

ITV plc response to Ofcom's consultation: Procedures for enforcement of BBC competition requirements

We have three points to raise in response to this consultation, both of which relate to the proposed procedures around how Ofcom decides whether to investigate.

Firstly, we note that Ofcom says that one of the factors that will determine whether or not they initiate an investigation is:

"The resource implications of conducting an investigation, for example what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected." (A1.28(c))

As we stated in relation to a similar point in the Ofcom consultation on assessing the impact of the BBC's public service activities, we appreciate that Ofcom has finite resources, and we also appreciate that if there are competing priorities for those resources then an investigation may be scheduled but put on hold until the appropriate resources are available. However, we would be surprised if Ofcom were to ignore genuine grounds for concern over a BBC breach of a competition requirement because staff were committed elsewhere at the time. Furthermore, we understand that Ofcom has secured substantial resources from the licence fee specifically for the purposes of regulating the BBC. We would appreciate any clarification from Ofcom that the availability of resource may impact the timing of an investigation, but not the decision to initiate one.

Secondly, we note that Ofcom also says that one of the factors that will determine whether or not they initiate an investigation is:

"b) the strategic significance of addressing the alleged conduct and whether we are best placed to act. For example:

- i) Whether an investigation would help clarify the regulatory or legal framework for stakeholders;*
- ii) Whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);*
- iii) Whether there are other alternative proceedings (for example, planned market reviews) that are likely to achieve the same ends, or deal with the same issues, as the potential investigation" (A1.28(b))*

Although we can appreciate point (iii), that if there is a separate concurrent proceeding that will address the same point, initiating a new investigation may not be necessary, we again would be surprised if Ofcom were to ignore genuine grounds for concern over the BBC breaching a competition requirement simply because that particular competition issue was not named as a strategic goal or priority for Ofcom that year. We would expect Ofcom to address potential breaches by the BBC of its competition requirements as a matter of BAU activity, where there are genuine grounds for concern.

Finally, we are concerned that Ofcom states that its decision to initiate an investigation into a breach of a competition issue will also be driven by whether or a complainant has made a complaint to the BBC in the first instance, and that complaints that have not been put to the BBC in the first instance will only be considered by Ofcom *'where there are exceptional circumstances for the complainant not doing so'* (A1.30(b))

As we raised in relation to Ofcom's consultation on assessing the impact of proposed changes to the BBC's public service activities, we are concerned with this general approach.

Of course, we do not object to the 'BBC First' or 'Broadcaster First' approach in the context of viewer complaints around standards, since it is right that individual viewers can take up their concerns directly with the relevant broadcaster in the first instance. However, it is a very different matter for Ofcom to suggest that the BBC's competitors should take up competition complaints with the BBC unless there are exceptional circumstances.

Of course, the BBC needs to ensure active compliance with the Charter, Agreement and relevant related obligations and this will require it to actively engage with the industry and with licence fee payers. However, it can't be right for Ofcom to suggest that it might not perform its role fully if stakeholders haven't, regardless of the reason, engaged on a particular issue with an organization that may be its closest commercial rival and/or key customer. In general, ITV would intend to engage with the BBC on concerns over competition issues where we can. However, it is perfectly possible that there will be good commercial or relationship reasons why we would not be comfortable taking up certain issues with the BBC instead of with Ofcom, or objections that could only be evidenced with commercially sensitive information.

We believe that Ofcom should be clear that while it expects the industry would wish to engage with the BBC where appropriate (and vice versa) this will not be a substitute for the proper discharge by Ofcom of its role.