



Assessing the impact of proposed changes to the BBC's public service activities

A consultation on Ofcom's procedures and guidance

Consultation

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About this document

The role of the BBC is to produce high quality and distinctive programmes and services which educate, inform and entertain.

As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.

The Charter places a number of obligations on the BBC with regards to proposed changes to its public service activities.

This document consults on the procedures and guidance that we will adopt when assessing whether Ofcom would allow material changes to the BBC's public service activities.

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Section 1

Introduction

- 1.1 The BBC's role is to act in the public interest and serve all audiences with content which informs, educates and entertains. To do so, it provides impartial news and information, together with high-quality and distinctive output and services. In resetting the BBC's Mission and Public Purposes,¹ the Government has confirmed the valuable contribution the BBC makes to the UK and to people's lives. The Government has also made clear that it expects the BBC to do more in certain areas, in order to justify its unique funding arrangements and privileged status.
- 1.2 As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.
- 1.3 For the BBC to succeed in meeting its objectives over the next decade, it may need to make changes to its existing activities and develop new services for its audiences. The new Royal Charter² and the agreement between the Secretary of State for Culture, Media and Sport, and the BBC (the "**Agreement**") – published by Government on 15 December 2016 – recognise this.³ But they also emphasise that in doing so the BBC needs to consider potential impacts on competition in the sector as a whole.
- 1.4 Ofcom has a role to protect fair and effective competition when the BBC proposes changes to its "**public service activities**".⁴ When assessing the impact of BBC proposals, we must take into account the BBC's obligations to fulfil its Mission and promote the Public Purposes.

Consultation

- 1.5 We are consulting on draft procedures and guidelines to fulfil our role under the Charter and Agreement in relation to proposed changes to the BBC's public service activities.⁵
- 1.6 We welcome any views and comments which respondents may have on the issues raised in this document. To ensure requirements are in place as soon as possible, we would like to receive responses by **5pm on 13 February 2017**.
- 1.7 Following our review of responses, we plan to issue final procedures and guidance by 3 April 2017.

¹ Articles 5 and 6 of the Royal Charter for the continuance of the British Broadcasting Corporation.

² In the rest of this document we refer to the Royal Charter for the continuance of the British Broadcasting Corporation as the "**Charter**", available at

<https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

³ <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

⁴ The BBC's public service activities comprise its UK Public Services and non-service activities.

⁵ See our separate guidance relating to existing BBC public service activities:

<https://www.ofcom.org.uk/consultations-and-statements/category-1/assessing-impact-BBC-public-service-activities>.

Role of the BBC

- 1.8 The Charter places a number of obligations on the BBC with regards to proposed changes to its public service activities. It must consider the effects on competition in the UK and avoid unnecessary negative impacts, and must have regard to promoting positive effects on the wider market.⁶ The BBC Board must also consider both the public benefit and competitive effect of material changes to public service activities.⁷
- 1.9 The Agreement expands on the BBC's Charter obligations. In particular, it must consider whether any proposed changes to its public service activities are material. If it considers they are, the BBC can only make the changes if it satisfies a "**public interest test**", and we agree it can proceed.⁸
- 1.10 The public interest test is met only if the BBC Board is satisfied that: (i) the proposed change contributes to the fulfilment of the BBC's Mission and promotion of its Public Purposes; (ii) it has taken reasonable steps to eliminate adverse impacts on fair and effective competition which are not necessary for that purpose; and (iii) the public value associated with the change justifies any remaining adverse impact.⁹ If the public interest test is satisfied and the BBC decides to proceed, it is required to publish its proposal.

Our role

- 1.11 Under the Charter, we must set requirements in the BBC's Operating Framework¹⁰ to protect fair and effective competition in the UK in relation to material changes to public service activities proposed by the BBC.¹¹ Our role involves considering whether a BBC proposed change is material and, if so, determining whether it may proceed.
- 1.12 In reaching a decision, we may carry out a competition assessment ("**BCA**"), which requires us to conclude whether the public value of the proposed change justifies any adverse effects on fair and effective competition. Alternatively, we may carry out a shorter assessment considering elements of the BCA.
- 1.13 We can reach four types of determination: (i) to send the proposal or elements of the proposal back to the BBC for reconsideration; (ii) to allow the change to proceed; (iii) to require modifications or conditions to be made before the change proceeds; or (iv) to find that the BBC may not proceed with the proposed change.

Purpose of this document

- 1.14 The proposals in this document are intended to form part of the BBC's Operating Framework and as such include obligations which are binding on the BBC. This document also sets out proposed guidance on the procedures, timescales and approach that we will generally apply.

⁶ Article 11 of the Charter.

⁷ Article 20(4) of the Charter.

⁸ Clause 7(6) of the Agreement in relation to UK Public Service, and clause 16(5) in relation to non-service activities.

⁹ Clause 8(1) of the Agreement in relation to UK Public Service, and clause 17(1) in relation to non-service activities.

¹⁰ The regulatory framework that we will impose on the BBC.

¹¹ Article 46(5)(a) of the Charter.

- 1.15 The remainder of the document is structured as follows:
- Section 2 sets out the legal framework underpinning our role.
 - Section 3 provides an overview of the types of competition concern that could be associated with BBC proposals to make changes to its public service activities.
 - Section 4 sets out the procedures we will adopt to assess proposals that have been published by the BBC.
 - Section 5 explains the analytical approach that we expect to apply when we choose to carry out a BCA.
- 1.16 These proposed procedures and guidance would apply only to changes to public service activities and do not therefore cover all categories of activity which the BBC may carry out.¹²
- 1.17 The procedures and guidance proposed in this document would take effect from 3 April 2017. They will be kept under review and amended as appropriate in light of further experience and any change to our powers and responsibilities. We will provide an explanation where we depart from the approach set out in the procedures and guidance.

¹² Specifically, it does not cover: provision of the World Service, commercial activities through a commercial subsidiary, trading activities, and a list of so-called "specified activities". These categories are further defined in the Charter and Agreement. In summary, the World Service is primarily targeted outside the UK; somewhat different considerations apply to commercial and trading activities; specified activities are matters required by the Government including support for digital television and radio coverage; Welsh, Gaelic, Irish and Ulster-Scots languages; spectrum efficiency; broadband rollout; and media monitoring. Where relevant, these activities are discussed in the Operating Framework.

Section 2

Legal framework

2.1 We set the procedures, requirements and guidance in this document based on the legal framework contained within the 2003 Communications Act (the “**Act**”), the Charter and the Agreement. This section summarises that framework.

The Communications Act

2.2 Ofcom is a statutory corporation created by the Office of Communications Act 2002. Our power to regulate the BBC is derived from the Act, which sets out that for the purposes of the carrying out regulation of the BBC we will have such powers and duties as may be conferred on us by or under the Charter and Agreement.¹³ Our general duties under section 3 of the Act therefore apply to the exercise of our functions in relation to the BBC.

Royal Charter for the BBC

2.3 Article 45(2) of the Charter provides that we must have regard, in carrying out our functions, to such of the following as appear to us to be relevant in the circumstances:

- the object of the BBC to fulfil its Mission and to promote the Public Purposes;
- the desirability of protecting fair and effective competition in the United Kingdom;
- the requirement for the BBC to comply with its duties under the Charter, including its general duties.

2.4 Article 46 of the Charter (Principal functions of Ofcom) sets out that we must set requirements in the BBC's Operating Framework to protect fair and effective competition in the UK in relation to material changes proposed by the BBC to the carrying on of public service activities.

Agreement between the Secretary of State and the BBC

2.5 The clauses of the Agreement which are most relevant to the procedures and guidance in this document are clauses 7 to 11 in relation to UK Public Services, and clauses 16 to 20 in relation to non-service activities. The provisions for both types of BBC activity closely mirror each other.

2.6 In summary:

- Clauses 7 and 16 set out the nature of UK Public Services and non-service activities respectively, and require the BBC to publish a policy on consideration of material changes to these activities. They make clear that the BBC may only materially change such activities where it has carried out a public interest test, the test is satisfied, and we have determined it may proceed.

¹³ We note that the precise scope of the key relevant provision, section 198 of the Communications Act, is currently the subject of a proposed amendment under the Digital Economy Bill.

