



Procedures for enforcement of BBC competition requirements

Procedures

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Section 1

Background

- 1.1 Ofcom is the independent regulator of the BBC. We must regulate the BBC in accordance with the Charter¹, the Agreement², the Communications Act 2003 (the “Communications Act”) and Part 5 of the Broadcasting Act 1996.³ We must prepare and publish an Operating Framework containing the provisions we consider appropriate to ensure the effective regulation of the BBC.⁴
- 1.2 In undertaking this role, Ofcom must have regard to its general duties under section 3 of the Communications 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 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.⁵
- 1.3 Ofcom’s regulation of the BBC covers, amongst others, the impact of the BBC’s activities on competition. Ofcom has set requirements as part of the Operating Framework to that effect.⁶ 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”.
- 1.4 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;⁷
 - b) requirements which Ofcom considers appropriate to ensure that the BBC’s commercial activities do not, as a result of their relationship with the UK Public Services, trading activities, or non-service activities, distort the market or gain an unfair competitive advantage;⁸

¹ *The Royal Charter for the continuance of the British Broadcasting Corporation* (the “Charter”) available here: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

² *The Agreement between the Secretary of State for Culture, Media and Sport, and the BBC* (the “Agreement”) available here: <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

³ Pursuant to section 198 of the Communications Act

⁴ Charter, Article 44(1), Article 46(2); Agreement, Clause 5(1)

⁵ Charter, Article 45(1), Article 45(2)

⁶ Charter, Article 46(5), Article 46(6)

⁷ 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.

⁸ Agreement, Clause 28(1)

- c) requirements which Ofcom consider appropriate to protect fair and effective competition in relation to non-service activities and trading activities;⁹ and
- d) the requirement whereby, in relation to the 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.¹⁰

Enforcement of competition requirements

- 1.5 In accordance with the Charter, Ofcom must enforce compliance by the BBC of the competition requirements.¹¹
- 1.6 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;¹² and/or
 - b) require the BBC to pay a specified penalty.¹³
- 1.7 In enforcing compliance by the BBC of the competition requirements, Ofcom may consider complaints, and we may carry out investigations into such compliance as we consider appropriate.¹⁴

Status of these Procedures

- 1.8 These Procedures set out how Ofcom enforces compliance with the competition requirements by the BBC. Where we depart from the approach set out in these Procedures, we will explain our reasons for doing so.
- 1.9 These Procedures form part of the Operating Framework and come into effect on 28 June 2017.

⁹ 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).

¹⁰ Agreement, Schedule 3, paragraph 7(2)

¹¹ Charter, Article 49(1)

¹² Charter, Article 49(2)

¹³ Charter, Article 49(3)

¹⁴ Charter, Article 49(1); Agreement, Clause 58(1)

Section 2

Opening an investigation

- 2.1 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

- 2.2 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.¹⁵
- 2.3 Ofcom may in exceptional circumstances consider complaints which are not in the first instance referred to the BBC. If a 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. Ofcom will decide on a case-by-case basis whether to consider such complaints.
- 2.4 Complaints should be submitted to BBCCompetitionComplaints@ofcom.org.uk
- 2.5 We expect stakeholders to make adequate, well-reasoned complaints backed up with evidence, including the information set out in Annex 1.
- 2.6 If a complaint contains confidential information, we will require the complainant to submit a non-confidential version of the complaint, in accordance with paragraph 3.17 of these Procedures, which can be shared with the BBC.
- 2.7 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 (or their former organisation) and where they have been unable to raise or resolve those concerns internally.¹⁶ Such disclosures can be made in confidence to the Ofcom's Corporation Secretary.

Timeframe for making a complaint

- 2.8 As stated in paragraph 2.2 above, we expect complainants to refer complaints to the BBC in the first instance. The BBC's deadline for resolution of complaints is set out in the BBC's complaints handling procedures (the "BBC deadline").

¹⁵ Charter, Article 56(3); Agreement, Clause 57(1). The BBC's complaints handling procedures can be found at: <http://www.bbc.co.uk/complaints/>

¹⁶ <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/procedure-for-making-a-disclosure>

- 2.9 If the BBC reaches a final decision before the BBC deadline, we would expect the complainant to refer the complaint to Ofcom within two 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 two months of the date of the BBC deadline.
- 2.10 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

- 2.11 Ofcom may decide to open an investigation to determine whether the BBC has breached a competition requirement on its own initiative.¹⁷ 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.

