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**Non-Confidential**

Melanie Everitt  
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24<sup>th</sup> September 2018

Dear Melanie

**Response to the Ofcom Consultation on The BBC's commercial and trading activities:  
Requirements and Guidance**

ITV welcomes this opportunity to respond to this Ofcom consultation.

In general we welcome much in the Ofcom consultation document and in particular the fact that Ofcom is proposing to address the rate of return issues more thoroughly and require considerably more information from the BBC, in that area. We can see the thought that has gone into the Ofcom proposals and appreciate the clarity of the process and the proposed new guidelines. It is vitally important that Ofcom does not dilute these proposals in the course of this consultation.

There are some outstanding points that we think Ofcom should address to ensure that the new framework delivers an effective regime for overseeing the BBC and we set these out below.

**Supply and Pricing of Goods and Services**

We are surprised and concerned at the proposal (para 3.30 in the Consultation document) by Ofcom to give equal weight to benchmarking as a way for the Public Service to identify a market-based price, rather than maintain the current hierarchy which requires the BBC to first consider an open market process. It is a very well established principle in EU State aid law that open market processes are far preferable to any other in establishing the right price for a state owned asset. This is hardly surprising given that that price is a real as

opposed to a theoretical one. Added to which, tenders are a good way of bringing additional transparency and competition to the way the BBC operates. We can see no reason for this change and the Ofcom consultation document does not appear to contain any persuasive reasoning.

In addition, whilst we recognize that there may be isolated incidents where using long run costs may be appropriate in transfer pricing (para 3.31 of the Consultation document) we believe that Ofcom should make sure that these are very much the exception. One way to help to ensure this would be to require the BBC to notify any use of that pricing methodology to Ofcom – we believe that Ofcom should insist on this. Furthermore, Ofcom should also provide more detail about how the BBC should determine what “*an appropriate contribution for reinvestment in Public Service activities*” actually is. We assume that this is another way of saying margin and Ofcom should be clear how it should be calculated.

### **Commercial Rate of Return**

We welcome Ofcom’s clarification (paras 4.15 and 4.16) that a commercial rate of return should be earned over an appropriate period of time. What is appropriate in this case must be rigorously compared to acceptable investment horizons in the UK commercial media sector. The BBC should be required to evidence the appropriateness of the periods it sets for achieving a commercial rate of return.

We also welcome Ofcom’s proposal to require action where a line of business is not likely to earn a commercial rate of return. This clearly makes sense. We think it would be appropriate for Ofcom to have the power to look carefully at changes the BBC proposes to make activity acceptably profitable. It is vital that such scrutiny considers the whole picture (particularly the history of the particular business) as well as the changes that are being proposed to restore it to profitability. It clearly wouldn’t be acceptable to keep revising business plans every few years in the hope that eventually profitability might arrive.

The only part of the proposed guidance that we didn’t understand was the proviso to the general rule that “*a non-commercial rate of return cannot be justified on the grounds of assisting the deliver of the BBC’s Mission and Public Purposes*” (para C11 of the proposed new guidance). The proviso reads:

*“However, in considering whether to (i) investigate a potential breach of Requirements C1 to C4, and (ii) impose a penalty in the event that a breach is found, we will take into consideration, among other factors set out in our Enforcement Procedures, any link between the Commercial Activity in question and the other activities carried out by the BBC which are subject to the regulatory regimes established by the Operating Framework”* (para C11 of the proposed new Guidance).

Put simply, we do not understand what that derogation means and the extent to which it might undermine the general principle of separation between commercial and public service activity. We are concerned that it might excuse underperformance of BBC Studios activity, provided it went with the grain of the BBC’s public purposes.

## **Monitoring, Reporting and Transparency**

We welcome the work that Ofcom has done to amend its requirements and guidelines around monitoring, reporting and transparency. Our only request would be to ensure that as much information as possible is made public so as to enable third parties to scrutinize the BBC's compliance with its obligations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Brooke', written in a cursive style.

**Magnus Brooke**  
**Director of Policy & Regulatory Affairs**