

Response to Ofcom
PSB Review: Phase 1

pact.

June 2008

Foreword



It is easy to lose sight of what is really important in the debate over public service broadcasting (PSB). As recently as the 1980s, television schedules were dominated by predominantly US imports. This is not to dismiss the ability of *Dynasty*, *Dallas* and *Cagney & Lacey* to entertain, but imported shows cannot substitute UK-originated programming as a way of representing, and questioning, our cultural and social identity. The list of difficult questions now facing PSB does not include: “Who shot JR?”

UK-produced programmes are at the heart of PSB. Home-grown programming helps us understand ourselves, the diverse viewpoints within our society, and the world in which we live today. At its best, UK programming unites us.

Ask the public what it wants from PSB, as Ofcom has done on numerous occasions, and the answer is clear. Audiences want public service content to be high quality, innovative and fresh. They want it to reflect a genuine range of different viewpoints. And, crucially, they want it to be made in the UK.

By design or accident, the PSB system has given them all those things. Over the past 25 years, we have seen the creation of a broadcasting and production system that provides thousands of hours of UK programmes each year. According to Ofcom, bought-in acquisitions now represent just 8% of programming on UK public service broadcasters - less than half the European average of 18%.

PSB is not just about the volume of UK content, of course. Just as importantly, this framework has delivered programming of the highest quality – innovative, engaging, and diverse. The key to this has been enabling a range of suppliers, including in-house departments at broadcasters and external production

companies, to compete. It is here that the independent production sector has played a vital role as a creative catalyst, providing a fresh voice, pioneering new approaches, and encouraging risk-taking across the entire sector. The fact that indies now win around 50% of all qualifying network commissions testifies to their extraordinary creativity.

Another thing that the public wants is choice. The future PSB system should ensure UK citizens can easily access content from more than one service. In future, if broadcasters no longer invest as much in the costs of UK production, yet also benefit from a range of regulatory or fiscal interventions, then they should not seek such extensive controls over how and when the public can access content. The primary commissioner should have a reasonable opportunity to re-coup investment via a primary use window. But outside that window, content should not be held back on an exclusive basis, warehoused or only released to secondary channels and services within the same corporate group. That content should be made available non-exclusively immediately after the primary use window, so that the public has access to it via a choice of services, channels and platforms.

Ultimately, though, whether the public receives content via analogue, digital terrestrial, satellite or broadband technology is secondary. It is the nature and quality of that content that is paramount; technology just makes it easier to access, or personalises it for us so we can become our own aggregators.

This review is primarily about broadcasting, but it cannot lose sight of the fact that broadcasting (or any distribution platform) is nothing without high quality content. The commercial broadcasting models that have historically invested heavily in UK content are coming under pressure. Genres with a perceived high opportunity cost are being abandoned or severely reduced. But in attempting to square the PSB circle, Ofcom must not undermine the very structures which fostered the high quality UK programmes that, once and for all, killed off JR.

Charles Wace

Chairman of Pact

June 2008

Executive summary

- 1) UK public service programming is envied – and formatted - around the world. Per capita, the British public enjoys a high level of well-funded, domestically-made programmes, with £2.75 billion invested in network originations per year.¹ The UK boasts not just one public service broadcaster in the BBC, but a pluralistic system of multiple public service channels that stimulates creative competition in programming, and choice for the viewer. That system encompasses not just a diversity of channels, but also a range of suppliers, with in-house and external competing to offer commissioners, and by extension the public, some of the most engaging, varied, innovative and exciting programming in the world. If some aspects of our PSB system are not found in other countries, they should be safeguarded nonetheless.
- 2) Emerging technologies are creating new challenges for public service programming, and Pact therefore strongly welcomes Ofcom's second review of public service broadcasting (PSB). As Ofcom identifies in its consultation paper, certain core areas of PSB – most immediately children's and nations and regions - are already experiencing shortfalls or under pressure. Without urgent steps it is clear that the PSB system will fail audiences in these key areas. In the case of children's programming, this is already a reality: investment from commercial PSBs has plummeted over the last decade by 80%, destroying the plurality of programming in many areas. In multi-cultural Britain, the fact that the only children's show on any channel representing a British-Indian family – My Life As A Popat – has now been stopped is symptomatic of a failure in the PSB system.

¹ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 56.

- 3) The PSB landscape is changing – public service programming is fast becoming public service content, delivered over a range of channels and new media platforms. But the essential DNA that defines public service content remains unaltered by iPlayers, iPods or 3G handsets. To fulfil the public purposes defined by Ofcom, content must be UK made.
- 4) This view is shared by the UK public. Ofcom's consumer research shows that an overwhelming majority of people – as high as 84%² - place a high value on new, home-grown programming that reflects and strengthens the nation's cultural identity.
- 5) Sustaining the level of UK public service content should therefore be a core goal of Ofcom's PSB review. However, the successful delivery of PSB cannot just be about the sheer volume of hours of UK-originated programming on television screens: the quality and diversity of that programming are also fundamental.
- 6) Competition in the supply market is key to achieving both of these aims. Having a range of content suppliers vying for commissions drives creative excellence, encouraging fresh ideas and approaches, and ensuring that a genuine range of voices is heard. The independent production sector is vital in this regard. It is responsible for about half the total amount of original network production per year, accounting for £1.35 billion in primary commissions.³ The contribution of independent companies is not just about sheer volume of production. The highly competitive independent sector helps ensure UK content is of the highest quality, challenging and complementing broadcasters' in-house production departments, driving innovation and offering a diversity of viewpoints. Independent production companies are amongst the leaders in core public service genres, from

² PSB Review Phase 1: The Digital Opportunity, Ofcom, page 33.

³ Independent production census 2007/08, Digital-i for Pact, page 18.

current affairs shows such as Question Time and Dispatches, to acclaimed children's programming like My Life As A Popat and Wise Up!, through to factual and drama programming such as Who Do You Think You Are? and Britz.

- 7) The public also wants choice in how this content is made available. Emerging platforms and services can enhance the provision of public service content, providing the public with greater variety in how it accesses and engages with public service content – particularly, as we argue in this submission, in terms of reaching out to specific communities of interest that may otherwise be underserved, and possibly in regional or local news provision. In the case of portfolio services belonging to the incumbent PSBs, such new forms of delivery may contribute to public service requirements, but at the same time should also be subject to all appropriate terms of the PSB licence. If, for example, children's programmes offered by a dedicated spin-off channel are to count towards public service requirements, they must be subject to terms of trade for commissioning from independents.

- 8) Additionally, if new entrants other than the incumbent PSBs are to play their part in meeting Ofcom's public service purposes, those services must have reasonable access to public service content in the first place. Historically, this has not been the case, and it should not be assumed that this will change dramatically in the future. In the analogue era, the market dominance of the incumbent PSBs (in terms of advertising revenues and, as a result, spend on commissioning new programming) has enabled them to control the buying and selling of rights to IP. This has allowed them to insist on exclusive ownership of content and, intentionally or not, restrain the growth of potential rivals.

- 9) The dominance of the PSB networks will continue long into the digital era. Even if the total value of spend on original commissioning by all broadcasters – PSB and non-PSB – declines, the proportion of spend coming from the main PSB channels is predicted to remain at 90% of the market. This is the same level as it is today, and the same level that it has been for many years.⁴ If anything, Ofcom forecasts that spend from multi-channels (PSB spin-offs and non-PSBs) is likely to decline as a proportion of total investment in new commissions.

- 10) The 2003 Communications Act sought to address this, introducing Codes of Practice between producers and broadcasters in order to ensure that the rights to content were disaggregated. No longer could broadcasters demand all rights exclusively. Creators were now able to own the IP rights to the programmes they made, and then license them to broadcasters, as well as to other services.

- 11) Opening up the IP regime in this manner has helped maximise the value of public service content for the public. Allowing IP rights to content to be more available on the market enables new services to become more involved in public service provision.

- 12) In Pact's view it is time to liberalise the IP regime further. We broadly agree with Ofcom's approach that core public service content should remain widely available and free at point of use for the public in what might be termed a "public service window". As Ofcom suggests, however, around that public service window there should be opportunities to develop new forms of delivery that may have an additional payment.

- 13) In particular, there should be opportunities for making content available as soon as possible outside the public service window. Even under the current

⁴ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 66, section 5.23, Figure 37.

Codes of Practice, PSB broadcasters have a significant and exclusive “holdback” period. This is the period after their primary transmission use or uses, but before they are required to make content available to the wider market. During this holdback period broadcasters are able to control that content exclusively (and even when this content is released after the holdback period they retain non-exclusive rights).

- 14) We see little public value in this holdback period granting exclusive control to the broadcaster. The public wants choice in how it access content. As the example of the music industry shows, people will use alternative, illegal means if denied prompt access to content at a reasonable price.
- 15) If broadcasters or other future public service providers seek public support, either direct or indirect, the resulting public service content should be made available to the market as quickly as possible after the legitimate use on the primary platform (be that television, online or another service) in the public service window. Content can then be made available quickly to the public via other third-party services. The commissioning broadcaster will of course retain non-exclusive rights, and benefit from a share of the revenues generated by third-party exploitation – which may well be generated in ways they would be unable to offer themselves.
- 16) The Codes of Practice have already introduced a limited degree of non-exclusivity, ie when the holdback period has expired. Despite PSB broadcasters’ claims that the Codes would fatally damage their business models, we have seen no evidence from them that this is the case. Indeed, research for the Department for Culture, Media and Sport and for Ofcom indicates that independents continue to provide an extremely cost-efficient source of original programming, as well as an important way of keeping the costs of in-house production in check.⁵

⁵ See LEK Consulting’s report for Ofcom Financial Review of Channel 4, 2007, and the Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006.

- 17) The overriding issue for the public is that the requirements of the 2003 Communications Act have created public value by liberalising the IP regime and enabling aggregators - be they the PSB broadcasters, non PSB multi-channels, or new entrants to the broadcasting sector - to offer UK content to audiences in innovative ways. This is in contrast to an era when the incumbent PSBs controlled all rights to a programme and were able to impose their propositions on the market and the public.
- 18) It is now time to take the next step, to take advantage of new ways of delivering content by significantly reducing exclusive holdback periods, and thereby providing increased choice for the public in how it accesses public service content.
- 19) Pact's response to Ofcom's second PSB review is therefore informed by three fundamental principles:
- UK-made programmes are essential to fulfilling the PSB purposes;
 - Plurality of supply, notably the independent production sector, is crucial to ensuring UK programmes are high quality, diverse and innovative; and
 - Liberalising the IP regime will offer the public greater choice in how it accesses UK content.
- 20) We are in the first instance opposed to making the licence fee contestable, as we have concerns that this would actually damage overall investment into content creation. In addition to increased administration costs, there is a risk that commercial broadcasters in receipt of licence fee funding would use it to replace investment in content that they would otherwise have made. Rather than diluting the licence fee itself, we support reinvesting

profits generated by (an increasingly profitable) BBC Worldwide. This would allow the BBC a level of security in knowing that its core licence fee is not subject to so-called “top-slicing.”

- 21) In our view, BBC Worldwide profits should only be redirected to a publicly-owned Channel 4, rather than a host of new services. This will reduce the burden to the BBC and its own programme budgets. Other parties seeking status as public service providers are welcome, particularly in terms of innovative new media approaches, but should be funded by alternative means. We have, for example, suggested that Ofcom consider whether there is a financial benefit derived from any of the PSB content to which commercial platforms have access and, if so, how this might be reinvested back into public service programming.
- 22) Our preferred model for PSB going forward is an enhanced version of Model 3 – retaining the BBC and Channel 4 as the core, plus revised licences for ITV and Five and, subject to available monies, contestable funding for new media services.
- 23) Channel 4 has been an influential force in delivering public service content since its first transmission. Its success in delivering fresh, distinctive and successful content illustrates the benefits of plurality in public service delivery. This is quite apart from the substantial advertising revenues that Channel 4 generates, which flow into the PSB system at no expense to the public. We therefore support the existence of a well funded, publicly-owned Channel 4 going forward.
- 24) Channel 4’s publisher-broadcaster status has been fundamental to its success in providing audiences with programming that “exhibits a distinctive character”, as it is required to do under the Communications

Act.⁶ Because of its publisher-broadcaster status, the channel has been able to select the best, most diverse, competitive and original programming from a range of external suppliers. Pact is therefore opposed to any weakening of Channel 4's publisher-broadcaster status, and the retention of this status should be a condition of any additional funding for the broadcaster.

25) In addition, and we stress that this should be a crucial stipulation, any additional funding should be dependent on Channel 4 being accountable, transparent and delivering appropriate levels of public service content. We suggest these conditions include:

- Demonstrating efficiency and accountability, with review process in place;
- Funding from BBC Worldwide or other sources must be ring-fenced for content budgets, rather than used for subsidizing Channel 4's other activities;
- If Channel 4's advertising revenues outperform forecasts, this additional revenue must also be spent on content budgets;
- IP rights to content should be made available to the market as quickly as possible.
- Channel 4 should enhance its public service provision in key areas over and above its current commitment in the Next on Four document. We are calling for a 50% out of London quota, and for a substantially enhanced children's offering.

⁶ Communications Act 2003, Section 265 (3) (d).

- 26) In terms of ITV and Five, in our view there is still value in the commercial PSB licences, and ITV and Five should be required to commission a level of PSB content that is proportionate to the value of spectrum space and other indirect support derived from the licences.
- 27) Furthermore, it is an open secret that the commercial PSBs would continue to provide a level of public service programming without being required to. Shows such as *Coronation Street* and *Emmerdale* are, for example, highly attractive commercially, and it is clear that ITV would have no intention of dropping them if it were to lose PSB status. Commercial programming that the market would make regardless of PSB status should not be allowed to count towards broadcasters' fulfilment of PSB duties such as the out of London quota. Otherwise, we risk wasting increasingly scarce public assets.
- 28) We also propose a more strategic use of existing funding from Government departments and other public sector bodies when commissioning external companies to supply online content and services. Central government spending on websites is estimated to amount to up to £230m per year.⁷ This is twice as much as the BBC spends annually on bbc.co.uk, and does not take into account the Government departments and local authorities that choose to procure content direct from suppliers.
- 29) Under the contracts used for such public sector procurement, external suppliers are required to surrender all of their IP to the Government or public body that is commissioning them. This is a missed opportunity, denying external suppliers the opportunity to explore the value of such IP in the market.

⁷ The National Audit Office estimated central government spending on websites in 2006/2007 was £208m, while MTM London's report for Ofcom put this figure at £230m.

- 30) We therefore propose that external suppliers should be allowed to retain certain IP rights when working for Government and public sector bodies. In this way, public sector procurement would act as a form of seed capital for creative companies - at no additional cost to the taxpayer.
- 31) In addition, we ask Ofcom to open up news provision to a greater range of external providers by revising the definition of qualifying independent programming under the Broadcasting (Independent Productions) Order 1991, and subsequent amendments. This would allow independent television production companies, as well as potential new players such as news and regional press organisations, to compete to supply regional and network news. Independents have shown they can produce acclaimed current affairs programming, such as Question Time and Dispatches, when given the opportunity. Enabling them to compete for regional and network news as well could potentially stimulate innovation, encouraging, for example, the creation of local news services from companies with relatively low margins that enter the market. In addition, the resulting competition could drive down the cost of news provision. And in the context of the nations and regions, it could also act as a significant catalyst for growth in the out of London supply sector.
- 32) Historically, the case for excluding news from qualifying independent hours has centred on issues of trust and compliance, and whether independents have sufficient scale to deliver. In the wake of recent failures across the entire industry, compliance systems have rightly been overhauled for all producers, in-house and external, and have never been more rigorous. In addition, the question of whether independents have the scale to deliver would seem less valid, given the recent growth of the sector. According to Ofcom, total spend on network and non-network news by all five terrestrial PSB channels is approximately £350m per annum.⁸ If indies were to win

⁸ Review of the Television Production Sector, Ofcom, page 47.

