

Submission to Ofcom's Consultation on BBC Studios' lines of business, Assessment of BBC Studios' changes to its lines of business

pact.

Introduction

1. Pact is the trade association which represents the commercial interests of the independent television, film, digital, children's and animation media production sector in the UK.
2. 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.
3. The UK independent television sector is one of the biggest in the world. UK independent television sector revenues have grown from £1.3 billion in 2005 to over £3 billion in 2019 largely driven by a growth in international sales.¹
4. The BBC and its commercial subsidiaries play an important role in the UK marketplace given the size and scale of the BBC. In 2019/20, BBC Studios won 49 new commissions from the BBC. BBC Studios sales were £1.4bn and £181m in profits.²
5. For further information, please contact Pact's Head of Policy, ✉.

¹ Pact Census Independent Production Sector Financial Census and Survey 2020, by Oliver & Ohlbaum Associates Limited

² BBC Annual Report 2020

Overview

- 1.1 Pact is broadly supportive of Ofcom's additional proposals however, we are concerned that monitoring, reporting and additional transparency requirements can only go so far. Ofcom must be willing to intervene when the BBC's activities are impacting the market and competition. In previous rulings Ofcom has shown that they are often unwilling to intervene on competition grounds. Given the dominance of the BBC and the advantages that BBC Studios has over many in the UK production market, Ofcom should use their powers when necessary.
- 1.2 We are supportive of Ofcom's proposals on the commercial rate of return requirements and guidance however Ofcom must clarify how this reporting will be interrogated and what powers Ofcom will use to take action if BBC Studios continually fails to make a commercial rate of return and misses targets. To ensure that BBC Studios is abiding by regulatory competition requirements, it should be allowed to fail just as any other production company would in the UK market. Further clarity from Ofcom on these points would give us confidence that BBC Studios does not have an unfair competitive advantage because of its relationship with the BBC.

Consultation Questions

Q1. Do you agree with our analysis that the BBC Studios decision to combine its production and distribution activities is consistent with market practice for competitors of a similar size and scope? Please provide reasons and evidence to support your answer.

- 2.1 Pact agrees that BBC Studios' decision to combine its production and distribution activities is consistent with market practice. However, while it may be consistent with similar sized entities in the market, this overlooks the fundamental differences between BBC Studios and other companies in the market, and the many advantages that BBC Studios has had since its inception.
- 2.2 Ofcom rightly identifies that other integrated production entities will not have the extensive back catalogue that BBC Studios enjoys and that this may cause a risk of subsidy which in turn could distort the market and give BBC Studios an unfair competitive advantage. However, there are very few entities in the market which are directly comparable to BBC Studios, something which Ofcom fails to take into consideration. There are also no equivalent independent production companies that own a UK broadcaster channel as part of its portfolio. This gives BBC Studios a considerable competitive advantage in the form of stronger relationships with commissioners and the ability to call upon significant financial resources in times of need, something which independent production companies take many years to develop. This means it is vital that Ofcom can accurately assess whether each line of business is making a commercial rate of return.
- 2.3 We have long argued that there is no other entity in the UK production market that would have access to the output deals that the BBC enjoys. Additionally, when BBC Studios began its commercial period it had an underpinning of scale and financial resources

which no other UK production entity could replicate. Before the renewal of the BBC Charter, Tony Hall stated that 'BBC Studios – and the removal of quotas associated with it – will open us up to the widest and most competitive range of suppliers.'³ However, Pact considers that BBC Studios has been gifted output deals and that all IP from BBC Studio goes to its own in-house distributor, something which is not common practice in the market. Larger independent production companies who have their own distribution arm will use other distributors if it commercially suits the content in question, for example another distributor may have better relationships with broadcasters in a key market. These added advantages mean that the regulatory conditions around competition concerns need to be rigorously applied and Ofcom needs to be vigilant in their monitoring of competition concerns.

Q2. Do you agree with our proposals to amend the monitoring, reporting and transparency requirements? Please provide reasons and evidence to support your answer.

