

Ofcom draft Annual Plan 2018-19– response from the Welsh Government

The Welsh Government welcomes this opportunity to comment on Ofcom's draft Annual Plan for 2018-19. We will provide comments below on the areas of Ofcom's proposed priorities and work plan which are of importance to the Welsh Government.

Ofcom's role in a devolved Wales

In recent months the Welsh Government has worked with Ofcom and DCMS to finalise the Memorandum of Understanding (MoU) outlining the relationship between UK Government, the Welsh Government, the National Assembly for Wales and Ofcom, arising as a result of the St David's Day Agreement and the subsequent Wales Act 2017. We hope that this MoU will be signed shortly.

The MoU commits Ofcom to consulting the Welsh Government on its draft annual plan and sets out the process for Welsh Ministers to appoint a member for Wales to the Ofcom Board for the first time. It also reinforces Ofcom's accountability to the National Assembly for Wales.

The Welsh Government intends to proceed with the recruitment of an Ofcom Board member for Wales as soon as possible and discussions are ongoing with Ofcom Wales officials and DCMS.

During our response to Ofcom's Annual Plan for 2016-17 and 2017-18, we referred to Ofcom's intention to increase its visibility and presence in Scotland and asked whether there was any intention for a comparable expansion in the other devolved nations, including Wales, to ensure parity with Scotland. We did not receive an explanation from Ofcom in relation to this.

We also note that an increasing number of posts advertised by Ofcom are specified as being located in either London or Edinburgh. We would again be interested to know the rationale behind this and why Cardiff (where the current Ofcom Wales office is located) is not also listed. In the same way there is a reference in the draft annual plan (6.9) to the successful relocation of a number of roles to offices in the North West of England and Scotland – again we would ask why Wales is not being considered.

In the context of Ofcom's additional regulatory responsibilities following the BBC Charter Review, we remain concerned as to whether Ofcom, at a UK level and in Wales, has the sufficient capacity to undertake these additional responsibilities.

Welsh Ministers would welcome the opportunity to discuss a number of the ongoing developments outlined in this response with the new Chair of Ofcom, as well as continuing the dialogue with the Chief Executive of Ofcom which began when she met Welsh Ministers in September 2016.

Broadcasting

Ofcom's new role as external regulator of the BBC

We recognise that this is currently a transitional period for Ofcom in relation to its new role as external regulator of the BBC, which we acknowledge is complex and wide-ranging. It is vital that the BBC delivers over the next Charter period against its strengthened mandate and duties to the people of Wales, as well as to the other nations and regions of the UK.

We welcome the fact that Ofcom will be looking at how the BBC is meeting the requirements under its Operating Framework and Operating Licence, as well as reviewing proposals for new BBC public services and their potential impact on competition. We also welcome that Ofcom will review the requirements for programmes with particular public service value to UK audiences, for example programmes made outside of London. In addition, we welcome the proposal to look at diversity and equality of opportunity in television and radio broadcasting and report on how the industry is performing. We would expect this work to recognise and include consideration of equality of opportunity across the diverse cultures of the nations and regions of the UK.

We welcome Ofcom's intention to complete the integration of its new responsibilities for regulating the BBC and the publication of your first annual report on the BBC's performance against the specific requirements in its Operating Licence and Operating Licence - including the particular requirements for the BBC to deliver in each of the UK's nations. We especially welcome the fact that Ofcom's first thematic review will focus on how the BBC reflects and represents the diverse communities of the UK's nations and regions

We welcome the details provided (5.9) about how Ofcom will regulate the impact of the BBC on fair and effective competition, although this underlines the importance of the issues we raise below in relation to the BBC's fifth public purpose: *To reflect the United Kingdom, its culture and values to the world*, which we urge Ofcom to consider.

The Welsh Government provided a detailed response in July 2017 to Ofcom's consultation on its first Operating Licence for the BBC¹.

In our consultation response, we raised a number of serious concerns about the draft Licence, which we strongly urged you to address to create a final Licence that was fit for purpose. It was disappointing that the Licence was not amended to reflect a number of important improvements which were suggested and explained in detail by the Welsh Government in its response to the consultation. We will refer to some of these concerns below.

