter of substance, it is a radio service.”

173. Mr Otty's example of online radio I do not think advances his case. Take Radio 4. It is broadcast over the electromagnetic spectrum and is a radio service within [2(2)]. The fact that it is also available online via the internet (through the Radio 4 website) and BBC Sounds does not stop it being a radio service. The same is true of BBC1 – obviously a television service – which is also available live online via BBC iPlayer. The fact that these services are available through both modes of delivery tells us nothing how they would fall to be characterised if it were *only* available online. Mr Otty got matters the wrong way around when he said a reasonable reader would understand that radio services (and television services) are *also* available online and are online services.

174. The Services List at [2(4)] of Sch 1 describes BBC Online as (emphasis added):

“a *comprehensive online content service*, with content serving the whole range of the BBC's Public Purposes and *including* the BBC's news and sports websites, BBC iPlayer and BBC Three for younger adult audiences.”

175. The key words are ‘comprehensive’ and ‘including’. This shows [2(4)] is not, and was not intended to be a comprehensive and exhaustive definition but was intended to be flexible and expandable, so as to allow new online services to be brought on stream as part of BBC Online.



176. I completely take Mr Otty's point that R1D has many 'radio like' features, and so, as he graphically put it in argument:

"If a service is intended to feel like a radio station, listed as a radio station, has the word 'radio' in its title and shares all of these core features with acknowledged radio stations [presenters, etc], then there is a pretty compelling, we would say ultimately irresistible argument, that it involves the carrying out of an activity as a radio service. I was struggling in preparing this hearing for the metaphor about birds which sound, look and walk like ducks probably being ducks: we are in that territory here my Lord."

177. The answer to this point, however, is online-only offerings which closely resemble traditional broadcast radio or television services can nonetheless fall within BBC Online. I can give two examples, both suggested by Ofcom. No doubt there are others.
178. Firstly, the definition of BBC Online explicitly refers to, and encompasses, BBC Three. At the time of the 2016 Services List, BBC Three was an online-only television station. When the BBC later proposed to re-launch it as a broadcast channel, Ofcom determined that that *would* amount to the launch of a new UKPS. Ali-Abbas Ali, Ofcom's Director of Broadcasting Competition, said this (Ali 1, [101]-[104(1)]):

"101. (...) The BBC subsequently proceeded to close the BBC Three broadcast television channel and launch the BBC Three online-only channel. At the time the Agreement was entered into, BBC Three was then expressly named as a part of the BBC Online UK Public Service. The BBC Online UK Public Service is described as 'a comprehensive online content service, with content serving the whole range of the BBC's Public Purposes and including the BBC's news and sports websites, BBC iPlayer and BBC Three for younger adult audiences' ... . For the avoidance of doubt, Ofcom does not consider BBC Three (in its online-only form) to constitute a distinct UK Public Service but considers it to form part of the BBC Online UK Public Service. Any references to BBC Three as a 'service' (lowercase) should not be misunderstood as suggesting anything to the contrary.

102. In March 2021, the BBC set out plans to re-launch BBC Three as a broadcast television channel during the hours of 7pm – 4am every day. In order to accommodate the distribution capacity and broadcast BBC Three as a linear channel during these hours, these proposals also included a proposed reduction of broadcast hours of the CBBC channel, so that broadcast ends at 7pm instead of 9pm.

103. The BBC concluded that re-launching BBC Three as a linear broadcast television channel involves the launch of a new UK Public Service and, therefore, automatically constituted a material change requiring a PIT. After its assessment, the BBC concluded that the PIT was satisfied and published the proposed change on 24 June 2021. The BBC also sent a copy of the proposed change to Ofcom.

104. Ofcom considered whether the proposed change amounted to a material change to the UK Public Services and, if so, what further form of assessment would be appropriate. Third parties were invited to comment on whether they considered the BBC's published proposals to be material and what further assessment might be required. Ofcom:

(1) agreed that the proposed change amounted to the launch of a new UK Public Service and, therefore, a material change to the UK Public Services – this is because we were satisfied that the reintroduction of BBC Three as a broadcast channel meant it would not fall within any of the existing services in Schedule 1 to the Agreement. In particular it would no longer fall within the BBC Online service ...”

179. Second, at the time of the 2016 Services List, CBeebies radio was (and still is) an online-only audio stream provided as part of BBC Online. Rowsell 1, [37] says:

“37. The list of UK Public Services is non-exhaustive. For example, as of December 2016 when the Agreement was published, in addition to those services mentioned in the definition, BBC Online also included: BBC Weather, BBC Bitesize, BBC Teach, BBC Food (ie, recipes), BBC Children's (CBBC and CBeebies pages), BBC Music and various online TV and radio programme pages and schedules, etc. Equally, I am aware that, at the time the current Charter and Agreement were negotiated, the Government produced a white paper in May 2016 (the 'White Paper'), which set out proposals that were ultimately adopted in the Charter and Agreement. The White Paper also gives additional examples of online offerings which were included within BBC Online, but which were ultimately not listed as examples in Schedule 1 of the Agreement. These examples of BBC Online offerings included the following:

...

(c) CBeebies as an online offering (as opposed to a broadcast channel), which included CBeebies Radio (which is now available on BBC Sounds) ...”

180. It is to be noted that CBeebies television service is listed as a UKPS at [2(1)(d)]. This is a clear example, therefore, of nomenclature not being a reliable guide as to where within Sch 1 a service falls. What principally matters is the mode of delivery, namely, via radio, television or online.
181. The treatment of BBC Online as a single comprehensive service is, I think, a nod to the future, and a recognition that in the future media content will likely be delivered less and less over traditional linear channels/stations, each with their own bounded content, and increasingly over internet-based platforms. Having a non-exhaustive definition of online services allows for flexible development of such future services.
182. At [54] of its Skeleton Argument the Claimant argued that:
- “... determination of whether R1D was an activity carried out as a new UKPS, requires a multi-factorial analysis.”
183. I do not agree. As I have said, what is required is a textual analysis of Sch 1 and consideration of the mode of delivery of the service in question.
184. The first reason I think the Claimant’s suggested approach is wrong is that similarities with other broadcast services are not a reliable guide to whether something is within or without that type of service, as I hope I have shown. BBC3 had programmes, and its name was similar to BBC1 and BBC2, but it was nonetheless an online service. CBeebies online and CBeebies television have virtually identical names, but are different species of UKPS.
185. I also consider this approach to be impossibly vague and hard to apply. Suppose the BBC had simply called R1D, ‘One Dance’; placed it away from radio services on the Sounds dial; and created programming without presenters. It would be much less ‘radio-like’, but how would one determine whether it was still a radio service ?
186. Next, whilst I understand Mr Otty’s duck metaphor, there are features of R1D which point to it being a different breed of bird. The key one is the one I began with, namely mode of delivery. R1D is not available on the radio spectrum and one cannot listen to it on a radio (even a digital radio). One could cycle through DAB, FM, etc, endlessly on the radio’s dial, but R1D would not be found anywhere. By no orthodox definition, therefore, can R1D be regarded as a *radio* service. A radio service which cannot be listened to on a radio would be a curious thing.
187. In its Skeleton Argument at [54(a) and (b)], the Claimant points to two provisions, Article 7(3)(b) of the Charter and Clause 7(7)(a) of the Framework Agreement, which make clear that any type of relevant activity could, in principle, be a new UKPS. It is argued that Clause 7(7)(a) means:

“... On its natural meaning this wording expressly envisages untrammelled analysis of the presentation and appearance of the service – ie, whether it has the characteristics of a new UKPS.”

188. I am not sure I entirely followed the argument that was being made, but the point is that Sch 1 in fact lists out the existing UKPSs and defines them in the way I have described. The mode of analysis is not ‘untrammelled’.

