
BritBox materiality assessment – final determination

Relationship between BritBox and the BBC's Public Service activities

[Britbox materiality assessment – final determination](#) – Welsh summary

STATEMENT:

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Overview

This document explains our final decision on whether the BBC's involvement in BritBox, a new subscription video on demand service with ITV, represents a 'material change' to its commercial activities.

When the BBC engages in a new or significantly changed activity, the BBC's Charter requires it to consider whether this is a material change to its commercial activities. If so, the change would require further detailed examination prior to launch.

The BBC Board assessed the corporation's proposed involvement in BritBox, and determined it was not material. Under the Charter, Ofcom must also consider this question, as part of our role to protect fair and effective competition.

What we have decided – in brief

There is not a significant risk that the BBC's proposed involvement in BritBox will distort the market or create an unfair competitive advantage. Our specific role is to consider whether this might happen as a result of the relationship between the BBC's commercial activities, which would include the BBC's involvement in BritBox, and its publicly-funded activities (the BBC's 'Public Service').

Although the BBC is only taking a 10% stake in BritBox, there is potential for issues to emerge as the venture develops. We already have measures in place to regulate the boundary between the Public Service and the BBC's commercial activities and we can use these to address most concerns, if they materialise. It is therefore important that we continue to monitor the BBC's relationship with BritBox so that we can step in if required.

There are two areas where we do not have existing rules:

- where changes are made to the way in which the BBC makes its programmes available on commercial services (the "Programme Release Policy"); and
- in relation to any cross-promotion on BBC iPlayer of programmes available on BritBox.

We consider that the changes to the Programme Release Policy will not create an unfair advantage or appreciably distort the market. The approach taken by the BBC Public Service fits with the BBC's Charter objectives and the changes are likely to have limited competitive effects. It is important that the BBC adopts a fair and non-discriminatory approach to the revised policy and is flexible in considering applications from services other than BritBox. If that does not happen we would be likely to take further action.

We also recognise there are concerns around cross-promotion. It is not yet known whether and how cross-promotion will take place on BBC iPlayer and we note that the BBC already has its own rules on cross-promotion. However, we are now also separately considering whether safeguards are needed in relation to how the BBC cross-promotes content on commercial services in order to anticipate future issues. We expect the BBC to inform us of its plans before it proceeds.

We have therefore decided that though the BritBox arrangements do not create a material change to the BBC's commercial activities we will monitor developments closely and have the ability to step in if concerns arise in future.

1. BritBox materiality assessment

The BritBox proposition

- 1.1 ITV and the BBC announced on 19 July 2019 the launch of BritBox, a new subscription video on demand service (SVOD) which will have “*the largest collection of British boxsets*”. ITV and the BBC have said they are launching this new service “*to offer something fresh and distinctive to the public*” by bringing together “*thousands of hours*” of content from ITV and the BBC, as well as other British broadcasters and producers.¹
- 1.2 BritBox will be an ITV-controlled venture, with ITV initially holding 90% of the equity and the BBC holding 10%, through its commercial arm.² Subject to commercial negotiations, the parties anticipate other partners will come on board who may take an equity share in BritBox in the future (as well as reaching agreements to supply content to the service). We understand that Channel 4 and Channel 5 have been in discussions with ITV about being involved in BritBox.
- 1.3 The intention is that a significant amount of ITV and BBC content will be available on BritBox after 30 days on ITV Hub, and 12 months on BBC iPlayer.³ In order to help audiences know where to find content, we understand that a key aim of BritBox will be for these programmes (likely to include genres such as scripted drama and comedy) to move “*seamlessly*” from BBC iPlayer or ITV Hub, onto BritBox.
- 1.4 The BBC’s participation in BritBox is a commercial activity, rather than something it is doing as part of the licence fee funded Public Service.⁴ In particular, BBC Studios (the BBC’s main commercial subsidiary) will license a range of content to BritBox – in the same way that it already supplies content to other UK and international platforms and channels, such as Sky, Virgin Media, Netflix and Amazon Prime.

Regulatory background

- 1.5 The BBC can only undertake commercial activities through commercial subsidiaries that are separated from the Public Service. These commercial subsidiaries exist to generate returns which can be reinvested in Public Service programmes and services and to supplement income from the licence fee.

¹ <https://www.bbc.co.uk/mediacentre/latestnews/2019/britbox-agreement>.

² The BBC has the option to acquire additional shares over time (up to 25% in total) and ITV will have the ability to bring other investors on board. ITV will appoint the majority of the BritBox board while the BBC’s equity stake provides it with board representation from the outset.

³ The BBC has undertaken a public interest test on its proposals to have content on BBC iPlayer for longer (e.g. 12 months as standard). We have recently published our determination that the BBC may proceed with these changes, subject to certain conditions and guidance. See <https://www.ofcom.org.uk/consultations-and-statements/category-3/proposed-changes-bbc-iplayer>.

⁴ References to the ‘Public Service’ in the rest of this document should be read as references to the BBC’s UK Public Services, trading activities and non-service activities.

- 1.6 To ensure that there is no unfair advantage or market distortion due to the relationship between the BBC’s commercial activities and the Public Service, Ofcom has put in place Trading and Separation requirements to regulate the boundary.⁵ These requirements address our competition concerns around: ensuring there are no inappropriate flows of information between the Public Service and the commercial subsidiaries; regulating the pricing of goods and services sold across the boundary; and ensuring that each commercial line of business earns a commercial rate of return.
- 1.7 Under the Agreement,⁶ the BBC must be satisfied that its commercial activities meet the commercial criteria, which are that they:
- a) fit with the Mission and Public Purposes;⁷
 - b) are commercially efficient;
 - c) do not jeopardise the good reputation of the BBC or the value of the BBC brand; and
 - d) do not distort the market or create an unfair competitive advantage as a result of the relationship between the commercial activity and the Public Service.⁸
- 1.8 If the BBC makes a change to its commercial activities, it must assess whether the change is material. If the BBC considers that it is material, it must carry out and publish a commercial test to satisfy itself that the new or changed commercial activity meets the commercial criteria set out in paragraph 1.7.⁹ We would then conduct a trading and separation assessment to decide whether the BBC could carry out the proposed change.¹⁰ If we disagree with the BBC’s assessment that a particular change is not material, we may take further action, such as requiring the BBC to carry out a commercial test.¹¹
- 1.9 Assessing whether a change is material involves consideration of:
- a) whether it is a new activity or a significant change to the BBC’s commercial arm; and
 - b) whether there is a significant risk that the change may distort the market or create an unfair competitive advantage as a result of the relationship of the activity with the Public Service.¹²

⁵ Ofcom, [The BBC’s commercial and trading activities: requirements and guidance](#).

⁶ The “Agreement” we refer to in this document is the [Agreement between the Secretary of State for Culture, Media and Sport, and the BBC](#).

⁷ The Mission of the BBC is to act in the public interest, serving all audiences through the provision of impartial, high quality and distinctive output and services which inform, educate and entertain. The Public Purposes of the BBC are a) to provide impartial news and information to help people understand and engage with the world around them; b) to support learning for people of all ages; c) to show the most creative, highest quality and distinctive output and services; d) to reflect, represent and serve the diverse communities of all of the UK’s nations and regions and, in doing so, support the creative economy across the UK; and e) to reflect the UK, its culture and values to the world.

⁸ Clause 23(5) of the Agreement.

⁹ Clause 24 of the Agreement.

¹⁰ Clauses 26 and 27 of the Agreement.

¹¹ Clause 25(6) of the Agreement.

¹² Clause 23(14) of the Agreement.

