

Submission to Ofcom's Proposed Annual  
plan 2020/21

**pact.**

---

February 2020

---

## **Introduction**

- 1) Pact is the UK trade association representing and promoting the commercial interests of over 500 independent television, feature film and digital content producers.
- 2) The UK independent television sector is one of the most successful in the world. Independent television sector revenues have grown from £1.3 billion in 2005 to just over £3 billion in 2018. <sup>1</sup> The sector is now one of the largest contributors to the UK economy and has driven inward investment and jobs across the UK.
- 3) Given that Ofcom continues to have a significant impact on the communications market including the audio-visual sector it will be important to our members that Ofcom's plans over the next year will continue to create the right conditions for the continued investment from the UK public service broadcasters (PSBs) into UK original content.
- 4) Pact welcomes this opportunity to consider and comment on Ofcom's proposed Annual Plan 2020/21.
- 5) For further information, please contact Pact's Head of Policy, Emily Oyama at [emily@pact.co.uk](mailto:emily@pact.co.uk) or on 020 7380 8232.

---

<sup>1</sup> Pact Census 2019

## **1 Overview**

1.1 We thank Ofcom for giving Pact the opportunity to comment on Ofcom's proposed annual plans 2020/21. We have focused our comments primarily on the upcoming PSB Review, BBC regulation, the BBC Studios Review, Ofcom's regional production guidance, diversity and Ofcom's duties in relations to the BBC's commercial activities.

## **2 PSB Review**

2.1 The PSB landscape, and wider television sector as a whole, has undergone substantial changes since Ofcom's last PSB Review in 2015. Pact remains a strong supporter of the PSB system and wants to see it continue into the future as the PSBs still account for 80% of UK external commissions.<sup>2</sup> Pact members benefit from the PSBs and vice versa; if one is damaged, the other will suffer too.

2.2 Given changes in the sector, technology and viewing habits, we believe that now is the right time for Ofcom to consider the future of the PSB system. We look forward to contributing to this Review and showing how important the independent production sector is to the UK PSB ecology. This is particularly important given the recent competition assessments related to the BBC.

## **3 BBC Regulation**

3.1 We are looking forward to the work Ofcom will be carrying out on the BBC in 2019/2020. Pact is a supporter of the BBC licence fee and recognises the critical role that the BBC plays in British broadcasting. Pact believes that there is a future for both the PSBs and the SVODs to co-exist in a dynamic and innovative UK market that is open to competition.

3.2 We continue to believe that the key to retaining audiences, and especially young audiences, is through commissioning dynamic and creative content as well as looking at distribution policies. In our mind the BBC has focused too much on distribution policies to the detriment of the market and with no tangible impact on public values. We reiterate our concerns regarding the competition assessments of BBC iPlayer and BritBox. We continue to believe that the iPlayer and BritBox decisions will have negative impact on the programme supply/financing markets. The terms of trade and the current rights model is dynamic and flexible enough to provide public value as it has enabled a retention of quality programming despite rising costs (through deficit financing). It has been key to the PSB ecology and given the upcoming PSB Review we will use that opportunity to discuss the impact these proposals are having on the overall PSB compact particularly on the supply market from smaller indies. We would like to remind Ofcom the particular

---

<sup>2</sup> Pact Census 2019

areas we have concerns with regarding recent BBC activity and which we will likely raise again in the capacity of the PSB review:

*iPlayer determination*

3.3 We agree with Ofcom that the public value that the changes will deliver are still to be realised and that the BBC have provided limited explanation as to how it would ensure that this public value would be delivered in its PIT.<sup>3</sup> We will look with interest at the BBC Annual Report in the summer and BBC Annual Plan in March to understand the performance metrics of the BBC on iPlayer. Other key areas that we continue to have concerns on are Ofcom's understanding of secondary rights revenue within the market and how the iPlayer changes will impact this revenue stream.

