

The Ofcom logo features the word "Ofcom" in a bold, red, sans-serif font. Below the text is a horizontal bar composed of several colored segments: purple, blue, green, yellow, red, and purple.

making communications work  
for everyone

# Distribution of BBC public services

A consultation on Ofcom's proposed requirements  
and guidance

Consultation

Publication date: 15 December 2016

Closing Date for Responses: 13 February 2017

## About this document

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

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

To ensure that everyone can enjoy its TV, radio and online content, the BBC negotiates distribution agreements with platforms. There is a risk that some platforms may not be able to develop compelling consumer offerings if they are unable to include BBC content, or are given access to it on unfair or discriminatory terms.

This consultation looks at how we intend to ensure the BBC negotiates distribution arrangements on a fair, reasonable and non-discriminatory basis. It also includes a range of factors that we will consider when looking at complaints from companies that think they have been treated unfairly.

# Contents

| Section |   | Page |
|---------|---|------|
| 1       | Introduction  | 1    |
| 2       | Legal framework   | 4    |
| 3       | Potential competition concerns and requirements for the BBC | 6    |
| 4       | Assessing complaints against the BBC                        | 11   |
| Annex   |   | Page |
| 1       | Responding to this consultation                             | 16   |
| 2       | Ofcom's consultation principles                             | 18   |

## Section 1

# Introduction

- 1.1 The BBC's role is to act in the public interest and serve all audiences with content which informs, educates and entertains. To do so, it provides impartial news and information, together with high-quality and distinctive output and services. In resetting the BBC's Mission and Public Purposes,<sup>1</sup> the Government has confirmed the valuable contribution the BBC makes to the UK and to people's lives. The Government has also made clear that it expects the BBC to do more in certain areas, in order to justify its unique funding arrangements and privileged status.
- 1.2 As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.
- 1.3 To ensure that everyone can enjoy its TV, radio and online content, the BBC negotiates distribution agreements with platforms.<sup>2</sup> However, the way in which the BBC distributes its UK Public Services can impact on the wider media market because of the high value audiences place on the range and quality of this content. There is a risk that platform operators may not be able to develop compelling consumer offerings if they are unable to access BBC Public Services or are given access to them on unfair or discriminatory terms.
- 1.4 At the beginning of this Royal Charter<sup>3</sup> period, the list of UK Public Services consists of national and regional television and radio services, as well as online services such as the iPlayer and BBC Three. During the Charter period, we expect the nature of what a UK Public Service is, and how audiences access content, will evolve in light of changes in technology and viewer preferences. Such changes may not immediately be reflected in the list of UK Public Services, maintained by the BBC, and we therefore refer to "public services" to capture this.

## Consultation

- 1.5 We are consulting on draft requirements and guidance that we propose to place on the BBC to protect fair and effective competition in relation to how the BBC distributes its public services.<sup>4</sup> We set out our requirements on the BBC and the factors we expect to take into account when assessing its compliance with them.

---

<sup>1</sup> Articles 5 and 6 of the Royal Charter for the continuance of the British Broadcasting Corporation. <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>2</sup> For the purposes of this document we define a "platform" as the mechanism through which the BBC's public services are distributed to audiences, for example, digital terrestrial TV, satellite, cable, analogue and digital radio, IP and broadband. Our definition refers to all aspects of distribution from the BBC to its audiences, including transmission (e.g. TV and radio broadcast networks, internet networks) and the devices, software and applications used to consume the public services (e.g. set top boxes, smart TVs, games consoles, mobile devices and apps).

<sup>3</sup> In the rest of this document we refer to the Royal Charter for the continuance of the British Broadcasting Corporation as the "Charter", available at <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>4</sup> For the avoidance of doubt, this guidance does not cover the distribution of services by the BBC's commercial subsidiaries.

- 1.6 We welcome any views and comments which respondents may have on the issues raised in this document. To ensure requirements are in place as soon as possible, we would like to receive responses by **5pm on 13 February 2017**.
- 1.7 Following our review of consultation responses, we plan to issue a statement of requirements and guidance by 3 April 2017.