- 1.10 In considering the effects of a change, and how to proceed, we think it is appropriate to take into account the presence of existing regulation. This includes our Trading and Separation requirements and the requirement set out in Schedule 3(7) of the Agreement that Public Service commissioning should follow a transparent contestable process between producers on fair, reasonable and non-discriminatory terms.¹³
- 1.11 The BBC assessed its intended involvement in the new BritBox SVOD service and acknowledged that, as its *“first involvement in a UK venture into long-form SVOD provision”*, it would be a new commercial activity.¹⁴ However, it concluded that it would not be a material change as it did not carry a significant risk that it would distort the market or create an unfair competitive advantage as a result of its relationship with the Public Service.
- 1.12 In light of the particular nature of the proposed changes to the BBC Public Service’s *“programme release policy”*, which controls the way content commissioned by the BBC for the Public Service is made available for commercial exploitation, we considered it appropriate to publish our minded-to decision on materiality for comment. Having considered responses we have now reached our determination.

Our assessment

- 1.13 Our assessment of the BBC’s involvement in the BritBox service takes into account: the BBC’s own consideration of materiality, which includes a description of the changes that it is planning to make to the Public Service’s programme release policy; the Memorandum of Understanding (MoU) it has agreed with ITV; further information provided by the BBC; the consultation responses received; and meetings we have had with the parties and other stakeholders (including follow up letters). This includes recent meetings with the BBC where we discussed (among other things) how it is planning to implement the changes to the programme release policy, given our expectations set out in our provisional decision.
- 1.14 We agree with the BBC that its involvement in BritBox is a new commercial activity and have therefore focused on whether it could distort the market or create an unfair competitive advantage, as a result of the relationship with the Public Service.
- 1.15 The BBC is participating in BritBox principally through its commercial arm, by taking an initial 10% share of equity and with BBC Studios entering into a content supply agreement with BritBox.
- 1.16 We had 10 responses from stakeholders to our provisional decision. Apart from the BBC and ITV, this included four industry bodies (Pact, COBA, Equity, and Directors UK), Sky, Virgin Media, one individual producer and an individual. We did not receive any responses from other SVODs that currently operate in the UK or are planning to enter the market.

¹³ Ofcom, [Commissioning for the BBC Public Services: A statement of Ofcom’s approach to assessing the BBC’s compliance with its requirements](#).

¹⁴ The BBC’s assessment of materiality.

1.17 Stakeholders generally agreed with our view that the audio-visual sector is evolving rapidly and that audiences expect to be able to access a wide range of content across different platforms and to watch what they want, when they want. The majority of industry bodies were also supportive of a new British focused SVOD service that would buy and commission content in the UK market. However, while the BBC and ITV agreed with our provisional decision, the remainder of stakeholders had some concerns about the BBC's proposed involvement in BritBox which we discuss below. Sky placed its concerns in the context of ITV and the BBC accounting for over 58% of linear viewing and 75% of Broadcaster VOD viewing in the UK.¹⁵

Competition concerns

Our provisional findings

- 1.18 We considered that the BBC's involvement in BritBox could potentially give rise to concerns about:
- a) information sharing between the Public Service and the BBC's commercial subsidiaries or the new BritBox service;
 - b) the prices that BBC Studios pays the Public Service for inputs that they use (such as the programme rights it holds and the use of the BBC brand); and
 - c) the Public Service favouring BBC Studios (or ITV Studios) in its commissioning process to secure content for BritBox.
- 1.19 We provisionally concluded that our Trading and Separation and commissioning requirements would adequately address these concerns. However, we had two potential concerns that may not be addressed through our current regulation. These related to the changes the BBC was planning to make to the Public Service's programme release policy and any Public Service cross-promotion of the BritBox service or programmes.

Stakeholder comments

- 1.20 A range of stakeholders responded to the competition concerns we set out in our provisional decision. In relation to these concerns, set out in paragraph 1.18 above, both Equity and Directors UK noted that Ofcom has requirements in place to address these and that it was important that Ofcom effectively monitors and regulates the boundary between the BBC commercial subsidiaries (including its stake in BritBox) and the Public Service.¹⁶
- 1.21 Sky considered that Ofcom should not rely on ex post enforcement action when considering the materiality of a proposal that is part of an ex ante regulatory framework. It argued this was not consistent with the framework put in place under the Charter.¹⁷

¹⁵ Sky response to consultation, page 4.

¹⁶ Equity response to consultation, page 1, Directors UK response to consultation paragraph 6.

¹⁷ Sky response to consultation, page 4

- 1.22 Pact was concerned about the potential for information sharing between the Public Service and BritBox when the Public Service is commissioning programmes. It considered there was a risk that the Public Service would “*seek to consult with BritBox on which programmes should be released early in order to meet BritBox’s commercial requirements.*” Pact also argued that if BritBox “*had access to information about the Public Service’s strategy and priorities that was not available to third parties, they may be in a better competitive position than their rivals.*”¹⁸
- 1.23 We separately discuss stakeholder concerns in relation to the changes to the programme release policy and any potential cross-promotion of BritBox by the Public Service, along with some additional concerns raised by stakeholders, below.

Our conclusions

- 1.24 We do not agree with Sky’s argument that we should not place some reliance on the potential for ex post enforcement under existing regulation in a situation where concerns relate to future behaviour. The Charter and Agreement envisage that the Trading and Separation requirements operate in concert with the material change process.¹⁹ Although we have identified potential concerns it is not clear that these will arise in practice. In considering the extent of any risk, and appropriate steps to take, it is reasonable for Ofcom to take into account in our forward look: (i) the effect of existing rules continuing to operate to address the risk of relevant issues arising; and (ii) that Ofcom can act under those rules to prevent harms arising.
- 1.25 In relation to Pact’s concern, the Trading and Separation rules require the BBC to have the appropriate measures, controls and processes in place to ensure that its commercial subsidiaries do not have access to information about the Public Service’s strategy, priorities and activities that is not available to third parties.²⁰ As the BBC and ITV have not yet agreed the details of how they will interact with BritBox, we will want to understand what happens in practice. We will therefore monitor the implementation of the MoU, including reviewing the long-form agreements between the parties. If any concerns arise, we can open an investigation into how the BBC is adhering to our Trading and Separation requirements.²¹
- 1.26 There is also regulation in place about transfer prices between the Public Service and its commercial activities and, to the extent that concerns relate to a potential advantage in the commissioning process, the commissioning requirements in Schedule 3(7) of the Agreement would apply.

¹⁸ Pact response to consultation, pages 3 and 4.

¹⁹ See for example Clause 27 of the Agreement.

²⁰ Except for some very limited circumstances or where there is no risk of market distortion or an unfair competitive advantage. Trading and Separation requirements and guidance, A2.

²¹ Or, if necessary, change the current regulation to ensure that the issue has been captured. We also note in this context the need for the BBC and ITV to comply with the Competition Act 1998.

- 1.27 We continue to consider that this regulation and the monitoring we will carry out will adequately address any concerns that may arise in relation to operational separation, transfer pricing and commissioning.
- 1.28 We separately discuss the Public Service programme release policy and cross-promotion below.