- 3.1 Pact is supportive of Ofcom's proposals to 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. Pact would like clarity on how Ofcom and/or the BBC would consult with third parties if there are any changes to their commercial services. We note that Ofcom confirm that if they consider the changes to be inconsistent with the requirements under the BBC charter and agreement they would 'consult' on whether they need to 'step in'. Clarity on whether the consultation would involve third parties is needed. Pact considers that wide consultation with stakeholders ahead of any changes is preferable.
- 3.2 It is vital that Ofcom acts when the BBC's activities are distorting the market and harm competition. Pact has been disappointed in several recent Ofcom rulings that have allowed the BBC to continue activities that Ofcom have acknowledged could damage the market and competition and/or have shown little evidence to prove that there is no impact on competition. For example, Ofcom's final determination on the BBC's iPlayer proposals. We were disappointed that Ofcom disagreed that these proposals would adversely affect fair and effective competition in the production sector. Although Ofcom recognised the potential impact on the price of secondary rights, they believed this would be offset by a rise in primary rights. We believe that this decision has been based on flawed evidence from the BBC-commissioned Frontier Economics report, which states that primary rights will increase if secondary revenues decline and that producers can pitch the idea to other broadcasters. The Frontier Economics report also states that 'care should be taken in interpreting the results.'⁴ We disagree with the assertions in the Frontier Economics report and have previously highlighted that producers create an idea with a specific broadcaster in mind, once an idea is rejected it is unlikely for it to be commissioned by another broadcaster. Given the impact that these decisions can have

³ Tony Hall Speech at the Media and Telecoms Conference, March 2016.
<https://www.bbc.co.uk/mediacentre/speeches/2016/tony-hall-enders>

⁴ Changes to BBC iPlayer, Competition Assessment, Frontier Economics, p89

on the market and competition, any rulings by Ofcom need to be based on extensive research and data.

3.3 Pact also remains concerned about the BBC's involvement in BritBox and the impact this has on the market and competition. We were also disappointed that in their decision Ofcom seem to have disregarded the negative impact BritBox will have on secondary rights. In their final determination, Ofcom states that the BBC would fund a greater proportion of the cost of production. However, Ofcom also acknowledges that tariffs for programmes are largely in decline and broadcasters rely on deficit financing to fund a production. The burden of deficit financing often falls on the producer and BritBox's programme release policy makes it more difficult for producers to exploit secondary rights revenue and in turn reduces the financial resources available to the commissioning broadcaster to fund a programme. As we have stated previously any negative impact on secondary rights will be to the detriment of the production financing model.

3.4 We were also disappointed in Ofcom's approval of changes to the BBC's operating licence related to children's programming, namely amending the quota to allow iPlayer-only commissions to count towards the quota. In our response to the consultation, we raised concerns regarding a lack of independent research and full impact assessment. We remain concerned that the allowing iPlayer-only commissions to count towards the BBC's children's quotas indirectly undermine the Terms of Trade and contradicts the codes of practice which were put in place to ensure fair and transparent relations between producers and the BBC. We also remain concerned that Ofcom's ruling could set a precedent in other genres which would further undermine the Terms of Trade. Ofcom has stated that if the BBC wishes to change the first-run definition for other services, a separate request to Ofcom would be required.⁵ However, Ofcom's approval in this case makes it increasingly difficult to argue against similar future requests to change the operating licence. While Ofcom has put in place safeguards such as additional monitoring and reporting requirements, the impact this will have is limited if the BBC's activities are having an adverse impact on the UK production market and competition.

Q3. Do you agree with our proposals to amend the commercial rate of return requirements and guidance? Please provide reasons and evidence to support your answer.

4.1 Pact agrees with Ofcom's proposals to amend the commercial rate of return requirements and guidance. However, it is not currently clear what will happen if a line of business is consistently not making a commercial rate of return, and whether BBC Studios will be allowed to fail like any other production/distribution business.

4.2 Ofcom must clearly set out what steps they will take if BBC Studios continually misses its targets and whether BBC Studios will be allowed to fail. No other commercial business in

⁵ Ofcom Statement on the BBC's request to change its Operating Licence, July 2020, p30

the UK production market would continue and be considered viable if they were not regularly earning a commercial rate of return and missing targets. BBC Studios should be no different to any other business in the market.

4.3 Pact appreciates the commercial sensitivity around the data that BBC Studios will be disclosing to Ofcom however, Ofcom should also clearly state how the reporting and monitoring processes will aid transparency on BBC Studios activities, this should include details on what information the BBC will be required to send. This will help give us confidence that the additional requirements and guidance are sufficient to monitor BBC Studios' impact on the market and competition.

Q4. Our changes will take effect from the date of our statement, are there any reasons to delay implementation?

1.3 Pact agrees that the proposed changes should take effect from the date of Ofcom's statement. There is no reason to delay implementation. It is vital that Ofcom has as much information as possible as soon as possible to ensure BBC Studios is abiding by its regulatory requirements.