## Role of the BBC

- 1.8 The Charter and Agreement<sup>5</sup> impose obligations on the BBC in relation to distribution.<sup>6</sup> In summary, the BBC must do all that is reasonably practicable to ensure UK citizens and consumers are able to access the UK Public Services that are intended for them, or elements of their content, in a range of convenient and cost effective ways.
- 1.9 It must not adversely impact fair and effective competition and it must also set a distribution strategy reflecting the obligations placed upon it. When third parties complain about the terms of supply offered by the BBC in a particular case, it must address those complaints.

## Our role

- 1.10 Ofcom's role is to impose requirements on the BBC which we consider necessary to protect fair and effective competition in the UK. We will then enforce against those requirements, taking into account the object of the BBC to fulfil its Mission and promote the Public Purposes.
- 1.11 In considering complaints made about the way the BBC distributes its public services, we will consider the potential impact on competition, as well as other factors which may not be directly related to competition, for example in relation to retention of editorial control.
- 1.12 We will not usually be involved in the BBC's distribution arrangements and are not responsible for setting its distribution strategy. Instead we will consider those arrangements where we receive a complaint from a third party which has not been appropriately resolved by the BBC.
- 1.13 We will look at the specifics of each case and assess whether the BBC has complied with the requirements. In this document we set out the types of factors which we expect may be raised by the BBC and complainants as part of their submissions, and which we would in turn consider when we assess complaints. We will consider the continued effectiveness of this guidance over the Charter period.

## Purpose of this document

- 1.14 The proposals in this document are intended to form part of the BBC's Operating Framework, and as such include obligations which are binding on the BBC. This

---

<sup>5</sup> The "Agreement" is used in the rest of this document to refer to the Agreement between the Secretary of State for Culture, Media and Sport, and the BBC, available at <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>6</sup> The BBC Trust currently has requirements on the BBC in relation to distribution through its Distribution Framework. This framework will remain in place until 3 April 2017, when Ofcom takes on its responsibilities for the BBC.

document also sets out proposed guidance on the approach that we will typically apply.

- 1.15 This consultation document is structured as follows:
  - 1.15.1 Section 2 sets out the relevant **legal framework**;
  - 1.15.2 Section 3 sets out the **potential competition concerns** we have identified and the **requirements** we propose to place on the BBC to protect fair and effective competition; and
  - 1.15.3 Section 4 sets out our **approach to assessing whether the BBC has complied with those requirements** in the case of a complaint about a specific distribution agreement, including a range of **factors we expect may be relevant** in assessing complaints.
- 1.16 Where we have discretion to impose requirements or to determine the form of the requirement, we have assessed the need for such a requirement, in line with our statutory duties.
- 1.17 Ofcom's approach to assessing other competition issues under the Charter and Agreement is covered in separate consultation documents.<sup>7</sup>
- 1.18 The procedures and guidance proposed in this document would take effect from 3 April 2017. They will be kept under review and amended as appropriate in light of further experience and any change to our powers and responsibilities. We will provide an explanation where we depart from the approach set out in the guidance.

---

<sup>7</sup> <https://www.ofcom.org.uk/consultations-and-statements/ofcom-and-the-bbc>

## Section 2

# Legal framework

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

## The Communications Act

- 2.2 Ofcom is a statutory corporation created by the Office of Communications Act 2002. Our power to regulate the BBC is derived from the Act, which sets out that for the purposes of carrying out regulation of the BBC we will have such powers and duties as may be conferred on us by or under the Charter and Agreement.<sup>8</sup> Our general duties under section 3 of the Act apply to the exercise of our functions in relation to the BBC.

## The Charter and Agreement

- 2.3 Together, the Charter and Agreement set out specific roles and responsibilities for the BBC and Ofcom with regards to the distribution of the UK Public Services.