3.4 In Ofcom's final determination on the iPlayer proposals it fundamentally disagreed that the iPlayer proposals would adversely affect fair and effective competition in the production sector. Ofcom recognises there could be an impact on the price of secondary rights but believes it will be offset by a rise in primary rights. We believe the premise for this decision is based on weak evidence from the BBC commissioned Frontier Economics report into the iPlayer whereby it 'theoretically' sets out that primary rights will increase if secondary revenues decline. The report itself notes that 'care should be taken in interpreting the results.'<sup>4</sup> It also wrongly assumes that there will be other broadcasters for producers to pitch to. As we have highlighted in previous submissions the nature of the UK broadcasting system means that when producers create an idea it is for a specific channel and broadcaster in mind – once this idea is rejected it is unlikely for it to be picked up by other broadcasters. We continue to disagree that there will be no adverse impact on fair and effective competition in the production sector and would like to clarify that that the proposals are harming competition elsewhere in the supply chain – namely the ability for smaller producers to compete within the market.

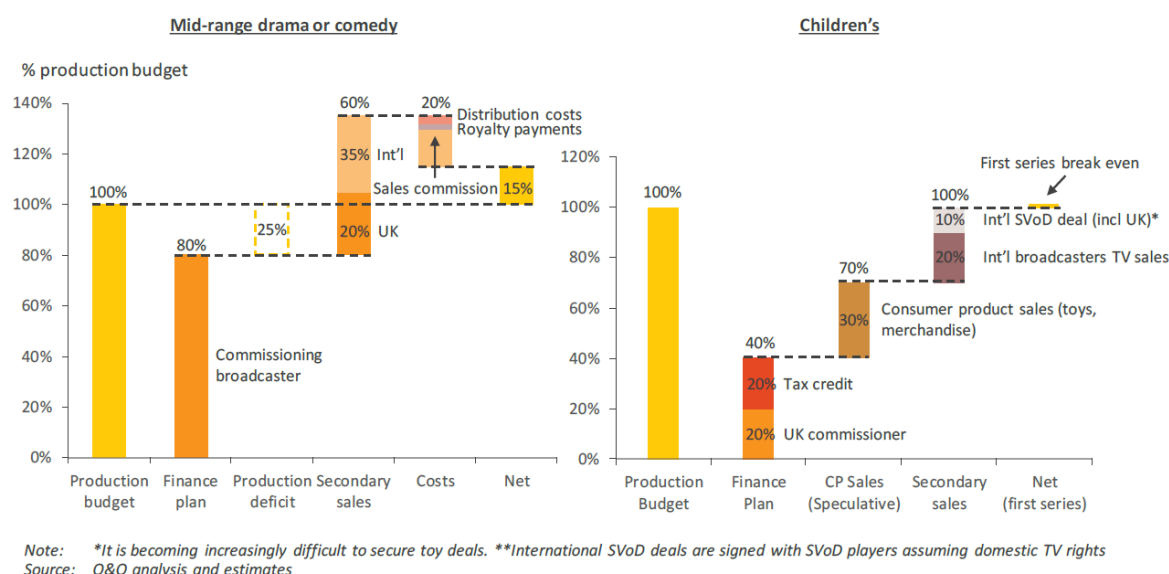
3.5 Pact commissioned media consultancy Oliver & Ohlbaum Associates to carry out a market impact assessment of the BBC's planned iPlayer changes. Excerpts from the market impact assessment are shown below. Figure 3 reviews the financing model for scripted content and comedy. This table shows the gap between the tariff provided by the UK commissioner (BBC) and the actual cost of the series. This underlines the importance of secondary rights sales to the independent production sector's ability to complete the necessary finance for their productions.

---

<sup>3</sup> Ofcom, BBC iplayer Competition Assessment Final Determination,

<sup>4</sup> Changes to BBC iplayer, Competition Assessment, Frontier Economics, p89

Figure 3: Illustrative finance models for mid-range drama/comedy and children's content



3.6 The importance of secondary sales has been exacerbated in recent years as producers are increasingly required to deficit finance productions due the decline in value of the BBC tariff to the overall budget. Pact will continue to put forward arguments that challenge the assumption that the iPlayer changes have no adverse impact on fair and effective competition as part of the PSB Review.

### BritBox

3.7 There continues to be a significant risk that the BBC's involvement in BritBox may, as a result of the relationship with the Public Service, distort that market or create an unfair competitive advantage. Our key concerns remain:

**3.8 Trading and separation rules:** These require the BBC to have the appropriate measures, controls and processes in place to ensure its commercial subsidiaries do not have access to information that would advantage them over third parties. We welcome that Ofcom has identified this as a concern and that it will be monitoring the implementation of the MoU and reviewing the long-form agreements between the BBC and ITV. This must be completed with urgency.