Public Service programme release policy

- 1.29 As discussed above, the BBC is planning to make changes to the Public Service’s programme release policy.²² This policy sets out the approach the Public Service takes to requests from producers to license programmes to other television and video on demand (VOD) services in the UK during the BBC’s licence period.²³
- 1.30 The BBC typically licenses the content it commissions for five years, with an 18-month exclusivity period (during which the content can only be made available on BBC Public Service channels or platforms) set out in the programme release policy. Until recently, content has usually been available on BBC iPlayer for 30 days after transmission on live TV,²⁴ followed by a 17 month period where the content is not shown anywhere (aside from repeats on a BBC live TV channel which generally lead to another 30 day catch-up period on BBC iPlayer).
- 1.31 The programme release policy currently states that the BBC will usually permit programmes to be exploited through commercial VOD services 18 months after the first linear transmission of the last episode. However, there are a number of grounds on which this exclusivity period could be reduced which the BBC has told us have developed in direct response to changes in the market. These include co-productions, standstill funding,²⁵ reduction in the primary licence fee the BBC has to pay, high investment from a distributor, where the BBC public value has been maximized, and if the programme has been decommissioned.²⁶
- 1.32 The BBC is planning to make most programmes available on BBC iPlayer for 12 months after broadcast, with some returning and non-returning series and archive programmes available for longer.²⁷ Ofcom has recently decided that the BBC may proceed with these changes, subject to certain conditions and guidance.²⁸
- 1.33 As discussed above, the BBC generally grants consent to producers to license this content to commercial VOD services after 18 months. The BBC is proposing to make changes to the

²² The current policy can be found [on the BBC’s website](#).

²³ The programme release policy relates to when the BBC will consent to the release of the so-called secondary rights to a programme. A television or VOD service would negotiate with the rights holder to agree suitable commercial terms on which to acquire the programme.

²⁴ Also sometimes referred to as ‘scheduled TV’ or ‘linear TV’.

²⁵ Standstill funding refers to the practice of the BBC investing the same amount in successive seasons of a programme, even when production cost has increased.

²⁶ BBC assessment of materiality and response to 11 June 2019 information request.

²⁷ Excluding live sport and topical news programmes. It also plans to make children’s programmes available for 5 years.

²⁸ Ofcom, [BBC iPlayer Competition Assessment: Ofcom’s final determination](#).

Public Service’s programme release policy to enable the release of BBC commissioned content to SVODs that meet certain qualifying criteria from months 12 – 18 of the current exclusivity window. It is expected that BritBox will qualify for early access to the BBC commissioned content under this change. The BBC has estimated that this change may affect around [X] titles per year. The actual number will depend on the number of BBC titles that BritBox, and any other qualifying SVODs, are successful in reaching agreements with producers to license.

- 1.34 We have considered whether this change could: (i) represent an unfair advantage to the BritBox service; or (ii) create a market distortion, as a result of it having six months’ earlier access to the content than other (non-qualifying) services.

Unfair competitive advantage

- 1.35 The Public Service’s objectives in changing the programme release policy are to:
- a) support the BBC’s Mission and Public Purposes; and
 - b) protect the BBC’s investment in content.
- 1.36 The BBC has said that it will determine which services qualify for access to Public Service content within the 12-18 month window through a fair, reasonable and non-discriminatory process. It has identified a number of criteria (discussed below) that will be required to meet these objectives. The BBC has said that while it will require all the criteria to be met, *“compliance may be a matter of degree, and certain elements of the overall Programme Release Policy may be more or less important depending on the circumstances of the case.”*²⁹
- 1.37 The BBC has said it will be open to proposals that meet its objectives. It wants to be satisfied that early release at 12 months will secure enhanced public value beyond that which is provided by the market when content is released at 18 months. The BBC intends to have a specific team which will assess any requests to become a qualifying service. The team will include senior group employees with no representation from its commercial subsidiaries.
- 1.38 While the changes to the programme release policy have not yet been finalised, the BBC has revised the criteria since the publication of our provisional decision. The current proposed draft of the BBC’s qualifying criteria requires that the SVOD:
- a) *“operates under a corporate strategy designed to invest in and support the UK creative industries and PSB ecology as a whole, whose editorial strategy is aimed at providing UK focused multi-genre content from UK content providers;*
 - b) *carries prominent and approved BBC branding at a service and content level;*
 - c) *provides the BBC with data based insight into the performance of BBC content on its service; and*

²⁹ The BBC’s assessment of materiality.

d) *provides the BBC with a material degree of oversight in relation to the prominence, attribution, promotion, windowing and scheduling of BBC content on its service.*"

1.39 The BBC has also set out to Ofcom that it will consider requests for early release to a qualifying SVOD on a title by title basis and may attach specific conditions of consent. In addition, it will require that the licence fee paid for the sale of the rights provides value for money and is in line with market rates.³⁰ In addition to the primary consideration around protection of the value of the BBC's public service and licence fee investment in content, we understand that value for money includes both any reduction in the upfront primary rights licence fee the BBC pays to the producer and the revenue it receives as a result of secondary content sales.

Our provisional findings

1.40 In our provisional decision, we considered that the objectives of the changes to the programme release policy were appropriate for the BBC. We also considered that the individual criteria were a justifiable means of achieving the objectives of the revised programme release policy, in the context of the exploitation of content on commercial SVOD services.

1.41 However, we considered it was important for the BBC to be open to releasing content early to any service which can deliver against the policy's broader objectives. We argued that the programme release policy should clearly set out that the criteria are not a rigid set of rules and that the BBC should be willing to consider alternative proposals which further these objectives. For example, we considered where there is clear content-level BBC branding and where providing early access to BBC-commissioned content would support the Public Purposes (e.g. by reaching new audiences and thus better meeting the needs of the UK's diverse communities), it may be reasonable for the BBC to release content to an SVOD that does not have service-level BBC branding. We also said it was important that the BBC has in place a clear, fair, reasonable, and non-discriminatory process for assessing applications to become a qualifying service, including a process for assessing any complaints.

1.42 We therefore considered there would not be an unfair competitive advantage for BritBox arising from the changes to the BBC's programme release policy if they were applied in a fair, reasonable, and non-discriminatory way with clear complaint procedures, as other services, able to meet the same criteria, would also be in the same position.

Stakeholder comments

1.43 The proposed change to the BBC Public Service's programme release policy was a key area of concern raised by stakeholders. In particular, stakeholders were concerned that the proposed criteria for early release to qualifying SVODs at 12 months and how they are likely to be applied by the BBC, would give BritBox an unfair advantage over its competitors.

³⁰ BBC letter to Ofcom, 6 September 2019.

1.44 COBA, Directors UK, Equity, Pact, and Sky were concerned that the criteria SVODs needed to meet to become “qualifying” were too restrictive and that this would potentially lead to BritBox being the only service that producers can sell content to from month 12.³¹ COBA, Equity, Pact, and Sky considered that the obligations resulting from the criteria would be highly unappealing for other commercial SVODs. They argued that commercial SVODs will therefore not be able or will decide not to seek to qualify as they will be required to make unreasonable concessions to the BBC. Pact also argued that the criteria “*will inhibit any new UK-focused SVOD entrants from entering the market*” as none will accept the terms of the criteria. Pact considered that to ensure that the market for SVODs is not distorted the criteria ‘*should not be such that they require substantial investment and/or compliance costs*’ and that the BBC should not have the ability to set the criteria for entry into a particular market.³² Pact reiterated these points in a follow up letter.

1.45 In terms of the criteria themselves:

- a) Stakeholders raised concerns about the first criterion. COBA said it was not clear how this would be defined and who would qualify, but considered it was likely that many commercial services could be disqualified.³³ Pact agreed with this position arguing that this criterion would mean that commercial SVODs like Netflix or new UK entrants would not be able to qualify and considered it relies on a subjective judgement from the BBC.³⁴ Sky argued that it was not clear how BritBox, as a commercial entity whose purpose is to deliver value to its shareholders, would be considered to have a corporate strategy designed specifically to invest in and support the public sector broadcasting (PSB) ecology.³⁵
- b) COBA considered that the conditions around the presentation of the BBC’s content were “*highly intrusive*” and some services may not be able to accommodate them.³⁶ In relation to criterion b), Sky considered that the wording at the time of our consultation allowed further subjectivity (in applying the criteria) and would prevent service providers from being able to judge whether their services might qualify.³⁷ Pact argued that the second criterion was unreasonable as no commercial company would allow BBC branding at the service level.³⁸
- c) In terms of the third criterion, Equity considered that providing the BBC with data on a programme’s consumption and performance was a condition very few (if any) of the BBC’s rivals were likely to meet.³⁹ Pact was concerned about commercially sensitive

³¹ COBA response to consultation, page 3. Directors UK response to consultation, paragraph 12. Equity response to consultation, page 1. Sky response to consultation, page 3.