## The BBC’s role

- 2.4 The Charter and Agreement set out two broad requirements for the BBC in relation to the distribution of its services:
- 2.4.1 to ensure the public services are made widely available; and
  - 2.4.2 to have regard to its impact on competition.
- 2.5 Article 11 of the Charter sets out that the BBC must have particular regard to the effects of its activities on competition in the United Kingdom. In doing so it must seek to avoid adverse impacts on competition which are not necessary for the effective fulfilment of the Mission and the promotion of the Public Purposes, and it must have regard to promoting positive impacts on the wider market.
- 2.6 Clause 61 of the Agreement requires the BBC to do all that is reasonably practicable to ensure that viewers, listeners and other users are able to access the UK Public Services that are intended for them, or elements of their content, in a range of convenient and cost effective ways which are available or might become available in the future.
- 2.7 In complying with this requirement, the BBC may place reasonable conditions under which it will make its output and services available to third parties. Any condition placed on this basis must not adversely impact fair and effective competition and must be fair, reasonable and non-discriminatory.

---

<sup>8</sup> We note that the precise scope of the key relevant provision, section 198 of the Communications Act, is currently the subject of a proposed amendment under the Digital Economy Bill.

- 2.8 The BBC Board must set a policy on the distribution of the UK Public Services.<sup>9</sup> The BBC must distribute its output and services according to that strategy and policy, which must:
- 2.8.1 set out how the BBC will fulfil its obligations under clause 61 (making UK Public Services widely available);
  - 2.8.2 include the reasonable conditions under which the BBC will make its output and services available to third parties;
  - 2.8.3 ensure the BBC can only limit the distribution of its output and services to third parties via the BBC's own services or platforms where it is satisfied this is reasonable and in the public interest; and
  - 2.8.4 ensure that it acts on a fair, reasonable and non-discriminatory basis.<sup>10</sup>
- 2.9 The BBC must consult with the public and Ofcom before publishing the policy.
- 2.10 Finally, any complaints about distribution of the public services must be made to, and resolved by, the BBC in the first instance.

### **Ofcom's role**

- 2.11 Article 46 of the Charter creates the basis for Ofcom to regulate distribution of the public services. This article states that Ofcom must set requirements in the Operating Framework to protect fair and effective competition in the United Kingdom in relation to agreements with, and conduct affecting, third parties in relation to UK Public Services, trading activities and non-service activities.
- 2.12 Clause 15 of the Agreement expands on Ofcom's role and states that the requirements included in the Operating Framework (considered appropriate by Ofcom to protect fair and effective competition) may include the distribution of the UK Public Services.
- 2.13 The Charter and Agreement do not specify the form which such requirements on the BBC should take.
- 2.14 Article 45 of the Charter outlines Ofcom's general duties in regulating the BBC, and will inform our approach to regulating distribution of the BBC's public services. Under this Article, Ofcom must have regard in carrying out its functions to the object of the BBC to fulfil its Mission and promote the Public Purposes. Ofcom must also have regard to the desirability of protecting fair and effective competition in the United Kingdom and the requirement for the BBC to comply with its duties under the Charter, including its general duties, all to the extent Ofcom considers it relevant in the circumstances.
- 2.15 If Ofcom imposes requirements on the BBC in relation to distribution, Ofcom will enforce compliance with those requirements. As noted above in paragraphs 1.12 and 2.10, this is subject to complainants normally bringing their complaints to the BBC first.

---

<sup>9</sup> Article 20 of the Charter.

<sup>10</sup> Clause 62 of the Agreement.

## Section 3

# Potential competition concerns and requirements for the BBC

- 3.1 This section provides an overview of relevant and continuing changes in the media sector, examining the potential competition concerns that may arise over this Charter period and the requirements we propose to impose on the BBC to protect fair and effective competition.
- 3.2 In carrying out our competition role we take into account the object of the BBC to fulfil its Mission and promote the Public Purposes. We also recognise that the BBC will need to take into account issues other than those related directly to competition. Depending on the circumstances, the BBC could adopt a perfectly legitimate position which results in its public services not being available on a specific platform or being available subject to specific terms. We consider these matters below.

