



# Procedures for enforcement of BBC competition requirements

A consultation on Ofcom's proposed procedures for enforcement of BBC competition requirements

Consultation

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## About this document

Under the new BBC Charter and Agreement, regulation of the BBC's activities will pass from the BBC Trust to Ofcom. Ofcom will regulate the BBC in accordance with the terms of the new Charter and the Agreement, and will prepare and publish an Operating Framework containing the provisions we consider appropriate to secure the effective regulation of the BBC.

Ofcom's regulation of the BBC will cover, amongst others, the impact of the BBC's activities on competition. Ofcom will set requirements as part of the Operating Framework to that effect. In addition, the BBC is also subject to certain competition-related requirements set out in the Agreement, some of which are enforceable by Ofcom. Together, we refer to the requirements in relation to competition which are enforceable by Ofcom as the "competition requirements".

In accordance with the new Charter and the Agreement, Ofcom must enforce compliance by the BBC with the competition requirements.

This consultation seeks views on the proposed procedures that Ofcom will normally follow when enforcing compliance by the BBC of competition requirements. 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

# Executive summary

- 1.1 On 15 December 2016, the Government published the new BBC Charter and Agreement 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. In particular, under the Charter, Ofcom has a duty to have regard to the desirability of protecting fair and effective competition in the UK. We must also have regard to the object of the BBC to fulfil its Mission and promote the Public Purposes, and the requirement for the BBC to comply with its duties under the Charter.<sup>1</sup>
- 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>2</sup>
- 1.4 Ofcom's regulation of the BBC will cover, amongst others, the impact of the BBC's activities on competition. Ofcom will set requirements as part of the Operating Framework to that effect.<sup>3</sup> In addition, the BBC is also subject to certain competition-related requirements set out in the Agreement, some of which are enforceable by Ofcom. Together, we refer to the requirements in relation to competition which are enforceable by Ofcom as the "competition requirements".
- 1.5 Specifically, the competition requirements include:
  - requirements which Ofcom considers appropriate to protect fair and effective competition in relation to the UK Public Services. These may include provisions which relate to the distribution of the UK Public Services and/or requirements which relate to the commissioning of programmes or material to be included in the UK Public Services<sup>4</sup>;
  - requirements which Ofcom considers 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>5</sup>

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<sup>1</sup> Charter, Article 45(1), (2)

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

<sup>3</sup> Charter, Article 46(5), Article 46(6)

<sup>4</sup> Agreement, Clause 15(4)

<sup>5</sup> Agreement, Clause 28(1)

- requirements which Ofcom consider appropriate to protect fair and effective competition in relation to non-service activities and trading activities;<sup>6</sup> and
- 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>7</sup>

1.6 On 15 December 2016, Ofcom published consultations setting out proposed requirements relating to the distribution of the UK Public Services, and the relationship between the BBC and its commercial subsidiaries.

## Enforcement of competition requirements

1.7 In accordance with the Charter, Ofcom must enforce compliance by the BBC with the competition requirements.<sup>8</sup>

1.8 If Ofcom is satisfied that the BBC has breached a competition requirement, then we may:

- 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 its requirements properly in future;<sup>9</sup> and/or
- require the BBC to pay a specified penalty.<sup>10</sup>

## Procedures for enforcement of competition requirements

1.9 The Charter provides that Ofcom must enforce compliance by the BBC of the competition requirements. In doing so we may consider complaints, and we may carry out investigations into such compliance as we consider appropriate.<sup>11</sup>

1.10 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 competition requirements.<sup>12</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.

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<sup>6</sup> Agreement, Clause 22(2), Clause 31(3). Non-service activities are defined in the Charter, Article 7(5) and trading activities are defined in the Charter, Article 7(7).

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

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

<sup>9</sup> Charter, Article 49(2)

<sup>10</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>11</sup> Charter, Article 49(1)

<sup>12</sup> Charter, Article 49(6); Agreement, Clause 5(4), Clause 57(1), Clause 58(2)

- 1.11 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;
  - c) If the BBC has failed to resolve a complaint within the timeframe set in its complaints handling procedures.<sup>13</sup>
- 1.12 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>14</sup>
- 1.13 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
  - 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>15</sup>
- 1.14 As regards investigations, the Agreement provides that Ofcom may carry out such investigations as we consider appropriate to determine compliance with a competition requirement, and that we must set and publish procedures for the carrying out of such investigations.<sup>16</sup>
- 1.15 As regards the imposition of sanctions, the Charter sets out the sanctions that Ofcom may impose if we are satisfied that the BBC has failed to comply with a competition 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>17</sup> and/or
  - b) require the BBC to pay a specified penalty.<sup>18</sup>

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<sup>13</sup> Agreement, Clause 57(1)

<sup>14</sup> Agreement, Clause 57(4)

<sup>15</sup> Agreement, Clause 57(4)

<sup>16</sup> Agreement, Clause 58(1), Clause 58(2)

<sup>17</sup> Charter, Article 49(2)

<sup>18</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))

- 1.16 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>19</sup>
- 1.17 We have proposed procedures for enforcement of the competition requirements in line with the above requirements of the Charter and the Agreement, and taking 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 competition 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 competition 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.

