

Submission to Ofcom's Proposed Annual
plan 2019/20

pact.

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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 biggest in the world. Independent television sector revenues have grown to £2.7 billion in 2017, making a major contribution to the UK creative economy and exports.
- 3) Given that Ofcom continues to have a significant impact on the communications market including the audio-visual sector it is important to Pact's 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 2019/20.
- 5) For further information, please contact (☒ - redacted for publication).

1. **Overview**

1.1 We thank Ofcom for giving Pact the opportunity to comment on Ofcom's proposed Annual Plan 2019/20. We have focused our comments primarily on the reviews of BBC Studios; BBC News and Current Affairs output, digital commissioning, and the guidance to broadcasters on production outside of London.

1.2 We welcome Ofcom's plans to review BBC Studios as there is still great concern about the separation between BBC Studios and BBC Public Service, and the possibility of indirect cross subsidy.

1.3 Below we outline in more detail Pact's views and comments on the proposed work plan and our recommendations for future reviews.

2. **BBC Regulation**

BBC Commercial and Trading Activities – Ongoing work

2.1 Pact notes that Ofcom's supervision of the BBC's Commercial and Trading activities is an ongoing process. Pact would urge Ofcom to adopt our recommendation of an independent audit of the BBC Group (BBC Public Service and BBC Studios) and a review into the BBC transfer pricing system. An independent audit would both safeguard commercially sensitive information and reassure the independent production sector that the BBC has adopted a commercially robust system of transfer pricing with the comprehensive and consistent use of commercial benchmarks. The adoption of independent auditing, which is consistent with the commercial practice of publicly traded media companies, would also help to ensure the necessary financial reporting transparency across the entire BBC Group (BBC Public Service and BBC Studios).

BBC Annual Plan

2.2 Pact looks forward to Ofcom's Annual Report on the BBC and other publications on the success of the Corporation in meeting its obligations in terms of contestability, transparency, equal treatment between BBC Studios and external producers, Out of London production quotas, genre quotas especially for children and diversity targets.

BBC Studios Consultation Review

2.3 When Pact originally negotiated an agreed position on accepting BBC Studios as an entity, we set out key principles which the BBC promised would be respected. These principles were enshrined in some form through the BBC Charter and Agreement and are listed below. Pact would suggest that the Ofcom consultation review should consider whether BBC Studios are meeting these principles in their commercial practices, and in their relationship with the BBC Public Service.

- no direct or indirect cross-subsidy;
- demonstrable separation between the finances and operations of BBC public service and BBC Studios;
- arm's length commissioning;
- fair transfer pricing (see BBC Commercial and Trading Activities section)
- fair and transparent competition for new commissions between BBC Studios and third-party independent producers.

2.4 The above principles could be explored through the following key comparisons between the BBC Public Service's treatment of BBC Studios producers vis a vis independent production sector producers:

- Confirmation of BBC Public Service's use of common criteria for both BBC Studios and independent production sector companies vis a vis eligibility to pitch and identity of the producer
- Confirmation of BBC Public Service use of common assessment criteria for programme proposals from BBC Studios and independent producers
- Confirmation that the same contractual terms are offered to BBC Studio producers and external producers by BBC Public Service
- Assessment of the commercial cost of the services provided to BBC Studios by the BBC Public Service including HR support, archival material use (waived licensing fees), equipment and legal services. Pact is concerned that this indirect subsidy will enable BBC Studios to reduce its overall costs and improve its operating margins to the detriment of creating a level playing field with independent production companies
- Comparison of annual numbers of development meetings between BBC Studios and BBC Public Service versus BBC Public Service meetings taken with external producers
- Comparison of percentage of development money awarded by BBC to BBC Studios versus funding awarded to external production companies
- Comparison of annual number of programme proposals received by BBC Public Service from BBC Studios and independent production companies
- Comparison of the time taken from the pitch and commission agreement signed or production start vis a vis BBC Studios and external production companies

- Comparison of annual number of multi-series orders awarded to BBC Studios versus independent production companies
- Comparison of the Percentage of final production budget from BBC license fee and the percentage of budget from BBC Studios versus third parties (independent producers) contribution from the sale of international rights and deficit financing.

2.5 The BBC Public Service and BBC Studios must not distort competition. Pact is concerned about the impact of the decision by the BBC and Discovery Communications to break apart UKTV and divide the assets (channels) between Discovery and BBC Studios. This will fundamentally alter the BBC Studios business model as it will turn the company into a vertically integrated media company which brings production, distribution and broadcast under one corporate umbrella. Pact believes that Ofcom's consultation review should investigate the impact of this decision in terms of distortion of the market. The investigation should also review the impact on BBC Studios' competitors, which may be denied multi-channel commissioning opportunities, and the creation of a competitor which can subsidise its costs such as, development with guaranteed revenue from the advertising on the company's channels.

2.6 Pact is also concerned whether BBC Studios are providing sufficient information to Ofcom that will enable them to assess whether the company or the company's lines of business are delivering a commercial rate of return. Pact would like to recommend that in the BBC Studios review, Ofcom should seek to determine the process by which BBC commercial businesses and lines of business will be allowed to fail. Ofcom should also seek clarification on which BBC Board will be responsible for this closure decision as the governance of such decisions is still unclear.