## Sector context

- 3.3 Media markets have undergone significant changes over the course of the last Charter period and we expect the sector to continue to evolve. New platforms are emerging and the ways in which content is distributed are becoming increasingly complex. As a result, audience behaviour and the way people access and consume content are changing.
- 3.4 The BBC seeks to fulfil its Mission and promote the Public Purposes by providing content which is viewed, listened to and engaged with by the majority of the UK population; it is popular and highly valued by UK audiences.
- 3.5 The BBC's position, and the importance of its content, gives it the potential to act as a catalyst for innovation and development in the media sector. The BBC is important to the ongoing development of new services, both in providing the public services to platforms and through the development of its own services (e.g. iPlayer). Given its popularity with audiences, the BBC has been able to encourage consumer take-up of new services and applications. As a result, its content is widely available on broadcast and internet platforms, consumed by audiences on a variety of devices, at home or on the move, live or via its own catch-up services.
- 3.6 Other companies are also contributing to significant sector developments. The number of TV providers has grown as new platforms have entered the market and providers are increasingly competing by bundling content alongside communications services (e.g. triple-play packages which include fixed telephony and broadband). Technological developments also mean this content is available through a number of different devices, particularly with the increasing presence of on-demand services, e.g. Netflix, Amazon Prime and NOW TV. This variety is providing consumers with an increasing choice in how they access TV content. In addition, broadcasters and platforms are continuing to invest in new content and related services.
- 3.7 These developments have delivered significant benefits to society and we expect innovation in media markets to continue. The sector is likely to evolve in ways that we cannot predict with certainty, with the development of new services, user-interfaces and ways of accessing content.

## The objectives of the BBC & commercial platforms

- 3.8 The BBC is required to make its UK Public Services and elements of its content available in convenient and cost-effective ways that can be accessed by viewers, listeners and other users. Therefore, it is in the interests of the BBC to make its public services available to audiences. As the media sector continues to develop we anticipate that the BBC may need to negotiate agreements with an increasingly diverse range of platforms in order to meet its obligation.
- 3.9 Given the importance of the BBC's public services, the ability of platforms to offer them to their own audiences is an important part of building a compelling consumer proposition. Indeed, payment of the licence fee creates an expectation that audiences will be able to access the BBC's public services as part of their TV package, radio service or online service. As a result, the absence of BBC content from a platform is likely to place it at a competitive disadvantage.
- 3.10 The BBC's objectives and those of the third party platforms will often be aligned. The BBC will want a wide range of platforms to carry its public services so it can reach as many people as possible. At the same time third party platforms will want to carry the public services in order to attract audiences and subscribers.
- 3.11 However, there is the potential for tension between the BBC's objectives and the interests of platforms. The BBC will want to supply its public services in such a way as to best meet its Mission and Public Purposes. The objectives set by Government will drive decisions about what public services are distributed to platforms and how the BBC wants its content to reach audiences.
- 3.12 The BBC is likely to take into account a number of factors when negotiating distribution agreements, including potential audiences, protection of the BBC brand, the ease of access to its content on the various devices and the prominence of its public services. We consider some of these potential factors further in paragraphs 4.11 – 4.21.
- 3.13 At the same time, third parties will want to agree terms with the BBC which they consider will make their platforms more appealing to consumers and subscribers. The quality of the consumer experience is key to the success of a platform. Different platforms are likely to have different objectives according to the design of their particular proposition. In addition, as they develop new propositions, with different characteristics to traditional TV services, they are likely to place new demands on the BBC and will potentially seek to integrate the public services in new ways in order to meet the needs and expectations of their customers.
- 3.14 As a result, there is the potential for the objectives of the BBC and platform operators to diverge. We anticipate potential tensions in distribution negotiations to emerge particularly around the presentation of the public services, seamless in- and out-of-home viewing, and access to metadata<sup>11</sup> to support developments in platform functionality. This could conflict with the BBC's objectives to ensure its public services are presented consistently, prominently and with appropriate accessibility.

