

Submission to Ofcom consultation: How to
Regulate the BBC

pact.

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Introduction

1. Pact is the UK trade association which represents and promotes the commercial interests of independent feature film, television, digital, children's and animation media companies.
2. The UK independent television sector is one of the biggest in the world. As much of 2020's production activities were disrupted by the outbreak of the COVID-19 pandemic, total sector revenues have fallen by 14% to £2.9 billion in 2020, representing the first decline in revenue since 2016.¹
3. Pact works on behalf of its members to ensure the best legal, regulatory and economic environment for growth in the sector. Pact has around 500 member companies across the UK and the majority of these are SMEs (small and medium sized enterprises) with a turnover of less than £50m a year.
4. In 2020, the BBC spent £508 million on commissions from UK external producers.² BBC Commissions are important for independent producers as they account for 36% of all UK commissions, making the BBC the biggest UK buyer of content made by independent producers in the UK.³
5. Pact recognises the important role that the BBC plays in the UK television marketplace and how it nurtures and adds to the finely balanced TV production ecology in the UK. Independent production companies and the content commissioned by the BBC helps it be a positive innovator and experimenter in the marketplace.
6. For further information, please contact Pact's Head of Policy, Emily Oyama, at emily@pact.co.uk or on 020 7380 8232

¹ Pact Census 2021

² IBID

³ IBID

Overview

- 1.1 Pact welcomes Ofcom's review into How Ofcom regulates the BBC. Pact considers that it is crucial that Ofcom assess how they regulate the BBC fairly and accurately. With regards to BBC Studios there must be a clear understanding that its performance should take into account its state before it acquired other businesses. We are concerned that by changing its arrangements over the last 4 years BBC Studios will escape a rigorous audit of its performance based on its original baseline.
- 1.2 On BBC's changes to its Performance Framework and the BBC's future operating licence we understand the need to adapt the licence to match changes in consumption habits but Pact has several issues that must be clearly addressed by Ofcom in its final periodic review of the BBC. These are:
- 1.3 Whether Ofcom has considered how changes to the operating licence and the BBC's proposals around its performance framework will impact the supply side of the market and whether Ofcom has analysed the kinds of genres that will be impacted by the shifts. It is difficult to measure the impact of the BBC if they have changed the performance framework as the plan is not transparent enough especially given the recent announcements on BBC Four programming. It is Pact's assessment that the reduction in original programming will have an impact on the access to market for particular range of producers.
- 1.4 Pact continues to have questions on this method and over how robust Ofcom is going to be in holding the BBC to account after the fact. We urge Ofcom to set out how exactly PSBs including the BBC would set out their remits and to what extent this would come under public scrutiny and/or industry engagement. As Ofcom will understand Pact has found engagement with the BBC in recent years, which has followed an ex-post framework of regulation, less than transparent and would want to make sure that any new framework allows for industry engagement ahead of any remits being agreed.
- 1.5 While we understand the difficulties some of the UK Public Service Broadcasters (PSBs) are having in attracting young audiences; Pact does not believe that only changing how programmes are distributed is the way to rectify this problem. The challenge continues to be mainly an editorial and creative issue.
- 1.6 The BBC needs to consider its commissioning direction and whether the ideas and content resonates with young audiences. In their own analysis on their Distribution Policy consultation response the BBC admit that their services are well distributed: 'The BBC performs well on these measures: its services are more widely distributed than any other broadcaster in the UK.'⁴
- 1.7 On the whole since Ofcom's regulation of the BBC began Pact has been disappointed with the lack of detailed assessment of competition issues. There is a lack of independent research and full impact assessment contained in consultations that consider the impact of the BBC's changes to their services. (for example most recently on the BBC's changes to the operating licence regarding

⁴ The BBC's Response the Distribution Policy consultation, June 2018, p4

children's programming, during its changes to the iPlayer and its decisions on BritBox) and this makes it difficult for Pact to properly assess the impact of these proposals. Many officials when we've spoken face to face have been unaware of the market impacts of the BBC's plans and seemed to not have any plans to assess the impact on genres or the UK content market.

Consultation Questions

Question 1: Do you agree with the proposed scope of the review of BBC regulation as set out in this document? If not, please explain the areas where you think changes should be made.

- 2.1 Pact considers that the proposed scope of the review of BBC regulation is the right scope for the review. That said, there is one element that we would like to ensure Ofcom includes in its periodic review and that is the BBC's commitment to opening up competition by 2027 and how this has progressed and to what extent it has opened up BBC spend to competition.⁵

Question 2: Do you agree with the proposed approach to reviewing the BBC Operating Licence? If not, please explain why.

