

**Ofcom**

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for everyone

# Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

Consultation

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Closing Date for Responses: 6 March 2017

## About this document

The role of the BBC is to produce high quality and distinctive programmes and services which educate, inform and entertain. Given its status as a large, publicly-funded organisation, it is essential that the BBC maintains the highest standards and can be held to account when it fails to meet public expectations.

Under the new Royal Charter and Agreement, regulation of the BBC will pass from the BBC Trust to Ofcom. As part of its new responsibilities Ofcom must establish procedures which ensure the BBC's compliance with requirements set out in the Charter and Agreement.

This consultation seeks views on our proposed procedures for:

- a) investigating breaches by the BBC of certain requirements set out in the Agreement; and
- b) investigating a failure by the BBC to comply with enforcement action by Ofcom in accordance with any of Ofcom's enforcement procedures applicable to the BBC.

Following the end of the consultation period, Ofcom will publish its new procedures. These will come into effect when Ofcom takes over responsibility for regulating the BBC on 3 April 2017.

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## Section 1

# Consultation

- 1.1 On 15 December 2016, the Government published the new BBC Charter<sup>1</sup> and Agreement<sup>2</sup> setting out how the BBC will be governed and regulated over the next 11 years. Regulation of the BBC will pass from the BBC Trust to Ofcom and governance of the BBC will pass to a new BBC Board.
- 1.2 Ofcom is the independent regulator for the UK communications industries, and will take on its new responsibilities for regulation of the BBC on 3 April 2017. In doing so, Ofcom will have regard to its general duties under the Communications Act 2003 and to the specific requirements of the Charter and Agreement.
- 1.3 Ofcom will regulate the BBC in accordance with the terms of the new Charter and the Agreement. As part of this, we are developing a range of documents forming an Operating Framework containing the provisions we consider appropriate to secure the effective regulation of the BBC.<sup>3</sup>

## Introduction

- 1.4 As set out in the Charter and Agreement, Ofcom must enforce compliance by the BBC with requirements specified as enforceable in the Framework Agreement or Operating Framework (“the specified requirements”). Those requirements cover a range of matters and Ofcom has produced specific procedures (“the Specific Procedures”) for:
  - a) enforcement of BBC competition requirements<sup>4</sup>;
  - b) investigating breaches of content standards on BBC broadcasting services and BBC on demand programme services<sup>5</sup>;
  - c) the consideration and adjudication of Fairness & Privacy complaints on BBC broadcasting services and BBC on demand programme services<sup>6</sup>; and
  - d) the consideration of sanctions for breaches of content standards on BBC broadcasting services and BBC on demand programme services<sup>7</sup>.
- 1.5 Those procedures are the subject of separate consultations. This document is a consultation on our proposed procedures for:
  - a) investigating breaches by the BBC of other requirements set out in the Agreement; and

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<sup>1</sup> ‘The Royal Charter for the continuance of the British Broadcasting Corporation’ (the “Charter”), available at: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.

<sup>2</sup> ‘The Agreement between the Secretary of State for Culture, Media and Sport, and the BBC’ (the “Agreement”), available at: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.

<sup>3</sup> Charter, Article 46(2); Agreement, Clause 5(1)

<sup>4</sup> Agreement Clause 15(4), Clause 28(1), Clause 22(2), Clause 31(3), Schedule 3, paragraph 7(2).

<sup>5</sup> Agreement, Schedule 3, Paragraph 3.

<sup>6</sup> Agreement, Schedule 3, Paragraph 4.

<sup>7</sup> Charter, Article 49.

- b) investigating a failure by the BBC to comply with enforcement action by Ofcom in accordance with the Specific Procedures or these procedures. This could occur where the BBC fail to comply with a direction made by Ofcom, or an undertaking given by the BBC, under Article 49(2) of the Charter.

## **Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action**

- 1.6 The Charter provides that Ofcom must enforce compliance by the BBC with the specified requirements. In doing so we may consider complaints, and we may carry out investigations into such compliance as we consider appropriate.<sup>8</sup>
- 1.7 The Charter and Agreement state that Ofcom must set out procedures for the handling and resolution of complaints, for conducting investigations and for the imposition of sanctions in relation to breaches of the specified requirements.<sup>9</sup> These procedures will form part of the Operating Framework. In proposing these procedures, Ofcom has had regard to the requirements of the Charter and the Agreement.
- 1.8 As regards procedures for the handling and resolution of complaints, the Agreement provides that Ofcom must set and publish procedures which cover the handling and resolution of complaints which are referred to us in the following circumstances:
  - a) If a complainant is not satisfied with the resolution of the complaint by the BBC;
  - b) If a complainant considers, following the resolution of a complaint by the BBC, that the imposition by Ofcom of a sanction against the BBC may be appropriate; or
  - c) If the BBC has failed to resolve a complaint within the timeframe set in its complaints handling procedures.<sup>10</sup>
- 1.9 The Agreement provides that Ofcom's complaints handling procedures must give information on how complainants can expect to be treated. To this end, the procedures must ensure that making a complaint is straightforward and accessible, and that the public know about their right to make a complaint and how. In addition, the procedures must ensure that complaints are handled in a timely and proportionate manner, and considered and resolved effectively.<sup>11</sup>
- 1.10 In this regard, the Agreement states that Ofcom's procedures must clearly explain:
  - a) how the complaints system works;
  - b) the remedies and sanctions Ofcom has the power to apply;
  - c) where relevant, the availability of other methods of redress in relation to the type of issues raised by the complainant; and

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<sup>8</sup> Charter, Article 49(1).