189. Next, [54(c)] of the Claimant’s Skeleton Argument argues:

“The UKPS List, at Schedule 1 to the Agreement, then gives concrete illustration (sic) of the types of services that are discrete UKPSs. An activity that is carried out in a similar manner to those listed services and is not itself a listed service, is on the natural meaning of those words being carried out ‘as a new UKPS’.”

190. There are two points here by way of response. Firstly, Sch 1 does not give ‘concrete illustration[s]’ of types of services that are UKPSs. It exhaustively defines them across existing modes of delivery. Second, the riposte to the second sentence is ‘not necessarily’. A new radio service not listed in [2(2)] would be a new UKPS. A new online service would not be, even if it shared content with an existing television or radio service.

191. Next, at [54(d)], the Claimant points to a footnote in the Ofcom Policy which says that new UKPSs are, ‘identifiable services supplied by means of television, radio, online or via newer technologies which would have fallen to be listed in Schedule 1 Part 1 of the Agreement had they existed at the time it was produced.’ That is not controversial. R1D would not have fallen to be so listed because it would have been within BBC Online. This does not advance the Claimant’s case.

192. Then, at [55], the Claimant says that its approach is supported by the ‘regulatory *lacuna* which would follow if the arguments of Ofcom and the BBC were correct’:

“It would, on their approach, be open to the BBC to introduce any number of new radio services and television services designed, marketed and operated in identical manner to existing radio stations and television channels, provided only that those services were not broadcast (in the case of radio) on DAB or other terrestrial radio or (in the case of television) on DTT [Digital Terrestrial Television]. On the approach of the BBC and Ofcom no mandatory PIT would be required for those new services, and the only regulatory safeguard would lie in Ofcom’s ability to determine that the relevant service might have a significant adverse impact on competition (so as to fall within Cl.7(7)(b) of the Agreement). But that analysis and

determination might come far too late, after launch of the relevant services, and after material damage had been done to the commercial sector.”

193. The answer is that there is no such *lacuna*. If the BBC were to adopt such a strategy then the need for an assessment of its effects on competition (the sort of material change in Clause 7(7)(b)) would be directly engaged. I think a complete answer is given in Ofcom’s Skeleton Argument at [25]-[26], and in the BBC’s Skeleton Argument at [19]. As to the former:

“25. The main consequence of Ofcom’s approach to this issue is that, if and when the BBC launches an online-only stream, it does not automatically have to conduct a PIT and instead will do so only if the BBC or Ofcom consider the change to be a material change to an existing UKPS (the subject of Ground 2 below). That is not a ‘*regulatory lacuna*’, and Radiocentre’s stated fear that the BBC could wave through ‘*any number of new radio services and television services*’ without conducting a PIT, and that Ofcom would simply sit back and do nothing until competitive harm has been done (see CSkel/§55), is not grounded in reality. The Court can and should proceed on the basis that the BBC and Ofcom will continue to act sensibly and responsibly: the regulatory framework should not be construed on the basis of an assumption that they would do otherwise.

26. There are also several other regulatory tools available to Ofcom; and indeed, given the fast-developing technological/media environment, Ofcom also keeps the regulatory framework itself under close review ...”

194. As to the BBC’s position:

“19. The Claimant contends that its ‘multi-factorial analysis’ will avoid what is said to be ‘the regulatory lacuna which would follow if the arguments of Ofcom and the BBC were correct’ (Claimant’s Skeleton [55]). The lacuna is said to arise because the BBC will be able to make sweeping changes to its television and radio services ‘provided only that those services were not broadcast [on TV or radio]’, ie, provided that they were delivered online, rather than by radio or television broadcast. But there is no such regulatory lacuna. Significant changes to an existing UK Public Service (including BBC Online) would be scrutinised under the second limb of clause 7(7) of the agreement: it is not only new UK Public Services which require a PIT, but also material changes to existing UK Public Services. The sorts of sweeping changes about which the Claimant is concerned would presumably easily

clear the threshold in clause 7(b) ('may have a significant adverse impact on fair and effective competition'). If they do not clear that threshold, it will be because the regulator has assessed the potential impact on fair and effective competition and concluded that there will be no significant adverse impact on it. If, on the other hand, a change is assessed to be material, there would then be a further assessment in the shape of a PIT to determine whether the material change should proceed."

195. At [57] onwards, under the heading 'Ofcom's contemporaneous analysis', the Claimant makes a number of criticisms about how Ofcom tackled this issue in the course of its analysis and eventual approval of R1D in September 2020.
196. I am not sure there is much mileage in this line of argument. On the 'new UKPS' point, Ofcom was not faced with the exercise of a discretion which could be vitiated if it did not consider the issue properly. It was faced with a binary question: was R1D a new UKPS, or not? Mr Otty expressly agreed the decision was a binary one. Ofcom decided that R1D was not a radio service and so not a new UKPS. The question for me is whether this conclusion was right. The fact Ofcom may have considered the issue earlier during its approval process, or done so in more detail, seems to me to be neither here nor there.
197. Ofcom concedes that the point was only considered briefly (Skeleton Argument, [29]) but also says that the point was a simple one and did not require much by way of consideration or analysis. I agree. I think the answer is obvious that R1D was not a new UKPS because it is an online service only, and not a radio service. Moreover, Ms Walsh said at Walsh 1, [19]:

"19. The BBC MA contained a section headed 'The Radio 1 Dance stream is not a new UK Public Service'. In that section, the BBC stated:

'The Radio 1 Dance stream is only available on BBC Sounds. BBC Sounds falls within the existing scope of the BBC Online UK Public Service, which is defined as 'a comprehensive online content service, with content serving the whole range of the BBC's Public Purposes and including the BBC's news and sports websites, BBC iPlayer and BBC Three for younger adult audiences'. As such the Radio 1 Dance stream is not a new UK Public Service.'

The analysis in the Governance Paper is focussed on whether the introduction of the Radio 1 Dance stream amounted to a change to a UK Public Service which may have a significant adverse impact on fair and effective competition. Whilst there is no specific analysis on whether the introduction of the Radio 1 Dance stream amounted to the introduction of a new UK Public Service in the Governance Paper, I can confirm that this is something

which I considered in reaching the Decision and this is recorded in the recommendation paper sent to Ali-Abbas Ali on the BBC materiality assessment at paragraph 16. I considered the BBC's analysis of this point was correct, namely that the Radio 1 Dance stream did fall within the scope of the existing 'BBC Online' UK Public Service because it was a service only available online, and was as a result of that fact not a new UK Public Service."

198. At [60]-[63] of its Skeleton Argument the Claimant makes various criticisms of what it calls Ofcom's 'consequent decision letter, dated 11 December 2020'. The letter of 11 December 2020 was actually Ofcom's response to the Claimant's letter before claim of 9 November 2020. Ofcom stated that it was not going to revisit its Decision, and responded to the arguments raised by the Claimant in similar terms to those it now advances. I therefore do not think I need to set out Ofcom's response in detail on this aspect of the claim.

199. For these reasons, overall, I agree with Ofcom's conclusion that R1D was not a new UKPS. It is an online service and falls within the definition of BBC Online in Sch 1 to the Framework Agreement.

200. I also agree with Mr Rowsell's and the BBC's analysis in Rowsell 1, [48]:

"48. Our view in relation to the online stream brand extensions was that they would form part of BBC Online as an expansion of BBC Sounds rather than be UK Public Services in their own right. This is consistent with the treatment of the online BBC Three service listed as part of BBC Online in the list of UK Public Services. It is also consistent with the BBC iPlayer PIT in 2019, where it was clear that the significant expansion of the availability of programmes on BBC iPlayer did not make iPlayer a new UK Public Service and that even the much expanded BBC iPlayer remained part of BBC Online."