- 3.1 Pact agrees with the proposed approach to reviewing the BBC Operating License. We particularly agree with the need for Ofcom to hold the BBC to account for its delivery across all its services including BBC's online services. Pact has long argued for the need for transparency in this area.

Question 3: Do you have any views on how to measure the BBC's performance?

- 4.1 Pact considers that the focus on allowing the BBC to determine its own delivery of its licence obligations has considerable risks that Ofcom need to be aware of and mitigate as much as possible. We welcome that a combination of quantitative and qualitative requirements will be used to update the regulations under the BBC operating licence but there is considerable vagueness surrounding the wording. As we have previously argued it is harder to hold the BBC to account after the matter of the fact. Although Ofcom has set out that it intends to require the BBC to set out in their Annual Plan full explanations for how it intends to comply with the quantitative and qualitative requirements it sets no obvious route for stakeholders to be consulted on these plans and Pact considers that the BBC should be required to consult on their annual plan or Ofcom should outline how stakeholders may have the opportunity to make representations about the BBC's explanations.
- 4.2 As we already outlined at the start of our response we consider more investigation into how the BBC is meeting its requirement to open up BBC Spend to full competition by 2027 must be made more explicit in Ofcom's plans. This along with why assurances on fair trading, is important for transparency and assuring the market that there is no market distortion occurring between the BBC Public Service arm and its commercial activities. This needs to be properly considered and signposted within the review to give certainty and stability for the market. The government expects the BBC to deliver on full competition for all the BBC's television and online content spend and to remove all existing in-house guarantees with the exception of news and news related current affairs. Furthermore Ofcom's focus on bringing public value into more focus must be clearly explained. Pact considers that public value must not be overly focused on if it jeopardises the Ofcom's ability to protect fair and effective competition.

Question 5: Do you agree with the issues we have identified with the processes for assessing the competitive impact of changes to the BBC's UK Public Services? If you

⁵ [A BBC for the future: a broadcaster for distinction](#)

consider there should be changes to these processes, please set out what these are and, if possible, provide any relevant evidence.

5.1 Pact agrees that the Public Interest Test that the BBC carries out lacks detail and opportunity for stakeholders to comment on plans in good time. That said, Ofcom's assertion that some BBC public service changes do not need to be followed up by Ofcom risks over seeing vital changes. This should only be approved if The BBC give an opportunity to comment on plans for stakeholders ahead of any changes to its services.

Question 6: Do you have any concerns about the regulatory framework for the BBC's commercial activities that are not being considered in the review of BBC Studios

6.1 As Ofcom look to make an assessment of BBC's commercial activities it is important that a fair assessment of BBC Studios is included. Pact hope Ofcom accurately measures the performance since the introduction of BBC Studios to the market – as Ofcom knows there has been several changes and Pact is concerned that a fair and robust assessment is missed. Absolute transparency is important to give the wider market assurance that BBC Studios is not receiving any direct or indirect subsidy in this area. BBC Worldwide has in the past enjoyed a 'first look' to acquire distribution rights in BBC content, secured by often substantial advances. If such arrangements have been continued, they must not only be at a market rate, they must be seen to be at a market rate. Otherwise BBC Studios may be accused of benefitting from a subsidy allowing it to operate at significantly lower production margins than other competitors in the market. It is acknowledged that commercial confidentiality constraints inhibit public disclosure of the detail of such arrangements, which is why Ofcom is best placed to provide the market with such assurance. Early assessment of this area, as required of it by Clause 29 of the Agreement, will enable the BBC to demonstrate with transparency that there is no risk of market distortion – in a market fundamentally altered by the creation of BBC Studios.

6.2 Pact continues to agree that Ofcom should introduce new requirements on the BBC to confidentially report on their lines of business, and for the BBC to give 3 months' notice to Ofcom if there are any changes to their commercial services. We continue to be disappointed that Ofcom have come to the conclusion that reporting on the lines of business isn't currently necessary. The best way to understand the distribution rights would be to understand the revenues and profits of the production activities in addition to distribution activities. As Ofcom noted in their publication statement on Lines of Business Ofcom may introduce enhanced transparency of these arrangements on an ongoing basis. We urge Ofcom to introduce this sooner rather than later.

6.3 On transfer pricing we also urge Ofcom to confirm that they will consider changes to their rules or set enforcement actions including additional assurances such as an audit of transfer pricing on an ongoing basis if any issues are identified regarding transfer pricing. Fair transfer pricing is vital for the market to help assurances that BBC's commercial activities in particular Studios are not able to 'distort markets by offering products at below cost, sustaining ongoing losses that would not be sustainable for commercial competitors.'⁶

⁶ BBC commercial and trading activities – Requirements and guidance, Ofcom, July 2017