### What does this Consultation cover?

- 1.18 This Consultation sets out our proposed procedures for the enforcement of competition requirements and seeks comments on these procedures.
- 1.19 Annex 1 sets out our proposed procedures. Specifically, it sets out 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.
  - 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.
- 1.20 The procedures also describe the sanctions that Ofcom has the power to impose, and how we will impose them, in the event that we find that the BBC has failed to comply with a competition requirement.

### Other proposed BBC enforcement procedures

- 1.21 Ofcom is also consulting on the following proposed complaints handling, investigations and enforcement procedures:
- a) Procedures that Ofcom will normally follow for BBC UK public broadcasting services and on demand programme services when:
    - i. considering and investigating content standards issues under Ofcom's Broadcasting Code (the "Code");

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<sup>19</sup> Charter, Article 49(5)

- ii. considering and adjudicating Fairness and Privacy complaints under the Code; and
  - iii. considering the imposition of sanctions for breaches of the Code.
- b) Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action.

### **Next steps**

- 1.22 Stakeholders are invited to comment on these draft procedures. The deadline for responses is **Monday 6 March 2017**.
- 1.23 Following our review of stakeholder responses, we plan to issue final procedures by the end of March 2017. They will come into effect on the Effective Date contained in the Charter which is 3 April 2017.



## Annex 1

# Proposed procedures for enforcement of BBC competition requirements

## Section 1

### Background

- A1.1 Ofcom is the independent regulator of the BBC.<sup>20</sup> We must regulate the BBC in accordance with the Charter<sup>21</sup>, the Agreement<sup>22</sup>, the Communications Act 2003 (the “Act”) and Part 5 of the Broadcasting Act 1996.<sup>23</sup> We must prepare and publish an Operating Framework containing the provisions we consider appropriate to ensure the effective regulation of the BBC.<sup>24</sup>
- A1.2 In undertaking this role, Ofcom must have regard to its general duties under section 3 of the Act and to the specific requirements of the Charter and the Agreement. In particular, under the Charter, Ofcom has a duty in regulating the BBC to have regard to the desirability of promoting fair and effective competition in the UK. We must also have regard to the object of the BBC to fulfil its Mission and promote the Public Purposes, and the requirement for the BBC to comply with its duties under the Charter.<sup>25</sup>
- A1.3 Ofcom’s regulation of the BBC will cover, amongst others, the impact of the BBC’s activities on competition. Ofcom will set requirements as part of the Operating Framework to that effect.<sup>26</sup> In addition, the BBC is also subject to certain competition-related requirements set out in the Agreement, some of which are enforceable by Ofcom. Together, we refer to the requirements in relation to competition which are enforceable by Ofcom as the “competition requirements”.
- A1.4 Specifically, the competition requirements include:
- a) requirements which Ofcom considers appropriate to protect fair and effective competition in relation to the UK Public Services. These may include provisions which relate to the distribution of the UK Public Services and/or requirements which relate to the commissioning of programmes or material to be included in the UK Public Services<sup>27</sup>;
  - b) requirements which Ofcom considers appropriate to ensure that the BBC’s commercial activities do not, as a result of their relationship with UK Public

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<sup>20</sup> Charter, Article 44(1)

<sup>21</sup> Charter, Article 44(1); Agreement, Clause 5(1)

<sup>22</sup> Charter, Article 44(1); Agreement, Clause 5(1)

<sup>23</sup> Pursuant to section 198 of the Communications Act 2003

<sup>24</sup> Charter, Article 46(2); Agreement, Clause 5(1)

<sup>25</sup> Charter, Article 45(1), Article 45(2)

<sup>26</sup> Charter, Article 46(5), Article 46(6)

<sup>27</sup> Agreement, Clause 15(4). The UK Public Services are defined in the Charter, Article 7(3) and the Agreement, Clause 7(1) and Schedule 1, Part 1

Services, trading activities, or non-service activities, distort the market or gain an unfair competitive advantage;<sup>28</sup>