³² Pact response to consultation, page 9.

³³ COBA response to consultation, page 3.

³⁴ Pact response to consultation, page 6.

³⁵ Sky response to consultation, page 6.

³⁶ COBA response to consultation, page 3.

³⁷ Sky response to consultation, page 6. The BBC has amended b) which previously read “*carry prominent and approved BBC branding at a service and content level delivering the BBC greater attribution and control of its brand*”.

³⁸ Pact response to consultation, page 7.

³⁹ Equity response to consultation, page 2.

data being shared with the BBC and asked how the BBC could guarantee it would not be shared with BritBox.⁴⁰

- d) Pact also considered the fourth criterion was unfair as the BBC would then have a considerable degree of control over a commercial company in competition with BritBox.⁴¹ Similar to its comment on criterion b), Sky considered the use of ‘material’ allowed further subjectivity and argued that ‘appropriate’ would be sufficient.⁴²

1.46 Concerns were also raised by stakeholders (COBA, Directors UK, Equity, Pact, and Sky) about the application of the criteria to determine which services will qualify, and in particular the absence of oversight from Ofcom.⁴³ Sky and COBA noted that it is not clear to stakeholders who would qualify, with Sky noting that the criteria and their application risked generating market uncertainty. Pact stated that the “*vague terms*” would “*grant BBC’s executives the freedom to make subjective qualification decisions that cannot be challenged on any objective criteria*” and that these combined would create too much uncertainty for competing services and would disincentivise them from applying to qualify. Directors UK called for Ofcom to monitor and review how the BBC applies the criteria, and it along with Equity asked that the final terms of the programme release policy be assessed by Ofcom.

1.47 Sky argued that there was no justification for restricting early access only to SVOD services. It considered this meant that it would not apply to the UKTV channels and catch-up services, or rental or ‘to keep’ services, and the BBC was therefore potentially denying itself additional sources of revenue.⁴⁴

Our conclusions

1.48 In this section we consider whether the objectives of the programme release policy are appropriate for the BBC Public Service and whether the criteria, and the approach to the application of the criteria, are a justifiable means of pursuing those objectives.

Whether the objectives of the programme release policy are appropriate

1.49 We continue to consider that the objectives of the programme release policy are appropriate for the BBC Public Service. The Charter sets out that the BBC’s objective is to fulfil its Mission and promote the Public Purposes.⁴⁵ In addition, protecting the BBC’s investment in content should help to ensure that licence fee payers receive value for money and that the revenue the BBC receives from secondary content sales (which

⁴⁰ Pact response to consultation, page 7.

⁴¹ Pact response to consultation, page 7.

⁴² Sky response to consultation, page 6.

⁴³ COBA response to consultation, page 3. Directors UK response to consultation, page 3. Equity response to consultation, page 2. Pact response to consultation, page 11. Sky response to consultation, page 6.

⁴⁴ Sky response to consultation, page 5.

⁴⁵ In this document we refer to the [Royal Charter for the continuance of the British Broadcasting Corporation as the “Charter”](#).

ultimately supports Public Service programming) is safeguarded.⁴⁶ No stakeholder disagreed with this view.

Whether the criteria are a justifiable means of pursuing the BBC's objectives

- 1.50 The BBC has told us that while potential qualifying services will need to meet all of the criteria, it will apply discretion about the way in which they could meet the criteria. For example, compliance may be a matter of degree and certain criteria might be more or less important depending on the specific circumstances.
- 1.51 In relation to the first criterion, we consider that supporting the UK PSB ecology and production sector can contribute to the BBC's Mission and Public Purposes. For example, the Public Purposes require the BBC to provide high quality and distinctive output and take creative risks (purpose 3) and to support the creative economy across the UK (purpose 4). Supporting the UK PSB ecology is particularly important now given there are a number of challenges facing PSBs as a result of declining live TV viewing and, for commercial PSBs, significant competition for advertising revenue from a wide-range of online video services (such as YouTube).⁴⁷
- 1.52 We note stakeholders' concerns that this criterion in particular might exclude other commercial providers. The BBC has said that a service could potentially meet this criterion if, for example, investing in UK content is only one of the activities in which it is involved, illustrating the flexible approach we expect it to take towards considering compliance with the criteria as a whole. We also note the BBC has changed the draft wording of the criterion itself to make it less prescriptive. We therefore consider that the wording does provide scope for other providers to be able to meet this criterion should they wish to do so.
- 1.53 With respect to BBC branding at a service and content level, this could help ensure consumers can recognise that the BBC is responsible for the content they enjoy watching, improving the perceived value and future resilience of the BBC. We note the concern that some providers may be unwilling to allow service level branding in particular. As we said in our provisional decision, it may be reasonable for the BBC to release content to an SVOD that does not have service-level BBC branding where there is clear content-level BBC branding, and providing early access to BBC-commissioned content would support the Public Purposes (e.g. by reaching new audiences and thus better meeting the needs of the UK's diverse communities). We consider that the BBC's intended approach, in which *"certain elements of the overall Programme Release Policy may be more or less important depending on the circumstances of the case"* should allow for this kind of flexibility. We also note the BBC's current draft of this criterion has been amended.⁴⁸

⁴⁶ By 'secondary content sales' we mean the sale of programme rights to other broadcasters or VOD services outside of the original commission.

⁴⁷ Commercial PSBs' total net advertising revenues declined by around 3.5% (£0.1bn) from 2017 to 2018. Online video advertising, of which commercial PSBs earned a share, increased by 16.5% (£0.1bn) over the same period. Source: Ofcom, 2019. [Media Nations 2019](#).

⁴⁸ Including to delete "greater" as suggested by Sky.

- 1.54 We note the concerns about commercially sensitive data being shared with the BBC. The MoU limits access within the BBC to data based insight into the performance of BBC programmes on BritBox. It is provided to the BBC for the main purpose of improving Public Service programme commissioning and the MoU explicitly prohibits the provision of this data to BBC Studios or BBC Commercial where it could influence commercial decisions. We would expect similar restrictions to apply to data provided by other qualifying SVODs. We continue to consider the provision of data to the BBC on the performance of different programmes is likely to provide useful insights to BBC commissioners to help promote the quality of future BBC content. This could also support the Mission and Public Purposes, particularly in terms of providing creative, high quality, and distinctive services (purpose 3). We understand that data (and attribution) already feature in commercial negotiations between broadcasters and platforms, and that some stakeholders do provide the BBC with data on the performance of their services.
- 1.55 We also consider it is reasonable for the BBC in this context to seek appropriate attribution and prominence of its content and a degree of control over the promotion, windowing and scheduling of this content. This could help consumers find BBC content on services like BritBox and, along with content- and/or service-level branding, enable consumers to attribute programmes to the BBC. Oversight of how BBC content is presented and when it is available on an SVOD (akin to the windowing and scheduling of content in live TV) may enable the BBC to further improve how it is perceived by audiences. For example, it could help the BBC to provide a steady flow of new content to ensure subscribers continue to watch the BBC-commissioned content and it allows for better phasing of content between live, broadcaster VOD services and any qualifying SVOD, which may help to keep the content fresh and retain its value. We accept the reference to a “material degree of oversight” gives the BBC discretion on these issues, but we understand it will adopt a flexible approach in the same manner as for the other criteria. We therefore do not consider that these criteria are overly restrictive. However, we expect the BBC to apply all the criteria in a fair, reasonable and non-discriminatory way and clearly set out to any SVOD, whose request to become a qualifying service is rejected, the reasons why it did not meet the criteria.
- 1.56 We note that the changes to the programme release policy have not yet been finalised and related negotiations with Pact on the terms of trade are on-going. We therefore expect the BBC to inform us of any changes to the wording of the criteria and we will continue to monitor the BBC’s implementation of the changes.
- 1.57 With respect to the concern raised by Sky about why the BBC has limited early release in the 12-18m window to qualifying SVODs, the BBC has confirmed that, for the purposes of the changes to the programme release policy, “SVOD” includes services providing consumers access to content through a single subscription, including a Pay TV subscription. The BBC noted that this did not include advertising-funded VOD services but that it considered this limitation to have no practical effect. This is because, regardless of the changes it is making to the programme release policy, it does not allow producers to sell to other PSB linear or VOD services within its five year licence period. While there are other

advertising-funded VOD services in the market, the BBC does not currently sell any relevant content to these services.

