

The Ofcom logo features the word "Ofcom" in a bold, red, sans-serif font. Below the text is a horizontal bar composed of several colored segments: purple, blue, green, yellow, red, and purple.

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# Assessing the impact of the BBC's public service activities

Ofcom's procedures and guidance

Publication date: 29 March 2017

Updated on 10 October 2018 to correct cross-referencing error at paragraph 4.15

# About this document

The role of the BBC is to produce high quality and distinctive programmes and services which educate, inform and entertain.

As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by offering more choice, stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.

We may carry out competition reviews to assess the potential impacts of the BBC's ongoing public service activities and whether the public value justifies any adverse impact on fair and effective competition.

In this document we set out the procedures and guidance that we will adopt in deciding whether to launch and then undertake a competition review.

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## Section 1

# Introduction

- 1.1 The BBC's role is to act in the public interest and serve all audiences with content which informs, educates and entertains. To do so, it provides impartial news and information, together with high-quality and distinctive output and services. In resetting the BBC's Mission and Public Purposes,<sup>1</sup> the Government has confirmed the valuable contribution the BBC makes to the UK and to people's lives. The Government has also made clear that it expects the BBC to do more in certain areas, in order to justify its unique funding arrangements and privileged status.
- 1.2 As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by offering more choice, stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.
- 1.3 For the BBC to succeed in meeting its objectives over the next decade, it may need to make changes to its existing activities and develop new services for its audiences. The new Royal Charter<sup>2</sup> and the agreement between the Secretary of State for Culture, Media and Sport, and the BBC (the "**Agreement**") – published by Government on 15 December 2016 – recognise this.<sup>3</sup> But they also emphasise that in doing so the BBC needs to consider potential impacts on competition in the sector as a whole.
- 1.4 In order to address the risk that the BBC's ongoing "**public service activities**" may give rise to competition concerns,<sup>4</sup> Ofcom has a role to protect fair and effective competition. When assessing the impact of public service activities on competition we must take into account the BBC's obligations to fulfil its Mission and promote the Public Purposes.

## Role of the BBC

- 1.5 The Charter places a number of obligations on the BBC. The BBC must have particular regard to the effects its public service activities have on competition in the UK. It must seek to avoid unnecessary negative impacts, while promoting positive impacts on the wider market.<sup>5</sup>

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<sup>1</sup> Articles 5 and 6 of the Royal Charter for the continuance of the British Broadcasting Corporation.

<sup>2</sup> In the rest of this document we refer to the Royal Charter for the continuance of the British Broadcasting Corporation as the "**Charter**", available at:

<https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>.

<sup>3</sup> <https://www.gov.uk/government/publications/bbc-charter-and-framework-agreement>

<sup>4</sup> The BBC's public service activities comprise its UK Public Services and non-service activities.

<sup>5</sup> Article 11 of the Charter.

## Our role

- 1.6 Under the Charter, we must set requirements in the BBC's Operating Framework,<sup>6</sup> to protect fair and effective competition in the UK in relation to the BBC's public service activities and trading activities.<sup>7</sup> The Agreement sets out that, in relation to ongoing public service activities, this may include conducting a BBC competition review ("**BCR**").<sup>8</sup>
- 1.7 The Charter and Agreement establish the role that the BBC is intended to play in the media market. A BCR will enable us to consider significant competition issues which emerge, in some cases gradually, over the course of the Charter period. It will enable us to consider, in light of developments that have occurred, whether an ongoing BBC public service activity is having a significant adverse impact on fair and effective competition. We can then also consider whether the public value of the public service activity justifies adverse impacts on fair and effective competition.
- 1.8 This is not about looking at day-to-day business decisions made by the BBC, for example decisions about individual programmes or scheduling. It is also not about revisiting historic matters settled in the Charter or the fundamental role of the BBC. A BCR is a tool intended to examine existing services where the BBC has made incremental changes over time and particular changes have not warranted a BBC competition assessment individually ("**BCA**") or shorter assessment under the Agreement,<sup>9</sup> or where market conditions have undergone significant change,<sup>10</sup> which may raise important questions about the impact of public service activities on markets.

## Purpose of this document

- 1.9 This document is intended to form part of the BBC's Operating Framework, and as such includes obligations which are binding on the BBC. This document also sets out guidance on the procedures, timescales and approach that we will generally apply.
- 1.10 The remainder of the document is structured as follows:
- Section 2 sets out the legal framework underpinning our role.
  - Section 3 provides an overview of the types of competition concern that could be associated with public service activities.

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<sup>6</sup> The regulatory framework that we will impose on the BBC. See our *Introduction to Ofcom's Operating Framework for the BBC* at:

[https://www.ofcom.org.uk/data/assets/pdf\\_file/0030/99408/bbc-framework.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0030/99408/bbc-framework.pdf).

<sup>7</sup> Article 46(5)(b) of the Charter. We will consult on requirements in relation to trading activities in due course.

<sup>8</sup> Clause 12 of the Agreement in relation to UK Public Services, and clause 21 in relation to non-service activities.

<sup>9</sup> See our separate guidance relating to proposed changes to the BBC's public service activities: <https://www.ofcom.org.uk/consultations-and-statements/category-1/assessing-impact-proposed-BBC-public-service-activities>.

<sup>10</sup> The latter category could include, for example, scenarios in which the BBC has implemented material changes to public service activities following a BCA or shorter assessment by us, but which are having a greater impact on competition following changes in market conditions.

- Section 4 sets out the broad procedure we generally expect to follow in carrying out a BCR.
  - Section 5 explains the analytical approach that we expect to apply when we choose to carry out a BCR.
- 1.11 These procedures and guidance apply only to public service activities and do not therefore cover all categories of activity which the BBC may carry out.<sup>11</sup>
- 1.12 The procedures and guidance in this document take effect from 3 April 2017. They will be kept under review and amended as appropriate in light of further experience and any change to our powers and responsibilities. We will provide an explanation where we depart from the approach set out in the procedures and guidance.