- c) requirements which Ofcom consider appropriate to protect fair and effective competition in relation to non-service activities and trading activities;<sup>29</sup> and
- d) 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>30</sup>

## Enforcement of competition requirements

- A1.5 In accordance with the Charter, Ofcom must enforce compliance by the BBC of competition requirements, and may consider complaints, and carry out investigations into such compliance as we consider appropriate.<sup>31</sup>
- A1.6 If Ofcom is satisfied that the BBC has breached a competition requirement, then 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>32</sup> and/or
  - b) require the BBC to pay a specified penalty.<sup>33</sup>

## Status of these Procedures

- A1.7 These Procedures set out how Ofcom will enforce compliance with the competition requirements by the BBC. Where we depart from the approach set out in these Procedures, we will be prepared to explain why.
- A1.8 These Procedures form part of the Operating Framework and will come into effect on the Effective Date contained in the Charter which is 3 April 2017.

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

<sup>29</sup> Agreement, Clause 22(2), Clause 31(3). Non-service activities are defined in the Charter, Article 7(5) and trading activities are defined in the Charter, Article 7(7)

<sup>30</sup> Agreement, Schedule 3, paragraph 7(2)

<sup>31</sup> Charter, Article 49(1)

<sup>32</sup> Charter, Article 49(2)

<sup>33</sup> Charter, Article 49(3)

## Section 2

# Opening an investigation

A1.9 Ofcom may consider opening an investigation to determine whether the BBC has breached a competition requirement in response to a complaint or on our own initiative.

## Complaints

A1.10 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>34</sup>.

A1.11 Ofcom may, in exceptional circumstances, intervene at any earlier stage to handle and resolve a relevant complaint which has not been resolved by the BBC. 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.

A1.12 Complaints should be submitted to [BBCCompetitionComplaints@ofcom.org.uk](mailto:BBCCompetitionComplaints@ofcom.org.uk)

A1.13 We expect stakeholders to make adequate, well-reasoned complaints backed up with evidence, including the information set out in Section 5.

A1.14 If a complaint contains confidential information, we will require the complainant to submit a non-confidential version of the complaint, in accordance with paragraph A1.53 of these Procedures, which can be shared with the BBC.

A1.15 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.

### Timeframe for making a complaint

A1.16 As stated in paragraph A1.10 above, we expect complainants to refer complaints to the BBC in the first instance. The BBC's deadline for resolution of complaints

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<sup>34</sup> Charter, Article 56(3); Agreement, Clause 57(1). The BBC's complaint handling procedures can be found at: <http://www.bbc.co.uk/complaints/>. Note: this link may change following publication of this document.

<sup>35</sup> <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>

regarding non-compliance with a competition requirement is set out in the BBC's complaints handling procedures<sup>36</sup> (the "BBC deadline").

- A1.17 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.
- A1.18 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.

## Own-initiative investigations

- A1.19 Ofcom may decide to open an investigation to determine whether the BBC has breached a competition requirement on its own initiative.<sup>37</sup> For example, Ofcom may consider opening such an investigation where routine monitoring by us gives rise to a concern about the BBC's compliance with a competition requirement or where we identify a concern through other areas of our work.

## Enquiry phase

- A1.20 Ofcom will generally first carry out an enquiry phase to establish whether it is appropriate to open an investigation to determine whether the BBC has complied with a competition requirement.<sup>38</sup> However, we may decide not to have an enquiry phase if we consider that we already have sufficient information to decide whether to open an investigation or not. In some cases, we may also not have an enquiry phase where there are reasons to proceed to an investigation more quickly.
- A1.21 We do not make a decision on whether or not there has been a breach of a requirement or the merits of a complaint during this phase of our assessment - the purpose of this phase is to decide whether we should commit our resources to an investigation of the relevant matters in all the circumstances, having considered all the relevant factors.
- A1.22 When we open an enquiry, we will normally provide the BBC, and the complainant, with contact details for the case leader. The case leader acts as the main point of contact during an enquiry and any subsequent investigation.
- A1.23 We will normally share a non-confidential version of the complaint with the BBC for comment. Ofcom will consider requests from complainants to remain anonymous on a case-by-case basis. However, it may not be feasible to open or conduct an enquiry or investigation without revealing the identity of the complainant. This does not apply to whistleblowers.
- A1.24 We may request information from the BBC and/or the complainant during this phase.<sup>39</sup> This may include, where relevant, requests for copies of documents

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<sup>36</sup> See footnote 34

<sup>37</sup> Charter, Article 49(1)(b); Agreement, Article 58(1)

<sup>38</sup> Charter, Article 49(1); Agreement, Clause 58(1)

<sup>39</sup> Charter, Article 47

relating to the BBC's consideration of the complaint and its decision. We may also meet with either or both parties.

