
Commissioning for the BBC Public Services

A statement of Ofcom's approach to assessing the BBC's compliance with its requirements

STATEMENT:

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1. Overview

The BBC's Mission is to inform, educate and entertain audiences and to promote its Public Purposes across a range of Public Services. To enable it to show the most creative, highest quality and distinctive output, it commissions programmes and other materials from both the BBC and external producers.

Over the course of the Charter period, the BBC has to commission an increasing amount of content following a competitive process, and to ensure that this process is fair, reasonable, non-discriminatory and transparent. It is Ofcom's role to monitor the BBC's compliance and enforce those requirements, and, if necessary, to impose additional requirements to protect fair and effective competition when the BBC commissions content for the Public Services.

This statement sets out Ofcom's decision on whether additional regulation is needed in this area.

What we have decided – in brief

We are not imposing any new substantive requirements with respect to commissioning for the public services in the BBC's Operating Framework, because the BBC is already subject to a requirement to ensure fair, reasonable, non-discriminatory and transparent (FRNDT) commissioning under the Agreement.

We are introducing guidance setting out the factors we would consider in assessing whether the BBC has met its obligations regarding FRNDT commissioning in the event of an investigation.

The BBC has agreed to publish and provide Ofcom with additional information which will allow us to undertake our monitoring role and we are therefore not imposing any new reporting requirements.

Background

- 1.1 On 30 July 2018, we published a consultation¹ setting out how we proposed to undertake our role and seeking views. We were minded not to impose additional substantive requirements on the BBC to protect fair and effective competition in commissioning, on the basis that adequate safeguards are already in place. However, we proposed factors we would likely consider when assessing whether the BBC has complied with the requirements in the Agreement, either in response to a complaint or as part of an Ofcom-initiated investigation. We also sought views on our proposed approach to monitoring the BBC's compliance with its requirements, and the reporting necessary to support this.
- 1.2 We received six consultation responses², and spoke with a range of stakeholders. Most Stakeholders agreed with Ofcom's position but expressed different views about the information the BBC should publish and Ofcom should collect, in relation to the BBC's

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0021/116706/consultation-bbc-commissioning-public-services.pdf

² AudioUK, BBC, Directors UK, NUJ, Pact and TAC. Stakeholder responses are available here:

<https://www.ofcom.org.uk/consultations-and-statements/category-2/commissioning-bbc-public-services>

commissioning activities. The BBC questioned the need for wide-ranging reporting requirements. Nevertheless, recognising the importance of transparency in this area, the BBC has agreed to annually publish or provide to Ofcom a range of additional information. This includes:

- i) In relation to TV commissioning, the publication, by the BBC, of an annual “TV supply report”, which will set out information such as details of engagement by BBC commissioners with the market (e.g. details of briefings and website updates), hours commissioned from different types of producers, metrics around the variety of suppliers worked with, and outcomes of tenders;
- ii) In relation to TV commissioning, for which Ofcom already collects a range of information on a programme-by-programme basis, additional reporting, including whether a TV programme was made following a contestable process;
- iii) In relation to radio commissioning, for which Ofcom does not currently receive any information, new reporting to Ofcom of information about radio commissions on a programme-by-programme basis; and
- iv) In relation to commissioning for online services, new reporting to Ofcom for online content, including for some content which currently falls outside the scope of the contestability requirements of the BBC Agreement.

1.3 Considering stakeholder responses, the above commitments from the BBC, and our further analysis, we have decided not to impose additional requirements on the BBC at this stage, including in relation to reporting. We also confirm our guidance about the factors we would take into account in case of an investigation. We will use the information published and provided to us by the BBC to monitor its activities. Where necessary, we will request additional information from the BBC on a case-by-case basis, for example if we were to open an investigation into the BBC's commissioning activity. We will also continue to engage with stakeholders to ensure we remain informed about the manner in which the BBC implements its requirements and commitments in practice and sector developments.

2. Introduction

- 2.1 The BBC is required to fulfil its Mission³ to inform, educate and entertain audiences and to promote its Public Purposes⁴ across a range of UK public services. To enable it to show the most creative, highest quality and distinctive output, it commissions programmes and other materials from both the BBC and external producers.
- 2.2 As a major commissioner, producer and broadcaster of UK content, and as recipient of the licence fee, the BBC inevitably has an impact on competition in the wider media sector. It may have a positive effect by increasing choice, stimulating demand or encouraging wider sector innovation. But, in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.
- 2.3 The Communications Act 2003 (the Act), the Charter and the Agreement⁵ give the BBC a range of obligations relating to competition and commissioning and give Ofcom a number of relevant powers and duties, as set out below.
- 2.4 In this statement, we set out how we have decided to discharge those duties.

The BBC's obligations

Requirements relating to competition

- 2.5 The Charter places the BBC under several general duties. Among them, Article 11 requires it to have particular regard to the effects of its activities on competition in the UK. It must seek to avoid adverse impacts on competition which are not necessary for the effective fulfilment of its Mission and its promotion of the Public Purposes and it must have regard to promoting positive impacts on the wider market.⁶ The BBC must also comply with any competition requirements Ofcom imposes on it in the Operating Framework.⁷

Requirements relating to commissioning

- 2.6 The BBC Agreement imposes a range of obligations on the BBC which the BBC must meet in connection with the commissioning and production of content for its public services. These include Schedule 3(7) to the Agreement, which sets specific quotas on the amount of

³ The BBC's mission is defined in Article 5 of the Royal Charter for the continuance of the British Broadcasting Corporation (the Charter):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577829/57964_CM_9365_Charter_Accessible.pdf

⁴ The Public Purposes that the BBC must promote are defined in Article 6 of the Charter.

⁵ An Agreement Between her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation (the Agreement):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584329/57965_Cm_9366_Print_1.pdf

⁶ Article 11 (1) and (2) of the Charter.

⁷ Articles 20(8) and 46(2) of the Charter.

television, radio and online commissioning opportunities which must be opened up to competition between BBC producers and external producers. It also imposes requirements to secure that such competition is fair and effective. These provisions aim to ensure that external producers can compete on a fair footing, and that the benefits of competition - increasing choice, stimulating demand or encouraging wider sector innovation – are realised.

- 2.7 Schedule 3(7) of the Agreement requires that the BBC must secure competition between BBC and external producers. In relation to making relevant television programmes, it must:⁸
- a) secure such competition for the commissioning of at least 40% of the in-house guarantee⁹ for drama, comedy, entertainment and factual programmes by 31st December 2018, alongside maintaining existing levels of competition;
 - b) remove the in-house guarantee for children’s, sport and non-news related current affairs programmes by 31st December 2019; and
 - c) secure such competition for 100% of relevant TV programmes by 31st December 2027.
- 2.8 There are separate quotas for the radio and online Public Services. The BBC must secure competition in commissioning for at least 60%¹⁰ of relevant radio programmes¹¹ by 31st December 2022, and it must secure competition in commissioning for 100% of relevant online material¹² by 31st December 2027. In the rest of this document, we refer to the quotas for television, radio and online as the “contestability quotas”.
- 2.9 Schedule 3(7) is clear that, in meeting the quotas, the BBC is required to ensure that there is genuine competition between BBC producers and external ones (whether independent or not) on a fair, reasonable, non-discriminatory and transparent (FRNDT) basis. In the rest of this document, we refer to the contestability quotas and the FRNDT requirement together as the “contestability requirements”.