- Clauses 8 and 17 set out what the BBC must be satisfied of in order for the public interest test to be fulfilled. They require the BBC to publish any proposed material change (and send a copy to Ofcom) if the test is satisfied and it wishes to implement the proposal.
- Clauses 9 and 18 cover initial assessment by Ofcom. In particular, we must assess whether or not a change is material and, if we decide it is, carry out an assessment: either a BCA under clause 10 or 19, or a shorter assessment. Clauses 9 and 18 also allow us to make relevant directions where the BBC has failed to publish a material change.
- Clauses 10 and 19 set out the matters a BCA must cover and that may be covered as relevant in a shorter assessment, that is a review of the BBC's procedures in carrying out its public interest test and of its public value assessment, and an assessment by Ofcom of any adverse impact on fair and effective competition and of whether the public value justifies such an impact. It requires that, except in exceptional circumstances, the BCA be completed within six months.
- Clauses 11 and 20 set out the possible outcomes of a BCA or shorter assessment. These are an Ofcom determination that the BBC may carry out the change, that it may not do so, that it may do so only subject to modifications or conditions, or that it must go back and reconsider any element of the public interest test or follow such further procedures as we consider appropriate. We may only block a change or make it conditional following a BCA and not a shorter assessment.

Section 3

The market impact of BBC proposals

- 3.1 The Charter and Agreement establish the role that the BBC is intended to play in the media market. The UK has a successful broadcast sector, sustained by a competitive media landscape of which the BBC is a central part. The BBC's programmes and services are integral to the wide range of high-quality and varied content that UK audiences enjoy. The BBC will continue to play this key role by delivering against its new Mission and Public Purposes.
- 3.2 Our role in relation to BBC change proposals involves looking at both the public value of proposed material changes and the potential adverse effects on competition. In this section we set out the potential competition concerns that could be associated with BBC proposals to make changes to its public service activities.

Identifying competition concerns

- 3.3 Competition typically produces benefits for society. Where a supplier offers a more attractive service or a better price than its rivals, it is likely to win customers and can attract new customers to the market. This in turn creates an incentive for all firms to innovate and invest in producing better services and to keep prices in line with their costs.
- 3.4 The BBC is a substantial public investment in the UK media sector. In order better to fulfil its remit, the public service activities that the BBC carries out and the way in which it carries them out will inevitably change over time. The BBC needs to be able to innovate and respond to people's tastes and preferences, and to sector developments.
- 3.5 This can be positive for competition by stimulating demand or promoting innovation, for example. However, there is a risk that these changes may unduly harm competition, investment and ultimately audiences. Indeed, activities that create a larger amount of public value, for example because they attract high audiences, may have a larger impact on fair and effective competition. Our role is to consider potential adverse effects on competition associated with proposed changes to BBC public service activities and look at whether they are justified in light of the potential public value.
- 3.6 While particular competition concerns will vary depending on the nature and scope of each BBC proposal, in most cases competition concerns are likely to be based on the following types of harm:¹⁴
- the risk of the BBC crowding out commercial activity; and/or
 - the risk of the BBC harming competition elsewhere in the supply chain.

The risk that the BBC crowds out commercial activity

- 3.7 As a publicly funded organisation, the BBC is given the freedom by Parliament not to need to make money as a commercial supplier would. The purpose, as made clear in

¹⁴ A BBC proposal may give rise to more than one competition concern and those concerns may be interrelated.

the Charter and Agreement, is to facilitate services consisting of a wide range of high quality and distinctive programmes.

- 3.8 People may favour a BBC service not because of its high quality or distinctive features, but because it is free¹⁵ and/or free from advertising. In addition, part of the affinity that people feel towards the BBC may be due to its brand, prominence or position as an organisation funded by the licence fee. This may provide the BBC with a competitive advantage that is not available to other providers, for example audiences may have a tendency to default to the BBC's services.
- 3.9 Where the BBC offers a particular public service, or carries out an activity in support of a public service, then this may reduce the potential audience for commercial rivals. For some, the impact of lower audiences will result in lower advertising revenues. For others, lower audiences may directly result in lower subscription fees. The BBC's presence may also mean that people are less willing to pay for media services and have a reduced tolerance for adverts, further reducing potential revenue. The BBC may reduce the profitability of its commercial rivals. This may undermine commercial operators' willingness to invest in new services or in improving the quality of their existing services. It may also result in some commercial operators ceasing to provide services or being deterred from entering the market, if it is no longer profitable to do so.
- 3.10 In summary, as a result of the competitive advantages described above, BBC public service activities may displace activities that could be undertaken by commercial providers. This can ultimately cause harm through reduced choice, quality and/or innovation. We will therefore need to look at such potential concerns alongside a consideration of the public value of the relevant proposals.

The risk that the BBC harms competition elsewhere in the supply chain

- 3.11 The BBC accounts for a significant proportion of the UK media sector, and is larger than commercial providers in many areas. How the BBC procures content and inputs to develop its services, for example, could have an adverse impact on competition. The types of competition concern that might arise include the following:
- the BBC may favour its own in-house services or subsidiaries over commercial competitors, even if those competitors are more efficient and able to deliver a better product or service;
 - when it buys products or services, the BBC may do so in a way that limits their availability to competitors (e.g. the BBC might require a supplier to exclusively serve the BBC); and
 - when it supplies important products or services to others, the BBC may do so in an unfair, unreasonable or discriminatory manner. This might place some providers at a competitive disadvantage compared to others.
- 3.12 Arrangements such as these can deter entry by other suppliers, reduce the scale of other suppliers or even result in them exiting the market. This could ultimately harm audiences as it can result in reduced choice, quality and/or innovation. As noted

¹⁵ BBC services are offered free of charge at point of use although they are ultimately funded by the licence fee. While many subscription services are free at the point of use as well, there is a more direct relation between subscription and use of service compared to payment of the licence fee and use of BBC services.

above, we will need to look at such potential concerns alongside a consideration of the public value of the relevant proposals.

Section 4

Procedures and guidance

4.1 This section sets out the procedures to which proposals to change the BBC's public service activities may be subject and provides guidance on how we will make our assessments.

Procedures involved in considering BBC changes

4.2 There are a number of potential steps involved in the BBC making changes to public service activities. In summary, the steps are:

BBC consideration

- a) **Development phase:** The BBC develops a proposal in line with its own published policy, which must include how it will assess the materiality of changes and consult interested parties where relevant.
- b) **Conduct of public interest test:** If the proposed change is material, the BBC Board carries out a public interest test, including considering the scale and likelihood of public value, and any adverse impact on fair and effective competition.
- c) **Publication and provision to Ofcom:** If it is satisfied the public interest test is met and it plans to implement the proposal, the BBC publishes details and provides a copy to Ofcom.

Ofcom consideration

- d) **Initial assessment by Ofcom:** Our initial assessment has two parts:
 - o We consider whether or not the proposed change is material. If we conclude it is not, or six weeks passes without our informing the BBC of our view, the BBC may proceed to implementation.
 - o If we consider the change is material, we consider what type of further assessment it is appropriate for us to conduct. This could be either a BCA or a shorter assessment, considering the elements relevant to a BCA assessment, but focussing on concerns with specific aspects of the proposed change or with the BBC's procedure.
- e) **Conduct of BCA or shorter assessment:** Where we decide to initiate a BCA, our assessment includes reviewing the procedures followed by the BBC and its public value assessment, and carrying out an assessment of the impact of the proposal on fair and effective competition. We may alternatively carry out a shorter, more focussed assessment drawing on elements of the BCA procedure.
- f) **Determination by Ofcom:** The outcome of our assessment will be a determination that the BBC may carry out the change, that it may not, or that it

