



Commissioning for the BBC Public Services:

A consultation on Ofcom's proposed approach to assessing the BBC's compliance with its requirements

BBC Response

September 2018

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Executive summary

The BBC welcomes the chance to comment on Ofcom's consultation on its proposed approach for assessing the BBC's compliance with its commissioning requirements.

We welcome Ofcom's conclusion that the BBC's commissioning processes are fit for purpose and that it sees no need to impose any additional regulation. We emphasise the following points:

- Commissioning is an area of vital importance to our ability to serve our audiences. We are strongly incentivised to commission the best ideas, irrespective of the identity of the producer;
- Commissioning decisions are taken based on expert creative judgement through an iterative development process to secure the best content to fulfil the BBC's mission and public purposes; and
- We have a strong track record under the Window of Creative Competition (WOCC) of running a fair, reasonable and non-discriminatory process where BBC producers compete with independent producers – this provides a strong foundation to meeting our new Charter obligations on contestability.

While we already provide considerably more transparency than relevant peers, we now propose to publish additional information on the commissioning process to benefit all stakeholders, including Ofcom. This would include information about the inputs to the commissioning process, as well as the outputs from the process. It is imperative for the BBC that our stakeholders, including potential suppliers, have full confidence in commissioning at the BBC.

We are also happy to commit to working with Ofcom to develop an approach to reporting for radio and online commissioning, with the aim of delivering this information by the time we publish the 2019 Annual Report and Accounts.

There are only two areas where we disagree with Ofcom's consultation:

- We consider that our online commissioning obligations under the Agreement apply to editorial content for relevant online services. Some of Ofcom's discussion in this area could be seen to imply that it considers these obligations are broader.
- We do not consider that our 2017-18 Annual Report and Accounts omitted to publish any required information on our progress towards meeting contestability requirements in TV, as Ofcom sets out.

This response is divided into four sections, which broadly map to the structure of Ofcom's consultation document, and cover TV, radio and online:

BBC Response to Ofcom consultation on commissioning for the BBC Public Services

- Sector context
- Potential competition concerns
- Assessing compliance with Fair, Reasonable, Non-Discriminatory and Transparent (FRNDT) requirements
- Monitoring and reporting requirements

1. Sector context

We set out below further details of how commissioning works at the BBC for TV, radio and online. This provides further important context to the helpful discussion in Section 3 of Ofcom's consultation document, and to the discussion in section 4 of this response on reporting and monitoring.

1.1 TV

Commissioning in TV is an iterative process, which often involves a significant amount of collaborative development work between the point that the BBC receives an idea from a producer and taking a formal decision to commission. Judgements depend not just on the idea alone, but on the context of an ever-shifting broadcast schedule and the competitive environment. Commissioners are constantly on the lookout for the best ideas.

The BBC sets its commissioning priorities for each year taking into account the success of previous series or programmes, as well as the BBC's creative remit published in the annual plan. We communicate these ideas with the market, including through the annual plan itself, information on the BBC website, and the regular interaction that commissioners have with suppliers. BBC commissioners receive a range of ideas from 'the market' on a regular basis. Some of these pitches may relate to specific priorities the BBC has set out; others are simply ideas that producers or writers think the BBC might be interested to make.

It is primarily on the strength of these ideas submitted to BBC that commissioners exercise their creative judgement on whether an idea is worth developing further. Ideas are reviewed by relevant genre teams, who consider whether to further develop these ideas against their commissioning briefs. Ideas are constantly evolving, even after being submitted to the BBC, as part of the creative process and ongoing dialogue between the BBC and its suppliers. In some instances the BBC may decide to fund further development of initial ideas. Genre teams then decide which ideas are strong enough to share with channel commissioning teams.

Commissioning teams then decide whether to move ahead to commission (or greenlight), taking into account audience needs, available slots, and the whole commissioning slate across different services. Ideas develop over time, as do the slots the BBC has available across the UK public services, and the BBC's commissioning priorities. This is not a static linear process, and commissioning decisions ultimately come down to the judgement of commissioners about the quality of an idea and whether it is the right thing for the BBC. Genre teams may continue to iterate the proposition with the producer even after the formal commission, to ensure the final programme is the best it possibly can be for audiences. Commissioners always welcome great ideas – in deciding to commission

or develop these ideas further they must re-evaluate proposals and the slate as ideas emerge and develop. There is no fixed set of 'commissioning opportunities' the BBC offers up to the market each year; these evolve over time depending on the multitude of decisions made both on returning series and new shows.

