

Siobhan Walsh
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3rd March 2017

Dear Siobhan,

The BBC's response to Ofcom consultation documents on:

Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

Procedures for enforcement of BBC competition requirements

1. The BBC welcomes the opportunity to comment on Ofcom's draft procedures relating to complaints handling and enforcement of BBC requirements in the Framework Agreement. This letter contains the BBC's response to both of the above consultation document. The comments below are made in the context of the BBC's duty under the Charter to publish an interim complaints framework, which will take effect from 3rd April 2017, and a final complaints framework by 3rd October at the latest, following consultation with the public. It is our aim to ensure that the BBC's framework and procedures are consistent with Ofcom's enforcement policies and procedures and that, taken together, the documents are easily understandable by the public.

1.1. We first set out points common to both consultation documents and then further points specific to each.

1.2 Under the BBC's complaints procedure there will be single point of entry for most complaints other than complaints about television licensing and access to party election, party political and referendum campaign broadcasts. However, Ofcom is proposing a number of separate procedures for complaints about potential breaches of the BBC's requirements - those for complaints which relate to "specified requirements", including competition requirements, and one for those that relate to breaches of other requirements in the Framework Agreement which are not covered by more specific procedures and failures by the BBC to comply with enforcement action under those more specific procedures. There is no reason that the different approaches cannot work together, but we want to be sure that all parties, including potential complainants, have certainty about the end-to-end procedures.

1.3 Accordingly, in the *Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action*, it would be helpful if the scope of the complaints covered by the procedure was clearly defined in terms of what is included rather

than what is excluded. At a minimum, it would be useful to have some illustrative examples of complaints which would be covered by the procedure set alongside examples of complaints covered by the other more specific procedures such as competition requirements. This could help a would-be complainant (who may be an individual or an organisation) understand the difference between the different “specified requirements” in the Charter and Agreement, including those that Ofcom’s has grouped together as “competition requirements” and the residual categories covered by this procedure.

1.4 It would also be helpful if in the Operating Framework, requirements that are competition requirements for the purposes of these enforcement and complaints procedures are flagged as such. For consistency across the suite of BBC and Ofcom documents relating to complaints and enforcement procedures, we will consider whether the BBC’s complaints framework can use the term ‘competition requirements’ where appropriate and give suitable examples. We will also consider asking complainants to identify, where relevant, which competition requirement has been breached.

1.5 Both Ofcom’s draft procedures take the ‘BBC deadline’ as the starting point for a two month window in which complaints can be referred to Ofcom and say that this deadline is set out in the BBC’s complaints handling procedures (A.1.18 of the consultation on requirements in the BBC Agreement and A1.16, A1.17 of the consultation on BBC competition requirements). However, the timeframes in the BBC’s procedures are indicative and described as such, rather than intended to apply to 100% of cases. A complainant would be notified of the expected timeframe for their complaint. We suggest that a less restrictive form of words would be appropriate and that Ofcom set out the operation of its time limit by reference to where the BBC has failed to respond within the target date set in accordance with its own procedures.

1.6 This would make the interaction between the BBC and Ofcom stages clearer for complainants and give Ofcom some protection against demands to consider complaints which the BBC could resolve reasonably soon after the target date set under our procedures. Ofcom could assess such demands against a general test of reasonableness. This echoes a similar point in the BBC’s response to Ofcom’s consultation on procedures for handling content standards complaints.

1.7 Further, it would be reasonable for Ofcom to give a commitment that it will aim to complete its investigations as quickly as possible and will generally inform the BBC of the expected length of an investigation and keep it updated on progress. This would mirror the commitment given in Ofcom’s draft enforcement guidelines for Competition Act 1998 cases.

Points relating to Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

1.8 A1.22 - Complainants are required to supply ‘sufficient detail’ about the subject matter of the complaint to Ofcom. This should include a specific requirement that complainants indicate if they are providing new evidence to Ofcom that has not been put before the BBC and, if so, an explanation as to why the evidence could not have been provided to the BBC. This would ensure the BBC has an opportunity to address relevant evidence at the earliest opportunity and minimise the risk of the process being unnecessarily prolonged by evidence being introduced only at Ofcom appeal stage.

