

Submission to Ofcom's Consultation on
Provisional Determination of the BBC
iPlayer Competition Assessment

pact.

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Introduction

- 1) Pact is the UK trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media companies.
- 2) In 2017, the BBC was the largest PSB commissioner of the independent production sector at £453 million. However, the BBC external commissioning spend has declined from 2013 when it stood at £476 million.¹ This fall in external spend has resulted in a growing financial gap between the BBC's programme tariff (budget contribution) and the actual cost of the programme. A large proportion of the decline in spend on first-run originated spend has been mitigated by an increase in third-party funding, such as co-production arrangements, tax credits and deficit funding from production companies.
- 3) This deficit financing model applies to all the PSBs (BBC, ITV, Channel 4 and Channel 5) as producers are required to accept risk as part of the financing process of much of UK PSB content. In order to secure the necessary UK and international sales to bridge the financing and/or enable the producer to make a profit from the series (IP), producers are incentivised under this system to make the series as high quality as possible to maximise its potential exploitation. The Terms of Trade system, in which producers own the IP of programmes developed by their production companies, therefore benefits both the PSBs and the UK audience alike.
- 4) IP ownership and access to the UK and international markets has enabled the UK independent television sector to be transformed from a cottage industry in 2003 to one of the biggest in the world. In 2017, UK independent television sector revenues stood at £2.7 billion.
- 5) 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.
- 6) Pact welcomes the opportunity to submit evidence to Ofcom's second consultation on the BBC's iPlayer proposals. Pact notes that Ofcom has requested further evidence for this consultation. Pact would also like to

¹ Pact Census 2018

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highlight that Ofcom's provisional conclusions are in part based on evidence submitted by the BBC such as the Frontier Economics report. This report was based on the market performance of 108 titles which were supplied by the BBC. Pact notes that the data on these 108 titles has not been made public.² This means that Pact, and other stakeholders, have not been able to check whether these titles represent an appropriate cross-section of BBC content. Lack of access to this data also means that it has not been possible for external stakeholders such as Pact to review the data analysis in order to confirm whether the conclusions provided by Frontier Economics stand up to independent verification.

- 7) Pact is disappointed that Ofcom has not considered Pact's two evidence-based reports on the likely impact of the BBC iPlayer proposals on the UK production and finance market to be sufficient. Both reports sought to model the impact of the BBC's iPlayer proposals on competition and the market from empirical information provided by programme distributors and production companies. It must be noted here that these reports were both completed very quickly with the report entitled 'Proposed Changes to the iPlayer' turned around in the consultation's short two-week period. Both reports showed that there is an important underlying Terms of Trade issue for the BBC's iPlayer proposals. It is disappointing that, despite the weight of evidence-based modelling and analysis provided by Pact, Ofcom has not agreed to widen the scope to include all the relevant competition issues in the consultation.
- 8) Pact is also concerned that the BBC are stating in a number of commercial negotiations with independent production companies that the iPlayer proposals have "been approved by Ofcom". Pact wants assurances from Ofcom that this is not the case. Pact calls on Ofcom to issue a clear statement in its final determination confirming that this is a grant of activity rather than a grant of rights to the BBC. Pact would also request that this is made clear to senior BBC Executives during the next period of consultation.
- 9) Following the announcement of the second consultation, Pact has now commissioned a new report from O&O that details how the BBC's iPlayer proposals directly affects the underlying Terms of Trade competition issue.
- 10) Pact would urge Ofcom to fix the new baseline to an exclusive 12 months iPlayer window and for a limited number of programmes in each of the

² BBC iPlayer Public Interest Test document, April 2019, para 219

categories such as scripted, returning, archive and non-scripted. Pact would also request that Ofcom does not permit any attempt by the BBC to extend either the exclusive 12-month iPlayer period or the number of titles available on the service in a given year. Following the BBC's Public Interest Test consultation, Pact has a number of reservations about the BBC Board's ability to independently assess the market impact of any new iPlayer changes on stakeholders such as BVOD competitors, UK owned SVOD entrants or the independent production sector.

- 11) For further information, please contact Pact's Interim Head of Policy, Niall Stewart, at niall@pact.co.uk or on 020 7380 8232.

Consultation Questions

1.1 Do you agree with our assessment of the likely impact of the Proposals on fair and effective competition? Please provide evidence to support your views.