201. Ground 1 therefore fails.

*Ground 2: did Ofcom err in its conclusion that R1D was not a material change to an existing UKPS by reason of its effect on competition (Clause 7(7)(b) of the Framework Agreement) ?*

202. To recap, Clause 7(7)(b) provides:

"(7) For the purposes of this Clause, a material change means-

...

(b) any change to a UK Public Service which may have a significant adverse impact on fair and effective competition."

203. Here, the Claimant's main complaint is that Ofcom erred in its decision of 23 September 2020 in finding that R1D would contain no new content and no exclusive content and that, therefore, its market impact was likely to be small (Statement of Facts and Grounds, [101], [122], [124]-[126], [142(a)]); Skeleton Argument [69]-[72].
204. The Claimant no longer pursues its complaint about listener figures (ie, the suggestion that Ofcom erred in finding that the listening numbers for R1D were 'likely to be low' ([142(b)]). Whilst not fatal, this withdrawal certainly does not assist the Claimant's case under this ground. If a new BBC offering attracts few listeners then it is less likely to have a significant adverse impact on fair and effective competition.
205. As I will explain, it was Ofcom's assessment in September 2020 that R1D would not attract a significant number of listeners in a way that would affect competition, and this prediction turned out to be correct.
206. In fact, Mr Otty took Ground 2 with the first part of Ground 4 (Skeleton, [79]-[81]) because, he said, each of those two aspects of the grounds rely upon common aspects of the factual background. The Claimant's arguments are put in the Skeleton Argument as follows:

"69. This Ground relates to the other species of material change identified in Cl.7(7) of the Agreement: Ofcom's consideration of the impact R1D 'may have' on competition. Here, the Claimant's complaint is that Ofcom erred in its decision of 23 September 2020 in finding that R1D would contain no new content and no exclusive content and that, therefore, its market impact was likely to be small.

70. Ofcom's [16 September 2020] Governance Paper was founded upon an assumption that R1D would feature existing content, with no new content and no exclusive content. Ofcom's letter of 23 September 2020 stated that as a consequence of there being 'no new or exclusive content' R1D's 'market impact was likely to be small'. After R1D's launch, the Claimant and its members informed Ofcom that R1D included new content in the form of simulcasts, which included exclusive tracks, and that most of R1D's content came from programming designed for R1D. Following inquiries of the BBC, Ofcom defended its initial decision stating in a letter of 11 December 2020 that inter alia (i) the wording of its September letter had been wrong as Ofcom had been aware that R1D would include simulcasts (and thereby new content); and (ii) it noted that one new dance programme and one new music mix were launched at the same time as R1D, but Ofcom had always understood that these were commissioned only with R1D 'in mind' and not



‘exclusively for’ R1D, such that this content apparently could not give rise to a material market impact.

71. That decision making process discloses both (i) an admitted error in the September decision; and (ii) a fundamentally flawed approach, whereby Ofcom failed to give any consideration to the potential competitive impact of content that would, or at least may, appear to listeners to be new and exclusive to R1D (see above: nn.54 and 55) and instead concluded bluntly that existing or simulcast content could not have an adverse competitive impact.

72. Ofcom seeks to defend its approach on two bases; neither remedy the flaw in its decision making. First, Ofcom says that it did not know that content was being ‘designed for’ R1D at the time of its September decision. That response, however, is undermined by Ofcom’s express confirmation that it had, in September, ‘understood that, going forward, the BBC would be creating and commissioning content with the existence of [R1D] in mind’. Secondly, Ofcom says that content commissioned with R1D ‘in mind’ was ‘existing’ because (it seems) it was already ‘on BBC Sounds’. That too, however, is no answer as: (i) simulcast content was not ‘already’ on BBC Sounds and (ii) this defence merely repeats Ofcom’s error of applying a rule that “existing” content could not have a material market impact.

...

77. The Claimant’s final ground of challenge relates to two errors on matters critical to Ofcom’s decision making. These are addressed in turn below.

...

79. The first error relates to the BBC’s commissioning for R1D: as already emphasised, it is now clear that from the moment of its conception R1D was intended to ‘feel like’ a radio station; specialist new dance shows would be made to add to its content and that fact was to be disguised by those shows being played first, overnight, on other BBC radio stations. Mr Wall set out this plan in his two emails in November 2019, confirming that it was envisaged that new shows would ‘really [be] being made’ for R1D, although played elsewhere first, and that it was important that the BBC ‘stick to a clear story of creating content [...] for our existing stations’ in order to disguise this fact. As is clear from the BBC’s subsequent commissioning decisions and

R1D's scheduling (see above nn.54 and 55), that plan was successfully implemented.

80. There is no dispute that Ofcom was ignorant of all this: the BBC's blog in February 2020 expressly stated that R1D 'isn't about us creating new dance content for Sounds as we aren't'; the BBC MA presented all R1D material as existing content – not new, and not exclusive; and when Ofcom asked the BBC questions about its commissioning strategy, the BBC refused to give a clear answer. There is also no dispute that a correct understanding of the nature of the content of R1D was central to Ofcom's assessment of whether R1D amounted to a material change in this case. Ofcom's ignorance of this (established and material) fact thus vitiated its decision.

81. Ofcom's main defence to this challenge appears to be that sight of the November 2019 emails and the plans they revealed would have made no difference to its decision making (ODG, [92L]). The 'no substantial difference' test sets a high threshold, requiring the Court to consider what the decision would have been in the absence of the conduct complained of and to conclude it to be highly likely that the outcome would not have been different. In the Claimant's submission, it is highly likely that when confronted with evidence of a regulated person's plan to avoid regulatory scrutiny (and act contrary to unequivocal public statements) a regulator would apply heightened scrutiny. As Ms Walsh observes, this may have led to Ofcom reaching no decision on materiality (see above §75). In any event, Ofcom's position in this regard is necessarily *ex post* speculation. It is well established that such explanations should be treated with caution: the relevant question is not 'what the decision-maker may with hindsight say he would have made of the evidence', but 'whether [objectively] the evidence was capable of having made a difference': *A v Kirklees Metropolitan Council* [2001] EWCA Civ 582, §17 (also see §20).

82. The second error relates to the BBC's design of deliberately delayed engagement with stakeholders, in order to shorten the period for their objections. That design is evidenced by emails and the BBC's subsequent conduct. And there is no dispute that Ofcom was left in ignorance of it: the BBC's email of 26 August 2020 made no reference to their deliberate delay. There can also be no doubt that this strategy would have been material to Ofcom: the [14 August] Email reflects Ofcom's keen interest in the question of effective engagement. The Claimant contends, therefore, that Ofcom's ignorance in this regard vitiated its

decision. As with the first error, Ofcom's main defence is that sight of the emails at the time would have made no difference to its decision (ODG, [92O]). As noted above, however, the threshold here is high and *ex post* speculation should be treated with caution. When considering materiality, Ofcom evidenced real concern about the BBC's engagement; discovery of this strategy would, viewed objectively, almost certainly have heightened that concern and may very well have led to a different outcome (eg, no materiality decision being taken by Ofcom: cf. Walsh 2, [14], [24(4)] ...)."

207. In his oral submissions, Mr Otty said:

"Now these grounds, my Lord, challenge Ofcom's conclusion that the launch of Radio 1 Dance did not involve any material change to an existing UK Public Service. They are dealing with the second category of material change. They do so, they bring that challenge, by reference to what was we say a cornerstone of Ofcom's analysis, the assumption that Radio 1 Dance would feature only existing content and would not be used for new or exclusive content. That turned out, we say, not to be the case in any substantive sense. We contend that, in consequence, Ofcom's original September 2020 decision was flawed by reference to a fundamental error of fact."

208. The Claimant says that the Ofcom paper prepared in advance of the 23 September 2020 Decision was founded upon an assumption that R1D would only feature existing content, with no new content and no exclusive content and that these assumptions were reflected in its Decision letter of 23 September 2020.