⁸ ‘Relevant television programmes’ means all television programmes included in the UK Public Services except-

- a) Programmes reserved for independent productions;
- b) News and news-related current affair programmes;
- c) Any programme where the BBC considers that complying with the obligation would not secure value for money.

⁹ The guaranteed allocation of air time to programmes made by BBC in-house producers under clause 56 of the 2006 Agreement.

¹⁰ Of the total time allocated to broadcasting relevant radio programmes on the UK Public Broadcast Services.

¹¹ ‘Relevant radio programmes’ means all network radio programmes included in the UK Public Services except-

- (a) News programmes; and
- (b) Repeats, continuity, simulcasts, EBU material and autoplaid music.

¹² ‘Relevant online material’ means all online material included in the UK Public Services except-

- (a) Programmes included in the UK Public On Demand Programme Services;
- (b) News and news-related current affairs material; and
- (c) Any material where the BBC considers that complying with the obligation would not secure value for money.

Transparency and reporting

- 2.10 The Charter also places an emphasis on transparency. Article 36 requires the BBC to publish an annual plan for each financial year. It must include the creative remit and work plan for that year, and provision for the United Kingdom's nations and regions. The BBC sets out its overall regulatory and additional commitments for each of its public services in the annual plan.¹³
- 2.11 In addition, the BBC must publish an Annual Report. It must include an assessment of how it delivered the creative remit and work plan, and of how it complied with each of its general duties and its regulatory obligations in the Operating Framework.¹⁴

Ofcom's role

- 2.12 Ofcom's role is not to tell the BBC which content to commission. Our powers and duties are concerned with the way the BBC commissions and from whom, reflecting the impact its commissioning activity could have on competition in the production sector.
- 2.13 We are required by the Charter to develop an Operating Framework setting requirements on the BBC which we judge to be appropriate to regulate its activities effectively. These must include requirements to protect fair and effective competition generally and may include requirements relating to commissioning specifically.¹⁵ We are given powers to enforce these requirements, and other regulatory requirements including those in Schedule 3(7) of the Agreement, and to require the BBC to give us information to help us perform our regulatory functions.
- 2.14 We are also responsible for holding the BBC to account in a transparent way. Article 50 of the Charter requires us to publish an Annual Report setting out how we have carried out our main BBC regulatory functions and our assessment of the BBC's compliance with specified requirements, including those in Schedule 3(7).¹⁶
- 2.15 The Charter makes clear that, in performing these functions, we have several important duties. The Charter applies our general duties under section 3 of the Act to our regulation of the BBC.¹⁷ These include the duty to further the interests of citizens and consumers, where appropriate by promoting competition. In doing so, we must have regard to the desirability of promoting competition and the principles under which our regulatory activities should be transparent, accountable, proportionate, consistent and targeted only

¹³ The BBC Annual Plan 2018/19, March 2018:

http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/bbc_annual_plan_2018.pdf

¹⁴ Article 37 of the Charter

¹⁵ Article 46(2) and (5) of the Charter and Clause 15(4) of the Agreement.

¹⁶ Article 50 of the Charter.

¹⁷ Article 45(1).

at cases in which action is needed. The Charter also requires us to take into account the desirability of protecting fair and effective competition in the UK.¹⁸

- 2.16 A key issue, therefore, given our powers to set the Operating Framework for the BBC, the existing competition requirements in Schedule 3(7) and our general duties, is the extent (if any) to which we should impose additional requirements on the BBC in relation to competition in commissioning. That is, the extent to which we judge it necessary and appropriate to impose further requirements to protect fair and effective competition between BBC producers and external producers.

Consultation

- 2.17 On 30 July 2018, we published a consultation setting out how we proposed to fulfil Ofcom's role. Taking account of the range of incentives on the BBC with regard to commissioning and the safeguards already in place, we were minded not to impose additional requirements on the BBC to protect fair and effective competition in commissioning. However, we set out our proposed approach to assessing whether the BBC is complying with its obligations as set out in the BBC Agreement.

- 2.18 The consultation closed on 24 September 2018. We received six responses from the following interested parties¹⁹:

- AudioUK
- BBC
- Directors UK
- National Union of Journalists (NUJ)
- Pact
- Teledwyr Annibynnol Cymru (TAC)

- 2.19 In addition, we met with stakeholders both prior and during the consultation.

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- 2.20 The rest of this document sets out how, in light of the responses to our consultation and Ofcom's further analysis, Ofcom has decided it will deliver its role and the steps Ofcom will take following publication of this statement. This statement should be read alongside the consultation.

¹⁸ In addition, we are required to also consider the object of the BBC to fulfil its Mission and promote the Public Purposes as set out in Article 6 of the Charter, and the requirement for the BBC to comply with its duties under the Charter, including its general duties – see Article 45(2) of the Charter. The BBC's General Duties are set out in Articles 9-17 of the Charter.

¹⁹ The responses are published on Ofcom's website at <https://www.ofcom.org.uk/consultations-and-statements/category-2/commissioning-bbc-public-services>

3. Analysis of responses to the consultation and Ofcom's final position

3.1 In this section, we discuss our consultation proposals, stakeholder responses, and our decision. We consider first the competition concerns we identified and our proposal not to impose additional requirements on the BBC to protect fair and effective competition. Second, we consider our proposals for assessing the BBC's compliance with its requirement to commission on FRNDT terms in the context of an investigation. Finally, we consider whether it is necessary to impose additional reporting requirements on the BBC to enable us to monitor the BBC's compliance with its commissioning requirements.

Competition concerns and substantive regulation

Ofcom's consultation

3.2 The consultation described the potential competition concerns relating to the BBC's commissioning of programmes and materials for its UK Public Services. We set out our proposed approach to fulfilling our duty to hold the BBC to account for the commissioning requirements in Schedule 3 of the Agreement; and our wider role to protect fair and effective competition.

3.3 We explained the BBC's major role as a commissioner, producer and broadcaster in the UK's commissioning landscape across television, radio and online. It is a vertically integrated operator, and producers from its commercial subsidiary BBC Studios can compete for opportunities to make programmes for the BBC alongside other independent producers.

3.4 We therefore examined the potential for the BBC to favour BBC Studios, their own in-house teams or particular external producers in a way which is harmful to fair and effective competition. We considered that there could be incentives for the BBC to act in this way, and that this is also recognised by the Charter and Agreement, including through the requirements in Schedule 3 of the Agreement.

