



Response to:

**The BBC's commercial activities: A consultation on
Ofcom's proposed requirements and guidance**

February 2017

1. General Comments

- 1.1. TAC is the trade association which represents the independent TV production sector in Wales, which is comprised of around 60 companies making content for all the UK Public Service networks, plus BBC Wales and S4C, as well as being involved in international co-productions.
- 1.2. During the BBC Charter Review process, TAC supported the idea of Ofcom regulating the BBC and put the arguments for doing so directly to Sir David Clementi and the Secretary of State for Culture Media & Sport, as well as putting them in its written response to the Green Paper. We are therefore pleased that Charter Review decided to proceed with the BBC being regulated by Ofcom, and look forward to working with Ofcom going forward.
- 1.3. In relation to this consultation on the BBC's commercial activities, broadly TAC is of the opinion that Ofcom's proposed requirements and guidance are sound. We do however have a small number of comments which we hope will be of use. We are of course happy to discuss any aspects of these with Ofcom at any time.
- 1.4. In general we believe that in some of areas discussed, there is a need for a fairly proactive approach by Ofcom. With specific regard to areas such as transfer pricing, which could have an immediate and highly detrimental effect on the indie sector, Ofcom should require regular reporting from the BBC on how they are adhering to the requirements set out in the consultation.

2. Comments on specific aspects of the proposed approach:

We have commented below on specific paragraphs within the Ofcom consultation.

Relevant paragraph	TAC comment
1.21	We note that 'Ofcom has discretion about when we open an investigation'. We welcome this provision and would ask it is born firmly in mind. An organisation as large and diverse in its operations as the BBC will be engaged in a wide range of activities, some of which may not neatly fit into categories of what should and shouldn't be investigated, and it is therefore Important to have an eye to deciding each case on its merits.
1.25	This para notes that Ofcom will be looking into the operation of the BBC's commercial subsidiaries with regard to issues such as transfer pricing. Ofcom will be aware that fairness and transparency in such aspects of BBC activity are crucial to the independent production sector. BBC Studios will be directly competing with indie production companies whose only income is that gained through their own production businesses. It is very important that the BBC is seen to operate at market rates and not use it size of operations to drive down prices or cross-subsidise productions.

1.27	<p>With respect to Ofcom carrying out a review of BBC Studios, Ofcom states that ‘We will consider whether this is appropriate in due course.’ We would urge strongly that an early review of BBC Studios is conducted, as concerns currently exist within the independent production sector that BBC Studios will have an unfair advantage in bidding for the production of programmes currently produced by the BBC.</p> <p>BBC Studios should be considered at this very early stage rather than left until the entity is well established and has won a number of tenders and commissions.</p> <p>Independent companies are currently investing significant resources in preparing tender submissions in direct competition with BBC Studios without there being complete transparency of costs of production, recharge rates for BBC Public Service overheads and use of facilities, audience research information etc. Decisions are currently being made in the awarding of tenders and it would be dangerous to operate a ‘wait and see’ approach in this respect, due to the fact that any issues over its activity in the market could have a significant negative impact on the independent production sector.</p> <p>Such effects would therefore need to be identified swiftly and corrective measures employed.</p>
3.18	<p>Regarding operational separation requirements, we agree with the measures Ofcom is proposing, and would ask that Ofcom ensures that it is demonstrated regularly by the BBC that aspects such as commercial subsidiaries not having any additional information about the BBC Public Services’ strategy must be strictly adhered to.</p>
3.24	<p>We agree with the measures set out in the table. Again we would like more detail on how Ofcom might require the BBC to regularly report on how it is adhering to these standards.</p>
3.26	<p>With regard to the BBC seeking efficiencies such as centralised HR or IT, we would again ask that Ofcom require demonstrable evidence that this could be done in a way that it could not lead to breaches of confidentiality. If the independent sector wishes to raise an issue in which it send to the Public Service confidential documents or sensitive comments about one or more individuals working in a commercial subsidiary, it needs to be certain that this cannot be compromised.</p>
3.38	<p>‘The BBC must ensure that any pricing methodologies and terms and conditions are reviewed regularly, and consistent approaches are applied to any similar goods and services.’</p> <p>This is clearly crucial to maintain the integrity of the operations of subsidiaries such as BBC Studios, and again we would like assurances that Ofcom will be proactivity ensuring that such reviews are carried out and evidence of having done so provided to Ofcom for verification.</p> <p>Clarity is required in terms of the commercial subsidiaries’ ability to borrow money to fund the businesses and to enter into long term leases etc. In which case the Public Service entity should not be used as guarantor or similar arrangement. Similarly should it be decided to close down any of the commercial subsidiaries then the Public Service funds should not be used to defray any losses.</p>
3.43	<p>‘A commercial activity need not generate a profit every year particularly if it is a new activity ... However, the plan must forecast a profit (by which we mean the expected</p>

	<p>return is higher than the opportunity cost of capital) over an appropriate period of time’.</p> <p>We would like clarification on what Ofcom considers an ‘appropriate’ period of time. Clearly there is a concern that with BBC Studios being a new activity, it could be allowed to run at a loss for a period of time unsustainable to an independent company, and thus be able to compete unfairly against other new entrants in the market. In addition clearly to be competing against indies whilst running at a loss is a luxury an indie could not afford and thus again provide the BBC with an advantage against existing independent companies.</p>
3.47	<p>‘In extreme circumstances, if there are concerns that the BBC has not established an appropriate rate, or has not established it at a sufficiently granular level, Ofcom may review the BBC’s work in establishing the rate of return and make directions to the BBC to develop an appropriate rate of return.’</p> <p>With regard to this para we feel it should not necessarily wait until ‘extreme circumstances’ are reached, rather it should apply automatically to instances where the BBC is entering an already vibrant market, such as the production sector.</p>
3.53	<p>‘Where Ofcom is concerned that a line of business is not earning a commercial rate of return, or considers that remedial steps decided on by the BBC are insufficient to rectify performance, Ofcom may launch an investigation.’</p> <p>As per the above, we would argue that such circumstances should automatically lead to an investigation.</p>
3.58	<p>‘Where Ofcom is concerned that a line of business is not earning a commercial rate of return, or considers that remedial steps decided on by the BBC are insufficient to rectify performance, Ofcom may launch an investigation.’</p> <p>This is an important measure which we believe should be accompanied by a system of confidential reporting to Ofcom as to how the BBC is managing to apply these methodologies in practice.</p>
4.22	<p>‘As the Agreement requires the BBC to have already consulted with interested parties as part of formulating its proposals, we would expect third parties to have well developed comments by the time we and the BBC publish the final proposals.’</p> <p>We would like Ofcom to note the potential difficulties in certain instances where the BBC might, in order to correctly ascertain whether there is a material change, that third parties may have to submit confidential information. We would like there to be provision for Ofcom to be asked to assess certain figures or other material and give its verdict to the BBC if necessary, rather than have the information supplied to the BBC direct.</p>