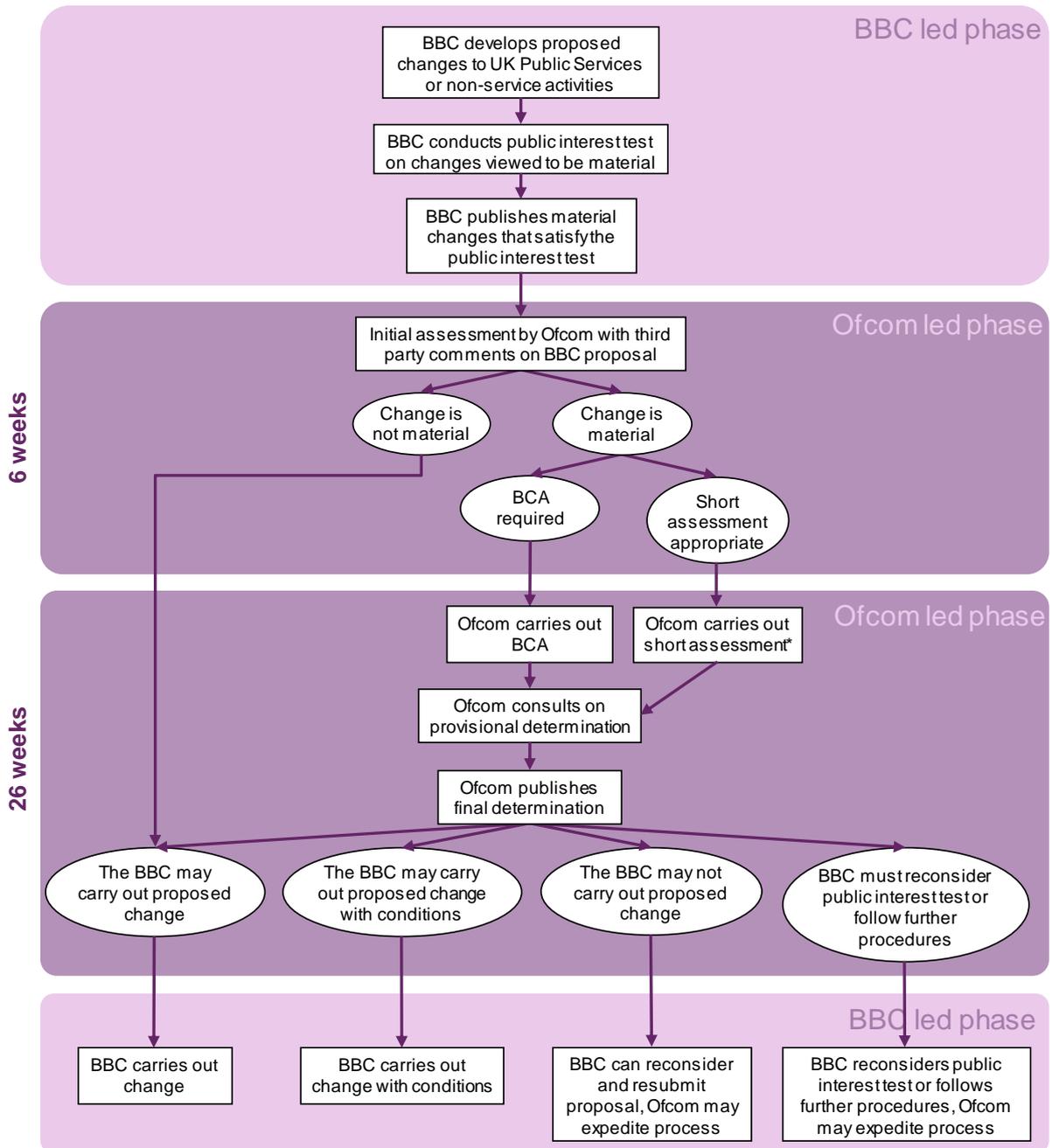
may do so subject to conditions.¹⁶ We can also require the BBC to reconsider aspects of the proposal and resubmit to us according to such procedures as we consider appropriate. Where we have decided to carry out a BCA, we are required to reach a determination within six months of that decision.

- 4.3 This document is principally about the Ofcom steps as set out above. The BBC is required by the Agreement to have its own published policy on the steps it will take to consider changes, the detail of which will reflect its own governance structures and the practicalities of developing and implementing proposals.¹⁷

¹⁶ Note that we can determine (i) the BBC may carry out a proposed change subject to conditions or (ii) that it may not carry out a proposed change where we have carried out a BCA, but not where we have carried out a shorter assessment.

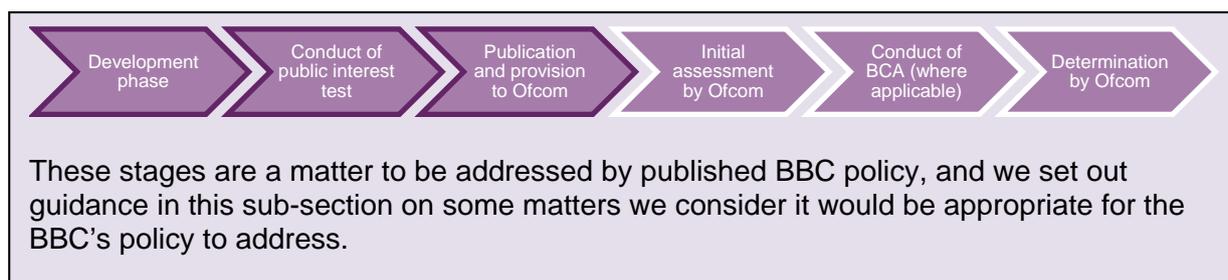
¹⁷ Clause 7(5) of the Agreement in relation to UK Public Services, and clause 16(4) in relation to non-service activities.

Indicative stages in the assessment procedure



* The determination procedure for short assessments differs from that of a BCA. In this case, we may only conclude that the BBC may carry out a proposed change, or reconsider its public interest test or follow such further procedures as we consider appropriate. However, it would be open for us to convert a shorter assessment into a BCA if it became appropriate.

Development of proposals by the BBC



- 4.4 The BBC is required under the Agreement to have its own published policy on how it will consider changes to public service activities. This must include how the BBC will assess materiality, apply the public interest test and consult those interested where appropriate. The details will be informed by the BBC's own procedures for development of new ideas, working them up into proposals capable of implementation, and corporate governance. We provide further guidance below on what we expect the BBC's policy to cover.
- 4.5 If we consider it appropriate, we may direct the BBC to change the content of its policy should it appear to us that the BBC's policy risks failing to ensure that material changes are published and provided to us in a form enabling proper assessment.

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"¹⁸ and therefore subject to a public interest test as set out below.¹⁹
- 4.8 The BBC may also propose changes to public service activities which are not "new" UK Public Services (i.e. 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.*"²⁰
- 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,²¹ 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

¹⁸ Clause 7(7)(a) of the Agreement.

¹⁹ New UK Public Services are identifiable services supplied by means of television, radio, online, or via newer technologies (clause 7(3) of the Agreement) which would have fallen to be listed in Schedule 1, Part 1 of the Agreement had they existed at the time it was produced. There is no *de minimis* threshold whereby small new services are exempt, so we would expect the launch of all such services to involve a formal process of consultation with interested persons.

²⁰ Clause 7(7)(b) of the Agreement in relation to UK Public Services and clause 16(6) in relation to non-service activities.

²¹ For example, what might be a small-scale investment in a major broadcast service may be very substantial in the context of local radio or for online apps.

market. We would expect the BBC to set out in its policy how it will assess materiality in further detail.

- 4.10 In this context, we note that there are decisions which the BBC makes which, while sometimes high-profile, are simply part of its day-to-day business and not “material” in the specific sense of the term set out in the Agreement (e.g. individual programme scheduling decisions). In the case of public service activities, such changes leave the service’s existing character and scale essentially unchanged and, in the case of non-service activities, the objective and overall means of achieving it is unaffected. We recognise the scope for business as usual changes of this type to proceed without regulatory intervention. We would expect BBC policy to adequately describe the types of decision in this category, consistent with the BBC’s obligations as to transparency, openness and accountability.²²
- 4.11 We note that the BBC may wish to undertake pilots and / or trial services before launching a new service. While some of these trials may be considered by the BBC as business as usual, there is no presumption that they would be, as it is quite possible a large-scale trial could have a competitive impact. We expect the BBC to consider whether such pilots or trials are in themselves material and if so, these should be subject to the same scrutiny as other proposed material changes. This is discussed further at paragraph 4.48.
- 4.12 In the event that a material change to public service activities is not published by the BBC, we have the ability to direct the BBC to freeze the proposed change and require it to conduct a public interest test. Two further measures should help ensure this situation is avoided. Firstly, the BBC is required to publish an annual plan including a work plan.²³ One purpose of this is to give third parties a good understanding of the areas where important strategic thinking is taking place, in sufficient detail to enable comment and debate. This should allow the BBC to engage with interested parties to identify which proposals might be material. Secondly, we expect the BBC to engage appropriately with us to keep us apprised of its pipeline of developments.

Conduct of a public interest test

- 4.13 If the BBC wishes to make a material change to public service activities, it is required to carry out a public interest test on the proposed change.
- 4.14 The public interest test requires the BBC Board to be satisfied that: (i) the proposed change contributes to the fulfilment of the Mission and the promotion of one or more of the Public Purposes; (ii) the BBC has taken reasonable steps to ensure that there are no unnecessary adverse impacts of the proposed change on fair and effective competition; and (iii) the public value of the proposed change justifies any adverse impact on fair and effective competition.²⁴
- 4.15 When carrying out a public interest test, the BBC should, as a minimum, seek to understand and assess the scale of market impacts associated with its proposals. This will require understanding how their proposals are likely to impact people and

²² Article 12 of the Charter.

²³ Article 36 of the Charter.