1.2 Pact does not agree with Ofcom's assessments on the likely impact of the proposals on fair and effective competition because it runs contrary to the findings of both market impact assessment reports which Pact has submitted to Ofcom. These reports showed that UK independent production sector will experience a substantial fall in secondary revenues as a result of the BBC's planned 12 months exclusive iPlayer window. This will create new economic challenges for small and medium sized companies in particular as producers will find it more difficult to complete their programme financing. Pact is also concerned at the likelihood of the iPlayer proposals leading to a loss of advertising revenue for the BBC's BVOD competitors. By restricting the flow of BBC content into the UK secondary market, Pact also believes that the iPlayer proposals will reduce the ability for new SVOD entrants into the UK market to access sufficient content to make their services attractive. Pact is also disappointed that Ofcom has found the evidence from the BBC to be more compelling than that of Pact, Viacom, COBA, Channel 4, Sky, Directors UK and all the other stakeholder organisations which submitted evidence to the first Ofcom consultation on the BBC iPlayer proposals.

1.3 Ofcom's conclusions are based on partial analysis from Frontier Economics that treats the independent production sector as a single entity with identical companies that follow one type of business model and have the same access to the international and UK television market. The reality is that the UK independent production sector comprises over 500 diverse companies that each have a unique blend of skills, experience, expertise, financing opportunities, production record and industry relationships in the UK and internationally. These companies range from micro-businesses to international conglomerates. Some focus on particular genres such as comedy whilst others produce a wide range of programmes. Some

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companies have production offices across the UK whilst others are based solely in London or in the Nations and Regions.

1.4 This is an industry in which companies and commissioners base major spending decisions on a perception of the audience's needs and wants. However, that perception is often confounded by the audiences' actual reaction which determines whether a programme is a success or failure. This is why a small company can devise IP (format) which can become a worldwide hit whilst a multi-national conglomerate production company can have a string of programme failures. This is an industry with a low cost of entry with growth driven by companies of all sizes investing in IP development.

1.5 This is a sector which requires specialist creative sector modelling which is based on detailed company and market research. This research needs to be constantly updated as the market is continually evolving to keep pace with technology and changing audience requirements. This is why Pact does not understand why Ofcom has placed so much credence on the findings from Frontier Economics. This report was based, as far as we are aware, on insufficient research of the sector and relied on selective data provided by the BBC. It is Pact's view that these 108 titles do not provide a survey of the entire spectrum of programmes of different genres, budgets and broad variations in terms of market popularity. This means that Frontier has come to the wrong conclusions about the likely impact of the BBC's iPlayer proposals on fair and effective competition. As stated previously Pact has had no opportunity to interrogate this data set and as such we can only take the view that this was a partial data set chosen to justify the BBC's claims of minimal market impact on the programme supply and financing. Pact would ask that Ofcom in its final determination explain its own analysis of this data set and why Ofcom arrived at the conclusion that there was little, if any, impact or that any impact would be offset by other forms of finance.

1.6 Pact's understanding of creative sector economics means that we do not share Ofcom's view that business failures – as stated in paragraph 6.31 and A3:100 – would not harm competition. The dynamism of the UK production and broadcasting ecosystem relies on the creation and growth of small and medium sized companies to provide greater choice for content commissioners, boost the development of IP across the industry, deliver new format hits and foster export growth.

1.7 Pact shares Ofcom's concern that the BBC has still not provided detailed costings of its proposals. Pact believes that the BBC's iPlayer proposals will bring increased economic uncertainties for UK small and medium sized production companies if these companies are not properly compensated for the loss of UK secondary revenue as a consequence of the planned iPlayer changes.

1.8 There is also the threat, posed by the proposals, to the prospects of growth for small and medium sized companies and the sector as a whole. This is because the

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UK PSB system and the Terms of Trade create a growth escalator for the UK independent production sector. This company growth is tracked by Pact in its annual Census. The 2018 Pact Census showed that Pact member companies in the £5-10 million turnover bracket had increased from a 13%-member share in 2016 to 24% in 2017. Companies in the £10-25million bracket had gone up from a 18% share to 20% over the same period. The Pact Census research on production companies' revenues has also established that the BBC commissions a greater share of content from small and medium sized companies than the other PSBs. It is also the leading commissioner of new content amongst the PSBs with 40% of its external content spend going on new commissions.

1.9 This means that the BBC rightly plays a role in the growth of SME production companies, but this important contribution will be lost, or at best diminished, following the introduction of the BBC's proposals and the consequent loss of secondary revenues for the independent production sector. The potential impact will be the loss of economic growth and dynamism in the sector as well as the possible reduction of competition in the sector.

