
BritBox materiality assessment

Relationship between BritBox and the BBC's Public Service activities

PROVISIONAL DECISION:

Publication Date: 19 July 2019

Closing Date for Responses: 12 August 2019

1. Overview

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

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

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

What we are minded to conclude – in brief

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

We are therefore minded to decide that there is not a material change to the BBC's commercial activities. If we decide to confirm this decision, it would mean that the BBC could proceed with its involvement in BritBox without a further assessment under the Charter.

We intend to publish our final decision by early September. We are inviting views on our assessment by 12 August.

This overview is a simplified, high-level summary only; further detail is set out in the remainder of this document.

BritBox materiality assessment

The BritBox proposition

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

Regulatory background

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

¹ The BBC has undertaken a public interest test on its proposals to have content on BBC iPlayer for longer (e.g. 12 months as standard). We recently consulted on our provisional determination that the BBC may proceed with these changes, subject to certain conditions and guidance. See

https://www.ofcom.org.uk/data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf.

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

³ References to the 'Public Service' in the rest of this document should be read as references to BBC's UK Public Services, trading activities and non-service activities.

- 1.6 To ensure that there is no unfair advantage or market distortion due to the relationship between the commercial activities and the Public Service, Ofcom has put in place Trading and Separation requirements to regulate the boundary.⁴ These requirements address our competition concerns around: ensuring there are no inappropriate flows of information between the Public Service and the commercial subsidiaries; regulating the pricing of goods and services sold across the boundary; and ensuring that each commercial line of business earns a commercial rate of return.
- 1.7 Under the Agreement,⁵ the BBC must be satisfied that its commercial activities meet the commercial criteria, which are that they:
- a) fit with the Mission and Public Purposes;⁶
 - b) are commercially efficient;
 - c) do not jeopardise the good reputation of the BBC or the value of the BBC brand; and
 - d) do not distort the market or create an unfair competitive advantage as a result of the relationship between the commercial activity and the Public Service.⁷
- 1.8 If the BBC makes a change to its commercial activities, it must assess whether the change is material. If the BBC considers that it is material, it must carry out and publish a commercial test to satisfy itself that the new or changed commercial activity meets the commercial criteria set out in paragraph 1.7.⁸ We would then conduct a trading and separation assessment to decide whether the BBC could carry out the proposed change.⁹ If we disagree with the BBC's assessment that a particular change is not material, we can require it to carry out a commercial test.¹⁰
- 1.9 Assessing whether a change is material involves consideration of:
- a) whether it is a new activity or a significant change to the BBC's commercial arm; and
 - b) whether there is a significant risk that the change may distort the market or create an unfair competitive advantage as a result of the relationship of the activity with the Public Service.¹¹

⁴ Ofcom, The BBC's commercial and trading activities: requirements and guidance. See

https://www.ofcom.org.uk/_data/assets/pdf_file/0018/136071/BBC-commercial-trading-updated-requirements.pdf.

⁵ The "Agreement" we refer to in this document is 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>.

⁶ The Mission of the BBC is to act in the public interest, serving all audiences through the provision of impartial, high quality and distinctive output and services which inform, educate and entertain. The Public Purposes of the BBC are a) to provide impartial news and information to help people understand and engage with the world around them; b) to support learning for people of all ages; c) to show the most creative, highest quality and distinctive output and services; d) to reflect, represent and serve the diverse communities of all of the UK's nations and regions and, in doing so, support the creative economy across the UK; and e) to reflect the UK, its culture and values to the world.

⁷ Clause 23(5) of the Agreement.

⁸ Clause 24 of the Agreement.

⁹ Clauses 26 and 27 of the Agreement.

¹⁰ Clause 25(6) of the Agreement.

¹¹ Clause 23(14) of the Agreement.

- 1.10 In considering the effects of a change we think it is appropriate to take into account the presence of existing regulation. This includes our Trading and Separation requirements and the requirement set out in Schedule 3(7) of the Agreement that Public Service commissioning should follow a transparent contestable process between producers on fair, reasonable and non-discriminatory terms.¹²
- 1.11 The BBC assessed its intended involvement in the new BritBox SVOD service and acknowledged that, as its *“first involvement in a UK venture into long-form SVOD provision”*, it would be a new commercial activity.¹³ However, it concluded that it would not be a material change as it did not carry a significant risk that it would distort the market or create an unfair competitive advantage as a result of its relationship with the Public Service.
- 1.12 In light of the particular nature of the proposed changes to the BBC Public Service’s *“programme release policy”*, which controls the way content commissioned by the BBC for the Public Service is made available for commercial exploitation, we consider it is appropriate to publish our minded-to decision on materiality for comment.