Initial assessment

- 2.12 Prior to opening an investigation, Ofcom will first carry out an initial assessment of the issues to determine whether there is sufficient concern to warrant committing our resources to an investigation, having considered all the relevant factors. We do not make a substantive decision on whether or not the BBC has breached a competition requirement at this stage.
- 2.13 As part of our initial assessment, we will normally give the BBC the opportunity to comment on the relevant issues and to provide information to assist us in deciding whether to open an investigation. This may include, where relevant, requests for copies of documents relating to the BBC's consideration of the complaint and its decision.¹⁸ Where we are carrying out our initial assessment following receipt of a complaint, we will also generally tell the BBC we are doing so and will normally share a non-confidential version of the complaint with the BBC for comment. Ofcom will consider requests from complainants to remain anonymous. However, it may not be feasible to open or conduct our initial assessment (or a subsequent investigation) without revealing the identity of the complainant to the BBC. This does not apply to whistleblowers.
- 2.14 In exceptional circumstances, we may decide not to provide the BBC with an opportunity to comment and provide information if we consider that we already have sufficient information to decide whether to an investigation. For example, this could be based on previous engagement with the BBC about the relevant issues, or where there are reasons to proceed to an investigation more quickly. For these reasons, or if the complainant has anonymity concerns, we may not consider it appropriate to share a copy of the complaint with the BBC during the initial assessment phase. In such cases, if we decide to open an investigation, we would (subject to any anonymity concerns) share a non-confidential version of the complaint with the BBC once we have opened the investigation.

¹⁷ Charter, Article 49(1)(b); Agreement, Article 58(1)

¹⁸ Charter, Article 47

- 2.15 We may request further information from the BBC and/or the complainant during this phase.¹⁹ We may also meet with the BBC and/or the complainant where we consider this will assist us in reaching a decision on whether to open an investigation.
- 2.16 We aim to complete our initial assessment as quickly as reasonably possible, but the length of time that this will take is likely to vary on a case-by-case basis based on the issues under consideration.
- 2.17 In cases where we decide that it is appropriate to give the BBC an initial opportunity to comment and provide information, we will write to it setting out how long it will have to comment and when we aim to have taken our decision on whether to open an investigation. We will also provide contact details for the case leader who will act as the main point of contact while we are making our initial assessment. We will provide the same information to any complainant. In those cases, we would also expect to keep the BBC and any complainant updated should our initial assessment take longer than expected.
- 2.18 We do not publish details of, or comment publicly on matters we are considering during our initial assessment phase.

How Ofcom decides whether to investigate

- 2.19 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.²⁰
- 2.20 We make decisions about whether to open investigations on a case-by-case basis, having regard to our statutory duties and having considered all the matters that appear to us to be relevant to the whether or not we should do so. 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. We cannot necessarily pursue every matter which comes to our attention and must make decisions about whether or not to open investigations by weighing up the likely benefits of conducting an investigation against the resources that would be required and the comparative benefits of using those resources in other ways.
- 2.21 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 resulting from 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 our taking action (for example, 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;

¹⁹ Charter, Article 47

²⁰ Charter, Article 49(1); Agreement, Clause 58(1)

- 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 alternative proceedings are likely to achieve the same ends. 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; and
 - c) The resource implications of our 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.
- 2.22 Where appropriate we will also consider other factors as well.
- 2.23 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

- 2.24 In some cases, Ofcom may be able to resolve an issue through other methods of redress, including informal resolution with the BBC.
- 2.25 For example, 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 for further enforcement action (although there may be a period of compliance monitoring). In such cases, we will normally write to the BBC and any complainant to explain the basis on which we have decided not to proceed to formal

enforcement action, and the circumstances in which we might reconsider the need to take formal enforcement action in future if relevant (for example, if the BBC did not take steps it had said it would or if we received further evidence of a potential compliance issue).