<sup>9</sup> Charter, Article 49(6); Agreement, Clause 5(4), Clause 57(1), Clause 58(2).

<sup>10</sup> Agreement, Clause 57(1).

<sup>11</sup> Agreement, Clause 57(4).

- d) how complainants will be notified of the resolution of the complaint and provided with an explanation appropriate to the nature of the complaint.<sup>12</sup>
- 1.11 As regards investigations, the Agreement provides that Ofcom may carry out such investigations as we consider appropriate to determine compliance with a specified requirement, and that we must set and publish procedures for the carrying out of such investigations.<sup>13</sup>
- 1.12 As regards the imposition of sanctions, the Charter sets out the sanctions that Ofcom may impose if we are satisfied the BBC has failed to comply with a specified requirement. In particular, we may:
- a) direct the BBC, or accept undertakings from the BBC, to take such steps we consider will remedy the failure to comply and/or ensure that the BBC complies with their requirements properly in future;<sup>14</sup> and/or
  - b) require the BBC to pay a specified penalty.<sup>15</sup>
- 1.13 The Charter also provides that we may not impose these sanctions unless we have given the BBC a reasonable opportunity to make representations on Ofcom's grounds for imposing the sanctions.<sup>16</sup>
- 1.14 This consultation proposes a set of procedures for enforcement of the specified requirements not covered by the Specific Procedures ("the Relevant Requirements") in line with the above requirements of the Charter and the Agreement. These procedures take into account our experience, and the procedures we follow, in undertaking our other enforcement functions. In accordance with the Charter and the Agreement, the proposed procedures cover how we will handle and resolve complaints and how we will conduct investigations into the BBC's compliance with the Relevant Requirements. The proposed procedures will also cover the process we will follow in imposing sanctions on the BBC for its failure to comply with the Relevant Requirements. Where we have discretion as to the procedures we may impose, we have assessed the need for the proposed approach, in line with our statutory duties.
- 1.15 The procedures will also cover the enforcement of directions by Ofcom, or undertakings offered by the BBC, under Article 49(2) of the Charter for the purposes of remedying a failure to comply with a specified requirement and/or ensuring that the BBC complies with its requirements properly in the future.

## What does this Consultation cover?

- 1.16 Annex 1 set outs our proposals for when and how we will:
- a) **Open an investigation:** including how to submit a complaint, the timeframe for making a complaint, when we might open a case on our own initiative, how we decide whether to investigate, other methods of redress we might consider in lieu of an investigation, and what we do if we decide to investigate.

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<sup>12</sup> Agreement, Clause 57(4).

<sup>13</sup> Agreement, Clause 58(1), Clause 58(2).

<sup>14</sup> Charter, Article 49(2).

<sup>15</sup> Charter, Article 49(3). The amount of any penalty that may be imposed must not exceed the maximum specified in section 198(5) of the Communications Act i.e. £250,000 (Charter, Article 49(4)).

<sup>16</sup> Charter, Article 49(5).

- b) **Conduct the investigation:** this includes information gathering, publication of information, confidentiality considerations, and changing the scope of our investigation.
- c) **Conclude the investigation:** this sets out investigation outcomes, including reaching provisional and final decisions on whether a breach has occurred or closing a case.

1.17 The procedures also describe the sanctions Ofcom has the power to impose, and how we will impose them.

## Next steps

- 1.18 Stakeholders are invited to comment on the draft procedures set out in Annex 1. The deadline for responses is **6 March 2017**.
- 1.19 Following our review of stakeholder responses, we plan to issue final procedures by the end of March 2017 to come into effect on 3 April 2017.

## Annex 1

# Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

## Introduction

- A1.1 This document outlines Ofcom's Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) into possible breaches by the BBC of requirements set out in the Agreement
- A1.2 <sup>1</sup> which are not covered by any of the specific BBC procedures set out below in paragraph A1.7.<sup>2</sup> These requirements are discussed in further detail in paragraphs A1.8 to A1.10 below.
- A1.3 The Procedures set out in this document are those Ofcom will usually follow in order to investigate whether a breach of a "relevant requirement" has occurred. The Procedures set out in this document are effective from 3 April 2017<sup>3</sup>.
- A1.4 If Ofcom considers it necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it will write to the BBC (and any other relevant party) in advance, setting out the nature/extent of its departure and its reasons for doing so.