3.5 However, Ofcom's provisional judgement was there was no need at present to impose additional requirements to protect fair and effective competition on the way the BBC commissioned programmes and materials. We set out five main reasons for this:

- i) The BBC is subject to trading and separation requirements as set out in Ofcom's Operating Framework, which apply to the Public Service when dealing with BBC Studios.
- ii) The BBC is subject to requirements in the Agreement to increase contestability and commission on FRNDT terms.
- iii) The requirements under the previous Charter and Agreement to increase contestability and commission on fair, reasonable and non-discriminatory terms led

the BBC to introduce procedures to make some commissioning opportunities contestable on a fair and transparent basis and, as a result, independent producers have won a large proportion of commissions.²⁰

- iv) The BBC has taken steps to ensure confidence in its commissioning processes, including through detailed guidance in its commissioning frameworks, which apply to all types of producers when working with the BBC
- v) The BBC has incentives to ensure genuine competition in commissioning, as seeking pitches and commissioning from a wide range of producers has the greatest potential to fulfil its Mission and promote the Public Purposes.²¹

3.6 We noted that while the BBC might still have some incentives to favour its own internal production, we considered, in light of the evidence to date on the BBC's commissioning activities as well as existing regulation, that further regulation was not warranted.

Summary of responses

- 3.7 Respondents generally agreed with Ofcom's position that there was not a sufficient need for additional substantive regulatory requirements in this area.
- 3.8 In support of this, Pact stated, "*As Ofcom have identified long standing procedures built up from the WOCC, existing trading and separation requirements, BBC's Commissioning Process Framework and the legislation itself mean the jeopardy is high for the BBC.*"²²
- 3.9 AudioUK welcomed opening up of BBC Radio programming in recent years and were confident that, with appropriate oversight from Ofcom, this was leading towards a "*far more lively and vibrant commissioning pattern in BBC Radio.*"²³
- 3.10 As part of its response to the consultation, the BBC re-iterated that "*commissioning fairly and on the merits of ideas pitched to us is at the heart of ensuring we can continue to deliver for our audiences by putting the best, most distinctive content on our services.*"²⁴
- 3.11 The BBC also provided additional information on its own processes, expectations of BBC staff working in commissioning, details on its commissioning processes and content suppliers over the past ten years.
- 3.12 The NUJ argued that Ofcom should not assume that the fact that independent producers had previously won a large majority of commissions from the BBC to be evidence of a

²⁰ The BBC Annual Report 2016-17 (page 144) shows that independent producers won 80 per cent of hours offered in 2016-17.

²¹ The BBC has five public purposes set out by the Royal Charter and Agreement that outline the values the BBC holds when striving to achieve its mission to inform, educate and entertain.

²² [Pact Response, page 3.](#)

²³ [AudioUK Response, page 2.](#)

²⁴ [BBC Response, page 11.](#)

FRNDT process being followed. It stated that there could be a bias in favour of external producers.²⁵

- 3.13 While not contending that substantive additional regulatory requirements were needed, some stakeholders raised some concerns in terms of the effect the BBC's commissioning could have on competition. These concerns included: that invitations to tender do not allow for sufficient creativity from producers²⁶; that on-air accreditation for content commissioned for radio is inconsistent²⁷; the lack of terms of trade for digital content²⁸ and insufficient protection of ideas in the pitching process.²⁹

Ofcom response

- 3.14 As outlined in the consultation and set out above, Ofcom's role is to protect fair and effective competition through our powers to set the Operating Framework for the BBC. Having considered the responses to the consultation and further engagement with stakeholders, we remain of the view that for the reasons set out in the consultation and reiterated above, it is not necessary to impose additional requirements on the BBC to protect fair and effective competition in commissioning.
- 3.15 While we accept the NUJ's point that the outcome of the commissioning process is not conclusive evidence of FRNDT commissioning, we consider it is a relevant indicator in assessing the BBC's processes and the need for additional regulation. We also welcome the BBC's stated commitments to commissioning on a fair and transparent basis.
- 3.16 Further, we note that we have today also published our statement on the BBC's commercial and trading activities. This statement, amongst others, addresses concerns around sharing of information between the BBC public service and its commercial subsidiaries. In the statement, we impose an additional requirement on the BBC to publish an annual statement setting out the measures, controls and processes it has implemented to address the risks of information sharing.³⁰
- 3.17 In relation to stakeholders' additional concerns, we believe that they do not, at this point, require intervention by Ofcom: as noted above, it is not Ofcom's role to decide what the BBC should commission. Editorial aspects of the BBC's commissioning briefs and tender invitations, and how the BBC best meets its Mission and Public Purposes are for the BBC to consider. We also believe that on-air accreditation and terms of trade are in the first place for the industry to seek agreement on.³¹ As far as the protection of producers' ideas is concerned, this is addressed by existing legislation and regulation.

²⁵ [NUJ Response, page 2.](#)

²⁶ [AudioUK Response, page 2.](#)

²⁷ [AudioUK Response, pages 8-9.](#) [NUJ Response, page 3.](#)

²⁸ [AudioUK Response, page 3.](#)

²⁹ [DirectorsUK Response, page 1-2.](#)

³⁰ [Statement: The BBC's commercial and trading activities, Ofcom.](#)

³¹ We are encouraged that AudioUK, at the time of writing their consultation response, had begun consulting with its members on a proposal from the BBC to introduce a standard system for credits and acknowledgements for a number of its stations, AudioUK Response page 9

Ofcom's guidance for assessing FRNDT compliance

Ofcom's consultation

- 3.18 The consultation set out our proposals for how we would assess whether the BBC has complied with its requirement to ensure FRNDT competition in commissioning. We said that Ofcom's "Procedures for enforcement of BBC competition requirements" would apply. In line with those procedures and the "BBC first" principle, a complainant would normally be required to take any complaint in relation to competition in commissioning to the BBC first.³²
- 3.19 The consultation further set out our proposals for the factors Ofcom would likely consider when assessing, particularly in the context of an investigation, if the BBC has complied with the requirements in the Agreement regarding FRNDT competition in television, radio and online commissioning. These factors would serve as a broad guide to the type of evidence and factors we might consider, but their application would vary dependent on the case and different factors may be relevant in different circumstances.
- 3.20 We said that the factors we provisionally identified would likely be relevant in many cases at different stages of the commissioning process and would cover the following areas:
- i) transparency surrounding the BBC's commissioning needs and their processes;
 - ii) eligibility to pitch and criteria related to the identity of the producer;
 - iii) access to commissioners and idea development;
 - iv) assessment criteria and decision making;
 - v) contractual terms; and
 - vi) the BBC's wider regulatory requirements.