Our assessment

- 1.13 We have been in discussion with ITV and the BBC prior to the announcement of BritBox in order to understand their plans.
- 1.14 Our assessment of the BBC’s involvement in the BritBox service takes into account: the BBC’s own consideration of materiality, which includes a description of the changes that it is planning to make to the Public Service’s programme release policy; the Memorandum of Understanding (MoU) it has agreed with ITV; and our meetings with the parties.
- 1.15 We agree with the BBC that its involvement in BritBox is a new commercial activity and have therefore focused on whether it could distort the market or create an unfair competitive advantage, as a result of the relationship with the Public Service.
- 1.16 The BBC is participating in BritBox principally through its commercial arm, by taking an initial 10% share of equity and with BBC Studios entering into a content supply agreement with BritBox. This involvement has the potential to give rise to concerns about:
- a) information sharing between the Public Service and the BBC’s commercial subsidiaries or the new BritBox service;
 - b) the prices that BritBox or BBC Studios pay the Public Service for inputs that they use (such as the programme rights it holds, the use of the BBC brand etc); and
 - c) the Public Service favouring BBC Studios (or ITV Studios) in its commissioning process to secure content for BritBox.

¹² Ofcom, Commissioning for the BBC Public Services: A statement of Ofcom’s approach to assessing the BBC’s compliance with its requirements. See https://www.ofcom.org.uk/data/assets/pdf_file/0024/134349/statement-bbc-commissioning-public-services.pdf.

¹³ The BBC’s assessment of materiality.

- 1.17 We consider that our Trading and Separation requirements already adequately address issues which may arise under concerns a) and b), and that commissioning requirements in Schedule 3(7) of the Agreement already adequately address issues that may arise under concern c).
- 1.18 We have two potential concerns that may not be addressed through our current regulation. These relate to the changes the BBC is planning to make to the Public Service's programme release policy and any Public Service cross-promotion of the BritBox service and/or programmes. We discuss these separately below.

Public Service programme release policy

- 1.19 The BBC is proposing making changes to the Public Service's programme release policy.¹⁴ This policy sets out the approach the Public Service takes to requests from producers to license programmes to other television and video on demand (VOD) services in the UK during the BBC's licence period.¹⁵
- 1.20 The BBC typically licenses content it commissions for five years, with an 18-month exclusivity period within the programme release policy. This means that this content can only be shown or made available on BBC Public Service channels or platforms during that 18 month period. Until recently, content has usually been available for 30 days on BBC iPlayer after transmission on linear TV, followed by a 17 month period where the content is not shown anywhere (aside from repeats on linear TV which generally lead to another 30 day catch-up period on BBC iPlayer).
- 1.21 The programme release policy currently states that the BBC will usually permit programmes to be exploited through commercial SVOD services 18 months after the first linear transmission of the last episode. However, the BBC has explained in its assessment that there are exceptions which have developed in direct response to changes in the market. These exceptions have included:
- a) co-productions (i.e. where another broadcaster or VOD provider has provided substantial investment in the creation of a programme);
 - b) standstill funding – where the BBC licence fee for future series has been held constant by the producer despite production costs increasing; and
 - c) secondary licensing where BBC public value has been maximised and the producer can secure an additional or earlier income stream.¹⁶
- 1.22 The BBC would like to make all programmes available on BBC iPlayer for a standard 12 months with some returning and non-returning series and archive programmes being on

¹⁴ The current policy can be found [on the BBC's website](#).

¹⁵ The programme release policy relates to when the BBC will consent to the release of the so-called secondary rights to a programme. A VOD service would still need to negotiate with the rights holder to agree suitable commercial terms on which to acquire that programme.