209. Again to recap, the 23 September 2020 letter said:

"I am writing to let you know that, having reviewed the materiality assessment and the additional information you have provided, we do not require the BBC to conduct a Public Interest Test ('PIT') in relation to the proposal. This is because we consider the impact of the Radio 1 Dance stream on the market is likely to be small, particularly given it will be online only and will contain no new or exclusive content."

210. After R1D's launch, the Claimant and its members informed Ofcom that R1D included what it said was, in fact, new content in the form of 'simulcasts', which included exclusive tracks, and that most of R1D's content came from programming designed for R1D.

211. Following inquiries of the BBC, Ofcom defended its initial decision stating in its response of 11 December 2020 to the Claimant's letter before claim under the heading, 'Whether Ofcom correctly understood the proposal':

“3. In your Letter before Claim you identified various features of the Radio 1 Dance stream which might be said to be inconsistent with Ofcom's understanding of the stream when it made the Materiality Assessment.

4. In our letter of 20 November 2020 we said that Ofcom would seek further information from the BBC in order to enable Ofcom to examine the issues you had raised. We also stated that if the actual Radio 1 Dance stream was significantly different to what Ofcom understood the proposal to be, then Ofcom would take a new decision, focused on whether the actual Radio 1 Dance stream involves a ‘material change’.

5. Accordingly, Ofcom sent the BBC a formal information request on 18 November 2020 in order to understand more about the nature of the content streamed on Radio 1 Dance. We received a response on 25 November 2020. We sent some follow-up questions on 1 December 2020 and received a further response on 4 December 2020.

6. Having considered the issue in light of your Letter before Claim and the further information received from the BBC, Ofcom has reached the view that the actual Radio 1 Dance stream is not significantly different to what Ofcom understood the proposal to be at the time of its Materiality Assessment. Accordingly, Ofcom does not intend to revisit the Materiality Assessment.”

212. Ofcom then went on at [7] of this letter to give a number of reasons for this overall conclusion, including: (a) it was aware the BBC was going to place R1D on the main navigational wheel of BBC Sounds (ie, alongside existing radio services that are UKPSs, such as Radio 1); (b) Ofcom was aware that R1D would include programmes simulcast with Radio 1. It gave two examples of programmes simulcast on Radio 1 and R1D and then repeated on R1D; (c) the language of the 23 September 2020 letter might have been clearer when it said that R1D would not contain ‘new or exclusive content’ in that programmes that are simulcast might be said to be new, but Ofcom did understand that R1D would carry simulcasts; (d) it understood that whilst the BBC would be creating content with R1D in mind, it would not be doing so exclusively for the purpose of including them in that stream. Overall, from the BBC’s responses, it did not consider the design of programming on R1D to be ‘significantly different’ to what Ofcom expected at the time of the Materiality Assessment; (e) it understood there would be cross-over with commercial dance stations.
213. At [17] and [19] it rejected the Claimant’s assertion that it had committed any errors of fact.

214. I do not accept that Ofcom's Decision was flawed on the basis asserted by the Claimant and I reject this ground of challenge.
215. To begin with, it seems to me that there is an air of unreality about this ground of challenge. It is that Ofcom should have anticipated something happening (R1D attracting a significant audience to as to affect competition) when that has turned out not be the case – meaning Ofcom would have been wrong if it had concluded what the Claimant says it should have concluded. To say Ofcom committed a public law error because it got right that which the Claimant says it should have got wrong would be a curious outcome.
216. I go back to what the BBC told Ofcom about the R1D proposal in its MA (emphasis added):

“1. The BBC proposes to launch the Radio 1 Dance stream around October 2020. It will make existing content more easily discoverable by bringing together existing dance genre content into one recognisable destination. The BBC has sufficient existing content in this genre to provide a dedicated, curated stream available via BBC Sounds with minimal additional costs.

2. This genre and format is likely to appeal in particular to under-served audiences, including young (15-34 year olds), BAME, and C2DE listeners across the UK. The introduction of the Radio 1 Dance stream is a continuation of the BBC's evolution of BBC Sounds' user experience and curation.

3. The Radio 1 Dance stream is not a new UK Public Service and is not a change to a UK Public Service or non-service activity that may have a significant adverse impact on fair and effective competition. As such it is not a material change.

...

10. The Radio 1 Dance stream will create new functionality, aiming to make existing content more discoverable by bringing together existing dance genre content from across BBC radio networks and BBC Sounds, into one, clearly labelled destination. The stream will be populated within the limits of our current permissions around network podcast episodes and music mixes. *It is not intended as a vehicle for new or exclusive content and this is reflected in the budget.*”

217. The BBC said, in particular, that the R1D stream would include music mixes and live simulcasts and that these shows might have dance-related branding in their name, such as ‘BBC Introducing Dance’ and ‘Radio 1's Dance Party with Annie

Mac'. The BBC also said that the R1D stream would be used to introduce listeners to new music, introduced and contextualised by trusted BBC DJs (at [9]).

218. Paragraph 20 amplified the final sentence of [10]:

“20. ... [R1D] will not comprise any new content. All content within the stream will either be existing BBC Sounds content (off-schedule podcasts and music mixes), live simulcast content, or archive content. The stream is an approach to curation that helps listeners find related Dance content in one dedicated place. The introduction of the Radio 1 Dance stream is a continuation of the BBC's evolution of BBC Sounds' user experience and curation to make it easier to discover and explore content for both current and new listeners. Radio 1 Dance shows are popular with younger listeners and it is important that this content is available in a way that meets audience expectations as audio consumption habits continue to evolve. As such, the introduction of the Radio 1 Dance stream would generally be considered as a business-as-usual development.”

219. A further answer to the Claimant's complaint, I think, is to be found in Ms Walsh's statement (Walsh 1) at [21]-[25], which I accept fully and completely set out Ofcom's position, and what she understood the programming plan for R1D to be:

“21. The BBC MA stated that the content on the Radio 1 Dance stream would be comprised of:

(1) existing BBC Sounds content being:

(i) off-schedule podcasts,

(ii) off-schedule music mixes;

(iii) live simulcast content; and

(iv) archive content.

22. By way of explanation of what I understood the terms used above to mean:

(1) In its Phase 1 Materiality Assessment for BBC Sounds of March 2018, the BBC explained that:

(i) off-schedule content comprises programmes that have not been broadcast previously on any of the BBC radio stations and which are designed for on-demand listening.

(ii) off-schedule podcasts are spoken word audio programmes created for on-demand consumption.

(iii) music mixes are single audio files in which individual music tracks are spliced together to provide a continuous listening experience, similar to a music radio programme.

(2) The term ‘simulcast’ (shorthand for ‘simultaneously broadcast’) is commonly understood by those familiar with the broadcasting industry. Content is simulcast if it is made available on more than one service at the same time. When content is simulcast, a user would be provided with the same content, at the same time, regardless of the source from which they access it. For example, a piece of audio content would be simulcast live if it was made available to listen to on Radio 1 and also on the Radio 1 Dance stream at the same time.

(3) In light of the specific examples provided in the BBC MA (as to which, see paragraph 23(3) below), I understood ‘archive content’ to refer to content which has been broadcast previously on any of the BBC radio networks.

23. The BBC MA further stated that the Radio 1 Dance stream would include:

(1) music mixes of both new and classic dance tracks including Danny Howard’s club mix and BBC Introducing Dance;

(2) simulcasts of live shows on BBC radio networks including Radio 1’s Party Anthems, Radio 1’s Dance Party with Annie Mac, Danny Howard and Radio 1’s Dance Anthems with Mistajam; and

(3) shows already broadcast on BBC radio networks, primarily Radio 1 or 1Xtra, such as Radio 1’s Drum and Bass Show with Rene Le Vice and Radio 1’s Classic Essential Mix.