Summary of responses

- 3.21 Pact agreed that the factors Ofcom set out were relevant to understand how the BBC is commissioning and performing against its obligations. It also believed the enforcement procedures set out in the consultation were suitable.³³
- 3.22 The BBC welcomed the clarification Ofcom had presented as to how we would assess any potential complaints about their commissioning processes. It noted the factors set out in the consultation and agreed that they would need to be considered on a case-by-case basis as to applicability in light of any investigation Ofcom would carry out.³⁴
- 3.23 However, the BBC sought to make a number of clarifications on the factors:

³² [Clause 56\(4\) of the Agreement.](#)

³³ [Pact Response, page 4.](#)

³⁴ [BBC Response, page 14.](#)

- In relation to **eligibility to pitch**, it noted geographic location of a producer did not affect its ability to pitch ideas. The BBC noted that the use of a range of producers from across the UK was important for it to meet its obligations and deliver for all the UK's communities. The BBC also said that, with the exception of tenders, the only eligibility to pitch criteria is whether that party "*can make a programme (i.e. are they a production company)*".³⁵
 - In relation to **access to commissioners**, the BBC stated that it takes "*all reasonable and appropriate steps to ensure that information on commissioning opportunities is made available to the whole of the market on an equivalent basis*". This includes publishing updates on its website, regular formal briefings across the UK and interactions between BBC commissioners and suppliers. It also said that where BBC commissioners and BBC producers are co-located, it has put in place measures to restrict information sharing that would give BBC Studios any advantage over other producers.³⁶
 - In relation to **assessment criteria**, the BBC explained that there are no rigid criteria which inform commissioner's decisions, and that creative judgment is at the heart of the commissioning process. It referred to several other factors which impact whether a proposal will make it to a commissioned programme but suggested that using the term "criteria" may not be appropriate.³⁷
- 3.24 TAC agreed with Ofcom that access to commissioners is a key part of the commissioning process and that engagement with a wide range of production companies (including from all nations and regions across the UK) is important. However, it believed the BBC had more to do in providing stronger levels of engagement with the production sector in Wales.³⁸
- 3.25 TAC suggested that Ofcom require the BBC to publish "an annual timetable of planned commissioning meetings to be held in each nation during the coming year." It believed this would focus the BBC on making sure it has regular planned engagement and also allow producers to plan sufficiently ahead to ensure that they can attend.³⁹

Ofcom response

- 3.26 We note stakeholders' support for the factors set out in the consultation as suitable for assessing the BBC's compliance with their requirements regarding FRNDT. In light of the BBC's requested clarifications, we have made some small amendments in our final guidance, annexed to this statement, which we have otherwise decided to adopt as proposed.
- 3.27 We note the BBC's comment that 'measures' have been put in place to restrict BBC Studios from gaining access to information before external producers. In our statement on the BBC's commercial and trading activities,³⁷ we have modified the requirements and guidance

³⁵ [BBC Response, page 14.](#)

³⁶ [BBC Response, page 15.](#)

³⁷ [BBC Response, page 15-16.](#)

³⁸ [TAC Response, page 4.](#)

³⁹ [TAC Response, page 5.](#)

in this area to make it clear that the BBC must have appropriate measures, controls and processes, so that the commercial subsidiaries do not have access to the Public Service information that is not available to third parties (apart from in the limited circumstances where information sharing is permitted).⁴⁰

- 3.28 In response to the suggestion of a requirement to publish a commissioning timetable of engagement, we remain of the view that additional formal requirements are not necessary at this stage. However, we would expect the BBC to continue to consider how it can best engage with a wide range of producers (including producers from all nations and regions across the United Kingdom) so that there is genuine competition between them on a FRNDT basis. We note that, as further explained below, the BBC has committed to the publication of an annual TV supply report which will detail how it engages with the market, and this may provide a useful source of information on engagement with producers in the nations and regions of the UK.

Reporting and monitoring approach

Ofcom's consultation

- 3.29 As set out above, we proposed not to impose additional substantive requirements on the BBC in relation to commissioning for its UK Public Services. However, we set out in our consultation that it would be necessary to monitor the BBC's commissioning activity on an ongoing basis.
- 3.30 We considered that there is a role not only for Ofcom but also for stakeholders in monitoring the BBC's activities. In particular, we expect stakeholders to hold the BBC to account by raising issues with it and with Ofcom about the BBC's commissioning activity.
- 3.31 We proposed that the BBC should publish, annually, a full update on its progress towards meeting (or its compliance with) the contestability requirements in Schedule 3(7)(1) of the BBC Agreement.
- 3.32 In recognising the extent of the BBC's commissioning activity and its potential impact on the production sector, we stated that we would also need the BBC to report additional information to Ofcom. We said that this would include information on how it measured progress towards meeting its contestability requirements and information to assess the requirement that the BBC is commissioning on a FRNDT basis (including some high-level indicators, which together could be used as signals of compliance).

⁴⁰ [Statement: The BBC's commercial and trading activities, Ofcom.](#)

Summary of responses

Commissioning information published by the BBC

Television

- 3.33 In relation to Ofcom’s proposals for publication of additional information in the annual report, the BBC said it disagreed with Ofcom’s view that it omitted to report its progress towards meeting the contestability requirement for children’s, sports and non-news current affairs. It believed that this requirement was different from the contestability requirement for drama, comedy, entertainment and factual genres and therefore its reporting on the requirement should be different. Specifically, the BBC said that the removal of the in-house guarantee for children’s, sport and non-news current affairs only meant that any new commissioning opportunities should be commissioned using an FRNDT process. It noted that for children’s and non-news current affairs, it had removed the in-house guarantee in 2016. It also confirmed plans are in place to remove the in-house guarantee for sport in 2019, which it would be communicating to stakeholders.⁴¹
- 3.34 However, the BBC stated its commitment to transparency and openness in its commissioning process. It proposed publishing an annual TV Supply Report setting out further details of “*both the inputs to and outputs from commissioning*”, including:
- i) Inputs: How BBC commissioners are engaging with the market, any changes to the commissioning website (e.g. updates to business frameworks or editorial requirements), listing who they work in partnership with and the details of tenders that have been run each year.
 - ii) Outputs: Broadcast hours by type of producer, further information on the range and scale of suppliers they have worked with and the outcomes of each tendering process.⁴²
- 3.35 The BBC stated that “*Some of this information is already publicly available, but we consider it would be more transparent to set it out in one single report*”. It expected the first publication to be April 2019 and that the content of the report would be considered over time following feedback from stakeholders.⁴³ The BBC also agreed, in discussions with us about its consultation response, that it would publish in its annual reports for the remainder of the Charter period its progress towards meeting its overall contestability requirement for all genres⁴⁴.
- 3.36 Pact agreed with Ofcom that the BBC needed to do more in reporting its progress to meeting the contestability quotas and supported annual publication of updates to meeting the quotas. It stated their disappointment that the BBC’s Annual Plan had not included

⁴¹ [BBC Response, page 19-20.](#)

⁴² [BBC Response, page 17-18.](#)

⁴³ [BBC Response, page 18.](#)

⁴⁴ Competition for 100% of relevant TV programmes by the end of the Charter period

“more explicit plans set out about the BBC’s requirement to secure full competition for all the BBC’s television and online content spend.”⁴⁵

- 3.37 Pact also stated that it would like the BBC to publish more data in terms of spend, not just in the total number of hours the BBC is commissioning.⁴⁶

Radio

- 3.38 The NUJ stated in its response that the BBC should be required to publish or *“at the very least supply to Ofcom”* more information relating to commissioning including further information regarding which radio slot the commission was for; details on guide prices and prices paid for commissions; renegotiation information; and details of external suppliers using BBC in-house facilities including costs of this usage.⁴⁷