The process described above is fundamentally different from the small minority of cases in which the BBC has taken the decision to tender programmes, on 'a work for hire' basis (i.e. on the basis of the payment of a standard production fee, with programme rights and brand management being controlled by the BBC public service). The BBC can only hold a tender where it owns the intellectual property rights. The tenders conducted to date have, as a result, been for long running returning series, to which the BBC owns the intellectual property, and that the BBC wanted to continue commissioning. They follow a specific linear process more akin to procurement for goods or services and are driven largely by the regulatory requirements of Schedule 3 of the Agreement rather than strategic commissioning priorities built on the BBC's mission and public purposes. For tenders we specify the opportunity and the product the BBC requires then publish tender documents for bidders to respond to.

1.2 Radio

As Ofcom sets out in its consultation, our Radio Commissioning Framework sets out details of the processes that we follow for different types of commission, including bundles, general ideas and direct commissions¹. In a number of instances the process starts with a published brief set out by BBC commissioners – this could be a tender for an existing series, or a brief for an unfilled slot (TBAs) in a station's schedule. Suppliers then work up proposals to submit to the BBC through the Proteus system which manages pitches. There are eligibility criteria that suppliers must fulfil to be shortlisted and invited to submit full proposals, on which commissioners will decide. This process is in some ways similar to a formal tender process, and the BBC will typically appoint a supplier to fulfil the requirement. However the process is also flexible to different types of commission to ensure it is proportionate in terms of the resource required for the BBC and prospective suppliers.

In certain instances, and where seeking only one commission on a specific subject, a commissioner will approach a small number of relevant suppliers directly, to provide full proposals and omit the usual eligibility checks and shortlisting. Finally, as with TV, suppliers are always welcome to pitch ideas to the BBC for commissioners to consider whether it meets with a commissioning brief or not. We

¹ See <https://www.bbc.co.uk/commissioning/radio> for further details

may decide to ask for full proposals if we like the ideas, and may then decide to commission the programme.

All of these processes are competitive. We have put in place a plan to allow us to contest the required 60% of Total Relevant Broadcasting Time by 31 December 2022. This then feeds in to the commissioning rounds that we run each year, where we contest a mixture of TBAs and retuning series. We are currently on track to meet this requirement.

1.3 Online

We operate a range of online services, as Ofcom sets out in 3.29 in its consultation document. We consider that it is specifically online editorial content to which our contestability obligations apply. This includes video, audio and text content; however it would generally exclude technical services and software. Unlike TV and radio content, the BBC does not have a dedicated online commissioning team. Commissioning for online editorial content is managed by relevant genre teams (e.g. BBC Children's). We also consider that content we commission for our video and audio on demand services is not covered by our contestability obligations for relevant online material.

1.3.1 Commissioning online material

Contestability for online material should be seen as equivalent to TV and Radio – what matters is contestability for the *editorial content* that we commission for relevant online services, not the totality of procurement for our online services. The overarching rationale for regulatory intervention in commissioning is about supporting the creative sector, not the wider technology market. We therefore consider that it is commissioning for video, audio and text content that is relevant to our contestability obligations under the Agreement. The nature of online services means that any individual page of an online service (website or app) is often made up of a number of different elements. Contestability applies to the pieces of content, not for entire pages, which are published and curated by BBC staff.

We do not consider that services like “technology and software”, which we have and will continue to procure in the market, are necessarily relevant to online commissioning, as could be inferred from Ofcom’s consultation at 3.32. While we advertise the procurement of some of these services on the commissioning section of the BBC website, these services enable the provision of content on the BBC’s online services, but they are not editorial content themselves. Likewise, technical services for TV and radio – such as playout etc. – are not included in contestability targets, nor does Ofcom propose to include these in our targets or reporting. The BBC’s procurement of these inputs is in any event conditioned by its General Duty to exercise good stewardship of the licence fee and its public commitment, via such

initiatives as “compete and compare” to bring down its overheads.² However, where technology is inseparable from editorial content, as it is with some games for example, we consider it would be relevant to online contestability requirements as it is effectively editorial content.

We also consider that any online content that has originally been commissioned for the BBC’s TV or radio services, would be subject to relevant contestability requirements for those services, and would therefore not be relevant to any online contestability requirements. As we have separate obligations, set out by Ofcom in this consultation, for this content, it would not be appropriate to consider it as ‘online’ content. There is also content on BBC online services that is ancillary to commissions for TV or radio, and which is therefore provided to the BBC as part of the commissioning process. For example, the Peaky Blinders page of BBC.co.uk is a BBC online service, but hosts content provided by the independent producer of the show, which is contracted for in the production agreement. Competition therefore applies to the TV commission, and the contestability duties engaged are therefore those which apply in relation to the commissioning of television programmes, which should be read to include any ancillary activities included in the commissioning brief and not the duties relating to online material.