²⁴ Clause 8(1) of the Agreement in relation to UK Public Services and clause 17(1) in relation to non-service activities.

existing or potential future market players. It will also require the BBC to consult interested parties. We would expect the BBC's policy to reflect this.

- 4.16 As to when consultation should occur, and how much detail it should reveal to competitors and others, there will inevitably be an element of case-by-case judgment for the BBC. However, we consider BBC policy must, as a minimum, allow for engagement with interested parties at a stage where it is still realistic that input could meaningfully influence final proposals in a manner which mitigates potential adverse impacts on fair and effective competition (and potentially creates positive impacts). It should also be sufficiently detailed to allow third parties to understand the proposal fully and to be able to provide constructive input.
- 4.17 Third parties will need to engage effectively with the BBC's work on its public interest test. The BBC can only address concerns that have been raised with it, and third parties should not assume our assessment of a proposal will provide a second opportunity to raise issues.
- 4.18 We expect the BBC's public interest test to clearly articulate the proposed change to the BBC public service activity, including how it is consistent with the BBC's broader strategy, timescales for the changes and costs involved. The public interest test will need to set out clearly the analysis and reasoning undertaken to conclude that the market impact identified is the minimum necessary to deliver the public value and why the market impacts are justified by the public value created.
- 4.19 The public interest test should also set out the expected current and future public value and market impacts (direct and indirect) associated with the proposed changes. Alongside this, the BBC should set out a clear articulation of what would be expected to happen if the BBC proposed changes did not take place. Where the BBC's public interest test has made assumptions about the impact of changes, these must be clearly articulated and reasoned with evidence as appropriate. Additionally, we would expect to see complete results and methodologies of market research and other studies undertaken by, or on behalf of, the BBC or any other evidence used to support analysis of public value and market impacts. This evidence should include analysis of relevant engagement with stakeholders.
- 4.20 If we are not satisfied that the BBC has undertaken a robust, thorough analysis and engaged with interested parties in a reasonable, transparent manner, the proposal may be sent back to the BBC to reconsider. We set out in more detail how we will approach the assessment of the BBC's proposed changes and our expectations of what the BBC's analysis should contain in Section 5.

Outcome of a public interest test

- 4.21 Where the BBC concludes that the proposal is material and the public interest test is satisfied, it is required under the Agreement to publish the proposal and send a copy to us.²⁵ We expect the BBC to send the same proposal to us as it went to the decision making body,²⁶ including detail of the public interest test carried out. We should be provided with a full version of the proposal, including all supporting documents. Where the full version includes confidential elements (for example, commercially sensitive details of agreements between the BBC and third parties) we also require the BBC to provide us with a non-confidential version that it considers

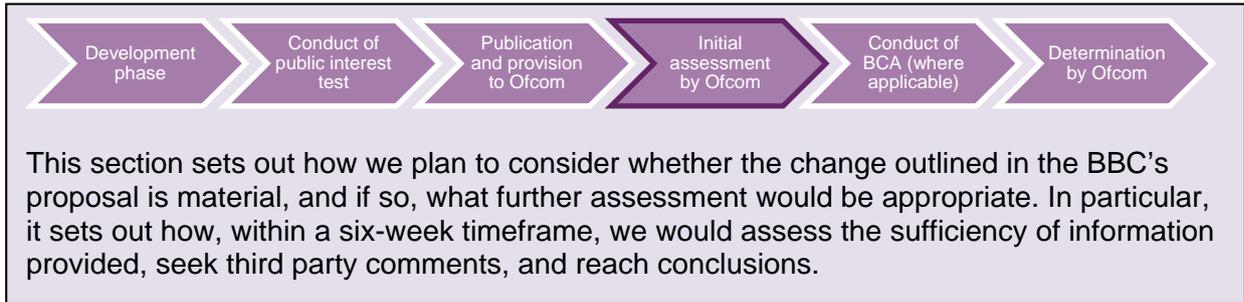
²⁵ Clause 8(3) of the Agreement in relation to UK Public Services, and clause 17(3) in relation to non-service activities.

²⁶ Whether the BBC Board or other entity with delegated authority.

suitable for publication. Any redactions in the non-confidential published version should be properly justified. Ofcom will take into consideration the BBC's justifications and the need to ensure that the non-confidential version enables full understanding and comment.

- 4.22 We expect the BBC to send its proposal, supporting evidence and non-confidential proposal to us before publication. Ofcom and the BBC should publish the non-confidential version of the proposal at the same time. In addition to the BBC's non-confidential proposal, we will announce the start of a two-week consultation period.

Initial assessment by Ofcom



- 4.23 On receipt of a copy of the BBC's published change proposal, our first task is to assess whether or not the change is material²⁷ and, if it is, what form our further assessment should take.²⁸ We have six weeks in which to carry out this initial assessment. If we have not informed the BBC as to whether or not we consider the change material after six weeks, the BBC may implement the proposal.²⁹

Sufficiency of information to make initial assessment

- 4.24 In order to carry out our initial assessment, we will first review the publication we have received from the BBC with a view to establishing whether there appears to be sufficient detail to enable us to conclude on materiality and on what further assessment is appropriate.
- 4.25 Our assessment procedure is intended to cover firm proposals only. As such, published proposals need to be capable of being fully understood by us and third parties. Their scale (both in terms of financial resource and where relevant in terms of reach and amount of content) and timescales for implementation must be clear. If the BBC wishes to make substantive changes to the proposal once we have started our six-week assessment, we would normally expect the BBC to need to undertake a new public interest test and resubmit proposals to us.
- 4.26 Where we do not consider the information provided by the BBC enables an assessment of materiality and the appropriate further assessment, we may request such additional information as we consider necessary.³⁰ This may take the form of a

²⁷ Clause 9(1) of the Agreement in relation to UK Public Services and clause 18(1) in relation to non-service activities.

²⁸ Clause 9(2) of the Agreement in relation to UK Public Services and clause 18(2) in relation to non-service activities.

²⁹ Clause 9(4) of the Agreement in relation to UK Public Services, and clause 18(4) in relation to non-service activities.

³⁰ Clauses 9(5) of the Agreement in relation to UK Public Services and clause 18(5) in relation to non-service activities.

request for specific information or clarifications. Additionally, in cases where the BBC appears to us to have published prematurely and further substantive work is required, we may direct the BBC to withdraw its publication and to republish and resubmit it only when that work has been completed.

- 4.27 Under the Agreement, we must make any request to the BBC for further information “as soon as possible”. Our aim is to do so within two weeks of the publication of the BBC proposal, but there may be circumstances where it would be appropriate to make such a request after that date, for example where a lack of information only becomes apparent due to issues raised with us by a third party.
- 4.28 Where we need to request further information, we may restart the six-week period in which we have to complete our initial assessment. Alternatively, we may put the assessment on hold and re-start the clock once the information has been received. This is because we would not consider an incomplete publication to satisfy the BBC's obligation to publish material changes.

Third party comments

- 4.29 We will invite third parties to comment on whether they consider the BBC's published proposals to be material and what further assessment may be required. Generally, we will place a limit of two weeks for third parties to respond.
- 4.30 In order to assist third parties in inputting to our initial assessment, we would anticipate responses to cover specific areas of concern with the BBC's proposal, whether the BBC has allowed third parties to input meaningfully (e.g. consulting sufficiently) and whether the BBC has made errors of fact or assessment in the public interest test which call into question its conclusions.
- 4.31 Although we will not be carrying out any detailed assessment at this stage, we would welcome any evidence that stakeholders are able to provide, such as market research or assessments of competitive impact.

Our assessment

- 4.32 As noted above, our initial assessment has two aspects. First, we must decide whether the change is material within the meaning set out in the Agreement and, second, whether further assessment would be appropriate and if so, what form this should take; it could be a BCA or a shorter assessment drawing on elements of the BCA.³¹

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 include:

³¹ Clause 9(2) of the Agreement in relation to UK Public Services, and clause 18(2) in relation to non-service activities.

- 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 may emerge;
- the incremental costs associated with the proposed change (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 that are likely to be strongly affected by the change.

4.34 Where we conclude a change is not material, we will notify the BBC that we do not consider the change material, and the BBC may proceed with its implementation.³² We would generally publish a brief update on our website to inform other stakeholders that we will not be assessing the matter further.