Commissioning information provided to Ofcom

Television

- 3.39 The BBC stated in its response that it did not agree that Ofcom required additional information that was not to be made available to other stakeholders and that justification for this additional information had not been made. In its response, it stated that it needed *“stakeholders, including potential suppliers, to have confidence that our process is FRNDT”*, and that *“further reporting to Ofcom is unlikely to provide that confidence, as this information would not be available to the market”*.⁴⁸
- 3.40 The BBC questioned whether Ofcom receiving historical data would be relevant as it *“indicates little about our upcoming plans, which are better reflected in our annual plan and via the commissioning priorities which are communicated through our website and engagement with the market”* and it considered it was more important for the sector to understand the transparency of its processes and upcoming opportunities.⁴⁹
- 3.41 TAC stated that whilst it did not want to make the data provision too onerous it would support the collection of data that allowed Ofcom to measure the BBC’s progress to their contestability requirements, compliance with FRNDT and that processes were resulting in *“a range and diversity of producers making BBC programmes across genres”*. TAC also stated that it would support the collection of data relating to the inputs of the commissioning process including producer participation and success rates.⁵⁰
- 3.42 Pact also set out a number of data points reporting including comparators for the BBC Studios or BBC in-house versus external producers at both the input and output stages of the commissioning process.⁵¹

⁴⁵ [Pact Response, page 4.](#)

⁴⁶ [Pact Response, page 5.](#)

⁴⁷ [NUJ Response, page 1.](#)

⁴⁸ [BBC Response, page 18.](#)

⁴⁹ [BBC Response, page 20.](#)

⁵⁰ [TAC Response, page 7.](#)

⁵¹ [Pact Response, pages 5-6.](#)

Radio

- 3.43 The BBC stated that it is committed to working with Ofcom to develop an approach to reporting for radio and to deliver information by the 2019 Annual Report and Accounts.
- 3.44 The BBC stated that it did not “*consider it proportionate to take the reporting that we currently provide for TV as the starting point for reporting on radio*” and that a starting position should be the information the BBC currently collects without need for additional resource.
- 3.45 The BBC proposed to provide the following information to Ofcom in respect of commissioned radio programmes:
- i) The title;
 - ii) The network (i.e. 1Xtra);
 - iii) Number of hours
 - iv) The supplier (i.e. the producer);
 - v) Whether the title is produced by BBC or external producers; and
 - vi) Whether it was contested.⁵²
- 3.46 AudioUK stated that it believed data should be available that provided a comparator of in-house and external productions for radio and information showing how much BBC is spending on radio productions in the nations and regions to evidence that there is a “*level playing field*” when it comes to commissioning.⁵³
- 3.47 AudioUK contended that, due to the BBC services now falling under a single Operating Licence, it was important the sector could access detailed reporting of the number of hours commissioned and spend data of genres on each of the BBC’s radio networks.
- 3.48 The NUJ argued that it would be disproportionate to require the BBC to provide Ofcom with information about every decision in the commissioning process but said Ofcom “*should request and analyse such detailed information for a number of commissions in every commissioning process.*” It said Ofcom should not notify the BBC in advance of these requests and when a concern is raised regarding a specific commission, Ofcom should carry out detailed analysis on the processes surrounding it.⁵⁴

Online

- 3.49 The BBC stated that it is committed to working with Ofcom to develop an approach to reporting for online and to deliver information by the 2019 Annual Report and Accounts. Its preferred approach would be to develop a different approach to television and radio, but wanted to “*ensure we report the most relevant information that allows Ofcom and stakeholders to track our progress to meeting our contestability requirements. We expect*

⁵² [BBC Response, page 21.](#)

⁵³ [AudioUK Response, page 7.](#)

⁵⁴ [NUJ Response, page 2.](#)

this may continue to be based on spend to enable reporting across different types of content.”

- 3.50 The BBC noted that the requirements in the Agreement which apply to online commissions do not capture content commissioned exclusively for on-demand services. However, it made it clear that it expected any TV or radio programmes commissioned exclusively for on-demand services to go through a FRNDT process. It also proposed reporting on contestability for off-schedule podcasts and long form on-demand only TV programmes.⁵⁵
- 3.51 Pact stated that it would like Ofcom to reconsider additional reporting requirements for online services and believed a similar framework for television as identified in the consultation should be applied.

Ofcom response

- 3.52 We remain of the view that the provision of information to Ofcom which supplements what is published by the BBC is necessary, so we can fulfil our duties. As a regulatory body, we must be vigilant in ensuring that the BBC complies with the requirements placed on it by the Charter and Agreement. This is particularly so where we are required⁵⁶ to report on our performance of our regulatory functions and our assessment of the BBC’s compliance with regulatory obligations that relate to increasing competition, of a certain quality (FRNDT), over time. The collection of additional information is appropriate and will allow us to assess and report on these matters.
- 3.53 We note the BBC’s position with regards to compliance with the requirement in Schedule 3(7)(a)(ii) on securing competition for children’s, sports and non-news related current affairs programmes. Removal of the in-house guarantee for these genres should mean new opportunities are not reserved for the BBC, and should lead to increased competition overall. That is the objective of Schedule 3(7). So that we can assess what the BBC is doing to comply with that objective, in line with our monitoring and enforcement duties, we need to see evidence of the consequences of the removal of the guarantee. That said, we believe we will be able to do so by reviewing the BBC’s progress to meeting its contestability requirement for all genres⁵⁷. We welcome the BBC’s agreement that it should be reporting on this contestability requirement, each year for the remainder of the Charter period.
- 3.54 We also welcome the BBC’s commitment to publish and provide Ofcom with additional information, as follows.
- 3.55 First, we believe the “TV Supply Report”, to be first published in April 2019, will provide stakeholders with useful information on the BBC’s commissioning processes, and we are encouraged by the BBC’s commitment to reviewing and developing this publication with feedback from stakeholders and Ofcom. As noted previously, and as stated in Ofcom’s

⁵⁵ [BBC Response, page 10.](#)

⁵⁶ By Article 50 of the BBC Charter.

⁵⁷ 100% competition by the end of the Charter period

annual report on the BBC, transparency about what the BBC does and how the BBC complies with its obligations is important for Ofcom and the market.⁵⁸

- 3.56 Second, the BBC has committed to supplement the information it already provides to us on an annual basis as part of its broadcast television annual data returns.⁵⁹ New information will include whether a programme was made following a contestable process and whether a programme was a “*relevant television programmes*” as defined in the Agreement.⁶⁰ This information will allow us to assess (at least on a high-level, prima facie basis) the BBC’s compliance with the contestability requirements .
- 3.57 Third, the BBC has committed to report new information for radio on a programme by-programme basis, which will allow us to analyse contestability within this sector and brings radio reporting closer to the television reporting we already receive from the BBC on an annual basis.
- 3.58 Fourth, we agree with the BBC that some commissioning for online is not currently captured by the requirements set out in the BBC Agreement. This is a growing and increasingly important area for the BBC and for stakeholders, and we welcome the BBC’s commitment that such content will be commissioned following a FRNDT process irrespective of the Agreement’s requirements.
- 3.59 We also welcome the BBC’s commitment to report on contestability for off-schedule podcasts and long form on-demand only TV programming. We note that the BBC has proposed to report off-schedule podcasts within the target for network radio, and long-form on-demand within the target for television programmes. It will need to do report on those matters in a way that enables us to assess its compliance with the contestability requirements for television and radio set out in the Agreement. We will therefore ensure that it does so.
- 3.60 Finally, we welcome the BBC’s commitment to working with Ofcom to develop its reporting for other online commissioning (which is captured by the BBC Agreement) and its agreement that it should be reporting on its progress to meeting this contestability requirement.⁶¹
- 3.61 We believe that the information the BBC has agreed to provide will allow us to make appropriate assessments of its compliance with the contestability requirements. We acknowledge that it will not enable us definitively to determine whether the BBC has complied. It will, however, give us high-level indicators that enable us to assess its

⁵⁸ [Ofcom’s 2018 Annual Report on the BBC, page 4.](#)

⁵⁹ This information supports our monitoring of broadcast PSB content, such as the amount of original programming by spend and hours in different genres. The information also includes details on the identity of the producer of the programme, which allows us to monitor outcomes in terms of the range and diversity of producers the BBC uses to make programmes.