- 2.26 Such informal action would not generally involve Ofcom taking any decision about whether or not a competition requirement has been breached.
- 2.27 Where Ofcom has decided not to pursue formal enforcement action in relation to a particular issue as a result of informal resolution, but we later become aware of further issues relating to the same or a similar issue, we may take formal enforcement action at that stage. If we did so, we would generally expect to take into account any failure of the BBC to abide by assurances previously given to us relating to this conduct.
- 2.28 We may publish details of assurances given by the BBC, for example where we consider this would be in the interests of potentially affected customers or consumers more generally. We will usually inform the BBC shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide it with a copy of the intended text for information only at that stage.
- 2.29 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

- 2.30 A senior member of Ofcom's executive with appropriate Board-delegated authority will decide whether to open an investigation. Typically, this will be the person who will be responsible for overseeing the investigation.
- 2.31 Where Ofcom decides not to open an investigation following our initial assessment, we will normally inform the BBC and any complainant, but will not usually give either the opportunity to comment before we take our decision. Ofcom will not usually publicise a decision not to open an investigation unless the fact that a complaint has been made has been put into the public domain by the BBC or the complainant, or the potential investigation is the subject of press speculation, or we consider it appropriate to exercise our other regulatory functions to address the concern, and we consider we should clarify the position. In such cases, we would usually inform the BBC shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide them with a copy of the intended text for information only at that stage.
- 2.32 In most cases, when Ofcom decides to open an investigation, we will 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. However, there may be some cases where we may delay doing so if we consider it may prejudice our ability to carry out an investigation.
- 2.33 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;²¹ and the case leader's contact details.

- 2.34 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

- 2.35 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.
- 2.36 If Ofcom decides to deal urgently with a case, we may decide to open an investigation without obtaining comments or information from the BBC or any complainant during our initial assessment. 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.

²¹ 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

- 3.1 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, complainants and third parties, and how we will gather information, publish information and deal with confidential information.

Engagement with Ofcom during the investigation

- 3.2 We seek to ensure that enforcement action is conducted in a fair, transparent, efficient and timely way. As set out in the relevant sections of this document, Ofcom may request representations from and engage with complainants or other relevant third parties.
- 3.3 We will endeavour to keep the BBC up-to-date on the progress of the investigation. If we receive a request to meet to discuss the case we will consider it, and we will be prepared to meet with the BBC and complainants or other third parties, and/or provide written or verbal updates, where we consider it to be appropriate to do so for reasons of fairness and transparency. We will decide whether and when it is appropriate to do so on a case-by-case basis, depending on the nature of the investigation and the stage that we have reached in our analysis.
- 3.4 We explain in the following sections of these Procedures 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

- 3.5 At the outset of an investigation, Ofcom will usually²² inform the BBC, and any complainant, of:
- a) the case leader - this is the person who will be their main contact at Ofcom for the case during the course of the investigation; and
 - b) the case supervisor - this is the person who will be overseeing the investigation.²³
- 3.6 We will also explain how the Procedural Officer can be contacted – see further paragraph 3.27 and Section 5.
- 3.7 At the same time, Ofcom may ask the BBC and any complainant to each nominate a principal point of contact for communications about the investigation.
- 3.8 We will update the BBC, and any complainant, if the case leader or case supervisor changes during the course of the investigation.

²² 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 the investigation.

²³ As explained at paragraph 4.1 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

- 3.9 Ofcom recognises that it is important for all stakeholders that if we open an investigation we progress it in a timely manner and conclude it as soon as reasonably possible. We will give the BBC and any complainant an indication of the likely timescale involved in completing an investigation – this will normally be at the point when we open an investigation (although we may delay doing so if we consider it may prejudice the conduct of the investigation).
- 3.10 We will provide updates to the BBC and any complainant on the progress of investigations, including when we expect to reach a specific milestone, and will also provide updates where this changes. We will also aim to publish on our website details of how long we expect to take to complete key milestones in an investigation.

Changing the scope of the investigation

- 3.11 We may widen the scope of an investigation if we become aware of new issues that warrant investigation, or reduce the scope if we decide that it is no longer appropriate to pursue particular aspects of the case.
- 3.12 When we change the scope of an investigation, we will inform the BBC and the complainant, and will update the notice on Ofcom's website. We will give the BBC and / or the complainant the opportunity to comment prior to deciding to change the scope of the investigation, where we consider this to be necessary for reasons of fairness.