25% (the minimum level of the independent quota), this would amount to approximately £87.5m – approximately 5% of the indie sector’s annual turnover, and less than the average annual growth of the independent sector in recent years.

33) Finally, our concerns revolve around the timing of any intervention. Ofcom states in this review that there will be “shortfalls in children’s programming” in the short term, ie before 2011.⁹ Nations and regions programmes, and possibly also Channel 4, may also come under pressure before 2011, and we urge Ofcom and the Government to consider appropriate interventions that could come into place before then. We have, for example, asked Ofcom to clarify what analysis it has conducted of the case for intervention under Sections 270 and 271 of the Communications Act to require greater commitment to children’s programming from ITV and other commercial PSBs.

34) Our overarching aim in this submission is to encourage the development of a PSB framework that safeguards provision for all while stimulating competition, innovation and diversity – not just in the means of delivery, but also in the nature of the content that is being delivered.

⁹ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 136.

Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector. We have more than 600 member companies across the entire UK, involved in creating and distributing television, film and interactive content.
- 2) Turnover in the independent production sector represents more than £2 billion per annum.¹⁰ Within this, independent production companies account for £1.35 billion in new, UK originations per annum – around half of all network originations.
- 3) This document responds to each of Ofcom's questions in its consultation paper in the order laid out by the regulator. We are also happy to supply copies of the Pact census of the independent production sector and our recent Out Of London Trend Report on request. For further information, please contact Adam Minns at adam@pact.co.uk.

¹⁰ Independent Production Census 2007/08, Digital-i for Pact.

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Questions

Section 3

Do you agree with Ofcom's assessment that television continues to have an essential role in delivering the purposes of public service broadcasting?

- 1) We agree with Ofcom's research for this review that audiences still value the public service purposes and characteristics outlined in Ofcom's previous PSB review,¹¹ and that television remains the public's primary media source.¹² This is supported by research for previous Ofcom reviews, such as last year's report on children's television, which showed that, although children are watching less adult programming, they are watching more children's shows than ever before.
- 2) While consumption of new media is growing, this is not necessarily at the expense of television viewing. Television should remain integral to delivering public service purposes and characteristics.
- 3) That said, media consumption is becoming increasingly complex, and we support Ofcom's intention to develop ways of providing public service content via digital and online platforms where this will improve the reach or impact of those services, or offer other benefits, such as cost savings. In addition to increased choice for the public, such services can foster innovation and competition, and encourage value for money and a greater range of voices.
- 4) In terms of television, public service programming should, where appropriate, be delivered by portfolio and dedicated digital channels, such

¹¹ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 27.

¹² Ibid, page 40.

as children's services. Ofcom's research shows that such channels are increasingly popular with audiences: although viewing of the five terrestrial PSB channels has fallen by 17% since 2003, this loss was offset by increased viewing of their portfolio channels.¹³

- 5) We therefore see portfolio television channels and other digital services as having a role in the targeted delivery of public service content for certain specific groups, such as a dedicated service providing children's programming.
- 6) Another area where usage is increasing is the internet, and it is worthwhile examining the potential for certain public service purposes, or at least certain aspects of particular public purposes, to be delivered online. The interactive nature of online delivery may in fact make it more suitable to delivering certain public purposes. It is therefore important that Ofcom conduct regular and original research into internet usage.
- 7) Universal access is a cornerstone of public service broadcasting, and this would raise issues for the delivery of public service purposes online or via digital services. However, this could potentially be less of an issue if, for the time being at least, such services were used only to reach specific groups where interest was particularly high. Also, digital and broadband penetration is growing - transferring certain elements of public service provision to alternative platforms may well drive further take-up, as evidenced by the popularity of the iPlayer.
- 8) Extending public service provision to such new services and platforms raises two key concerns for us, however. First, emerging services must have reasonable access to public service content if they are to play a role in delivering public service purposes. This has not been the case in the

¹³ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 42.

past. The PSB broadcasters' dominance has historically allowed them to bundle additional rights, such as new media, into the main television license and "warehouse" rights – ie keep hold of rights in order to suppress competition from new markets. Additionally, the conditions attached to exclusive "hold-backs" – which allow a broadcaster to veto subsequent sales of a programme to a third party - frequently restrict the producer's ability to sell on programming.

- 9) As we elaborate in greater detail in Section 5, this dominance of the incumbent PSB broadcasters will remain largely intact well into the future. Oliver & Ohlbaum Associates' forecasts for Ofcom show that the dominance of the PSB broadcasters in terms of spend on original commissioning is likely to continue, even if the total level of commissions declines. Commissioning spend from PSBs is likely to remain at 90% of total investment through to 2020.¹⁴
- 10) Our second concern is that, if public purposes are to be fulfilled via other services, those services must be subject to all appropriate PSB requirements. A dedicated digital children's channel should, for example, commission under the terms of trade with independent producers if its output is to be counted towards fulfilment of a PSB licence.

Do you agree that UK-originated output is fundamental to the delivery of public service broadcasting purposes?

- 1) We agree. This question goes to the heart of PSB more than any other in this review. The UK is widely recognised as having one of the most vibrant, successful and creative television production sectors in the world.

¹⁴ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 65, section 5.23, Figure 37.

Decade after decade has produced programmes that have challenged and influenced UK society, from *That Was The Week That Was*, to *Brass Eye*, through to *Jamie's School Dinners*.

- 2) The PSB landscape is changing – public service programming is fast becoming public service content, delivered over a range of channels and new media platforms. New technologies are affecting not just how that content is distributed, but also the very nature of that content, allowing creators to experiment with interactivity in ways that are still emerging.
- 3) But the essential DNA that defines public service content remains unaltered by iPlayers, iPods or 3G handsets. To fulfil the four public purposes defined by Ofcom, content must be UK made:
 - **Informing our understanding of the world:** home-grown programmes are crucial to informing ourselves about the UK; they also ensure that events in the rest of the world are made relevant to UK audiences;
 - **Stimulating knowledge and learning:** UK originations are clearly intrinsic to learning about UK topics; however, they also help UK audiences to understand international issues by using appropriate reference points;
 - **Reflecting UK cultural identity:** UK-made programming is essential in reflecting the culture of the UK as a whole, including the nations and regions, both to UK audiences and to the wider world;
 - **Representing diversity and alternative viewpoints:** UK programming is crucial in making us aware of diverse communities and views from within the UK; at the same time, it plays a valuable

role in interpreting viewpoints from around the world for UK audiences.

- 4) Imported content of course makes a contribution, particularly in providing knowledge of international events and topics. However, even in this case, it is also desirable to have international events filtered through the lens of a UK production team that is able to speak directly to a UK audience and interpret the world with a shared set of cultural and political reference points. Even imported formats such as *The Apprentice* have hugely increased their impact when produced locally with a degree of cultural specificity.
- 5) The important role of domestic programming within PSB is enshrined in the Communications Act 2003, which states that licenced PSBs must broadcast an appropriate level of original productions.¹⁵
- 6) The view of Parliament is supported by Ofcom's consumer research for this and other reviews, which shows that the public places a high value on new, home-grown programming that reflects and strengthens the nation's cultural identity. In Ofcom's consumer research for this PSB review, it found that 83% of people thought it important for the PSB channels to provide programmes that are made in the UK and reflect life in the UK.¹⁶ This was even higher than in Ofcom's last PSB review, which found that 74% of people viewed a high proportion of programmes made in the UK as important.¹⁷ We also note that, for this PSB review, the public listed the amount of programmes made in the UK as a chief concern.¹⁸

¹⁵ Communications Act 2003, section 278 (1) (a).

¹⁶ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 33.

¹⁷ (First) Review of Public Service Television Broadcasting, Phase 1, Ofcom, page 49.

¹⁸ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 43.

- 7) Thus, the public, Parliament and the regulator have acknowledged the importance of home-grown programming. Historically, the UK production sector has succeeded in meeting this demand, and the UK public has enjoyed a high level of original programming as a result. Sustaining the level of UK content should therefore be a core goal of Ofcom's PSB review.
- 8) However, the successful delivery of PSB cannot just be about the sheer volume of hours of UK-originated programming on television screens: quality and diversity are also fundamental. Competition in the supply market is key to achieving both of these aims, stimulating creative excellence, nurturing fresh ideas and approaches, and ensuring that a genuine range of voices is heard.
- 9) The independent sector has a continuing and important role to play in achieving this. The independent production sector is responsible for about half the total amount of original UK production, accounting for £1.35 billion in primary commissions, according to Pact's most recent census of the sector, and this figure has grown consistently since 2005.¹⁹ But the contribution of independent companies is not just about volume. The highly competitive independent sector is a creative catalyst, challenging and complementing broadcasters' in-house production departments across a wide range of genres. Independent production companies are amongst the leaders in core public service genres, creating flagship current affairs shows such as Question Time and Dispatches, and acclaimed children's programming like My Life As A Popat and Wise Up!. Independent factual and drama programming is just as innovative (Who Do You Think You Are?), influential (Wife Swap), era defining (Life On Mars), and controversial (Britz).

¹⁹ Independent production census 2007/08, Digital-i for Pact, page 18.

- 10) The future of public service content creation cannot therefore be left solely in the hands of incumbent, vertically-integrated broadcasters: UK content is at the heart of PSB, but a dynamic, competitive and innovative content creation sector ensures the quality and range of that content.
- 11) Looking ahead at the opportunities presented by new platforms and forms of delivery, enabling a diverse range of creative expertise to flourish will be more important than ever. Pact is, for example, working with NESTA, the National Endowment for Science, Technology and the Arts, on a digital convergence project. The project will develop standard agreements to enable television production and new media companies to work together to win cross-platform commissions; it will be based around developing models for both sectors to jointly exploit the IP they co-create.
- 12) As new platforms and technologies open up different ways of creating and delivering content, harnessing creative expertise from different sectors will be increasingly important to ensure that UK content stays at the cutting edge. Independent television production companies, new media and games companies will compete and collaborate on cross-platform ideas, and creating an environment where they can all flourish will be paramount.
- 13) Alongside a vibrant, competitive content creation sector, the way to ensure increased choice and innovation for the public in how it accesses this content will be to liberalise the IP regime. Allowing emerging platforms and services appropriate access to IP rights to UK content will enable them to offer that content to the public in the increasing number of ways that people are already demanding. We outline our views on this in greater detail in the next section, Section 4.

Section 4

Do you agree with Ofcom's conclusions about the way that other digital channels and interactive media contribute towards public purposes?

- 1) UK-made content remains fundamental to PSB, as we have argued in the preceding section. Emerging platforms and services offer the potential to fulfil the public purposes of PSB in new ways, providing choice and driving competition and innovation. However, unless they are able to secure the IP rights to UK content on a reasonable basis, the contribution of such services to delivering public value will be limited.

Digital channels

- 2) Investment from non-PSB channels is just 10% of all spend on UK originations.²⁰ Ofcom cites such channels as Discovery, The History Channel, National Geographic and Sky Arts as providing public service content, but a high level of UK programming on these services is acquired from third-party rights owners and has actually been funded by the PSB channels. Even the portfolio channels run by the PSB broadcasters are unable to offer a level of first-run originations comparable to their main PSB channels, instead providing a mix of originations and repeats from the main channel.
- 3) Nevertheless, there may be potential for digital services to play a greater role in PSB, particularly in terms of different communities within the UK and more targeted audiences, such as children. Multi-channel services with a higher proportion of UK-made content, such as The Community Channel or Guardian Media Group's Channel M, are often focused on community-based or highly local content. While they cannot be seen as

²⁰ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 55. Ofcom excludes spending on sport and film rights.

currently offering a direct replacement of the commercial PSB channels, they fulfil certain public service criteria, particularly the public purpose of representing diverse communities.

- 4) Children may also be well served via a dedicated television channel. In Ofcom's review of children's television last year, a dedicated children's television channel providing a safe home for children's PSB content (and an alternative voice to the BBC) emerged as parents' favoured option.²¹ Parents expressed concern that online delivery of public service content was not an appropriate way to deliver public service content for most children, for reasons of safety, access, and because the interactive nature of the internet was not suitable.²² Such a channel, it was proposed, could be run by an existing commercial PSB as a portfolio service, or by a new institution.²³
- 5) Such a dedicated channel for children's PSB would also fit with young audiences' changing viewing habits. Ofcom's research found that children were watching more children's television than previously, but that viewing was moving away from mainstream channels to dedicated children's services as multi-channel penetration increased.²⁴ Such a channel would also remove the opportunity cost for mainstream broadcasters of showing children's programming in place of adult shows.

Interactive media

- 6) As we have noted earlier, while television remains central, internet usage is increasing, and the interactive nature of online delivery may make it more suitable to delivering certain public purposes. Based on available

²¹ The future of children's programming, Ofcom research report, page 129.

²² Ibid, page 127.

²³ Ibid, page 129.

²⁴ Ibid, page 88.

evidence, online provision is particularly relevant in specific genres and for engaging specific communities of interest around the UK. Online provision of public service content is especially appropriate for formal and informal learning - Ofcom's research indicates that the internet is particularly used for furthering personal interest, finding out about people with shared interests, and knowledge about topics. Therefore, for example, as part of the public purpose of stimulating knowledge and learning, online content might enable informal learning in arts, science and history. We note this is one area where Ofcom suggests television consumption may be declining.²⁵

- 7) Additionally, enabling aspects of non-network news to be delivered online would offer additional potential for greater value for money. In our view, news is potentially one of the prime areas where online content represents an efficient way to reach niche audiences.
- 8) Recent evidence shows that bbb.co.uk is the BBC's fourth most used service (after BBC 1, 2 and radio 2), but costs only 3% of the license fee.²⁶ This equates to 13.8 pence per user. Online media also offers certain other benefits particularly relevant to news, often in support of linear programming, such as being updatable.
- 9) We also see potential for Government departments and other public sector organisations to use their current investment in new media services more strategically. Government and public sector bodies currently commission external suppliers to design and service their websites. Central government spending on websites is estimated to amount to up to £230m per year.²⁷ This is twice as much as the BBC spends annually on

²⁵ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 31.

²⁶ Review of bbc.co.uk, BBC Trust, May 2008.

²⁷ The National Audit Office estimated central government spending on websites in 2006/2007 was £208m, while MTM London's report for Ofcom put this figure at £230m.

bbc.co.uk, and does not take into account the Government departments and local authorities that choose to procure content direct from suppliers. Central government spending on online content accounts for a substantial part of this spend, representing up to £90m. The single largest investment in 2006/2007 was £13.8 on Directgov, the citizen-facing “supersite.”

- 10) However, under the contracts used for such public sector procurement, suppliers are required to surrender all of their IP to the Government or public body that is commissioning them. In this way, the external supplier is denied any ownership of the IP rights to their work. This is a missed opportunity. Pact has seen no evidence to suggest that the public sector ever exercises the rights it owns. The IP is effectively warehoused.
- 11) We propose that external suppliers should be allowed to retain certain IP rights when working for Government and public sector bodies. This could potentially stimulate the online content creation sector in much the same way that the Codes of Practice introduced in the 2003 Communications Act have benefited the independent television production sector. Allowing external suppliers to retain certain IP rights would enable them to explore the value of those rights in the market. Public sector procurement would act as a form of seed capital for creative companies - at no additional cost to the taxpayer.
- 12) A more strategic use of public sector procurement in this manner would build on the conclusions of the recent Cox report on Creativity in Business for HM Treasury, which highlighted the role of the public sector in helping unlock the potential for the creative industries, stating: “The public sector is estimated to spend around £125 billion each year on goods and services, of which local authorities spend around £47.5 billion. The public sector therefore exerts a huge influence over the tens of thousands of companies, indeed over whole industries, which supply it. The extent, to

which it allows, encourages or even demands creativity from its suppliers therefore has a huge influence on the UK business environment. At present, this power to stimulate creativity is not being used effectively. Indeed, in many cases, it is having the opposite effect.”²⁸

Delivering choice

13) Addressing inefficiencies in public sector procurement is, however, only one part of how the UK’s IP regime must be liberalised if we are to take full advantage of developments in technology in order to increase choice for the public in how content is offered. It is crucial that new entrants to the distribution market are allowed to compete alongside incumbent broadcasters for original UK content at a reasonable cost and with relative ease. Otherwise, they will fill their services with imported content, as they have done in the past.