---

<sup>11</sup> Metadata refers to data that describes programme content, such as the title, genre, names of actors and directors, series and episode number, etc. Some metadata is widely used because basic platform features depend on it to work, e.g. content title and transmission metadata is integral to EPG listings. Other forms of metadata, e.g. technical production metadata, may be used by a narrower range of applications.

- 3.15 These underlying tensions between the requirements of the BBC and those of the platforms could, in extreme cases, lead to a platform being unable to carry the public services. This may have adverse impacts on consumers and could give rise to competition concerns.

## Potential competition concerns

- 3.16 The benefits of competition to consumers are widely recognised; effective competition encourages innovation and delivers increased choice and quality. The ability for platforms and media providers to innovate and develop new services, to meet changing audience and consumer preferences about how they access and watch content, is an important element of such competition in the media sector.
- 3.17 As noted above, given the importance and popularity of the public services, access to them is likely to be a key factor in this competitive process. As a result, there is a risk that the way in which the BBC makes its public services available could place commercial platforms at a disadvantage and distort overall competition. Where there is a risk of a material impact, Ofcom may need to act to protect fair and effective competition.
- 3.18 First, there is the risk that the BBC supplies its public services in a discriminatory fashion (e.g. only supplying some platform operators or offering very different terms to similar platforms). This could directly distort competition between platforms.
- 3.19 Second, if the BBC supplies its public services on overly restrictive terms (even if it does so to everyone) then this may limit the ability of platform operators to compete by innovating and investing in improvements to their services. As a result, the range and quality of services available to people could be reduced.
- 3.20 Third, there is the possibility that the BBC declines reasonable requests for supply from third party platforms. This could include not just an absolute refusal to supply, but also the case where the BBC offers terms which the platform cannot reasonably be expected to accept.
- 3.21 Complaints from third parties about the BBC's distribution of public services will be dependent on the specific case in question. However, the way in which platforms can operate and develop could be affected by the way the BBC distributes its public services, with the potential to harm fair and effective competition and ultimately reduce innovation and investment, thereby affecting consumer choice.

## Requirements

- 3.22 As set out at paragraph 2.11 and 2.12 above, the Agreement states that the Operating Framework must set out any requirements we consider are necessary to protect fair and effective competition, including requirements relating to the distribution of the BBC's public services.
- 3.23 In delivering against its objectives set by Government, the BBC must take into account the market impact of its activities. It should be able to place reasonable conditions about the way its public services are distributed as long as these conditions are consistent with the Public Purposes.
- 3.24 As noted above, given the importance of the public services, it is possible that the BBC could undermine competition and innovation in the way it supplies these services to third parties. It is also important that the BBC does not unfairly

disadvantage third party platforms as a result of its distribution activities. The central role that the BBC plays in the UK media sector means that there is the potential for such risks to have a major impact.

- 3.25 Access to some of the BBC's services, such as the BBC content on linear channels, is well-established. However, platforms and services evolve and the demands from platforms change to meet the needs of their audiences. As a result, the BBC's approach to distribution is also likely to need to evolve. Since the BBC is required to make its public services widely available, it is likely to need to negotiate more distribution agreements with a wider range of platforms, each potentially with their own particular characteristics or requirements.
- 3.26 Given the rapid technological development in the sector and innovation in user interfaces, new sources of tension between the objectives of the BBC and third parties are likely to emerge. We therefore expect that the potential for disputes will grow rather than diminish.
- 3.27 In considering whether to impose obligations to protect fair and effective competition, we have taken into account the potential competition concerns set out above, the existing market context and potential sector developments. We consider that the risks involved merit a form of regulation that allows Ofcom to intervene where there is a material risk to fair and effective competition.
- 3.28 As highlighted above, there is a wide range of possible issues which may arise in the context of the BBC's distribution arrangements. Some already exist, others are expected to arise, and others still lie ahead in an unknown future. Instead we consider it appropriate to impose general requirements which would apply to all of the BBC's distribution arrangements. This means that the BBC can adapt to market and technological developments as they occur and that Ofcom can consider the application of these obligations in a range of circumstances as required.
- 3.29 The specific form of these requirements reflects the importance of the BBC's content to consumers and platform operators, while being mindful of the BBC's Mission and Public Purposes. Specifically, we believe that the starting point should be that the BBC should supply its public services where it receives a reasonable request to do so. However, this can only be a starting point, and we recognise that there are a number of considerations related to its Mission and Public Purposes which will impact whether the BBC should in fact supply those public services in the manner requested – in other words, the BBC may have an objective justification for not supplying those services. In section 4 of this document, we set out a range of factors which may be relevant to that assessment.
- 3.30 In addition, we believe that where the BBC makes its public services available, it should do so on fair, reasonable and non-discriminatory terms. We note that under the Agreement, the BBC also has an obligation to only impose conditions for supply which are fair, reasonable and non-discriminatory.<sup>12</sup> However, the terms of supply are a key consideration in assessing the impact on competition of a distribution arrangement, and are inextricably linked to the BBC's offer of supply. Indeed, we expect that the terms on which the BBC is prepared to supply its public services are likely to be the central question in any disagreement about distribution.