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<sup>11</sup> Specifically, it does not cover: provision of the World Service, commercial activities through a commercial subsidiary, trading activities, and a list of so-called “specified activities”. These categories are further defined in the Charter and Agreement. In summary, the World Service is primarily targeted outside the UK; somewhat different considerations apply to commercial and trading activities; specified activities are matters required by the Government including support for digital television and radio coverage; Welsh, Gaelic, Irish and Ulster-Scots languages; spectrum efficiency; broadband rollout; and media monitoring. Where relevant, these activities are discussed in our *Introduction to Ofcom’s Operating Framework for the BBC* – available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/99408/bbc-framework.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/99408/bbc-framework.pdf).

## Section 2

# Legal framework

2.1 We set out the procedures, requirements and guidance in this document based on the legal framework contained within the 2003 Communications Act (“**the Act**”), the Charter and Agreement. This section summarises that framework.

## The Communications Act

2.2 Ofcom is a statutory corporation created by the Office of Communications Act 2002. Our power to regulate the BBC is derived from the Act, which sets out that for the purposes of the carrying out regulation of the BBC we will have such powers and duties as may be conferred on us by or under the Charter and Agreement.<sup>12</sup> Our general duties under section 3 of the Act therefore apply to the exercise of our functions in relation to the BBC.

## Royal Charter for the BBC

2.3 Article 45(2) of the Charter provides that we must have regard, in carrying out our functions, to such of the following as appear to us to be relevant in the circumstances:

- the object of the BBC to fulfil its Mission and to promote the Public Purposes;
- the desirability of protecting fair and effective competition in the United Kingdom;
- the requirement for the BBC to comply with its duties under the Charter, including its general duties.

2.4 Article 46 of the Charter (Principal functions of Ofcom) sets out that we must set requirements in the BBC’s Operating Framework to protect fair and effective competition in the UK in relation to the effect on fair and effective competition of the BBC’s public service activities and trading activities.

## Agreement between the Secretary of State and the BBC

2.5 The clauses of the Agreement which are most relevant to the procedures and guidance in this document are clause 12 in relation to UK Public Services and clause 21 in relation to non-service activities. The provisions for both types of BBC activity closely mirror each other.

2.6 In summary, we may, following such procedures as we consider appropriate, carry out a BCR where we have reasonable grounds for believing the carrying out of a public service activity is having a significant adverse impact on fair and effective competition. Such a review must assess whether the public value of the activity justifies its current and future impact on fair and effective competition. It may conclude that the BBC may continue the activity, or that it must make modifications or continue subject to conditions.

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<sup>12</sup> We note that the precise scope of the key relevant provision, section 198 of the Communications Act, is currently the subject of a proposed amendment under the Digital Economy Bill.



## Section 3

# The market impact of public service activities

- 3.1 The Charter and Agreement establish the role that the BBC is intended to play in the media market. The UK has a successful broadcast sector, sustained by a competitive media landscape of which the BBC is a central part. The BBC's programmes and services are integral to the wide range of high-quality and varied content that UK audiences enjoy. The BBC will continue to play this key role by delivering against its new Mission and Public Purposes.<sup>13</sup>
- 3.2 Over the course of the Charter period, BBC public service activities may gradually evolve in a direction which alters their market impact, including through a series of incremental changes which may not individually have warranted the conduct of a BCA or shorter assessment, but which are material taken as a whole. Additionally, market conditions may change significantly, changing the impact of ongoing public service activities.
- 3.3 Where, in light of developments in BBC public service activities and in market conditions, we have reasonable grounds to believe a public service activity is having a significant adverse impact on fair and effective competition we may consider launching a BCR. Under a BCR we will look at both the public value of the service and the adverse effects on competition.
- 3.4 A BCR will therefore enable us to consider significant competition issues which emerge, in some cases gradually, over the course of the Charter period. We will not consider launching BCRs to look at day-to-day business decisions made by the BBC, for example decisions about individual programmes or scheduling. We also do not consider that BCRs are intended to act as a means of undermining the fundamental role of the BBC settled in the Charter and Agreement. Nor do we consider that they would be used to revisit historic matters specifically settled in the Charter. Instead, the BCR is available as a tool to examine existing services where incremental service changes or significant changes to market conditions raise important questions about the impact of public service activities on markets.
- 3.5 In this section we set out the nature of potential competition concerns associated with BBC public service activities.

## Identifying competition concerns

- 3.6 Competition typically produces benefits for society. Where a supplier offers a more attractive service or a better price than its rivals it is likely to win customers and can attract new customers to the market. This in turn creates an incentive for all firms to innovate and invest in producing better services and to keep prices in line with their costs.
- 3.7 The BBC is a substantial public investment in the UK media sector. In order better to fulfil its remit, the public service activities that the BBC carries out and the way in which it carries them out will inevitably change over time. The BBC needs to be able

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<sup>13</sup> Article 45 of the Charter.

to innovate and respond to audience tastes and preferences, and to sector developments.

- 3.8 This can be positive for competition by increasing choice, stimulating demand or promoting innovation, for example. However, there is a risk that some of the BBC's public service activities or aspects of them may unduly harm competition, investment and ultimately audiences. Indeed, activities that create a larger amount of public value, for example because they attract high audiences, may have a larger impact on fair and effective competition. Our role is to consider whether there is significant adverse effect on competition associated with the public service activity and whether it is justified in light of the potential public value.
- 3.9 While particular competition concerns will vary depending on the nature and scope of the public service activity involved, in most cases competition concerns are likely to be based on the following types of harm:<sup>14</sup>
- the risk of the BBC crowding out commercial activity; and/or
  - the risk of the BBC harming competition elsewhere in the supply chain.

### **The risk that the BBC crowds out commercial activity**

- 3.10 As a publicly funded organisation, the BBC is given the freedom by Parliament not to need to make money as a commercial supplier would. The purpose, as made clear in the Charter and Agreement, is to facilitate the provision of services consisting of a wide range of high quality and distinctive programmes.
- 3.11 People may favour a BBC service not because of its high quality or distinctive features, but because it is free<sup>15</sup> and/or free from advertising. In addition, part of the affinity that people feel towards the BBC may be due to its brand, prominence or position as an organisation funded by the licence fee. This may provide the BBC with a competitive advantage that is not available to other providers, for example audiences may have a tendency to default to the BBC's services.
- 3.12 Where the BBC offers a particular public service activity then this may reduce the potential audience for commercial rivals. For some, the impact of lower audiences will result in lower advertising revenues. For others, lower audiences may directly result in lower subscription fees. The BBC's presence may also mean that people are less willing to pay for media services and have a reduced tolerance for adverts, further reducing potential revenue. The BBC may reduce the profitability of its commercial rivals. This may undermine commercial providers' willingness to invest in new services or in improving the quality of their existing services. It may also result in some commercial providers ceasing to provide services or being deterred from entering the market, if it is no longer profitable to do so.
- 3.13 In summary, as a result of the competitive advantages described above, BBC public service activities may displace activities that could be undertaken by commercial providers. This can ultimately cause harm through reduced choice, quality and/or

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<sup>14</sup> A BBC public service activity may give rise to more than one competition concern and those concerns may be interrelated.