⁶⁰ “relevant television programmes” means all television programmes included in the UK Public Services except-
(a) programmes reserved for independent productions;
(b) news and news-related current affairs programmes;
(c) any programme where the BBC considers that complying with the obligation in paragraph (1) would not secure value for money;

⁶¹ [BBC Response, page 22.](#)

performance (including for annual reporting purposes). As we noted in the consultation, we do not believe it would be appropriate for us to consider every commissioning decision in detail, nor that there is a single measure which would allow us to assess the BBC's compliance in all cases. The information the BBC has agreed to provide to us will instead give us useful markers of its performance and areas where we might have cause for concern.

- 3.62 On that basis, we have decided not to impose additional reporting requirements on the BBC. We accept its agreement either to give us or to publish additional information in lieu of the imposition of formal requirements. If the BBC does not maintain its agreement, or information we receive proves insufficient, we will consider imposing formal regulatory requirements, or taking enforcement action, as appropriate.
- 3.63 We acknowledge that a number of stakeholders suggested a range of additional 'data points' that we have considered collecting in order to assess the BBC's compliance with the FRNDT requirements. Pact, for example, wanted to see spend data published by the BBC, while AudioUK suggested that this information be provided to Ofcom.
- 3.64 We have decided not to pursue these suggestions for the time being. The Agreement requires the BBC to open competition up in terms of hours of programming. Spend information may (or may not) provide an indicator to assess the BBC's compliance with FRNDT commissioning requirements, and we note that Ofcom currently receives information on spend as part of the BBC's annual returns for television. We will continue to assess whether the data we receive for radio is sufficient and, if necessary, can seek additional information (such as spend data).
- 3.65 There were a number of requests to collect data to enable further comparisons between the BBC's commercial subsidiaries (BBC Studios) and independent producers. Again, we note that Ofcom receives information within our annual returns that indicates who made a programme for the public service.
- 3.66 We considered the usefulness of data which would allow us to monitor the percentage of successful pitches by each producer in the commissioning process. However, having considered this further, we note that producers' success rates could vary for a number of reasons. This indicator alone may not, therefore, be sufficiently indicative that the BBC was operating its contestability processes on a FRNDT basis.
- 3.67 That said, wherever we need to investigate the BBC's compliance with the contestability requirements, we will require it to provide us with relevant data. We therefore expect it to retain information relating to its commissioning processes, so it would be available if necessary. We would expect the BBC to retain such information for a period sufficient to ensure it is available to enable Ofcom to consider a complaint about commissioning which has been considered by the BBC first. Further, as noted in our consultation and the annex to this statement, we are most likely to be concerned about matters where a potential substantive adverse effect on competition as a whole can be identified. Therefore, information relating to the BBC's commissioning processes should enable us to consider

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competition in commissioning as a whole, not just in relation to individual commissioning processes.

- 3.68 We will continue to engage with stakeholders to ensure we remain informed about the manner in which the BBC implements its requirements and commitments in practice.

4. Next steps

- 4.1 Following the decision outlined in this statement not to impose additional requirements on the BBC at this stage, we will continue to engage with stakeholders to ensure we remain informed about the manner in which the BBC implements its requirements and commitments in practice.
- 4.2 Ahead of the next annual report, we will continue discussions with the BBC to develop its reporting for online commissioning which is currently captured under the Agreement and its reporting on contestability for off-schedule podcasts and long form on-demand only TV programming. As noted above, we recognise the growth of this sector and the interest that stakeholders have in the area.
- 4.3 The BBC highlighted it has introduced new approaches and processes for commissioning for sport productions and has held a briefing with stakeholders. We will further engage with the BBC and stakeholders on these processes.
- 4.4 Alongside stakeholders, we will review the “TV Supply Report” when published in April.
- 4.5 We expect to receive the additional information for television contestability and the new radio reporting as part of the BBC’s annual data returns to Ofcom and we will use this to inform part of our assessment of the BBC’s performance in this area.

A1. Guidance for assessing compliance with the BBC's FRNDT requirement

- A1.1 This guidance sets out the factors we are likely to consider when assessing, in particular in the context of an investigation, if the BBC has complied with the requirements in the Agreement regarding FRNDT competition in television, radio and online commissioning.
- A1.2 The factors below, and the way we describe their application, are not exhaustive. Whether and how they would apply is likely to vary depending on the case and different factors may be relevant in different circumstances. Nevertheless, they serve as a broad guide to the type of evidence and factors we would consider.

Enforcement procedures

- A1.3 The BBC commissions hundreds of programmes every year, and the decisions about what it commissions and what programmes best fulfil its Mission and Public Purposes are matters for it, not Ofcom. Although the BBC's regulatory obligations (e.g. arising from the Charter and Agreement and the Operating Licence) have an impact on its programme offering, it is not the regulator's job to get involved in creative decisions about what the 'right' programmes are and why some may not be suitable. Ofcom's concern is with the way in which the BBC goes about making commissioning decisions to make programmes in a way which help the BBC to meet its Mission and Public Purposes and its regulatory obligations.
- A1.4 Ofcom will also not directly be involved in how the BBC commissions content for the Public Services: we are not prescribing detailed processes it must follow or ex ante requirements it must meet. In the first place, it is for the BBC to establish processes which ensure it meets its obligations. We expect only to consider the BBC's approach to commissioning where we receive a complaint or where we open an investigation of our own initiative because concerns about what it has done or that its commissioning processes are failing to deliver genuine competition on FRNDT terms.⁶²
- A1.5 The Charter and Agreement have established a process which requires that complainants take any complaint, including in relation to fair and effective competition in commissioning, to the BBC first.⁶³ Where a complainant disagrees, for example, with the BBC's approach to commissioning for the Public Services, it should first take its complaint to the BBC.
- A1.6 In general, a complaint should only be made to Ofcom,⁶⁴ where:
- the BBC has failed to resolve a complaint;

⁶² [Clause 58 of the Agreement.](#)

⁶³ [Clause 56\(4\) of the Agreement.](#)

⁶⁴ In exceptional circumstances Ofcom may intervene at an earlier stage to handle and resolve a complaint not resolved by the BBC as set out in Clause 57(2) of the Agreement.