Appropriate assessment procedure

- 4.35 Where we conclude a change is material, we must consider what further procedure to carry out. Our options would be:
- **BCA.** Where a proposal raises large, complex and/or particularly contentious issues, potentially involving a number of interested parties and ways in which there may be an adverse impact on fair and effective competition, a full BCA is more likely to be appropriate. This would involve each of: (i) a review of the procedures the BBC has followed in its public interest test (including consultation with third parties); (ii) a review of the public value of the proposed change; (iii) an assessment of any adverse impact of the proposed change on fair and effective competition; and (iv) an assessment of whether the public value of the proposed change justifies any adverse impact of the proposed change on fair and effective competition.
 - **Shorter competition assessment.** We might undertake a shorter assessment where there is a narrower range of issues to consider. Such an assessment would consider the four elements of a full BCA (as noted above) but may not reach a conclusion on all of them. We expect shorter assessments to be potentially appropriate in the following circumstances:
 - where an Ofcom procedure is technically required because the BBC's proposal concerns a new UK Public Service, but no real competition issues can be identified;

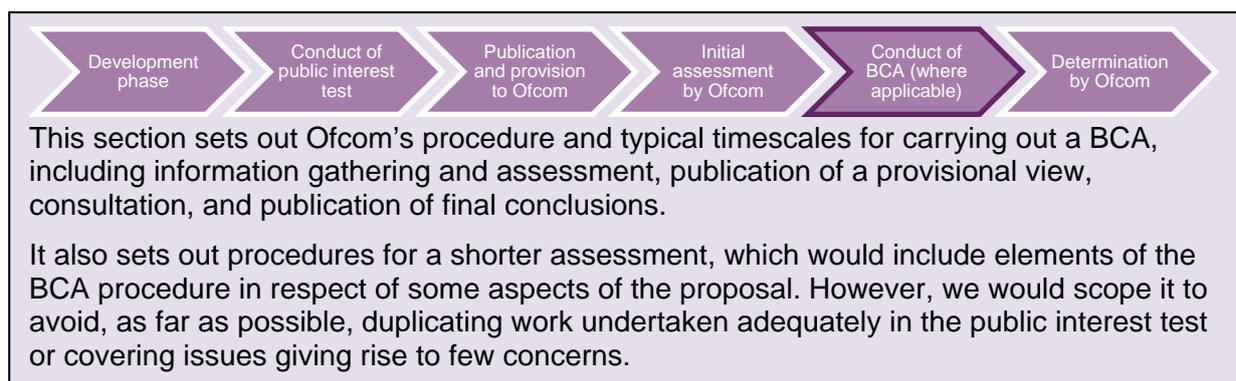
³² Clauses 9(3) and 18(3) of the Agreement.

- we are not satisfied with the BBC's procedures in carrying out the public interest test;
- where large parts of the change proposal give little cause for concern but a limited element (e.g. a separable element of a proposal) requires consideration;
- where the public interest test carried out by the BBC adequately addresses all (or most) issues.

4.36 In deciding which of the assessments above is most appropriate, we will take into account those factors we consider most relevant in the circumstances. These will vary depending on the facts of the case but may include (without limitation):

- **The thoroughness, quality and balance of the BBC's public interest test.** A full BCA would involve reviewing the BBC's procedures and the BBC's assessment of the public value, and assessing the adverse impact on fair and effective competition and whether this is justified by public value. If the standard of the BBC's own work is such that we consider full assessment to be duplicative, this would be a factor in deciding to conduct a more limited, shorter assessment. We take into account, however, that the BBC has an incentive to reach a positive conclusion from its public interest test and would be looking to see evidence that work is appropriately balanced and robust. This may include, for example, full and objective discussion of adverse impacts and limitations in the public value case.
- **Whether there is a real prospect of an outcome other than unconditional clearance.** For example, in a proposal where there is clearly a large and compelling public value case, and the adverse effects on fair and effective competition appear both small and necessary relative to the public value. In these circumstances even if a BCA or other procedure differed in its detailed considerations slightly from the BBC's public interest test, it may be highly unlikely to affect the overall conclusion.
- **Whether there is a separable element of the proposal giving rise to concern, while other elements give rise to few concerns.** We would be more likely to carry out a shorter assessment of a proposal where we can carve out a narrow aspect where any adverse impacts appear to reside.
- **The resources required to conduct a full BCA.** In particular, we will consider whether the resources needed are proportionate to the scale of the proposal.

Procedure for a BCA or shorter assessment



- 4.37 When conducting a BCA or shorter assessment, we will determine whether the public value of the BBC's proposal justifies any adverse impact on fair and effective competition. In making this determination we will consult with the BBC and interested parties before making a final decision.

Scope

- 4.38 Our announcement initiating a BCA or shorter assessment may include a brief statement of the reasons why we consider such an assessment is appropriate. This will not serve to limit the scope of our assessment should further issues arise in the course of our work, but should help us, the BBC, and interested third parties to understand and focus on the most pertinent issues. We note that the scope of our assessment may differ from that conducted by the BBC and that this will be dependent on the nature of our concerns.

Timescales

- 4.39 The aim of the Agreement is to secure prompt assessments of change proposals. We must normally start a BCA or shorter assessment immediately on deciding to do so, but may delay commencement where we have reasonable grounds to do so³³. Once launched, we must complete a BCA within six months of a decision to initiate one (the period normally starts immediately following the initial assessment outlined above), but we may allow for a longer period in exceptional circumstances.³⁴
- 4.40 In relation to the circumstances which may make it reasonable for us to delay commencing a BCA immediately following an initial assessment, an important example could be where the BBC has published a number of proposed changes at the same time such that it is appropriate to prioritise. It is, of course, in the BBC's hands to manage its pipeline of proposals to avoid the need to publish multiple material changes in a short period.
- 4.41 There are also a number of circumstances where we might consider extending the six-month period to deal with exceptional circumstances. In particular:

³³ Clause 9(2) of the Agreement in relation to UK Public Services and clause 18(2) in relation to non-service activities.

³⁴ Clause 10(2) of the Agreement in relation to UK Public Services and clause 19(2) in relation to non-service activities.

- Where the BBC misses a deadline for the provision of information in response to a request from us, we may extend the period by an amount reflecting the delay.
 - Where material issues emerge in the BBC's proposed change and public interest test (such as an important methodological flaw in research underlying its conclusions on public value) we will consider "stopping the clock" on the procedure until the BBC rectifies the matter to our satisfaction.
 - Where the methodology for collecting information sufficient to assess whether the public value justifies the market impact of a proposal is unusually complex.
- 4.42 Where the BBC makes a substantive change to an aspect of its proposal over the course of a BCA, such as to alter the nature of the proposal, we will generally cease the BCA and require the BBC to undertake a new materiality assessment (and where appropriate undertake a further public interest test). If we consider it necessary to undertake a BCA on the new proposal, we will start the procedure and six-month clock afresh. If the BBC proposes only minor changes we will consider whether it is necessary to start a new procedure. We may conclude that it is sufficient to recommence the procedure instead of starting a new procedure. However, we expect this to only occur in exceptional circumstances.
- 4.43 Below, we set out an indicative timetable we would envisage for a typical BCA. This is intended to provide an indication for the BBC and interested third parties of what to expect. The timetable covers 24 weeks in total, leaving a small contingency of two weeks.
- a) Information gathering, developing analysis and publication of provisional view – we would expect this typically to take approximately 14 weeks.
 - b) Consultation – we would expect to consult on our provisional view for a period of four weeks.
 - c) Final conclusions – we would expect it to require eight weeks to reach final conclusions having considered all consultation responses and potentially gathered further information if required.
- 4.44 We must complete a shorter assessment in less than six months.³⁵ The precise timescale would depend on the scope of the issues that the shorter assessment was focussed on, and we would seek to provide an indicative timescale at the start of such an assessment. The purpose of a shorter assessment is to deal with issues in an appropriate manner with a view to reaching a conclusion more promptly and (if appropriate) enabling the BBC to make material changes with public benefits more promptly than would otherwise be possible. However, it is possible that in some circumstances, evidence comes to light in the course of a shorter procedure indicating it would be appropriate to extend the period or convert it to a full BCA. We expect this to occur only in limited circumstances, but if it does happen, we will provide an update with revised timescales.

Interim undertakings/directions

- 4.45 The Agreement prevents the implementation of proposals while a BCA or shorter assessment is underway. We recognise the BBC may wish (at its own risk given the

³⁵ Clause 9(2) of the Agreement in relation to UK Public Services and clause 18(2) in relation to non-service activities.

different possible outcomes of the Ofcom procedure) to progress its proposals during the period of the BCA in anticipation that we will decide that they can go ahead. However, this must be limited to background work rather than implementation. The BBC must not undertake activities such as advertising proposed changes to the public, rolling out of services to the public (even on a limited basis), or carrying out other steps which might have a bearing on the procedure itself.