<sup>15</sup> BBC services are offered free of charge at point of use although they are ultimately funded by the licence fee. While many subscription services are free at the point of use as well there is a more direct relation between subscription and use of service compared to payment of the licence fee and use of BBC.

innovation. We will therefore need to look at such potential concerns alongside a consideration of the public value of the public service activity.

### **The risk that the BBC harms competition elsewhere in the supply chain**

3.14 The BBC accounts for a significant proportion of the UK media sector, and it is larger than commercial providers in many areas. How the BBC procures content and inputs to develop its services, for example, could have an adverse impact on competition. The types of competition concern that might arise include the following:

- the BBC may favour its own in-house services or subsidiaries over commercial competitors, even if those competitors are more efficient and able to deliver a better product or service;
- when it buys products or services, the BBC may do so in a way that limits their availability to competitors (e.g. the BBC might require a supplier to exclusively serve the BBC); and
- when it supplies important products or services to others, the BBC may do so in an unfair, unreasonable or discriminatory manner. This might place some providers at a competitive disadvantage compared to others.

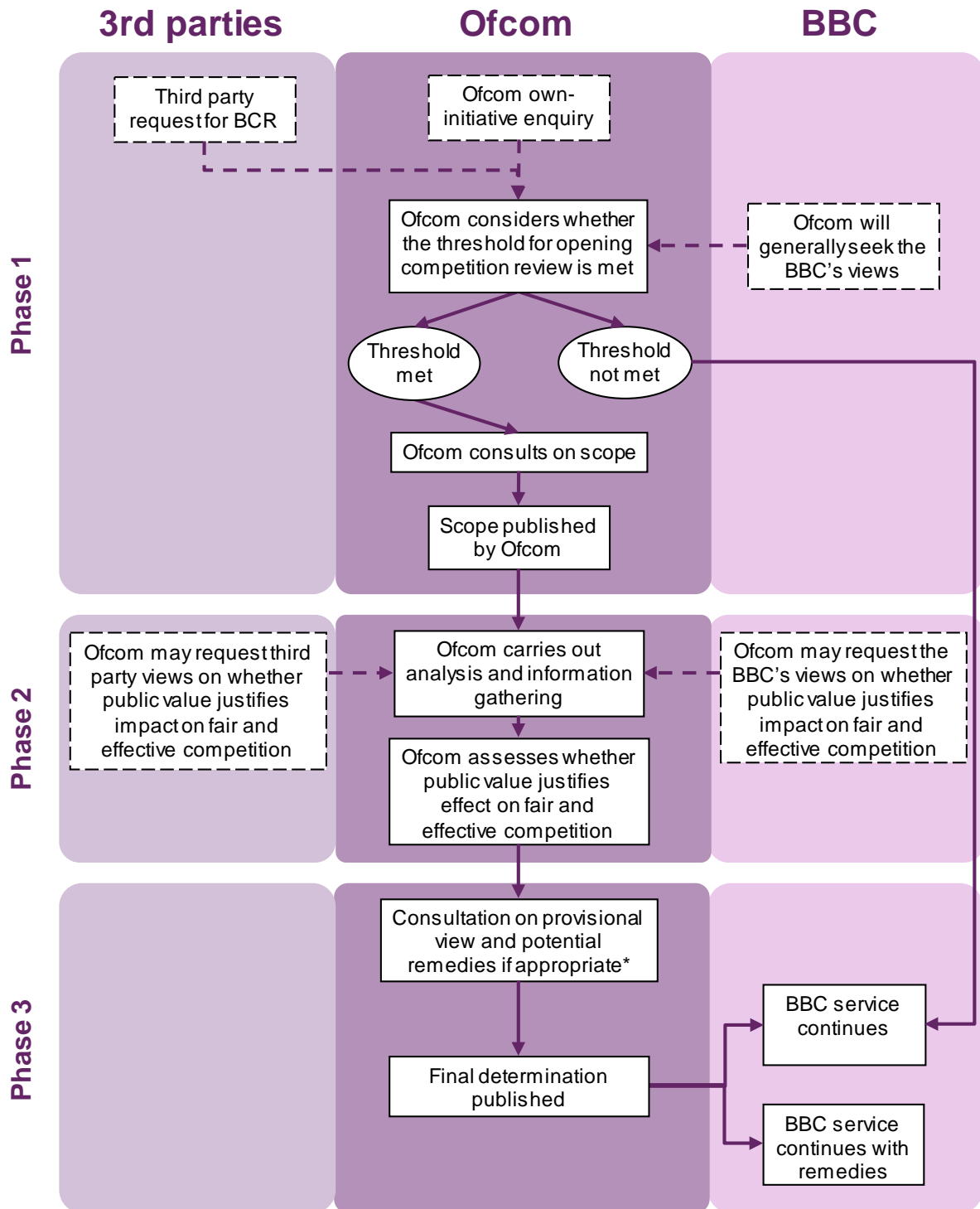
3.15 Arrangements such as these can deter entry by other suppliers, reduce the scale of other suppliers or even result in them exiting the market. This could ultimately harm audiences as it can result in reduced choice, quality and/or innovation. As noted above we will need to look at such potential concerns alongside a consideration of the public value of the public service activity.

Section 4

# Procedures and guidance

4.1 This section sets out the framework, including indicative timings, within which we will carry out BCRs in respect of BBC public service activities.

Indicative stages of the review procedure



\*We may re-consult on any potential remedies where necessary.

## Phase 1: deciding whether or not to initiate a BCR

4.2 We may decide to initiate a BCR in response to requests from stakeholders, or on our own initiative. We address these possibilities in detail below, and provide a non-exhaustive list of factors that we are likely to consider in deciding whether to exercise our discretion to initiate a BCR.