- has not resolved it satisfactorily; or
- where, following the resolution of the complaint by the BBC, the complainant considers that the imposition by Ofcom of a sanction may be appropriate.⁶⁵

A1.7 We expect that the majority of complaints can and will be resolved through the BBC's complaints process, and that Ofcom will only intervene in a limited number of cases. Nevertheless, Ofcom will maintain oversight on the amount and nature of those complaints. The BBC has committed to providing us with information on complaints it receives which fall within Ofcom's jurisdiction.⁶⁶

A1.8 Ofcom has published procedures for making a complaint to Ofcom about the BBC's compliance with the requirements in this document (as well as other competition requirements). Such procedures include other matters which Ofcom are likely to take into account when considering whether to accept a complaint.⁶⁷

Submissions from the parties and Ofcom's analysis

A1.9 Parties wishing to make complaints to Ofcom should do so in line with our Procedures for enforcement of BBC competition requirements. They should set out why they believe the BBC has not commissioned on a fair, reasonable, non-discriminatory and transparent basis. We would expect the BBC to provide us with all relevant information about the commissioning process concerned and to make submissions about how it was in accordance with the BBC's obligations.

A1.10 The factors we have outlined below, which may be relevant to the question of whether the BBC commissioned in an FRDNT manner, could be used as a guide to the kinds of things we would expect the parties to include in their complaints and submissions. Other factors may be relevant as well.

A1.11 Individual commissioning processes should be contestable, but Ofcom's remit also extends to protecting fair and effective competition as a whole. We may therefore intervene in individual cases where the complainant alleges the BBC has not commissioned on FRDNT terms. However, those cases are likely to be more suited to resolution by the BBC. Ofcom is most likely to be concerned about matters where a potential substantive adverse effect on competition as a whole can be identified, and the bigger the adverse effects, the more likely we are to be concerned. Cases, or groups of cases, which raise concerns about the commissioning process as a whole are likely to be our highest priority. We would expect the complainant to set out the anti-competitive effects it alleges result from the BBC's behaviour. As part of our analysis, we will assess the specific risks and possible impact on competition that arise from the conduct outlined in the complaint.

⁶⁵ Article 49(3) of the Agreement specifies that where the BBC has failed to comply with a specified requirement, Ofcom may impose a penalty on the BBC.

⁶⁶ BBC Complaints Framework and Procedures, page 41 – which refers to complaints falling within Ofcom's "remit appeal jurisdiction."

⁶⁷ Statement on procedures for enforcement of BBC competition requirements.

- A1.12 Another likely important consideration in our analysis is the BBC's duties and obligations under the Charter and Agreement and how the BBC believes it should best fulfil its Mission and promote the Public Purposes. In its submissions to Ofcom, we would therefore expect the BBC to clearly set out why and how the position it has taken is appropriate to achieve those ends.
- A1.13 It is also possible that Ofcom would decide to open an investigation of its own initiative. For example, following review of information submitted to Ofcom by the BBC, where the BBC continues to get similar complaints from a number of producers over its commissioning practices, or where a number of stakeholders have informally raised the same issue with Ofcom. We would, in the course of such investigations, seek submissions from the BBC on the same issues, and may seek information from third parties.

Factors

- A1.14 We have noted that the commissioning process has different stages: from the identification of new opportunities by commissioners, to making available information to producers, eligibility to participate, development discussions between commissioners and producers, and decision making. We recognise that commissioning decisions will involve creative judgments and will be based on a number of factors which might differ in different cases. Nonetheless, it is important at each stage that the BBC has the right processes in place and that it applies these and behaves in a way consistent with genuine competition on a FRNDT basis.

Identification of opportunities and transparency of information

- A1.15 Transparency about the BBC's commissioning needs and how the BBC goes about commissioning content is key to ensuring a wide group of producers can submit programme ideas to the BBC and compete fairly for the right to make relevant content.⁶⁸

Transparency about the BBC's commissioning needs

- A1.16 Having clear commissioning priorities for its UK Public Services which can be accessed by all producers on an equivalent basis will allow producers pitching to the BBC to develop the most appropriate and specific ideas to support the BBC's objectives, regardless of whether they are a BBC producer or an external one.
- A1.17 The BBC provides information about its commissioning needs by publishing creative plans on an annual basis and by publicising additional information on its commissioning website. It also undertakes commissioning briefings, during which commissioners give further information and flavour about the types of ideas they are looking for. In addition, the BBC publishes specific briefs where it offers a targeted commissioning opportunity, such as an

⁶⁸ Transparency around the programmes broadcast by the BBC and compliance with its contestability requirements are dealt with in Section 7 of this consultation.

invitation to tender or an invitation to pitch. These are all important tools to disseminate information to producers.

- A1.18 In considering whether the BBC commissioned on a FRNDT basis, we are likely to consider how the BBC communicated its commissioning needs and priorities to the wider production sector. In particular, we may consider the amount of information provided, how it was disseminated to producers, how easily accessible the information was, whether it was provided in a timely fashion, and whether producers could access the same information at the same time.

Transparency about the BBC's commissioning process

- A1.19 Clear commissioning processes help ensure that the way commissioning is undertaken is fair to all involved. They give producers clear expectations about timescales and any procedural requirements.
- A1.20 In considering whether the BBC commissioned on a FRNDT basis, we are likely to take account of whether the BBC clearly established its processes for commissioning content and how it communicated them to producers. We would expect the BBC to provide clarity around key stages of the processes, including how it plans to interact with producers, timescales for submitting information and the nature of the decision-making.
- A1.21 In an investigation, we would also expect to consider whether the BBC had applied its procedures and guidance appropriately. We understand there may be circumstances where the BBC needs to depart from its usual processes. However, where this is the case, we would consider whether the BBC had communicated this appropriately to producers.

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

- A1.22 Competition in the production market enables the BBC to best fulfil its Mission and promote the Public Purposes by providing a greater variety of programmes from which to commission. It is in the BBC's interest to allow the greatest possible number of producers to submit commissioning ideas. Similarly, commissioning programmes from a wide range of producers will enable the BBC to ensure a diversity of voices in its programme offering.
- A1.23 However, the BBC also needs to be confident that producers are able to meet its commissioning needs and priorities. In commissioning programming for the Public Services, we would therefore expect that the BBC will want to assess the ability of producers to deliver their proposed ideas, for example by considering their previous experience.
- A1.24 We also note that one of the Public Purposes is to reflect, represent and serve the diverse communities of all the UK's nations and regions, and to support the creative economy across the UK. We would expect the BBC will consider this throughout their commissioning processes.
- A1.25 The BBC may therefore set eligibility criteria for access to the BBC's online pitch systems; or for submitting a commissioning proposal in relation to a specific pitch or tender opportunity. The BBC may also take such criteria into account when accepting or rejecting

proposals at the pitching stage. Nevertheless, we would expect that any requirements the BBC imposes to be linked to the sorts of legitimate objectives described in the previous paragraphs, and to be necessary to meet them.