Information gathering

- 3.13 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.²⁴
- 3.14 If the BBC does not comply with a requirement under the Charter 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*.²⁵ If a person other than the BBC does not comply with a requirement under the Charter to provide us with information, we may enforce compliance in accordance with our Enforcement Guidelines for regulatory investigations.²⁶

Confidentiality

- 3.15 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. Ofcom may consider it appropriate to disclose information notwithstanding a party has asserted confidentiality over it. In particular, Ofcom may judge that that it is necessary to disclose information gathered from complainants or

²⁴ Charter, Article 47

²⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0031/96808/Procedures-for-enforcement-of-requirements-in-the-BBC-Agreement-and-compliance-with-Ofcom-enforcement-action.pdf

²⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf

other third parties to the BBC in order to allow it to respond to Ofcom's case. Similarly, Ofcom may judge that disclosure of information gathered from the BBC to a complainant and other third parties is justified in order to facilitate the carrying out by us of our functions. We will decide on the best means of dealing with confidential information on a case by-case basis, in accordance with the relevant statutory framework,²⁷ having regard to the respective interests of the party that has provided the confidential information, and of the BBC.

- 3.16 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. This decision will be made by the case team and/or the case supervisor and will be communicated to the party concerned in advance of the disclosure being made. Where the decision is to disclose the information despite the party whose information it is continuing to object to such disclosure, we would give that party the opportunity to escalate its concerns to the Procedural Officer. We would expect to delay disclosing the information until the Procedural Officer has reached his/her decision. If we intended to proceed to disclose the information after taking these steps, we would inform the party concerned in advance.
- 3.17 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.

Publicising cases

- 3.18 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.
- 3.19 As set out in the relevant sections of this document, Ofcom will publish updates regarding the progress of an investigation on its website.
- 3.20 We may also issue media releases regarding the outcome of our investigations, for example where we consider this would be in the interests of potentially affected customers or consumers more generally.
- 3.21 We do not agree the text of website updates or media releases with the BBC, or any complainant. However, we will ordinarily inform the BBC shortly before (and no more than one working day before) publication on Ofcom's website that we will be doing so, and provide it with a copy of the intended text of the website update for information at that stage.
- 3.22 Where we consider an announcement to be potentially market sensitive, we will generally inform the BBC and the complainant after markets have closed, with

²⁷ Communications Act, section 393

publication at 7.00am on Ofcom's website and via the Regulatory News, just before markets open.

- 3.23 There may be certain cases which we consider it would be inappropriate to publicise, for example because they are particularly sensitive and/or publicity could have a detrimental impact on third parties. We would inform the BBC and any complainant if we intended to take this approach. We expect that this would be exceptional.

Involvement of third parties

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

How to raise concerns with Ofcom

- 3.26 If the BBC, complainant or third party (where relevant) is dissatisfied with 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.
- 3.27 Where engagement with the case leader / case supervisor does not resolve a party's concerns about a significant procedural issue, it may contact the Procedural Officer. The process for doing so is set out in Section 5.

Section 4

Investigation outcomes and decision making

Decision making

- 4.1 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).
- 4.2 Following the issue of a provisional breach notification and the receipt of any written submissions from the BBC (as explained further at paragraphs 4.3 to 4.10 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.

The provisional breach notification

- 4.3 If Ofcom's provisional view is that the BBC has breached a competition requirement, Ofcom will notify the BBC of this provisional 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.
- 4.4 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.²⁸ In determining penalties, Ofcom will have regard to our Penalty Guidelines.²⁹ 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.³⁰
- 4.5 When we issue the provisional breach notification, we will also provide the BBC with copies of or access to the evidence that we have considered during the course of the investigation and which we have taken into account in reaching our provisional view.³¹ Wherever possible and appropriate, we will provide the BBC with copies of or access to the relevant documents in electronic form, but in some cases we may provide hard copies. Where we have relied upon evidence provided to us by the BBC

²⁸ Charter, Article 49(3) to 49(5)

²⁹ 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.

³⁰ Charter, Article 49(2)

³¹ Excluding any internal Ofcom documents or any routine administrative documents / correspondence.

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.

- 4.6 Confidential information in the provisional breach notification and any accompanying documents will be marked. We will redact (or withhold as relevant) confidential third party information where appropriate, in accordance with paragraphs 3.15 to 3.16 above.
- 4.7 Ofcom will not publish provisional breach notifications but we will generally publish an update on our 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 will also explain that the BBC now has the opportunity to make representations on our proposed findings before we make our final decision.