Whether the criteria will be applied proportionately when pursuing the BBC's objectives

- 1.58 As we set out in our provisional decision, we consider the criteria must be applied in a proportionate manner and the BBC should assess the extent to which an applicant can meet the Public Service's wider policy objectives. We welcome the statement from the BBC that the criteria are not intended to be inflexible and there will be discretion as to how they may be met.
- 1.59 In particular, we note stakeholders' concerns about how the BBC intends to assess qualifying services given the discretion that it has in how the policy is applied. We expect the BBC to: set out publicly the process for how it will assess qualifying SVODs and that this will include a standard application process; provide reasons if it does not approve an application; and have a complaints process in place. We will monitor the implementation of the policy to ensure that it is applied in a fair, reasonable, and non-discriminatory way. In particular, as we monitor we will look for the policy to be operated in a flexible way considering each application on its merits. If concerns arise (including from stakeholders) we will review the operation of the revised programme release policy (in the context of the BBC's involvement in BritBox) with a view to considering whether further requirements are needed as part of the Operating Framework.

Conclusion on unfair competitive advantage

- 1.60 We therefore consider that the objectives of the changes to the programme release policy are appropriate for the BBC Public Service. We also consider that the criteria, and the proposed approach to the application of the criteria, are a justifiable means of pursuing those objectives. We will monitor the BBC's approach to ensure, for example, that it does not apply the criteria as a rigid set of rules and, as set out above, if concerns arise we will consider the need for further requirements within the Operating Framework. On this basis we do not consider that there is a significant risk of the changes to the programme release policy giving rise to an unfair competitive advantage as other services able to meet the same criteria would also be in the same position.

Market distortion

- 1.61 We also assessed whether the changes to the programme release policy may give BritBox (and other qualifying services) a competitive advantage that distorts the market.⁴⁹ We considered this may arise if:
- a) the content is sufficiently attractive that early access will give BritBox an appreciable competitive advantage against other VOD services;

⁴⁹ In conducting this assessment, our focus was on the impact of the programme release policy (in order to understand the market impact of the relationship with the Public Service). We have not evaluated the prospects of the BritBox venture more generally.

- b) the early release of this content to BritBox diminishes its subsequent attractiveness to other SVOD services (who would struggle to qualify for early access) to such an extent that they are placed at an appreciable competitive disadvantage; and/or
 - c) an absence of services competing to acquire this content after month 12 means that BritBox is able to purchase the early access content for a low price.
- 1.62 Having assessed these three issues, we provisionally determined that there is not likely to be an appreciable market distortion as a result of the change to the programme release policy.

Stakeholder comments

- 1.63 Some stakeholders were supportive of the creation of a 12-18 month window, on the condition that BritBox pays a fair price for licensing this content.⁵⁰ However, a number of stakeholders were concerned that the changes to the programme release policy, as described, would create a market distortion and had particular concerns about the potential impact on producers. COBA and Pact argued that early access to BBC content would give BritBox an appreciable competitive advantage over its competitors.⁵¹ We discuss stakeholder concerns below in relation to the three potential competition concerns we identified.
- 1.64 We did not receive any responses from current SVOD services about the potential impact of this change to the programme release policy on their services, with the exception of NowTV (in Sky's response).
- 1.65 By way of context, in a report undertaken for Pact, Oliver and Ohlbaum Associates (O&O) considered that the new 12-18 month window would be highly valuable and important for attracting customers to BritBox.⁵² O&O estimated that BritBox might attract 1.6m to 2.4m subscribers and as a result there could be a reduction in SVOD subscriptions of up to 484,000 and a reduction in Pay TV subscriptions of up to 320,000.⁵³
- 1.66 Pact was concerned that the change to the programme release policy would potentially prevent other UK focused SVODs from having early access to BBC commissioned content.⁵⁴ Pact's claim appears to relate to potential concern (a) in paragraph 1.61.
- 1.67 We did not receive comments directly in relation to our potential concern (b). However, O&O undertook some analysis of the rights market and provided an indicative example where, if producers sold content in the 12 – 18 month window, then this may result in a 20 per cent decline in the revenue producers can receive from the 18 – 30 month window.⁵⁵

⁵⁰ Directors UK response to consultation, page 2. Equity response to consultation, page 1. Pact response to consultation, page 11.

⁵¹ COBA response to consultation, page 3. Pact response to consultation, page 3.

⁵² O&O report undertaken for Pact, page 4.

⁵³ O&O report undertaken for Pact, page 7.

⁵⁴ Pact response to consultation, page 3.

⁵⁵ O&O report undertaken for Pact, page 13.

- 1.68 In relation to our potential concern (c), a number of stakeholders (COBA, Directors UK, Equity, Pact) highlighted the impact of the changes to the programme release policy on producers and rightsholders.
- a) In particular, some stakeholders (Pact, Directors UK, Equity) were concerned that if only BritBox were able to license content in the 12 – 18 month window under the criteria, it would not pay the “*market price*” (we have discussed their concerns about the criteria in paragraphs 1.43 – 1.47 above).⁵⁶ In its report undertaken for Pact, O&O set out indicative figures for the value of rights in different windows. It presented an indicative example to illustrate its view that BritBox will be able to acquire the rights to show content in months 12 – 18 at a price “*far below*” the amount it would have to pay if there were competing bidders.⁵⁷
 - b) The BBC has set out in a letter to Ofcom that it intends to update the programme release criteria to ensure that, in order for programmes to qualify for early release, the licence fee paid will need to “*provide value for money and [be] in line with market rates*”.⁵⁸
 - c) We said in the provisional decision that the impact of the changes to the programme release policy on rights prices may be limited as producers have the option of waiting until month 18 to sell the rights. Pact noted that this might be the case for larger producers and/or high value productions, but smaller producers and marginal productions would be unlikely to have this option. It was also concerned that the BBC would expect a reduction in the cost of its primary rights, if it had allowed a producer to sell to qualifying SVODs in the 12 – 18 month window. Pact considered this combination of factors and the uncertainty around the actual price producers can sell content for in the 12 – 18 month window (if BritBox was the only possible buyer) could put greater pressure on smaller producers. It believed that ultimately this could lead to smaller producers finding it harder to survive and may result in more consolidation in the market.⁵⁹
- 1.69 Also in relation to our potential concern (c), Pact claimed that currently a significant amount of content is released earlier than 18 months (sometimes earlier than 12 months).⁶⁰ Along with Equity, it was concerned about the impact of the BBC stopping all other early release apart from to qualifying SVODs in the 12 – 18 month window on producers’ ability to exploit secondary rights. Pact was concerned that the changes to the programme release policy could therefore result in producers finding it more difficult to

⁵⁶ Pact response to consultation, page 8. Directors UK response to consultation, paragraph 12. Equity response to consultation, page 2.