A1.25 We do not publish details of enquiries, or comment publicly on enquiries.

## How Ofcom decides whether to investigate

A1.26 In accordance with the Charter and the Agreement, Ofcom may carry out investigations, should we consider it appropriate, to determine whether the BBC has complied with a competition requirement.<sup>40</sup>

A1.27 We make decisions about whether or not to open investigations on a case-by-case basis, having considered all relevant matters. In doing so, we seek to exercise our discretion to target our action at the cases we think are most likely to produce good outcomes for citizens and consumers.

A1.28 The matters we will generally consider include the following, so far as they are relevant to the case concerned:

- a) The risk of harm arising from/ seriousness of the alleged conduct. For example:
  - i. The risk to the interests of citizens or consumers as a result of the alleged contravention or infringement (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of taking action (e.g. to deter similar conduct by others);
  - ii. Whether the conduct is on-going;
  - iii. Whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
  - iv. Whether the business which is under investigation has a history of similar breaches or infringements, or a demonstrated record of poor compliance;
- 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.
- c) The resource implications of conducting an investigation, for example what resources (in particular what specialist resources) are required to conduct an

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<sup>40</sup> Charter, Article 49(1); Agreement, Clause 58(1)

investigation, given the need to do justice to the interests of all parties likely to be affected.

A1.29 Where appropriate we will also consider other factors.

A1.30 In relation to complaints received regarding the BBC's compliance with a competition requirement, we will also consider the following:

- a) Where the complainant has made a complaint to the BBC in the first instance, we will consider why the complainant is referring the complaint to Ofcom, and whether it falls within the following categories:
  - i. the complainant is not satisfied with the resolution of the complaint by the BBC;
  - ii. 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;
  - iii. the BBC has failed to resolve a complaint within the timeframe set in its complaints handling procedures.
- b) Where the complainant has not made a complaint to the BBC in the first instance, we will consider whether there are exceptional circumstances for the complainant not doing so.

## **Other methods of redress**

A1.31 In some cases, Ofcom may be able to resolve an issue through other methods of redress, including informal resolution with the BBC.

A1.32 We may be satisfied that the BBC has taken, or has offered assurances that it will take, appropriate steps to address any concerns we have identified, such that there is no need to open an investigation into the BBC's compliance with a competition requirement. In such cases, we would normally write to the BBC and any complainant to explain the basis on which we have decided not to open such an investigation.

A1.33 We may also consider it appropriate to deal with concerns raised in relation to the BBC's compliance with competition requirements through exercising our other regulatory functions in relation to the BBC.

## **Decision on whether to open an investigation**

A1.34 A senior member of Ofcom's staff with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this will be the person who will be responsible for supervising the investigation.

A1.35 If Ofcom decides not to open an investigation, we will generally inform the BBC and any complainant, but will not usually give either the opportunity to comment. Ofcom will not usually publicise a decision not to open a formal investigation. However, we may do so if the fact that a complaint has been made has been put into the public domain or is the subject of press speculation, or we consider it appropriate to exercise our other regulatory functions to address the concern, and we consider fairness requires us to clarify the position.

- A1.36 If Ofcom decides to open an investigation, we will generally inform the BBC and the complainant by sending them each a case opening letter explaining the scope of Ofcom's investigation, the identity of the case leader and case supervisor, and next steps (although we may delay doing so if we consider it may prejudice our ability to carry out an investigation).
- A1.37 Shortly after sending the case opening letter(s), we generally also announce that we have opened an investigation on Ofcom's website (although we may delay doing so if we think this could prejudice our ability to carry out an investigation). The case opening announcement would typically include the following details: the competition requirement to which the investigation relates; the scope of the investigation; the identity of the complainant;<sup>41</sup> and the case leader's contact details.
- A1.38 Announcing the beginning of an investigation does not imply that Ofcom has formed any view about whether or not a competition requirement has been breached.

### Dealing with cases urgently

- A1.39 There may be circumstances in which Ofcom considers it necessary to deal urgently with a potential breach of a competition requirement by the BBC. For example, we may consider this to be appropriate if we consider the alleged breach has resulted in or is creating an immediate risk of serious harm to stakeholders or consumers. Ofcom will decide whether to deal urgently with a potential breach on a case-by-case basis.
- A1.40 If Ofcom decides to deal urgently with a case, we may decide to open an investigation without undertaking an enquiry phase. We may also set short deadlines for provision of information and written representations by the BBC and the complainant, and would expect timely co-operation from the parties in these circumstances.