Finally, we consider that the market for online content provision is distinct from TV and radio content production where we do business with independent producers. There will be instances for online – for example if we commission a specific piece of short form video content for our website and apps – where we may expect to deal with independent producers. However, much of the content on our website and apps is in the form of text, graphics or related formats that may not be commissioned in the way that long form TV programmes are, and involves doing business with different types of suppliers and individuals for different types of goods and services. We welcome further engagement with Ofcom on this point as we develop reporting in line with Ofcom’s proposed timescales.

1.3.2 On demand services

The BBC’s on demand services – BBC iPlayer, iPlayer Radio and BBC Sounds – are online services but are not captured by the current requirement for online contestability in the Agreement.

The Agreement sets out that the BBC must secure competition for all “relevant online material” by 31 December 2027. It goes on to define “relevant online material” as all online material included in the UK Public Services except

² As reported in the BBC’s Annual Report and Accounts 2018, 6% of controllable spend was on overheads.

- (a) “programmes included in the UK Public On Demand Programme Services;
- (b) news and news-related current affairs material; and
- (c) any material where the BBC considers that complying with the obligation in paragraph (1) would not secure value for money”

The UK Public On Demand Services are then defined in the Agreement as “those UK Public Services the principal purpose of which is the provision of programmes comparable in form and content to programmes normally included in television and radio programme services, and access to which is on demand, and UK Public On Demand Programme Service means any of those services”. Furthermore the Agreement at Clause 60 sets out that “Online material excludes programmes provided in an on-demand programme service”. The Agreement therefore clearly excludes any content commissioned primarily for BBC iPlayer, iPlayer Radio or BBC Sounds from any online contestability requirements.

We consider that the intention of this exclusion is to ensure there is no risk of ‘double counting’ between requirements for On Demand Services captured by TV and radio contestability on the one hand, and online requirements on the other. However, it appears that any commissioning exclusively for the UK Public On Demand Services may also be excluded from any contestability requirements relating to TV or Radio in the Agreement, and therefore also from any reporting:

- For radio, the contestability requirements relate to relevant “network radio programmes”, which we consider clearly excludes any content commissioned for on demand only services, as these are not Network radio as defined in the Agreement³
- For TV, references in the Agreement to the removal of the in-house guarantee must refer solely to network output, as the in house guarantee is based on a proportion of airtime, which can only be measured by reference to a linear schedule
- The wider obligation to achieve 100% contestability by 2027 would cover the BBC’s on demand services included in the UK Public Services as “relevant television programmes” is defined as “all television programmes included in the UK Public Services”⁴, not by reference to the in-house guarantee or to network television.

³ The Agreement defines network radio as “Radio 1, 1Xtra, Radio 2, Radio 3, Radio 4, BBC 4 Extra, BBC Radio 5, BBC 6 Music and BBC Asian Network”

⁴ The Agreement lists the UK Public Services in Schedule 1, which includes online services and specifically references BBC iPlayer.

For the avoidance of doubt we expect that any TV or radio programmes commissioned exclusively for our on demand services (i.e. off schedule podcasts or commissions BBC iPlayer only) would in any event be commissioned through a FRNDT process, even in the absence of a strict legal obligation to do so under Schedule 3 of the Agreement.

Given the ambiguity in the Agreement requirements and our commitment to contestability we consider it would be most transparent for us to report:

- Off-schedule podcasts within the target for network radio, as this more accurately reflects how the BBC is serving its audiences (i.e. anything that is comparable to a radio programme would be reported under radio)
- Long form on-demand only TV programmes within relevant reporting for television programmes (i.e. anything that is comparable to a television programme would be reported under television) as we track our progress towards the 2027 target

We think this most accurately reflects the intention of the Charter and Agreement to ensure that we contest the production of TV and radio content. However, we welcome further engagement with Ofcom on how best to report in these areas in future. There are still some potential areas of ambiguity that we need to try to resolve; for example, whether short form audio visual content should be reported as online material or as a television programme.

2. Potential competition concerns

The Agreement makes clear that Ofcom has a duty to regulate commissioning at the BBC. In discharging this duty Ofcom must clearly justify any potential regulation in line with its duties under Section 3 (3) of the Communications Act, and must therefore have a robust and evidence-based rationale for any proposed regulatory intervention, taking into account the impact on the BBC. Regulation in this space mainly relates to the collective buying power of all Public Service Broadcasters, not simply the BBC. We note that, in relation to commissioning, the BBC in itself does not have significant market power. Ofcom's Media Nations Report shows BBC network TV programmes at only 16% of total spend in the UK⁵. However we also note the important role the BBC plays in the commissioning ecosystem and the need to clearly demonstrate that we run a FRNDT process, particularly given our public funding.