¹⁶ The BBC's assessment of materiality.

the service for longer.^{17 18} It has recently undertaken a public interest test on these proposed changes to BBC iPlayer¹⁹ and Ofcom has consulted on our provisional determination that the BBC may proceed with these changes, subject to certain conditions and guidance.²⁰

- 1.23 The BBC is proposing to make changes to the Public Service’s programme release policy to enable the release of BBC commissioned content to SVODs that meet certain qualifying criteria from months 12-18 of the current exclusivity window. As discussed above, the BBC generally grants consent to producers to licence this content to all SVOD services after 18 months. The BBC has estimated that this change may affect around [X] titles per year. The actual number will depend on the number of BBC titles that BritBox decides to licence.
- 1.24 It is expected that BritBox will qualify for early access to the BBC commissioned content under this change. We have considered whether this could: (i) represent an unfair advantage to the BritBox service; or (ii) create a market distortion, as a result of it having 6 months’ earlier access to the content than other (non-qualifying) services.

Why we consider there is not an unfair competitive advantage

- 1.25 The Public Service’s objectives in changing the programme release policy are to:
- a) support the BBC’s Mission and Public Purposes; and
 - b) protect the BBC’s investment in content.
- 1.26 The BBC has said that it will determine which services qualify for access to Public Service content within the 12-18 month window through a fair, reasonable and non-discriminatory process. It has identified a number of criteria (discussed below) that will be required to meet these objectives. The BBC has said that while it will require all the criteria to be met, *“compliance may be a matter of degree, and certain elements of the overall Programme Release Policy may be more or less important depending on the circumstances of the case.”*²¹
- 1.27 The BBC has said it will be open to proposals that meet its objectives. It wants to be satisfied that early release at 12 months will secure enhanced public value beyond that which is provided by the market when content is released at 18 months. The BBC intends to have a specific team which will assess any requests to become a qualifying service. The team will include senior group employees with no representation from its commercial subsidiaries.
- 1.28 The BBC’s qualifying criteria require the SVOD to:

¹⁷ Excluding live sport and topical news programmes.

¹⁸ The BBC’s proposals include making all programmes available on BBC iPlayer for 12 months after broadcast, with children’s programmes available for 5 years and some returning, non-returning and archive series typically available for an additional 12 months.

¹⁹ <https://www.bbc.co.uk/mediacentre/latestnews/2019/iplayer-ofcom-submission>.

²⁰ Ofcom, BBC iPlayer Competition Assessment: Consultation of Ofcom’s provisional determination https://www.ofcom.org.uk/data/assets/pdf_file/0020/152327/consultation-bbc-iplayer-provisional-determination.pdf.

²¹ The BBC’s assessment of materiality.

- a) *“operate under a corporate strategy designed specifically to invest in and support the UK creative industries and PSB ecology as a whole, and its core editorial strategy will be aimed at providing UK focused multi-genre content from UK content providers;*
- b) *carry prominent and approved BBC branding at a service and content level delivering the BBC greater attribution and control of its brand;*
- c) *provide the BBC with data based insight into the performance of BBC content on its service; and*
- d) *provide the BBC with a material degree of oversight in relation to the prominence, attribution, promotion, windowing and scheduling of BBC content on its service.”*

1.29 We consider the objectives of the changes to the programme release policy are appropriate for the BBC. The Charter sets out that the BBC’s objective is to fulfil its Mission and promote the Public Purposes.²² We consider that protecting the BBC’s investment in content can help to ensure that licence fee payers receive value for money and that the revenue the BBC receives from secondary content sales (which ultimately supports Public Service programming) is safeguarded.²³

1.30 In the context of the exploitation of content on commercial SVOD services, we also consider that criteria along the lines of those set out above are a justifiable means of achieving the objectives of the revised programme release policy.

1.31 Supporting the UK PSB ecology and production sector can contribute to the Mission and Public Purposes. For example, these require the BBC to provide high quality and distinctive output and take creative risks (purpose 3) and to support the creative economy across the UK (purpose 4). This is particularly important now given there are a number of challenges facing PSBs as a result of declining linear TV viewing and for commercial PSBs significant competition for advertising revenue from a wide-range of online video services (such as YouTube).²⁴ We therefore consider supporting British content focused SVODs will help to support the creative economy across the UK, particularly given the increase in SVOD revenues in recent years.²⁵

1.32 The provision of data back to the BBC on the performance of different programmes could provide insights to BBC commissioners to help promote the quality of future BBC content.²⁶

²² In 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>.