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<sup>41</sup> If a complainant has a concern about being publicly identified on Ofcom's website, the complainant should raise this concern with us, ideally at the time of making its complaint submission. For the avoidance of doubt, Ofcom will not publish a copy of the complaint submission itself.

## Section 3

# Investigating

## Introduction

A1.41 This section sets out how Ofcom is likely to conduct an investigation. This includes guidance on Ofcom's likely engagement and contact with the BBC, complainant and third parties, and how we will gather information, publish information and deal with confidential information.

## Engagement with Ofcom during the investigation

A1.42 We seek to ensure that enforcement action is conducted in a fair, transparent and timely way, and that those we are investigating have a fair opportunity to respond to Ofcom's case as part of the administrative process. In order to conduct efficient and prompt investigations, we will give the BBC a fair opportunity, but no more than a fair opportunity, to make representations to us and engage with us during the course of an investigation. As set out in the relevant sections of this document, Ofcom may also request representations from and engage with complainants or other relevant third parties.

A1.43 Where it would assist the investigation, we will be prepared to meet with the BBC and complainants, and/or provide written or verbal updates. We will decide whether and when it is appropriate to do so on a case-by-case basis.

A1.44 We explain in the following sections of these Guidelines the type of engagement that the BBC, complainants and third parties can generally expect to have with Ofcom at key points during the investigation.

## Case team

A1.45 At the outset of an investigation, Ofcom will usually<sup>42</sup> inform the BBC, and any complainant, of:

- who the case leader is - this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and
- who the case supervisor is - this is the person who will be overseeing the investigation.<sup>43</sup>

A1.46 At the same time, Ofcom may ask them to nominate a principal point of contact for communications about the investigation.

A1.47 We will update the BBC, and any complainant, if the case leader or case supervisor changes during the course of the investigation.

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<sup>42</sup> As noted above, there may be circumstances in which we decide not to do this until a later point in the investigation, for example where we consider this could prejudice the conduct of any subsequent investigation.

<sup>43</sup> As explained at paragraph A1.61 below, the case supervisor would typically be the person responsible for deciding whether there are grounds for action and to issue a provisional breach notification.



## Timescales

A1.48 Ofcom recognises that it is important for all stakeholders that if we open an investigation we complete it as soon as possible. We will provide updates to the BBC and the complainant on the progress of investigations as appropriate, including when we expect to reach a particular milestone, where possible.

## Changing the scope of the investigation

A1.49 We may widen the original scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope of an investigation if we decide that it is no longer appropriate to pursue particular aspects of the case. If we decide to change the scope of an investigation we will inform the BBC and the complainant, and will update the notice on Ofcom's website.

## Information gathering

A1.50 Ofcom relies on accurate information, provided in a timely manner, to carry out efficient investigations. We may require the BBC and/ or any other person to provide us with information to assist an investigation, or to assist us in deciding whether to open an investigation.<sup>44</sup>

A1.51 If the BBC does not comply with a request to provide us with information, we may take enforcement action in accordance with our *Procedures for enforcement of the requirements in the BBC Agreement and compliance with Ofcom enforcement action*.

## Confidentiality

A1.52 Ofcom will always consider whether disclosure of information about a particular business is necessary for the purpose of facilitating the carrying out of our enforcement functions. In particular, Ofcom may judge that it is necessary to disclose information gathered from complainants or other stakeholders to the BBC in order to protect its rights of defence. Similarly, Ofcom may judge that disclosure of information gathered from the BBC to a complainant and other stakeholders is justified in order to facilitate the carrying out by us of our functions.

A1.53 Ultimately, it is for us to determine what is, and is not, appropriate to disclose within the relevant statutory framework.<sup>45</sup> If Ofcom is proposing to disclose information which a party considers to be confidential, we will take reasonable steps to inform that party and will give it a reasonable opportunity to make representations on our proposal, before making a final decision on whether to disclose the information.

A1.54 We may request that we are provided with a non-confidential version of a submission, if needed for the purposes of publication and/or disclosure. Such a non-confidential version should normally include suggested non-confidential summaries of information (for example "confidential details of contracts") or ranges of numbers, rather than simply removing the confidential information.