24. Paragraph 10 of the BBC MA ([SW1/p.1470]) stated:

‘The Radio 1 Dance stream will create new functionality, aiming to make existing content more discoverable by bringing together existing dance genre content from across BBC radio networks and BBC Sounds, into one, clearly labelled destination.’

25. I understood from the BBC MA read as a whole that the content made available on the proposed Radio 1 Dance stream would not be ‘new’ or ‘exclusive’ in that it would not be carried for the first time exclusively on the stream. Rather, I understood that the stream was intended to bring together content under the Radio 1 Dance brand that would

otherwise be available on BBC Sounds, whether as existing on-demand music mixes or programmes, as repeats of shows that had previously been broadcast on other stations (which would also be available on-demand), or as simulcasts of live shows being broadcast for the first time on other stations like Radio 1. In other words, the stream would be comprised of content otherwise available as part of the BBC Sounds service so was a way of bringing together and repackaging that existing content into a linear stream.

26. The BBC MA further stated:

“As well as the artists and tracks audiences know and love, the Radio 1 Dance stream would introduce listeners to the next wave of talent and new music, introduced and contextualised by trusted BBC DJs.”

27. As such, at the time of my Decision, I also understood that going forward the BBC would be creating and commissioning content with the existence of the Radio 1 Dance stream in mind. However, my understanding was that the BBC would not be creating or commissioning programmes exclusively for the purposes of including them in the stream since the BBC MA also stated that the Radio 1 Dance stream was ‘not intended as a vehicle for new or exclusive content’.

220. I understand Ofcom’s concession that the letter of 23 September 2020 could have been better worded. But I also accept that the ultimate question is not about the quality of its drafting, but whether Ofcom correctly understood the facts, or whether it misunderstood them to such an extent that its determination is unlawful. As to that, I think that it is clear from Ms Walsh’s evidence that Ofcom obviously did understand that there would be live simulcasts. I have also had regard to Ofcom’s paper of 8 December 2020. This assessed whether R1D as launched was significantly different to what Ofcom had understood it would be at the time of its Decision. This document explains at [29]-[33] under the heading, ‘Type of Content streamed on Radio 1 Dance’:

“29. In its Materiality Assessment, the BBC stated that the Radio 1 Dance stream would be populated with:

- a. existing BBC Sounds content (off-schedule podcasts and music mixes);
- b. simulcasts of live shows on BBC radio networks;
- c. shows already broadcast on BBC radio networks;
- d. archive content.



30. The BBC also said that the music mixes would contain both new and classic dance tracks.

31. The BBC has confirmed in its response to our formal information request that all content featured on the Radio 1 Dance stream falls within one of the categories listed above. In particular, the BBC has told us that no programmes were premiered on the Radio 1 Dance stream and that all music mixes included in the stream have already been made available for on-demand consumption before being streamed.

32. The BBC has also provided us with further information on specific programmes which Radiocentre raised concerns about as follows:

a. Classic Dance Anthems with Charlie Hedges: the BBC said this is an off-schedule music mix. It uses material from the live Radio 1 'Classic Dance Anthems' programmes and is made available on the BBC Sounds app for on-demand consumption before being streamed on Radio 1 Dance.

b. Radio 1 Dance Presents ...: the BBC said that this is a radio programme broadcast on Radio 1 on Saturdays at 2am-3am. It is simulcast on the Radio 1 Dance stream at this time, and then repeated multiple times on the Radio 1 Dance stream. According to the BBC, this programme falls under the categories of 'simulcasts of live shows on BBC radio networks' and 'shows already broadcast on BBC radio networks'.

c. Radio 1 Dance 24/7: the BBC said that this is a radio programme broadcast on Radio 1 every weekday morning from 4am to 5am and is simulcast on the Radio 1 Dance stream at this time, and then repeated on the Radio 1 Dance stream. According to the BBC, this programme falls under the categories of 'simulcasts of live shows on BBC radio networks' and 'shows already broadcast on BBC radio networks'.

d. Radio 1 Workout Anthems: the BBC said that this is a radio programme broadcast on Radio 1 every Tuesday morning at 3am-4am. It is then repeated multiple times on the Radio 1 Dance stream. According to the BBC, this programme falls under the category of 'shows already broadcast on BBC radio networks'.

33. Based on the information we have received from the BBC and our own analysis of the Radio 1 Dance schedule, it therefore appears that:

a. ‘Radio 1 Dance Presents ... ’ and ‘Radio 1 Dance 24/7’ are radio shows which are simulcast on Radio 1 and Radio 1 Dance (and then repeated on Radio 1 Dance). As set out in paragraph 28 above, in its Materiality Assessment the BBC had indicated that such content would be made available on Radio 1 Dance; and

b. ‘Classic Dance Anthems with Charlie Hedges’ is an Off-Schedule music mix which is made available on the BBC Sounds App prior to being featured on the Radio 1 Dance stream. As set out in paragraph 29 above, in its Materiality Assessment the BBC had indicated that such content would be made available on Radio 1 Dance. Ofcom did not consider that such mixes would be broadcast on other radio stations before being made available on Radio 1 Dance.”

221. The Claimant also said that Ofcom misunderstood the BBC’s plan for programming in the sense of existing vs. new programmes. As I have said, the BBC MA said that R1D would curate ‘existing’ content, as well as carrying simulcasts and archive content. The Claimant’s point – as I understand it - is that the BBC gave the impression, and Ofcom therefore understood, that it would not be commissioning new programmes specifically for R1D. That is said to be a factual error.
222. I think the answer to this argument is that Ofcom correctly understood the facts. Ofcom obviously knew that the BBC would continue to commission new programmes – it was not going to fix its roster of dance programmes in aspic (Ofcom Skeleton, [48]). Ofcom also realised that, when the BBC commissioned new dance programmes, it would inevitably have in mind all of its means of making that content available, including R1D. So Ofcom did not read the BBC’s MA as suggesting that the BBC would simply commission programmes as though R1D did not exist. On the other hand, it is right to say that Ofcom did apprehend that the BBC was not planning to commission programming exclusively for R1D.
223. Ofcom’s understanding was explained to the Claimant in its pre-action response of 20 November 2020, which enclosed the paper from 16 September 2020.
224. Ofcom’s understanding is also confirmed, for the avoidance of doubt, in Ms Walsh’s statement, which I quoted earlier (Walsh 1 [27]). It is also reflected in Ofcom’s 8 December 2020 paper at [42]:

“42. We appreciate that BBC's schedules will continue to evolve and that when the BBC creates content it will have regard to the various channels which that content will be distributed through. When considering the BBC Materiality Assessment, Ofcom appreciated that going forward, the BBC would be creating and commissioning content with the existence of Radio 1 Dance in mind, although it would not be creating or commissioning programmes exclusively for the purposes of including them in the stream. This is consistent with what the BBC described as the aim behind

the creation of Radio 1 Dance, ie, to seek to ensure that the way its content is distributed matches audience expectations about how content is made available. We also note that 'Radio 1 Dance' was an existing BBC brand."

225. Furthermore, the BBC confirmed in these proceedings that Ofcom's understanding accurately reflected the BBC's plans at the time of the Decision: see Mr Rowsell's response of 4 December 2020 to Ofcom's enquiries, which I quoted earlier.

226. Mr Rowsell said (Rowsell 1, [116]-[119]) having referred to concerns expressed by Ofcom:

"116. ... one of the reasons for launching the R1D Stream was to respond to Ofcom's concerns, as dance music was identified as a key genre to help address those concerns. That finding did not only feed into the decision to launch the new shows may be commissioned with the intention to expand the BBC's dance offering. These shows are either broadcast first on our network of pop stations or are simulcast on a network pop station and R1D. They then become part of the existing Sounds content that can be used to put together the offering for the R1D Stream. As such, R1D will necessarily reflect changes in linear radio schedules and commissioning choices, as we explained to Ofcom in the second point referred to above.