14) As we explain further in the next section, Section 5, the dominance of the PSB broadcasters in the advertising and commissioning markets will continue well into the future, according to our own and Ofcom’s research for this review. This gives the main terrestrial broadcasters huge strength in negotiating IP rights to content. As we mentioned earlier, there is a long history of the incumbent broadcasters using their dominant position to stifle secondary markets by warehousing and imposing excessive holdback periods. This creates a danger that new entrants will be excluded from developing new platforms and services with UK content, restricting the availability of public service content that the public has, directly or indirectly, funded.

²⁸ Cox Review of Creativity in Business, page 34.

Section 5

Do you agree with Ofcom's assessment of the implications of different economic scenarios for the UK TV market for the future prospects for delivery of the public purposes?

- 1) We agree that the audience share of the licenced PSB channels is likely to continue to fall, and agree with Ofcom and Oliver & Ohlbaum Associates' analysis for this PSB review that overall spend on originations will fall as a result. However, this should not mask the fact that the dominance of the incumbent terrestrial-based broadcasting groups will continue long into the digital era. According to research commissioned by Pact from Oliver & Ohlbaum, the PSB networks and their spin off channels currently account for 79% of all viewing; by 2015, this is still forecast to be as high as 70%, representing more than 70% of all TV advertising revenue.²⁹
- 2) This is confirmed by Oliver & Ohlbaum's forecasts for Ofcom, which show that the dominance of the PSB broadcasters in terms of spend on original commissioning is likely to continue, even if the total value of commissions declines. According to Ofcom, commissioning spend from multi-channels (PSB spin-offs and non-PSBs) is likely to fall in proportion to declines at PSBs (under both its "gradual transformation" and "stagnation" scenarios). The result is that spend from non-PSBs and PSB spin-off channels will remain at around 10% of the total market through to 2020, with the main PSB services controlling the remaining 90%.³⁰
- 3) There was also little evidence of this dominance weakening in Digital-i's 2007/08 census of the independent production sector for Pact. The report found that independent companies' revenues from primary commissions from broadcasters have hit £1.35 billion, up from £1.14 billion in 2005. Of

²⁹ UK TV Content in the Digital Age – Opportunities and Challenges, Oliver & Ohlbaum, page 29.

³⁰ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 66.

this, all but a little over £200m came from the main terrestrial-based broadcasters.³¹

- 4) The fact that only around 10% of commissioning spend is predicted to come from multi-channels or PSB spin-offs through to 2020, means that little has changed since the conclusions of the Independent Television Commission's A Review of the UK Programme Supply Market. This highlighted the strength of the main terrestrial broadcasters in negotiating rights to content, stating that:

"Almost all investment in programming flows through a few main broadcasters - the BBC, ITV, Channel 4 and Five between them account for 90% of all programme commissions in the UK - which means they determine the programmes that viewers get to see, and have significant bargaining power when buying programmes from independent producers."

³²

- 5) This view was reinforced more recently by Ofcom in its review of the production sector. Ofcom concluded that the growth of rival, non-PSB channels would make little difference to the importance of the primary licence as a source of programme finance, and hence have little impact on the negotiating strength of the terrestrial broadcasters. Ofcom stated:

"The sources of demand for external productions are growing – mainly from digital channels, but also some emerging demand from international markets and new distribution platforms. However, the main terrestrial broadcasters are likely to remain the main buyers of originated programming going forward – and so their negotiating strength will only be ameliorated to a limited extent." ³³

³¹ Independent production census 2007/08, Digital-I for Pact, page 18.

³² A Review of the UK Programme Supply Market, ITC, page 5.

³³ Review of the Television Production Sector, consultation paper, Ofcom, page 8.

- 6) Historically, this bargaining power has allowed broadcasters to seek an array of additional rights to be bundled into the price they pay for the primary licence for no additional cost. As we have noted, the incumbent PSB broadcasters have historically used their dominant position to stifle secondary markets by warehousing IP rights and seeking excessive, exclusive holdback periods. This creates a danger that new entrants will be excluded from developing new platforms and services with UK content, resulting in a significant loss to the viewer. This will perpetuate many of the restrictions of the analogue model.

Do you agree with Ofcom's analysis of the costs and benefits of PSB status?

- 1) Ofcom's analysis for this review shows that the PSBs will continue to account for the vast majority of advertising revenues going forward, even if their share will come under pressure.³⁴ This underlines the significant value that remains in the PSB licences.
- 2) Some programmes that currently count towards the commercial PSBs' out of London obligations are highly attractive commercially, and would be likely to be made without requirements to do so. Shows such as Emmerdale and Coronation Street are fundamental to ITV's market position, which relies on audiences outside London.
- 3) This type of programming should not be counted towards broadcasters' fulfilment of public service duties, and should not be rewarded by any free or discounted regulatory assets. In our view, the value of regulatory assets granted to public service providers at lower than the market rate should be

³⁴ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 64, figure 36.

proportionate to the level of public service programming they commission over and above any content that they would have made anyway. Ofcom should establish in more detail the level and type of out of London and other public service programming that the licenced commercial PSBs would be likely to commission without being required to.

- 4) We are concerned that the brand value for ITV licencees of being network and non-network news providers is not reflected in Ofcom's analysis. BSkyB runs Sky News as a loss leader, for example. Given current debate about devolution in the nations, a channel's status as the primary, dedicated news service for a nation would seem particularly valuable as a way of developing market profile.
- 5) We welcome Ofcom's statement in this review that the terms of trade with independent producers are in the first instance a commercial matter for the broadcasters to discuss with Pact.³⁵ This has been the case since the 2003 Communications Act, and has worked successfully in practice. The requirements in the Act for Codes of Practice and the subsequent terms of trade have ensured that broadcasters and producers have to arrive at flexible and relevant agreements. This proved to be the case for both the terms of trade for primary broadcast use and then, in 2006, the agreements for VoD uses.
- 6) Pact has always sought to negotiate terms of trade with broadcasters that are consistent with the Codes of Practice under the Communications Act and Ofcom's subsequent guidance, while arriving at negotiated agreements with broadcasters for the primary rights they need. As Ofcom is aware, the Act requires an appropriate clarity about the different categories of rights that are being acquired by the commissioning

³⁵ Ibid, page 72.

broadcaster.³⁶ Ofcom's guidance notes add that: "A key principle underlying Ofcom's approach to the Codes of Practice is that producers should retain rights in the programmes unless these are explicitly sold to a PSB and/or to other parties."³⁷

- 7) Outside the primary window, if the broadcaster does not wish to acquire exclusive rights on a commercial basis, it is still able to exploit that content on a non-exclusive basis. Furthermore, when broadcasters have developed new services that are not included in the primary package, Pact has negotiated arrangements to ensure that they have access to the necessary rights. With the iPlayer, for example, the BBC did not incur any additional upfront costs in acquiring rights. In return for appropriate rights for content to be provided on the iPlayer, the BBC relaxed its holdback on sales of the programme (which potentially benefits the licence fee payer by making programmes available on a greater choice platforms more quickly). In addition, the BBC reduced its share of the revenues from commercial exploitation on the part of the producer (from 50:50 to 75:25 in favour of the producer).
- 8) We are therefore concerned that Ofcom has cited terms of trade as a cost for PSBs, as we have seen no evidence from Ofcom or broadcasters to support the assertion that the terms of trade are responsible for any substantial increase in the cost of PSB status.
- 9) PKF's research for the Department for Culture, Media and Sport as part of the BBC Charter review process supports our view – in fact PKF concluded that there remained a potential for a reduction in costs for the BBC as a result of increased commissioning from independents. PKF concluded the terms of trade would have little, if any, impact on the vast

³⁶ Communications Act 2003, Part 3, Section 285 (3) (b).

³⁷ Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers, Ofcom, June 2007, page 19.

majority of shows due to the number of repeats granted to the BBC under the primary licence.

10) PKF also noted the potential for increased competition for commissions from independents to drive down costs at in-house production departments – a factor which holds true across the wider industry. The broadcasting sector is a buyers' market, with hundreds of would-be suppliers competing for commissions from relatively few broadcasters. While more established companies may consolidate, new companies have launched, incentivised by the minimum terms provided for all suppliers by the new terms of trade. External suppliers represent a source of potentially cost-efficient programming, and a way to keep in-house costs in line with the market. PKF concluded that there was a possibility that: "the real competition created by the WOCC will bear down on in-house costs."³⁸

11) PKF added that prices at other broadcasters indicated that independents could produce programming at relatively low costs:

"What is clear is that the BBC does not have consistently higher or lower costs than all other broadcasters. It also cannot be said that independent producers are consistently more/less expensive than in-house production. However, what the data for broadcasters B and C suggest is that it may be possible to commission relatively low cost independently produced programmes for most genres."³⁹

12) PKF also noted that independents were likely to remain a cost effective source of programming despite consolidation in the production sector. Rather than enabling indies to dictate commissioning terms, as broadcasters have suggested, PKF found that consolidation in the

³⁸ Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006, page 20.

³⁹ Ibid, page 76.

independent sector may yield further efficiencies. The report added: "Taken together this may offer the opportunity to reduce costs."⁴⁰

- 13) It is worth noting that, despite consolidation, individual independent producers have a modest share of the commissioning budget of any one channel, and therefore cannot dictate terms based on market dominance, although there is clearly a premium on a hit show. No single producer group accounted for more than 15% of the total commission spending of any of the main commissioning channels, according to a 2007 report for Pact by Oliver & Ohlbaum. The report concluded that:

"This would suggest that no producer has sufficient influence over the programme supply chain - either in general or over a specific commissioning channel - to leverage an increase in prices."⁴¹

- 14) PKF's conclusions were supported by LEK's research for Ofcom's recent review of Channel 4, which agreed that independents provided a cost-efficient source of programming. LEK's report found that Channel 4, as a publisher broadcaster, was often paying less for commissions than broadcasters with in-house capacity.⁴²

- 15) While Ofcom has so far failed to establish if there has been any systematic reduction in the prices paid for programmes as a result of netting off by the broadcasters of secondary revenues, it is evident that prices for programmes have been declining over the past three years. This could be a combination of netting off, price competition between producers or greater efficiency due to new technologies. Whatever the actual reason(s), it is clear that having a diverse and competitive programme

⁴⁰ Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006.

⁴¹ Channel 4 and Independent Production: Vertical integration and the future funding of Channel 4, O&O Associates, page 3.

⁴² Ofcom Financial Review of Channel 4, LEK Consulting, page 51.

supply market, where not all of the programme rights are bundled or warehoused by the incumbent broadcasters, has added additional dynamics to the market that have a beneficial effect for both supply and demand. If the independent quota or the Codes of Practice did not exist, then broadcasters and their in-house production departments would face less competition and less scrutiny.

- 16) The galvanising effect of the terms of trade on the PSB broadcasters as well as the independent sector was illustrated in Ofcom's recent LEK report on Channel 4. This recognised that the terms of trade had encouraged Channel 4 to successfully re-focus some of its revenue-generating activities. LEK reported that Channel 4: "has successfully reinvented its consumer products business following the Production Sector Review and has grown its profit contribution to the group."⁴³
- 17) The consumer products division, principally driven by DVD sales, was directly impacted by the terms of trade, which required Channel 4 to separately secure secondary rights for DVD sales. LEK states that this review forced a change to the business model, bringing much of the DVD operation in-house rather than it being licensed out. The unit has been able to benefit as the DVD market has grown, enjoying increased revenues and profits in 2006. The report concludes: "The more selective and proactive role taken as a result of these changes has led to a significantly increased sales activity."⁴⁴
- 18) Nor should it be overlooked that broadcasters benefit from a share in revenues generated by independent producers. Armed with overseas rights, independents have, for example, grown the market for international formats substantially, to the point where it is now worth £232m - 75% of

⁴³ Ofcom Financial Review of Channel 4, LEK Consulting, page 117.

⁴⁴ Ibid, page 62.

the indie sector's total international sales of £310m.⁴⁵ Because independents have grown the market to this degree, Channel 4's revenues from overseas sales may in fact be no worse off than before the terms of trade. Under the terms of trade, Channel 4 receives 15% of all international revenues. Based on best available data, we estimate that Channel 4's 15% is worth approximately £8.6m. In comparison, 4 Rights generated £11.7m in 2003, the last year before terms of trade, from both international and new media sales.

19) However, the overriding issue for the public is that the Codes of Practice have created public value by liberalising the IP regime and enabling aggregators - be they the PSB broadcasters, non-PSB multi-channels, or new entrants to the broadcasting sector - to offer UK content to the public in innovative ways. Negotiating the terms of trade has involved all parties in detailed research, discussions and subsequent agreements. The process has challenged the initial assumptions of the broadcasters about how they envisaged the market developing. Before the Codes of Practice, PSB broadcasters were able to simply warehouse content, preventing competitors (and the public) from accessing that content in order to protect their dominant position.

20) It could be argued that, precisely because of the Codes of Practice and the requirement for broadcasters to reach negotiated settlements, broadcasters have been forced to think far more carefully about what they wish to do, and to be more open about their plans. This is in contrast to an era when they controlled all rights to a programme and were able to impose their propositions on the market and the public. Indeed, the very process of being forced to negotiate requires broadcasters to present credible plans if they are to convince rights owners that there is value in working with them.

⁴⁵ Independent production census 2007/08, Digital-i for Pact.

21) Opening up the IP regime further is crucial going forward if the public is to benefit from increased choice in delivery offered by new technologies, as we detail in the next section, Section 6.

Section 6

Do you agree with Ofcom's vision for public service content?

- 1) Yes. Ofcom's audience research shows that the public agrees with the public purposes and characteristics as outlined by Ofcom. As we have already noted, we absolutely agree that UK-made content is fundamental to delivering these purposes.
- 2) While television remains the main medium for delivering this content, there is scope for providing certain aspects of public service content via new media, as we have previously mentioned. We would add that the key to ensuring that UK content is made available to the public via as wide a choice of platforms as possible is to open up the IP regime so that rights to that content are available as quickly as possible to the wider market and, by extension, the public.

How important are plurality and competition for quality in delivering the purposes of public service broadcasting, and in what areas?

- 1) The public clearly values plurality: to maintain current levels of PSB across the range of licenced providers, the majority of people in Ofcom's consumer research for this review were prepared to pay an additional £20 a year in the form of an enhanced licence fee.⁴⁶ Just as tellingly, when asked to consider where public service programming might be reduced, no clear majority emerged.⁴⁷

⁴⁶ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 37.

⁴⁷ Ibid, page 38.

- 2) This supports the findings from Ofcom's previous PSB review, which reported that more than 82% of people saw "issues of range and balance in programming and across the schedules" as important.⁴⁸ This made range and balance one of the public's key concerns regarding public service broadcasting.
- 3) Plurality of provision is crucial in ensuring this range and balance is provided. It enables the provision of complementary services for different audiences, ensures a range of perspectives, and provides competition to spur innovation and investment in new types of programming and delivery.
- 4) Ofcom concluded in its previous PSB review that: "The risk of leaving PSB provision to the BBC alone is great: the lack of competition in broadcasting PSB programming risks leading to complacency, inefficient production, lack of innovation, lower quality programming, a narrowing of perspectives and the loss of PSB programming for certain groups."⁴⁹
- 5) This view was supported by the Government's BBC Charter Review White Paper, which stated: "The Government believes that sustaining a plurality of PSB providers who both complement and compete with each other has been important in ensuring that this quality and diversity are maintained."⁵⁰
- 6) The BBC has also acknowledged the role of plurality in providing public service programming, saying: "We understand the arguments in favour of plurality in public service programming, and strongly support the ongoing

⁴⁸ (First) Review of Public Service Television Broadcasting, Phase 1, Ofcom, page 49.