2.1 Ofcom's potential competition concerns

Ofcom sets out in 4.2 to 4.7 some potential concerns about the BBC, as a vertically integrated broadcaster and producer, seeking to favour itself through the commissioning process. However, Ofcom also acknowledges in 4.12 to 4.13 that there are countervailing incentives on the BBC, which, combined with the effective processes we already have in place, mitigate the potential risk of market distortion. We agree, and we welcome Ofcom's finding that no further regulation of commissioning is therefore required.

We emphasise that commissioning fairly and on the merits of the ideas pitched to us is at the heart of ensuring we can continue to deliver for our audiences by putting the best, most distinctive content on our services. This is a fundamental component of delivering the mission and public purposes, which is the object of the BBC. There are clear incentives on the BBC to either make decisions based on the quality and delivery of an idea, and to run a transparent and open process. If the process is not fair, we cannot expect to commission the best ideas. If it does not appear to be FRNDT to potential suppliers, it is less likely they will want to pitch ideas, or to pitch the best ideas, to the BBC. This in turn will decrease the quality the BBC is able to offer our audiences, and therefore our ability to deliver for our audiences.

Ofcom's stated concerns around the commissioning process, as set out in 4.2 to 4.7 would in general apply to any vertically integrated broadcaster/ producer, and are

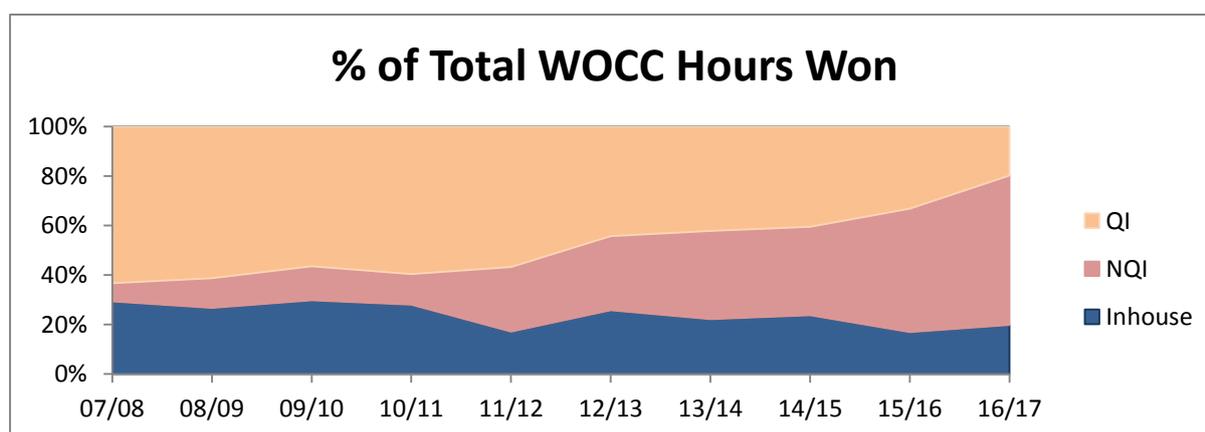
⁵ Ofcom, Media Nations 2018 https://www.ofcom.org.uk/_data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf, Figure 23, p40

not unique to the BBC. C4 is the only major UK television commissioner that is also not a producer, and to which these potential incentives would not apply. Within a commercial vertically integrated broadcaster and producer it may be, as Ofcom sets out, a rational strategy to commission as much content from an in-house or associated producer. Such an approach would ensure that the majority of advertising revenue funds group production, that intellectual property also stays within the group and therefore maximises potential shareholder returns, which investors will expect.⁶

However, within the BBC group the same incentives do not apply: it is only in the BBC's interests to support a commercial production business where doing so ultimately enhances the BBC's ability to deliver for audiences, either by returning value back to the BBC public services, and/or by producing distinctive content for the BBC. There is therefore no incentive to commission a bad idea from BBC Studios, simply to support our commercial arm, as doing so conflicts with our ability to achieve our mission and public purposes. Our commissioners are not incentivised by the financial performance of the organisation, but the success of their portfolio of shows.