117. This means that, sometimes, commissions are considered that do take account of the existence of the R1D Stream, which can be seen from a number of internal discussions in late 2019 during the early stages of the development of the R1D Stream. However, my understanding is that the intention was never for this content to be played only on R1D (ie it was never intended to be new and exclusive content for R1D alone); rather, the intention was that it would contribute to the BBC's overall dance offering to better serve the key audience sectors highlighted above and would first be broadcast on the BBC's pop networks (mostly Radio 1) or simulcast. I note that Jonathan Wall expressly acknowledged on 28 November 2019 that the BBC could not 'be seen to do things in a cloak and dagger way', for example hosting shows on local radio. As such the content found on R1D also is and will continue to be consistent with: (a) the BBC's existing regulatory permissions; (b) what we set out in our materiality assessment; and (c) what was discussed with Ofcom in other conversations related to R1D.

118. I understand that, from the evidence that Ofcom has filed in these proceedings this was also their understanding.

## Conclusion

119. The materiality assessment undertaken by the BBC in respect of the launch of the R1D Stream and communicated to Ofcom concluded that the launch was not a material change. I believe that this was the right conclusion in all of the circumstances, Ofcom agreed with that conclusion, and the actual performance of the R1D Stream has proved to be comfortably within the predictions contained in the materiality assessment.”

227. For all of these reasons, Ground 2 fails. Ofcom rightly understood the BBC’s plans for R1D and in any event its listener figures are small.

### *Ground 3: was the Decision rendered unlawful by procedural unfairness ?*

228. The Claimant’s third ground of challenge relates to alleged procedural unfairness during the decision making process. It argues that Ofcom ‘departed from the standard of procedural fairness it set itself, with no good reason’ (Skeleton Argument, [75]). The argument concerns the level of engagement which the BBC had (or did not have) with the commercial radio sector over its plans for R1D. It overlaps with part of Ground 4 (see Claimant Skeleton Argument, [82], complaining about delayed engagement by the BBC).

229. Mr Otty took me through a series of emails (largely BBC internal emails) during the spring and summer of 2020, and also to the contentious telephone conversation between Ms Kenny and Mr Purnell on 30 July 2020. However, Mr Otty expressly accepted I did not need to resolve the conflict of recollection.

230. Central to the Claimant’s case is the suggestion that during this period the BBC was not open or transparent with the Claimant, or commercial radio more broadly, about its plans for R1D; that there had been no real engagement; and that the BBC had deliberately delayed engagement with commercial radio to avoid objections being raised by it in relation to R1D; and that there had been failures in regulatory oversight by Ofcom.

231. Mr Otty said that nothing in the BBC MA of 31 July 2020 made any claim that any meaningful detail had been provided to the commercial sector about R1D:

“It makes no claim that Radiocentre has been expressly informed of the intent to launch dance and it simply contemplates an announcement of the October launch in August.”

232. I think this overstates matters. As I set out earlier, the BBC MA did refer to the stakeholder engagement that had already taken place (at [12]), albeit I accept it did not go into detail.

233. The argument as now advanced by the Claimant turns on the following passage in the email from Ofcom to the BBC of 14 August 2020 (quoted earlier but repeated for convenience):

“The issue of third party engagement is of particular importance for us in this case [...]. We think it is important that there is effective engagement with the commercial radio sector in particular before these plans are confirmed. It would be helpful if you could provide further detail on the engagement that you have had with third parties since the stream was first announced in February this year, including the concerns that have been raised with you by the commercial radio sector, and how you have taken those into account in shaping the proposals and reaching a view that they are not a material change. The BBC’s annual plan for 2020/21 stated that the plans for the Radio 1 Dance stream were on hold, so we would be keen to know if you have had any further engagement with industry since then and, if so, what concerns have been raised and how they have been taken into account by the BBC.”

234. The Claimant contends that in this email Ofcom was making clear that (a) it considered evidence of effective engagement necessary to support its assessment of whether R1D amounted to a material change within the meaning of Clause 7(7) of the Framework Agreement; and (b) ‘effective’ in this context meant, at least, informing stakeholders what the proposal was, doing so at a time that allowed for concerns to be raised and for those concerns to be taken into account, and then in fact taking any concerns into account. Having set this standard for its own decision, Ofcom was required to conform to it unless there was a good reason not to.

235. Ms Buxton of the BBC replied to this email on 26 August 2020, saying (*inter alia*):

“On 30 July James Purnell also spoke with Siobhan Kenny of Radiocentre to let her know that we were not planning to launch DAB extensions, but would proceed with the creation of streams within Sounds, including Radio 1 Dance.

The BBC has not received any further approaches from Global, Bauer, Wireless or other third parties since James’ RTS interview and conversation with Siobhan Kenny.

In the materiality assessment, we noted that the launch of the Radio 1 Dance stream was planned for October 2020, with a planned announcement in late August. The planned announcement has now been moved to mid-September in order to allow time to update commercial radio stakeholders about the BBC’s plans in advance.”

236. Summarising the position, Mr Otty said:

“More significantly again, I emphasise this again showing it is not necessary to resolve that conflict, there is no claim in this e-mail that any of the key features of Radio 1 Dance were being drawn to commercial radio's attention. So no claim of engagement at that level and, we say, necessary level of substantive detail.

We set out what contact then followed, my Lord, in September in paragraphs 36-40 of the skeleton argument, culminating in the BBC being told that [the materiality] assessment would be approved and the formal Ofcom governance paper and decision we have already looked at.

Pausing there, there are, we say, drawing it together, four points which are apparent whatever view is taken of the Purnell/Kenny telephone conversation. First as I said, never suggested that the BBC told anyone in the commercial sector of all of the key features of Radio 1 Dance that I have addressed.

Secondly, not suggested that the BBC in September were doing anything other than informing the commercial sector of what was to occur. No suggestion that representations were to be invited. No suggestion of meaningful engagement in that sense.

Thirdly, never suggested that the BBC ever told Ofcom of any desire on its part to avoid an engagement with the commercial sector, to avoid a long summer of objections and the like.

Fourthly, on the chronology, we see Ofcom ‘tipping the wink’ as it is put in one of the e-mails to the BBC that approval ... (indistinct) would be given on 14th September. That is six days before one key commercial player, Bauer, are informed, three days before another, Global, are informed. Impossible to characterise that we say as effective engagement.”

237. The Claimant makes two points in this regard (Skeleton Argument, [75]): (a) none of the Claimant, Global or Bauer were at any point given detail as to what R1D was, such that they were not at any point prior to launch in a position to comment on the proposal and its impact; and (b) those stakeholders were only informed of the plans to launch R1D in the period of three to six working days before a scheduled public announcement, leaving no time for their concerns to be taken into account. In finding the BBC's response satisfactory notwithstanding these failings, Ofcom departed from the standard of procedural fairness it set itself, with no good reason.
238. Mr Otty identified what the Claimant says were the public law errors here as follows:

“Against that factual background we say there are two public law complaints which arise. Firstly, Ofcom has set for itself a criterion of effective engagement by the BBC with the commercial sector before it, Ofcom, would approve the course the BBC was taking. It then proceeded to grant its approval, notwithstanding an obvious lack of such engagement, an approach which involved a complete absence of any procedural fairness at all so as to allow engagement.

The BBC simply did not provide the commercial sector with remotely sufficient detail to allow engagement. It instead provided fair notification of launch, a matter of days before making a public announcement. That is the first error.