### Request from stakeholders

4.3 From time to time, stakeholders may request that we carry out a BCR in respect of BBC public service activities. The decision to initiate a BCR requires us to be satisfied that we have reasonable grounds to believe that the carrying out of public service activities is having a significant adverse impact on fair and effective competition.<sup>16</sup> Moreover, it requires us to commence a substantial procedure, which will place an administrative burden on us, the BBC and others, and may lead to a degree of uncertainty for the UK media sector (although, as we explain at paragraph 4.23, we will seek to complete any investigation in a timely manner). It is also appropriate that the BBC should be able to comment on a request for a BCR.

4.4 In light of this, we require a request for us to initiate a BCR to be made formally (in the case of a limited company, by the directors) and to include, as a minimum:

- The name, address, telephone number and email address of an individual or individuals with whom we can discuss the detail of the request and ask for further information if appropriate.
- Full information on the organisation making the request (e.g. whether it has commercial interests in matters covered by the request, or whether it represents other affected parties).
- Contact details of any third parties who may be in a position to provide further information.
- A description of the specific UK Public Service (or part thereof)<sup>17</sup> or non-service activity which the requesting party considers is having an adverse impact on fair and effective competition.
- A clear description of the nature of the adverse impact on fair and effective competition (i.e. the competition concerns involved).
- Evidence of an actual adverse impact on fair and effective competition.
- Evidence of impacts on audiences.
- A description of remedial measures which the requesting party would consider appropriate in the circumstances to address the competition concerns identified,

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<sup>16</sup> We are not required, as part of meeting the threshold to initiate a BCR, to reach a view on the public value arising from the public service activities. However, our view of public value may have a bearing whether or not we exercise our discretion to initiate a BCR, and must form part of any BCR once initiated (see further below).

<sup>17</sup> Clause 12(6) of the Agreement makes clear that a UK Public Service may include a part of the service.

and why any resulting impact on public value of implementing such measures would be proportionate.

- Information about steps taken by the requestor to resolve the matter with the BBC itself.
- Reasons why, in light of the indicative list of factors below and any other relevant matters, it would be appropriate for us to exercise our discretion to initiate a BCR.

4.5 Given that we will seek the BBC's comments on a request for a BCR, we require requesting parties to confirm that the complaint is non-confidential, or to provide a non-confidential version of the request, clearly indicating the reasons why the requesting party considers redacted information to be confidential.<sup>18</sup>

### **Own initiative investigation**

4.6 We may initiate a BCR in the absence of a formal request. This could be relevant where, for example, our work in other areas (such as performance monitoring or broader research into markets in which the BBC is involved) gives rise to evidence that the carrying on of a public service activity is having a significant adverse impact on fair and effective competition and that this may merit further investigation, for example because the associated public value appears relatively limited.

4.7 It may also be relevant where we are aware of concerns from a number of stakeholders, but these have not been formalised in a request.

4.8 We are mindful, in this context, that there may not be an obvious third party who has the incentive to request a BCR in some cases.<sup>19</sup>

### **Decision to initiate a BCR**

4.9 There are two aspects involved in a decision to initiate a BCR:

- We need to consider whether there are reasonable grounds to believe that the carrying out of a public service activity is having a significant adverse impact on fair and effective competition (i.e. whether the minimum threshold that must be met before initiating a BCR is met).
- Given that the Agreement gives us discretion as to whether or not to carry out a BCR in such circumstances, we need to consider whether it would be appropriate to do so in light of matters including the scale of apparent impacts, any initial view of possible public value and measures potentially available to resolve the issue.

4.10 Our aim, where we receive a request to initiate a BCR, will generally be to reach a decision on that request within six weeks. However, this will depend on a number of factors, including whether we need to carry out further information gathering and analysis.

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<sup>18</sup> In some circumstances, there may be information which the requesting party considers confidential in respect of third parties but not the BBC (e.g. commercially confidential discussions between the requesting party and the BBC itself). Again, this should be clearly set out by the requesting party.

<sup>19</sup> For example, if the potential adverse impact involves barriers to small, innovative companies providing services, such companies may never be established in the first place (and so would not be in a position to make a request).

- 4.11 We will generally seek the BBC's views where we are considering whether to initiate a BCR (although we may decide not to in cases appearing to us to be urgent). Where we are responding to a request, this would involve provision of a non-confidential version of the request. Where we are considering a BCR on our own initiative, we will provide the BBC with our grounds for believing that the carrying out of a public service activity is having a significant adverse impact on fair and effective competition, and evidence we will be relying upon to initiate the BCR.
- 4.12 In reaching our decision on whether or not to initiate a BCR, we will generally give the BBC two weeks to respond and will ask for the BBC's views on the existence of reasonable grounds for believing that the operation of a public service activity is having a significant adverse impact on fair and effective competition. We will not ask the BBC for a full rebuttal, as that is a matter for the full BCR procedure if the threshold for its initiation is met.
- 4.13 One matter that the BBC may wish to consider as part of any response, is whether there are immediate steps it can offer to take to rectify any adverse impact on fair and effective competition and avoid the need for a BCR. What these steps might entail will be informed by the nature of the competition concern. The BBC may also wish to make reference to any reasonably advanced plans to make relevant changes to the activities in question that it would expect to come to us as a change proposal under the Agreement.<sup>20</sup>
- 4.14 Having considered the BBC's response, we will determine whether we have reasonable grounds for believing that the operation of a public service activity is having a significant adverse impact on fair and effective competition.
- 4.15 Where we consider reasonable grounds exist, we will consider whether to exercise our discretion to initiate a BCR. We will make decisions about whether or not to open investigations on a case-by-case basis. The factors we may consider include the following.
- The likely scale of the adverse impact we have reasonable grounds for believing may exist.<sup>21</sup> We will consider at a high level the factors set out in our guidance on our analytical approach at Section 5.
  - The potential for any adverse impact to increase or reduce in future. For example, where there is a trajectory of incremental increase in the scale or scope of BBC activities, this could indicate a potential for concerns to increase over time.
  - Any initial view we have on the public value of the elements of the BBC public service activities a BCR would examine. A more detailed assessment of public value relative to adverse impact is a matter for the BCR itself if initiated, but an initial view may inform our view on the merits of carrying out a full BCR.
  - The existence of appropriate potential measures we could put in place to address any adverse impact. We note in this context that we may require the BBC to

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<sup>20</sup> Clauses 7 to 11 of the Agreement in relation to UK Public Services and clauses 16 to 20 in relation to non-service activities.