- 4.46 In the case of shorter assessments, the analysis may be focused on considering competition concerns associated with a particular aspect of a change proposal which is clearly separable from the rest of the proposal. It may, in some circumstances, be possible and appropriate to allow aspects not subject to regulatory scrutiny to be implemented promptly. This will be highly case specific, and we will discuss with the BBC should it wish to proceed with some elements.
- 4.47 On initiation of a BCA or shorter assessment, we would expect to discuss with the BBC the nature and extent of work it has planned in relation to the proposal over the period of the procedure. Where we have concerns over areas, we would aim to agree undertakings on the limits of that work, and may make directions in the absence of timely agreement.
- 4.48 In some circumstances the BBC may wish to propose changes to run pilots or trials before full introduction of a change. Our general position is that trials or pilots should in principle be subject to the same procedure as other proposals. That is, the BBC would be required to consider if the pilot or trial is itself material and if so to undertake a public interest test as set out above.³⁶

Information gathering

- 4.49 Our first steps in a BCA will be to establish, internally, an analytical framework and to gather information enabling us to reach provisional views.
- 4.50 We would expect to draw on a range of evidence to assess a proposal including, but not limited to, market research, results from trials and pilots, business cases, and analyses of actual and potential competitive impact.
- 4.51 In relation to market research, we recognise that this is often likely to form an important part of the BBC's assessment of public value carried out as part of its public interest test. Reviewing this assessment is part of our role, and we would expect as a minimum that:
- market research will adhere to the Market Research Society guidelines;³⁷
 - the scope of the proposed change to the public service activity will be sufficiently tightly defined for the research participants to meaningfully comment on the proposal;
 - the research will include evidence of the likely take up and use amongst the target audience;

³⁶ However, if a wider proposal is subject to a BCA or shorter assessment, but the BBC wishes to proceed with some more limited trials during the assessment period (e.g. with respect to timing or coverage) that is a matter we would consider on a case-by-case basis. In those circumstances we would expect the BBC to provide clear messages to people as to the nature of the trial.

³⁷ As of the time of publication, the latest version can be found here: <https://www.mrs.org.uk/standards/guidance>.

- where research participants ascribe benefit to others, (i.e. where they state they think a service would be of value to a group to which they are not part of) and the BBC seeks to rely on that finding, this will be substantiated by direct evidence of likely use among that group; and
 - where feasible, the research will include participants' views on potential trade-offs and consequences, for instance asking participants to assess the proposed service in the context of a comparison to other existing services.
- 4.52 We are likely to issue information requests to the BBC and to third parties who we consider may have relevant information. Given that third parties may have an incentive to delay the procedure (as the BBC may not implement proposals until it is complete) and because of the challenging six-month timescale allowed by the Agreement, we will seek to allow a reasonable period for responding to such requests, but deadlines are likely to be strict.
- 4.53 Our general practice will not be to send draft information requests for comment prior to issue and, if parties do not have the information sought, then they should advise us of this in their response. Our general practice is that information sought under an information request should be provided to us within 5-10 working days (depending on the complexity of the request) and that extensions will not be given. Where any information is considered to be confidential, we may ask for a non-confidential version. We will require claims of confidentiality to be adequately justified, and will not entertain blanket claims that everything is confidential.

Provisional view

- 4.54 The Agreement requires us to determine whether or not the BBC may carry out its proposed changes. We may make carrying out the proposed change conditional on modifications or other conditions, or may direct the BBC to reconsider elements of the public interest test or follow other procedures we consider appropriate.³⁸
- 4.55 The Agreement does not oblige us to do so, but we consider it is desirable to allow the BBC and interested third parties to comment on our provisional views and reasoning before publishing final conclusions. Our provisional view will not be a full draft of the final determination, but will set out which of the possible conclusions set out in the Agreement we are minded to arrive at, and the main elements of our provisional assessment and reasoning leading us to that view.
- 4.56 This will enable us to publish provisional findings in a timely manner, allowing reasonable time for the BBC to propose further modifications to address any concerns raised and for interested third parties to respond. We will generally consult on our provisional view for a period of four weeks.
- 4.57 We note that the BBC may decide, before we reach our final determination, to make changes to its proposal in response to competition concerns we may have identified. In these cases, we may still be able to go straight to a final determination or we might consider it appropriate to re-consult on the specific modifications. In either case, we would expect to do this expeditiously.

³⁸ Clause 11 of the Agreement in relation to UK Public Services and clause 20 in relation to non-service activities.

Final conclusions

- 4.58 We would generally expect to require eight weeks to finalise our conclusions having considered responses to our consultation on the provisional view. This will, of course, vary somewhat depending on the nature of responses. For example, in some cases, we may need to gather some additional information, or to explore details of commitments offered by the BBC.

Determination by Ofcom



- 4.59 Whether or not we have carried out a full BCA, if we consider a change proposed by the BBC is a material change, we are required to proceed to a determination. This determination may be that: (i) the BBC may carry out the proposed change; (ii) that it may not carry out the proposed change; (iii) that it may carry out the change in accordance with such modifications or with such conditions as we consider appropriate; or (iv) that it must reconsider any element of the public interest test or follow such further procedures as we consider appropriate.³⁹
- 4.60 **Where we conclude that a change can go ahead without further conditions**, the BBC is not *required* to carry out the change, and it remains open to the BBC not to go ahead (e.g. to give priority to other projects) but we would expect such a decision to be communicated to us and interested parties in line with the BBC's duties as regards transparency. If the BBC does carry out the change, we would expect this to be the same change as that published in all material respects. This is because our assessment will have been based on the public value and effects on fair and effective competition of the proposal as a whole. We would also expect the BBC to carry out the changes within timeframes indicated in its published proposal. This is because our assessment will have been carried out in the context of the market as it existed at the time, and substantial delay may alter aspects of the assessment.
- 4.61 **Where we conclude that a change cannot proceed**, the BBC may not proceed with the proposed change. It would be open to the BBC to make revised proposals in future but, of course, these should address through appropriate amendments the issues raised in our final conclusions. In this case the BBC would be required to do a new public interest test before resubmitting the proposal to us. Depending on the scale of the modifications of the revised proposal, we may decide to undertake a shorter assessment focused on the modifications.
- 4.62 **We may conclude that the change may proceed with modifications or conditions**. We would be cautious about this route because it is not our role to devise strategy to meet the Mission and Public Purposes. Where we do propose modifications or conditions we will seek to be as specific as we can as to the nature of those modifications or conditions. Where possible, we will set these out in the form of a direction or undertakings agreed with the BBC. In some cases, it may be that

³⁹ Clause 11(1) in relation to UK Public Services, and clause 20(1) in relation to non-service activities.

there needs to be some further discussion with the BBC following publication of our final decision to finalise a modification or condition. Such discussions would relate to clarification and practical implementation within the BBC rather than reopening the substantive issues covered by the procedure and final conclusions. In such cases, we would publish directions or undertakings when finalised.

- 4.63 It is not possible to provide an exhaustive list of the types of modification or condition that may be appropriate as these will be highly dependent on the case, and particularly the nature of harm involved. However, the primary purpose of such requirements is to address any adverse impacts on fair and effective competition we have identified. Our aim would be to remove or reduce the scale and likelihood of those adverse impacts without substantially impacting the public value identified. For example, we may allow some aspects of a proposal to proceed but not others, impose conditions in relation to the size of an offering, restrict further incremental change in future, or introduce reporting requirements.
- 4.64 It would not generally be our intention to impose requirements to enhance the public value. If the public value does not, in our view, justify any adverse impact on fair and effective competition, it will be open to the BBC to reshape proposals itself to enhance public value, and resubmit them. This is consistent with our role being described in the Agreement as being to “review” public value but “assess” adverse impacts on fair and effective competition. It is for BBC governance to take the lead on securing the effective fulfilment of the BBC's mission and promotion of its Public Purposes, by shaping the public value aspects of proposals.
- 4.65 **We may require the BBC to reconsider any element of the public interest test or follow such further procedures as we consider appropriate.** This may be appropriate where we consider the BBC could reshape the proposal in a relatively modest way such that the public value would be likely to justify any adverse impact on fair and effective competition. In this case it would be up to the BBC to lead that reshaping rather than for us to require specific modifications. For example, we may consider there is scope to reduce the adverse impact on fair and effective competition but the potential changes required could reduce or change the public value generated. The BBC is likely to be better placed to develop the detail of how that would be implemented, and to make an initial assessment of the scale and likelihood of the public value. In this case the BBC would be required to revise its new public interest test before submitting a new proposal to us. Depending on the scale of the modifications of the revised proposal, we may decide to undertake a shorter assessment focused on the modifications.
- 4.66 In the case of a shorter assessment, the Agreement does not permit us to determine that the BBC may not carry out the change or require it to make modifications.⁴⁰ However, if we identify issues in the course of a shorter assessment that such means appear likely to be appropriate to resolve the issues identified, we may extend the procedure from a shorter assessment to a BCA. It is important to bear in mind that the purpose of a shorter assessment is to deal with cases appearing to involve issues which appear more limited in scope and/or where there is a risk of duplicating a robust public interest test carried out by the BBC. That is, cases which at the outset appear likely to be capable of resolution within less than six months.