²³ By ‘secondary content sales’ we mean the sale of programme rights to other broadcasters or SVOD services outside of the original commission.

²⁴ Commercial PSBs’ total net advertising revenues declined by around 9% (£0.2bn) from 2016 to 2017. Online video advertising, of which commercial PSBs earned a share, increased by 25% (£0.2bn) over the same period. Source: Ofcom, 2018. [Media Nations 2018](#).

²⁵ Subscription revenue from these and other services generated £895m in the UK, which represented an annual growth rate of 35% in real terms. Source: Ampere Analysis / Zenith Media. Ofcom, 2018. Media Nations 2018, page 38.

²⁶ The MoU between the BBC and ITV limits access within the BBC to information on the performance of programmes on BritBox. It is provided to the BBC for the main purpose of improving Public Service programme commissioning. The MoU explicitly prohibits the provision of this data to BBC Studios or BBC Commercial where it could influence commercial decisions.

This could also support the Mission and Public Purposes, particularly in terms of providing creative, high quality and distinctive services (purpose 3).

- 1.33 We also consider it is reasonable for the BBC in this context to seek appropriate attribution and prominence of its content and a degree of control over the promotion, windowing and scheduling of this content. This could help consumers to find BBC content on services like BritBox and, along with content- and/or service-level branding, enable consumers to recognise that the BBC is responsible for the content they enjoy watching, improving the perceived value and future resilience of the BBC. Oversight over how BBC content is presented and when it is available on an SVOD (akin to the windowing and scheduling of content in linear TV) could help to further improve the perception of the BBC. For example, it could help the BBC to provide a steady flow of new content to ensure subscribers continue to watch the BBC commissioned content and that it can be seen by audiences in appropriate contexts (such as when related events are happening). In addition, it allows for better phasing of content between linear, broadcaster VOD services and BritBox, which may help to keep the content fresh and retain its value. We therefore consider these criteria should support both the Mission and Public Purposes and the BBC's investment in content.
- 1.34 We also consider it is important that the BBC is open to releasing content early to any service which can deliver against the policy's broader objectives. The programme release policy should clearly set out that the criteria are not a rigid set of rules and that the BBC is willing to consider alternative proposals which also further these objectives. To illustrate, where there is clear content-level BBC branding and where providing early access to BBC-commissioned content would support the Public Purposes (e.g. by reaching new audiences and thus better meeting the needs of the UK's diverse communities), it may be reasonable for the BBC to release content to an SVOD that does not have service-level BBC branding. It is also important that the BBC has in place a clear fair, reasonable and non-discriminatory process for assessing applications to become a qualifying service, which includes a process for assessing any complaints.
- 1.35 If the revised programme release policy is applied in a fair, reasonable and non-discriminatory way with clear complaint procedures, we do not consider this would result in an unfair competitive advantage as a result of the relationship between the Public Service and BritBox as other services meeting the same criteria would also be in the same position.
- 1.36 As the BBC has not yet finalised the changes to the programme release policy and the parties are still negotiating long-form agreements, we will continue to engage with the BBC to ensure that the changes to the programme release policy are implemented in a fair, reasonable and non-discriminatory way.

Why we consider there is not an appreciable market distortion

1.37 We have also assessed whether the changes to the programme release policy may give BritBox (and other qualifying services) a competitive advantage that distorts the market.²⁷ This may arise if:

- a) this content is sufficiently attractive that early access will give BritBox an appreciable competitive advantage against other VOD services;
- b) the early release of this content to BritBox diminishes its subsequent attractiveness to other SVOD services (who would struggle to qualify for early access) to such an extent that they are placed at an appreciable competitive disadvantage; and/or
- c) an absence of services competing to acquire this content after month 12 means that BritBox is able to purchase the early access content for a low price.