<sup>21</sup> We recognise in this context that there is a danger of not appreciating that a small matter for an organisation of the BBC's scale may be large for some others in a particular market.

make modifications to activities in light of the outcome of a BCR<sup>22</sup>, but we cannot require changes by others in the market.

- The existence of alternative, potentially more appropriate mechanisms to address the issues raised including other regulatory tools and further discussions between the BBC and third parties.
- The resources required to conduct a BCR and the comparative benefits of using those resources in other ways. We are particularly aware in this context of projects drawing on similar resources such as other ongoing BCRs and BCAs.
- Whether the subject matter is appropriate for a BCR, given the purpose of this procedure; as explained in paragraphs 1.7 and 1.8 we do not believe a BCR is appropriate for some matters.

4.16 Our framework for considering whether it would be appropriate to carry out a BCR is illustrative. We will therefore take into account other factors where appropriate.

4.17 We will inform any requesting party and the BBC of our decision on whether or not to initiate a BCR. It is important to note that a decision not to initiate a BCR would not preclude doing so at a later date. We will generally also publish an update on our website (without detailed reasons) so that third parties are aware of areas where initiating a BCR has been considered.

### **Scoping document**

4.18 Where we decide to initiate a BCR, we will generally consult for two weeks on the scope of our investigation. The scoping document will summarise:

- a) the UK Public Service (or part thereof) or non-service activity which is subject to the BCR;
- b) the reasonable grounds we have for believing that the BBC activity is having a significant adverse impact on fair and effective competition;
- c) an overview of expected timescales and procedure for the BCR;
- d) any other information that we consider relevant, such as measures which have been suggested by any requesting party or considered by us to address the adverse impact on fair and effective competition should its existence be substantiated by the BCR, and any initial view we have on the public value of the elements of the BBC public service activities subject to the BCR.

4.19 Consultation responses should be limited to the proposed scope of our review. Stakeholders will have an opportunity during Phase 2 to comment on the detailed issues raised by the BCR. We will then aim to publish the finalised scoping document within two weeks of the close of the consultation on the draft.

4.20 The purpose of the finalised scoping document is to ensure that the BCR remains focussed on issues which gave rise to its being initiated in the first place. Without such focus, there is a risk that there will be pressure to extend a BCR to matters which are not directly relevant to the grounds we have for believing the BBC activity

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<sup>22</sup> Clause 12(5)(b) of the Agreement in relation to UK Public Services and clause 21(5)(6) in relation to non-service activities.



is having an adverse impact on fair and effective competition. This would add to the timescales and workload involved for us, the BBC and others.

- 4.21 We will not be limited, however, to issues raised in the original scoping document where relevant evidence emerges indicating that further relevant concerns exist, or concerns extend to additional BBC activities.

## Phase 2: conduct of a BCR

- 4.22 A BCR is intended to be a reasonably flexible tool for addressing competition issues, and procedures and timescales will need to be tailored to the matter under consideration. However, we provide below an overview of features we typically expect to be involved.

### Timescale

- 4.23 We appreciate the importance of progressing a BCR in a timely manner, and generally expect Phase 2 to be completed within six months, which is the same period envisaged for the BCA, which we may undertake where the BBC proposes material changes to public service activities. We will set challenging timescales and strict deadlines, with a view to completing any procedure in a reasonable period.

### Restriction on changes during a BCR

- 4.24 It may be appropriate, for the period of the BCR, for us to require the BBC not to make any changes to the relevant public service activities without our consent, pending an outcome. Where possible, we will set these out in the form of a direction or undertakings agreed with the BBC.

### Information gathering

- 4.25 Having set an appropriate initial scope for the BCR, we will gather information in order to carry out our assessment. This is likely to include issuing information requests to the BBC and to third parties who we consider likely to have relevant information. We will seek to allow a reasonable period for responding to such requests, but deadlines are likely to be strict and challenging given the aim stated above to progress BCRs in a timely manner.
- 4.26 The Agreement provides that *“Ofcom may require the BBC to carry out an assessment following such procedures as Ofcom considers appropriate to consider the public value of a UK Public Service [or non-service activity] and adverse impacts on fair and effective competition.”*<sup>23</sup>
- 4.27 In most cases, we will request the BBC to provide us with a submission (a **“BCR submission”**), explaining why the public value of the relevant public service activity (or activities) justifies the potential adverse impacts on fair and effective competition.
- 4.28 We will provide the BBC with guidance on what should be covered in the BCR submission. Our request is likely to focus on public value rather than on adverse impacts on fair and effective competition. This recognises that, while we may well ask testing questions about aspects of the BBC’s assessment of public value and may

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<sup>23</sup> Clause 12(2) of the Agreement in relation to UK Public Services and clause 21(2) in relation to non-service activities.

carry out our own work, the BBC itself has primary responsibility for the way in which it fulfils its Mission and promotes the Public Purposes.

- 4.29 In relation to market research, we recognise that this is often likely to form an important part of the assessment of the public value of a public service activity. Where the BBC undertakes the research we would expect that:
- market research will adhere to the Market Research Society guidelines;<sup>24</sup>
  - the research will include evidence of the current and likely future take up and use amongst the target audience;
  - where research participants ascribe benefit to others, (i.e. where they state they think a service would be of value to a group to which they are not part of) and the BBC seeks to rely on that finding, this will be substantiated by direct evidence of current and likely future use among that group; and
  - where feasible, the research will include participants' views on potential trade-offs and consequences, for instance asking participants to assess the public service activity in the context of a comparison to other existing services.
- 4.30 Our general practice will be not to send draft information requests for comment prior to issue and, if parties do not have the information sought, then they should advise us of this in their response.
- 4.31 With the exception of BCR submissions, where the timeframe we set for responding to our request will be case-specific, our general practice is that information sought under a formal information request should be provided to us within 5-10 working days (depending on the complexity of the request) and that extensions will not be given. Where any information is considered to be confidential, we may ask for a non-confidential version. We will require claims of confidentiality to be adequately justified, and will not entertain blanket claims that everything in a response is confidential.