Written submissions

- 4.8 Ofcom will give the BBC a reasonable opportunity to make representations on the provisional breach notification and on any proposed penalty, proposed directions and/or undertakings we are minded to accept from it.³² 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.
- 4.9 Where we consider it to be appropriate for reasons of fairness, we may provide a complainant or relevant third party with the opportunity to comment on a non-confidential copy of the provisional breach notification. This will typically be where they may have further information relevant to the proposed decision and therefore could provide informed comments on the provisional breach notification. Another example may be where Ofcom's provisional findings could have a direct impact on the economic interests of a complainant or third party. We will set deadlines for representations depending on the circumstances of the case.
- 4.10 In such cases, Ofcom would expect to give the complainant or third party 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 complainants or third parties with copies of or access to the underlying evidence.

Further provisional breach notification

- 4.11 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. We will adopt an appropriate process to deal with such evidence which ensures fairness to the BBC.
- 4.12 New information or evidence may lead us to consider making a material change to the nature of the proposed breach findings³³ and/or increasing in the proposed level of penalty. In such circumstances, we would issue a further provisional breach

³² Charter, Article 49(5)

³³ Such as evidence of a different or more serious breach or a material change in our reasoning for proposing to find a 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

- 4.13 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.³⁴
- 4.14 Ofcom will normally ask the BBC to confirm by a given date if it wishes to make oral representations, and will then set a date for the oral hearing, which will normally be held 10 – 20 working days after the deadline for written submissions have elapsed.³⁵
- 4.15 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, case leader and other members of the case team may also be present and may comment during the course of the hearing. Other personnel from Ofcom may attend as appropriate, for example, legal advisers, economic advisers and/ or technical experts, depending on the circumstances of the case.
- 4.16 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.
- 4.17 Complainants and other third parties will not usually be invited to attend the oral hearing.
- 4.18 Ofcom will agree an agenda with the BBC in advance of the oral hearing, which will include reasonable periods of time for the BBC to make oral representations and for Ofcom personnel present to ask the BBC questions on its representations.
- 4.19 The hearing will be transcribed and the transcript will be provided to the BBC who may comment on the factual accuracy of the transcript.

The final decision

- 4.20 Following the oral hearing (if there is one) and, having considered all of the relevant evidence and any representations, the final decision maker will take a final decision on the case.
- 4.21 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:

³⁴ Charter, Article 49(5)

³⁵ However, if the BBC provides its written representations prior to the deadline and requests that the oral hearing takes place earlier, the oral hearing might be held earlier.

- i. explain that Ofcom has imposed a financial penalty on the BBC, and the penalty amount;³⁶
 - 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;³⁷ 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.³⁸
- 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, and case should be closed with no further action.
- c) A decision is taken that the case should be closed without Ofcom having reached a decision on the merits of the case (for example, for administrative reasons, taking into account the factors set out in paragraph 2.21 above).
- 4.22 Ofcom will notify the BBC of its final decision, and will normally inform the complainant that we have reached a final decision on the investigation.
- 4.23 If Ofcom intends to close the case because we think there is insufficient evidence of a breach or without taking a decision on the merits of the case, we would follow the process set out in paragraphs 4.28 to 4.32 below.

Publication of final breach decisions

- 4.24 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 once the final decision has been taken and notified to the BBC. 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.
- 4.25 Ofcom will publish a non-confidential version of the final breach decision on our website once we have 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

- 4.26 Ofcom's powers to impose directions and/or accept undertakings for breach by the BBC of a competition requirement, as set out in paragraph 4.21 above, are "specified

³⁶ Charter, Article 49(3). Any penalty imposed will be no greater than that set out in the provisional breach notification and, in accordance with Article 49(4) of the Charter, will not exceed the maximum amount specified in section 198(5) of the Communications 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.

³⁷ Charter, Article 49(2)

³⁸ Charter, Article 49(2)

requirements” and therefore enforceable under Ofcom’s powers as set out in Article 49 of the Charter.

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

Investigations that do not lead to a breach decision

- 4.28 Some investigations may not lead to a finding that the BBC has breached a competition requirement. The relevant decision maker³⁹ 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, without having come to a decision on the merits of the case.
- 4.29 In both cases, we would typically follow the same process.
- 4.30 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.
- 4.31 In certain cases, we may consider that fairness requires that we provide an opportunity for the BBC, the complainant and/or relevant stakeholders 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 of the case closure decision in advance of publishing any case closure notice or decision on Ofcom’s website. Ofcom will also normally inform any complainant that we have reached a final decision on the investigation.
- 4.32 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 and any complainant in advance of the intended date of publication.