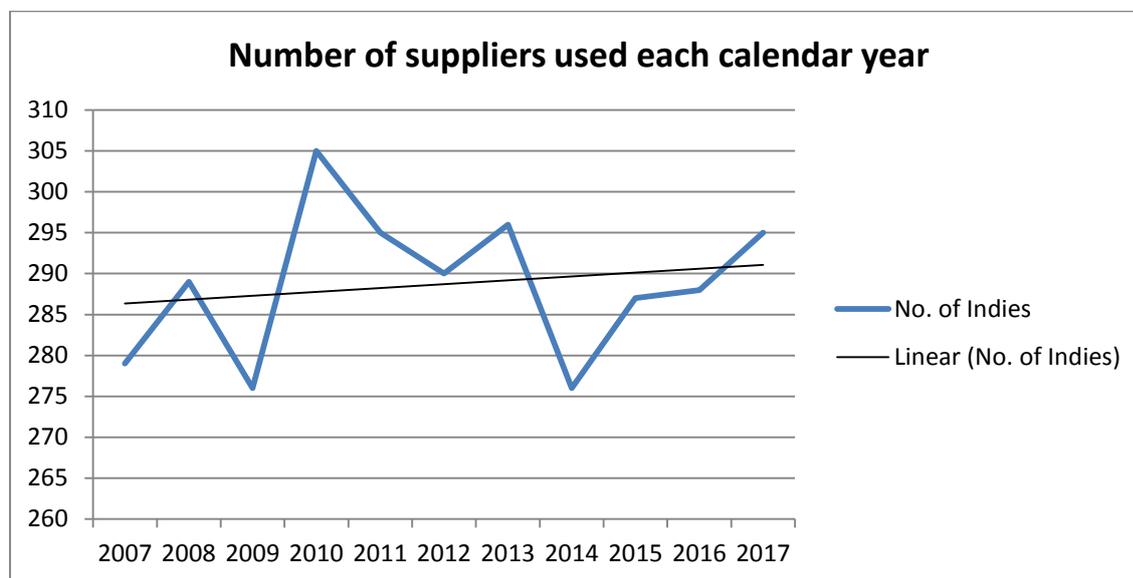
2.2 Our track record under the WOCC

Evidence from the Window of Creative Competition (WOCC) demonstrates the incentives on BBC commissioners to commission the best ideas working in practice. The chart below sets out details of hours won under the WOCC each financial year:



⁶ For example, since 2009 ITV has increased the proportion of ITV output made by ITV Studios from 50% to 66% (<https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/2016-itv-plc-annual-report.pdf>, p.39; <https://www.itvplc.com/~media/Files/I/ITV-PLC/documents/reports-and-results/2017-annual-report.pdf>, p.29).

In each year of the WOCC, independent producers won at least 70% of the hours available. Over the ten years the WOCC operated, independent producers won on average 76% of hours. Over the same period we also commissioned from an average of 288 different suppliers each calendar year across network and non-network commissions – the trend was slightly increasing over the period as the chart below shows:



Since 2012 we have also tracked the number of new suppliers we worked with each calendar year, which averaged 51 each year between 2012 and 2016 – on average 18% of all independent producers we worked with each year over this period were new suppliers to the BBC. Since 2012 we have received no complaints about the commissioning process framework and no upheld complaints about commissioning.

We note that the WOCC involved BBC in-house teams pitching against external third parties, without the current separation requirements Ofcom has in place for BBC Studios. This clearly demonstrates the BBC’s commitment to commissioning the best ideas, and the BBC’s track record of ensuring that commissioning is FRND. We have built on this experience in engaging with our new regulatory requirements. We further note Ofcom’s stated concern about the colocation of employees of BBC producers and BBC commissioners, which Ofcom cites as a potential concern (here, and implicitly in its consultation on trading and separation requirements and guidance). This is a risk the BBC has successfully managed throughout the WOCC. Given previous success in managing this with wholly in-house teams, the current degree of separation required by Ofcom is clearly not a necessary pre-requisite to secure fair and effective competition. We consider this is particularly pertinent for Ofcom to consider given that much of its rationale around its proposed separation requirements for the BBC rests on the potential for market distortion through the commissioning process.

3. Assessing compliance with FRNDT obligations

Ofcom's consultation sets out a range of factors it considers may be relevant to different stages in the commissioning process. We consider that in general these reflect our processes, and we welcome the clarification as to how Ofcom would assess any potential complaints about commissioning at the BBC. We agree with Ofcom that as part of any investigation Ofcom should consider how the proposed factors may apply to the specific circumstances. We note the points set out in Section 1 about the way commissioning works, and the different type of process that apply to different material, which justifies the flexibility that Ofcom rightly proposes. We set out comments below on several of Ofcom's proposed factors.

Eligibility to pitch and criteria related to the identity of a producer

Ofcom sets out in 5.26 that it "would...expect that the BBC will want to consider how working with producers allows it to fulfil the Mission and promote the Public Purposes, for example by commissioning content in different areas of the UK, or to promote diversity."