Quality and International Sales

1.10 Ofcom states that in A3.121 – A3.123 that they would not expect the “value of international secondary rights to be significantly affected by a longer BBC iPlayer window as the availability of international content remains unaffected”. Pact cannot understand why Ofcom has made this assertion as it ignores the detailed evidence from O&O on the relationship between UK secondary and international rights. The evidence found that global rights, with the UK included, are much more attractive to buyers than global rights excluding the UK. O&O noted that the financial models between the UK secondary and international revenues are not independent and producers' ability to monetise their content on an international scale would likely be affected by the expansion of the iPlayer window in the UK.

1.11 O&O also reported that producers must put as much value on screen as possible in order to realise international sales. Following the introduction of the 12 months exclusive iPlayer window, producers may be unable to access full market value due to buyer concerns about audience fatigue or lack of exclusivity. This gap in market finance will be exacerbated if the BBC should fail to raise the primary commission tariffs in order to offset any loss of secondary revenues in either the UK secondary or international market. Loss of finance will mean that the producers will not be able to spend as much on a programme as before. This budget cut will reduce the programme's quality which will lower the programme's likelihood of international sales or at best, reduce its profitability in the international market. Pact is concerned that it may start a downward spiral in which buyers' expectations of UK content will be steadily lowered and so will offer less for international rights to UK content or IP.

Buyer Power

1.12 Paragraph 6.35c in the Ofcom consultation document argues that it is “unclear why the Proposals would improve the BBC’s bargaining position when negotiating content deals”.

1.13 Pact is disappointed that Ofcom has not accepted the findings of the O&O report which was submitted as part of Pact’s response to the first consultation on the proposed changes to the BBC iPlayer. The BBC’s buyer power is considerable as the BBC accounts for almost 50% of PSB commissioning spending and around one third of all UK commissioning. The BBC’s buying power is particularly strong in certain genres such as comedy in which it accounted for 82% of all PSB commissioned hours in 2017. For drama, it was 53% of PSB commissioned hours and 54% of specialist factual.³

1.14 The BBC’s buying power is further strengthened due to the PSBs providing content for different demographic skews. This was shown by the O&O report which showed the very different target audiences for each of the PSBs and their BVOD services. The media consultancy Oxera reported in 2015 that this means that independent producers develop IP projects with specific broadcasters in mind. This means that there are – at most – two buyers for a particular project.

1.15 For the significant majority of these projects, whose costs are borne by the production company, the broadcaster declines to take the IP to series which means that the producers often have no or limited options to exploit the developed IP any further. This means that independent producers invest millions of pounds in R&D each year but very little of this is recouped in terms of commissions.

1.16 Under the UK PSB system, once a PSB and a production company are in negotiations for a commission, then any rival PSB buyer will lose interest. This means that the company is locked into negotiations with a PSB who has the negotiating power of being the only prospective buyer.

1.17 For smaller UK producers, this weakness is accentuated by their lack of leverage on the BBC to improve on the commission terms. These companies cannot avoid making programmes with significant secondary value for the BBC and are also unable to compensate reduced secondary value with more commissions from global platforms.

³ O&O report. ‘Ofcom consultation on proposed changes to BBC iPlayer’, page 7, final paragraph and page 8 – Figure 6

Impact on SMEs

1.18 Pact must register its disappointment with Ofcom's observation in paragraph 6.3 that UK producers, who rely on UK secondary rights, may become less profitable and face increased trading obstacles in the marketplace. These UK producers tend to be smaller and regional independent producers who tend to make mid budget range factual and scripted programmes which largely focus on the UK market. These are amongst the programmes most at risk of reduced secondary income as there is limited – if any - international sales potential.

1.19 Competition should be encouraged by ensuring that companies do not face increased obstacles in the marketplace. This is why Pact is launching such initiatives as the Production and Business Accelerator programmes to accompany its existing Export Accelerator scheme.⁴

1.20 It is not in the interests of competition that viable companies face greater market uncertainties through the introduction of BBC proposals. As stated earlier, the prosperity of the UK production and broadcasting ecosystem relies on such companies to drive IP generation and this could be threatened by the BBC's proposals that lack any detail on compensation payments for example.

1.21 Pact has commissioned a new report from leading media consultancy O&O to highlight the implications for the Terms of Trade competition issue that arise as a result of the BBC iPlayer proposals. This report is included in Pact's submission as Annex A.