⁴⁹ Ibid, Phase 2, Ofcom, 5.13.

⁵⁰ Charter Review White Paper, A public service for all: the BBC in the digital age, March 2006.

contribution of ITV1, Channel 4 and Five as investors in high-quality British programming across a wide range of genres.”⁵¹

7) Ofcom has previously broken down the areas where plurality within the industry is important as a way of delivering plurality in programming. In Pact’s view, all are vital to healthy PSB system:

- **Plurality of outlets:** so that viewers do not have to be reliant on a single provider in order to receive PSB.
- **Plurality of commissioning:** so that a range of commissioners working for different organisations can bring their different perspectives to bear on the system.
- **Plurality of production:** so that there are different creative organisations competing for commissions. We have previously outlined our views on the importance of plurality and competition in the supply sector in Section 3.

8) From a suppliers’ point of view, plurality in commissioning is key to developing a sustainable business that is not wholly subject to changes in commissioning policy at any single broadcaster. Pact members seek to work with multiple broadcasters. Our most recent census indicated that even the smallest companies (by turnover) work with an average of 1.5 broadcasters, while larger production businesses will regularly be commissioned by six different broadcasters.⁵²

9) In children’s, the public service genre where commercial PSB commissioning has already been most undermined, the impact of a loss of

⁵¹ BBC, Building Public Value: renewing the BBC for a digital world, June 2004.

⁵² Independent Production Census 2007/08, Digital-i for Pact, page 22.

plurality is already becoming clear. The BBC, the only remaining commissioning centre in key areas of children's programming, is swamped with hundreds of proposals for just one available slot. Long established companies are already downsizing or closing. Plurality in commissioning is fundamental to a healthy supply sector.

10) Plurality in production is just as important to ensuring that a wide range of voices are heard, and that UK content remains world class. As we have previously outlined, creative competition in the supply market is key to achieving quality and diversity in home-grown content.

11) The independent sector has a continuing and important role to play in achieving this, acting as a creative catalyst that challenges and complements broadcasters' in-house production departments across a wide range of genres. The future of public service content creation cannot therefore be left solely in the hands of incumbent, vertically-integrated broadcasters: UK content is at the heart of PSB, but a dynamic, competitive and innovative content creation sector ensures the quality and range of that content.

In maximising reach and impact of public service content in the future, what roles can different platforms and services play?

1) We agree that emerging platforms and services can enhance the provision of public service content, providing the public with greater choice in how it accesses and engages with public service content. Technological developments mean that there is no option but to offer people what they want, when they want it, on a legitimate basis. If we do not, they will find

an alternative way to obtain that content anyway, as the example of the music industry illustrates.

- 2) Historically, UK citizens' access to UK-made television content that fulfils public service criteria has often been limited to the dominant terrestrial broadcasters. It should not be assumed that this will change dramatically in the future, despite developments in technology. As we have previously noted, forecasts by Oliver & Ohlbaum Associates for Ofcom for this review confirm that the dominance of the incumbent PSB networks will continue long into the digital era.⁵³ In the analogue era, this dominance has enabled the PSB broadcasters to control the buying and selling of rights to IP, allowing them to restrain the growth of secondary markets. They have been able to bundle additional rights, such as new media, into the main television license, warehouse rights, and use exclusive holdback periods to restrict the producer's ability to sell on programming, even on a non-exclusive basis.
- 3) The 2003 Communications Act set out to limit such practices. In introducing Codes of Practice between producers and broadcasters, it ensured that content creators were able to own the IP rights to the programmes they made (which they then licensed to broadcasters for a number of specific uses over an agreed period).
- 4) We welcome Ofcom's assertion in the consultation paper that a more sophisticated understanding is required of what it means for public service content to be widely available on different platforms and services, and in what circumstances additional payments might be required to receive it. We would broadly agree with Ofcom's approach in section 6.34 that core public service content should remain widely available and free at point of use, but that there should be opportunities around that "public service

⁵³ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 66.

- window” to develop new forms of delivery that may have an additional payment. Under this model, the public service window would offer a clear way for the public to access content that has been supported directly or indirectly by public funds. At the same time, this framework would allow the market to make that content available immediately after the public service window via innovative services that may command a premium.
- 5) In Pact’s view, the best way to engender this flexibility is via a more open market for IP rights. Even under the current Codes of Practice, PSB broadcasters have a significant and exclusive holdback period after the primary use window, during which they can deny any third-party access to that content even on a non-exclusive basis.
 - 6) It is now time to build on the Communications Act and liberalise the IP regime further. We see little public value in the restrictive, exclusive holdbacks that PSB broadcasters continue to apply to public service content. If broadcasters or other future public service providers seek public support, either direct or indirect, the resulting public service content should be made available to the market as quickly as possible on a non-exclusive basis.
 - 7) This will allow new entrants to content distribution - such as internet service providers, telecommunications companies, and content creators turned aggregators - to secure IP rights and stimulate competition in developing new ways of offering content to the public. This will in turn encourage the kind of innovation in public service delivery that Ofcom has set out to promote in this review.
 - 8) Would-be new media content aggregators do not necessarily need a contestable fund in order to develop their services; what they require in many cases are the appropriate IP rights to content that already exists.

We have held discussions with more than one new entrant to the sector about their frustrations in accessing rights to existing content, particularly in regard to holdbacks on popular returning series.

- 9) Opening up the IP regime in this manner will maximise the value of that content for the public. As well as enabling new services to become more involved in public service provision, liberalising IP will help meet Ofcom's stated goal of maximising the reach and impact of public service content, making public service content more attractive to specific communities of interest.

- 10) Many broadcasters balk at the concept of making content they have part funded available to other platforms on a non-exclusive basis. They argue that these new platforms and services will impact on their core business. However, we have seen no evidence that this will be the case on any significant level. The Codes of Practice have already introduced a limited degree of non-exclusivity, ie the window after the holdback period has expired. Yet, a full three years after their introduction into the market, the PSB broadcasters have failed to demonstrate in any way that the Codes have damaged their business models. Indeed, research for the Department for Culture, Media and Sport and for Ofcom indicates that independents continue to provide an extremely cost-efficient source of original programming, as well as an important way of keeping the costs of in-house production in check, as we have previously outlined.⁵⁴

- 11) Moreover, under our proposal, the primary broadcaster will still benefit from a share of the revenues generated from the exploitation by third parties. It is not a given that the most efficient way to generate these revenues is by the broadcaster controlling the exploitation.

⁵⁴ See LEK Consulting's report for Ofcom Financial Review of Channel 4, 2007, and the Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006.

- 12) This is not a radical departure from current custom and practice by the UK PSBs when they deal with US imports. The US studios will extract a high price for a more limited use than the broadcasters are granted when they commission UK content. Channel 4 has already agreed with a US studio that, after first transmission, all of the VoD rights are returned exclusively to the US studio for exploitation in the UK, with no revenues being paid to Channel 4. In many cases the price for even this limited access to US shows is greater than that incurred when commissioning a UK programme in the same genre.
- 13) The requirements of the 2003 Communications Act have created public value by liberalising the IP regime and enabling a wider mix of aggregators to offer UK content to audiences in innovative ways. This is in contrast to an era when the incumbent PSBs controlled all rights to a programme and were able to impose their propositions on the market and the public.
- 14) It is now time to take the next step, to take advantage of new ways of delivering content by significantly reducing exclusive holdback periods, and thereby providing increased choice for the public in how it accesses public service content.

Do you agree that the existing model for delivering public service broadcasting will not be sufficient to meet changing needs in the future?

- 1) While television remains the primary medium for the delivery of public service content, delivery of the public service remit under any future PSB licences should not necessarily always be restricted to a single main channel. Certain aspects of public service content, particularly those with more niche audiences, may be better suited to delivery via portfolio channels or even new media services. The increasing popularity amongst

audiences for children's programming to be accessed via dedicated children's services rather than a mainstream channel indicates that public service content for children would be better delivered on such channels.

- 2) Permitting broadcasters a degree of flexibility in how they deliver public service content is welcome, but this would be counterproductive if it allowed them to dilute their public service provision. In our view, it is worth considering mechanisms that allow flexibility in the delivery of PSBs, such as being permitted to broadcast children's shows on portfolio channels. However, these mechanisms should also require the broadcaster in so doing to adhere to all relevant PSB commitments, such as terms of trade and quotas for out of London and independent commissions.
- 3) Terms of trade, for example, should apply across different platforms: if an aggregator in receipt of direct or indirect public support is commissioning content as part of its public service requirements, that content should be subject to terms of trade regardless of whether its primary window is television, online or another platform. Otherwise, public service providers will simply be cherry picking one PSB requirement, and divesting themselves of another.
- 4) We would like to flag up concerns in this regard over Channel 4 moving its schools content online. We understand the reasoning behind this strategy and welcome the current £6m spend online. However, we are concerned that this should not set a precedent when commissioning other genres online. As Ofcom is aware, the terms of trade with independent producers do not apply to schools television programming to the same extent as other genres. While the schools exception should rightly be transferred across to the online world, this should not prejudice future public policy regarding online content creation in other PSB genres, or Channel 4's other multiplatform and public sector content projects, like 4IP. Otherwise,

content from online producers will be effectively owned outright by Channel 4, thereby restricting the UK's embryonic secondary market for digital content.

- 5) Nor should Channel 4 be permitted to dilute the definition of schools content so that it can use its school budget to supplement or replace funding for broader, more commercial types of informal educational content that are not genuinely aimed at schools, curricular outcomes or formal education. This would amount to a failure to deliver one of the special obligations for Channel 4 under the Communications Act. As Ofcom is aware, this requires Channel 4 to "finance the production of schools programmes," defining such programmes as "programmes which are intended for use in schools."⁵⁵
- 6) We are also concerned that Channel 4 appears to be undertaking a number of joint ventures with and taking equity stakes in external companies that it subsequently commissions for online content, undermining the principle of its position as a publisher broadcaster under the Communications Act.
- 7) In granting broadcasters flexibility, the PSB regulatory framework must also give the regulator the power to address shortfalls if they emerge. We agree with Ofcom that this has not always been possible under the Communications Act 2003, which in certain sections is framed too loosely to ensure the adequate delivery of public service content (perhaps in the intention to allow for a degree of flexibility in broadcasters' statements of programming policy). As we have seen in ITV's dramatic reduction in children's hours over recent years, Ofcom has so far been unable under the Act to require suitable provision of programmes classified as tier 3.

⁵⁵ Communications Act 2003, Part 3, Sections 296 (3) (b) and (12).

Section 7

What are your views of the high-level options for funding public service broadcasting in the future?

Direct public funding

- 1) Pact would maintain that it may fall within the remit of certain Government departments to fund aspects of PSB – for example, the Departments for Children, Schools and Families and for Innovation, Universities and Skills could have a role in formal and informal learning and schools content. This would, however, raise state aid issues, as well questions of editorial integrity.

Licence fee

- 2) In the first instance, we are in principle opposed to making the licence fee contestable, as we have concerns that this will damage overall investment in content creation. It is unclear where the BBC would be forced to make cuts in its own budgets in order to compensate for lost licence fee income, and there remains a risk that funding would be taken from programme budgets. So-called “top-slicing” would therefore address the important issue of plurality, but would not solve the equally key issue of replacing lost investment in PSB. Indeed, it would be likely to exacerbate pressure on overall funding for PSB: in addition to the administrative costs incurred by top-slicing the licence fee, there is a potential risk of substituting the investment that commercial broadcasters would have otherwise made anyway.
- 3) Rather than diluting the licence fee itself, we support reinvesting profits generated by BBC Worldwide. BBC Worldwide is performing well above

inflation: in 2006/07, pre-tax profits hit £111m, up 24% year-on-year and triple profits from three years ago.⁵⁶ Redistributing profits generated by BBC Worldwide, rather than the licence fee itself, would reduce any dilution of the connection between the BBC and the licence fee payer. It would also allow the BBC a level of security in knowing that its core licence fee is not subject to top-slicing.

- 4) In our view, BBC Worldwide profits should only be redirected to Channel 4. Other parties seeking status of a public service provider are welcome, but should be funded by alternative means, as we outline later in this section. This will reduce the burden to the BBC and its own programme budgets.
- 5) Additionally, we would recommend that any redistribution of funds from BBC Worldwide to Channel 4 be on strict and demonstrable conditions. Channel 4 must demonstrate transparency and efficiency, and deliver an appropriate level of public service commitments. Also, any additional funding must be ring-fenced for the broadcaster's content budget.
- 6) However, we would propose that the case for Channel 4 receiving a share of licence fee money that has been reserved for digital switchover should be reviewed if and when profits generated by BBC Worldwide are determined to be insufficient in addressing any gap in Channel 4's funding. This would be subject to ensuring that re-distributed licence fee income did not come from programme budgets. Our overarching concern here is to ensure plurality of provision without damaging investment in original content.

Regulatory assets

⁵⁶ BBC Worldwide annual report 2006/2007.

- 7) The value of regulatory assets granted to public service providers at lower than the market rate should be proportionate to their public service commitments. Additionally, substantial parts of current PSB commitments are likely to be provided by broadcasters without them being required to – shows such as *Emmerdale* and *Coronation* are integral to ITV, for example, and would be made without the need to meet an out of London quota. Ofcom should therefore exclude the value of such programming when reviewing the appropriate level of public service commitment in return for regulatory assets.
- 8) We would also recommend that Ofcom explore the potential for internet search engines to provide preferential positioning for public service sites in their sponsored sections. This could potentially provide exposure for public service content – usage of Google, for example, more than doubled between 2005 and late 2007.⁵⁷

Industry funding

- 9) We would support a review of whether there is financial benefit for commercial platforms in carrying PSB content, and if there is what the value of this is. If there is, we would support further analysis of how a share of this might be reinvested in public service programming. This might be in terms of creating a contestable fund for new media services, or exploring the merits of granting a discount to PSBs.
- 10) Value generated in this way might be redistributed either to PSBs or to new services on a contestable basis. As we noted above, we see benefits in terms of innovation and diversity in encouraging new entrants, particularly online services, to participate in the delivery of public service content.

⁵⁷ Nielsen.

Are the proposed tests for effectiveness for future models for public service broadcasting the right ones?

- 1) We would broadly agree that Ofcom's proposed criteria are correct, although we do have concerns related to allowing public service aggregators to be flexible in how they deliver content, as we have outlined in Section 6. Clearly, this is important as a way of responding to changing audience trends and taking advantage of emerging technologies. However, as we have previously noted, permitting broadcasters a degree of flexibility should not allow them to renege on their public service provision by cherry picking which public service commitments they deliver. We therefore support increased flexibility in principle, but are concerned that broadcasters should be explicitly required to adhere to all the public service duties that come with the main PSB channel licence – such as terms of trade - regardless of platform.
- 2) Furthermore, there should be effective regulatory or statutory powers to enforce these requirements, whatever the platform. We agree with Ofcom that this has not always been possible under the Communications Act 2003, as demonstrated by ITV's dramatic reduction in children's hours over recent years.
- 3) As previously noted in Section 6, we would like to flag up concerns in this regard over Channel 4 moving its schools content online. As Ofcom is aware, the terms of trade with independent producers do not apply to schools television programming to the same extent as other genres. While the schools exception should rightly be transferred across to the online world, this should not prejudice future public policy regarding online content creation in other PSB genres, or Channel 4's other multiplatform and public sector content projects, like 4IP. Otherwise, content from online

producers will be effectively owned outright by Channel 4, thereby restricting the UK's embryonic secondary market for digital content.