We would like to clarify that geographic location would not affect the eligibility of a production company to submit an idea to the BBC, e.g. through BBC Pitch. Geographic location of producers is important in enabling the BBC to meet its obligations for made out of London, and ensuring that we represent all of the UK's communities in our output.

Ofcom sets out in 5.28 that "In considering whether the BBC commissioned content on a FRNDT basis, we are likely to consider if any eligibility criteria had the effect of unduly limiting producer participation in the commissioning process or unduly favouring a particular producer or type of producer."

The only real 'eligibility to pitch' criterion we have is whether someone can make a programme (i.e. are they a production company). The exception to this is tenders for returning series' which, as set out above, operate more like a procurement process. As noted above, commissioners are also required to consider a range of quotas, including made out of London and qualifying independent producers, as part of their decision making, but this does not affect the ability of producers to submit ideas to the BBC. We aim to draw in the widest possible range of ideas and producers and, from that pool, to then commission content of the highest quality which also fulfils our regulatory content quotas.

Access to commissioners and ideas development

Ofcom sets out in 5.33 that "We note that, in some instances, BBC commissioners and BBC producers may be colocated, for example at Pacific Quay. We would expect

the BBC to take steps to ensure that BBC producers do not derive an unfair competitive advantage...”

BBC producers, including BBC Studios, may be located in the same buildings as BBC commissioners in some locations out of London. In London, where the largest BBC Studios production team is based, BBC commissioners are located in a separate building from BBC Studios production staff. We also provide office space to independent producers in Salford and at Pacific Quay, and would do so in other locations if producers were working on developing and/or producing BBC commissions. Furthermore, in a market where producers and production staff often work on a freelance basis, we do not consider it is necessarily instructive to characterise any individual as a BBC producer. They may work for a variety of production companies, including the BBC, on different commissions. There is therefore a market for production talent in which all production companies try to secure the most talented and well regarded personnel to then be able to compete in the production supply market.

We take all reasonable and appropriate steps to ensure that information on commissioning opportunities is made available to the whole of the market on an equivalent basis, including: publishing details of opportunities on the commissioning website, regular formal briefings with suppliers around the UK and informal interactions between commissions and suppliers. We have also put measures in place to restrict circulation of commissioning information to ensure BBC Studios cannot access more information than third parties. Any potential impact of colocation is mitigated by the BBC providing transparent information about, and equal access, to commissioning and information. Given ever increasing competition for the attention of viewers and listeners, the BBC’s incentive to commission the best ideas regardless of the identity of the producer continues to strengthen. There is no incentive for the BBC to restrict the free market for ideas by favouring BBC producers, or by providing them with preferential access to commissioners or information.

Assessment criteria and decision making

Ofcom sets out in 5.34 that “When evaluating producers’ ideas for programming for the Public Services, the BBC considers a number of factors or criteria” and that “a decision to take forward an idea does not just involve the application of strict criteria, but also creative judgement”. At 5.36 Ofcom also sets out that “It is important that the BBC offers as much clarity as possible to producers regarding any relevant assessment criteria it will take into account when commissioning, and regarding the relative importance of criteria.”

We have some concerns about the use of ‘criteria’ here and what it may imply about commissioning. As set out in Section 1 commissioning is not typically a formal procurement process with fixed processes for scoring and ranking proposals to fulfil a particular need, particularly in TV. The BBC’s decision on what to commission is based on the following factors:

- The quality of idea, compared to other ideas in play at that time;
- The cost of the programme based on our published tariff range, taking into account potential third party funding and our budget;
- Slot availability in the schedule;
- Whether the producers will be able to deliver what they set out in line with the opportunity in the schedule;
- The audience and competitive context.

Other than this we do not have rigid ‘criteria’ for decision making. It is the creative judgement of BBC commissioners that is at the heart of this process. Ultimately commissioners must base such decisions on their skills and experience, which is what the BBC pays them to do. Creative decisions require a certain degree of risk taking – because the best ideas may not look like anything on the existing slate – which is also difficult to define for the purposes of formal processes and procedures. Indeed this is essential for the BBC to fulfil its mission to provide “high-quality and distinctive output and services”.

4. Monitoring and reporting

4.1 TV

4.1.1 Additional information the BBC proposes to publish

We note that Ofcom has asked in this consultation whether stakeholders consider there is additional information it should collect from the BBC, making reference to pitch information as one potential data point. We are committed to transparency and openness in commissioning, because this aligns with our incentives to commission the best, highest quality, most distinctive and entertaining ideas. While we already publish more information than relevant peers, we recognise that we can still do more. We therefore propose to publish additional information about commissioning at the BBC in an annual TV Supply Report. We consider this would be more transparent, effective and appropriate than the confidential reporting proposed by Ofcom.