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<sup>44</sup> Charter, Article 47

<sup>45</sup> Communications Act 2003, section 393

## Publicity

- A1.55 Ofcom is required to have regard to the principle under which regulatory activities should be transparent and accountable. Publicising the action we take can also usefully draw it to the attention of parties who have relevant information, can help deter non-compliance in future and educate others about what can go wrong. Consequently, publicising the investigations we are carrying out and our final decisions is an important part of carrying out our functions.
- A1.56 As set out in the relevant sections of this document, Ofcom may publish updates regarding the progress of an investigation on its website. We do not agree the text of website updates with the BBC, or any complainant. However, we will ordinarily inform the BBC and the complainant shortly before publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information at that stage.
- A1.57 Where we consider an announcement to be potentially market sensitive, we will generally inform the BBC and the complainant after markets have closed, with publication on Ofcom's website and via the Regulatory News Service at 7.00am the following morning, just before markets open.

## Involvement of other stakeholders

- A1.58 Ofcom may consider it necessary to seek input from other relevant third parties – for example, from other broadcasters or viewers, in order to assist us in reaching a decision on the case. Ofcom will involve third parties in an investigation to the extent necessary to carry out our functions fairly and effectively.

## How to raise concerns with Ofcom

- A1.59 If the BBC or a complainant is dissatisfied with any aspect of the way in which Ofcom is proceeding, they should usually raise their concerns in writing with the case leader or case supervisor in the first instance.
- A1.60 Where engagement with the case leader / case supervisor does not resolve these concerns, the BBC or complainant may contact the office of Ofcom's Secretary to the Corporation ([corporationsecretary@ofcom.org.uk](mailto:corporationsecretary@ofcom.org.uk)) who will review their case.<sup>46</sup>

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<sup>46</sup> Further information on complaint escalations is set out on our website:  
<http://www.ofcom.org.uk/about/policies-and-guidelines/complaints-about-ofcom/>

## Section 4

# Investigation outcomes

## Decision making

- A1.61 The decision on whether there are grounds for pursuing formal enforcement action (in other words, whether to issue a provisional breach notification) 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 (the case supervisor).
- A1.62 Following the issue of a provisional breach notification and the receipt of any written submissions from the BBC (as explained further at paragraphs A1.68 – A1.75 below), Ofcom will nominate a final decision maker who will be responsible for deciding on the final outcome of the investigation. This will be 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 provisional breach notification.

## Investigations that do not lead to a breach decision

- A1.63 Some investigations may not lead to a finding that the BBC has breached a competition requirement. Ofcom may conclude that:
- a) there is insufficient evidence of a breach; or
  - b) we no longer consider it to be appropriate to continue an investigation, taking into account the factors set out in paragraph A1.29 above.<sup>47</sup>
- A1.64 In both cases, we would typically follow the same process.
- A1.65 In the majority of cases, a case closure decision of this type is likely to be a brief statement indicating case closure and the basis on which we have closed the case. We would expect to publish this on Ofcom's website. In some cases, we may also publish a reasoned case closure document on Ofcom's website, if there is good reason to do so, for example if we think it would be helpful for all stakeholders to clarify our interpretation of a particular competition requirement.
- A1.66 In certain cases, we may provide an opportunity for the BBC and the complainant to comment before we finalise our decision to close the case. In cases where we do not provide the opportunity to comment in advance of the case final closure decision being taken we will inform the BBC and the complainant in advance of publishing any case closure notice or decision on Ofcom's website.
- A1.67 A non-confidential version of a reasoned case closure decision will be published on Ofcom's website once we have finalised the relevant redactions of any confidential information, and we will generally inform the BBC in advance of the intended date of publication.

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<sup>47</sup> If we no longer considered it appropriate to continue an investigation, we would not come to a decision on the merits of the case.

## The provisional breach notification

- A1.68 If Ofcom's provisional view is that the BBC has not complied with a competition requirement, Ofcom will notify the BBC of this finding, by providing it with a provisional breach notification. This is a provisional view only and may be subject to change in light of subsequent representations or material provided by the BBC (or complainants or other third parties where relevant) or any further evidence which comes to light.
- A1.69 The provisional breach notification will set out Ofcom's reasoning for provisionally concluding that the BBC has breached a competition requirement. It will also set out whether Ofcom is minded to impose a penalty, and the proposed penalty amount.<sup>48</sup> In determining penalties, Ofcom will have regard to our Penalty Guidelines.<sup>49</sup> The provisional breach notification may also set out that Ofcom is minded to direct the BBC, or minded to accept undertakings from the BBC, to take such steps we consider will remedy its failure to comply with a competition requirement and ensure that the BBC complies with its requirements properly in future.<sup>50</sup>
- A1.70 Along with the provisional breach notification we will generally provide the BBC with copies of or access to the evidence we have relied upon in reaching our provisional breach notification. Wherever possible and appropriate, we would seek to do this by providing the BBC with copies of or access to the relevant documents in electronic form, but in some cases we may instead, or in addition, also provide hard copies. Where we have relied upon evidence provided to us by the BBC itself, rather than providing copies of the relevant documents, we may instead list these in a schedule so that it is easy for the BBC to cross-refer to its own copies.
- A1.71 Confidential information in the provisional breach notification and any accompanying documents will be marked. We will redact (or withhold as relevant) confidential information where appropriate.
- A1.72 Ofcom will not publish provisional breach notifications but we will generally publish an update on Ofcom's website. Our update will normally explain that we have issued a provisional breach notification, include a summary of the proposed breach that we are minded to find and, where relevant, any directions we are minded to impose or undertakings we are minded to accept from the BBC. We may also explain that the BBC now has the opportunity to make representations on our proposed findings before we make our final decision.

