

Submission to Ofcom's consultation on  
assessing the impact of the BBC's public  
service activities

**pact.**

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## Introduction

1. Pact is the UK trade association which represents and promotes the commercial interests of independent feature film, television, digital, children's and animation media companies.
2. The UK independent television sector is one of the biggest in the world. Despite the difficult economic climate, independent television sector revenues have grown to around £3 billion in 2015.<sup>1</sup>
3. In 2015, the BBC spent £443 million on commissions from UK external producers. Last year, the BBC commissioned 46% of eligible television content from external producers<sup>2</sup>.
4. BBC Commissions are important for independent producers as they account for 29% of all UK commissions, making the BBC the biggest buyer of content made by independent producers in the UK.<sup>3</sup>
5. Pact recognises the important role that the BBC plays in the UK television marketplace and how it nurtures and adds to the finely balanced TV production ecology in the UK. We are pleased with the renewed charter whereby the license fee has been secured for another 11 years. The BBC is a positive innovator and experimenter in the marketplace and this is often driven by the content which it commissions from independent production companies.

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<sup>1</sup> Pact Census 2016

<sup>2</sup> BBC Annual Report 2015/16

<sup>3</sup> Pact Census 2015

## **1. Overview**

- 1.1 Pact welcomes this opportunity to comment on the draft framework outlined in this consultation to help Ofcom assess the impact of the BBC's public service activities.
- 1.2 We agree that a series of incremental changes over time could be material taken as a whole and strongly agree that both the public value of the service and the adverse effects on competition should be considered under any review.
- 1.3 Pact supports the use of competition reviews as a tool to examine existing services where the BBC has made incremental changes over time. It is important that Ofcom recognises its role to regulate the protection of fair and effective competition and demonstrate clearly to the BBC that it takes full responsibility for this role especially as the BBC's primary responsibility is to fulfil its Mission and Public Purposes.
- 1.4 It is important that Ofcom makes clear from the outset that it will regulate the BBC robustly in these matters because it will establish a transparent compliance regime in the future. Overall the principles set out by Ofcom are helpful. However, the effectiveness of the new regulatory arrangements will inevitably depend on how these principles and the framework are applied in practice and on Ofcom's appetite to open own-initiative investigations where substantive concerns arise.
- 1.5 Pact supports the clear routes identified in this document for third parties to raise concerns. However we urge Ofcom to have a continued dialogue with the BBC on developments within the BBC – particularly where multiple small changes could accumulate into a significant change. Which may have the effect over time of distorting fair and effective competition.

### **Pact believes complainants should be able to put forward confidential information possibly via representative parties**

- 1.6 In deciding whether or not to initiate a BCR we think that contact details of any third parties should be provided confidentially so that it makes it easier for our members to come forward with concerns. We're happy to be able to represent the concerns of members and to be a main contact point.
- 1.7 As part of the evidence gathering to decide on whether to initiate a BCR Ofcom has indicated that any complaint will be non-confidential. As we do not think the complainant should be non confidential we would like to clarify that representative organisations will be able to voice concerns in this instant as it will be harder for members to come forward with a request especially if it is in connection with commissioning. As they may be concerned that this could damage their future opportunities at the BBC.

### **Ofcom should keep channels open as far as possible with the BBC to keep abreast of developments that could have a long term impact**

1.8 We welcome that Ofcom has the power to carry out its own initiative investigations. Pact believes that in considering whether to undertake such investigations, it is important that Ofcom considers any informal representations it has received from third parties, especially if confidentiality is not guaranteed in any formal request. Given such a high bar set in terms of requirements a request has to meet, which we agree with, it inevitably means that incremental changes to certain services may be overlooked. For example under the Trust's public value tests it was noted in the Fingleton report on fair trading that third parties were not able to comment on the cumulative changes to iplayer as iplayer is covered by the BBC Online Service Licence and is not a service in its own right and accordingly did not meet the threshold for a public value test.<sup>4</sup> Therefore knowing what the mechanisms are for monitoring small changes that may have a cumulative detrimental impact will be vital.

1.9 Pact calls for a commitment from Ofcom that it will consult the complainants on any solutions offered by the BBC at this stage – if it is minded to accept them before making a final decision. This will give the opportunity for third parties to comment on the public service activity and if it could have a significant impact on fair and effective competition.

1.10 It will be incredibly important for Ofcom to keep channels open and to closely monitor developments within the BBC – particularly where multiple small changes may have a cumulative impact. We believe Ofcom will be in a unique position by having significantly more information than others about what activities the BBC will be developing. Ofcom should not rely wholly on external parties to identify concerns, since it will often be aware of developments in advance and others in the wider market may not become fully aware of changes until after they have affected their markets.

### **Pact welcomes the clear routes for third parties to voice their concerns**

1.11 We welcome the opportunity given to third parties to comment on the scope of any BCR that Ofcom might carry out.

1.12 We also welcome the restrictions on changes to relevant public service activities during a BCR and believe this should be the case early on in the process and that restrictions on changes should be in place as soon as a substantive BCR request has been lodged.

1.13 It also puts heightened onus on Ofcom to be fully responsible for enforcing fair and effective competition especially as the BBC does not see itself as having a key responsibility for this.

1.14 We welcome Ofcom's decision to allow third parties and the BBC to comment ahead of published final conclusions and think the timings for consultation on the provisional

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<sup>4</sup> Fair trading policy review, A report for the BBC Trust, p21 April 2015

view is appropriate. However, we believe that where the BBC makes proposals which are significantly different to Ofcom's provisional conclusions then third parties should have the chance to comment on them before Ofcom make a final decision.

1.15 We welcome the requirements that Ofcom has identified to ensure the BBC complies with Ofcom's determination along with any directions it offers especially any directions where Ofcom considers are appropriate to mitigate adverse impacts. Pact calls again for the reasons outlined above that third parties should have the opportunity to comment on the BBC's implementation of final conclusions.

**Ofcom should not be restricted by resource implications if a significant regulatory issue needs investigating**

1.16 We would also like to raise the point that Ofcom should not be in the position that allows them to refrain from investigating a potentially significant regulatory issue because of resource constraints – that would not give comfort to the market nor third parties.