1.38 In terms of the first of these potential concerns, we consider BritBox is unlikely to have an appreciable competitive advantage against other VOD services as a result of the changes to the programme release policy as:

- a) Content released early under the programme release policy is likely to account for a relatively small proportion of the content available on BritBox. As part of a library of thousands of hours [redacted] of content from major UK broadcasters, only a small proportion [redacted]²⁸ of the total BBC commissioned content is likely to be available on BritBox as a result of the changes to this policy;
- b) A significant proportion of consumers currently subscribe to multiple SVOD services, so a household taking a subscription to BritBox does not necessarily mean that it will discontinue its subscription to, for example, Netflix;²⁹
- c) [redacted];³⁰ and
- d) BritBox intends to position itself as a different proposition to existing SVOD services. In terms of those services, recent survey evidence suggests that UK SVOD consumption is largely driven by US TV series and original content.³¹ Therefore BBC content released early under the programme release policy is unlikely to have an appreciable effect on the competitiveness of BritBox against those other SVOD services.

1.39 In terms of the second of the potential concerns, this might arise if content affected by the change to the programme release policy was important to other VOD services. This is not the case, as reflected in the three main SVOD libraries, with UK PSB content accounting for

²⁷ In conducting this assessment, our focus is on the impact of the programme release policy (in order to understand the market impact of the relationship with the Public Service). We have not evaluated the prospects of the BritBox venture more generally.

²⁸ [redacted].

²⁹ In the UK, households have on average 1.5 subscriptions per SVOD household, according to Ampere Analysis, May 2019. [*The UK VoD market: Current status and future developments.*](#)

³⁰ [redacted].

³¹ For example, nine out of the top ten programmes viewed on SVOD services in the UK were US made. GfK SVOD Tracker, Q3 2018, Netflix and Amazon Prime Video.

only a small share of the total content.³² Similarly the main PSB VOD services (All 4, My5) use content from their parent broadcaster rather than BBC commissioned content. This suggests that other VOD services are unlikely to be placed at an appreciable competitive disadvantage by the change to the programme release policy.

- 1.40 Our third concern relates to whether BritBox is able to negotiate a low price during the 12-18 month window, when it may be the only SVOD able to license the content from producers. However, the impact on rights prices may be limited as producers have the option of waiting until month 18, when other services that do not qualify for early release are also able to bid. Waiting may be a credible strategy for producers as a delay of just six months is unlikely to further reduce the ‘freshness’ of their content by much given that, if the BBC’s proposals for changes to BBC iPlayer are approved and implemented, it will already have been available on BBC iPlayer for 12 months.³³
- 1.41 For the reasons set out above, we do not consider there is likely to be an appreciable market distortion as a result of the change to the programme release policy.

Public Service cross-promotion

- 1.42 The BBC has agreed in the MoU to cross-promote BritBox within its existing regulatory and legal framework as appropriate, although we understand that the BBC and ITV have not yet agreed how they will do this.³⁴
- 1.43 We are engaging further with the BBC to understand how the Public Service might cross-promote BritBox. We will consider whether further regulation is required once we have seen if and how the BBC cross-promotes BritBox in practice.

Our minded-to decision

- 1.44 We have provisionally determined that the BBC’s involvement in the BritBox service is not a material change to its commercial activities. In reaching this provisional determination, we have relied on what the BBC has told us about its plans to change the programme release policy. In particular that any application from an SVOD to qualify for access to the BBC content from 12-18 months will be assessed using fair, reasonable and non-discriminatory criteria and considered in the round against the policy’s objectives.
- 1.45 In order to address any concerns which may arise in relation to information sharing, or the prices paid to the Public Service, we will continue to monitor the BBC’s compliance with our Trading and Separation requirements and guidance. We will also continue to monitor compliance with commissioning requirements to address any concerns which may arise in relation to the Public Service favouring BBC Studios (or ITV Studios) in its commissioning

³² UK PSB content share of the total UK library is the highest on Netflix, around 6% as at December 2018, according to Ampere Analysis. BBC content accounted for around 4% of all content hours on Netflix, 1.2% on Amazon Prime Video and 1.3% on Now TV.

³³ Further, the small proportion of Briton’s content affected by the change to the programme release policy (see paragraph 1.38(a)) and the [3<] (see paragraph 1.38(c)) also suggest it will not enjoy a large competitive advantage.

³⁴ MoU, paragraph 3.3.

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

Next steps and stakeholders

- 1.46 Stakeholders are invited to comment on the contents of our assessment by sending submissions to Claire.Local@ofcom.org.uk and Harriet.Taylor@ofcom.org.uk. The deadline for comments is 12 August. We intend to publish our final view by early September.