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0016/105361/Welsh-Government.pdf

The BBC's first public purpose: To provide impartial news and information to help people understand and engage with the world around them.

We emphasised that the high-level objective for the BBC to *“seek to maintain its coverage of regional, national and international themes and stories within its news, current affairs and factual programming...”* (now at 1.24.2 in the final Licence) is wholly inappropriate. It implies that current activity is delivering sufficiently for people in the nations and regions, which is entirely contrary to the recognised need (in your consultation document) for the BBC to better serve all audiences and to *“improve its representation and coverage of the devolved nations in its news, current affairs and factual output”*. The BBC itself acknowledges this deficit and we therefore asked that this objective be significantly strengthened in the final version of the Licence. That it has been left unchanged is striking.

We asked that Ofcom develop a genuine performance measure to assess the impact of the BBC's news services on democratic engagement and awareness. We welcome Ofcom's intention now to *“ensure that research conducted in the nations as part of the performance tracker and separate News Consumption Survey will have a robust sample”* and we will monitor the effectiveness of this carefully - but the absence of an appropriate regulatory condition in the Licence itself, to ensure that further improvements are delivered upon, remains a concern.

We also identified a straightforward opportunity for Ofcom to address the issue of democratic engagement by extending a high-level objective under public purpose four to include *“appropriate coverage of issues relevant to that nation or region in news and current affairs services aimed at those audiences and on the network”*. This very simple but powerful change was not made.

The BBC's fourth public purpose 4: To reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions.

Ofcom's decision to set quotas for BBC production in the nations and regions at levels equating to population share is arbitrary and potentially economically damaging. Also, as we noted in our response, setting these quotas below historic and current performance levels is contrary to the requirement in the Charter and Agreement for the first Licence to *increase* current requirements to secure provision of more distinctive output and services.

We are particularly disappointed that Ofcom hasn't simply ignored calls from stakeholders, including the Welsh Government, to strengthen quotas for production outside the M25 and in the specific nations and regions – it has emboldened the BBC to retain production inside the M25 at the expense of other parts of the UK. The BBC, in its main response to your consultation, claims that it would not be able to meet your proposed 34% target for production in the English regions without moving *“c.£35 million of content spend from areas of ‘over-delivery’ – London, Scotland and potentially Wales”*, stating that this would *“penalise creative success and put a cap on growth in particular areas (e.g. Wales) because of the need to move programmes to another area to meet different annual quotas”*.

It is simply not acceptable for the BBC to equate Wales and Scotland with London as areas of supposed 'over-delivery'. We are surprised Ofcom has accepted this statement without question. The M25 area is of course a historic centre of the UK's creative industries and we too recognise "*London's value as a world-class creative hub*" - but in 2016 it still attracted 49.4% of the BBC's production expenditure, despite being home to just 13% of the UK's population. The purported 'over-delivery' in Wales and Scotland, which is marginal in comparison, is a welcome but very recent development following many years of under-investment. The apparent inference that the BBC would consider sacrificing production in the nations in order to deliver more for the English regions, rather than moving activity out of London, is entirely inappropriate.

It is time the BBC was directed to further reduce its activity within the M25, to a level significantly lower than 50% - and to spread the benefits of that activity across the rest of the UK. Instead, Ofcom has confirmed the inadequate, population share targets for production in the nations - effectively mandating the BBC to curtail production in Wales and Scotland if it wishes to. Ofcom states that to do otherwise "*risks 'baking in' the current distribution of BBC production across the UK, with the result that some areas would benefit, and others lose out*". This statement does not stand up to scrutiny, especially as Ofcom has done precisely this for London, by "baking in" to the Licence the BBC's ability to retain up to 50% of its production activity within the M25 and reducing the English regions target to 30%.

We welcome Ofcom's review of its Made Outside of London guidance and we will continue to engage fully with that work – but improvements in Ofcom's guidance to the BBC about what qualifies as out of London activity will only deliver significantly improved outcomes for the nations and regions if the fundamental flaws in the production quotas you have set are also addressed.