## Statutory framework

- A1.5 Ofcom regulates the BBC by virtue of section 198 of the Communications Act 2003 ("the 2003 Act") to the extent that provision to do so is contained in the BBC Charter and Agreement,<sup>4</sup> the 2003 Act and Part 5 of the Broadcasting Act 1996.

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<sup>1</sup> 'The Agreement between the Secretary of State for Culture, Media and Sport, and the BBC' (the "Agreement"), available at: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.

<sup>2</sup> Our existing General Procedures will continue to apply to other broadcasters including commercial BBC companies licensed by Ofcom, available at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0019/31942/general-procedures.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0019/31942/general-procedures.pdf). [Ofcom is separately consulting on a small number of amendments to these procedures – see <https://www.ofcom.org.uk/consultations-and-statements/category-1/review-procedures-handling-content-standards-and-broadcast-licensing>]. Ofcom has no remit to consider complaints concerning the World Service.

<sup>3</sup> Other methods of redress may be available to complainants through the civil courts. Complainants may wish to obtain legal advice.

<sup>4</sup> The Royal Charter for the continuance of the British Broadcasting Corporation' (the "Charter"), available at: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.



- A1.6 In accordance with the Charter, Ofcom must enforce compliance by the BBC with the specified requirements set out in the Agreement<sup>5</sup>. These requirements include<sup>6</sup>:
- a) any requirement imposed on the BBC by Ofcom in the Operating Framework;
  - b) any regulatory condition imposed on the BBC in the operating licence;
  - c) the various regulatory obligations set out in Schedule 3 of the Agreement (excluding the obligation on editorial guidelines<sup>7</sup>);
  - d) the requirement for the BBC to provide information to Ofcom under the Charter;<sup>8</sup> and
  - e) requirements relating to the retention, provision and publication of information relating to complaints.<sup>9</sup>
- A1.7 The Charter provides<sup>10</sup> that If Ofcom is satisfied that the BBC has failed to comply with a specified requirement, Ofcom may:
- a) Direct the BBC, or accept undertakings from the BBC, to take such steps as Ofcom considers will:
    - i) Remedy the failure to comply;
    - ii) Ensure that the BBC complies with its requirements properly in future.
  - b) Serve on the BBC a notice requiring it to pay them, within a specified period, a specified financial penalty. The maximum penalty that may be imposed on any occasion is £250,000.<sup>11</sup>

### When do these Procedures apply?

- A1.8 Ofcom has produced specific procedures, which apply to investigations of potential breaches by the BBC of specified requirements under the Agreement. These specific procedures are listed in the table below. A breach by the BBC of the requirements shown in the table below would generally be investigated under the corresponding specific procedure and would not be covered by these Procedures.

Requirement/s dealt with	Specific procedure
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<sup>5</sup> Charter, Article 49.

<sup>6</sup> Agreement, Clause 59.

<sup>7</sup> Agreement, Clause 59(c).

<sup>8</sup> Charter, Article 47.

<sup>9</sup> Agreement, Clauses 56(6) to (8).

<sup>10</sup> Charter, Article 49(2).

<sup>11</sup> The maximum specified in section 198(5) of the 2003 Act.

<p>Requirement to observe the content standards objectives applied in the Ofcom Broadcasting Code<sup>12</sup>.</p>	<p>Procedures for investigating breaches of content standards on BBC broadcasting services and BBC on demand programme services.</p>
<p>Requirement to observe the fairness and/or privacy requirements applied in the Ofcom Broadcasting Code<sup>13</sup>.</p>	<p>Procedures for the consideration and adjudication of Fairness &amp; Privacy complaints on BBC broadcast services and BBC on demand programme services.</p>
<p>Requirements which Ofcom consider appropriate to ensure fair and effective competition in relation to the UK Public Services<sup>14</sup>.</p> <p>Requirements which Ofcom consider appropriate to ensure that the BBC's commercial activities do not, as a result of their relationship with UK Public Services, trading activities, or non-service activities, distort the market or gain an unfair competitive advantage<sup>15</sup>.</p> <p>Requirements which Ofcom consider appropriate to protect fair and effective competition in relation to other activities carried out by the BBC<sup>16</sup>.</p> <p>The requirement whereby, in relation to UK Public Services, the BBC must ensure there is genuine competition between BBC producers and external producers (whether independent or not) on a fair, reasonable, non-discriminatory and transparent basis for the right to make relevant television, radio programmes and relevant online material, and that the BBC must evaluate any such bids on a fair, reasonable, non-discriminatory and transparent basis<sup>17</sup>.</p>	<p>Procedures for the enforcement of BBC competition requirements.</p>

A1.9 These Procedures apply to investigations of potential breaches by the BBC of all other specified requirements, which are not included in the list above.

<sup>12</sup> Agreement, Schedule 3, Paragraph 3.

<sup>13</sup> Agreement, Schedule 3, Paragraph 4.

