



SECTION 1: INTRODUCTION

- 1.1 We refer to the following Ofcom procedural consultations as part of its preparations for regulating the BBC (“**the Consultations**”):
- (a) Procedures for enforcement of BBC competition requirements (“**the Competition Procedures**”);
 - (b) Procedures for handling content standard complaints, investigations and sanctions for BBC programmes; and
 - (c) Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action.
- 1.1 The BBC remains a significant intervention by the state in the UK media sector. Its vast scale and remit means it has an inevitable impact on competition in the wider market, at all levels of the value chain. Without appropriate safeguards, the BBC’s public service activities and commercial services have the potential to harm the ability of others to compete effectively.
- 1.2 Consequently, there is a need to have appropriate and robust checks and balances in place to ensure that the BBC’s activities do not have adverse effects on competition. In this context, Ofcom’s role in effectively scrutinising and controlling the BBC’s impact is all the more important.
- 1.3 This is even more necessary given Ofcom’s significant duties in relation to the BBC as described in our response to Ofcom’s consultations on competition regulation of the BBC.¹
- 1.4 In particular, Ofcom has a duty in regulating the BBC to have regard to the desirability of ‘*protecting fair and effective competition*’ in the UK, and not to ‘*promote fair and effective competition*’ as Ofcom mistakenly states at paragraph A1.2 of the Competition Procedures. The difference is however significant. The overarching aim of Ofcom’s duties in respect of the BBC is the *protection* of fair and effective competition in relation to the BBC’s activities, whose unique funding arrangements and privileged status represent a significant intervention into broadcasting and related markets. It is therefore essential that Ofcom takes a precautionary approach to regulating the BBC’s activities when assessing whether fair and effective competition is harmed.
- 1.5 Sky UK Limited (“**Sky**”) welcomes and supports much of Ofcom’s proposed procedures. Sky however considers that although most of proposals seem reasonable, their effectiveness will depend on how they work in practice. Sky notes that the proposed system allows for significant flexibility for Ofcom. However, Ofcom should at all times remain conscious of its statutory obligations as set out above, and in particular, the need, at all times for Ofcom to act in such a way as to protect fair and effective competition.
- 1.6 For instance, Sky notes that Ofcom reserves the right to depart from the approach set out in the Consultations. Such instances should be exceptional and complainants, as those most likely to be

¹ Sections 1.12 and 1.13 of Sky’s response to Ofcom’s consultations on competition regulation of the BBC dated February 2017.

harm, or at risk of harm from the BBC, should be given an opportunity to comment on proposals to depart from the established procedures.

- 1.7 Given the novelty of the regulatory arrangements in respect of the BBC, Sky also recognises that an important challenge for Ofcom is to create an operating framework which works effectively for all stakeholders. Ofcom should review its procedures on a regular basis in the light of its experience, and in any event no less than every two years.
- 1.8 Finally, Sky has a few detailed concerns with Ofcom's proposed proposals which are set out in this response to Ofcom's consultations.

SECTION 2: THE PROPOSED PROCEDURES

Procedures for enforcement of BBC competition requirements

- 2.1 In Sky's view, the Competition Procedures will play a critical role in ensuring that BBC's impact on fair and effective competition is effectively scrutinised and controlled. It is essential that Ofcom's procedures in relation to protecting fair and effective competition make appropriate provision for the involvement of complainants. This should include appropriate involvement of the complainant where:
- (a) Ofcom resolves an issue through other methods of redress.² If the complainant is not involved in any 'informal' resolution process, it could lead to further harm to fair and effective competition, as well as procedural inefficiency should further such resolution prompt further complaints;
 - (b) Ofcom decides not to open an investigation³ or Ofcom decides to close a case.⁴ Such decisions are of importance for the complainant who needs a reasoned decision in order to be able to exercise its rights of appeal. This is consistent with practice in competition law complaints, for example, under the European Commission's procedures;⁵ and
 - (c) Ofcom provides for an oral hearing following a provisional breach notification.⁶ Ofcom states that complainants and third parties will not "usually" be invited to attend the oral hearing. However, just as Ofcom's procedures provide for third parties to receive a non-confidential copy of the provisional breach notification, it may be appropriate in certain circumstances for third parties to attend the oral hearing or be afforded their own hearing. This is also consistent with the European Commission's competition procedures.⁷

Sky

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² Section A1.31 of the Competition Procedures.

³ Section A1.35 of the Competition Procedures.

⁴ Section A1.66 of the Competition Procedures.

⁵ Article 7(1) of Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TEU].

⁶ Section A1.79 of the Competition Procedures.

⁷ See for example Article 6(2) of Regulation 773/2004.