- A1.26 In considering whether the BBC commissioned content on a FRNDT basis, we are likely to consider if any eligibility criteria or any other requirements related to the identity of the producer had the effect of unduly limiting producer participation in the commissioning process or unduly favouring a particular producer or type of producer. We note that there may be different ways in which producers could respond to such eligibility requirements, for example through co-production or other ways of working. We are also likely to consider whether the BBC has been clear about the criteria which it would use to assess the suitability of a producer and, where appropriate, the relative importance of such criteria, in the context of assessing programme proposals.

Access to commissioners and idea development

- A1.27 Commissioning programmes typically involves a creative exchange between commissioners and producers, in which commissioners are directly involved in the development of the programme ideas submitted to them by producers. This seeks to ensure that the programmes commissioned best meet the broadcaster's priorities and vision. It can also help producers, who can benefit from commissioners' expertise, and it may facilitate or enable access to funding, facilities and services. However, not all ideas come to fruition, and the process can be time and money consuming for both broadcasters and producers without guarantee of success.
- A1.28 Access to commissioners is often key for producers, to get their ideas noticed or to ensure successful development. Such access will depend on a range of factors, including the quality of ideas, a producer's track record in successfully delivering programmes, and the stage of the commissioning process that a producer's idea has reached. However, access to commissioners could also skew a producer's ability to get its ideas noticed. We expect the BBC to continue to engage with a wide range of producers (including producers from all nations and regions across the United Kingdom) so there is genuine competition between them on a FRNDT basis.
- A1.29 Access to funding and a range of services such as studio facilities is another important factor in successfully developing an idea. The BBC may enable or facilitate such access. The BBC may also impose conditions as part of the development process. It may, for example, require the producer to produce pilot episodes prior to commissioning a programme.
- A1.30 In considering whether the BBC commissioned content on a FRNDT basis, we will usually consider the bases on which the BBC offers producers access to commissioners, funding and facilities. We will also likely consider the conditions the BBC imposes for programme development. We are likely to be concerned if any of these things have the effect of unduly restricting the ability of producers to participate fairly and effectively in commissioning processes. However, we would not necessarily consider the refusal of a meeting with BBC commissioners on its own to be indicative of failing to commission on a FRNDT basis.

A1.31 We note that, in some instances, BBC commissioners and BBC producers may be co-located, for example at Pacific Quay. We would expect the BBC to take steps to ensure that BBC producers do not derive an unfair competitive advantage – such as access to information about commissioning needs that is not available to the wider market – through their co-location with BBC commissioners.⁶⁹

Assessment criteria and decision making

A1.32 Producers submit thousands of ideas to the BBC every year and the BBC will not develop or make them all. When evaluating producers' ideas for programming for the Public Services, the BBC considers a number of factors. The BBC will assess, for example, the strength of producers' ideas and the ability of producers to deliver their proposed idea on time and within budget. It may also take account of its ability to fulfil its Mission and promote the Public Purposes and meet its regulatory obligations. Importantly, commissioning decisions will also involve decision makers applying their own creative judgement about what may work with audiences.

A1.33 The quality of an idea, and how it helps the BBC to deliver on its mission and public purposes (as well as the BBC's strategy and creative plan) are for the BBC to assess, and the BBC is free to decide not to commission a proposal. As long as the BBC complies with its regulatory obligations, Ofcom would not intervene in this respect. Even so, we note that the BBC plays an important role in developing new talent. One of its Public Purposes is to show the most creative, highest quality and distinctive output and services. In promoting that purpose, we expect that it will place some focus on innovation and take risks.⁷⁰

A1.34 It is important that the BBC offers as much clarity as possible to producers regarding any factors it will take into account when commissioning, and their relative importance to the process. In considering whether the BBC commissioned content on a FRNDT basis (and mindful that a commissioning decision does not just involve the application of a formal checklist), we will usually consider both (i) whether any such factors are objectively justifiable and do not give an unfair advantage to a particular producer or group of producers; and (ii) whether the BBC applied them properly in making its commissioning decision(s). We will also consider whether the results of those discussions were properly communicated to producers.

Contractual terms

A1.35 The terms on which a commission is made are governed by the contract agreed between the BBC and the producer. Where relevant, contract discussions take place within the

⁶⁹ We also note that under the Trading and Separation requirements, the BBC has certain obligations to ensure operational separation between the Public Service and the commercial subsidiaries. This includes a requirement to "ensure that commercial subsidiaries do not have access to information about the BBC Public Service's strategy, priorities and activities that is not available to the wider market, other than that strictly required to ensure the activities of the BBC's commercial subsidiaries fit with the Mission and Public Purposes or for the fulfilment of any existing commercial relationship."

⁷⁰ [Paragraph 3.17, 'Holding the BBC to account for delivering for audiences'](#)

framework set by the terms of trade agreed with the trade bodies for independent television and radio production.⁷¹ The BBC has also published additional guidance on the terms on which it will commission, as well as tariffs. However, there remains scope to agree contracts outside the terms of trade, or to negotiate amendments to terms. In addition, terms for certain contracts are yet to be developed (e.g. for some online commissions), and terms of trade only apply to contracts with qualifying independent producers.

- A1.36 The protection offered by the terms of trade (and other published guidance) is important, and, as we noted in our review of the television production sector⁷², they have been critical in the development of the independent production sector. The flexibility to amend contract terms is equally important. The Charter requires the BBC to exercise rigorous stewardship of public money, and in fulfilling that requirement, the BBC will want to ensure it negotiates fair contracts that help secure the best use of public money. However, contractual terms could also lead to unfair practices. For example, if competitive pressure on the producers enabled the BBC to force those producers to accept unfavourable or ambiguous terms.
- A1.37 In considering whether the BBC commissioned content on a FRNDT basis, we will usually, where relevant, consider whether any terms negotiated are aligned with the terms of trade and, where not, whether they are the result of a fair negotiation between the parties.

The BBC's wider regulatory requirements

- A1.38 The BBC determines the creative plans for its Public Services, setting out how the Public Services will fulfil the Mission and promote the Public Purposes. For example, the BBC's creative plans for 2018-19 noted that for children, it would show "memorable content, always available, that helps children create and explore" and set out its priorities in this respect.⁷³ The BBC maintains editorial control of the Public Services and makes commissioning decisions to fulfil its creative plans.
- A1.39 In addition, when commissioning programmes for the Public Services, the BBC must meet a broad range of regulatory requirements (as well as its own public commitments). Its regulatory requirements include those set out in the BBC Charter and Agreement, Operating Framework and Operating Licence.
- A1.40 When assessing a complaint, we will therefore take into account the BBC's wider regulatory requirements that it must consider when commissioning programming for the Public Services. As we have noted at various points when discussing the factors above, the BBC's wider regulatory requirements could impact on how it commissions content, for example when setting eligibility criteria or assessing programme proposals. However, such

⁷¹ [BBC Business Framework](#).

⁷² [Ofcom's Review of the operation of the television production sector](#)

⁷³ [The BBC Annual Plan 2018-19](#)

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obligations exist alongside the BBC's requirement to commission on a FRNDT basis and the BBC must comply with all of them.