

Submission to Ofcom's consultation on the procedures for enforcement of requirements in the BBC Agreement, compliance with Ofcom enforcement action and BBC competition requirements

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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. Despite the difficult economic climate, independent television sector revenues have grown to around £3 billion in 2015.¹
3. In 2015, the BBC spent £443 million on commissions from UK external producers. Last year, the BBC commissioned 46% of eligible television content from external producers².
4. BBC Commissions are important for independent producers as they account for 29% of all UK commissions, making the BBC the biggest 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. We are pleased by the positive trajectory of the new charter whereby the license fee has been secured for another 11 years. The BBC is a positive innovator and experimenter in the marketplace and this is often driven by the content which it commissions from independent production companies.
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 2016

² BBC Annual Report 2015/16

³ Pact Census 2015

Overview

1.1 Pact welcomes the opportunity to comment on both the Ofcom consultations on:

- Procedures for enforcement of BBC competition requirements and
- Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

1.2 We have amalgamated our response to each consultation in order to make it easier to convey our thoughts on enforcement.

1.3 On enforcement of BBC competition requirements - overall we agree with the majority of the requirements and procedures set out with some comments for Ofcom to take into account. These mainly refer to:

- How Ofcom will determine whether to carry out investigations – some helpful guidance is included but some further clarification is needed. And it is difficult to understand how this will interact with the BBC Executive procedures on fair trading which already exist. For example will Ofcom require the BBC's guidelines on fair trading to be adapted to take into account the new procedures?
- Other ways of redressing competition issues with the BBC and ensuring these methods are transparent.

1.4 On enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action we again support the overall procedures and requirements outlined. We have only brief comments on how stakeholders are consulted on final decisions and we reiterate the need for an early review of Studios given the fundamental change this will bring to commissioning arrangements in the BBC.

Procedures for enforcement of BBC competition requirements

1.5 We agree with the overall approach outlined. We especially welcome Ofcom's recognition of the potential need to open investigations on its own initiative, and to intervene early where necessary if a relevant complaint isn't resolved by the BBC. It is particularly important for third parties that this latter option exists because the previous review on fair trading⁴ outlined that one of the reasons third parties believed there was a drop in complaints was a lack of trust in the internal complaints system. This stemmed from a belief that BBC Executive involvement in the first phase of complaints tended to involve the Executive 'marking their own homework'. If there is a route for third parties to go to Ofcom at an early stage,

⁴ Fair Trading Policy Review – A report for the BBC Trust April 2015

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where justified by the circumstances, this could help establish trust in the process.

1.6 Decisions on whether or not to open an investigation are rightfully made on a case by case basis and with the best outcome for the consumer and citizens in mind. It is important that this is applied in way which allows Ofcom to take account of the risk to, and impact on, individual businesses (or groups of businesses). For example, a single instance of unfair practice in a commissioning process could cause significant detriment to an individual production company. It is important to be assured that such instances would be investigated and Pact would welcome clarification on this point. Finally we would urge Ofcom to make sure it is not prevented from investigating vital regulatory issues because of resource restrictions.

1.7 In relation to "other methods of redress", Pact also calls for more clarity on what, in Ofcom's view, will constitute 'assurances' from the BBC sufficient to address concerns without the need for an investigation. We agree that informal routes to resolve complaints should be allowed but transparency on how any resolution is arrived at will be important in order for third parties to have trust in the process. In particular, Pact would welcome confirmation from Ofcom that it will take steps to ensure that any assurances given by the BBC about future action are actually delivered.

1.8 Finally Pact calls on a timeframe to be put on the length of time Ofcom will have to consider complaints. Given that third parties in the most recent review of fair trading were concerned about the total length of time it takes to complain and to have appeals considered a more explicit timeframe will help third parties to engage with the complaints system.⁵ (We note that Ofcom has included indicative timeframes in its general complaints procedures for BBC Agreement requirements).

1.9 We understand that Ofcom will reserve the right to share information it might have received from complainants to the BBC. We note Ofcom's proposal that, when issuing a provisional breach notification, it will provide the BBC with a copy and the opportunity to make representations. However Ofcom proposes to consult third parties only where it considers they "may have further information relevant to the provisional breach notification". This does not seem even-handed. In particular, Pact considers that Ofcom should provide complainants with the opportunity to comment on provisional notifications as well as the BBC. Furthermore we would like third parties/complainants to also have the opportunity for an oral hearing – not just the BBC as currently indicated.

⁵ Fair trading policy review – A report for the BBC Trust, April 2015

Submission to Ofcom's consultation on the procedures for enforcement of requirements in the BBC Agreement, compliance with Ofcom enforcement action and BBC competition requirements

1.10 Finally, Pact would welcome clarification from Ofcom of how these procedures will work in relation to the BBC's trading activities. We note that they will cover requirements set by Ofcom to protect fair and effective competition in relation to trading activities (para 1.5). However Ofcom has not yet made clear what those requirements will be. We would ask Ofcom to set out its proposals for the regulation of trading activities as soon as possible and, in particular, to clarify how far the current BBC Fair Trading policy and/or guidelines will continue to apply.

Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action

- 1.11** Overall we are happy with the requirements and procedures described in this document. That said, we would like to reiterate again as we have in other consultation responses that Ofcom should use this framework to make sure the Pact/BBC Agreement, which helped secure the in-principle agreement to BBC Studios, has been fully implemented by agreeing to a review as soon as possible on BBC Studios and if necessary agree to regular reviews of the entity to make sure that it is operating fairly.
- 1.12** The establishment of BBC Studios marks a fundamental structural change in the BBC's commissioning and production arrangements. As such we consider that a two-year review by the regulator is essential to give the market confidence that these new arrangements are working as intended. This was a key part of the basis upon which Pact was able to support the move to BBC Studios and we note that the principle of a two-year review is supported by both the BBC Executive and the BBC Trust. Pact therefore urges Ofcom to make a firm commitment now that it will conduct a review of BBC Studios after two years.
- 1.13** In addition we have some comments around how third parties might be informed about decisions on investigations. For example we note that final decisions will be given to the BBC a day ahead of the Ofcom decision being published. We would urge Ofcom to ensure that both complainants and the BBC are given the result of the investigation at the same time so that both sides have an opportunity to prepare a public response if necessary.
- 1.14** We note that Ofcom proposes to offer the BBC "and any relevant third party" the opportunity to comment on its Preliminary Views. It would be helpful to clarify that complainants will always be included in this consultation as relevant third parties. There should also be scope for complainants to request oral hearings, as well as the BBC.