The second error is that to the extent Ofcom formed a view that there had been effective engagement by the BBC, that view was vitiated by a fundamental error of fact. Ofcom was left entirely in the dark about what appears to have been the BBC's strategy of delayed engagement with the commercial sector. They asked themselves whether they should engage with the commercial sector substantively in July and they decide not to because they want to avoid a long summer of objections.

There no dispute that Ofcom was ignorant of the BBC's design and desire to delay engagement. There was therefore, we say, an established mistake. The claimant was obviously not responsible for that mistake, being ignorant of it too until disclosure in these proceedings. The mistake must be treated as playing a material part in decision making, as Ofcom was rightly concerned to know about effective engagement and it would inevitably, given all the transparency considerations I referred to, have been concerned at a strategy to delay such engagement.

Ofcom says in its skeleton argument, that ignorance of any such strategy of delay in engagement goes nowhere because the rationale behind the timing of the BBC's engagement with the commercial sector was, as it puts it, simply not a factor in Ofcom's decision making. As before, we respectfully submit that misses the point of the complaint that is made. We know that effective engagement was a factor in Ofcom's decision making because we have seen them asking about it and saying it was particularly important in their 14th August e-mail.

We say it inevitably follows that evidence showing deliberate strategy to avoid that engagement would have been a factor. Finally on this issue Ofcom says again that

even if aware of such a strategy it would have made no difference to its deliberations. That, we respectfully submit, is a remarkably sanguine stance to adopt and it simply cannot be accepted for the reasons we have set out in our skeleton argument at paragraph 82.”

239. The reference to delayed engagement is to BBC internal emails which, as I have said, the Claimant says show that the BBC deliberately pursued a strategy of delaying engagement with the commercial sector in order to minimise the opportunity for objection. For example, it cites this email from 29 June 2020 from Ms Lester (BBC) to Mr Rowsell (Skeleton Argument, [82]):

“At the (final) Oslo meeting today, there was a discussion about when to engage stakeholders around the new Dance stream. James' [Purnell] inclination was to hold off until September and engage Ofcom and commercial radio at that point. The rationale being that this avoided a long summer of objections and lobbying. The preferred launch is 9th October. Would that work from your point of view? Is that enough lead time for Ofcom ?”

240. I am not persuaded that the Decision was vitiated by procedural unfairness and I reject this ground of challenge. That is for the reasons set out in Ofcom’s Skeleton Argument at [60] et seq, and for the following reasons.
241. As a preliminary point, as I explained when I set out the factual background earlier in this judgment, it is clear that the Claimant, and commercial radio more generally, was aware from quite early on in 2020 (pre-pandemic) about a new BBC dance stream and had had very many opportunities to comment and/or object to it.
242. Ofcom rightly notes that procedural fairness generally refers to: (a) a requirement fairly to follow a procedure which has been published or in some other way promised or held out to the affected person; or (b) a requirement to follow a procedure which, although it has not been published or promised, is required by rules of natural justice in order to ensure fairness to the affected person.
243. Neither of those situations pertained here. The 14 August 2020 email was sent by Ofcom to the BBC and not to the Claimant, and the Claimant only became aware of it when it was disclosed in these proceedings. There was no promise to the Claimant of a consultation by the BBC, nor could it have had any legitimate expectation of one, because, as Mr Rowsell said, the published policies require consultation in some contexts, but not in the context which arose in this case (Ofcom Skeleton Argument, [62]). The Claimant accepts (Skeleton Argument, [76]) that Ofcom had no power to compel the BBC to consult. Nor did the email communicate any expectation on the part of Ofcom that the BBC should carry out any particular form of consultation. Hence, even if the Claimant had been copied in, then it would not have advanced the Claimant’s case.
244. Mr Jones took me through Ofcom’s Policy and explained that consultation is only required under Ofcom’s Policy where either it, or the BBC, has decided that a



change to UKPSs is material (see especially Section 4). If there is no such determination, then any consultation by the BBC is voluntary and/or arises out of its general Charter duty of openness and transparency to which I have referred. Hence in this case, because the BBC had determined the introduction of R1D not to be a material change, its engagement process was voluntary and not required by its own Policy or the Ofcom Policy.

245. Ms Walsh explained the purpose of the 14 August email in Walsh 2, [11]-[14]:

“(1) Ofcom’s intentions as to the meaning and role of engagement with stakeholders

11. I think it is important to set out what Ofcom intended by its ‘effective engagement’ and its request for information from the BBC regarding the same. In preparing this response I have also spoken to Mr Ball who wrote the 14 August 2020 email. Whilst I cannot specifically recall whether I reviewed that email before it was sent, it is the kind of email that Mr Ball would typically ask me to review before it was sent out and I believe it is likely that I did review it. In any event, its content reflected discussions that I had had with him around that time about understanding what the BBC had done by way of stakeholder engagement.

Making engagement a ‘pre-requisite’ to Ofcom’s ‘approval’

12. As a preliminary point, I should make it clear that in relation to considerations of materiality, the starting point is that Ofcom believes that the BBC should engage with stakeholders about potential changes it is planning to make and Ofcom has been encouraging it to do so. We (Ofcom) consider it to be generally important for the BBC to engage with stakeholders, among other things because (in a case such as the present case) such engagement may reveal information relevant to the materiality assessment. However, at the time of the Decision (and at present) Ofcom could not (and cannot) compel stakeholder engagement in any form by the BBC. The Claimant is therefore wrong to suggest that Ofcom was, by Mr Ball’s 14 August email, making BBC engagement a ‘pre-requisite’.

13. Furthermore, the Claimant is wrong to speak in terms of Ofcom ‘approving’ the launch of the Radio 1 dance stream. There is not a process under which Ofcom ‘approves’ the BBC’s considerations of materiality. Ofcom makes its own decision on these matters.

14. To test the point, I have considered what we would have done if the BBC had failed to provide any update to Ofcom on the engagement it had undertaken or planned to

undertake. In those circumstances, then it is possible that Ofcom would not have progressed directly to reaching its own decision on whether or not the Radio 1 Dance stream is or is not a material change. Ofcom does not have sight of everything that is going on in the market, so we may have been reluctant to press ahead in a situation where we thought there had been inadequate engagement with commercial radio. However, that does not mean that we would have prevented the BBC from launching the Radio 1 Dance stream pending its own process of engagement or pending any materiality decision from Ofcom. Ofcom has powers under Clause 9(6) which include a power to direct the BBC to stop carrying out a change but that is dependent upon Ofcom having made its determination that a change is material and then deciding that such a direction is appropriate. The BBC could therefore have launched the Radio 1 Dance stream, but would have run the risk that Ofcom might have reached a different decision on materiality and directed it to stop at a later stage. It is possible that, had we thought there had been inadequate engagement with commercial radio, we might have decided we couldn't reach our own materiality decision without first making our own additional enquiries of commercial radio, but that is not something which I am aware of ever having happened and (for reasons which I explain below) it is not something that we needed to consider here."

246. She went on to explain that at the time of its Decision, Ofcom understood that the BBC had announced its intention to release the R1D stream as early as February 2020, that it had told Ms Kenny on 30 July 2020 that it was proceeding with a plan to introduce a new dance stream within BBC Sounds (as I have said, there is an issue about this), and that it discussed this plan in more detail with Global and Bauer in September 2020. Ofcom also understood that in early 2020, Global had argued that R1D ought properly to be viewed and regulated as a new radio station (which indicated that commercial stakeholders had a broad sense of what R1D was going to be). Ofcom also understood from the BBC that neither Global nor Bauer had raised any new argument in September 2020 which was specific to the R1D stream. She said in Walsh 2, [18]-[19]:

"(2) Ofcom's understanding of what the BBC did in terms of engagement at the time it took the Decision

18. In this case, the BBC had been communicating around potential changes to BBC Sounds for some time, including its plan to introduce a new dance stream. We were therefore of the view that the BBC should maintain a dialogue on these plans as it appeared that there might be genuine concerns to consider on the part of commercial radio.