## **Phase 3: concluding a BCR**

### **Provisional view**

- 4.32 The Agreement does not oblige us to do so, but we consider it is desirable to allow the BBC and interested third parties to comment on our provisional views and reasoning before publishing final conclusions. Our provisional view will set out which of the possible conclusions set out in the Agreement we are minded to arrive at, and our provisional assessment and reasoning leading us to that view.
- 4.33 Where we provisionally conclude that there is an adverse impact on fair and effective competition that is not justified by the public value of the activity, we may consider that the relevant public service activities need to be modified or made subject to appropriate conditions. If so, we will invite comments on possible modifications or conditions to address the impact on competition. We will seek to be as specific as we can as to the nature of those modifications or conditions.

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<sup>24</sup> As of the time of publication, the latest version can be found here: <https://www.mrs.org.uk/standards/guidance>.

- 4.34 This procedure should enable us to publish provisional findings in a timely manner allowing reasonable time for the BBC to propose further modifications to address any concerns raised and for interested third parties to respond. We will generally consult on our provisional view for a period of six weeks.

### **Determination by Ofcom**

- 4.35 We generally expect to require eight weeks to finalise our conclusions having considered responses to our consultation on our provisional view. This will, however, vary depending on the scope of the BCR and the nature of responses. For example, in some cases, we may need to gather some additional information, or to explore details of commitments offered by the BBC.
- 4.36 The Agreement provides that, having had regard to the BCR, we may determine that the BBC may: (a) continue to carry out the public service activities or (b) carry out the public service activities in accordance with such modifications to the public service activities, or subject to such conditions, that we consider appropriate.<sup>25</sup>
- 4.37 Where we conclude that public service activities need to be subject to modifications or conditions, we will seek to be as specific as we can as to the nature of those modifications or conditions. Where possible, we will set these out in the form of directions or in the form of undertakings agreed with the BBC.
- 4.38 In some cases, it may be that there needs to be further consultation with the BBC and other stakeholders following publication of our final decision to work through the details of a direction or undertakings. Such consultation would relate to clarification and practical implementation within the BBC. In such cases, we would publish directions or undertakings when finalised.
- 4.39 It is not possible to provide an exhaustive list of the types of modification or condition that may be appropriate as these will be highly dependent on the case, and particularly the nature of the harm involved. However, the primary purpose of such requirements is to address any adverse impacts on fair and effective competition we have identified that are not justified by the public value of the activity. Our aim would be to remove those that are not necessary in terms of generating identified public value, and to reduce the scale and likelihood of others.
- 4.40 In some cases, addressing adverse impacts on fair and effective competition, or ensuring these are justified by public value, may involve reshaping elements of a public service activity in a way that also changes the public value. We generally consider that precisely how such adjustments are designed is primarily a matter for the BBC, but also appreciate that there may be limited incentives on the BBC to make changes to an already ongoing activity to address regulatory concerns.<sup>26</sup>
- 4.41 We would generally seek to allow the BBC to take the lead in any necessary changes where these relate closely to public value. However, we will set challenging timescales in view of the fact we would have identified an ongoing adverse impact, and we have the ability, to be more directive or set outcomes that would apply in the absence of acceptable proposals from the BBC, if appropriate.

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<sup>25</sup> Clause 12 of the Agreement in relation to UK Public Services and clause 21 in relation to non-service activities.

<sup>26</sup> In contrast with service change proposals initiated by the BBC, where it would generally wish to meet concerns in order to allow it to implement changes.

## Enforcement

4.42 As noted above, this document forms part of the BBC's Operating Framework. That means that the obligations it imposes on the BBC are "specified requirements" as defined by clause 59(a) of the Agreement. Additionally, obligations imposed on the BBC pursuant to the procedures set out above, such as interim and final directions requiring the BBC to modify an activity, or comply with conditions in relation to an activity, are also specified requirements. All such obligations are enforceable under our powers as set out in Article 49 of the Charter.

4.43 The following are specified requirements imposed by this document:

### **Specified requirements**

- The BBC must promptly provide such information and explanation as Ofcom requests for the purposes of Ofcom carrying out its functions under the Charter and Agreement in relation to BCRs. This includes carrying out, in accordance with any directions made by Ofcom, any assessment Ofcom may require under the Agreement of public value or adverse impact on fair and effective competition.
- Whilst Ofcom is carrying out a BCR as permitted under the Agreement, the BBC must comply with any directions made by Ofcom where Ofcom considers these are appropriate to mitigate adverse impacts on fair and effective competition that Ofcom has reasonable grounds to believe are taking place giving rise to the BCR.
- The BBC must comply with Ofcom's determination at the conclusion of a BBC BCR, including complying with any directions made by Ofcom as part of such a determination.

References to "directions" above include both directions made by Ofcom and undertakings offered by the BBC and accepted by Ofcom.

## Section 5

# Guidance on our analytical approach

## Introduction

- 5.1 This section sets out the guidance on the analytical approach we expect to apply in assessing whether there is a significant adverse impact on fair and effective competition and whether the public value of the activity justifies any adverse impact (both current and future) on fair and effective competition.<sup>27</sup> We set out both how we expect to look at the scope of an assessment together with the factors we might typically consider as part of the analysis.
- 5.2 BBC public service activities are broad-ranging and therefore the specific issues may vary by BCR. We may depart from the guidance where we consider it appropriate for the purposes of carrying out our functions in accordance with our duties.

## Scope of the assessment

- 5.3 The first step in the substantive analysis is likely to involve identifying:
- **The activity resulting in the competition concern:** We will identify the BBC public service activity or aspects of it that give rise to the concerns that the effects on competition may not be justified by the public value of the activity. For each aspect, we will identify an appropriate baseline, which will generally be a world where we do not intervene, meaning the public service activity continues unchanged. We will compare that baseline against a scenario or scenarios where the aspect of the public service activity giving rise to the competition concern is removed, reduced or modified, which we refer to as “**Alternative Scenarios**”.<sup>28</sup>

In the Alternative Scenarios, the BBC’s rivals may supply their services to a larger audience and/or additional firms may be present (as they have been crowded out in the baseline) but public value may be lower (as the BBC’s activities are diminished). There may be more than one aspect of a public service activity that gives rise to competition concerns and these may be interrelated. We may analyse these aspects individually and/or the public service activity as a whole. Where we assess the future impacts of a public service activity, we would factor in upcoming developments where relevant.