<sup>14</sup> Agreement Clause 15(4).

<sup>15</sup> Agreement, Clause 28(1).

<sup>16</sup> Agreement, Clause 22(2), Clause 31(3).

<sup>17</sup> Agreement, Schedule 3, paragraph 7(2).

- A1.10 These requirements are referred to in this document as “relevant requirements”. The relevant requirements include:
- a) those imposed on the BBC in the Operating Framework<sup>18</sup>;
  - b) regulatory conditions imposed on the BBC in its Operating Licence<sup>19</sup>;
  - c) the requirement not to charge for reception<sup>20</sup>;
  - d) the requirement to comply with quotas for the broadcasting of independent productions under the 2003 Act and under Schedule 3 of the Agreement<sup>21</sup>;
  - e) the specific requirements of Schedule 3, paragraph 7(1) of the Agreement in relation to television programmes, radio programmes and online material;
  - f) the requirement to draw up, revise and comply with a code relating to programme commissioning<sup>22</sup>;
  - g) the requirement to comply with a code drawn up by Ofcom giving guidance as to (a) the extent to which the UK Public Services should promote the understanding and enjoyment by persons who are hearing impaired, visually impaired or dual sensory impaired of programmes; and (b) the means by which such understanding and enjoyment should be promoted<sup>23</sup>;
  - h) the requirement to retain and provide recordings to Ofcom<sup>24</sup>;
  - i) the requirement to comply with Ofcom notifications regarding international obligations of the UK in respect of UK Public Services<sup>25</sup>;
  - j) the requirement to promote equal opportunities in employment<sup>26</sup>;
  - k) the requirement to make arrangements for training and retraining of staff engaged in connection with providing any of the UK Public Services<sup>27</sup>;
  - l) the requirement to make those affected by equal opportunity and training arrangements aware of them, review those arrangements and publish a report on the arrangements once a year<sup>28</sup>;

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<sup>18</sup> Agreement, Clause 59(a).

<sup>19</sup> Agreement, Clause 13.

<sup>20</sup> Agreement, Schedule 3, paragraph 1.

<sup>21</sup> Agreement, Schedule 3, paragraph 6.

<sup>22</sup> Agreement, Schedule 3, paragraph 8.

<sup>23</sup> Agreement, Schedule 3, paragraph 9. Please note that under the Agreement, Schedule 4, paragraph 5 (3), Ofcom’s Code on Television Access Services provided for under clause 59 of the 2006 Agreement will continue to apply to the BBC under clause 59 of the Agreement until Ofcom issues a new code.

<sup>24</sup> Agreement, Schedule 3, paragraph 10.

<sup>25</sup> Agreement, Schedule 3, paragraph 11.

<sup>26</sup> Agreement, Schedule 3, paragraph 12.

<sup>27</sup> Agreement, Schedule 3, paragraph 13.

<sup>28</sup> Agreement, Schedule 3, paragraph 14.

- m) the requirement to provide Ofcom with information it has requested<sup>29</sup>;
- n) the requirement to retain records of its handling of relevant complaints<sup>30</sup>;
- o) the requirement to provide reports to Ofcom in relation to relevant complaints<sup>31</sup>;
- p) the requirement to publish information about the operation and effectiveness of the complaints procedures in relation to relevant complaints<sup>32</sup>; and
- q) any requirement to comply with a direction made by Ofcom, or an undertaking given by the BBC, in accordance with Article 49(2) of the Charter.

A1.11 These procedures also cover the investigation of any failure by the BBC to comply with a direction made by Ofcom, or undertaking offered by the BBC, under Article 49(2) of the Charter for the purposes of remedying a failure to comply with any specified requirement and/or ensuring that the BBC complies with their requirements properly in the future. In these procedures, any reference to an investigation into the BBCs compliance with a relevant requirement or a breach of a relevant requirement (as discussed in paragraph A1.9 above) should be read as including such further enforcement action by Ofcom.

## Procedures

A1.12 Ofcom may launch investigations on its own initiative as well as investigate complaints made by others. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

## Making a complaint

A1.13 Complaints under these Procedures can be made to Ofcom by any person or body who considers that the BBC has failed to comply with a relevant requirement.

A1.14 Ofcom will expect a complainant to refer its complaint to the BBC in the first instance. A complainant may then make a complaint to Ofcom if:

- a) the complainant is not satisfied with the resolution of the complaint by the BBC;
- b) the complainant considers, following the resolution of a complaint by the BBC, that the imposition by Ofcom of a sanction against the BBC may be appropriate;
- c) the BBC has failed to resolve a complaint within the timeframe set in its complaints handling procedures<sup>33</sup>.

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<sup>29</sup> Charter, Article 47. We are considering whether we require further guidelines on our information gathering powers moving forwards and this will include a consideration of whether we require such guidelines for third parties.

<sup>30</sup> Agreement, Clause 56(6), Clause 56(9) provides that for the purposes of the Agreement "Relevant complaint" means a complaint that the BBC has failed to comply with a specified requirement.

