

21 October 2014

Alex Towers  
BBC Trust  
180 Great Portland Street  
London W1W 5QZ

YIH-CHOUNG TEH  
Competition Policy Director

Dear Alex,

## **BBC Fair Trading Review**

As part of the Trust's review of its Fair Trading policies and framework, Ofcom has been asked to provide the Trust with our views on its competitive impact codes. The Framework Agreement<sup>1</sup> states that when considering whether to adopt or publish a competitive impact code the Trust must have regard to (i) any fair and effective competition codes issued by Ofcom and (ii) any views expressed by Ofcom as to matters that should be covered by the Trust's codes. In accordance with this framework, our response is focussed on issues potentially relevant to the Trust's formulation of competitive impact codes and does not consider the broader operation of the BBC Fair Trading regime.

As you know, Ofcom has a variety of regulatory roles in relation to the broadcasting sector, where our principal duty is to further (i) the interests of citizens, and (ii) the interests of consumers, where appropriate by promoting competition. We also have concurrent competition functions under the Competition Act 1998 and the Enterprise Act 2002. In considering competition issues we have regard to relevant case-law and practice, for example in relation to the identification of market power and barriers to entry.

We have not undertaken an analysis of the Trust's competitive impact policy or the approach it is taking towards identification of competition issues. The Fair Trading policies and framework are administered by the Trust, with any complaints under the regime being considered by the Trust. We have not received any formal representations or complaints regarding the BBC competitive impact codes in the three years since the Trust's last review.

Our primary engagement with the BBC's activities from a competition perspective has been through our role in public value tests (PVT)<sup>2</sup> and significance tests<sup>3</sup>. For example, our first market impact assessment (MIA) analysed the impact of proposed new on-demand services. This assessment was considered by the BBC Trust as part of its Public Value Test, which ultimately led to the launch of BBC iPlayer. Our last MIA examined the impact of the BBC's local video proposals on local media services, concluding that the launch of the proposal would have a significant negative market impact on commercial providers. Our analysis recognised the challenges faced by the wider local media market, particularly local

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<sup>1</sup> Clause 66(3)

<sup>2</sup> <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/bbc-mias/>

<sup>3</sup> <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/bbc-trust-significance-tests/>

newspapers, in meeting the changing needs and preferences of consumers in the digital age and the potential impact the BBC's local video proposal might have on the wider market.

### ***Code on cross and digital TV promotion***

This Code is in place, we understand, to address concerns that the cross promotion of commercial services/products by a large publicly funded broadcaster could adversely impact on the wider market. The BBC's portfolio of channels account for 32.4% of all viewing in multichannel households<sup>4</sup>, therefore any promotional material it broadcasts still has the potential to reach and influence a large number of viewers. Furthermore, the BBC's interest as a shareholder in a number of specific platforms (Freeview, YouView, Freesat) amongst a growing range of digital platforms and services may suggest that the code's objective with respect to the promotion of digital services remains relevant. We therefore consider that the original rationale behind the Code remains valid.

### ***Potential areas to consider further for competitive impact codes***

One area that the BBC's activities have the potential to impact on the wider market is the provision of on-demand content. The strength of the BBC's VOD proposition in respect of UK originated content means that access to its content could be very important for platform providers. The Trust's on-demand syndication policy addresses in some detail the framework under which the BBC should make its VOD content available to platforms. However, it is less clear how this policy sits in relation to the competitive impact code framework.

We also note that, while the Trust has not undertaken any PVTs in recent years, there have been a number of significance tests to determine whether a service proposal should be subjected to a PVT, requiring Ofcom's input. We consider that there is a continuing question about how incremental changes to services are assessed. While individually each of these changes might be small, over time and cumulatively there is the potential for such changes to have a greater impact on the market. The Trust may wish to consider further whether these concerns could be considered through a competitive impact code (or alternatively, through a different mechanism).

I hope these observations are of assistance.

Yours sincerely



Yih-Choung Teh

cc. Jon Cowdock, BBC Trust; Alex Baker, Fingleton Associates

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<sup>4</sup> See Figure 2.69, Ofcom Communications Market Report 2014.