⁵⁷ O&O report, page 13. We set out O&O’s example in more detail below. In terms of remedies for this concern, O&O suggested that Ofcom should require the BBC to have fewer restrictions on the services that can have access to the content, intervene to ensure that a FRND price is paid to producers (e.g. 20% higher than the current 18 month window) or do away with the holdback period altogether. O&O report pages 5-6.

⁵⁸ BBC letter to Ofcom, 6 September 2019.

⁵⁹ Meeting with Pact and O&O, 12 September 2019.

⁶⁰ Pact response to consultation, page 8.

finance certain programmes (as the revenue from BritBox might be significantly lower than what the producers could earn from a more general early release). It noted that this would disproportionately affect smaller producers as they are more reliant on external financing.

- 1.70 Directors UK and Equity suggested that Ofcom should monitor how this change to the programme release policy is implemented to ensure that producers and rightsholders are not disadvantaged.⁶¹ Directors UK and Equity noted that there are wider changes in the market beyond BritBox, such as upcoming changes to BBC iPlayer, and asked that Ofcom monitor the combined impact of these broader changes on the secondary rights market. COBA noted that if the proposals were to *'dampen competition in the market for secondary rights by excluding at least some VOD providers'*, this could risk damaging not only those VOD providers but also the UK production sector.

Our conclusions

Whether early access content is sufficiently attractive to give BritBox an appreciable competitive advantage against other pay TV and VOD services

- 1.71 In relation to potential concern (a), in the light of O&O's estimate that some pay TV subscribers may cancel their subscriptions once they have signed up to BritBox, we have also considered the impact on pay TV subscriptions. We continue to consider that the changes to the programme release policy are unlikely to give BritBox an appreciable competitive advantage against other pay TV and VOD services.
- 1.72 This is because:
- a) Content released early under the programme release policy is likely to account for a relatively small proportion of the content available on BritBox. As part of a library of thousands of hours [redacted] of content from major UK broadcasters, only a small proportion [redacted]⁶² of the total BBC commissioned content is likely to be available on BritBox as a result of the changes to this policy;
 - b) A significant proportion of consumers currently subscribe to multiple SVOD services (or SVOD services as well as a Pay TV subscription), so a household taking a subscription to BritBox does not necessarily mean that it will discontinue its subscription to, for example, Netflix;⁶³
 - c) [redacted].⁶⁴

⁶¹ Directors UK response to consultation, page 3. Equity response to consultation, page 3.

⁶² [redacted].

⁶³ In the UK, households have on average 1.5 subscriptions per SVOD household, according to Ampere Analysis, May 2019. [*The UK VoD market: Current status and future developments*](#). In addition, 72% of SVOD users surveyed also have a pay TV service. Source: GfK SVoD Tracker Q1 2019.

⁶⁴ [redacted].

- d) O&O used a survey to produce an estimate for Pact of BritBox take-up and substitution.⁶⁵ However, it is difficult to accurately estimate substitution using a survey when the service has not been launched and consumers haven't been able to evaluate it. In any event, we note O&O's forecast that BritBox take-up might be modest and it estimated the percentage reduction in SVOD and Pay TV subscriptions might be relatively small (maximum of circa 2%).⁶⁶ Moreover these forecasts relate to BritBox as a whole, not just the impact of the change to the programme release policy. While we have not placed weight on O&O's figures given the difficulties noted above, even if we were to do so they would imply that the market impact of the programme release policy is unlikely to be large.
- e) BritBox intends to position itself as a different proposition to existing SVOD services and pay TV services. As we set out above, BritBox is marketing itself as having the largest collection of British boxsets and intends to bring together content from a range of British broadcasters whereas traditional SVOD services available in the UK comprise content originating from across the globe or are genre based, e.g. Hayu is a reality based SVOD. Only a small proportion of US based SVOD content is from UK PSBs.⁶⁷ In terms of what they want to watch on these services, SVOD consumers have said watching original series and something different to content on main TV was important.⁶⁸ Pay TV services offer a wider range of content than BritBox will, including live sport. Pay TV subscriptions are driven by the content available, bundling with other services and price.⁶⁹ Therefore BBC content released early under the programme release policy is unlikely to have an appreciable effect on the competitiveness of BritBox against other SVOD and pay TV services.

1.73 In response to Pact's concern, we would expect that another UK focused SVOD service would be able to structure itself in such a way as to be able to meet the BBC's criteria (and therefore would qualify for early release), if this content was sufficiently important to it.

Whether early release of content diminishes its subsequent attractiveness to other SVOD or pay TV services to such an extent that they are placed at an appreciable competitive disadvantage

1.74 In terms of potential concern (b), this might arise if content affected by the change to the programme release policy was sufficiently important to other VOD and pay TV services. We do not consider this to be the case; as discussed in paragraph 1.72 e), in the three main current SVOD services' libraries, UK PSB content accounts for only a small share of the total content. Similarly the main PSB VOD services (All 4, My5) use content from their parent broadcaster rather than BBC commissioned content and, regardless of the change to the

⁶⁵ This was on an online survey of 7,852 individuals. Respondents were introduced to the BritBox offer and then asked whether they were likely subscribe to it, and if so, would they do so at the expense of their existing SVOD subscriptions.

⁶⁶ We compared O&O's potential churn figures (set out on page 4 of its submission) with the total number of SVOD (19.1m) and pay TV (14.3m) subscriptions in Q1 2019. BARB Establishment Survey, quoted in Ofcom, Media Nations 2019, page 59.

⁶⁷ For example, as of March 2019 Netflix's content is 3% BBC; 1% ITV & 0% C4. [Media Nations interactive report – Online video: service content](#).

⁶⁸ GfK SVoD tracker Q1 2019 as reported in Ofcom's Media Nations 2019 UK report page 63.

⁶⁹ Ampere analysis consumer, Q1 2019, UK.

programme release policy, the BBC does not allow its content to be sold to other PSB linear or VOD services in its five year licence period. This suggests that other VOD services are unlikely to be placed at an appreciable competitive disadvantage by the change to the programme release policy.

- 1.75 Given this evidence, we do not consider that other SVOD or pay TV services are likely to be placed at an appreciable competitive disadvantage by any reduction in the value of BBC content from being sold in the 12 – 18 month window (as this content only makes up a small share of their total content and is not likely to be a driver for their subscriptions). We discuss the extent to which early release might diminish the value of content in subsequent windows in paragraph 1.77 below.

Whether there is an appreciable market distortion because an absence of services competing to acquire content after month 12 means BritBox is able to purchase early access content for a low price

- 1.76 Potential concern (c) relates to whether BritBox is able to negotiate a low price during the 12-18 month window, when it may be the only SVOD able to license the content from producers, at least initially.⁷⁰ If this is the case then it may provide an advantage to BritBox and (as set out by Pact and others) disadvantage content producers.
- 1.77 Overall, we do not consider that any market distortion of this type, arising as a result of the changes to the programme release policy, is likely to be appreciable. This is for the following reasons:
- a) The impact on rights prices may be limited as producers have the option of waiting until month 18, when other services that do not qualify for early release under the policy are also able to bid. Waiting may be a credible strategy for producers as a delay of just six months is unlikely to further reduce the ‘freshness’ of their content by much given that it will likely already have been freely available on BBC iPlayer for 12 months.
 - b) Pact claimed that just releasing the rights to month 18 onwards is likely to be more of a credible strategy in certain circumstances e.g. for larger producers or programmes that are ‘hits’. However, the vast majority of producers currently do just sell the rights from month 18 onwards (see paragraph 1.80 below) which we consider indicates that this can be a credible strategy for many producers.
 - c) O&O disagreed with our view that the impact on rights prices may be limited. It presented an indicative example which O&O said showed BritBox would be able to acquire the rights to months 12 – 18 for a price which is “*far below*” the price they would have to pay if there were competing bidders. This is because O&O considered that making content available in months 12 – 18 only has a “*relatively small*” impact on the price of those rights in month 18+.⁷¹ We consider that the impact of early sale on

⁷⁰ “Low” in this context is in comparison to the price that would result if the programme release policy were less restrictive, meaning that a greater number of services could compete to acquire the rights to the month 12-18 period.