---

<sup>12</sup> Clause 61 of the Agreement and paragraph 2.7, above.

3.31 We therefore propose to set the following requirements on the BBC:

Ofcom requires that the BBC must offer the public services to third parties in response to reasonable requests for supply, except where the BBC has an objective justification for not doing so.

In offering the public services for supply, and in supplying those services, the BBC must act on a fair, reasonable and non-discriminatory basis.

We refer to these as “the Requirements” in the remainder of this document.

## Section 4

# Assessing complaints against the BBC

- 4.1 In this section we set out the approach that we expect to take when assessing complaints about the BBC's compliance with our Requirements.

## Enforcement procedures

- 4.2 Ofcom is not responsible for setting the BBC's distribution strategy, or for approving that strategy – that strategy is a matter for the BBC. Ofcom will also not usually be involved in the BBC's distribution arrangements. Instead, we will generally only consider those arrangements where we receive a complaint from a third party.
- 4.3 In addition, where a third party platform disagrees with the BBC about a distribution agreement in a particular case, and has been unable to resolve that through commercial negotiations, it should first take its complaint to the BBC. This is because the Agreement has given the BBC primary responsibility to resolve complaints.<sup>13</sup> Only where the BBC has been unable to resolve the complaint, or has not resolved it satisfactorily, should the third party bring its complaint to Ofcom.<sup>14</sup> We expect that the majority of disagreements can and will be resolved through commercial negotiations or the BBC's complaints process, and that Ofcom will only intervene in a limited number of cases.
- 4.4 Where third party platforms do submit a complaint to Ofcom, we will consider, before opening an investigation, whether the parties have exhausted all available routes as well as the parties' conduct during the negotiations. Ofcom will shortly consult on the 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 will include other matters which Ofcom will take into account when considering whether to accept a complaint.

## Submissions from the BBC and the complainant

- 4.5 If Ofcom opens an investigation, we will consider arguments and evidence from both the BBC and the complainant. We would expect both parties to clearly set out how the BBC's approach may impact competition. We would also expect the BBC to clearly set out why the position it has taken is appropriate for the effective fulfilment of its Mission and the promotion of its Public Purposes.
- 4.6 In considering the parties' arguments, Ofcom believes it is appropriate that the onus should be on the BBC to demonstrate why it should not make public services available on the basis requested, or why the conditions for supply are fair, reasonable and non-discriminatory. This is because, as set out above, the BBC's licence-fee funded activities seek to serve all audiences, those audiences expect access to those services through a wide variety of means, and the BBC has an obligation to make its content widely available. That the onus should be on the BBC does not mean, however, that it is only legitimate for the BBC to refuse to supply on

<sup>13</sup> Clause 56(4)(a) of the Agreement.

<sup>14</sup> Ofcom may also resolve complaints where the complainant considers that, following the resolution of a complaint by the BBC, it may be appropriate for Ofcom to impose a sanction against the BBC; intervene at an early stage to resolve a complaint not resolved by the BBC; and open investigations of its own initiative. Clause 57 of the Agreement.

the terms requested by the platform operator in exceptional circumstances. Specifically, we have set out below a range of factors which may be relevant to the question of whether or not supplying, or not supplying on the terms requested by the platform operator, is appropriate in order to meet the BBC's Public Purposes.