- **The services and products potentially affected:** We will identify the range of services and products affected by the BBC public service activity and those likely to be affected in the future. In some cases, we may consider the geographic basis on which the impacts should be assessed. However, we would not normally expect to conduct a formal market definition exercise of the type carried out in competition law investigations.

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<sup>27</sup> Clause 12(3) of the Agreement in relation to UK Public Services and clause 21(3) in relation to non-service activities.

<sup>28</sup> For example, the competition concern may arise from the amount of a particular type of content that the BBC includes within a service. The corresponding Alternative Scenarios might be that the BBC supplies less of the content in question (for example, where the amount of content is reduced slightly, reduced significantly and/or removed completely).

- **The boundaries of the assessment:** The effects of a BBC public service activity are likely to ripple across the supply chain. It is important to keep the scope of a BCR tractable. Accordingly, we would generally expect to focus our assessment on the main impacts of the BBC public service activity that gave rise to our decision to initiate a BCR. We may consider more remote effects, but detailed analysis is less likely to be appropriate.
- **The assessment period:** We will assess the relevant current and future impacts associated with a public service activity. To assess the future impacts, the relevant forecast period may vary but will typically range from three to five years. In our view, this provides a reasonable balance between the need to consider the impact of relevant market developments, the impact on nascent services as they evolve towards maturity, and the desire to avoid unduly speculative projections.

## Factors considered in the assessment

5.4 A BBC public service activity typically affects:

- people that use the service that the BBC is supplying;
- society as a whole (for example from having more informed citizens as a result of using the BBC service);
- suppliers / third party commercial operators; and
- licence fee payers, who ultimately fund the BBC's public service activities.

5.5 To understand how these groups might be affected, we will consider a number of factors. This list is indicative, i.e. it is not an exhaustive list of all relevant factors, nor will each one be relevant to every BCR.

5.6 We will generally need to consider take up, the impact on commercial revenues and profitability, the public value generated, adverse impacts on fair and effective competition as well as other relevant factors when conducting a BCR. It is also important to recognise that these factors are interrelated. For example, in the Alternative Scenarios the take up of a BBC service may be smaller as a result of people switching to commercial providers. This may have a positive impact on their revenues and profits which is likely to affect the extent to which the adverse impact on fair and effective competition is diminished.

5.7 Our assessment is likely to involve qualitative and potentially quantitative analysis drawing on the available evidence. We may look at historic evidence where available, but it is unlikely to be possible to quantify, or accurately quantify, some of these factors and therefore other indicative evidence will need to be used.

5.8 We also recognise that assessment involves making a probabilistic prediction about future events and will involve an exercise of judgment. For example, BBC public service activities are likely to affect dynamic markets, the future size and features of which may be dependent on contingencies which cannot be known with precision at the time of assessment.

## Take up

5.9 It will generally be relevant to estimate the change in take up and usage of a BBC service in the Alternative Scenarios compared to the baseline. It is likely to consist of estimating:

- **audience reduction:** overall take up of an activity may be reduced as people may reduce their use of this type of service (e.g. where the service is changed to reduce the competition concern); and
- **audience substitution:** people may switch to an alternative (either an existing BBC public service or a competitor's service).<sup>29</sup>

## Impact on commercial revenues and profitability

5.10 In a BCR we will generally assess the change in commercial suppliers' revenues between the baseline and Alternative Scenarios. The impact on revenue and ultimately profitability may be positive or negative.

5.11 The impact on revenue will help to consider commercial suppliers' willingness to invest in new services or in improving the quality of their existing services in the Alternative Scenarios. Increases in revenue may result in more commercial operators being attracted to enter the market, as it may be more profitable to do so, or less likely to cease providing their services.

## Analysis of evidence

5.12 As set out in paragraph 4.27 we will generally envisage a formal request to the BBC (the "**BCR submission**") as part of our information gathering. This will help us understand the BBC's views on the public value associated with a public service activity (or aspects of that activity) and whether the public value justifies any adverse effects of fair and effective competition. This may include asking the BBC for a comparison of the baseline against various Alternative Scenarios.

5.13 We will carry out further work where required and may assess the data from the BCR submission or follow up with information requests seeking clarification if appropriate. In particular, we are likely to consider:

- whether the analysis conducted by the BBC is reasonable (e.g. relies on well-reasoned assumptions), complete and objective;
- whether the BBC's response reflects a reasonable view of what constitutes public value (as discussed in paragraphs 5.24 to 5.26);
- whether the interpretation of the evidence presented is credible and relevant;
- whether the analysis is robust under different scenarios.

## Adverse impacts on fair and effective competition

5.14 As set out in Section 3, the BBC has been given freedom by Parliament not to need to make money as a commercial broadcaster would. The purpose, as made clear in

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<sup>29</sup> The total change in demand for the BBC service will be the sum of audience reduction and audience substitution.

the Charter and Agreement, is to facilitate the provision of services consisting of a wide range of high quality and distinctive programmes.

- 5.15 There are, typically, two potential sources of harm to competition. This sub-section sets out the main factors that we may consider in an assessment of the extent to which these adverse impacts are reduced, consistent with the fulfilment of the BBC's Mission and promotion of its Public Purposes.
- 5.16 The focus of Ofcom's assessment is on the change that may result where the competition concern associated with the public service activity is reduced i.e. the difference between the Alternative Scenarios and the baseline.
- 5.17 We recognise that BBC activities that create a larger amount of public value, for example because they attract high audiences, may have a larger impact on fair and effective competition, and that both public value and market impact form part of our assessment.