⁷¹ O&O report undertaken for Pact, page 13. Suppose the change in the price that the rights can command in months 18+ as a result of early release (in months 12 – 18) is £X. In essence, O&O’s logic is that BritBox will be able to secure the rights to early release by offering an amount just above £X.

further secondary rights windows is difficult to determine in the abstract and likely to be dependent on a number of factors including: (i) the genre and programme itself (for example, shows like Friends appear to have enduring value); (ii) the amount of viewing the programme had in the primary rights window; and (iii) which qualifying SVODs license the programme.

- d) Another fact that indirectly gives us some comfort that the impact on secondary rights prices may be modest is that we consider it is questionable whether the BBC Public Service has an incentive to suppress secondary rights revenue. Lower prices for secondary rights (for month 12 onwards) may mean the BBC needs to pay a larger amount for primary rights (we also note that the rights for extended availability on BBC iPlayer are still being negotiated), may diminish the amount BBC Studios earns in the secondary market for content it produces, and may diminish the share of revenue that the BBC (as the commissioner of content) receives from secondary rights.⁷² These points are particularly relevant given that the BBC only has a 10% equity holding in BritBox and thus only enjoys a small proportion of any extra profits it earns.

1.78 Further, BritBox is unlikely to enjoy a large competitive advantage as a result of any impact on rights prices given the small proportion of BritBox's content affected by the change to the programme release policy and the [§<] (see paragraph 1.72).

1.79 In terms of the impact on producers:

- a) We believe that for the majority of productions the new programme release policy is likely to be more attractive than its predecessor.⁷³ The majority of productions are not currently released before 18 months. For these productions, being able to supply a qualifying SVOD at month 12 gives them an additional option that was not available before and is therefore unlikely to make them worse off. We do accept, however, that for those programmes that are currently released earlier than 18 months, some individual producers may be worse off after the change if the BBC no longer allows early release under the new criteria. However, these account for a minority of productions. We requested information from the BBC to understand the extent to which the BBC was releasing programmes early at the moment.⁷⁴ Overall the number of titles released early was small (c.4%) but there were notable differences between genres, likely to be related to the cost of the production. For example, drama had the highest proportion of titles released early with c.11%.⁷⁵ Furthermore, the BBC has said that it does not anticipate significant changes to its approach to early release to secondary TV and commercial VOD services on the bases outlined in paragraph 1.31.

⁷² Under [the current Terms of Trade](#), the BBC takes a 25% share of any secondary revenues from UK television or commercial VOD during the BBC's 5 year licence – any reduction in the value of these rights would reduce the revenue the BBC receives from this share.

⁷³ This is putting aside any impacts on producers as a consequence of the BBC's plans to make programmes available on BBC iPlayer for a longer period of time. We understand that the BBC is currently negotiating terms for extended availability with producers

⁷⁴ [§<], Formal Information request, 30 July 2019.

⁷⁵ Ofcom analysis of BBC data provided on 6 August 2019 in response to a formal information request.

b) We would also expect changes in the amounts earned from secondary rights to produce at least partially offsetting impacts in the amounts earned from primary rights. For example, if the amount a particular producer is likely to earn from secondary rights falls then then we would generally expect the BBC to directly fund a greater proportion of the cost of production in order to allow for the programme to be made.

1.80 More generally, as highlighted by Equity and Directors UK, the UK programme rights market is currently experiencing significant changes as a result of the shift in consumer viewing from live TV to on-demand, the evolving strategies of broadcasters and existing SVOD services, and the launch of new SVOD services. In the UK market, the BBC has recently announced its plans to change its iPlayer offering and as a result it needs to agree new terms with producers. It will be some time before these changes play out in the market. The impact of BritBox and, in particular, the change to the programme release policy will be part of this. We recognise the importance of the UK production sector in ensuring the quality of content available to UK audiences. We therefore consider it is important to continue monitoring developments in the market and we will be engaging with producers as part of our review of Public Service Broadcasting.

Conclusion on distorting the market

1.81 In conclusion, we do not consider there is likely to be an appreciable market distortion as a result of the changes to the programme release policy and the potential concerns identified.

Public Service cross-promotion

1.82 The BBC agreed in the MoU to cross-promote BritBox within its regulatory framework as appropriate. The BBC and ITV have not yet agreed how the BBC will do this.

Our provisional findings

1.83 We said we will consider whether further regulation is required once we have seen if and how the BBC cross-promotes BritBox in practice.

Stakeholder comments

1.84 Stakeholders, mainly Sky and Virgin Media, raised concerns about the lack of regulation in place to protect fair and effective competition in this area. Virgin Media considered that Ofcom needs to set limits on the BBC's ability to cross-promote BritBox ahead of the BBC concluding a commercial arrangement with ITV. In its view, if the BBC is permitted to proceed without any form of regulatory constraint, this would be unprecedented among all other broadcasters who are subject to the Ofcom Cross-Promotion Code and it would set an unacceptable precedent regarding when and how the BBC can promote third party interests.⁷⁶

⁷⁶ Virgin Media response to consultation, page 3.

1.85 Sky was particularly concerned about the possibility of the BBC cross-promoting BritBox from BBC iPlayer, making reference to the intention set out in the press release for the BBC to “look at how best to connect viewers between BritBox [...] and iPlayer”.⁷⁷ Sky noted that any cross-promotion from BBC iPlayer, which is funded by the licence fee, would represent a significant advantage for BritBox, and one which is unavailable to existing commercial services, including UKTV.⁷⁸

Our conclusions

1.86 The BBC has not yet determined whether and how it will cross-promote BritBox content on BBC iPlayer.

1.87 Since we published our provisional decision in July, the BBC has updated its Editorial Guidelines, including its commercial cross-promotion guidance.⁷⁹ This sets out that the BBC will not publicise its commercial activities (other than BBC programme-related materials) through the Public Service unless there is a clear editorial justification for doing so (for example, a news story on the launch of a new SVOD service). Any trails for BBC programme related materials “*must be editorially justified, should be made on a non-discriminatory basis (i.e. to provide no unfair advantage to one of the BBC’s commercial subsidiaries) and comply with any relevant trails guidance.*” With respect to online the guidance allows for links to external websites which offer purchase of BBC programme related materials on a non-discriminatory basis. Any cross-promotion of BritBox content on BBC iPlayer would therefore need to comply with these guidelines. This mitigates the potential risk of distortion in the event the BBC does begin to cross-promote.

1.88 However, we are conscious that we do not currently have any regulation in place on the BBC in this area and taking into account stakeholder concerns, we are considering whether regulation on cross-promotion is required to protect fair and effective competition. This work will include looking at what is agreed in relation to cross-promotion in the long-form agreement between ITV and the BBC. In this context we expect the BBC to explain to us the approach it intends to adopt to cross-promotion on BBC iPlayer prior to implementation.

1.89 On this basis we do not consider the concerns relating to cross-promotion give rise to a significant risk of the relationship between the Public Service and BritBox creating an unfair advantage or a distortion of competition.

