

Yr Arglwydd Elis-Thomas AC/AM
Y Gweinidog Diwylliant, Twristiaeth a Chwaraeon
Minister for Culture, Tourism and Sport



Julie James AC/AM
Arweinydd y Tŷ a'r Prif Chwip
Leader of the House and Chief Whip

Llywodraeth Cymru
Welsh Government

Y Swyddfa Breifat

31 JAN 2018

PO 347

Private Office

Elin Jones AM
Y Llywydd
Cynulliad Cenedlaethol Cymru

30 Ionawr 2018

Annwyl Elin,

Amgaeaf i'ch sylw ddrafft o'r Memorandwm Cyd-ddealltwriaeth (y Memorandwm) sy'n amlinellu'r berthynas rhwng Llywodraeth y DU, Llywodraeth Cymru, Cynulliad Cenedlaethol Cymru a'r Swyddfa Gyfathrebiadau (Ofcom) a ddatblygwyd yn sgil Cytundeb Dydd Gŵyl Dewi a Deddf Cymru 2017 a ddilynodd.

Mae'r Memorandwm yn ei gwneud yn ofynnol i Ofcom ymgynghori â Llywodraeth Cymru ar ei gynllun blynyddol drafft ac yn amlinellu'r broses i Weinidogion Cymru benodi aelod o Gymru i Fwrdd Ofcom am y tro cyntaf. Mae hefyd yn atgyfnerthu atebolrwydd Ofcom i Gynulliad Cenedlaethol Cymru (mae paragraffau naw a thri ar ddeg yn berthnasol iawn mewn perthynas â'r mater hwnnw).

Ein bwriad yw bwrw ymlaen â'r gwaith o recriwtio aelod o Gymru i Fwrdd Ofcom mor fuan â phosibl. Yn dilyn y camau gan Ysgrifennydd Gwladol Cymru yn Senedd y DU ddiwedd Tachwedd y llynedd i gychwyn darpariaethau Adran 68 o Ddeddf Cymru 2017, trosglwyddir pwerau penodi i Lywodraeth Cymru ddiwedd Mawrth. Gellir dechrau'r broses recriwtio cyn y dyddiad hwnnw, er bydd angen cwblhau'r Memorandwm sydd ynghlwm a'i lofnodi cyn hynny.

Byddem yn ddiolchgar petasech yn cyfeirio'r Memorandwm at y pwyllgorau perthnasol er mwyn iddynt ei drafod more fuan â phosibl. Byddwn yn aros am unrhyw sylwadau gan y pwyllgorau hynny a chithau cyn cytuno ar y Memorandwm a'i lofnodi.

Yn gywir,

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

MEMORANDUM OF UNDERSTANDING

Between the UK Government, Welsh Government, National Assembly for Wales and the Office of Communications

Scope and Purpose

1. This Memorandum of Understanding (MoU) concerns the relationship between UK Government, the Welsh Government, the National Assembly for Wales and the Office of Communications (Ofcom) arising as a result of the St David's Day Agreement and the subsequent Wales Act 2017.
2. The MoU commits Ofcom to consulting the Welsh Government on its draft annual plan; and sets out the process for Welsh Ministers to appoint a member to the Ofcom Board. All parties are committed to working constructively together to achieve the purposes set out in the MoU.

Background

3. The Commission on Devolution in Wales, also known as The Silk Commission, was established by the UK Government in 2011 to look at the future of the devolution settlement in Wales. Part II of the Commission's report, entitled 'Empowerment and Responsibilities: Legislative Powers to Strengthen Wales' published in March 2014¹, made a number of recommendations in relation to broadcasting. While the report found there was no case to devolve the regulation of broadcasting, it made a specific proposal in relation to Ofcom:

R.22 The interests of Wales should be represented on the Ofcom board through a board member with specific responsibility for representing Wales.

4. The aim of this recommendation is to strengthen the input of the Welsh public and representative organisations in the development of Ofcom policies across its entire remit (broadcasting, telecoms and postal services) at a United Kingdom level. Following the BBC's new Royal Charter², this remit also includes the regulation of the BBC in addition to Ofcom's existing duties regulating the other Public Service Broadcasters.
5. Following the publication of the Silk report, the UK Government launched a review of legislative powers relevant to Wales, which became known as the St David's Day process. This culminated in the publication of a Command Paper by the UK Government in February 2015, 'Powers for a purpose: Towards a lasting devolution settlement for Wales'³, outlining how the recommendations of the Silk Commission were to be implemented. Paragraphs 2.8.5 - 2.8.8 outline the government's commitment to implement the Silk Commission's recommendations, and further commitments made by

¹<https://www.gov.uk/government/publications/empowerment-and-responsibility-legislative-powers-to-strengthen-wales>

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577829/57964_CM_9365_Charter_Accessible.pdf

³https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf

the UK Government, in relation to Ofcom. These are broadly consistent with the arrangements set out in the Smith Commission Agreement⁴, on the further devolution of powers to Scotland.

6. The Wales Act 2017⁵ implements these measures:

- Section 68 amends the Office of Communications Act 2002 to confer the power on Welsh Ministers to appoint one member of Ofcom's Board who is capable of representing the interests of Wales. Prior to any appointment, the Welsh Government is required to consult with the Secretary of State. This will support the Secretary of State in their role to ensure that the Board will function effectively as a whole. The appointment will be subject to the existing regulatory framework for appointments to the boards of public bodies, which is set out in the Code of Practice issued by the Commissioner for Public Appointments. The appointee will have the same UK-wide responsibilities as other non-executive members of Ofcom.
- Section 68 also amends the Office of Communications Act 2002 to require the Comptroller and Auditor General to send a copy of Ofcom's statement of accounts to Welsh Ministers to be laid before the National Assembly for Wales, and to require Ofcom to send a copy of its annual report to Welsh Ministers to be laid before the National Assembly for Wales.