<sup>31</sup> Agreement, Clause 56(7) and 59(c).

<sup>32</sup> Agreement, Clause 56(8) and 56(9).

<sup>33</sup> Charter, Article 56(3); Agreement, Article 57(1). The BBC's complaint handling procedures are located here: <http://www.bbc.co.uk/complaints/>. Note: this link may change following publication of this document.

- A1.15 Ofcom will only consider complaints which are not referred to the BBC in the first instance in exceptional circumstances.<sup>34</sup> If the complainant considers that there are exceptional circumstances for not referring a complaint to the BBC in the first instance, it should clearly explain this in its complaint submission to Ofcom. Ofcom will decide whether to consider such complaints on a case-by-case basis.
- A1.16 Ofcom has published guidance on how individuals working in the communications sector may contact us if they have concerns about possible wrongdoing at their own organisation and where they have been unable to raise or resolve those concerns internally.<sup>35</sup> Such disclosures can be made in confidence to the Secretary of the Corporation.
- A1.17 Unless a complainant asks Ofcom not to do so, Ofcom may disclose the complainant's identity to the BBC as well as sharing a non-confidential version of the complaint submission with it for comment. Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open or conduct an investigation without revealing the identity of the complainant. This does not apply to whistleblowers<sup>36</sup>.
- A1.18 The BBC's deadline for resolution of complaints regarding non-compliance with a competition requirement is set out in the BBC's complaints handling procedures<sup>37</sup> (the "BBC deadline"). If the BBC reaches a final decision before the BBC deadline, we would expect the complainant to refer the complaint to Ofcom within 2 months of the date of the BBC's final decision. If the BBC does not reach a final decision or resolve the complaint before the BBC deadline, we would expect the complainant to refer the complaint to Ofcom within 2 months of the date of the BBC deadline.
- A1.19 Ofcom will consider complaints referred to it outside of these timeframes in exceptional circumstances, and will decide whether to do so on a case-by-case basis.
- A1.20 Ofcom requests that complaints are submitted via its complaint form, available at <https://www.ofcom.org.uk/tv-radio-and-on-demand/how-to-report-a-complaint>. Alternatively, you can contact us at: Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA, or telephone 0300 123 3333 or 020 7981 3040.
- A1.21 People with sensory impairments who find it easier to do so may call our text phone on 020 7981 3043 (please note that this number only works with special equipment used by people who are deaf or hard of hearing). People with visual impairments wishing to complain may wish to use our dedicated email address: [adcomplaints@ofcom.org.uk](mailto:adcomplaints@ofcom.org.uk).

## Information to be provided

- A1.22 All complaints should include sufficient detail about the matter complained of to enable Ofcom to investigate fully. All complaints should, therefore, include details about what is alleged to have been done, or not done, in relation to which BBC service (where relevant) together with the BBC's final response to the complaint

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<sup>34</sup> Agreement, Clause 57(2)

<sup>35</sup> See Procedure for making a disclosure to Ofcom under the Public Interest Disclosure Act 1998 ('PIDA') at <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>.

<sup>36</sup> Ofcom is a "prescribed person" under Part IVA of the Employment Rights Act 1996 (as inserted by PIDA) to which "qualifying disclosures" can be made about certain matters, including broadcasting and the provision of television and radio services.

<sup>37</sup> See footnote 49

(where received). A failure to provide these details may mean that Ofcom is not able to investigate the complaint. The complainant's full contact details (including email address where appropriate) should also be included.

### **Initial assessment of complaints**

- A1.23 Ofcom may investigate the BBC's compliance with a relevant requirement following receipt of a complaint or on its own-initiative (for example, where information comes to Ofcom's attention during routine monitoring). When deciding whether to open an investigation, Ofcom will consider whether, on its face, a complaint raises potentially substantive issues in relation to a relevant requirement that warrant investigation by Ofcom. It will do so by reference to the gravity and/or extent of the matter at issue. In addition, if Ofcom considers that the BBC has reached an appropriate decision, it will consider whether the imposition by Ofcom of a sanction against the BBC may be appropriate.
- A1.24 Ofcom may ask the BBC for information to assist our consideration of the matter(s), and/or – in cases relating to the output of a broadcast service or on-demand service – recordings of the relevant output/programme(s), which must be provided within five working days<sup>38</sup>. At this stage we will not normally request that the BBC provides written representations.
- A1.25 Based on an initial assessment of the complaint, the BBC's final response to the complaint under its own procedures, and any other relevant material/evidence from the BBC, Ofcom will consider whether there may have been a breach of a relevant requirement(s) that Ofcom considers requires further investigation.
- A1.26 Where, following the initial assessment, Ofcom decides not to investigate further, Ofcom will normally notify the complainant of its decision. If Ofcom has contacted the BBC for information or recordings to assist in the assessment of the issue or complaint, Ofcom will notify the BBC of its decision not to pursue the matter. Ofcom will also normally publish details of its decision not to investigate in a table in its Broadcast and On Demand Bulletin. However, there may be some cases where Ofcom considers it would be inappropriate to publicise the matter, for example because the issues raised are particularly sensitive and/or publicity could have a detrimental impact on third parties (although there may be exceptional cases where we do publish in such circumstances, such as where there is a high level of public interest in the matter complained of).
- A1.27 Ofcom may also conclude at the assessment stage that a complaint did raise a potentially substantive issue in relation to a relevant requirement(s) but that on Ofcom's assessment, the issue was appropriately dealt with by the BBC and does not require a separate investigation by Ofcom. Ofcom will notify the complainant of this outcome through publication in the Broadcast and On Demand Bulletin.
- A1.28 Ofcom usually aims to complete an initial assessment of all complaints within 15 working days.