Of the four possible models for long term delivery of public service content, which, if any, do you consider the most appropriate and why? Are there any alternative models, or combination of models, that could be more appropriate, and why?

Model 1

- 1) While we agree the value of terrestrial spectrum is indeed falling, the PSB licence remains valuable in providing such benefits as a prominent EPG listing and DTT space. Ofcom's analysis for this review also shows that the PSBs will continue to account for the vast majority of advertising revenues going forward, even if their share will come under pressure.⁵⁸ There is still value in the commercial PSB licences, and ITV and Five should be required to commission an appropriate, and proportionate, level of PSB content in return for the indirect support of the licences (we deal with Channel 4 separately under Model 3).

- 2) As we have noted, the commercial PSBs would continue to provide a level of public service programming without being required to. Shows such as Coronation Street and Emmerdale are, for example, highly attractive commercially, and it is clear that ITV would have no intention of dropping them if it were to lose PSB status. Programming that the market would make regardless of PSB status should not count towards the fulfilment of PSB duties (and thereby be rewarded with public support). Otherwise, Ofcom risks wasting increasingly scarce public assets.

⁵⁸ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 64, figure 36.

- 3) However, even with these revisions, it is unlikely that this model alone would continue to provide the same levels of public service content as before. We therefore support a version of Model 1 combined with Model 3, as we explain later in this section.

Model 2

- 4) We consider this the weakest model as it fails to provide plurality and it represents a waste of public resources as it fails to harness the value of such public assets as DTT spectrum and EPG prominence. It would also mean a substantial reduction in investment in and provision of public service programming. We see no merit in this option other than the fact that there would be no potential risk of undermining the BBC by re-distributing the licence fee.

Model 3

- 5) Model 3 offers plurality, with a strong Channel 4, and is therefore attractive, particularly when combined with a version of Model 1, as we have mentioned above. We consider Channel 4 to be hugely valuable to public service broadcasting, a public asset that has generated substantial levels of investment through its advertiser-funded model with minimal drain on public funds. Even if those advertising revenues are under pressure, to lose Channel 4's contribution to public service broadcasting, and the substantial level of additional advertising revenues that it ploughs back into public service content, would seem contrary to Ofcom's goal of promoting public service broadcasting.
- 6) We therefore recommend that any redistribution of funds from BBC Worldwide go solely to securing Channel 4's ability to provide an appropriate level of public service content. We would also agree that

Channel 4's remit should be extended across other platforms where appropriate.

7) In return, it is absolutely crucial for the credibility of Channel 4, and for the effective delivery of public service content going forward, that any additional funding for Channel 4 be awarded only after a rigorous process of accountability. This would include the following factors:

- Channel 4 must demonstrate that it is operating efficiently;
- Channel 4 should deliver on appropriate public service commitments in key genres that are not being provided for by the market. In some areas these should be above and beyond commitments in the Next on Four document, particularly in children's and out of London. These commitments should be clearly stated so that Channel 4 can be held to account;
- Additional funding from BBC Worldwide or other sources must be ring-fenced for content budgets, rather than subsidizing Channel 4's other activities;
- Similarly, if Channel 4's advertising revenues outperform forecasts, this additional revenue must be spent on content budgets;
- Content should be available to the market as soon as possible, reducing restrictive and exclusive holdbacks that prevent new services from acquiring content and making it available to the public beyond the "public service window;"
- Channel 4 should not be permitted to produce programmes or online content in-house (we elaborate on the reasons for this in the following section);
- The value of indirect support from DTT space and prominent EPG listings must be factored into estimates of Channel 4's funding shortfall; and

- Channel 4's funding requirements should be reviewed every three years. This would give Channel 4 the security of knowing the total level of funding it will have available, but without it being able to take such funding for granted.
- 8) We would also welcome support for new entrants to the sector, as this would potentially boost competition and innovation in public service provision, and possibly engage other communities of interest. Along with any additional direct funding that may be available for such services following the outcome of this review and the Government's spending review, we see support in the form of a more open IP regime as crucial to enabling emerging services to become more involved in public service content. As we have previously noted, key to this will be ensuring that exclusive holdback periods are reduced substantially. This will allow new entrants to content distribution, such as internet service providers, telecommunications companies, and content creators turned aggregators, to secure IP rights and stimulate competition in developing new ways of offering content to the public.

Model 4

- 9) We agree that new institutions and providers will stimulate competition and innovation, particularly in terms of new technology where incumbent broadcasters may not be best placed to pioneer new forms of content. However, funding for such services should not be at the expense of a strong Channel 4, for the reasons outlined above.

Section 8

What do you think is the appropriate public service role for Channel 4 in the short, medium and long term? What do you think of Channels 4's proposed vision?

- 1) As we maintained in our response to Ofcom's financial review of Channel 4 last year, we see Channel 4 has having been an influential force in delivering public service content. Its success in delivering fresh, distinctive and successful content illustrates the benefits of plurality in public service delivery.
- 2) We therefore support the existence of a well funded, publicly-owned Channel 4 going forward, and have proposed a version of Model 3, combined with revised PSB licences for ITV and Five, under which we believe this will be the case. However, any additional funding should be dependent on Channel 4 being accountable and delivering appropriate public service commitments, as well as ensuring that content is made available to the market as quickly as possible, as we have previously mentioned. Channel 4 should also enhance its public service provision in key areas, particularly children's and nations and regions, as we detail later in this section.
- 3) Pact welcomes key parts of Channel 4's Next on Four document. Channel 4 should be able to deliver public service content on different platforms where appropriate – particularly for specific communities of interest - and we would support its remit being expanded beyond the core channel.
- 4) As we have previously outlined, future public service provision should be under a "public service window" that would be free at point of use, and potentially on any platform. Outside of this window, content may be

charged for, similarly to the current model of a primary and secondary use under the terms of trade.

- 5) Content commissioned for these digital television or online services should be under terms of trade with independent producers and all other appropriate PSB requirements. Releasing secondary IP rights back into the market under the terms of trade is fundamental to ensuring that content is made available to the public on a variety of platforms as quickly as possible, as well as helping fulfil Channel 4's role in supporting the wider creative economy. To this end, Channel 4 should significantly reduce its exclusive holdback periods, as we have previously outlined.

- 6) Pact also welcomes the commitment to UK-made programming in the Next on Four document - including Channel 4's proposal to reduce its annual spend on acquisitions by 20% over the next five years, redirecting this money to originated content – and to the external supply sector. Channel 4's annual investment in commissions from the independent production sector is worth £300m, representing nearly 25% of the indie sector's total income from primary commissions.⁵⁹ This investment underpins a healthy supply market that offers all broadcasters an alternative to their in-house production departments or imports. Vertical integration at Channel 4 could have an undermining effect on the production sector.

- 7) Just as importantly, Channel 4's publisher-broadcaster model allows it to pick and choose the best programming from a wide range of suppliers across the country. This view was supported by PricewaterhouseCoopers' recent analysis of Channel 4's impact on the creative industries, commissioned by Channel 4. The study praised Channel 4's strategy of investing in programming from a wide range of suppliers. It stated that:

⁵⁹ Independent Production Census, 2007/08, Digital-i for Pact, page 19.

“Channel 4's chosen strategy has benefited itself, the viewer and by extension, the UK creative economy.”⁶⁰

- 8) Channel 4's publisher-broadcaster status has therefore been fundamental both to the health of the production sector, and to Channel 4's success in providing audiences with programming that “exhibits a distinctive character,” as it is required to do under the Communications Act.⁶¹ Because of its publisher-broadcaster status, the channel has been able to select the best, most diverse, competitive and original programming from a range of external suppliers.
- 9) In contrast, production departments at other broadcasters can potentially stifle competition in the supply market. Broadcasters' market power creates the possibility of them unfairly limiting external suppliers' access to viewers, restricting the development of new channels and services, as well as growth in the production sector.
- 10) There were, for example, sustained and widespread concerns that the BBC was not commissioning the best ideas on merit, but unduly favouring in-house production. It has recently addressed these issues with measures such as the Window Of Creative Competition (WOCC), opening up a further 25% of qualifying commissioning to all external suppliers.
- 11) Research indicates that it will remain a buyers' market into the foreseeable future, and that vertical integration at broadcasters will therefore continue to be a factor in the supply of programming. As we have noted, analysis by Oliver & Ohlbaum Associates for Ofcom for this review confirms that the main PSB networks will remain responsible for around 90% of

⁶⁰ The impact of Channel 4 on the UK independent sector, creative industries and the economy, PricewaterhouseCoopers for Channel 4, March 2007, page 4.

⁶¹ Communications Act 2003, Section 265 (3) (d).

spending on originations through to 2020. In its Review of the Television Production Sector, Ofcom confirmed that vertical integration at broadcasters remained "a significant issue." Along with the independent quota, the regulator found that "the position of Channel 4 as a publisher-broadcaster continues to provide an important balance to the sector."⁶²

12) Pact is therefore opposed to any weakening of Channel 4's publisher-broadcaster status. In addition to competition concerns, Pact remains unconvinced that vertical integration at Channel 4 would be cost-effective or produce better programming than that offered by external suppliers. In the highly competitive independent sector, the onus is typically on suppliers to meet the broadcaster's needs, both creatively and economically, if they wish to secure a commission ahead of rivals. External suppliers' ability to win commissions hangs on their reputation for being able to deliver a production to a broadcaster's satisfaction on all levels. Independent programming must therefore be consistently of the highest quality, and as tailored to broadcasters' needs as in-house departments.

13) This view was supported by LEK's research for Ofcom's recent review of Channel 4. As we have previously noted, this concluded that independents provided a cost-efficient source of programming. As a publisher broadcaster, Channel 4 was found to often be paying less for commissions than broadcasters with in-house capacity.⁶³

14) Instead of taking the retrogressive step of vertical integration, Channel 4 should be encouraged to work with external suppliers to develop new services that incentivise both supplier and broadcaster, as well as offer increased choice and convenience to consumers. Pact's approach to

⁶² Review of the Television Production Sector, Statement, Ofcom, October 2006, page 27.

⁶³ Ofcom Financial Review of Channel 4, LEK Consulting, page 51.

terms of trade with all broadcasters has been to allow content to be offered to the public as quickly and as conveniently as possible, and to generate revenues for all parties.

15) Additionally, there are certain important areas in Channel 4's Next on Four document that should be developed. We welcome the pilot fund for children's programming as a first step, but are concerned that this commitment is subject to additional funding. Ofcom has identified children's programming as the area of public service content most immediately at risk and, if Channel 4 is to genuinely be the cornerstone of plurality that it wishes to position itself as, it should address this. Plurality in the provision of children's programmes that reflect life in the UK was clearly a matter of priority for parents in Ofcom's consumer research for this review - second only to news.⁶⁴

16) Channel 4 should therefore review the case for expanding its children's provision from £5m a year (as it has currently put forward as a pilot initiative) to a dedicated channel for children, ideally using existing assets to provide the channel. We further detail the case for developing Channel 4's remit in children's in Section 10.

17) Similarly, in our view, Channel 4's commitment to raise its nations programming by 50% does not go far enough. Channel 4's level of involvement in the nations is currently low. Even doubling its commitment would not represent a solution for PSB in and from the nations and regions. Indeed, there is a risk that increased programming from the nations will simply replace programming from the English regions.

18) We therefore urge Channel 4 to go further in its commitment to nations and regions and work towards achieving 50% of programming from out of

⁶⁴ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 35.

London (nations and regions) by 2012. Within this quota, Channel 4 should commit to an appropriate level of programming from the nations, as the BBC has done recently.

Which of the options set out for the commercial PSBs do you favour?

- 1) As we have previously outlined, the PSB licence remains valuable. We therefore consider that the commercial PSB licence is worth retaining, and that PSB duties on broadcasters should be proportionate to this value.
- 2) We are, however, concerned that highly commercial programming that the market would make regardless of PSB status is being set against public service requirements. We have cited such out of London shows as Emmerdale and Coronation Street as examples, and see no reason why commissioning such shows should be rewarded with indirect public subsidy. Therefore commercial programming that the market would make regardless of PSB status should not count towards the fulfilment of PSB licences.
- 3) However, it is unlikely that continuing with this model would provide the same levels of public service content as before. Model 1 would therefore not be enough on its own, but should not necessarily be abandoned completely. We favour a version of Model 3, ie retaining BBC and Channel 4, with additional services if possible, but also retaining a possibly revised version of the commercial PSB licences for ITV and Five under Model 1.

Section 9

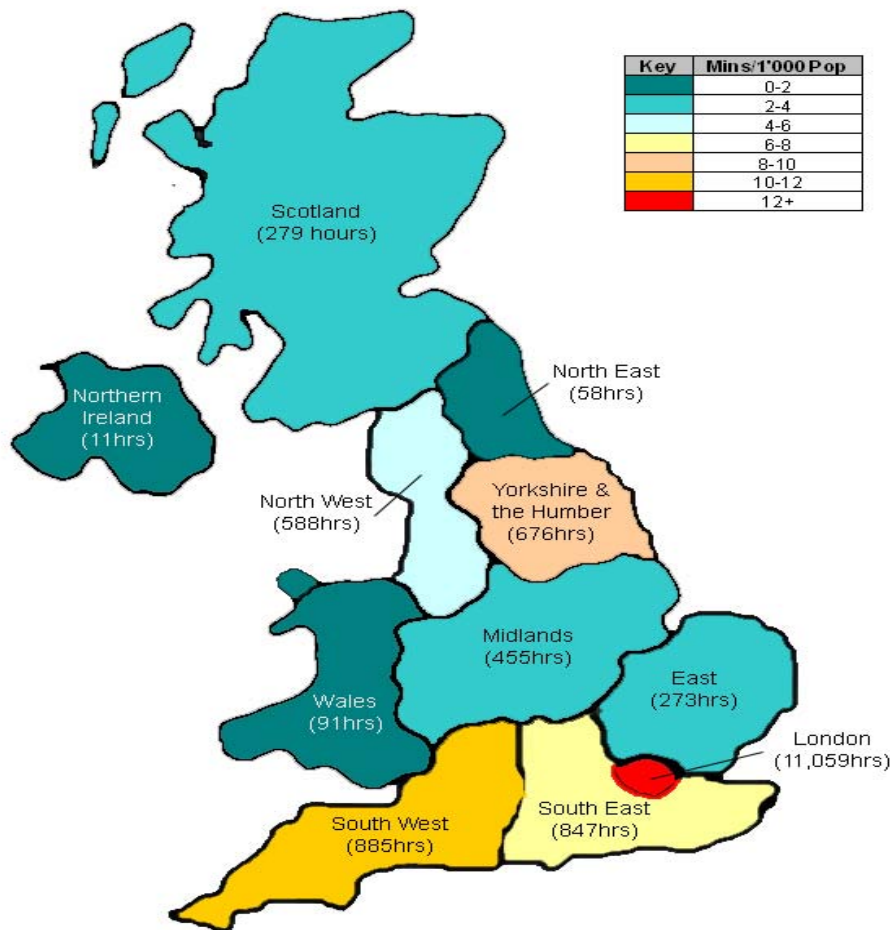
To what extent do you agree with Ofcom’s assessment of the likely future long-term issues as they apply to the nations, regions and localities?