Online content

2.7 As part of its annual review of the BBC, Ofcom should encourage greater BBC transparency around the contestability of online content and how the transition to 100% contestability over the course of the current Charter period is progressing. The most recent BBC Annual Report showed that 'digital/online' content contestability sits at 31% with external suppliers¹. Pact would expect to see this figure grow over time, yet there is little transparency around how the 31% figure is being reached.

2.8 Pact has over a number of years argued the need for a fairer deal for online content production. We are currently in discussions with BBC to secure better deal terms. The BBC in particular is exacerbating a trend that is happening online when it comes to remunerating content creators. Through

¹ BBC Annual Report and Accounts 2017/18

BBC3 they are paying minimum rates for short form content, which is then shared with millions of users who are not license fee payers.

2.9 Pact believes that this current practice is exploitative. This means producers cannot geo-block their content and the subsequent value of their content is lost. As it currently stands the distribution arrangements are only increasing this.

2.10 The BBC should acknowledge that indirectly there are competition issues when they decide to unilaterally take the rights of short form content produced by independent producers. For modest budgets, producers are expected to deliver short programmes of network quality that the BBC will then give away globally denying producers any chance to try and distribute the content for themselves thus losing out on the revenue, which can limit a company's growth, ability to employ more people, and invest more in developing new ideas.

2.11 This model is unsustainable if these companies are to develop. Pact wants these companies to succeed and grow. This is the next generation of new producers that we need to come up with the next big show or next international hit that brings in more money into the UK economy. Digital content suppliers should retain the IP rights to the content which they produce in the same manner as TV producers.

2.12 The BBC could play an important role as a catalyst for growth in the digital economy by opening out more opportunities to the digital sector. This should include flexibility in IP rights ownership to enable different business models to develop.

BBC News and Current Affairs Review Report

2.13 Pact looks forward to the publication of the report on BBC News and Current Affairs but recommends that Ofcom launch a consultation review of contestability in current affairs commissioning. This is a key issue to producers of factual content, especially in Scotland and Northern Ireland. The review should also seek to establish if the boundary lines between News Current Affairs and Non-News related Current Affairs could be more clearly defined. This is a matter of concern for Pact's members, who are competing with BBC inhouse departments for current affairs commissions. Pact would also like to re-emphasize our support for Ofcom's earlier proposals, that the BBC provide additional commissioning data on non-news current affairs as this transparency will provide the essential authoritative evidence on how the BBC are meeting their contestability requirements in this genre.

3. Diversity

3.1 We look forward to reading the report on diversity and equality of opportunity in broadcasting. Pact has a strong commitment to diversity across the TV/Film production sector and our CEO has recently stepped down as the Chair of the Creative Diversity Network which works with senior industry partners to drive forward greater inclusion.

3.2 Our members are engaged in delivering on Project Diamond and we are working closely with the CDN to increase awareness and to improve return rates. We continue to develop our work on diversity and inclusion; through our website which offers guidance and resources to the whole industry, with production companies on a new cultural change programme and inclusive leadership lab and also through our diversity training scheme. We call on Public Service Broadcasters to remain vigilant in ensuring there is diversity off screen throughout their organisations, not just on screen. We look forward to Ofcom's third annual report on the UK TV industry to promote diversity and equality of opportunity in broadcasting.

4. Production Out of London Consultation

4.1 Pact represents over 150 companies which are based outside of London from its membership of over 500 companies. Pact has always championed the need for all PSBs to implement a strong nations and regions strategy, so that a local and vibrant production sector can be sustainably maintained in the nations and regions. Pact welcomes the second phase of the consultation on the review of guidance to PSBs for production outside of London and looks forward to making our views known reflecting our members' interests and concerns.

5. Review of EPG Code and the Future of PSB Prominence

5.1 Pact looks forward to Ofcom's report on the review of the EPG Code and the future of PSB prominence. Pact supports the PSB ecosystem as it is good for the UK, the British public and the indie production sector. However, Pact hopes that Ofcom will be guided by robust impact assessment evidence from the PSBs on why prominence should be extended online and elsewhere. Pact believes that any extension of the prominence regime to the PSBs' new services and devices must be accompanied by the imposition of the same obligations and responsibilities that are imposed on PSBs linear services. The report should also recognise that any changes to the prominence rules might have a damaging impact on the multi-channel companies in terms of advertising revenue and their prominence on the EPG. Any changes must minimise the impact on multi-channel companies who are playing an ever-greater role in the commissioning of UK content. Pact would also urge that Ofcom must be careful of any regulatory changes which will stifle innovation and investment in online products and services.

6. Review of Children's content

6.1 Whilst we were disappointed that Ofcom chose not to fully deliver on the power given to it by Government and Parliament through the Digital Economy Act, Pact looks forward to Ofcom's publication of the broadcaster's robust plans to the Ofcom review of the quantity, range and quality of content available to children. The Ofcom Media Nations Report 2018 found that PSBs' investment in new UK children's programming has continued to fall, with a further 18% drop in real terms in 2017 to £70m.² Pact would very much welcome an opportunity to comment on the broadcaster plans before they are published by Ofcom in the summer 2019. We are open to discussions around how this can be achieved. Depending on the plans published, which we believe should result in increased investment across the PSBs, the option of imposing children's content quotas on the commercial public service broadcasters should remain on the table.

² Ofcom, Media Nations report 2018