Primary Commission Prices

1.22 Pact notes that Ofcom has recognised that the proposals will incur costs for the BBC and queried the BBC's failure to provide detailed costing of their proposals.⁵ Ofcom has also noted in A3:117 that rises in primary rights prices should offset any fall in secondary rights prices. However, Ofcom has qualified this statement by stating that this rise may only "partially" offset this loss of essential revenue to the independent production sector. Pact is concerned that Ofcom has not recognised the essential role that is played by secondary rights revenue. Considering the gap between the actual cost of the programme and the tariff provided by the BBC,

⁴ The Pact Export Accelerator is one stop shop to help Indies create their export strategy as well as listing upcoming opportunities to attend overseas markets and missions. The Business Accelerator will provide help to producers in order to help them run their businesses better, The Production Accelerator will help Pact members to adopt production best practice standards in order to develop their development slates, manage productions more effectively and build relationships with TV commissioners.

⁵ 'BBC iPlayer Competition Assessment: Consultation on Ofcom's provisional determination' document, para 5.46

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secondary revenues often make a production viable. This is where the production company begins to earn a profit.

1.23 In addition, Pact cannot understand why Ofcom has not required the BBC to provide full detailed costings of their iPlayer proposals as part of the assessment of the market impact. It is a fundamental principle of the Terms of Trade with the BBC that the BBC pays for any increased uses of the content it commissions from suppliers.

1.24 The relatively high profit margins on secondary revenues are crucial to the independent production company. This is the revenue which enables producers to make content. It is the revenue which enables producers to take risks, generating new ideas and risking a 'flop', knowing that it might be covered by secondary revenues associated with a 'hit'. This is why Pact believes that the rise in primary rights prices and payments for any increased use on the iPlayer must fully offset the loss of any secondary rights revenues as a result of the BBC's planned changes.

1.25 It is clear that the BBC has considerable buyer power as the largest commissioner of content in the UK. Small and medium sized companies have very limited options for whom the BBC may be a key source of commissions in the very competitive independent production sector. The importance of the BBC as a key commissioner of small production companies is shown by the fact that in 2017, it accounted for 62% of all commissions to companies with a turnover of £5million or less.⁶ The importance of the BBC as a commissioner of small production companies is even greater in the Nations and Regions. In Northern Ireland, the BBC had a 96% share whilst in Wales, it accounted for 91%.

1.26 The BBC cannot expect small and medium-sized companies, which specialise in UK-focused content such as mid-range drama, factual and comedy, to subsidise the BBC's 12 months exclusive iPlayer window. In the past, the PSBs have compensated producers in return for the rights which enabled the PSBs to launch their 30-day VOD window. Pact believes that the BBC should follow the 2007 precedent through offering all producers compensation for the loss of secondary rights revenues as a consequence of any extension of iPlayer availability.

⁶ Table 7, O&O report, Proposed changes to the BBC iPlayer: Supporting Pact's response to Ofcom's call for evidence' – May 2019

Important Revenue Sources

1.27 In A3: 117, Ofcom refers to producers' other important sources of revenue. Considering the uncertainties surrounding the established sources of finance for content producers bar the three tax credits, Pact requests that Ofcom list these 'important sources of revenue'. This is because these 'important sources' form one of the six key reasons why Ofcom does not accept that the BBC proposals will harm competition in the production sector.⁷ On publication of these sources, Pact would welcome the opportunity to discuss them with Ofcom and provide up to date research evidence on their actual value to producers.

Impact on Competitor BVOD and SVOD Services

1.28 Pact is concerned that Ofcom are permitting the BBC's proposals to go ahead even though paragraph 6.23 stated that the "revenue and viewing of rival services" will be reduced.

1.29 Pact is concerned by evidence from Channel 4 to Ofcom's first consultation that the BBC analysis "significantly underestimates" the impact of these proposals on the other PSB VOD services and in particular All 4. Channel 4 also forecasts that their younger audience skewing BVOD service will be specifically targeted by the BBC's iPlayer proposals which is likely to lead to a fall in advertising revenue. Channel 4 asserts that 68% of their overall revenues are invested in content so the channel has little scope to absorb even relatively small revenue falls without it impacting the channel's ability to deliver its remit. Pact understands that this means that the channel may potentially be forced to cut its content spend. If this occurs, then it means that the independent production sector may be affected twice by the BBC's proposals. This is because Channel 4 is a major commissioner of content from small and medium sized companies, so any content spend cuts will further reduce the revenues of small and medium sized independent producers

UK Owned SVODs Entrants

1.30 Paragraph 3.16 of the Ofcom consultation document states that creating a new SVOD service, which can offer a competitive content library to established SVODs, is an increasingly difficult prospect. Pact believes that the addition of BBC and ITV content to the commercial BritBox service is essential to its future.