- 1) Representing the nations and regions at network level is clearly fundamental to one of the prime public purposes of PSB as defined by Ofcom - reflecting UK cultural identity. It is also important to another public purpose, representing diversity and alternative viewpoints.
- 2) Independent production in the nations and English regions makes a valuable contribution to delivering those public purposes. Indies provide creative competition for broadcasters’ in-house production departments, helping bring to television screens a genuine diversity of viewpoints that represent the entire UK. Independents are in some cases more accessible and identifiable in their local communities than broadcasters, and larger companies such as Aardman Animations in Bristol have helped establish creative hubs around them.
- 3) Pact therefore welcomes Ofcom’s assertion that out of London production and portrayal at network level are “major issues,” and the intention that Phase 2 of the review will examine this area more fully.⁶⁵ This will build on Ofcom’s recognition in its first PSB review that representing the devolved nations and English regions is a valuable part of public service broadcasting.
- 4) Research commissioned by Pact demonstrates the lack of representation of the devolved nations and English regions at network level. Pact’s latest Production Trend Report for Out of London, conducted by Attentional, confirms our previous report and shows that London provides a

⁶⁵ PSB Review Phase 1: The Digital Opportunity, Ofcom, section 9.12, page 113.

disproportionately high level of hours per capita than the rest of the country, as illustrated by Figure 1.

Figure 1: Nations and regions representation per capita



Source: Attentional for Pact

- 5) Along with the resulting failure to represent the UK in its entirety, a lack of network commissions severely limits the ability of companies in the nations and regions to develop their businesses. Network commissions, usually of larger scale than non-network, allow production companies to build their businesses on a long-term basis. Such commissions, particularly larger scale network commissions such as returning series,

enable the out of London supply sector to have the confidence to make capital investments in local skills and infrastructure.

- 6) In the absence of network commissioning, independents in the nations and regions have often won commissions from multi-channel broadcasters. This has meant, however, they have been unable to use the terms of trade to develop their businesses. Network commissioning under the terms of trade is key to creating sustainable, creative clusters in the devolved nations and English regions, and we ask Ofcom to consider this in further detail in Phase 2 of this review.
- 7) The rest of this section uses data from our Out of London Trend Report. We present these figures, which are based on best available data, as a contribution to the debate over out of London programming rather than a definitive picture. We also point out that they do not include figures for BBC3 and BBC4.

English regions

- 8) The English regions have not suffered the declines evidenced in the nations – yet. We are concerned, however, that commissioning from the English regions will imminently come under pressure as they have historically accounted for the vast bulk of ITV1's out of London network commissioning, and it is ITV's investment that appears to be most at risk, as Ofcom points out.
- 9) Significantly, none of ITV1's network programming in 2006 came from Wales, whilst Scotland accounted for 23 hours and Northern Ireland just six. Combined, nations hours on ITV1 represented only 1% of all network programming, while the English regions accounted for 30%, as the table overleaf illustrates.

Figure 2: ITV out of London network hours (non news)

Hours of Programming, ITV1				% of Hours, ITV1			
	2004	2005	2006		2004	2005	2006
English Regions	937	730	1,185	English Regions	29%	25%	30%
London	2,235	2,190	2,712	London	70%	74%	69%
Northern Ireland	—	5	6	Northern Ireland	—	0%	0%
Scotland	27	21	23	Scotland	1%	1%	1%
Wales	10	7	—	Wales	0%	0%	—
Total	3,208	2,952	3,926	Total	100%	100%	100%

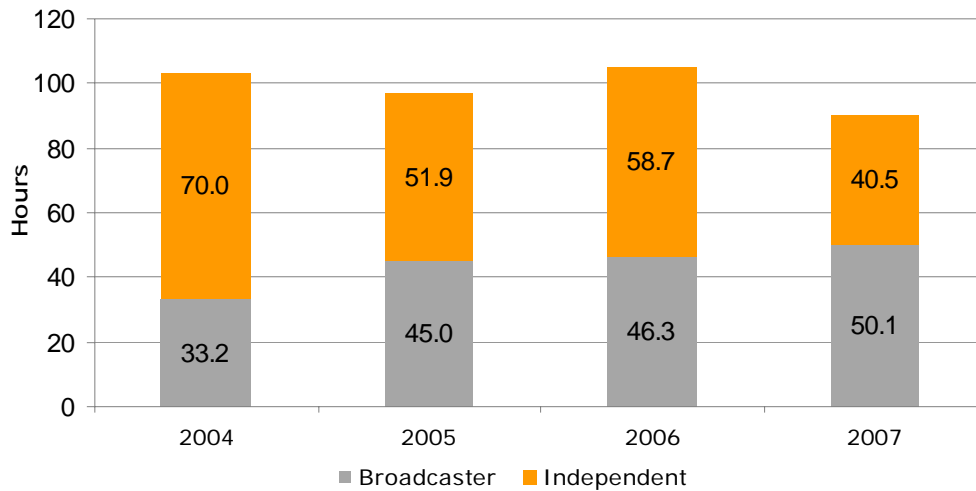
Source: Pact/Attentional

10) We agree that overall pressure on ITV's out of London spend is likely to intensify going forward, as Ofcom states in this review. While we would argue that ITV would be likely to commission a certain level of programming from out of London even without being required to do so – shows such as Coronation Street and Emmerdale are crucial to its success – we would expect the range and levels of commissions to be impacted, particularly in core public service genres. Commissioning from external suppliers would also be severely damaged.

Wales

11) The latest data from our Trend Report indicates that the level of Welsh network programming has declined year-on-year. Programmes from Wales (in-house and external) now represent on average less than 1% of total network television hours on the five terrestrial services.⁶⁶ Per capita, Wales therefore has one of the UK's lowest number of hours of network television.

⁶⁶ The Production Trend Report for Out of London, Attentional for Pact, pages 18-20.

Figure 3: Hours of network production, Wales

Source: Pact/Attentional

12) We are also concerned that in some parts of the country network commissioning is strongly skewed towards in-house production departments at broadcasters. Wales is a case in point: independent production accounted for all of the reduction in 2007.

13) Of the BBC's investment in Wales, the bulk appears to be going in-house. This appears to be largely the result of the BBC's spend on Doctor Who and Torchwood, both of which are in-house productions.

14) We would argue that this raises questions about the range of voices from Wales on the BBC, as well as the BBC's commitment to growing the wider production sector in Wales. The BBC's Charter commits it to a public purpose of stimulating the creative industries, in addition to representing the lives of the Nations and regions.⁶⁷

⁶⁷ BBC Charter Agreement, sections 8 and 9.

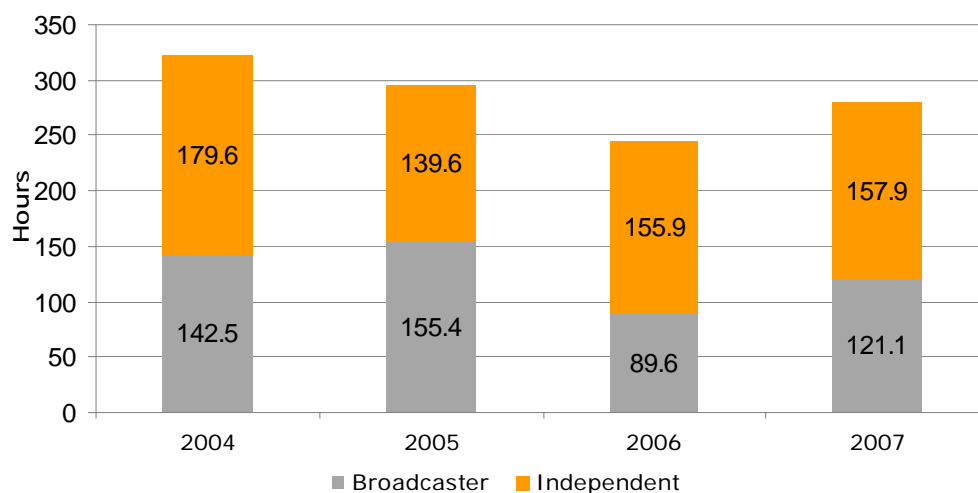
15) In failing to invest in Welsh independent companies the BBC misses an opportunity to act as a creative catalyst. Companies with experience gained from, for example, a returning BBC series, would be better positioned to win further commissions of scale, both from the BBC and also other broadcasters.

16) Finally, in terms of broadcast plurality within Wales, Channel 4's role in the nation would also have to be reviewed under Model 3. Offering Channel 4 programming in Welsh via S4C would not provide plurality for English-speaking audiences.

Scotland

17) Non-news network programming from Scotland has been in decline in recent years. 2007 saw an upturn in hours due to the BBC, but ITV and Channel 4 hours fell. Current levels remain lower than 2004 figures, as illustrated below.

Figure 4: Hours of network programming from Scotland

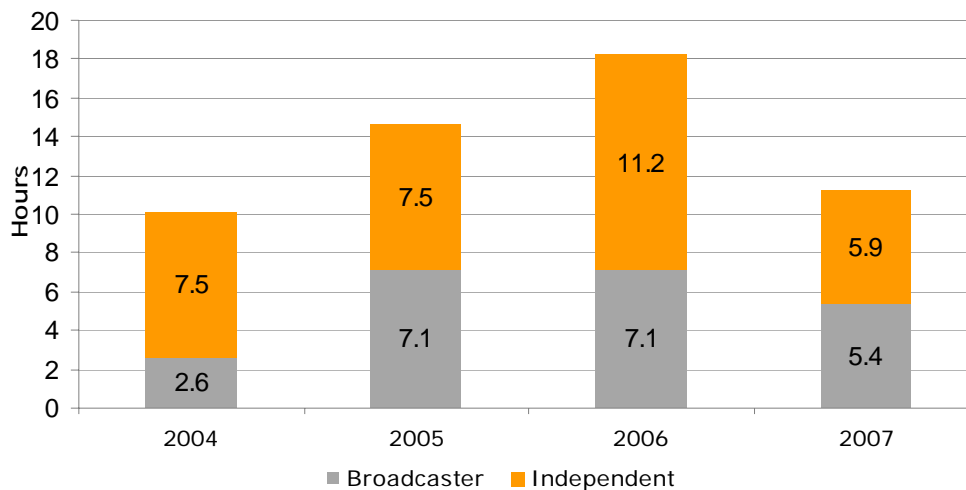


Source: Pact/Attentional

Northern Ireland

18) While, as Ofcom states, UTV may be in a relatively strong position compared to other ITV licencees, this does not mean that Northern Ireland is well represented at network level. On the contrary, of all the nations, Northern Ireland demonstrated the worst year-on-year performance at network level.

Figure 5: Hours of network production, Northern Ireland



Source: Pact/Attentional

Which models do you think would be most appropriate in each of the nations and English regions in the long term, and why?

- 1) Pact in principle supports a similar approach to Model 3 – the BBC, a strong, publicly-owned Channel 4 and, if possible, additional contestable funding – combined with revised commercial PSB licences for ITV and

Five. Having a well funded, publicly-owned Channel 4, as well as retaining certain elements of PSB provision at the other commercial PSBs, is particularly important in light of Ofcom's concerns over plurality in the nations and regions.

- 2) There are, however, particular issues making a future PSB solution more complex for the nations and regions. The ITV licencees have played an important role in providing programming from the English regions, and any solution would have to address this. As we have already mentioned, plurality in English-language broadcasting in Wales would also remain an issue under Model 3.
- 3) There are a number of ways of exploring this, including a potential combination of all of the options below:
 - Expanding out of London provision for Channel 4;
 - Retaining certain PSB requirements for ITV; and
 - Opening up news to a wider supply base, including independents and new entrants to the sector. Delivery may be online in certain cases.

Channel 4

- 4) In our view, Channel 4's commitment to raise its nations programming by 50% does not go anywhere near far enough to addressing recent declines. Channel 4's level of involvement in the nations is currently low – it broadcast just one hour of non-news network programming from Northern Ireland in 2006, while Scotland and Wales each represented just

2% of total non-news network hours during the year, as the table below shows. Even doubling this commitment would not represent a solution for PSB in and from the nations and regions. Indeed, there is a risk that increased programming from the nations will simply replace programming from the English regions.

Figure 6: Channel 4 out of London network hours (non news)

Hours of Programming, C4				% of Hours, Channel 4			
	2004	2005	2006		2004	2005	2006
English Regions	843	705	932	English Regions	30%	25%	34%
London	1,864	1,997	1,691	London	67%	72%	62%
Northern Ireland	2	2	1	Northern Ireland	0%	0%	0%
Scotland	42	42	44	Scotland	2%	2%	2%
Wales	32	38	51	Wales	1%	1%	2%
Total	2,784	2,784	2,719	Total	100%	100%	100%

Source: Attentional for Pact

- 5) We would therefore urge Channel 4 to go further in its commitment to nations and regions and work towards achieving 50% of programming from out of London by 2012. Within this quota, Channel 4 should commit to an appropriate level of programming from the nations, as the BBC has done recently.
- 6) As previously mentioned, in terms of broadcast plurality within Wales, Channel 4's role in the nation would also have to be reviewed under Model 3. Offering Channel 4 programming in Welsh via S4C would not provide plurality for English-speaking audiences.

Retaining ITV PSB requirements

- 7) In our view, ITV has effectively been permitted to cherry pick which PSB requirements it fulfils. Following questions raised by our Out of London

Trend Report, Ofcom has established that ITV has failed to meet its out of London quota by some distance for the last two years running. We are also concerned that, as we understand, ITV has invested only a fraction of the £9m Nations & Regions Production Fund that it launched in 2005 following Ofcom's first PSB review.

- 8) At the same time, while seeking to scale back core public service genres such as news, ITV is able to count such highly commercial shows as Emmerdale and Coronation Street towards its out of London quota. These programmes are fundamental to ITV's market position, which relies heavily on audiences outside London, and would be made regardless of PSB requirements.
- 9) We ask Ofcom to establish in more detail the level and type of out of London programming that ITV would be likely to commission without being required to. A detailed analysis of this issue is essential in ensuring that the PSB licence is not diluted to the point where regulatory assets are used to underwrite commercial activities. ITV should then be required to deliver a certain level of genuine PSB commitments, over and above any out of London programming that it would commission anyway, in return for regulatory assets. These regulatory assets should be proportionate to ITV's investment in genuine PSB programming.
- 10) We ask Ofcom to consider the scope for retaining ITV's PSB duties in this manner, in addition to developing Model 3 as a solution for PSB in the future.
- 11) In terms of issues relating to specific nations, we are concerned that the benefits for ITV licencees of being a Scottish news provider – in terms of branding and profile – may be particularly underplayed in Ofcom's analysis. Sky News is highly respected editorially, but BSkyB runs it as loss leader. We are not opposed to the principle of supporting ITV

licencees in Scotland in their PSB duties where necessary, and where such support does not impact on programming budgets elsewhere. Indeed, Ofcom's proposal of uniting the ITV licences in Scotland would potentially enhance the brand value of being *the* Scottish news provider. But Ofcom must be rigorous in its analysis of the value it puts upon public assets.

- 12) In Wales, we would welcome further consideration of the proposal that part of the DTT spectrum should be used for an English-language Welsh service, as long as this does not impact on S4C. This would provide an English-language public service alternative to the BBC.

Opening up news

- 13) We ask Ofcom to consider opening up news provision (network and non-network) to independent production companies, online content providers and other external suppliers from outside the traditional broadcasting sector. This could potentially drive down the cost of news provision by increasing competition amongst external suppliers and broadcasters' own production departments, as well as by paving the way for the commissioning of cost-efficient, independently-made content. The potential for driving down costs would seem particularly relevant in the context of nations and regions provision. And on top of a potential cost reduction, we see huge potential in this approach for stimulating innovation. We outline our proposal later in this section in response to Ofcom's question about ITV regional news provision.

What are your views on short/medium-term issues referred to, including the out-of-London network production quotas?