**3.9 The BBC's criteria for the programme release policy:** This policy continues to ensure that BritBox effectively becomes the only buyer for BBC content during the 12-18 months BBC holdback window. Pact considers this gives an unfair competitive advantage for BritBox, in which the BBC has a commercial interest and investment. It will also potentially stop new UK content focused SVOD entrants from buying BBC content which will lead to a reduction of public choice, innovation and investment in the market. In the original Ofcom consultation on BritBox it states that the BBC wants to be satisfied that early release at 12

months will enhance public value beyond that provided by the market. Pact believes that this particular criterion has been established to provide the BBC “specific team” with a ‘catch all’ reason to reserve the 12-18 months early access privilege to BritBox. This and the other criteria are not about adding ‘public value’ to the market, but instead distorting it by closing off BBC content from fair and competitive price competition between BritBox and other secondary rights buyers.

- 3.10 Ofcom’s disregard for the negative impact BritBox will have on secondary rights:** Ofcom’s final determination has stated that they consider that the BBC would fund a greater proportion of the cost of production in order to allow for the programme to be made. (however, evidence submitted to us anonymously suggests that primary rights are not being increased nor are costs of production being met as new terms are negotiated with the BBC). As Ofcom has rightly identified previously the trend in third party funding is not abating – this means deficit financing and the reliance on secondary finance to make up the programme budgets is significantly prevalent. Ofcom acknowledges that tariffs for programmes are in decline and that PSBs increasingly rely on deficit financing that third parties like independent producers can bring to a production budget. If this is the case, then the expectation from the BBC and other PSBs is to presumably secure third-party funding regardless of secondary revenues is false. The inadvertent result of the programme release policy will be a reduction in production companies exploiting the secondary rights revenue, which will in turn reduce the amount they are able to get to help fund programmes, thereby reducing the ability of the BBC to showcase diverse content. As we have shown above this will affect smaller producers across all genres. As part of its general monitoring of BritBox Ofcom should understand and identify how the programme release policy will impact smaller producers within the market. Again, we will use the upcoming PSB review to highlight our continued issues with BBC policies on BritBox.

## *BBC Studios Review*

3.11 The BBC Charter and Agreement contains a set of principles for how BBC Studios should operate, and its relationship with the BBC Public Service.

- No cross-subsidy from BBC Public Service to BBC Studios;
- Demonstratable separation between the finances and operations of BBC Public Service and BBC Studios;<sup>5</sup>
- Arms' length commissioning, with commissions offered to BBC Studios subject to the same range of published tariffs and terms as are available to external producers;
- Fair transfer pricing – access to equipment, facilities, technology, archived materials and core services within the BBC Public Service for BBC Studios and other third party, would be charged under a fair transfer pricing methodology, as per the BBC's Fair-Trading Policy & Guidelines<sup>6</sup>
- Fair and transparent competition between BBC Studios and external, third party-producers for new commissions and established/returning series through a tendering process.

3.12 Pact remains concerned about a number of issues that may be distorting competition and creating an uneven playing field with independent production companies. In our submission to Ofcom's proposed Annual Plan last year, we outlined a number of ways Ofcom could measure how and if the BBC is complying with the principles set out above. Ofcom's Review of BBC Studios should clearly set out metrics that measure the BBC's performance in relation to the principles set out in the BBC Charter and Agreement.

3.13 In 2019, the BBC withdrew its commitment regarding BBC Studios lines of business and did not publicly explain the reasons behind this. Pact is pleased that in Ofcom's most recent Annual Report on the BBC,<sup>7</sup> Ofcom recognise this and will be considering whether the lines of business provide sufficient transparency for Ofcom and other stakeholders on the performance of different activities within BBC Studios.<sup>8</sup>

---

<sup>5</sup> This should include arms-length arrangements which ensure that BBC Studios does not have privileged access to information regarding the BBC's commissioning activities. The BBC also expects its commissioners and BBC Studios will be located separately.