1.31 In the consultation document, Ofcom was concerned about the number of previous series of returning and non-returning series as well as scripted archive

⁷ 'BBC iPlayer Competition Assessment: Consultation on Ofcom's provisional determination' document, para A3:118

programmes that would be available on iPlayer⁸ and its impact on BritBox. Pact believes that BritBox will only succeed if these categories have a limited number of titles that can be exclusively available on iPlayer and for no longer than 12 months. The limits will help to ensure that there is sufficient quantity of BBC content available to the BritBox service to attract a UK audience. If the exclusive window is not restricted to a 12-month period, then the content will cease to have any meaningful value to any prospective buyer of the UK secondary rights.

Impact on Children's Content Producers

1.32 Competition for children's content IP from the other PSBs is limited. This is because the BBC currently accounts for 95% of the entire PSB spend in children's programming.⁹

1.33 Established financing sources for children's content such as DVD rights and merchandising are in serious decline due to the impact of digital disruption. Merchandising now only provides major revenues to global brands such as Peppa Pig or Paw Patrol. International distributors will now advance only 2.5% of the budget in return for the international sales rights for those pre-school live action programmes which are considered to have international potential. Other sources of finance such as the Young Audiences Content Fund are available but limited in scope. The children's content tax credit typically provides some 19% to the production budget with all UK broadcasters/commissioners automatically factoring this figure into all production budgets.

1.34 Pact has heard from children's content producer members that UK secondary and international sales to the SVODs are growing increasingly unlikely due to the BBC's increasing reluctance to waive their 5-year holdback period. Pact is concerned that this is in preparation for the BBC's iPlayer strategy that is outlined in the proposals to Ofcom.

1.35 Regardless of the weakness of other revenue streams, the BBC continues to provide for live action shows between 10-60% of the programme's cost even though it has already barred independent producers from accessing secondary revenues through SVOD sales for example. Producers are also concerned that the BBC intends to provide much lower tariffs (budget contributions for iPlayer specific commissions). For animations, the BBC tariff is only between 10% - 19% on average

⁸ 'BBC iPlayer Competition Assessment: Consultation on Ofcom's provisional determination' document, para 6.17

⁹ O&O Report – 'Proposed changes to the BBC iPlayer: Supporting Pact's response to Ofcom's call for evidence', page 18, last para

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of the programme's cost so any further reduction of the BBC's contribution will be critical to the viability of the programme to the production company.

1.36 If the BBC should fail to provide higher contributions to the budget to compensate producers from the loss of secondary revenues, then only the largest children content companies will be able to undertake commissions for the BBC. This is because these companies can regard the BBC commission as a loss leader for their global brand development. Smaller companies may have to opt for the SVOD commission, which will provide to the company a fully financed production which is promoted globally. These production companies will then have to write off future IP revenues and IP-driven growth in favour of a substantial and upfront production fee in order to remain in business

1.37 The impact on the UK production and broadcasting ecosystem will be to reduce the number of formats (IP) offered to the BBC; retard the growth of UK small and medium sized children's content production companies due to the lack of IP ownership and inhibit the growth of UK exports by giving the ownership of future children format hits to American-owned SVODs.

1.38 The above evidence means that Pact cannot understand Ofcom's conclusion in paragraph 6.49 that the proposals are unlikely to affect children's content investment incentives. Pact hopes that this document will enable Ofcom to revise its conclusions with regards to the impact on children's content of the BBC's iPlayer proposals.

2.1 Do you agree with our provisional conclusions on the conditions and guidance that should apply to the BBC? Please provide evidence to support your views.

2.2 Ofcom must state explicitly in their final statement that the BBC does not have an automatic right to provide content on an exclusive 12-month iPlayer window.

2.3 Ofcom's final determination must make it clear to the BBC that this is a grant of activity and not rights. The Ofcom consultation document has recognised that the BBC 12 months iPlayer exclusive window must be negotiated and paid for on commercial terms. This is why Pact shares Ofcom's concern that the BBC has not put forward any detailed costing for their proposals.

2.4 Ofcom intends that the exclusive 12 months iPlayer window should be regarded as a baseline. In order that UK owned SVODs such as Britbox have the opportunity to licence BBC content under commercial terms, Ofcom must make it clear to the BBC that the potential exclusive iPlayer window is only for 12 months.