We propose that this TV Supply Report would set out further details of both the inputs to and outputs from commissioning. For inputs, our focus is to demonstrate the steps that we take to ensure equal access to BBC commissioners and opportunities:

Area	Information we expect to publish
BBC Commissioners' engagement with the market	Number, location and reach of commissioning briefings and other engagement activity
Commissioning website and updates	Set out what is already published (in the first report) then report on significant website updates thereafter, including any changes to business frameworks or editorial requirements
Partnerships & support activity	List out who we work with (in the first report) then highlights and updates thereafter.
Tenders	Details of tenders run each year

For outputs, our focus is to demonstrate that the outputs of the commissioning process provide an effective check against the fairness of the process. Some of this information is already publicly available, but we consider it would be more transparent to set it out in one single report:

Area	Information we expect to publish
Levels of business	Measured in hours by supply type – BBC in-house, BBC Studios, Non-Qualifying Independent producers (NQIs), and Qualifying Independent producers (QIs)
Which suppliers worked with	Number of suppliers and number of new suppliers, range and scale of suppliers worked with
Tenders	Outcomes (e.g. who won)

We expect the first publication will be in April 2019. We would then report annually, showing how trends evolve. Over time we will consider the information contained in the report, including any feedback from our stakeholders about further information that may be helpful.

As we are committed to transparency, we do not agree that further reporting of unspecified information about the health of commissioning for TV to Ofcom is necessary or desirable for Ofcom, or other stakeholders. We need stakeholders, including potential suppliers, to have confidence that our process is FRNDT. We consider that further reporting to Ofcom is unlikely to provide that confidence, as this information would not be available to the market. We also do not consider that Ofcom has set out any robust justification for why additional reporting would help to address any of its potential concerns or discharge any of its regulatory functions, or would be proportionate to the harm Ofcom is seeking to prevent.

4.1.2 Information not published in the 2017/18 Annual Report

Ofcom notes in the consultation document that the BBC “omitted to report on its progress towards meeting the contestability requirements for television children’s, sport and non-news related current affairs which must be met by 31 December 2019”. Ofcom notes that this information would help it to understand our progress towards meeting our quotas, as well giving stakeholders confidence in the BBC, including around the identification of opportunities. Ofcom has also written to us under its formal information gathering powers to request this information.

As we have set out to Ofcom in our response to Ofcom’s information request, we consider that Ofcom’s position that this represents an omission is based on an incorrect interpretation of our contestability requirements under the Agreement. Ofcom’s position is based on an interpretation that all the requirements of Schedule 3, Paragraph 7(1) (a) (i) and (ii) are identical, and therefore should be measured and reported in the same way. However these requirements have been drafted differently, with clearly different defined parameters, which means we do not

consider it proportionate or necessary for the purposes of transparency to take the same approach to reporting. Schedule 3, Paragraph 7(1) of the Agreement states:

The BBC must secure competition between BBC producers and external producers (whether independent producers or not) as follows-

(a) in relation to making relevant television programmes-

(i) the BBC must secure competition for at least 40% of the in-house guarantee for drama, comedy, entertainment and factual programmes by 31st December 2018, alongside maintaining the existing level of competition;

(ii) the BBC will remove the in-house guarantee for children's, sport and non-news related current affairs programmes by 31st December 2019; and

(iii) the BBC must secure competition for 100% of relevant TV programmes by 31st December 2027

Both (i) and (ii) above require the BBC to remove any in-house guarantee (i.e. "guaranteed allocation of air time to programmes made by the BBC"). The BBC's interpretation of this requirement is that programming to fill any relevant free slots (TBAs) whose air-time hours formerly sat within the in-house guarantee, must be commissioned using a FRNDT process. However, (i) also goes further and requires that, in addition to the removal of the in-house guarantee, the BBC must secure competition for 40% of all comedy, drama, entertainment and factual programmes by 31 December 2018, i.e. including ongoing series previously included in the in-house guarantee.

We therefore consider that the information we need to report against these requirements is distinct, and that we have kept our commitment to publishing progress against contestability requirements through the 2017-18 Annual Report and Accounts. For the avoidance of doubt we removed the in-house guarantee for non-news related current affairs, and children's in 2016, along with drama, comedy, entertainment and factual. Plans are in place to remove the in-house guarantee for sport in 2019 and are being communicated to the sector in advance. We also highlight that:

- Non-news related current affairs programmes sit within the factual commissioning slates and therefore any returning non-news related current affairs programming commissioned from BBC Studios previously sat within the factual in-house guarantee and within the BBC's reporting in the 2017-18 Annual Report and Accounts. This does not represent a significant volume of hours given that it only represents the narrow band of content which is

commissioned without editorial oversight by the Director of News and Current Affairs – but which nonetheless meets Ofcom’s definition of current affairs.