7. An MoU is the best means of providing clarity and certainty about how the different parties will be consulted on the setting of Ofcom's strategic priorities. This is because, due to Ofcom's independence from Government it is not possible to give a statutory underpinning to a formal consultative role for the Welsh Government or National Assembly for Wales.

Parties

- The Department for Culture, Media and Sport ("DCMS")
- The Office of Communications ("Ofcom")
- The Welsh Government
- The National Assembly for Wales

Commitments

Formal consultative role for the Welsh Government and the National Assembly for Wales in setting the strategic priorities for Ofcom with respect to its activities in Wales.

8. Each year Ofcom publishes an Annual Plan which sets out its strategic priorities and describes the other work it will be conducting in the coming year.
9. The process for formally consulting the Welsh Government and the National Assembly for Wales in the formulation of Ofcom's Annual Plan shall be as follows:

⁴http://webarchive.nationalarchives.gov.uk/20151202171017/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf

⁵ The Act received Royal Assent on 31 January 2017

- Ofcom will consult the Welsh Government and appropriate committees of the National Assembly for Wales on its draft Annual Plan once published.
- Ofcom will consider any representations from Welsh Government (Ministers and Officials), and the National Assembly for Wales' appropriate committees through this process in formulating its Annual Plan;
- Ofcom will send its final Annual Plan to Welsh Government ministers and relevant committees of the National Assembly for Wales outlining how it determined its priorities, with reference to the main issues raised during the preceding consultation process.

Welsh Ministers' power to appoint a member to the Ofcom Board

10. Section 1 of the Office of Communications Act 2002, as amended by section 68 of the Wales Act 2017, provides that the Welsh Ministers have the power to appoint a member of the Ofcom Board and must consult the Secretary of State before doing so. Further agreed guidance on the operation of the appointment process is attached at Annex 1.

Annual report and accounts

11. Ofcom's Annual Report and Accounts are presented to the UK Parliament and the National Assembly for Wales pursuant to paragraphs 11 and 12 of the Schedule to the Office of Communications Act 2002. Ofcom is required to send its accounts to the Secretary of State and the Comptroller and Auditor General (C&AG). Welsh Ministers will lay any report sent to them by C&AG before the National Assembly for Wales. Ofcom will send a copy of its Annual Report to the Secretary of State and Welsh Ministers who will lay it before the UK Parliament and the National Assembly for Wales respectively.

Other Ofcom appointments

12. Under section 17 of the Communications Act 2003, Secretary of State approval is required for appointments to the Communications Consumer Panel. In relation to the member for Wales, Ofcom will also consult the Welsh Government and secure the required approval from the Secretary of State in making the final appointment.

Ofcom reporting and appearing before the National Assembly for Wales

13. Section 37 of the Government of Wales Act 2006 provides that the National Assembly for Wales may require any person to attend its proceedings, for the purposes of giving evidence in concerning any matter relevant to the exercise by the Welsh Ministers of any of their functions. This therefore includes Ofcom in relation to the discharge of its functions in Wales. Ofcom receives invitations to provide evidence to Committees of the National Assembly for Wales both by production of documentary evidence and by appearing in person. Ofcom welcomes these invitations.

Meetings

14. There will be separate meetings between Ofcom and Welsh Ministers; and between Ofcom and Wales Office Ministers. These will take place at least once a year.

15. There will be regular meetings as appropriate during the year between Ofcom and the Welsh Government; and between Ofcom and the Wales Office at official level. It is recognised that more informal engagement at official level between Welsh Government and Ofcom on specific topics will continue and that the meetings envisaged above will not serve to limit that.
16. DCMS, Ofcom and the Welsh Government agree that this MoU will be the subject of periodic review, at official level, the first review to occur no later than two years after the date of signature.

Signatures

<i>(For and on behalf of the Secretary of State for Culture, Media and Sport)</i>	<i>(For and on behalf of Ofcom)</i>
<i>(For and on behalf of the Welsh Government)</i>	

Annex 1

Appointment by Welsh Ministers of a member of the Ofcom Board

1. The appointment of a Member of the Ofcom Board shall be made by Welsh Ministers following consultation with the Secretary of State.
2. The appointment of the Welsh Member shall be made in accordance with the Governance Code on Public Appointments (2017, or as updated from time to time) and the Code of Practice for Ministerial Appointments to Public Bodies' (2012, or as updated from time to time) (the 'Code').
3. At the commencement of an appointment process the Welsh Government shall meet with the Chair of Ofcom to agree the key criteria for the appointment, including skills, knowledge and experience required of the individual.
4. The parties acknowledge that that any person so appointed will, as a member of the Ofcom Board, have the same UK-wide responsibilities as all other non-executive Members of the Board.
5. Ofcom and the Welsh Government will work together to agree the form of advertising, search process and timetable for the new appointment (with costs incurred being borne by Ofcom). DCMS will be advised of the role specification, details of the panel's composition and plans for advertising before the advert is published.
6. An Advisory Panel will be established in accordance with the Code and will include, as a minimum, a Chair nominated by the Welsh Government, an Independent member and the Chair of Ofcom.
7. The Advisory Panel will agree the process for sifting candidates and the timetable and process for interviewing the short-listed candidates.
8. Following the interviews, the Advisory Panel will make a recommendation to the Welsh Ministers on the individual or individuals the Panel believes meet(s) the criteria for the appointment.
9. The Welsh Ministers will make the appointment in accordance with the Governance Code on Public Appointments, and will formally document it with the successful candidate. This will be done following consultation with the Secretary of State.