2.5 Ofcom must remove the term 'circa' in referring to any quota for a programme category as this allows for potentially a broad interpretation by the BBC. A definite limit of the number of titles permitted for each programme category will ensure that the BBC takes a robust approach to selecting the series for their public value and not

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to drive up viewing figures or warehouse content that could be exploited in the broader market

2.6 With reference to children's content, the term 'any one time' must be removed as the term is too vague and open to misinterpretation by the BBC. The 30 titles limit should be applied to a definite time period such as a year. This will bring it into line with other programme genres in terms of the length of the exclusive iPlayer window.

2.7 Under the 'other commissions' section, the term 'variable volume' and 'beyond the initial 12 months' are too vague for any meaningful guidance and must be removed. The provisional decision refers to 50 titles per year which should be adopted by Ofcom without any poorly defined or vague terms.

BBC Board

2.8 Pact understands from paragraph 7.15 that Ofcom regards the 12-month exclusive period to be the baseline. It is therefore concerning that Ofcom has included the qualifying phrase that the BBC should 'carefully consider' the impact on competition if it seeks changes to the baseline. Pact understands from this paragraph that Ofcom has granted this baseline because the BBC promised that the vast majority of returning series, non-returning series and archive series would not be available on an exclusive basis after the 12-month period. Any qualifying phrase such as 'carefully consider' undermines the Ofcom baseline from the very beginning. Pact holds the view that the BBC Board has hitherto shown a lack of concern for the impact on the market and competition. This was demonstrated by the absence of any market impact research in the BBC Public Interest Test consultation for the iPlayer proposals. Due to this lack of care and consideration by the BBC Board, Pact has reservations that the BBC Board will properly review the impact of any BBC executive decision on further iPlayer changes.

2.9 In paragraph 7.14, Ofcom states that the BBC Board will have to decide if any further changes to the iPlayer are material. As stated earlier, Pact has reservations regarding the Board's willingness to challenge any BBC executive decisions. Ofcom should require the BBC to hold a Public Interest Test consultation for all new iPlayer proposals and undertake an independent market impact assessment for any proposed change to assess the impact on competition.

2.10 With reference to paragraph 7.18, Pact would also like to request that the conditions that will be imposed upon the BBC by Ofcom are done in as transparent a manner as possible and through procedures that are open to scrutiny.

Pact has grouped the following questions together as the Ofcom consultation document makes a number of assertions and conclusions on these question subjects which Pact feels obliged to register its disagreement.

3.1 Do you agree with our estimate of the likely increase in BBC iPlayer viewing as a result of the Proposals? Please provide evidence to support your views.

3.2 Ofcom makes the following assertion in paragraph 4.5 that it is “perhaps unsurprisingly” that respondents viewed the proposed iPlayer changes favourably. Considering that the public are being offered content for free for a year, Pact does not believe that it is surprising at all that the audience research participants welcomed the planned changes.

3.3 Pact holds this view because the Kantar Media research found that the BBC iPlayer’s main failing for the 16-24-year age group is the lack of relevant content rather than the period of availability. The evidence for Pact’s view is shown by the findings in the Kantar Media research:

- The biggest gaps between the over 55 versus the 16-24 age group in the Kantar research was on their respective opinions of the value and relevance of BBC iPlayer/linear TV content. 63% of the over-55 age group thought that the iPlayer provided programmes relevant to them. This was substantially more favourable than the younger age group of whom only 43% shared this opinion. On the range of programmes available on iPlayer, the difference was virtually the same with 63% of the older age group agreeing that there was a wide range of content available as opposed to 42% of the 16-24-year group. On the extended availability question, all the age groups showed the least enthusiasm for the concept in comparison with their response to questions on content and value for money¹⁰
- The Kantar Media research also found that only 12% of internet users, as a whole, stated they would watch BBC iPlayer more and other services less due to the extended 12 months window

3.4 The evidence presented above shows that it is questionable that the 16-24-year age group will take advantage of the free content that will be available for longer on the BBC iPlayer.

3.5 Ofcom have based their assessment of iPlayer viewing changes on the data provided by the BBC regarding the daily viewing of box set series. These titles suggest that viewing will increase by 15-44%.¹¹ Pact is disappointed that this very limited data was used, as the possibility cannot be excluded that the BBC specially

¹⁰ Kantar, BBC iPlayer Competition Assessment Research Report Prepared for Ofcom June 2019, Top 3 Box, page 22

¹¹ BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document para 4.10

selected popular titles on linear TV between June 2018 and January 2019 in the knowledge that such content would also appeal to younger age groups on iPlayer. This heavily selective sample would then exaggerate the benefits of increased availability on the iPlayer. The data would not provide an accurate picture of the iPlayer performance of BBC series across genres and budget ranges.