³⁹ Depending on the stage at which this decision is reached, this may be the person responsible for deciding whether there are grounds for action (i.e. whether to issue a provisional breach notification), who will typically be the person responsible for overseeing the investigation, or it may be the final decision maker.

Section 5

Procedural complaints about investigations

- 5.1 If the BBC, any complainant or a third party (where relevant) is dissatisfied about any aspect of the investigation procedure, it should usually raise its concerns in writing with the case leader in the first instance, and then with the person overseeing the investigation (i.e. the case supervisor).
- 5.2 If a party does not consider that its concerns have been satisfactorily resolved by the case leader and/or the case supervisor then, if an investigation has been formally opened, it may refer certain procedural complaints to Ofcom's Procedural Officer.

The Procedural Officer

- 5.3 A number of appropriately experienced Ofcom staff have Board-delegated authority to act as the Procedural Officer for the purposes of an investigation. The relevant Procedural Officer will be appointed on a case-by-case basis, if a relevant procedural complaint is made.
- 5.4 The Procedural Officer is independent from the investigation, case team and decision makers, and will not have been involved in the investigation (other than as the Procedural Officer). The role of the Procedural Officer is intended to ensure that procedural issues can be addressed quickly, efficiently and cost effectively, and independently of the case team.

Types of complaint which can be made to the Procedural Officer

- 5.5 Complaints about the procedure followed by Ofcom when conducting an investigation can be made to the Procedural Officer by the subject of the investigation, complainant or a third party (where relevant) once the investigation has been formally opened.
- 5.6 The Procedural Officer will deal with complaints which relate to the following:
- deadlines for parties to respond to information requests, submit documents or provide representations;
 - requests for redaction of confidential information in documents that Ofcom proposes to publish or disclose;
 - requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
 - issues relating to the process for oral hearings;
 - other significant procedural issues that may arise during the course of an investigation.
- 5.7 The Procedural Officer is not able to deal with complaints which relate to decisions taken by Ofcom relating to substantive issues, for example decisions on the scope of

information requests or decisions relating to the scope and substance of an investigation.

Making a complaint to the Procedural Officer

- 5.8 If a party is not satisfied with the decision of the case supervisor regarding the procedural issue it has raised, then it may refer its concerns to the Procedural Officer. If it wishes to do so, it should make an application to the Procedural Officer as soon as possible after receiving the decision from the case supervisor, and in any event within five working days.
- 5.9 The application should be no longer than five sides of A4 paper and should include:
- the name and contact details of the applicant;
 - the name and contact details of the lawyers acting for the applicant (where appropriate);
 - the Ofcom case name and reference number;
 - the date of decision made by the case supervisor; and
 - a short summary of the issues including a summary of the case team's original decision, the decision of the case supervisor, the reason the applicant wants a review of that decision and the outcome the applicant is seeking.
- 5.10 The applicant should also provide copies of relevant correspondence between it and Ofcom relating to the issue in question and copies of any relevant information or documents which the applicant holds.
- 5.11 The application should be submitted by email to Procedural.Officer@ofcom.org.uk
- 5.12 The Procedural Officer will provide an opportunity for members of the case team and the case supervisor and the applicant to present their arguments to the Procedural Officer orally on the telephone or at a meeting.

The Procedural Officer's decision

- 5.13 The Procedural Officer will deal with the application as quickly as possible, and will aim to take a decision in most cases within 10 working days from receipt of the application. In any event the Procedural Officer will reach a decision within 20 working days from receipt of the application. The Procedural Officer may extend this timeframe by no more than 20 working days if there are special reasons to do so.
- 5.14 The Procedural Officer's decision will be submitted in writing to the applicant, and it will be binding on the case team and decision makers. A non-confidential version of the Procedural Officer's decision, or a summary of it, will be published on Ofcom's website, generally at the time the decision is made or at the end of Ofcom's investigation.

Annex 1

Complaints submission details

Section A: Preliminary information

A1.1 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

A1.2 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

A1.3 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

A1.4 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.

A1.5 Where the complainant 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.

A1.6 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

A1.7 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

A1.8 Please include any relevant supporting information, documents and evidence, for example copies of any relevant documentation, industry reports and/or consumer surveys.