## Ofcom's analysis

- 4.7 As the focus of Ofcom's role in this area is the protection of competition, the impact on competition of a given distribution arrangement is an important consideration in our analysis. We are unlikely to intervene unless a material effect on competition can be identified. As part of our analysis, we will therefore assess the nature of competition, and the specific risks and possible impacts associated with the position adopted by the BBC. We could, for example, take account of the ability of a small platform operator to innovate.
- 4.8 The other important consideration in our analysis is the BBC's object. Ofcom will therefore also assess and give due weight to the BBC's duties and obligations under the Charter and Agreement and how the BBC believes it best to meet its Mission and Public Purposes. In this respect, we note that the Mission and Public Purposes will not change over the Charter period. However, we expect that the content and structure of the public services, and how audiences access that content, will evolve during the Charter period, and we will take that into account.
- 4.9 Ofcom will consider each case on its merits, and our assessment is likely to depend on the specific circumstances in question. However, we set out below a range of factors, and the types of issues which may arise in connection with them, which could be relevant to determining whether it is necessary for Ofcom to intervene. Whether that is the case will depend on the nature of the disagreement and the specific circumstances in question. The factors are particularly relevant to points the BBC may raise to justify its position with respect to its Mission and Public Purposes.
- 4.10 The factors below listed below are non-exhaustive, and there may be other issues Ofcom will need to consider in any given case.

## Factors

### Platform compatibility

- 4.11 Different platforms have different technical capabilities, which may have an impact on their ability to carry the public services. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.11.1 Which other platforms the BBC provides its public services to and whether it provides them with the same range of services on comparable terms to those sought by the complainant.
- 4.11.2 Whether the complainant has technology capable of supporting the public services or whether the BBC would need to provide a degree of customisation.
- 4.11.3 Whether the BBC has already been prepared to supply to another platform a version of the public services requiring a similar level of modification to that requested by the complainant.

## Costs of distribution

- 4.12 Under the Charter, the BBC must exercise stewardship of public money.<sup>15</sup> As such, it needs to take account of the costs that it would incur in making the public services available on different platforms and devices. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.12.1 The costs incurred by the BBC in supplying the public services to other platforms.
  - 4.12.2 The costs that the BBC would incur if it had to make its public services available in the way requested on the complainant's platform.
  - 4.12.3 Whether the complainant indicated during negotiations that it would be prepared to pay the BBC's incremental costs for the provision of customised services.
- 4.13 In assessing any complaint concerning the level of incremental costs, we would take into account whether the costs identified are reasonable, efficiently incurred and necessary. We also recognise that dealing with third party requests may result in additional costs being incurred by the BBC. We would expect to consider a range of costs such as management time and effort, the costs incurred by the BBC for ongoing maintenance of the customised service and the direct costs involved in customisation.

## Consumer experience

- 4.14 There are a number of different issues which can have a bearing on the experience of audiences as they watch, listen to and use the BBC's public services. These can range from the prominence of these services, the quality of reception and the ease with which audiences can find and identify BBC content. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.14.1 The quality of service that audiences would enjoy when accessing the public services (e.g. audio and visual quality, loading and buffering times for on-demand services).
  - 4.14.2 Whether people would be able to find the public services and access them quickly and easily, in line with their needs and expectations.
  - 4.14.3 Whether the public services would be clearly attributed to the BBC.
  - 4.14.4 The ability to offer search and navigation functions on the complainant's platform that are in line with audience needs and expectations.

## Editorial control

- 4.15 We recognise that it is legitimate for the BBC to maintain editorial control over the public services and place reasonable restrictions in the terms of supply it negotiates with third parties to achieve this.

---

<sup>15</sup> Article 16 of the Charter.

- 4.16 When we assess a complaint, the complainant and/or the BBC may reference whether the BBC would retain sufficient rights and controls to be able to comply with legal and compliance requirements if it supplied the public services in the way requested by the complainant.