Quotas

- 1) We have highlighted a dearth of network-level out of London commissioning, but this is not to say that the out of London quota has not had an impact. On the contrary, it is reasonable to assume that without such a requirement levels of investment from broadcasters in programming from the nations and regions would be lower still. Ofcom concluded as much in its recent review of the television production sector, stating that:

“There is little evidence that significant levels of production outside London would be provided by the market...Production would become even more concentrated in London if quotas were removed.”⁶⁸

- 2) The idea cited by Ofcom of an out of England quota has merit. Too often, “out of London” has meant a few miles outside the M25, with the nations in particular losing out. We therefore welcome the BBC’s commitment to a 17% target for the nations as part of its overall out of London quota, and would support targets for the nations being introduced for all public service broadcasters. We have previously recommended such an approach for Channel 4 in this document.
- 3) However, the danger is that this increased programming from the nations will be at the expense of programming from the English regions. It is therefore important that broadcasters’ commitments to the nations and regions as a whole increase at the same time as any quota for nations production is introduced. We therefore support the BBC’s recent pledge to increase network commissioning from out of London to 50% at the same

⁶⁸ Review of the Television Production Sector – Policy Statement, Ofcom, October 2006, page 21.

time as raising commissioning levels from the nations, and urge Channel to do the same.

Portrayal

- 4) Although they may be blunt tools, quotas do encourage greater on-screen portrayal by, for example, stipulating that production be based out of London, or use out of London crews and talent.

What are your initial views on the preliminary options set out relating to ITV plc's regional news proposal?

- 1) ITV's regional news requirements are a core part of its public service licence and should be maintained wherever practicable. The broadcaster should be allowed an appropriate level of flexibility in how it delivers its services. However, ITV should only be allowed to dilute its delivery of targeted regional news services once Ofcom is convinced that it has made a clear case for doing so and that all options have been considered.
- 2) We are not convinced that all avenues have been explored, or that the economic case has been fully made. As we have outlined earlier, we ask Ofcom to conduct a further assessment of ITV's PSB commitments to determine the level of out of London programming that it would be likely to provide without being required to. ITV should not receive support through regulatory assets for programming that it would have commissioned anyway, and any support should be proportionate to ITV's spend on genuine PSB genres that the market would not provide.

- 3) In addition, we ask Ofcom to open up news provision to a greater range of external providers. We are proposing a revision of the definition of qualifying independent programming under the Broadcasting (Independent Productions) Order 1991, and subsequent amendments, to include news programming. This would allow independent television production companies, as well as potential new players such as news and regional press organisations, to compete.
- 4) Paving the way for independent production companies and other external companies to be able to genuinely compete for regional and network news commissions could have a number of potential effects, including:
 - Stimulating creative competition and innovation for the viewer;
 - Potentially driving down the cost of news provision in-house by increasing competition from external suppliers;
 - Potentially reducing the costs of news provision by opening up the market to cost-efficient independent television programming and online content; and
 - Fostering growth in the out of London production sector.

Current market for news

- 5) According to Ofcom's Review of the Television Production Sector, the total value of network and regional news commissions by the terrestrial channels was around £350m per annum in 2004 (the most recent year available),⁶⁹ with nations and regions news accounting for around 45% of this spend. Currently, as news is excluded from programming that counts towards the independent quota, broadcasters with in-house production departments have little incentive to commission from external suppliers. In the case of terrestrial broadcasters without in-house production

⁶⁹ Review of the Television Production Sector, Ofcom, page 47.

themselves, the dominance of established news departments at other broadcasters has prevented independents entering the market.

Can indies deliver?

- 6) Historically, the case for excluding news from qualifying independent hours has centred on issues of trust and compliance, and whether independents have sufficient scale to deliver. In terms of compliance issues, in the wake of recent controversies, monitoring systems across the entire industry, including in-house and external, have rightly been overhauled, and have never been more rigorous. Pact has been engaged with broadcasters to develop compliance systems for independents in line with in-house production departments, and mechanisms are now in place that provide clear reporting processes, as well as addressing broader cultural issues.

- 7) The question of whether independents have the scale to deliver news content seems less valid, given the recent growth of the independent sector. Turnover in the independent production sector has risen from £1.6 billion in 2005 to more than £2 billion currently.⁷⁰ If indies were to win 25% of total network and non-network news originations (the minimum level of the independent quota), this would amount to approximately £87.5m – less than the average annual growth of the indie sector in recent years, and approximately 5% of total annual turnover.

- 8) The recent example of the Window of Creative Competition (WOCC) underlines independents' ability to win a greater share of commissions when given a genuine chance to compete with in-house production departments. Oliver & Ohlbaum Associates put the value of the additional commissions won by independents (excluding non-qualifying external

⁷⁰ Independent Production Census 2007/08, Digital-i for Pact.

companies) at £121m if indies were to win just under 40% of BBC network commissions as a result of the WOCC (in the event, independents won at least 43%).⁷¹ This means that the gains made by independents in the first year of the WOCC are estimated to be comparable to the value of 25% of total news spend by all PSBs (network and non-network).

- 9) Would larger independent companies be interested in such a supposedly non-commercial genre as news? In our view, both network and non-network news would attract a high level of interest from independent companies in London and in the nations and regions, particularly if it were offered as larger scale, long-term commissions. The recent tendering process for Question Time saw an array of larger independent companies competing against each other in the core public service genre of current affairs, suggesting there is a high level of interest from larger scale independent companies in providing news. The list of 15 bidders included Lion TV (part of the All3Media Group), Cheetah TV (Endemol), Ten Alps, Mentorn (Tinopolis), and Tiger Aspect (IMG), along with smaller companies such as Juniper and Princess.

- 10) Question Time has almost no rights value in terms of format sales or overseas distribution because of the nature of the programme, so the only profit is from a production contract, albeit a stable one. However, a commission the scale of Question Time, which covers three years, offers an opportunity to become the leading current affairs producer in the independent sector. Companies are able to develop their businesses strategically around such a commission, investing in talent and creating related content such as documentaries.

⁷¹ Prospects for Independent UK Production to 2010, Oliver & Ohlbaum Associates, September 2006, page 15.

11) Indeed, preparing a proposal as part of the tendering process for Question Time cost a significant sum, particularly as part of the final shortlist. Companies were willing to invest risk capital in an effort to win this tender.

12) Question Time also illustrates the creative benefits of opening up commissioning to a wider range of suppliers. To win the commission companies had to compete with each other creatively, as well as financially, to deliver the most innovative and compelling proposal. George Entwistle, the BBC's then head of current affairs, said of the tendering process for Question Time:

“It was a very tough and rigorous selection process. All four shortlisted companies came up with strong proposals both for the linear programme and for developing multi-platform offerings. It was particularly gratifying to see companies whose core experience has not so far been in this area of programming making such strong pitches.”⁷²

13) Mentorn's eventual success in winning the commission for Question Time was reportedly in no small part due to the company's proposals to develop new ways to engage the studio audience and online users: the ultimate beneficiary of an open and meritocratic commissioning process was the viewer.

Cost-efficient news provision

14) Opening up network and non-network news commissions to independents offers the potential to drive down the costs of providing news services. In the most recent major assessment of production costs in the independent sector, LEK's analysis for Ofcom's financial review of Channel 4, Channel 4, as a publisher broadcaster, was often paying less for commissions than

⁷² MediaGuardian, March 8 2007.

other broadcasters, particularly in core public service genres, into which news would fall.⁷³ LEK also concluded that Channel 4's costs for originations in core public service broadcasting genres were broadly in line with inflation, and in some genres were actually falling.⁷⁴

15) Similarly, PKF's Review of the BBC Value for Money and Efficiency Programmes, for the Department for Culture, Media and Sport, concluded that prices across the broadcasting sector indicated that independents could produce programming at relatively low costs. It stated:

"What is clear is that the BBC does not have consistently higher or lower costs than all other broadcasters. It also cannot be said that independent producers are consistently more/less expensive than in-house production. However, what the data for broadcasters B and C suggest is that it may be possible to commission relatively low cost independently produced programmes for most genres."⁷⁵

16) Just as importantly, PKF noted the potential for competition from independents under the WOCC to drive down costs at in-house. The report concluded:

"There may be, therefore, scope for further discussion in relation to the settlement – for example about whether the real competition created by the WOCC will bear down on in-house costs."⁷⁶

Fostering nations and regions growth

⁷³ Ofcom Financial Review of Channel 4, LEK Consulting, page 51.

⁷⁴ Ibid, page 112.

⁷⁵ Review of the BBC Value for Money and Efficiency Programmes, PKF for DCMS, April 2006, page 76.

⁷⁶ Ibid, page 20.

- 17) Enabling independents to compete for non-network news commissions would have the additional benefit of potentially growing the out of London supply base. Independents based outside London are on average smaller in scale than those in the capital, but nevertheless there are significant potential news providers based in the nations and regions. Moreover, if regional news contracts were offered on a long-term basis, this would give companies based outside London the confidence to invest in scaling up their businesses in the nations and regions in order to deliver such commissions. As we have outlined previously, if offered on a long-term or large-scale basis, such commissions would appeal to large companies as well as to smaller ones.
- 18) It is also worth bearing in mind that, with out of London production in non-news genres under pressure, it is likely that a substantial proportion of the supply base in those areas would be available and keen to compete for news commissions.
- 19) Allowing news content to count towards the independent quota would also be likely to encourage innovation by expanding the range of companies competing for commissions. We would envisage companies from outside the traditional independent television production sector entering the market. A key benefit in terms of new developments could, for example, be greater competition in local news services. The lower margins of independents compared to broadcasters would better allow them to develop local news content, and independents with commissions to make regional news would be expected to build their news departments in this manner. In this regard, the smaller scale of many independent companies compared to in-house news departments at broadcasters could work as an advantage.

Section 10

Do you agree with our assessment of the possible short term options available to children's programming; are there any other options available?

- 1) As Ofcom chief executive Ed Richards stated at the launch of this review, children's programming is "the bleeding edge" of the current threat to PSB. Pact has consistently argued that children's programming is an urgent issue, and we welcome Ofcom's view as stated in this review that children's programming is the PSB area under most immediate threat. Ofcom's timetable for implementing a new PSB model rightly states that shortfalls in children's programming will be evident in the short term, ie from 2008 onwards.⁷⁷

- 2) The importance of public service programming for children was well documented by Pact and others during Ofcom's review of children's television last year. To summarise those arguments, UK-made children's programming plays a vital role in helping young audiences understand the world and society in which they live today. Children's drama tackles issues such as growing up in a multi-cultural society, or in a single parent family, while factual shows help children understand events such as the death of Damilola Taylor or the July 7 bombings in a way that speaks directly to them. Just as importantly, genres such as animation inspire and entertain by reinventing traditional storytelling. Ofcom's research shows that television remains the single most important medium for children, and that children's viewing of children's programming is increasing, even if they are watching less adult television. Yet new, home-grown programming now accounts for just 1% of all children's television in the UK.⁷⁸

⁷⁷ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 5

⁷⁸ The Future of children's television programming, Annex 10 to Phase One of Ofcom's second review of public service broadcasting, page 16.

- 3) Ofcom's consumer research for this PSB review and the preceding children's review illustrates the depth of public opinion on this issue. Parents ranked children's programming alongside issues of trust as the PSB area with the biggest gap between their expectations and actual delivery.⁷⁹ This was at the height of the national uproar over phone-in and editing scandals.
- 4) By its nature, children's is a special case, subject to a smaller advertising market than other genres. According to Ofcom, revenues available to broadcasters from children's programmes account for just over 3% (£300m) of total industry turnover.⁸⁰ In addition to recent restrictions on HFSS advertising to children, broadcasters face other problems specific to children's programming - generating additional revenues from on-demand services and premium-rate telephony is difficult, because minors are not able to enter directly into commercial transactions.
- 5) Children's programming is "a canary in the tunnel" for public service programming. It is a genre that has felt the impact of fragmenting audiences and diluting advertising revenues ahead of the wider content sector. As we have consistently argued, there is therefore a need to introduce urgent measures to improve the provision of children's public service programming in the short term, in addition to the case for longer term solutions.

Current £30m-£50m shortfall

- 6) To assess Ofcom's proposed options we would like to briefly recap analysis of the extent of the problem in children's. We broadly agree with

⁷⁹ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 46.

⁸⁰ The Future of Children's Television Programming: Research Report, Ofcom, page 47.

Ofcom's findings in its 2007 report, *The Future of Children's Programming*, and Phase One of the PSB Review. These found that total expenditure from commercial PSBs on first-run original children's programmes had fallen by 80% over the last decade. This has resulted in a funding gap of £50m in terms of spend from non-BBC broadcasters, and an overall shortfall in children's originations of around £30m once increased BBC spend over the period is factored in.⁸¹

- 7) There is no sign of this improving; in fact, it is more likely that funding levels will decline further as the recently-introduced restrictions on HFSS advertising bite and the effects of ITV's most recent reduction in children's hours become apparent. Despite Channel 4's welcome commitment to invest an additional £5m per year for the next two years, it does not come close to filling this gap. Meanwhile, the BBC's recent commitment to invest more funding into children's through online budgets is again welcome, but will merely offset the cuts it announced last year.
- 8) In the wake of the HFSS restrictions, those outside the industry have sometimes argued that broadcasters will be able to develop alternative sources of advertising. This has not happened yet in the children's genre and, according to Ofcom's analysis, would seem unlikely to happen in the future. Ofcom reports that:

"The advertising market for children is relatively finite and inelastic. The advertising market for children's airtime is comprised of relatively few specialist industries and manufacturers – principally in consumables, toys and entertainment."⁸²

Short-term options

⁸¹ The Future of children's television programming, Discussion Paper, Ofcom, page 18. Figures exclude S4C's spend on Welsh-language programming.

⁸² Ibid, page 48.

- 9) Pact is not convinced that any of the proposed short-term measures from Ofcom or stakeholders will fully address this £30-£50m funding gap. Our favoured short-term measure remains a tax credit, as we have previously outlined. Targeted only at genres that are most at risk, and only available to non-BBC programmes (both BBC in-house and BBC commissions from indies would be excluded), we see it as a targeted, practical measure that could be introduced quickly and would encourage plurality of PSB provision. However, we agree with Ofcom that this is now a matter for Government rather than the regulator.
- 10) Therefore, in addition to looking at the proposals outlined by Ofcom, we are asking Ofcom to clarify what analysis it has conducted of the potential for regulatory intervention. Ofcom makes clear in this PSB review that its powers under the Communications Act 2003 are limited, particularly around changes to programming policy statements. Ofcom states that “there is no obligation on the commercial PSBs to follow Ofcom’s guidance – this was recently demonstrated by ITV’s proposals to reduce the amount of children’s output on the ITV1 channel.”⁸³
- 11) Ofcom, we understand, is referring to its ability to offer guidance (but no more) under Section 267 of the Communications Act. However, the Communications Act does allow for Ofcom under certain conditions to require a revision of a provider’s statement of programme policy under Section 270 and, under Section 271, to recommend that the Secretary of State modify a public service remit as part of this PSB review. We ask Ofcom to clarify what analysis it has done of the case for intervention under either of these sections to require greater commitment to children’s programming from ITV and its fellow commercial PSBs. We elaborate on this at the end of this section, after looking at the short-term proposals in

⁸³ PSB Review Phase 1: The Digital Opportunity, page 133.

Ofcom's consultation paper, and the case for extending Channel 4's remit in the long term.

Tax incentives

12) While we accept that these are now a matter for Government, we would like to respond to the potential drawbacks identified by Ofcom.

13) In terms of measuring the impact of such schemes, it is crucial to bear in mind that there will be no loss to the Exchequer if the tax credit does not work. We have deliberately proposed that the credit offer 30% of qualifying production costs – substantially higher than the benefit to the production yielded by the film tax credit – in order to make it attractive for commercial broadcasters, particularly the dedicated children's channels, to commission public service content. However, if such programming is still not being commissioned, the tax credit will simply remain unused, without any cost to the taxpayer.

