



Siobhan Walsh  
Content Policy Director  
Ofcom Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

18<sup>th</sup> March 2017

Dear Siobhan,

The BBC's trading activities – a consultation on Ofcom's proposed requirements

- 1.1 The BBC welcomes the chance to opportunity to comment on the requirements that Ofcom proposes to place on the BBC to ensure that its trading activities do not harm fair and effective competition.
- 1.2 We understand that the current regulations and procedures regarding trading activities must be revised and updated to reflect the provisions of the new Charter and Framework Agreement. It is important that Ofcom's regulatory requirements are principle-based, non-intrusive and proportionate to the actual level of risk observed in this area. We note in this regard that the scope of the BBC's trading activities is severely constrained from the outset by the provisions in the Framework Agreement and we are familiar with working within strict parameters from our previous regulatory regime. In addition, the BBC is mindful that other factors might serve to curtail its provision of goods, assets, services and rights externally, such as obligations to rights holders.
- 1.3 In the remainder of this response, we suggest some general clarifications, and then set out how the proposed requirements could be modified in certain respects.

## 2. General clarifications

- 2.1 **References to “discriminatory pricing/access” and “discrimination”** – It may be helpful for Ofcom to clarify and use consistent language around ensuring the BBC does not unduly discriminate, which could reflect the language used elsewhere in competition law, i.e. non-discriminatory treatment and objective justification.

For example, in paragraph 3.11, Ofcom gives the following examples of discriminatory pricing/access: “charging different prices to different third parties for the same service, granting

preferential access or refusing to supply certain third parties.” On the pricing example, there may be fair and objective reasons for different prices (e.g. seasonality, package of goods/services being purchased by the third parties etc.). Similarly, on the refusal to supply example, there may be fair and objective justifications (e.g. poor credit record of the third party).

We would also suggest that Ofcom make it clear, as it has in its requirements and guidance for the BBC’s commercial activities<sup>1</sup>, that it does not expect the BBC to make all goods and services available to the wider market, e.g. where the BBC supplies such goods and services solely to its commercial subsidiaries for reasons of operational efficiency, such as shared business support functions (e.g. Finance, HR and Legal).

**2.2 References to “goods and services”** – Ofcom focuses on “goods and services” throughout the consultation document. We note that some of the BBC’s trading activities are likely to involve rights in content and technology, as set out in the list of trading activities in Clause 31(2) of the Framework Agreement and replicated in paragraph 3.2 of the consultation document. It may, therefore, be appropriate to reflect this language in Ofcom’s Operating Framework.

### **3. Proposed Requirements**

**3.1 Trading activities requirements (3.1-3.7)** – Ofcom sets out the trading activities the BBC is permitted to carry out under Clause 31(2) of the Framework Agreement. Either within this section or the previous Section 2 Legal Framework, we would suggest that Ofcom also specifically recognise that the BBC is constrained by the Framework Agreement as to the range of goods and services it can “trade” in the wider market and that the BBC is not “in the business” of selling such goods and services.<sup>2</sup>

Paragraph 3.6 sets out that the BBC’s trading activities are not expressly designed to make a profit. This may be the case for some categories but, as Ofcom recognises at Paragraph 3.11, it is also important that the BBC does not price below market norms. There is a clear tension between these two requirements.

To ensure that the BBC does not undercut the market and that the trading activity is delivering a reasonable return to the Public Service, it may be appropriate for the price to incorporate an appropriate profit margin (e.g. in the case of licensing of rights). However, in the case of the trading activities described in Clause 31(2)(b), the BBC is explicitly permitted to charge on a cost recovery basis, with any profit being no more than incidental (e.g. ticket sales to a Public Service

---

<sup>1</sup> Paragraphs 3.28-3.30 of Ofcom’s requirements and guidance on the BBC’s Commercial Activities - [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/99412/bbc-commercial.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/99412/bbc-commercial.pdf)

<sup>2</sup> Clauses 23(4) and 31(2) Framework Agreement. Also see para 4.11 [https://www.ofcom.org.uk/data/assets/pdf\\_file/0037/99577/BBCCompetitionStatement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0037/99577/BBCCompetitionStatement.pdf)

event<sup>3</sup>). Paragraph 3.6 could therefore be adjusted to reflect that whilst some of the BBC's trading activities will, in line with market benchmarks, be required to return an appropriate profit, others will not, and indeed may involve the BBC charging on a cost recovery basis.

