



**HOLDING THE BBC TO ACCOUNT FOR THE DELIVERY OF ITS
MISSION AND PUBLIC PURPOSES**

CONSULTATION

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A submission from STV Group plc

Closing 17 July 2017 – (extension granted to week of 24 July)

25 July 2017

NON CONFIDENTIAL

STV Response

1. STV is the commercial public service broadcaster for Scotland. Within its group STV owns the two Channel 3 licences, broadcasting across central and north Scotland, along with the five local television licences delivering local public service television across Scotland on our local services channel “STV2”. These new City TV services are emerging new services, and designated PSBs.
2. With its base in Scotland, STV Productions is Scotland’s largest indigenous television production company with a portfolio of UK and international customers.
3. We are a dynamic PSB model driving investment and competition to the BBC, delivering large audiences to regional and national news, and striving to provide opportunities for growth in Scotland’s creative industries.
4. STV welcomes this opportunity to contribute to the consultation on “Holding the BBC to account”.
5. Our particular focus is the very real and present example of the proposed new BBC television channel for Scotland. Ofcom makes reference to it within this Consultation Document¹. This channel has been described by the BBC in its Annual Plan as “*the biggest single investment in broadcast content in Scotland in over 20 years*”. It will represent a material change to the BBC Public Services, and we note that a consultation on the Public Interest Test is under way with a closing date of 25 July. We will be submitting to that consultation.
6. We have no wish to pre-empt the outcomes on the PIT consultation and the Ofcom assessment process around this proposed new Channel for Scotland (we intend to fully contribute to the consultation as appropriate), but it is important that we flag our key concerns with the intended regulatory regime to hold the BBC to account:-
 - (i) Firstly, and on a general point, regardless of the proposals Ofcom makes for regulating the BBC, on the scant information published to date on the proposed BBC Channel we are concerned as to how any significant assessment can be made of its public value relative to the scale and likelihood of any adverse impact on fair and effective competition – the assessment that Ofcom is required to make.²
 - (ii) Secondly, we are concerned that a regulatory framework that permits such latitude around performance and delivery would be ill-equipped to classify any change as material, thereby triggering the required protections, namely the assessment of impact on competition.
 - (iii) Finally, we are perplexed at the sequencing of the current consultations, and are very keen that it should not operate to our disadvantage.

¹ Paragraph 4.108 - “We note the recently announced BBC Commitments in relation to Scotland (Wales and NI (...). we will consider the implications of these commitments as part of our broader assessment of the BBC’s published plans”.

² BBC Charter, paragraph 10 (4)

- This Consultation closes 17 July (extension granted). Ofcom's statement and a final operating licence are due to be published at the end September 2017.
- According to the stages of the assessment process around the proposed new Channel³, it could be February 2018 before that process concludes with the potential for an outcome permitting the change with/without conditions. At that point, we have no certainty around the consultation process which will consider both (i) the amendment to the licence, and (ii) amendment to the performance measures (including how the performance measures associated with the new service would affect those currently applied to existing services such as BBC One and BBC Two).
 - Ofcom states *"Where Ofcom is considering an amendment to a Licence, Ofcom will consult the BBC, and Ofcom will decide on a case by case basis which other persons (if any) it is appropriate to consult, having regard to the nature and significance of the proposed amendment"*⁴. It appears to us that the sequencing above makes it necessary for Ofcom to incorporate into the operating licence all the terms (and conditions) applied to the new service, if approved, and that a further consultation at that point should be held to ensure transparency of the process of amending the licence and the performance measures.

Given STV's role as the commercial public service broadcaster for Scotland, STV seeks assurances that it would be consulted on both any amendment to the Operating Licence with respect to Scotland, and performance measures for any new channel (and associated changes to performance measures applied to other BBC services as a direct consequence of the approval, if forthcoming, of any new channel), over and above the opportunity to be consulted via the PIT.

- We note, with concern, a reference in the BBC Annual Plan to preparations already underway within the BBC before any form of regulatory approval, or even assessment: *"On the journey to the new channel's proposed launch, we will refresh our on-screen offer, with distinctive new drama, comedy and factual titles and a commitment to bringing Scottish culture and sport to a wider audience"*.⁵ This seems to pre-suppose that a new service will be approved, and STV is concerned that the BBC may make such an outcome a *fait accompli*.
- This leads us to a larger point about the Annual Plan. This is still termed "interim" and will only be finalised once Ofcom publishes the Operating Licence in September. At the same

³ https://www.ofcom.org.uk/data/assets/pdf_file/0028/99415/bbc-public-service-activities-proposed.pdf

⁴ This Consultation Document, paragraph A5.5

⁵ http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/BBC_Annual_Plan_2017-18.pdf, page 26 under Nations and Regions

time, Ofcom says: “Alongside responses to this consultation, we will also consider the BBC’s interim Annual Plan, which it is required to publish by 3 July 2017;” indeed, Ofcom has “extended the closing date of this consultation to allow stakeholders to comment upon our proposals having seen the BBC’s interim plan”, and it notes early on in the consultation document that the interim plan “will be an input to our consultation and on the consultation responses from other stakeholders”. We are concerned that elements of the Plan that do not relate to BBC Scotland may not be subject to proper consultation prior to changes being made to the Operating Licence – and indeed, even with the extension, there is little time to consider the impact of the many elements of the Annual Plan in any real depth. Will all relevant aspects of the Annual Plan be subject to a materiality test and therefore full consultation or will these elements simply be incorporated into the Licence via discussion with Ofcom?