14) Ofcom states in its consultation paper that this sort of intervention has been open to abuse. This is not true of the UK's current tax credit for film production. While the now defunct Section 48/Section 42 scheme for film production was subject to widespread abuse, Government and industry developed the current tax credit partly as a way of cutting out such incidents. As we explained in our previous submission, the film tax credit is fundamentally different to Section 48/Section 42. The new credit for film is far simpler, removing the need for a partnership of investors to act as middle-men so that the producer of a film can access the tax deferral – these partnerships were identified as the cause of abuse under Section 48/Section 42.

- 15) A further distinction is that, unlike Section 48/Section 42, the new credit is also only available on UK spend. This removes the ability to base a production largely overseas in order to access international tax-based funding, while still claiming tax relief in the UK on the entire film.
- 16) As a result, the new tax credit system has now been in place for a year and a half, and there has not been a single recorded case of abuse.
- 17) Indeed, we see the children's tax credit proposal as even cleaner than the new film tax credit. Because of film's patchwork, international financing structure, it is often impossible to ensure in advance that a UK distributor is in place. It is therefore possible that a film will access the tax credit but never be seen by the UK tax payers who have contributed to its funding. In contrast, the children's credit would only be available to productions that had secured a UK broadcast licence.
- 18) As Ofcom states, it does indeed remain the case that the opportunity costs for mainstream commercial PSBs might outweigh the incentive provided by the tax credit. However, as we outlined in our previous submission, the tax credit proposal was never limited just to these broadcasters. It would encompass dedicated children's channels such as CITV and Nickelodeon. As these services air only children's programmes, any opportunity costs would be relatively low. These channels are already commissioning a small amount of UK content; a tax credit would encourage them to increase this activity in core public service areas of children's programming.
- 19) Questions of state aid would indeed need to be considered, as they would with many of Ofcom's proposals for PSB as a whole, but given that the tax credit would only be available in public service genres where there is a demonstrable market failure, and, like the film tax credit, could be fitted

with a Cultural Test, we would argue that such an intervention would clearly be justified.

Developing the BBC's role

20)The BBC is increasingly important in providing children with high quality public service broadcasting, and we welcome its recent commitment to invest in children's programming via its online funding. This will offset previously announced cuts, although it will not mean an overall rise in funding for children's programming. The decline in investment from commercial PSBs makes this funding all the more important, and we are asking the BBC Trust to ensure that the BBC does not reduce its children's provision in our response to the BBC Trust's current review of children's services.

21)However, augmenting the BBC's role will not address the issue of plurality. The BBC's editorial team are on public record as stating that they place a high value on competition in children's programming, both as a way of serving the viewer, and in order to keep the BBC at the top of its creative game. In a keynote speech at the Showcomotion children's conference last year, director of BBC Vision Jana Bennett said:

"This isn't just about the BBC. It's about plurality of supply and plurality of commissioning. The BBC doesn't want to become anything like a monopoly. It's not good for us. Competition keeps us sharp. This is as true of children's as it is of news, or soaps, or sport or drama or any other genre. All those years of Saturday mornings head-to-head with the opposition kept our children's output fresh and lively and engaging. And it wasn't just the BBC who benefited, it was our audiences too. It is just not right that our children's audiences should be deprived of choice."⁸⁴

⁸⁴ Jana Bennett, director of BBC Vision, Keynote speech given at Showcomotion, Children's Media Conference, Sheffield July 5 2007.

22) Plurality in the provision of children's programmes that reflect life in the UK was clearly a matter of priority for parents in Ofcom's consumer research for this review – plurality in children's was second only to plurality in news.⁸⁵ This supported Ofcom's findings in last year's children's television review, which indicated that parents were concerned not only about the level of provision, but also about the range of content on offer. For parents, genuine range of channels meant not just having the BBC compete with imported shows on commercial channels, but having real choice in public service content across more than one outlet. Parents, Ofcom concluded: "felt that the BBC had a distinct tone of voice and that children would benefit from a variety of voices."⁸⁶

Extending C4's remit

23) We highlighted at length the historic role of Channel 4 as a commissioner of children's content in our submission to Ofcom for its review of The Future of Children's Television Programming, and called for Channel 4 to renew this commitment. Before it closed down its children's department in the 90s, Channel 4 played a valuable role in providing for young audiences, broadcasting such acclaimed programmes as The Snowman, Coping With...Parents, and the influential Wise Up!. These shows represent some of the finest examples of children's PSB.

24) The public value reasons for Channel 4 commissioning and airing original first-run children's programmes are no less valid today than they were in the 90s. Indeed, the subsequent reduction in investment by other commercial broadcasters, and the resulting lack of a significant alternative to the BBC's output, would mean that a return to children's commissioning

⁸⁵ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 35.

⁸⁶ Ibid.

would be an even more important contribution to public service broadcasting. Ofcom's PSB review has identified children's as the public service genre under the most immediate threat; Channel 4 should have a strong commitment to children's if it is to genuinely provide plurality in public service content by acting as an alternative to the BBC's channels.

25) Children's provision would fit well with Channel 4's current remit under the Communications Act as a public service broadcaster. While Channel 4 does not have an explicit requirement under the Act to broadcast children's shows (nor indeed any other genre outside news and current affairs and education/schools), it does have a statutory duty under the Act to make a significant contribution to providing programmes of "educative value."⁸⁷

26) Public service children's programming clearly has the potential to fulfil such a mandate. Helping children learn and develop is at the heart of public service programming for young audiences. We would also suggest that UK-made children's programming has a more informal educative value in stimulating children's interest in the world around them.

27) Children's programming could also contribute strongly to Channel 4's remit under the Communications Act to provide programming for a culturally diverse society. Programmes which reflect multi-cultural Britain have been amongst the highest profile casualties in the recent series of cuts in children's programming by commercial broadcasters. *My Life As A Popat* (an independent commission for ITV) was the only example of a British-Indian family on children's television. Despite being one of ITV's most popular children's shows (regularly appearing in its list of top 10 kids' shows), winning a Bafta, and being nominated for a Race in the Media

⁸⁷ Communications Act 2003, Section 265 3 (c).

Award from the Commission for Racial Equality, it has been dropped following ITV's cut backs in children's originations.

28) Similarly, *Rooted* (another independent commission, this time for Five) followed the journeys of 13 British children to the countries of origin of their parents or grandparents, to experience first-hand the differences in culture, society and religion and examine the contrasts with their life in Britain. The programmes looked at a range of religions, from African Islam to Sikhism, in countries across the world from Armenia to Zambia. However, now that Five has cut all programming for older children, the series has been cancelled. Five's *A Different Life*, a series about children with unusual lives, such as having rare disabilities or living in the South African bush, met the same fate.

29) High quality children's programming has also been shown to have a particularly beneficial effect for children from minority groups where English is a second or additional language. A 2006 University of Chicago study found that:

"The positive effects we find on verbal, reading and general knowledge tests are largest for children from households where English is not the primary language, for children whose mothers have less than a high school education, and for non-white children."⁸⁸

30) In Pact's view, Channel 4 has a duty under the Communications Act to deliver programming that helps children understand and engage with the UK's diverse society, particularly when it is not being provided elsewhere. Channel 4's requirement under the Act to appeal to a culturally diverse society should not exclude children.

⁸⁸ Does Television Rot Your Brain? New Evidence from the Coleman Study, University of Chicago, page 4.

- 31) Most importantly of all, children's programming on Channel 4 can provide an alternative viewpoint by fulfilling the channel's remit under the Communications Act to be innovative and distinctive. Historically, the channel's children's offering was highly innovative and engaging. As well as winning an array of awards, it enabled children's voices to be heard. Shows such as *Wise Up!* were made with children's input – for example, 10 year-olds wrote into the show, concerned about their parents' smoking, and were given the chance to interview the Health Minister of the day about the dangers of smoking and what the government was doing to prevent people smoking. This was "user-generated content" years before the term even existed.
- 32) As we have mentioned earlier, Channel 4's commitment to return to children's commissioning in its *Next on Four* document is welcome. However, its pledge to invest £10m in children's over two years does not go far enough to address the £30m-£50m funding gap in children's provision that Ofcom has identified. Moreover, Channel 4's current commitment is only a pilot scheme that may not be continued.
- 33) Just as importantly, Channel 4 should seek to provide a service for as wide an age range of children as possible - we are concerned that its programming should not just cater to young teens upwards. Ofcom's review of children's television found "significant reasons for concern" for provision for children aged 9-12,⁸⁹ and we would argue that shortfalls in the provision of UK originations in certain genres (notably animation) extend right the way down to pre-school children. We therefore ask Ofcom to monitor closely the range of Channel 4's programming for children, particularly in terms of age.

⁸⁹ The Future of Children's Television Programming: Research Report, Ofcom, page 200.

34) As a long-term option, we would also recommend that Channel 4 explore the case for launching a dedicated public service children's channel as a solution to the current shortfall in children's provision that Ofcom has identified. Such a service would preferably use existing assets in terms of spectrum space and other overhead costs, replacing one of its current non-public service channels.

35) Ofcom proposed such a channel - run by Channel 4 or another commercial PSB as a portfolio service, or by a new institution – in its consumer research, and it received a high level of support from the public. Parents wanted a dedicated children's channel offering a safe home for children's public service content (and an alternative voice to the BBC). Ofcom concluded:

“This scenario was chosen by most parents as the preferred scenario. Parents also liked the fact that some PSB children's programming would be provided by a different broadcaster to the BBC, providing the potential for tonally different PSB programming. In addition, as it would be a separate channel, it would be easier to find PSB content compared to Scenario 2, where PSB programming would be embedded in non-PSB channel schedules.”⁹⁰

36) To be clear, we stress that, while we see Channel 4 as a strong candidate for such a service, we would also welcome consideration of other options. Extending the remit of S4C into English-language provision (providing this did not impact on its Welsh-language role) may be worth exploring.

37) A dedicated children's service – run by Channel 4 or another party - would be expected to offer an appropriate amount of new media provision built around it, but we would see a television channel as the core offering.

⁹⁰ The future of children's programming, Ofcom research report, page 129.

Ofcom's consumer research shows that older children (13+) are using new media, but also that parents are concerned that online delivery of public service content is not an appropriate way to deliver public service content for younger children, for reasons of safety, access, and because the interactive nature of the internet may not be suitable.⁹¹

Exploring S4C's role

38)As we have mentioned above, the case for extending S4C's remit to provide an English-language children's channel may be worth reviewing as a long-term option.

39)More immediately, Pact intends to consult with S4C on how the wider exploitation of Welsh-language originated programming for English-speaking audiences might be encouraged. Few companies in Wales are currently originating children's programmes for S4C that are shown elsewhere, and there may be an opportunity to increase the public value of S4C's investment by making its programming more widely available. For S4C to have a real impact on children's programming across the UK, our initial thinking is that it needs to co-produce with other UK broadcasters to a greater degree. As well as generating more programming for broadcast in Wales and the UK as a whole, such a move might also enable companies based in Wales to secure more network-level commissions and thereby develop their businesses.

Additional proposal: the Communications Act

40)As previously mentioned, we ask Ofcom to consider the potential for regulatory intervention. While Ofcom states in this PSB review that its powers under the Communications Act 2003 are limited, it only refers to its

⁹¹ The future of children's programming, Ofcom research report, page 127.

role regarding PSB's changes to programming policy under Section 267 of the Communications Act. However, the Communications Act does allow for Ofcom under certain conditions to require a revision of a provider's statement of programme policy under Section 270 and, under Section 271, for the Secretary of State to modify a public service remit following a recommendation by Ofcom in this PSB review. Both options would seem to offer the potential for ensuring an increased level of children's PSB provision as a short-term solution.

41) We therefore ask Ofcom to clarify what analysis it has done of the case for intervention under Sections 270 and 271 of the Communications Act to require greater commitment to children's programming from ITV and its fellow commercial PSBs.

42) While the public service remit for ITV1 may not explicitly refer to children's programming, we note that Section 270 of the Communications Act applies regardless, if Ofcom is of the opinion that a PSB licensee: "has failed, *in any respect*, to make an adequate contribution towards the fulfilment of public service television broadcasting in the United Kingdom."⁹²

43) Ofcom appears to have already concluded that a failure to contribute to PSB has already occurred. The regulator recently explicitly stated that ITV has an important role as a PSB licensee to contribute to children's PSB, and that any reduction in its children's provision beyond four hours a week would therefore be inappropriate. In its statement this year regarding ITV's reduction of children's hours in its 2008 programme policy statement, Ofcom said:

⁹² Communications Act 2003, Part 3, Section 270 (1) (b).

- “As a PSB, albeit a commercial one, ITV1 has a duty to contribute to the provision of programming that the market would not otherwise deliver. In this context we believe that ITV1 still has an important role to play in the provision of children’s PSB. Therefore - whilst noting the market-related points made by ITV – Ofcom informed ITV of its opinion that it would be inappropriate to change the level of ITV1’s delivery of children’s programmes from 2007.”
- 44)ITV nevertheless reduced its hours from four to 2.5. While this may constitute fulfilling its requirement to take account of Ofcom’s guidance on programme policy under Section 267, we ask Ofcom to clarify whether ITV has made an “adequate contribution” towards the purposes of PSB under Section 270. As Ofcom is aware, the Act clearly defines children’s programming as one of those purposes in Section 264.
- 45)Section 270 would seem to provide considerable scope, applying to a failure to adequately contribute to PSB purposes “in any respect.” Under the Act, Ofcom must be convinced that the failure is serious – Ofcom’s statement this year regarding ITV’s reduction in children’s hours said that: “Ofcom considers that the delivery of PSB content for children is of primary importance.”
- 46)Ofcom must also be convinced that the failure cannot be excused by market conditions – Ofcom’s same statement said that: “Whilst noting the market-related points made by ITV, Ofcom informed ITV of its opinion that it would be inappropriate to change the level of ITV1’s delivery of children’s programmes from 2007.”
- 47)We would therefore ask Ofcom whether it considers it appropriate to require a revision to ITV’s statement of programme policy under Section 270 under which children’s provision would be increased. We also ask

Ofcom to clarify what analysis it has made of the case under Section 271 for it to recommend as part of this current PSB review that the Secretary of State change the PSB licences by order to require a greater level of children's PSB provision.

48) Given that Ofcom has confirmed that children's is the PSB genre under most immediate risk, this issue must be addressed in the short term. Failure to do so would be to ignore Ofcom's own conclusions. Regulatory intervention under either Section 270 or 271 may be a potential way of achieving a substantial improvement in children's PSB provision relatively quickly, potentially during this Parliamentary session. Since this proposal involves a change to the current PSB licences, which are due to expire in 2014, it is by definition temporary and need not prejudice any long-term solution that Ofcom or the Government develop.

Section 11

Do you agree that new legislation will need to be in place by 2011 in order to ensure continued delivery of the public purposes in the medium and long term?

- 1) Pact has consistently argued that a solution for children's programming should be in place before 2011 in order to ensure the continued provision of PSB programming for young audiences at an appropriate level. We welcome Ofcom's statement in this PSB paper that there will be "shortfalls in children's programming" in the short term, ie before 2011.⁹³ We infer from this that 2011 would be too late if children are to be offered an appropriate level of PSB content going forward.

- 2) We have also highlighted funding shortfalls in the nations and regions (non news) through our recent Out of London trend reports. We would argue that programming in the nations and regions is already experiencing shortfalls, as confirmed by Ofcom's recent announcement that ITV has failed to meet its Out Of London quotas two years running. In this light we would say that Ofcom's assertion that "pressures on programming for nations and regions" will occur prior to 2011 is an understatement, and that more urgent measures are called for.⁹⁴

- 3) Additionally, as we have argued, Channel 4 is vital to ensuring PSB plurality and investment in public service content. If in Ofcom's view it is seriously threatened prior to 2011 then we would absolutely support more immediate intervention.

⁹³ PSB Review Phase 1: The Digital Opportunity, Ofcom, page 136.

⁹⁴ Ibid.