**3.2 Requirements for trading between the BBC Public Service and BBC commercial subsidiaries (3.13-3.14)** – Ofcom confirm that its requirements and guidance on the BBC's commercial activities<sup>4</sup> addresses the risk of the BBC providing its commercial subsidiaries with an unfair competitive advantage. As suggested above, we would ask that Ofcom consider clarifying that the requirement for “equivalent access to goods and services by third parties” is limited to those goods and services the BBC makes available to the wider market, i.e. excluding those it is permitted to supply solely to BBC commercial subsidiaries.<sup>5</sup>

**3.3 Proposed requirements for trading between the BBC Public Service and third parties (3.15-3.21)** – Ofcom propose that the market pricing principles in its requirements on the BBC's commercial activities<sup>6</sup> should apply to the pricing of goods and services sold by the BBC Public Service to third parties. We set out below clarifications based on the specific circumstances of the BBC's trading activities:

**3.3.1 *Selling of assets or of excess capacity in the BBC's resources held for use by the UK Public Services (including any capacity on a television multiplex service that is under the BBC's control)***

We note Ofcom's footnote in paragraph 3.11, which recognises “Where occasional sales are being made on an ad hoc basis, prices that cover short run incremental costs of providing studios space to a third party, that would otherwise have been vacant, may be appropriate even if the contribution to fixed costs is small (so long as there is no repeated pattern of such sales).” It would be helpful if Ofcom recognised that in the context of any spare capacity deal, it may occasionally be reasonable for the BBC to charge a spot rate that is below market rates for short term use where the asset (e.g. staff member or an outside broadcast van) would otherwise be under-utilised, in order for the BBC to “sweat” its assets and bring some value back in to the Public Service.

**3.3.2 *Trading and other activity between the BBC and the BBC's commercial arm, or between different parts of the BBC's organisation***

As reflected in the BBC's submission to Ofcom on the BBC's commercial activities,<sup>7</sup> where the BBC is setting prices for group assets and services that it supplies only to the commercial

---

<sup>3</sup> The application of ticket sale proceeds towards the costs of hosting certain Public Service Events is also explicitly acknowledged and permitted in Clause 49(4)(h) of the Framework Agreement

<sup>4</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/99412/bbc-commercial.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/99412/bbc-commercial.pdf)

<sup>5</sup> As reflected in paragraphs 3.28-3.30 of Ofcom's requirements and guidance on the BBC's Commercial Activities - [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/99412/bbc-commercial.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/99412/bbc-commercial.pdf)

<sup>6</sup> Ibid.

<sup>7</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/99223/BBC-Commercial.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/99223/BBC-Commercial.pdf)

subsidiaries,<sup>8</sup> BBC Group assets and services are either procured at market rates or tend to be BBC-specific and do not lend themselves to meaningful market-comparison (for example, access to BBC sets or props or specialist advice on BBC standards). In such cases, it is essential only that the cost (including direct costs and an appropriate share of overheads) is passed on to the subsidiaries based on their use.<sup>9</sup>

Your sincerely,

A handwritten signature in black 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

---

<sup>8</sup> As permitted in paragraphs 3.28 – 3.30 of Ofcom’s requirements and guidance on the BBC’s Commercial Activities - [https://www.ofcom.org.uk/data/assets/pdf\\_file/0025/99412/bbc-commercial.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0025/99412/bbc-commercial.pdf)

<sup>9</sup> This is recognised by Ofcom at paragraph 4.20 in - [https://www.ofcom.org.uk/data/assets/pdf\\_file/0037/99577/BCCCompetitionStatement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0037/99577/BCCCompetitionStatement.pdf)