- Children’s has similarly already removed the in-house guarantee; all free slots in the schedule are competed through the commissioning process with no reservation of air time for in-house production. When any current returning series’ meet their natural end they will be decommissioned, freeing up slots that will be competed through the commissioning process by 2027. If any returning series are not decommissioned, we will tender these before 2027 where they fall within the definition of ‘relevant programming’.
- BBC Sport is an integrated, cross-platform provider of sports event coverage and sports journalism. Its scope to run competitions for the domestic production of sports events is highly constrained by the fact that it needs to compete for the acquisition of sports rights in the first place (which we note means that there is already competition among broadcasters and VOD platforms ‘for the market’ via bidding for sports rights).
 - The market norm for the domestic TV production of sporting events in the UK is for the activity to be carried out by a vertically integrated producer/broadcaster (e.g. Sky Sports, ITV Sport). It is not practical in the commercial negotiations around sports rights for the BBC to run an open competition - either in advance of or during these negotiations – for a production company to produce content relating to these rights (i.e. we can’t tender for a producer while we are bidding for sports rights). This leaves us subject to any conditions placed on the BBC as to who may produce content in the rights agreements secured by BBC Sports.
 - There is only one programme produced by BBC Sport – Sports Personality of the Year – for which the IP rights rest solely with the BBC.

Furthermore, we do not agree that publishing this information for sport, children’s and non-news related current affairs would help producers see where commissioning opportunities might lie, as Ofcom sets out. As historic data, it indicates little about our upcoming plans, which are better reflected in our annual plan and via the commissioning priorities which are communicated through our website and engagement with the market. We consider it most critical that producers have the necessary transparency over BBC commissioning processes and potential opportunities. Producers and production companies have an intimate and in-depth knowledge of commissioning, the BBC and the TV production ecology. It is

not clear that Ofcom could meaningfully supplement this through such high-level reporting.

4.2 Radio and online

We are keen to work with Ofcom to agree reporting around radio and online services. We consider that any requirement should be proportionate and not unduly burden the UK Public Services.

Radio

We are happy to commit to working with Ofcom to develop an approach to reporting for radio, to deliver information by the 2019 Annual Report and Accounts. In the 2017-18 Annual Report and Accounts we set out the overall percentage of contested hours for network radio, as well as network radio supply by station from independent producers. We consider that it is not proportionate to take the reporting that we currently provide for TV as the starting point for reporting on radio. We have agreed for television commissioning to supplement the extensive and longstanding reporting that feeds into Ofcom's monitoring of all Public Service Broadcasters. Ofcom has never collected such extensive data for the radio sector. Therefore we consider that Ofcom, in putting in place regulatory obligations including those relating to reporting, needs to ensure these are proportionate and targeted to the question of FRNDT commissioning for radio.

Ofcom's appropriate starting point in considering regulatory reporting should be the information we currently record and can therefore report without further resource being required, rather than necessitating the spending of licence fee funds that could otherwise be invested in original British radio content for our listeners. As such, we propose that reporting should be based on information that can easily be provided by the Proteus system, which we use internally to monitor contestability. In practice this means that for all contested programmes we would provide:

- The title;
- The network (i.e. 1Xtra);
- Number of hours;
- The supplier (i.e. the producer);
- Whether the title is produced by BBC or external producers; and
- Whether it was contested.

If Ofcom does not consider this information sufficient to its requirements in monitoring radio commissioning at the BBC, we would expect Ofcom to set out a

robust justification for the information it requires and why it is necessary to discharge Ofcom's regulatory functions, taking into account the impact on the BBC.

We welcome further engagement with Ofcom in this area over the coming months on the format of reporting as well as the point set out in 1.3 about reporting off-schedule podcasts.

Online

We are happy to commit to working with Ofcom to develop an approach to reporting for online, to deliver information by the 2019 Annual Report and Accounts.

For online we would propose to work to develop an appropriate approach taking into account that online is not a 'programme' based offering in the same way that radio and TV are, noting the potential complexities we set out in 1.3. We note that it is likely that we will take a different approach to reporting than we have in the 2017-18 Annual Report and Accounts, to ensure we report the most relevant information that allows Ofcom and stakeholders to track our progress to meeting our contestability requirements. We expect this may continue to be based on spend to enable reporting across different types of content.

We welcome further engagement with Ofcom in this area over the coming months.