⁴⁰ Clause 11(2) of the Agreement in relation to UK Public Services and clause 20(2) in relation to non-service activities.

Enforcement

4.67 As noted above, this document forms part of the BBC's Operating Framework. That means that the obligations it imposes on the BBC are "specified requirements" as defined by clause 59(a) of the Agreement. Additionally, obligations imposed on the BBC pursuant to the procedures set out above, such as interim and final directions requiring the BBC to modify an activity, comply with conditions in relation to an activity, or follow further procedures, are also specified requirements. All such obligations are enforceable under our powers as set out in Article 49 of the Charter.

4.68 The following are specified requirements imposed by this document:

Specified requirements

- In relation to the policy that the BBC is required to have under Clauses 7(5) and 16(4) of the Agreement, the BBC will comply with any directions made by Ofcom for the purposes of ensuring that material changes are published and provided to Ofcom in a form enabling proper assessment.
- The BBC must comply with any directions made by Ofcom where Ofcom considers that the BBC may have made a decision to make a material change to a UK Public Service or non-service activity, and the BBC has:
 - failed to carry out a public interest test as required by the Agreement; or
 - failed to publish information enabling Ofcom to make the assessment required of it under the Agreement; or
 - implemented or begun to implement the change contrary to the BBC's obligations under the Agreement.
- The BBC must promptly provide such information and explanation as Ofcom requests for the purposes of Ofcom carrying out its functions under the Charter and Agreement in relation to proposed changes to public service activities.
- Market research relied upon by the BBC in a public interest test must comply with the minimum requirements set out in these procedures and guidance.
- The BBC must not implement a proposed change to a UK Public Service or non-service activity while Ofcom is considering whether or not it is material or carrying out an assessment of a material change under the Operating Framework, and must comply with any directions made by Ofcom in that regard.
- The BBC must comply with Ofcom's determination at the conclusion of a BCA (or shorter procedure as permitted under the Agreement), including complying with any directions made by Ofcom as part of such a determination.

References to "directions" above include both directions made by Ofcom and undertakings offered by the BBC and accepted by Ofcom.

Section 5

Guidance on our analytical approach

Introduction

- 5.1 This section sets out guidance on the analytical approach we expect to apply in assessing whether the public value of a proposed change justifies any adverse impact on fair and effective competition. We set out both how we expect to look at the scope of an assessment together with the factors we might typically consider as part of the analysis.
- 5.2 BCAs can cover a broad range of BBC proposals for changes to public service activities. We will consider each proposal on a case by case basis and may depart from this guidance where we consider it appropriate for the purposes of carrying out our functions in accordance with our duties. Where a shorter competition assessment is initiated we would draw from this guidance to the extent relevant.

Scope of the assessment

- 5.3 The first step in the analysis is likely to involve identifying:
- **The change(s) being proposed:** We will identify the baseline against which the effects of the proposal will be considered. We will generally expect this to be the position as it would look in the absence of the proposed change to the BBC's service.⁴¹ In some cases we may disaggregate a proposed change into several distinct and separable components. In these cases, we would expect to analyse the components individually but may also look at the proposal as a whole.⁴² As the analysis is forward looking, we would factor in upcoming developments where we consider it relevant.
 - **The services and products potentially affected by the BBC proposal:** We will identify the range of services and products likely to be affected by the BBC proposal. In some cases, we may consider the geographic basis on which the market impact should be assessed. However, we would not normally expect to conduct a formal market definition exercise of the type carried out in competition law investigations.
 - **The boundaries of the assessment:** The effects of a BBC proposal are likely to ripple across the supply chain. However, it is important to keep the scope of a BCA tractable. Accordingly, we would generally expect to focus our assessment on the main likely impacts of the BBC's proposal. We may acknowledge more remote effects, but detailed analysis is less likely to be appropriate.
 - **The forecast period:** A BCA is a forward looking assessment. The relevant forecast period may vary from case to case but will typically range from three to five years. In our view, this provides a reasonable balance between the need to consider the impact of relevant market developments, the impact on nascent

⁴¹ Where the BBC proposes entering a joint venture with others, the baseline may be slightly different. It could be if the BBC does not participate, the joint venture would not proceed. It may alternatively be that the joint venture would proceed in a different form or with different partners.

⁴² For example, if the BBC proposal consisted of (i) revision of a service (ii) launch of a new service then we might consider (i) and (ii) separately, adjusting the baseline as necessary.

services as they evolve towards maturity, and the desire to avoid speculative projections.

Factors considered in the assessment

5.4 A BBC proposal will typically affect:

- people that use the service that the BBC is supplying or plans to supply;
- society as a whole (for example from having more informed citizens as a result of using a BBC service);
- suppliers / third party commercial operators; and
- licence fee payers, who ultimately fund the BBC's public service activities.

5.5 To understand how these groups might be affected, we will consider a number of factors. This list is indicative, i.e. it is not an exhaustive list of all relevant factors, nor will each one be relevant to every BCA.

5.6 We will generally need to consider take up, the impact on commercial revenues and profitability, the public value generated, adverse impacts of fair and effective competition as well as other relevant factors when conducting a BCA. It is also important to recognise that these factors are interrelated. For example, the take up of a BBC service as a result of people switching from commercial providers may have a negative impact their revenues and profits which is likely to influence the extent to which a BBC proposal has an adverse impact on fair and effective competition.

5.7 Our assessment is likely to involve qualitative and potentially quantitative analysis drawing on the available evidence. It is unlikely to be possible to quantify, or accurately quantify, some of these factors and therefore other indicative evidence may need to be used.

5.8 We also recognise that assessment involves making a probabilistic prediction about future events and will involve an exercise of judgment. For example, BBC public service activities are likely to affect dynamic markets, the future size and features of which may be dependent on contingencies which cannot be known with precision at the time of assessment.

Take up

5.9 Where the BBC proposes a new public service, it will generally be relevant to analyse the total usage of that service over the forecast period. Where the BBC proposes changes to an existing service, the focus is instead on how usage of that service will change as a result of the BBC's proposal. In both cases this is likely to consist of estimating:

- **audience growth:** the BBC's proposal may increase overall take-up of the service, as those that may not have previously used the type of service begin to do so; and
- **audience substitution:** people may switch from an alternative (either an existing BBC public service or from an existing competitor's service). Additionally, some people that would have chosen alternative commercial services that emerge in

the future (or would have emerged absent the BBC's proposal) may remain with the BBC.

Impact on commercial revenues and profitability

- 5.10 In a BCA we will generally consider the likely changes in commercial revenues that would occur if the BBC proposal went ahead. The impact on revenue and ultimately profitability can be positive or negative.
- 5.11 The impact on revenue will help consider commercial suppliers' willingness to invest in new services or in improving the quality of their existing services. Falls in revenue may result in some commercial operators ceasing to provide services or being deterred from entering the market, as it is no longer profitable to do so.

Adverse impacts on fair and effective competition

- 5.12 The focus of Ofcom's assessment is on the changes that result from the BBC's proposal that have adverse impacts on fair and effective competition.
- 5.13 In carrying out the assessment:
- the starting point for our analysis will generally be the BBC's public interest test. Where the BBC's analysis is reasonable, complete and objective, there will be less need for us to conduct further analysis;
 - we will undertake our own analysis as appropriate, which may involve gathering additional information and will involve considering matters raised by other stakeholders;
 - we will consider whether the analysis is robust under different scenarios.
- 5.14 We recognise that BBC proposals that create a larger amount of public value, for example because they attract high audiences, may have a larger impact on fair and effective competition, and that both public value and market impact form part of our assessment.

The risk that the BBC crowds out commercial activity

- 5.15 As described in Section 3 where the BBC enters a market or improves a service there is likely to be a distortion to fair and effective competition. This is because as a publicly funded organisation it does not need to make money in the same way as a commercial supplier and offers its public service activities free and/or free of advertising. As a result, audiences may divert to the BBC or remain with the BBC despite better offerings emerging because of the fact that it is free and free of advertising.
- 5.16 These impacts may reduce other providers' revenue and profitability (as described in paragraphs 5.10 to 5.11) potentially reducing their willingness to innovate and invest and may result in some providers ceasing to provide services and others being deterred from entering to an extent is not in society's interests.
- 5.17 In order to assess the potential effects on fair and effective competition, we will take into account both the assessment of audience substitution and the change in the revenue and profitability of other suppliers. The scale of the adverse impact on fair and effective competition is likely to be related to these factors (i.e. the more people

that switch to the BBC service and the greater the negative impact on revenues, the more likely the BBC's proposal will have an adverse effect on competition).