3.6 Considering the vulnerability of hypothetical evidence to empirical bias, Pact notes that Ofcom has recognised this by stating that there is uncertainty about the actual impact of the BBC's planned changes which "depends on how appealing BBC programmes are to audiences". Considering this qualification and the breadth of assumptions made about hypothetical audience behaviour, Pact is disappointed that the predicted audience rise has been used to justify Ofcom's ruling that the proposed iPlayer changes will bring additional public value.¹²

4.1 Do you agree with our estimate of how the viewing of other services is likely to be affected by the Proposals? Please provide evidence to support your views.

4.2 In Section 4, Ofcom states that there are "significant challenges ... in estimating the impact on other BVODs" and "the impact on BVOD services and their incentives to invest may be larger or smaller" than the 2020 ranges. Pact wishes to register its concern that Ofcom has made its provisional decision without reliable evidence for the impact on the audiences of BVOD services beyond the first year.¹³

4.3 Pact welcomes Ofcom's decision in paragraph 4.8 that the BBC must negotiate for the rights needed to enable the 12 months exclusive iPlayer window baseline. Pact has successfully negotiated revised Terms of Trade with Channel 4, Channel 5 and ITV in the last year. Each Term of Trade is tailored to the particular requirements of each broadcaster and their business model. Pact echoes Ofcom's concern in paragraph 5.6 of the consultation document that the BBC has not provided sufficient detail of the costs implicit in their proposal or the impact of such costs on their overall service. These need to be clarified as quickly as possible.

5.1 Do you agree with the findings from our review of the BBC's assessment of the public value of the Proposals? Please provide evidence to support your views.

5.2 Ofcom states in paragraph 5.50 that it is "difficult to reach a conclusion on whether the public value of the proposals justifies the adverse impact on

¹² 'BBC iPlayer Competition Assessment: Consultation on Ofcom's provisional determination' document para 5.18/5.20

¹³ 'BBC iPlayer Competition Assessment: Consultation on Ofcom's provisional determination' document, para 4.6

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competition”. Pact cannot understand why Ofcom has provisionally approved the BBC’s proposals if it is unable to reach a firm conclusion on this key test.

5.3 Pact notes that Ofcom plans to address this important issue by imposing conditions on the BBC. Pact would like to request information on the form of these conditions and the procedures that will be used by Ofcom to enforce such conditions. Pact believes that these conditions will be important to all stakeholders such as new SVOD entrants and the UK broadcasting and production ecosystem. Ofcom must ensure that the procedures enforcing these conditions should be conducted in as transparent a way as possible and be open to independent scrutiny.

5.4 Pact also believes that the BBC must outline in public how they will ensure that public value is delivered and how they intend to provide Ofcom with the necessary “assurance on delivery of public value and its contribution to the mission and public purpose”.

5.5 The Ofcom consultation document noted that the BBC has failed to consider the impacts on the public value generated by other broadcasters in its PiT.¹⁴ Ofcom states that the BBC’s failure to address this issue will be addressed separately. Pact cannot understand how Ofcom has approved the BBC’s proposals without such information being in its possession so that the full impact on public value can be fully assessed. Pact believes that Ofcom must specify exactly how it intends to deal with this issue with the BBC in its final statement.

5.6 Pact shares Ofcom’s concerns that the BBC has not properly addressed the implications to the BBC’s overall service of the additional costs of its proposals.¹⁵ Pact holds the view that the BBC must set out the full costings of its proposals and that services such as the new Scotland channel or BBC Four are not closed down or content provision reduced as a result of such costs.

5.7 Pact believes that any loss of BBC services or content to UK audiences will mean a much greater reduction of public value than any public value derived from the extension of the iPlayer window. In light of this possibility, Pact cannot understand why Ofcom has decided to make this provisional decision without detailed costings from the BBC on the likely costs of the proposed changes and the possible impact on the services provided to the UK audience by the BBC.

¹⁴ ‘BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document, para 5.43

¹⁵ ‘BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document para 5.46

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5.8 With reference to paragraph 5.6, Pact notes that Ofcom would be concerned if the “BBC selected titles simply to drive viewing to BBC iPlayer, rather than deliver public value” such as by showing niche content to wider audiences.¹⁶ Pact would request clarification from Ofcom on their criteria for determining whether a title has been selected for public value or for driving up iPlayer’s viewing figures. Pact would also appreciate from Ofcom further explanation on their planned procedure should the BBC be found to have selected titles to drive greater viewing rather than deliver public value.

6.1 Do you agree with our provisional conclusion that the public value associated with the BBC’s iPlayer proposals justifies the adverse impact on fair and effective competition we have identified? Please provide evidence to support your views.