19. At the time of my Decision, this is what I understood about the nature of the engagement with commercial radio stakeholders about the Radio 1 Dance stream:

(1) the BBC had informed commercial radio in high level terms about its wider proposals in respect of BBC Sounds, including the launch of a new dance stream within Sounds called ‘Radio 1 Dance’, in February 2020;

(2) the BBC had subsequently spoken to representatives of Global about the Radio 1 Dance stream, and Global had said that it considered the stream was a new radio station;

(3) the BBC had put its wider plans on hold for a period and communicated this in its May 2020 Annual Plan;

(4) on 30 July 2020, James Purnell of the BBC had taken part in a webinar interview in which he said the BBC was not proceeding to launch new DAB stations but would be ‘innovating its audio offering within BBC sounds including bringing together on-demand and linear material’;

(5) James Purnell had then explained to Ms Siobhan Kenny (the Chief Executive Officer of the Claimant) on 30 July 2020 that the BBC was not proceeding to launch new DAB stations but that there would be a new dance stream within Sounds;

(6) the BBC had not received any further feedback from commercial radio stakeholders between the 30 July 2020 events and the time of sending its 26 August 2020 email to Ofcom;

(7) in the week prior to 14 September 2020, Jonathan Robertshaw (BBC Head of Strategy for Radio and Education) had spoken to representatives of Global and Bauer (the two largest commercial radio operators) to ‘brief’ them on the launch of the Radio 1 Dance stream and in that conversation had sought to obtain feedback from those representatives by reference to various prepared questions was interested in discussing in this and that their concerns were broader in nature and concerned the nature of BBC Sounds as a whole and the regulatory process by which changes could be made to it.”

247. In its Skeleton Argument at [72] Ofcom said:

“72. Radiocentre’s core complaint is that it was not told about the ‘key features’ of R1D before launch. Radiocentre’s SFG at fn 182 gives examples of what it

meant by ‘key features’. These related to details about the specific content that would be played on R1D and how it would be accessible to listeners within BBC Sounds. Ms Walsh explains that Ofcom did not proceed on the basis that the BBC had given any detailed explanations to stakeholders about R1D. Rather, Ofcom proceeded on the basis that the BBC had given a high-level explanation of what R1D would be (in effect, that it would be a new dance stream on BBC Sounds which would feature a combination of on-demand and linear content). This was not an unfounded assumption. In a letter to Radiocentre sent on 24 February 2020, the BBC said that it was planning to launch R1D which would be a stream on BBC Sounds which would group together content that would otherwise be on BBC Sounds. In a public blog post, dated 26 February 2020, the BBC again explained what R1D would be in general terms ... The BBC again explained in its Annual Plan dated May 2020 that R1D would be a stream, on BBC Sounds, which would help audiences discover live and on-demand content otherwise available on BBC Sounds. Ofcom considered this would be enough to enable stakeholders such as the Claimant to raise any concerns given their background in the industry.”

248. In Walsh 2, [19]-[22], Ms Walsh said:

“20. I did not assume that the BBC's updates had or would contain granular levels of detail of the kind suggested by the Claimant about the characteristics of the Radio 1 Dance stream (for example, the fact that the stream would be placed on the Sounds wheel, that it would have ‘presenter led content’, that there would be content commissioned with Radio 1 Dance in mind, or that there would be an ‘utterance’ for the stream on smart speakers). I understood that the BBC had explained to commercial radio stakeholders that it was proposing to launch a new dance stream within Sounds which would be called ‘Radio 1 Dance’ and that this would be understood to feature a combination of on-demand and linear content. My assumption was that this level of detail would have provided the Claimant, taking into account its expertise and familiarity with BBC services, a fairly good understanding of the new stream.

21. Based upon my understanding of what the BBC had done, as set out above, I formed the view that commercial radio stakeholders had been provided with a sufficient window of time in which to raise any objections or issues that they had with the Radio 1 Dance stream specifically. A view had been expressed that the stream ought to be

considered as a new radio station, and the BBC had responded to that particular point. On that basis, I considered that Ofcom could properly proceed to considering the materiality of the stream.

22. In any I event I struggle to understand from the Claimant's [Amended Statement of Facts and Grounds], exactly what it argues it would have raised with the BBC (or Ofcom) had it been provided with more granular detail about the stream, which I had not already taken into account in reaching my Decision. In this regard, I would note that the Claimant was very active in pointing out features of the stream that it had thought Ofcom had got wrong or failed to take into account after the Decision was made. Ofcom considered and rejected all of those arguments ..."

249. She then went on to give two examples: (a) the Claimant sent Ofcom a letter on 13 October 2020 which raised arguments about features of the Radio 1 Dance stream which it believed Ofcom had not properly appreciated at the time of the Decision (including, for example, that it was on the Sounds wheel). Ofcom explained in its response of 16 October 2020 why there were no such errors of understanding; (b) the Claimant also argued that the actual operation of the R1D stream did not reflect what the BBC had told Ofcom it would contain in its letter before claim dated 9 November 2020. Ofcom investigated those matters (including by issuing an information request to the BBC) and concluded that the actual operation of the R1D stream was not significantly different to what Ofcom had understood it to be when taking the Decision.

250. Overall, I am not satisfied there was any procedural unfairness. The Claimant was not promised any particular consultative procedure. In any event, there was a consultative process. The BBC engaged with the Claimant and other stakeholders from an early stage in 2020, gave them information about its plans for R1D sufficient to allow them to raise issues, and Ofcom did not misunderstand the position and what engagement there had been between the various parties. It rationally decided that it had enough information to make its own materiality assessment (which, as I said earlier, has turned out to be correct). On any view, the Claimant had a month from early September to make representations once it learned of the BBC's October launch plans, and Ofcom remained receptive to approaches from the Claimant even after R1D had launched, and it sought further information from the BBC, which it considered.

251. This ground of challenge therefore fails.

*Ground 4: was Ofcom's Decision vitiated by material errors of fact ?*

252. The Claimant's final ground of challenge is addressed in its Skeleton Argument at [77] onwards. It says it relates to two errors on matters critical to Ofcom's decision making.

253. To a significant extent I have already addressed the substance of this ground of challenge, which Mr Otty (in his oral submissions at least) subsumed into

Grounds 2 and 3. I have rejected those grounds, and so it largely follows that Ground 4 fails as well.

254. In considering error of fact, the governing principles are well-established: the Claimant must show that: (a) the decision-maker made a mistake as to an existing fact; (b) the mistake is ‘established’ in the sense that it is uncontentious and objectively verifiable; (c) the claimant was not responsible for the mistake; and (d) the mistake played a material, though not necessarily decisive, part in the reasoning for the decision *R (Institute of Chartered Accountants in England and Wales) v Lord Chancellor* [2019] EWHC 461 (Admin), [77], citing *E v Secretary of State for the Home Department* [2004] QB 1044, [66].
255. The Claimant says that these requirements are satisfied in relation to both errors in the present case.
256. The first error alleged by the Claimant relates to the BBC’s commissioning for R1D: it is said that Ofcom did not properly understand the BBC’s plans for R1D and that programmes would be made with R1D in mind albeit they would be broadcast elsewhere.
257. I rejected this complaint in relation to Ground 2 on the basis of Ms Walsh’s evidence. Ofcom did not misunderstand the BBC’s plans and committed no error of fact.
258. The second error alleged by the Claimant relates to the BBC’s design of deliberately delayed engagement with stakeholders, in order to shorten the period for their objections.
259. I rejected this complaint in relation to Ground 3.
260. As I have said, it follows that Ground 4 fails.

## **Conclusion**

261. This claim for judicial review is therefore dismissed.