

BT Consultation response to Ofcom Consultations ‘Assessing the impact of the BBC’s public service activities’ and ‘Assessing the impact of proposed changes to the BBC’s public service activities’.

Note: BT is making a single submission to the two Ofcom consultations which pertain to the BBC’s public service activities.

1. As a shareholder alongside the BBC in YouView, BT has had the opportunity to observe current non-service governance processes and the wider political and competitive context around the free-to-air (FTA) Joint Ventures (JVs) at close quarters. In this submission we highlight a number of problems with the previous governance regime which Ofcom now has the opportunity to address in the detailed design of its new approach. We also have some significant concerns relating to Ofcom’s introduction of the BBC Competition Review (BCR) framework for existing Public Services and non-services.
2. BT recognises that the fundamental reform to install Ofcom as the BBC’s regulator does create the potential for resolving these previous governance issues leading to greater efficiency. We also welcome Ofcom’s direct engagement with BT as an important stakeholder in YouView. However, there is insufficient detail in Ofcom’s consultation documents to give BT comfort that the previous deficiencies of governance will be properly addressed by the new regime.
3. In particular, we urge Ofcom to make a clear statement on the circumstances which would trigger a BCR or when changes to Public Services and non-services are likely to be referred to Ofcom, rather than remaining within the sole purview of the Unitary Board. We understand Ofcom’s desire to avoid creating disincentives for BBC Management by setting out Materiality Thresholds or BCR triggers too prescriptively, but believe that any referral or trigger framework which is not based on exhaustive, objective and quantifiable criteria and, instead, relies on more subjective considerations will fail to give the necessary clarity to stakeholders and the wider market and will be open to gaming by both the BBC and third-parties.
4. Ofcom’s new provision for BBC Competition Reviews of existing services raises profound concerns for BT. In our recent discussion with Ofcom Executives (01/11/16) concerning the governance of changes to Public Services and non-services, we received reassurance that Ofcom does not intend to dictate how shareholders in the FTA JVs should operate. However, this reassurance is not formalised in these consultation documents and nor is it explained how this will practically be delivered. Overall, BT considers that there is a need for greater clarity around how the BCR process applies in the context of JVs with a commercial partner which is not subject to the BBC’s regulatory regime.
5. We would also highlight that, without these issues being addressed in Ofcom guidance, the uncertainty of a future BCR is likely to have an overall negative impact on the BBC’s attractiveness as a partner and the conflict that this poses with the Government’s wider partnership agenda, much discussed in the Charter Review process. It will be increasingly difficult for external parties to invest in ventures with the BBC if there is a risk of intervention or regulatory blockage, not just in the approvals stages, but at any point thereafter. Ofcom needs to consider how it can shape the BCR process to give any future BBC partners appropriate certainty and security.

6. BT is also concerned about the implications of Ofcom's proposals not to accept blanket confidentiality requirements from third-parties and to publish any BBC Public Interest Test (PIT) application or BCR evidence more fully than in previous Public Value Test (PVT) processes. BT expects that Ofcom will continue to adopt its customary regulatory practice of only seeking information from the BBC that is necessary to an investigation, rather than all information that the BBC may hold. Given that, in the case of BT, the BBC will be in possession of commercially confidential information from the operation of the YouView JV, BT is concerned that Ofcom's powers to request commercial information is subject to normal regulatory processes.
7. In addition, BT recognises the need for Ofcom to be able to disclose enough detail to conduct meaningful consultation processes; however this should not be at the expense of disclosure of third party commercially sensitive confidential information. This would apply not only to commercially sensitive information relating to BT directly, but equally to sensitive information that the YouView JV itself has developed. Given the adverse impact on competition disclosure of either such information could have on BT's legitimate business interests, BT requests Ofcom provides reassurance to third parties on the protection of commercially sensitive information disclosed by the BBC in the course of the development of a PIT application. In short, BT is seeking reassurance from Ofcom that its business secrets (including those developed by YouView itself) will not be exposed as a result of these processes – and that the BBC cannot “override” a claim of commercial confidentiality from BT or any other third party.
8. Conclusion: In BT's November 2016 meeting with Ofcom Executives, it was acknowledged that the frameworks set out in these consultation documents were necessarily high-level in the first instance as Ofcom has not yet had the opportunity to work through the scenarios on the potential implications for the very different BBC activities they will cover, including non-services. Given the materiality of these proposals for BT's business and shareholders, we would like further information on the process via which Ofcom intends to develop the necessary detail and what opportunity BT will have to protect its interests, ahead of the finalisation of your guidance. We are happy to participate in further face-to-face discussions of these issues if helpful to that process. In particular, we would like to understand:
 - i. What the discretion for Ofcom to require the BBC to cease further development of a non-service under BCR until the review has reached a conclusion on its competitive impact, means practically?
 - ii. What Ofcom envisages it would instruct the BBC to do in the event that a BCR process identifies an unacceptable market impact arising from a non-service and how Ofcom would avoid damaging the BBC's partners interests in that process?
 - iii. How Ofcom plans to ensure that this process does not open up the BBC's FTA JV partners to 'gaming' on the part of competitors seeking to use the BCR process simply to frustrate the legitimate day-to-day activities of the JVs.
 - iv. How Ofcom plans to protect the commercial confidentiality of the JV partners in any BCR process.