6.2 Pact does not agree with Ofcom’s provisional conclusions. In A3: 22c, Ofcom states that the commercial companies, which Pact understands to be the commercial PSBs, may react to falling revenue by producing fewer programmes in expensive genres like drama. Ofcom also stated that such reductions in content spend could have a negative impact on the consumer if this reduces overall choice. The reduction of programme provision could also have the effect of reducing the range of audience that competitor services could attract thus reducing the viability of their service. Pact believes that this reduction of viewer choice and the possible detriment on iPlayer competitors will diminish public value much more than any possible benefits of the BBC iPlayer proposals. There is also the damaging impact on the UK production and broadcasting ecosystem if small and medium sized companies face greater economic uncertainties because of the reduction in secondary revenues. This may reduce the IP on offer to the PSBs which will, in turn, reduce the quality of their offering to the public. In this way, public value will be reduced.

6.3 Ofcom have acknowledged that their organisation have not considered the potential market impacts of the BBC’s iPlayer proposals on children’s content¹⁷ but claim that the proposals are unlikely to “substantially affect investment incentives”.¹⁸ Without the possession of concrete evidence for either argument, Pact cannot understand Ofcom’s decision to approve the BBC’s proposals for children’s content.

¹⁶ ‘BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document para 5.27

¹⁷ ‘BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document para 6.21

¹⁸ ‘BBC iPlayer Competition Assessment: Consultation on Ofcom’s provisional determination’ document para 6.22 and 7.10

6.4 Paragraph A30: 130 states that the longer availability on iPlayer would not affect the price of the secondary rights because children would have aged over the five years BBC licence period and so would no longer be interested in such content once it became available on other services. Pact would query this argument as it seems to ignore the fact that children's programmes are watched over the years by different generations of children rather than just one.

7.1 Do you have any comments or other views on the sector developments and likely future developments we describe in Section 3?

7.2 Paragraph 3.18 refers to the SVOD companies 'economies of scale' and "greater weight in negotiations with content owners". The paragraph later argues that these combined advantages could make it harder for single country VOD services to compete in the future.

7.3 Pact cannot understand how Ofcom has reached this view as the Ampere research shows that the BBC iPlayer remains the dominant VOD player in the UK with the other three PSB players and Sky in the top seven along with Netflix and Amazon.¹⁹ This is unique in Europe where only one or two national broadcasters in each country have established their VOD players.²⁰ This demonstrates that the UK PSBs have responded quickly and effectively to the changing demands of the UK market. With all the PSBs, this was achieved through negotiation of their respective Terms of Trade with Pact.

7.4 Section Three of the consultation document quotes extensively from the Ampere Report on the UK VOD market. Pact notes with interest that the Ampere report makes the following assertions which underlines Pact's belief that the SVOD threat to the PSB linear and BVOD services has been exaggerated. The report also shows that the BBC is following the wrong strategy of prioritising distribution instead of changing editorial priorities to target content investment at younger audiences

- The number of 18-24 BVOD users mirrors the national average of this age-group at 37%.²¹ The Ampere research found that the commercial PSBs players All4 and My5 have proven to be particularly successful in reaching younger age groups which shows that the PSBs can reach the key target age groups through the right content

¹⁹ Ampere Analysis, The UK VoD Market: Current status and future developments' report, Table 1.2.3.

²⁰ Ampere Analysis, The UK VoD Market: Current status and future developments' report, Page 7, para 2

²¹ Ampere Analysis, The UK VoD Market: Current status and future developments' report, page 5

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- Only two SVOD companies (Netflix and Amazon) have broken into the UK market which is dominated by the PSB and Sky VOD services
- 60% of the UK audience use the BBC iPlayer service each month with 13.4 million monthly UK users. This is the highest of an BVOD or SVOD service in the UK. The BBC iPlayer is 3.5 million monthly users above the second ranked VOD service which is Netflix on 9.9 million²²

7.5 Considering the evidence listed above from Ofcom's Ampere Analysis report, Pact is disappointed that Ofcom has not appreciated the long-term danger of the mistaken BBC approach in failing to prioritise content for younger age-groups.

Annex A:

O&O Report on the BBC iPlayer proposals impact on the underlying Terms of Trade competition issue. The Report entitled 'The BBC's Proposed Extended iPlayer Window and the Implications for Terms of Trade Intervention' will be submitted to the consultation as a separate document.

²² Ampere Analysis, The UK VoD Market: Current status and future developments' report, page 7, para 2 and Box 1.2.3