

BBC Charter Renewal White Paper

The governance and operation of the BBC is currently controlled by the Royal Charter and by an agreement with the Secretary of State for Culture Media and Sport. The Royal Charter is the constitutional basis for the BBC. It sets out the public purposes of the BBC, guarantees its independence, and outlines the duties of the Board. The current Charter expires at the end of 2016.

'A BBC for the future: a broadcaster of distinction', sets out the UK Government's vision for the BBC and the conditions for Charter renewal.

The White Paper delegates much of the crucial regulatory detail to the next phase, running through to Charter renewal in January 2017. There is much yet to play for.

Key governance and regulatory proposals

Governance

- The BBC Trust and current Board are to be replaced by a new unitary board. The board will be responsible for the governance of the BBC and the delivery of its services. It will set strategy, deliver services, oversee operational delivery, measure performance and engage with the public
- A Public Appointments process, led by the Government, will be used to appoint the non-executive Chair and Deputy Chair, and non-executive members for each of the four nations of the UK (a total of six members). The remaining non-executive members, and executive members, will be appointed by a nominations committee of the BBC board

Regulation

- Ofcom will be appointed as the external independent regulator of the BBC
- The Charter will give rise to a Framework Agreement, setting out more detail on regulation
- Ofcom will design a new Operating Framework sitting under the Charter and Framework Agreement and above the various operating licences.
- The Operating Framework will contain detail on the regulatory obligations of the BBC and how Ofcom will apply them
- Ofcom will issue the operating licences for BBC services, regulate editorial standards, arbitrate complaints, regulate commercial activity, regulate market impact and public value tests, and monitor and review performance



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- The BBC Board will have first-line responsibility for operating the Public Value Tests for new service proposals and for reviewing existing services
- Ofcom will be able to commence investigations on its own initiative and will be the final arbiter of the public interest issues. Previously the BBC Trust only conducted Public Value Tests for "significant" issues and Ofcom conducted the market impact assessment that was the competition input to the overall assessment of a service's impact. Now it appears PVT issues need not meet this significance test to be launched
- The process for Public Value Tests will be time-limited aiming to give the market more certainty.
- Ofcom will have the right to apply proportionate sanctions including fines
- The National Audit Office will become the BBC's financial auditor

Mission Statement / Public Purpose

- There will be a new Mission Statement: To act in the public interest, serving all audiences with impartial, high-quality and distinctive media content and services that inform, educate and entertain
- There will be a revised set of the BBC's public purposes, embedding distinctiveness and diversity at the core of BBC culture

Charter Reviews

- There will be an 11 year cycle for review, with a mid-term review to assess effectiveness of core proposals

Funding and Licence Fee

- The licence fee stays as the BBC's primary source of funding. The Government will increase the licence fee level in line with inflation for five years from 2017/18 so that the BBC can continue to provide high quality, distinctive content for all audiences
- A new consistent process for setting the licence fee will be introduced, providing the BBC with future financial certainty it needs by setting the licence fee every five years and ensuring that future licence fee settlements can be informed by independent advice for the benefit of licence fee payers
- All those who consume BBC on-demand content (e.g. on BBC iPlayer) will have to pay the licence fee
- The BBC will be able to pilot some elements of subscription in addition to its current services

Production and Commissioning

- The in house guarantee for television content production is removed except for news and news-related current affairs, thereby opening the BBC's content commissioning to greater competition, providing hundreds of millions of pounds of new opportunities for the production sector.
- A new £20 million contestable public service content fund is designed to create new opportunities for other content producers to provide the best public service broadcasting content in the UK enhancing plurality in the provision of public service content
- The BBC should increase its work with others in creative sector by working more in productive partnership with UK players of all sizes so that others can benefit more extensively from its expertise and reputation

Commentary

BBC and Fair Trading

- Commercial units must serve the BBC's public purpose, not the other way around. The new Board will be required to review whether commercial units are serving the new purposes of the BBC. This ongoing review process combined with Ofcom's new powers may impact on the availability of outside capital for new ventures
- The content of the new Operating Framework to be developed by Ofcom will include matters such as the fair trading commitments with BBC commercial units. We can expect this process to lead to a review of existing or to-be-renewed supply agreements to BBC commercial units and joint ventures
- Ofcom (as well as the UK competition authorities) will have the power to intervene after the fact in existing commercial agreements, if, for example, there is an undue effect on competition: this could create further uncertainty for long term agreements. Ofcom will have to develop a way of working with other regulators to agree who acts in particular circumstances
- Reconciling allowing the BBC into subscription and the BBC's fair trading duties will be challenging and may imply price regulation to the consumer. Ensuring that any public service subsidy does not distort the market for the BBC's subscription content will be key

Taking action: Public value test, market impact assessments

- It is likely that the substance of the existing Public Value Test will be largely retained, continuing the inherent difficulty of comparing market impact to public benefit
- The exact scope of Ofcom's ability to intervene where the BBC is acting anti-competitively is yet to be resolved. In particular will there be a qualifier requiring such conduct to be "unduly" anti-competitive? The interaction with Ofcom's general duties to have regard to competition matters will have to be determined.
- The White Paper does not define the "market" impacted by the BBC and Ofcom's scope of assessment. For example, an open point is whether, where the BBC operates in non-UK markets through commercial services, Ofcom will be able to review the BBC's relationship with its commercial services if they are having an adverse impact on UK market players via those non-UK markets
- The scope of its value for money investigations and the degree to which the National Audit Office can intervene will be explored further. This might give commercial competitors a second bite at the cherry when seeking to limit the BBC's activities

Transparency and commercial rivals' customer base

- The combined effect of Ofcom's scrutiny, new transparency duties of the board, and the audit by the National Audit Office could significantly increase the amount of information about BBC activities available to market competitors, providing an alternative to Freedom of Information Act requests (which can be notoriously slow and difficult)
- The White Paper suggests requiring pay-tv businesses to share their customer base details with TV Licensing enforcement. Safeguarding proprietary data will be key

Sanctions

- It may be worth clarifying whether an adverse Ofcom finding on a Public Value Test would give rise to a damages action against the BBC for breach of statutory duty, and what use would be made of any fines
- Any significant increase in Ofcom's fining power will have to be approved by both the House of Commons and the House of Lords under section 198(7) of the Communications Act. We can expect this to be a heavily contested area in the House of Lords

Process and consultation

- The new Operating Framework and operating licences are to be written by Ofcom and will contain much of the substantive content and mechanics of the regulation. It is likely that Ofcom will operate a full public consultation process for this which, given the timetable for implementation by January 2017, is ambitious. Under section 7 of the Communications Act, it is expected that Ofcom will have to publish a full impact assessment and solicit representations, alongside a consultation process

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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