7. Our answer at Question 5 is a more general one, but still relates to delivery by the BBC for the nation of Scotland. We believe there is an important factor missing from the high-level objective to be set by Ofcom in assessing whether or not the BBC is promoting its “nations and regions” Public Purpose, Public Purpose 5, and that is **distinctiveness**. We comment more fully in our response to Q5.
8. Ofcom invites views on its proposed approach to establishing a set of regulatory conditions and requirements for a single operating licence and we set out our responses to the Questions 1, 5 and 6 below in respect of regulation of services within Scotland.

Consultation Questions

Questions about the operating licence

Q.1 Do you agree with our overall approach to setting the operating licence?

A1 We note that it results in one licence. For Scotland that means the description of regulated activity that is set out at paragraph 2.59 to 2.65 in the related document – The BBC’s services: audiences in Scotland⁶.

We would expect that were any new channel for Scotland to be added to this list, it would have some measurable criteria against which its impact on other PSB services in Scotland could be measured. Moreover, we would expect that any material change to the new service (for example in terms of hours broadcast, genre mix, budget, source of content across acquisitions, commissions and transfers from other BBC channels) would itself be subject to review and consultation prior to amendment of the licence and performance measures.

Q.5 Do you agree with the approach we have proposed for public purpose 4, including the high-level objectives and regulatory conditions we are proposing?

A5 Public purpose 4 is “to reflect, represent and serve the diverse communities of all of the United Kingdom’s nations and regions and, in doing so, support the creative economy across the United Kingdom”.

Ofcom has explained in its Consultation Document that it wanted to set out high-level objectives for the BBC to meet in promoting this purpose⁷. Ofcom goes on to list them in the draft Operating Licence⁸. There are 5 of them, number 3 being:

- (ensuring) programming for the nations and regions serves and creates content of interest and of relevance to the people living in the area for which the service is provided. Within Scotland, this should include a wide range of genres, including drama, comedy, sports and indigenous language broadcasting.

In the Regulatory Conditions which Ofcom proposes to impose, Ofcom goes on to set floor quotas in respect of BBC One Scotland (not less than 290 hours news and current affairs); and not less than 155 non news programming (including repeats and acquisitions), alongside scant programme description.

We believe that in relation to Scotland, there is a significant omission in the high-level objectives set. We note Ofcom’s functions (under the BBC Charter)⁹ require it to set an operating licence for the UK Public

⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0030/99525/bbc-services-scotland.pdf

⁷ Consultation Document, paragraph 4.109

⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0030/99525/bbc-services-scotland.pdf paragraph

1.31.3

⁹ BBC Charter, paragraph 46 (3)

Services which must contain regulatory conditions they consider appropriate for requiring the BBC:

- to fulfil its Mission and promote the Public Purposes;
- to secure the provision of distinctive output and services; and
- to secure that audiences in Scotland, Wales, Northern Ireland and England are well served.

The high-level objectives set, alongside the Regulatory Conditions proposed do not go towards securing the provision of “distinctive output and services”. We believe that “distinctiveness” is key, and a reference to it within the regulatory conditions for Scotland within the draft operation licence is vital.

Q.6 Do you agree with Ofcom’s approach to how we will set and amend the operating licence, as set out in Annex 5?

A6 We note Annex 5 – proposed procedures and considerations for setting and amending the operating licence. We note A5.5:-

“Where Ofcom is considering an amendment to a Licence, Ofcom will consult the BBC, and Ofcom will decide on a case by case basis which other persons (if any) it is appropriate to consult, having regard to the nature and significance of the proposed amendment”.

We note under the BBC Agreement that where the BBC has published a proposed change, Ofcom must assess whether the change is material¹⁰. A material change brings with it competition assessment.

We note paragraph 7 (6) of the Agreement –

(1) The BBC may only make a material change to the UK Public Services where -

- (a) The BBC has carried out a public interest test on the proposed change;*
- (b) The BBC has determined that the public interest test is satisfied, and*
- (c) Ofcom determine that the BBC may carry out the proposed change.*

STV has two concerns:-

Firstly, how will Ofcom assess whether or not the change is material, particularly where the leeway accorded to meeting licence conditions is wide under the proposed regulatory conditions – confined to meeting quota hours, and high-level objectives? In particular, we are concerned about any attempt to aggregate performance measures across multiple services in the event of approval of a new service, without full assessment (including a consultation with affected parties) around the

¹⁰ Paragraph 10, BBC Agreement

amendment of the licence and of any associated performance measures. This applies equally to changes made subsequently to a service, whether around genre mix, budget, broadcast hours, source of content or any other change – all of which should be considered formally via consultation with potentially affected parties.

Secondly, in determining whether a material change is to take effect, Ofcom has to carry out the competition assessment and balance public value against likelihood of any adverse impact on fair and effective competition. However, it is recognised within the BBC Agreement, that “(Ofcom’s determination) will require qualitative assessments to be made and that direct comparison of factors relating to public value and factors relating to risks to fair and effective competition may not be possible”.

Our views on the specifics of the proposed launch of the new BBC Scotland service will be expressed at the appropriate times in the review process undertaken by the BBC and Ofcom. Our point here is to ensure that there is clear direction in the framework for holding the BBC to account such that the precise terms (and where relevant conditions) of the service (if approved) are themselves subject to further consolidation in the context of amending the operating licence and performance measures. We also seek clarity that future evolution of the service, for example in its schedule, genre mix, budget, and content sourcing, are also liable to be reviewed as potentially material and therefore subject to further consultation with potentially affected parties.

Overall, we are keen to ensure that any leeway granted to Ofcom in relation to amending either the operating licence or specific performance measures is carefully circumscribed so as to maintain accountability of the BBC on a transparent and fair basis. In the event of any doubt as to the materiality of an amendment either to the operating licence or the performance measures, we believe Ofcom should err on the side of caution and proceed with a formal review to which potentially affected third parties would be invited to contribute.

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