### Written submissions

- A1.73 Ofcom will give the BBC a reasonable opportunity to make representations on the provisional breach notifications and on any proposed penalty, proposed direction and/or undertakings we are minded to accept from it<sup>51</sup>. Ofcom will decide the period for making written representations on a case-by-case basis, and may give a longer period in more complex cases.

<sup>48</sup> Charter, Article 49(3), Article 49(4)

<sup>49</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/96101/Penalty-guidelines-2015-Section-392-of-the-Communications-Act-2003.pdf) These Guidelines apply to penalties imposed by Ofcom on the BBC by virtue of section 392(7) of the Communications Act 2003

<sup>50</sup> Charter, Article 49(2)

<sup>51</sup> Charter, Article 49(5)

A1.74 Where we consider that other stakeholders may have further information relevant to the provisional breach notification, we may also provide that stakeholder with a non-confidential copy of the provisional breach notification for the purposes of giving it the opportunity to make written representations on it. In such cases, Ofcom would expect to give the stakeholder access to a non-confidential copy of the provisional breach notification subject to its entering into appropriate agreements with us limiting its use of and onward disclosure of the document. We will not usually provide stakeholders with copies of or access to the underlying evidence.

#### Further provisional breach notification

A1.75 In some cases, new information or evidence may come to Ofcom's attention after we have issued a provisional breach notification and given the BBC the opportunity to comment on it, which leads us to consider making a material change to the nature of the proposed breach findings (such as evidence of a different or more serious breach) and/or increasing in the proposed level of penalty. In such circumstances, we would issue a further provisional breach notification on which we would give the BBC the opportunity to comment as described above, before proceeding to reach a final decision.

#### Oral hearings

A1.76 Ofcom will offer the BBC the opportunity to attend an oral hearing to make oral representations on matters referred to in the provisional breach notification, which will be held after written submissions have been provided.

A1.77 The oral hearing will usually be held at the Ofcom offices where the investigating case team is based and will be chaired by the final decision maker. The case supervisor and members of the case team may also be present and may comment during the course of the hearing. The hearing will be transcribed and the transcript will be provided to the BBC.

A1.78 The BBC may bring legal advisers or other relevant expert advisers to the oral hearing to assist in presenting its oral representations, although Ofcom may ask that the BBC limit the number of persons attending the oral hearing on its behalf to a reasonable number.

A1.79 Complainants and other third parties will not usually be invited to attend the oral hearing.

### **The final decision**

A1.80 Following the oral hearing and, having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.

A1.81 The possible outcomes at this stage are that:

- a) Ofcom issues a final decision confirming a finding of a breach of a competition requirement. The final decision will set out Ofcom's reasons for concluding that the BBC has breached a competition requirement, and the evidence Ofcom has relied on. Where relevant, it will also:

- i. explain that Ofcom has imposed a financial penalty on the BBC, and the penalty amount;<sup>52</sup>
  - ii. set out any required action that Ofcom has directed the BBC to take to remedy the failure to comply with the competition requirement and ensure that the BBC complies with its requirements properly in the future;<sup>53</sup> and/or
  - iii. set out any undertakings Ofcom has accepted from the BBC that it will take steps to remedy the failure to comply with the competition requirement and/or ensure that it complies with its requirements properly in the future;<sup>54</sup>
- b) A decision is taken that, in light of the representations received and/or review of further evidence, Ofcom's provisional breach notification cannot be maintained, as there is insufficient evidence of a breach; or
- c) Ofcom no longer considers it appropriate to continue an investigation, taking into account the factors set out in paragraph A1.28 above.<sup>55</sup>

A1.82 Ofcom will notify the BBC and the complainant of its final decision.