### **Investigating possible breaches and preparation of Ofcom's Preliminary View**

- A1.29 Where, following Ofcom's initial assessment, Ofcom decides to open an investigation into the BBC's compliance with a particular relevant requirement,

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<sup>38</sup> Under the Agreement, the BBC must comply with any request to produce recordings of programmes and any related material to Ofcom.

Ofcom will generally inform the BBC and any complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation (i.e. the particular relevant requirement(s) which Ofcom considers are relevant and applicable to the complaint(s) or matters concerned. Ofcom will also indicate to the BBC in this letter if it considers that it is appropriate to offer the broadcaster the opportunity to make oral representations in a particular case in accordance with paragraph A1.40 below.

- A1.30 Shortly after sending the case opening letter(s), Ofcom will normally publish details of issues under investigation in a table in its Broadcast and On Demand Bulletin. However, there may be some cases where Ofcom considers that it would be inappropriate to publicise the matter at this stage, for example because the issues raised are particularly sensitive and/or publicity could have a detrimental impact on third parties (although there may be exceptional cases where we do publish in such circumstances, such as where there is a high level of public interest in the matter complained of). In such cases, Ofcom may delay publicising the investigation until after Ofcom has completed its consideration of the BBC's compliance with a relevant requirement or may decide not to publicise such cases at all.
- A1.31 Other than in cases falling within paragraph A1.32 below, when Ofcom sends the broadcaster the case opening letter, Ofcom will invite the BBC to make representations in response (and to provide any relevant material/evidence in support) within 10 working days.
- A1.32 If in any case Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that Preliminary View.
- A1.33 There may be specific cases where the matter(s) in issue, on the facts, mean that Ofcom does not consider it necessary to seek representations or any further information from the BBC at this stage. This will normally be where the question of whether there is a breach of a relevant requirement is a matter of objective fact. There may also be other specific cases where the matter(s) in issue, on the facts, mean this approach is appropriate. In these cases, Ofcom will not usually seek the BBC's representations at this stage. Instead, Ofcom will write to the BBC with its Preliminary View on the substance of the matter(s).
- A1.34 Ofcom aims to complete those cases that it takes forward for investigation usually within 50 working days.

### **Representations from third parties**

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and determination of a complaint(s) and who may have interests independent of the BBC. Wherever possible, the BBC should seek to take account of and include the representations of such persons/bodies in its submissions in response to a complaint and confirm to Ofcom that it has done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in respect of a complaint which Ofcom proceeds to investigate. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation of a complaint as possible, setting out if/to what extent their representations differ from those of the BBC. Ofcom will, as appropriate, take

those representations into account and include those persons/bodies in its decision-making process under these Procedures.

## Preparation of Ofcom's Preliminary View

- A1.35 Ofcom will prepare its Preliminary View on the substance of the possible breach of the relevant requirement(s).
- A1.36 Where Ofcom considers in a particular case that it would be appropriate in order to reach its Preliminary View, Ofcom will provide a draft Preliminary View to a panel of Ofcom's Content Board members<sup>39</sup> for their advisory opinion. The decision to issue a Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation.
- A1.37 The Preliminary View will contain:
- a) a summary of the matter;
  - b) a summary, if relevant, of the material parts of the programme/broadcast to which the matter and/or any complaint(s) relates;
  - c) the particular relevant requirements that Ofcom considers are applicable to the matter/complaint(s); and
  - d) Ofcom's preliminary assessment of whether any breach(es) of those requirements have occurred and the reasons for that assessment.
- A1.38 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the BBC (and any relevant third party).
- A1.39 The BBC (and any relevant third party) will have the opportunity to make written representations on Ofcom's Preliminary View. The period for written representations will normally be 10 working days.
- A1.40 Ofcom considers that it will normally be able to reach its final Decision fairly and properly following written representations and without oral representations from the BBC. However, there may be some cases where, in view of the nature of the breach under consideration and the complexity of the issues raised, Ofcom considers it appropriate to give the BBC the opportunity to make its representations orally to Ofcom, following the submission of any written representations to Ofcom. Ofcom will inform the BBC if it considers that it is appropriate to offer the broadcaster the opportunity to make oral representations in a particular case.
- A1.41 In any event, the BBC may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised.