1.9 A1.23 - Where the BBC has reached an appropriate decision, it would seem to be a reasonable presumption that Ofcom would not routinely impose a sanction. This should be reflected in Ofcom's drafting: for example, "*Ofcom will consider if it is nonetheless appropriate to impose a sanction taking into account the BBC's actions to resolve the complaint.*" Ofcom should also provide a clearer indication of the circumstances under which it would consider imposing a sanction on the BBC for breach of a specified requirement where the BBC has already reached an appropriate decision. Ofcom should, for example, take account of any remedial action the BBC has already initiated before deciding whether to apply any of the sanctions available to it. We would also argue that financial sanctions should be treated as a last resort, reserved for repeated breaches or the most serious breaches.

2.0 A1.40 – We note that there is no right for the BBC to have an oral hearing in contrast with the "competition requirements" procedure. It is not clear why this distinction has been made and there may be some non-competition related complaints where the opportunity for an oral hearing could aid a swift and effective resolution. It would therefore be helpful to understand when Ofcom would deem it appropriate for the BBC to make oral representations either following the case opening letter or the issuing of Ofcom's preliminary view. The BBC would particularly want the opportunity, where possible, to make representations about how an early resolution might be reached in order to save time and expense for Ofcom and complainants.

Points relating to *Procedures for enforcement of BBC competition requirements*

2.1 The BBC would always want to address concerns about its compliance with its regulatory requirements as soon as possible. Ofcom's process should build in a clear opportunity for the BBC to engage with the concerns Ofcom is investigating prior to the issue of a provisional breach notice. The informal resolution process that is envisaged at A1.32 is helpful but it should be expanded to set out how this might be facilitated by allowing the BBC to have sight of the complaint or of Ofcom's rationale for opening an investigation at a relatively early stage. This would allow the BBC, where possible, to engage constructively on resolving the issue at an early stage or at least correcting any material errors of fact. The possibility of early resolution should also be highlighted in A1.42 as one of the ways Ofcom will give the BBC a fair opportunity to make representations to and engage with Ofcom during the course of an investigation.

2.2 More generally, it would also be helpful to have some provision for regular "state of play" meetings in longer, more complex cases to ensure that any opportunities for early and effective resolution are taken in the interests of all parties.

2.3 We have two main concerns about the provisional breach notification part of the process. First, the disclosure of the provisional breach decision to other stakeholders (A1.74) runs the risk that highly prejudicial information and analysis which the BBC may not have had an opportunity to review or challenge would be shared with third parties (and possible competitors), by conducting something in the nature of a general consultation on whether the BBC has breached its obligations.

2.4 Second, Ofcom clearly needs to be able to gather evidence from third parties to assess whether there is in the first place a case to answer and to reach a final determination on that having allowed the regulated party a reasonable opportunity to respond to those

findings. However, this could be achieved in a more proportionate and fair way by the use of Ofcom's power to send out focussed information requests to third parties rather than inviting them to review the whole provisional case against the BBC. This would also avoid what could be an extensive process of agreeing what could be included in a non-confidential version of the provisional decision without unfairly prejudicing the BBC's position.

2.5 The procedure at A1.73 and A1.75 does not set out a minimum time in which BBC will have a chance to make representations in response to a provisional breach notification but states this will be on a case by case basis. Given the time that the preparation of a BBC response might need in terms of internal clearances including at Board level, we would like the opportunity to discuss with Ofcom what might be a reasonable time period depending on the circumstances.

2.6 Similarly, while it may not be possible to set out a single target date for completion, A1.48 should include a commitment to set target dates for key stages once the decision to open an investigation has been taken and to communicate them to the BBC and the complainant.

2.7 A1.27 – This paragraph should also cross-refer to the fact that Ofcom would be entitled to take into account any other guidance it had issued on the competition requirements covered by this procedure in other parts of the Operating Framework - for example, its Trading and Separation requirements.

2.8 A1.39 – It would be more proportionate and consistent with interim measures processes under the Competition Act 1998 if this expedited procedure was confined to cases where the risk of harm is not just significant but also irreversible unless action is taken immediately.

2.9 A1.49 – It would be helpful if additional detail was provided on when, in Ofcom's view, it would be reasonable to widen the scope of an investigation.

3.0 We would welcome the opportunity to discuss these comments further.

Yours sincerely,

A handwritten signature in blue ink that reads "J. Heath". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

James Heath

Director of Policy, BBC