Other competition concerns raised by stakeholders

1.90 A number of stakeholders expressed some additional competition concerns relating to the BBC’s involvement in BritBox that were not addressed in our provisional decision. We discuss these below along with our conclusions on these issues.

⁷⁷ Sky response to consultation, section 2.3, page 7- 8.

⁷⁸ To note, the Broadcasting Code permits all Ofcom licensees to cross-promote programme-related materials.

⁷⁹ See [BBC Commercial Cross Promotion Guidance](#).

Stakeholder comments

- 1.91 COBA and Sky were concerned about the availability of BBC content on other services apart from BritBox. COBA noted that if VOD services were unable to compete to buy the rights to UK content, it could make it difficult for them in future to meet potential quotas for European works on their services.⁸⁰ Sky noted that *“if a significant amount of BBC content were reserved to BritBox there is a significant risk of distortion of the market and/or unfair advantage to the new venture as a result of that content ceasing to be widely available.”* Sky noted this would be a change in strategy by the BBC as it currently sells content to a variety of pay TV services, including through its UKTV subsidiary. Sky also questioned what the impact of BritBox would be on the availability of BBC content on BBC public services stating that it expected *“content licensed by BritBox in the early release window to cease to be available”* on the Public Service. Sky considered Ofcom needed to understand the extent to which BBC content will be available outside BritBox to determine the impact of the BBC’s involvement in BritBox on the market.⁸¹ We understand that COBA and Sky’s concerns go beyond the issue of early access to BBC content in months 12 – 18 (which is discussed earlier in this document).
- 1.92 Equity and Directors UK noted that our provisional decision did not discuss original commissions by BritBox and how these would operate.⁸² Equity also expressed concerns about whether the budget of BritBox would be sufficient to acquire a range of rights in addition to original commissions.⁸³

Our conclusions

- 1.93 With respect to COBA and Sky’s concerns about the availability of BBC content on other services, we note that a select number of BBC Studios controlled titles will be licensed to BritBox on an exclusive basis ([§<]).⁸⁴ The BBC has informed us that BBC Studios will continue to seek to sell BBC content to a range of services. It will be up to a commercial negotiation between BritBox and the individual producers whether any other non-BBC Studios-controlled content will be licensed exclusively by BritBox. With respect to UK pay TV services, we understand that UKTV carriage on Sky and Virgin will continue.⁸⁵ The BBC has stated that its main strategy is to enhance the BBC iPlayer offering, transforming BBC iPlayer *“from a catch-up service into a destination.”* We do not have any additional concerns over the wider availability of BBC Public Service content.
- 1.94 Our role in relation to BritBox was to determine whether the BBC’s involvement in the service could distort the market or create an unfair competitive advantage as a result of the relationship with the Public Service. We have not therefore assessed the BritBox

⁸⁰ COBA response to consultation, page 4.

⁸¹ Sky response to consultation, section 2.2, page 7.

⁸² Equity response to consultation, pages 2-3. Directors UK response to consultation page 3.

⁸³ Equity response to consultation, page 2.

⁸⁴ [§<]

⁸⁵ <https://corporate.uktv.co.uk/news/article/sky-extends-uktv-services/>, <https://www.virginmedia.com/shop/tv/tvupdate>

service itself and how it will commission programmes. We expect BritBox will acquire rights and commission content in line with market norms.

Our process

Stakeholder comments

- 1.95 Some stakeholders were concerned that Ofcom did not have sufficient information about the BBC's involvement in BritBox to make a robust decision on whether it is a material change to the BBC's commercial activities.
- 1.96 In particular, Sky considered Ofcom should take a precautionary approach to the first phase review. It argued that our threshold for determining whether there is a significant risk of market distortion or an unfair competitive advantage as a result of the relationship between BritBox and the Public Service should be low. Sky further stated we should have assessed a number of different types of further information from the BBC.⁸⁶

Our conclusions

- 1.97 As set out in our provisional decision, we took into account the BBC's assessment of materiality, the MoU between the BBC and ITV (which includes the principles of content supply between BBC Studios and BritBox) and the conversations we had with the parties. This included information on how much of the BBC controlled content will be exclusive to BritBox and arrangements for content remaining on BBC iPlayer. A significant amount of the information provided to Ofcom by both parties was confidential and was not included in the published version of our provisional decision.
- 1.98 Our assessment was based on the BBC's involvement in BritBox and specifically the areas where we had concerns that there might be a market distortion or unfair competitive advantage *as a result of the relationship between BritBox and the Public Service*. Some of the information that Sky suggested we needed to assess is not linked to any of our potential competition concerns set out in our provisional decision or the relationship between BritBox and the Public Service. For example, we have assessed the MoU to the extent that it impacts our theories of harm, particularly in relation to the change to the Public Service's programme release policy, but not considered the overall impact of the agreement on the VOD market.
- 1.99 While we have assessed some of the information suggested by Sky for our final determination, this also covers several areas where it is not yet known how specific arrangements will be made as the new BritBox venture develops. This is particularly in relation to cross-promotion and the operation of the revised programme release policy. That is one reason why it is important for Ofcom to take into account the ability to address issues under our regulation on an ongoing basis. Where concerns can be addressed under the existing Trading and Separation requirements we will do that. With the programme release policy and cross-promotion there are additional concerns, but we explain above

⁸⁶ Sky response to consultation, pages 3-4.

how those concerns will be addressed. We do not think we should delay this decision if we consider we have appropriate means to address issues we have identified as concerns that may arise in the future. To proceed otherwise would be detrimental to competition and risks disadvantaging audiences as it would unnecessarily delay the introduction of a new competitor into the market.

Our decision

- 1.100 We consider that the BBC's involvement in BritBox could potentially give rise to concerns about:
- a) information sharing between the Public Service and the BBC's commercial subsidiaries or the new BritBox service;
 - b) the prices that BBC Studios pays the Public Service for inputs that they use (such as the programme rights it holds and the use of the BBC brand); and
 - c) the Public Service favouring BBC Studios (or ITV Studios) in its commissioning process to secure content for BritBox.
- 1.101 We consider that our Trading and Separation requirements and the rules on commissioning by the BBC Public Service, together with the monitoring we will carry out, will adequately address concerns that may arise in relation to operational separation, transfer pricing and commissioning.
- 1.102 We consider that the objectives of the changes to the programme release policy are appropriate for the BBC Public Service. We also consider that the criteria, and the proposed approach to the application of the criteria, are a justifiable means of pursuing those objectives. We will monitor the BBC's approach to ensure, for example, that it does not apply the criteria as a rigid set of rules. On this basis we do not consider that there is a significant risk of the changes to the programme release policy giving rise to an unfair competitive advantage.
- 1.103 We have also considered whether the changes to the programme release policy might distort the market, but as explained above, we do not consider there is likely to be an appreciable market distortion as a result of the concerns identified.
- 1.104 We recognise there are concerns around cross-promotion. It is not yet known whether and how cross-promotion will take place on BBC iPlayer and we note that the BBC already has its own rules to control how this might happen. Nonetheless we are now also actively considering whether safeguards are needed in relation to how the BBC cross-promotes content on commercial services in order to anticipate future issues and we expect the BBC to inform us of its plans before it proceeds. On this basis we do not consider the concerns relating to cross-promotion give rise to a significant risk of the relationship between the Public Service and Britbox creating an unfair advantage or a distortion of competition.
- 1.105 As a result of the above, we conclude that there is not a significant risk that the BBC's involvement in BritBox may, as a result of the relationship with the Public Service, distort the market or create an unfair competitive advantage. We have therefore decided that the

BBC's involvement in BritBox does not give rise to a material change as defined under Clause 23(14) of the Agreement.

The Overview section in the document is a simplified high-level summary only. The decisions we have taken, and our reasoning, are set out in the full document.