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<sup>39</sup> The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>.



## The Final Decision

- A1.42 Once Ofcom has received and considered the BBC's representations on its Preliminary View (if any) and/or any representations from a relevant third party, it will reach its final decision (i.e. whether or not to record a breach of a relevant requirement(s)) ("the Decision") and inform the BBC.
- A1.43 Where a panel of Content Board members has reviewed in the draft Preliminary View in a particular case, generally the draft decision in that case would be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken.
- A1.44 The final decision will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

## Publication of the Decision

- A1.45 Where Ofcom has found that the BBC has breached a relevant requirement(s), Ofcom will publish its Decision in Ofcom's Broadcast and On Demand Bulletin<sup>40</sup> and/or in the relevant broadcast licensing section of the website. Ofcom will normally publish all breach and resolved Decisions, even where Ofcom has not previously publicised details of the matters under investigation in accordance with paragraph A1.29 above.
- A1.46 Ofcom will provide the BBC for information only with an embargoed copy of the Decision one working day before publication.
- A1.47 Ofcom will also normally publish information in its Broadcast and On Demand Bulletin about Decisions in which it has found that the BBC has not breached a relevant requirement. However, where Ofcom has not published details of an issue under investigation, Ofcom would not normally publish a "not in breach" decision at the conclusion of the investigation.

## Non-Disclosure

- A1.48 It is an essential part of the integrity of Ofcom's processes and its ability to regulate that all parties concerned abide by Ofcom's published rules and procedures, including those relating to non-disclosure below.

### Non-Disclosure

Parties to a complaint (complainants, the BBC, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation.<sup>41</sup>

<sup>40</sup> <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

<sup>41</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information regulations

Failure to follow this requirement may result in Ofcom ceasing to consider the party's representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation.<sup>42</sup>

## Time limits

A1.49 Complainants and the BBC should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or the BBC seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

## Sanctions

A1.50 In accordance with the BBC Charter, Ofcom may impose a financial penalty on the BBC, direct the BBC, or accept undertakings from the BBC, to take such other steps as it considers appropriate in the circumstances of the case.

A1.51 Accordingly, where Ofcom determines that there has been a breach (or breaches) of a relevant requirement, Ofcom may determine that it justifies consideration of a sanction against the BBC. Ofcom will make such a determination clear in its Decision and the Procedures set out below will apply.

## Decision making

A1.52 In accordance with the BBC Charter, Ofcom will not impose a sanction on the BBC unless it has given the BBC a reasonable opportunity of making representations about the matters appearing to Ofcom to provide grounds for the imposition of the sanction.

A1.53 Decisions on sanction under these Procedures will be made (and where relevant, preliminary views taken) by one or two (depending on the nature of the breach) senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board, one of whom will be the final decision maker on the breach of a relevant requirement.

A1.54 A decision maker in a sanctions case will not have been involved in the investigation of the breach of the relevant requirement, up to and including the preparation of the Preliminary View on the breach.

A1.55 When Ofcom writes to the broadcaster in accordance with paragraph A1.56 below, it will identify the decision maker(s).

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2004). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

<sup>42</sup> Ofcom may (in investigating and publishing its decision) withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

## Consideration of sanctions

- A1.56 Ofcom aims to conclude the consideration of the imposition of a sanction within 60 working days from the date Ofcom records the breach(es) of a relevant requirement(s). However, the circumstances of individual cases can vary considerably and completion may in some cases take longer.
- A1.57 If Ofcom consider that a sanction may be appropriate, it will write to the BBC with the following information, as appropriate:
- a) details of the breach(es);
  - b) comments on any issue raised by the BBC that is material to the case;
  - c) details of any relevant BBC cases on which Ofcom has already adjudicated;
  - d) details of the BBC's recent compliance history;
  - e) details of Ofcom's preliminary view that a sanction may be appropriate;
  - f) details of Ofcom's preliminary view on the type and level of any sanction considered to be appropriate and proportionate;
  - g) a summary of the material on which it has relied in reaching its preliminary view; and
  - h) a copy of the relevant documentation<sup>43</sup> that Ofcom has taken into account.
- A1.58 Where, at this stage, Ofcom's Preliminary View is that the appropriate sanction should include a financial penalty, it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf).
- A1.59 Ofcom will invite the BBC to make representations on its Preliminary View that a sanction may be appropriate and of the type and level of any sanction being considered. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate (see paragraphs A1.59 to A1.61 below).

## BBC representations

- A1.60 When invited to make written representations on Ofcom's Preliminary View that a sanction may be appropriate and on the type and level of any sanction being considered, the BBC should respond in full within 15 working days, unless otherwise specified. In some circumstances, Ofcom may, if it considers appropriate, seek further information or representations from the BBC.<sup>44</sup>

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<sup>43</sup> Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

<sup>44</sup> Under Article 47 of the BBC Charter, Ofcom may require the BBC and any other person to provide information for the purposes of the carrying out by Ofcom of their functions. We are considering whether we require further guidelines on our information gathering powers generally and this will include a consideration of whether we require such guidelines for third parties.