### **Curation of the public services**

- 4.17 In its negotiations, the BBC may seek to directly 'curate' the public services, using its ability to promote and direct audiences to content which, in turn, could help it fulfil its Mission and promote the Public Purposes. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.17.1 The level of control the BBC has over the way in which the public services are presented and promoted (including cross-promotion) to audiences.
  - 4.17.2 Whether alternative ways to present and promote the public services that might be proposed by the complainant would be likely to achieve the BBC's objectives.
  - 4.17.3 Whether the BBC is able to comply with its requirement under the Agreement not to carry advertising or sponsorship on the public services.

### **Technical and service innovation**

- 4.18 BBC has a duty to promote technological innovation,<sup>16</sup> including to support the delivery of the public services. Developments in this area can improve the experience of audiences. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.18.1 How the BBC and/or complainant's position relate to the BBC's duty under the Charter to promote technological innovation.
  - 4.18.2 Whether the BBC has engaged in exclusive working arrangements with other third parties to meet its commitments to support technical and service innovation.<sup>17</sup>
  - 4.18.3 If the complainant requires BBC content or input for its innovation or if it can partner with someone else instead.

### **Market norms**

- 4.19 When assessing the positions taken by the BBC and the complainant, we would consider these positions in light of market practices. This would include reviewing the arrangements that other broadcasters make for the distribution of their services and content. When we assess a complaint, areas that the complainant and/or the BBC may reference in relation to this factor could include:
- 4.19.1 The extent to which the positions adopted by the BBC and the complainant are in line with standard industry practice.

---

<sup>16</sup> Article 15 of the Charter

<sup>17</sup> When considering such cases, we would look at both the duration of any period of exclusivity as well as the extent to which the specific objectives of the arrangement support the delivery of the BBC's Mission and the Public Purposes.

- 4.19.2 The extent to which changes over time in the nature of competition between different platforms have impacted how consumers expect to access and enjoy the public services.

### **Openness and transparency**

- 4.20 To keep pace with technological developments and changes in audience behaviours, the BBC needs to develop the public services as well as its approach to distribution over the medium to long term. To support their own businesses, third parties need to find out about and understand the BBC's strategic approach so they can factor this in to their own plans for developing their platforms.
- 4.21 When we assess a complaint, the complainant and/or the BBC may reference the extent to which the BBC has openly, and in a timely manner, communicated its distribution strategy and its thinking about the future development of technical standards to the complainant and to the industry more generally.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 To ensure requirements are in place as soon as possible, Ofcom would like to receive views and comments on the issues raised in this document **by 5pm on 13 February 2017**.
- A1.2 We strongly prefer to receive responses via the online form at <https://www.ofcom.org.uk/consultations-and-statements/category-1/bbc-distribution-guidance/>.
- A1.3 We also provide a cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>) for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A1.4 If your response is a large file, or has supporting charts, tables or other data, please email it to [BBCDistribution@ofcom.org.uk](mailto:BBCDistribution@ofcom.org.uk), as an attachment in Microsoft Word format, together with the cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>). This email address is for this consultation only, and will not be valid after April 2017.
- A1.5 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Jonathan Mackay  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.6 If you would like to submit your response in an alternative format (e.g. a video or audio file), please contact Jonathan Mackay on 020 7783 4442.
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.8 A short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if in your response you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.10 If you want to discuss the issues and questions raised in this consultation, please contact Jonathan Mackay on 020 7783 4442.

## Confidentiality

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

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

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

## Next steps

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

## Ofcom's consultation processes

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

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

Tel: 020 7981 3601  
Email [steve.gettings@ofcom.org.uk](mailto:steve.gettings@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

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

### Before the consultation

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

### During the consultation

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

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

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

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

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

### After the consultation

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

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

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

Nothing  Name/contact details/job title

Whole response  Organisation

Part of the response  If there is no separate annex, which parts?

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

**DECLARATION**

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

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

Name

Signed (if hard copy)