<sup>6</sup> Fair, properly benchmarked, transfer pricing should apply to all goods and services and materials provided from BBC Public Service, to BBC Studios, and to the use of the BBC brand. Goods, services and materials which are relevant to commissioning and production should be made available on a fair and non-discriminatory basis to all producers.

<sup>7</sup> Ofcom Annual Report on the BBC 2019

<sup>8</sup> Ofcom Annual Report on the BBC 2019, p22

3.14 In Pact's submission to Ofcom's last proposed Annual Plan, we raised concerns regarding the split of UKTV between BBC Studios and Discovery. This deal has fundamentally altered the business model of BBC Studios and turned it into a vertically integrated media company bringing production, distribution and broadcasting together. Pact remains concerned about the impact this deal has had on the market and competition. Pact understands that Ofcom decided not to conduct a formal competition assessment of the UKTV deal.<sup>9</sup> However, we believe that the impact of this deal should be looked at as part of the BBC Studios Review.

#### *Monitoring BBC Public Service and Commercial Activities*

3.15 In Ofcom's 2018 Annual Report on the BBC, Ofcom state that 'the BBC is not sufficiently transparent, particularly in the area of competition.'<sup>10</sup> In Ofcom's latest Annual Report on the BBC, Ofcom again raised issue with a lack of transparency and stated that the 'the BBC needs to be much more open to engagement with third parties to deliver its duty to have regard to the impact of its activities on competition.'<sup>11</sup> Pact is growing increasingly concerned about issues of transparency at the BBC and welcomes Ofcom's monitoring of the BBC's current activities, future plans and the impact these have on competition. We were particularly concerned about the lack of consultation ahead of the changes the BBC put forward on iPlayer, BritBox and children's operating licence. Sufficient independent evidence and market impact assessment should be carried out so we can properly assess how issues would affect competition.

3.16 In December 2019, Ofcom consulted on the BBC's proposed changes to its Operating Licence in relation to children's content. In our submission, we outlined our disappointment at the lack of independent research and full impact assessment that the proposals would have on the market, in particular on competition. Ofcom should be wary of eroding the BBC's duties and commitments through any further changes to the BBC's Operating Licence. Any substantial changes to the BBC's activities, particularly commercial activities, should include a full impact assessment as well as independent research. This will allow Pact and other external stakeholders to properly assess the impact that any proposed changes may have on the market.

#### *BBC Scotland*

3.17 Pact was pleased with the announcement of BBC Scotland and this additional investment in the Scottish independent production sector. Pact looks forward to Ofcom's assessment of how BBC Scotland is performing. Pact wants to ensure the contestability process at BBC Scotland is abiding by fair, reasonable, non-

---

<sup>9</sup> Materiality assessments of the BBC's commercial activities, Ofcom, November 2019

<sup>10</sup> Ofcom Annual Report on the BBC, October 2018, p4

<sup>11</sup> Ofcom Annual Report on the BBC, October 2019, p21

discriminatory and transparent competition requirements as set out in the BBC Framework Agreement. Previously, we have raised issue, with BBC Scotland directly and the BBC Board, that the Multi-Platform Production Team based at BBC Scotland is not abiding by the regulatory requirements set in place. This unit is not part of BBC Studios but is competing with independent production companies and BBC Studios for BBC network, online and BBC local commissions. Currently it's unclear to us how this unit is abiding by competition requirements. Ofcom's assessment of BBC Scotland should set out how commissioning is working at BBC Scotland, and more widely how BBC Scotland is meeting its competition requirements.

#### **4 Diversity**

- 4.1 Pact is committed to improving diversity and inclusion across the industry, including social mobility. We offer a range of initiatives and programmes to strengthen diversity and inclusion across the industry, including the Indie Diversity Training Scheme. Pact members are also engaged in delivering Project Diamond and we work closely with the Creative Diversity Network to increase awareness and improve return rates to get a more accurate picture of diversity in the industry. We look forward to Ofcom's report on diversity and equality of opportunity in broadcasting later in the year.

#### **5 Regional Production Guidance**

- 5.1 Pact represents the interests of over 500 members across the UK, around a third of Pact members are based outside London. In 2019, we submitted our views to Ofcom's review of regional TV production and programming guidance. Pact was pleased with the outcome of this review and is looking forward to seeing how this new guidance is working in Ofcom's annual compliance reporting.