A1.83 If Ofcom intends to close the case because we think there is insufficient evidence of a breach or we no longer think it is appropriate to continue an investigation, we would follow the same process as set out at paragraphs A1.63 to A1.67 above.

## Publication of final breach decisions

A1.84 If Ofcom issues a final decision making a breach finding, we will close the case and update the details of the case on Ofcom's website. This will generally include a summary of the breach Ofcom has found and details of any penalty and/or directions imposed, and/or undertakings accepted.

A1.85 A non-confidential version of a final breach decision will be published on Ofcom's website once Ofcom has finalised the relevant redactions of any confidential information. We will generally inform the BBC and the complainant in advance of the intended date of publication of the final breach decision.

## Non-compliance with a direction or undertaking

A1.86 Ofcom's powers to impose directions and/or accept undertakings for breach by the BBC of a competition requirement, as set out in paragraph A1.81 above, are "specified requirements" and therefore enforceable under Ofcom's powers as set out in Article 49 of the Charter.

A1.87 If the BBC fails to comply with such a direction or undertaking Ofcom may take enforcement action in accordance with our Procedures for enforcement of

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<sup>52</sup> Charter, Article 49(3). Any penalty imposed will be no greater than that set out in the provisional breach finding and, in accordance with Article 49(4), will not exceed the maximum set out in section 198(5) of the Act. We will have regard to the factors set out in our Penalty Guidelines when setting the penalty and penalty amount, in accordance with section 392(7) of the Communications Act 2003

<sup>53</sup> Charter, Article 49(2)

<sup>54</sup> Charter, Article 49(2)

<sup>55</sup> In these circumstances, Ofcom would not reach a decision on the merits of the case.

requirements in the BBC Agreement and compliance with Ofcom enforcement action.

## Section 5

# Complaint submission details

### Section A: Preliminary Information

A1.88 Please provide:

- a) **a summary of the complaint**, including background, key dates, alleged competition requirement infringement and the actual or potential harm caused; and
- b) **complainant details**, including the complainant's name/ name of complainant organisation, address, telephone number, email address and, if the complainant is an organisation, the contact details of the person who can discuss details of the complaint with Ofcom.

### Section B: Legal basis for the complaint

A1.89 Please specify the competition requirement the complainant believes has been breached and explain clearly why the complainant believes the requirement has been breached.

### Section C: Details of the complaint

A1.90 Please provide:

- a) an explanation for the reasons for the complaint;
- b) details of relevant products and services;
- c) relevant dates and incidents;
- d) a chronology of events;
- e) how the complainant, or those the complainant represents, has/ have been affected by the alleged breach; and
- f) evidence of actual or potential effect on stakeholders or consumers.

### Section D: Details of the complaint to the BBC / the BBC's decision

A1.91 Where the complainant has made a complaint to the BBC in the first instance, please provide:

- a) the complaint submission;
- b) the BBC's final decision (where one has been reached); and
- c) any other relevant information and documentation relating to the BBC's consideration of the complaint.

A1.92 Where the complaint has made a complaint to the BBC in the first instance, please also explain why the complainant is referring the complaint to Ofcom, as follows:



- a) if the complainant is not satisfied with the resolution of the complaint by the BBC, please state this and explain why;
- b) if the complainant considers, following the resolution of the complaint by the BBC, that the imposition of a sanction against the BBC may be appropriate, please state this and explain why; and
- c) if the BBC has failed to resolve a complaint within the time period set in its procedures for handling complaints, please state this.

A1.93 If the complainant has not made a complaint to the BBC in the first instance, please explain why the complainant considers it has exceptional circumstances for not doing so.

**Section E: Verification by a senior member of the organisation**

A1.94 Where the complainant is an organisation, please include a declaration by a senior member of the executive of the organisation, with appropriate delegated authority, preferably the CEO, CFO or General Counsel or equivalent, stating:

The information provided in this submission is correct and complete to the best of my knowledge and belief.

Signed:

Position in the organisation:

Date:

**Section F: Other relevant information**

A1.95 Please include any relevant supporting information, documents and evidence, for example copies of any relevant documentation, industry reports and/or consumer surveys.

## 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/procedures-enforcement-bbc-competition-requirements>. 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 [BBCFECEnforcement@ofcom.org.uk](mailto:BBCFECEnforcement@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 the question in the consultation in relation to all points covered in the proposed procedures if you do not have a view; a short response on just one point is acceptable. We also welcome joint responses.
- A2.8 It would be helpful if your response could include direct answers to the question asked in the consultation document. 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 question 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 do not 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. However, we may need to publish all responses on occasions, 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 by 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 at 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 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 as to 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)?

YES  NO

### 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)