- 5.18 The potential scale of any adverse impacts on fair and effective competition are also likely to depend on the extent to which the proposed/revised service:
- **Operates differently from commercial operators:** The adverse competition effects would tend to be larger where a commercial provider would need to charge a high price in order to cover the cost of a service, while the BBC instead provides its service for free.
 - **Benefits from people's special affinity for the BBC:** The adverse competition effects would tend to be larger where affinity to the BBC as a result of its brand and prominence is an important driver of people's decision to use the BBC or where there is a tendency to default to BBC services.

The risk that the BBC harms competition elsewhere in the supply chain

- 5.19 As explained in Section 3, a BBC proposal may harm competition elsewhere in the supply chain. It is harder to generalise about the factors that will be relevant to the potential extent of these effects – rather they will depend on the particular mechanism through which the proposal may adversely affect fair and effective competition.⁴³
- 5.20 That said, we would generally need to consider the likelihood of other suppliers having access to inputs (such as talent and content) restricted and the impact of such a restriction. Examples of factors that may shed light on this include:
- **The availability of alternative suppliers:** If there are few alternative, credible input suppliers then restricting access to one supplier is more likely to have an adverse impact on fair and effective competition. Similarly, we are more likely to be concerned where using alternative input suppliers would significantly raise users' costs and therefore place them at a competitive disadvantage.
 - **The strength of the restriction:** An arrangement that completely prevents an input supplier from serving customers other than the BBC is more likely to have an adverse impact on fair and effective competition than one which is non-exclusive.
 - **The importance of the input:** Restricting access to an input that is essential or which accounts for a high proportion of total costs is more likely to have an adverse impact on fair and effective competition.

Public value

- 5.21 As part of a BCA, we will assess whether the public value of a proposed change justifies any adverse impact on fair and effective competition. To take into account the public value generated, we will review the BBC's assessment of the public value

⁴³ For example, where a proposal creates the *potential* for the BBC to discriminate when supplying content to downstream firms, it would often be relevant to assess what safeguards exist that might prevent discrimination, and whether certain forms of discrimination may be objectively justified. In contrast, different factors would need to be considered when assessing the impact of an exclusive arrangement between the BBC and a major content producer.

of a proposed change.⁴⁴ The nature of this review will be different from our consideration of effects on competition. In looking at public value we will principally be testing the analysis conducted by the BBC, whereas in looking at competition issues we will be conducting our own evaluation.

5.22 As part of our review of public value, we are therefore relatively unlikely to conduct our own original research.⁴⁵ When reviewing a public value assessment, we are likely to consider:

- whether the analysis conducted by the BBC is reasonable (e.g. relies on well-reasoned assumptions), complete and objective;
- whether the BBC's assessment reflects a reasonable view of what constitutes public value (as discussed in paragraphs 5.23 and 5.24);
- whether the interpretation of the evidence presented is credible and relevant;
- whether the assessment of public value is consistent with other elements of the assessment (e.g. the take-up assumptions, BCA scope); and
- whether the analysis is robust under different scenarios.

5.23 Consistent with our approach to assessing adverse impacts on fair and effective competition, the focus is on the changes to public value that result from the BBC's proposal. Accordingly, in the context of a BCA, we would expect the BBC's analysis to consider the *additional* public value to people associated with the proposal.

5.24 People may benefit from using the service offered by the BBC. Additionally, where people use the BBC's public services, they may also change their attitudes and behaviour in ways that benefit those around them. For example, providing impartial news could foster active and informed participation in the democratic process that improves the lives of fellow citizens. These wider benefits to citizens are reflected in the BBC's Public Purposes.

Additional factors

5.25 In addition to the factors discussed above, other factors may be relevant to the assessment of a particular proposal. Examples are set out below, although this is not an exhaustive list and different factors may be relevant in different cases.

- **Positive effects on innovation:** A new/improved BBC service can increase people's interest in and familiarity with new technology. This may break down audience resistance to taking services from other suppliers that use that technology. It may also pressure commercial providers to deploy similar services to those offered by the BBC.
- **Cost of the proposal:** Part of the value to people of a BBC proposal stems from the fact that the BBC offers its services free and/or free of advertising. Therefore, it is important to take into account in the assessment the cost of the proposal to the BBC and ultimately the licence fee payer as failure to do so could

⁴⁴ Clause 10(3)(b) of the Agreement in relation to UK Public Services and clause 19(3)(b) in relation to non-service activities.

⁴⁵ Although we may assess the raw data from the BBC assessment, carry out further work where required, or send back to the BBC for further analysis where we are not satisfied with its submission.

overestimate the benefits of a proposal. We would rely directly on evidence direct from the BBC setting out the cost of the proposal. It is important to note that our role is not to assess the value for money associated with a particular proposal.

Concluding the assessment

- 5.26 There are four potential conclusions following our assessment: that the BBC may carry out the proposal; that the BBC may not carry out the proposal; that it may, subject to modifications or conditions; or that it must reconsider elements of the public interest test or follow such further procedures as we consider appropriate.⁴⁶
- 5.27 We recognise that concluding on the likely effects of any proposal will involve an exercise of judgment. In particular, we do not expect that a direct comparison of factors relating to public value and factors relating to risks to fair and effective competition will be possible.⁴⁷ We may assess whether the analysis is robust under different scenarios. However, given that it will not be possible to attach reliable probabilities to particular scenarios, we will use our judgement to factor in uncertainties appropriately.
- 5.28 In exercising our judgement, we will consider the specific facts of the case and take into account all of our relevant duties and regulatory obligations. Under this framework we will reach a conclusion on whether the public value of the proposed change justifies any adverse impact on fair and effective competition,⁴⁸ taking into account the scale and likelihood of these effects.⁴⁹ As explained above, our decision may involve considering factors which do not fit readily into a particular category but which are nonetheless relevant to the overall assessment.
- 5.29 If we identify there is a case for amendment of a proposal that reduces the likely adverse effects on competition without having a disproportionately negative impact on the public value we will explore the possibilities for modifications and conditions, or sending back to the BBC, as discussed at paragraphs 4.62 to 4.66.

⁴⁶ Clause 11(1) in relation to UK Public Services, and clause 20(1) in relation to non-service activities.

⁴⁷ Clause 12(4) of the Agreement in relation to UK Public Services and clause 21(4) in relation to non-service activities.

⁴⁸ Clause 10(3)(d) of the Agreement in relation to UK Public Services and clause 19(3)(d) in relation to non-service activities.

⁴⁹ Clause 10(4) of the Agreement in relation to UK Public Services and clause 19(4) in relation to non-service activities.

Annex 1

Responding to this consultation

How to respond

- A1.1 To ensure requirements are in place as soon as possible, Ofcom would like to receive views and comments on the issues raised in this document **by 5pm on 13 February 2017**.
- A1.2 We strongly prefer to receive responses via the online form at <https://www.ofcom.org.uk/consultations-and-statements/category-1/assessing-impact-proposed-BBC-public-service-activities>.
- A1.3 We also provide a cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>) for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A1.4 If your response is a large file, or has supporting charts, tables or other data, please email it to bbccompetitionassessment@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>).
- A1.5 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Steven Ball
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.6 If you would like to submit your response in an alternative format (e.g. a video or audio file), please contact Steven Ball on 020 7981 3000.
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.8 A short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if in your response you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.10 If you want to discuss the issues raised in this consultation, please contact Steven Ball on 020 7981 3000.

Confidentiality

- A1.11 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in

the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on our website, www.ofcom.org.uk, as soon as we receive them.

- A1.12 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.14 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <http://www.ofcom.org.uk/terms-of-use/>.

Next steps

- A1.15 Following this consultation period, Ofcom plans to publish a statement in April 2017.
- A1.16 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details, please see <http://www.ofcom.org.uk/email-updates/>.

Ofcom's consultation processes

- A1.17 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.18 If you have any comments or suggestions on how we manage our consultations, please call our consultation helpdesk on 020 7981 3003 or email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.19 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Steve Gettings, Ofcom's consultation champion:

Steve Gettings
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601
Email steve.gettings@ofcom.org.uk

Annex 2

Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.

A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.

A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.

A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.

A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)