#### The risk that the BBC crowds out commercial activity

- 5.18 Where the BBC is present in a market there is likely to be a distortion of fair and effective competition. This is because as a publicly funded organisation it does not need to make money in the same way as a commercial supplier and offers its public service activities free and/or free of advertising. As a result, audiences and end users may divert to the BBC or remain with the BBC despite better offerings existing because of the fact that it is free and free of advertising.
- 5.19 These impacts may reduce other providers' revenue and profitability (as described in paragraphs 5.10 to 5.11) potentially reducing their willingness to innovate and invest and may result in some providers ceasing to provide services and others being deterred from entering to an extent not in society's interests.
- 5.20 In order to assess the change in the adverse impact on fair and effective competition in the Alternative Scenarios, we will take into account both the assessment of audience substitution and the change in the revenue and profitability of other suppliers. The scale of the reduction of the adverse impact on fair and effective competition is likely to be related to these factors.
- 5.21 The potential scale of any adverse impacts on fair and effective competition are also likely to depend on the extent to which the public service activity or the aspects in question:
- **Operate differently from commercial operators:** The adverse competition effects would tend to be larger where a commercial provider would need to charge a high price in order to cover the cost of the service while the BBC instead provides its service for free.
  - **Benefit from people's special affinity for the BBC:** The adverse competition effects would tend to be larger where affinity to the BBC as a result of its brand and prominence is an important driver of people's decision to use the BBC or where there is a tendency to default to BBC services.

#### The risks that the BBC harms competition elsewhere in the supply chain

- 5.22 As explained in Section 3, the BBC may harm competition elsewhere in the supply chain. It is harder to generalise about the factors that will be relevant to the potential



extent of these effects – rather they will depend on the particular mechanism through which the public service activity may adversely affect fair and effective competition.<sup>30</sup>

5.23 That said, we would generally need to consider the likelihood of other suppliers having access to inputs (such as talent and content) restricted and the impact of such a restriction. Examples of factors that may shed light on this include:

- **The availability of alternative suppliers:** If there are few alternative, credible input suppliers then restricting access to one supplier is more likely to have an adverse impact on fair and effective competition. Similarly, we are more likely to be concerned where using alternative input suppliers significantly raises the users' costs and therefore places them at a competitive disadvantage.
- **The strength of the restriction:** An arrangement that completely prevents an input supplier from serving customers other than the BBC is more likely to have an adverse impact on fair and effective competition than one which is non-exclusive.
- **The importance of the input:** Restricting access to an input that is essential or which accounts for a high proportion of total costs is more likely to have an adverse impact on fair and effective competition.

## Public value

5.24 Consistent with our approach to assessing the adverse impacts on fair and effective competition, the focus of our review is on the changes to public value that may occur under the Alternative Scenarios.

5.25 Accordingly, in the context of a BCR, we expect to request the BBC's BCR submission to consider the *change* in public value to people in the Alternative Scenarios. We expect to principally test the analysis conducted by the BBC, whereas in looking at competition issues we will be conducting our own evaluation.

5.26 People may benefit from using the service offered by the BBC, but where a service is for example scaled back, this benefit may be reduced. Additionally, where people use the BBC's public services, it may affect their attitudes and behaviour in ways that benefit those around them. This benefit may also be reduced in the Alternative Scenarios. For example, providing impartial news could foster active and informed participation in the democratic process that improves the lives of fellow citizens. These wider benefits to citizens are reflected in the BBC's Public Purposes.

## Additional factors

5.27 In addition to factors discussed above, other factors may be relevant to the assessment of a public service, some of which may result in positive impacts for people, and others which may be negative. Examples are set out below, although this is not an exhaustive list:

- **Impacts on innovation:** a BBC public service activity can increase people's interest in and familiarity with new technology. If in the Alternative Scenarios, for

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<sup>30</sup> For example, where the concern is that the BBC may be discriminating when supplying others then one factor we would consider is whether its conduct is truly discriminatory (rather than, for example, reflecting differences in its costs of supply). In contrast, different analysis would be needed where the concern is that the BBC is placing restrictions on its suppliers also dealing with others.

example, the scale of the BBC's activities was smaller, then it may not do so to the same extent. It may also reduce pressure on commercial providers to deploy new innovative services.

- **Cost of the activity:** Part of the value to people of a BBC public service activity stems from the fact that the BBC offers its services for free and/or free of advertising. This value may be reduced in the Alternative Scenarios. Therefore, it is important to also take into account in the assessment any reduction in the cost of the public service activity. We would rely on evidence direct from the BBC setting out the cost of the public service activity. It is important to note that our role is not to assess the value for money associated with a public service.
- **Length of the transition period:** If, as a result of a BCR, we were to require the BBC to scale back certain services, then this is likely to provide scope for commercial operators to expand. However, it may take commercial operators time to do so, for example because they need to reposition their existing services or because new entry cannot happen immediately. As a result, people may not reap the benefits of fair and effective competition straight away.<sup>31</sup> The length of the transition period is thus relevant to assessing the merits of intervention (and the form in which any intervention should take).

## Concluding the assessment

- 5.28 There are two potential conclusions following our assessment. The first is that the BBC may continue to carry out particular public service activities without any changes being required. The second is that it may carry out the particular public service subject to modifications or conditions.
- 5.29 We recognise that concluding on the likely effects of any proposal will involve an exercise of judgment. In particular, we do not expect that a direct comparison of factors relating to public value and factors relating to risks to fair and effective competition will be possible.<sup>32</sup> We may assess whether the analysis is robust under different scenarios. However, given that it will not be possible to attach reliable probabilities to particular scenarios, we will use our judgement to factor in uncertainties appropriately.
- 5.30 In exercising our judgement, we will consider the specific facts of the case and take into account all of our relevant duties and regulatory obligations. Under this framework we will reach a conclusion on whether there is a significant adverse impact on fair and effective competition and, if so, whether the public value of the service justifies any adverse impact (both current and future) on fair and effective competition,<sup>33</sup> taking into account the scale and likelihood of these effects.<sup>34</sup> As explained above, our decision may involve considering factors which do not fit readily into a particular category but which are nonetheless relevant to the overall assessment.

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<sup>31</sup> In other words, it may take time to transition between the baseline and the world described in the Alternative Scenarios.

<sup>32</sup> Clause 12(4) of the Agreement in relation to UK Public Services and clause 21(4) in relation to non-service activities.

<sup>33</sup> Clause 12(3) of the Agreement in relation to UK Public Services and clause 21(3) in relation to non-service activities.

<sup>34</sup> Clause 12(4) of the Agreement in relation to UK Public Services and clause 21(4) in relation to non-service activities.

5.31 If we identify there is a case for amendment of a BBC public service activity that reduces the adverse effects on competition without having a disproportionately negative impact on the public value we may conclude that possible modifications or conditions are required, as discussed above in paragraphs 4.37 to 4.41.