## Oral representations

- A1.61 If Ofcom considers that, in addition to making written representations, it is necessary to invite the BBC to make oral representations in order to ensure that Ofcom can fairly and properly determine whether to impose a sanction, and the appropriate and proportionate level of any sanction, it will invite the BBC to make such representations. Ofcom will normally give the BBC at least 15 working days' notice of the date for making such representations. The hearing of oral representations will be in private and may take place in any UK nation, as appropriate.
- A1.62 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the BBC in advance of the date of the hearing, to set out the procedure to be followed on the day.

## Disposal

- A1.63 After consideration of written and/or oral representations from the BBC, Ofcom may decide that no sanction is appropriate in a particular case. The BBC will then receive written notification to this effect and notification will be published in Ofcom's Broadcast and On Demand Bulletin.

## Sanctions decision

- A1.64 If, after considering all the evidence and representations from the BBC, Ofcom believes that a sanction is appropriate, it shall consider and decide which of the available sanctions is appropriate. If Ofcom decides that the sanction should include a financial penalty, it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at:  
[https://www.ofcom.org.uk/data/assets/pdf\\_file/0032/49685/penalty\\_guidelines\\_2015.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0032/49685/penalty_guidelines_2015.pdf).

## Publication of Sanction Decision

- A1.65 The Sanction Decision will be sent to the BBC 24 hours before its publication on a confidential and embargoed basis. Where the sanction includes a financial penalty, the level of the penalty will be omitted. The BBC will be notified of the level of any financial penalty immediately before the publication of the decision.
- A1.66 Ofcom will publish its decision on its website. A summary of the Sanction Decision will normally be published in Ofcom's Broadcast and On Demand Bulletin at:  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>.

## Non Disclosure

- A1.67 It is essential to the integrity of Ofcom's processes and its ability to regulate fairly that all parties abide by Ofcom's published rules and procedures, including those relating to non disclosure below<sup>45</sup>.

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<sup>45</sup> Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Information provided to Ofcom may need to be disclosed by Ofcom in order to meet such obligations.

### **Non Disclosure**

Ofcom expects the BBC to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already in the public domain. In particular, Ofcom expects the BBC to keep strictly confidential any information provided to it by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction that may be imposed<sup>46</sup>.

This does not limit what Ofcom can publish in its decision at the end of the investigation.

### **Time limits**

A1.68 The BBC should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to make decisions relating to sanctions) to amend or adapt the time limits in a particular case. If the BBC requires an extension to a time limit it should explain in writing to Ofcom why it believes the relevant time limit should be extended.

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<sup>46</sup> Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the BBC will be notified that relevant material has been withheld and the reasons why.

## Annex 2

# Responding to this consultation

## How to respond

- A2.1 Ofcom would like to receive views and comments on the issues raised in this document, **by 5pm on Monday 6 March 2017**.
- A2.2 We strongly prefer to receive responses via the online form at <https://www.ofcom.org.uk/consultations-and-statements/category-2/enforcement-bbc-agreement-compliance>. We also provide a cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>) for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A2.3 If your response is a large file, or has supporting charts, tables or other data, please email it to [BBCenforcement.Requirement@ofcom.org.uk](mailto:BBCenforcement.Requirement@ofcom.org.uk), as an attachment in Microsoft Word format, together with the cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>). This email address is for this consultation only, and will not be valid after April 2017
- A2.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Alex Pascoe  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A2.5 If you would like to submit your response in an alternative format (e.g. a video or audio file), please contact Alex Pascoe on 020 7981 3000.
- A2.6 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.
- A2.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A2.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A2.9 If you want to discuss the issues and questions raised in this consultation, please contact Alex Pascoe on 020 7981 3000.

## Confidentiality

- A2.10 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.

- A2.11 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.
- A2.12 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.
- A2.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <http://www.ofcom.org.uk/terms-of-use/>

## Next steps

- A2.14 Following this consultation period, Ofcom plans to publish a statement before the end of March 2017.
- A2.15 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <http://www.ofcom.org.uk/email-updates/>

## Ofcom's consultation processes

- A2.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 3.
- A2.17 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.

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 3

# Ofcom's consultation principles

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

### Before the consultation

A3.1 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

A3.2 We will be clear about whom we are consulting, why, on what questions and for how long.

A3.3 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.

A3.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.

A3.5 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.

A3.6 If we are not able to follow any of these seven principles, we will explain why.

### After the consultation

A3.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.



## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

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

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

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

### DECLARATION

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

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

Name

Signed (if hard copy)

## Annex 4

# Consultation question

A4.1 Please respond to the following:

*What are your views on Ofcom's proposed "Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action"?*

*Please provide reasons for your views.*