The BBC's fifth public purpose: To reflect the United Kingdom, its culture and values to the world.

Ofcom's argument for excluding the fifth public purpose from the draft Licence was based on the presumption that the World Service is the sole mechanism for its delivery. We agree that the World Service is separate to the UK Public Services and a matter for the BBC Board. However, we pointed out that the BBC's Annual Plan sets out *three* delivery strands for this purpose – the World Service, commercial news services and BBC Worldwide. We noted that a major part of BBC Worldwide's remit is to commercialise content originally created for the UK Public Services. This is both an opportunity (to reflect more and better content for or about the nations and regions to the rest of the world) and a risk (that the driver to monetise public service content might erode its quality and distinctiveness).

We therefore urged Ofcom to consider its role in monitoring and regulating these matters and to amend the Operating Licence accordingly. In your final statement you acknowledge that we raised a concern, but you ignore altogether the role of commercial news services and BBC Worldwide in delivering against this purpose. Instead you continue to rely on a presumption, which the BBC's Annual Plan shows to be incorrect, that this purpose relates solely to the World Service. We hope you

will yet realise that the nations and regions are not well served by the decision to entirely abdicate this responsibility to the BBC Board.

The above is not an exhaustive list of outstanding issues, but it does illustrate some of the key areas where we expected more from Ofcom in its first BBC Operating Licence. We will continue to liaise constructively with Ofcom, to ensure that the BBC is properly held to account for the delivery of its services. The Welsh Government and the National Assembly will both be closely monitoring the BBC's progress against the requirements of the Service Licence.

We welcome your assurance that the Operating Licence and performance measures will evolve over time and that you expect the BBC to continue improving how it delivers against its remit.

Other broadcasting matters

It is vital that Ofcom continues to fulfil its obligations in relation to public service broadcasting in Wales, including those related to ITV Cymru Wales, S4C and Channel 4.

We do not intend to repeat what we have said previously to Ofcom in relation to public service broadcasting, including the substantive points made in our response to Ofcom's third review of public service broadcasting, which is available on Ofcom's website².

We acknowledge the reference in the plan (4.21) to Ofcom working with the UK Government and S4C to implement any recommendations relating to Ofcom arising from the independent review of S4C. The Welsh Government will also consider in detail the findings of the review and discuss where relevant with all the relevant stakeholders, including Ofcom.

We welcome Ofcom's intention to review the guidance to Public Service Broadcasters for production outside of London, and consider if this remains fit for purpose in supporting and strengthening production across the UK's nations and regions (3.18).

We are also interested in the publication of your second annual report on the UK TV industry and your first report on the UK radio industry to analyse how broadcasters and the industry are performing on equality of opportunity, diversity and inclusion in employment (3.20). These reports will obviously feed into the forthcoming report on how the BBC reflects and represents the diverse communities of the UK's nations and regions.

In section 5 of the report *Ongoing work to fulfil our duties* and specifically in *Other work across our goals*, where there is a list of where Ofcom plan to engage with the UK Government, devolved governments and administrations on a number of issues,

²http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/responses/Welsh_Government.pdf

we are surprised that there is no specific reference to engaging on public service broadcasting matters generally.

When television and radio licenses for stations in Wales are awarded or reviewed, due consideration should be given to the bilingual nature of Wales and the importance of the Welsh language in the context of the Welsh Government's aim of having one million Welsh speakers by 2050 by specifying in the contract that a set number of hours be broadcast in Welsh along with a statement about Welsh-language web content such as text, streams and clips.

Therefore, in the context of section 4.6 of the plan, *National, regional and local broadcasting services should also meet the needs, and reflect the diversity, of audiences across the regions and nations of the UK*, linguistic diversity, especially the Welsh language in services for Wales, should be set as a target when granting and regulating services for Wales.

Radio

We recognise that there have been improvements in DAB coverage in some parts of Wales during recent years and we urge Ofcom to continue to liaise with relevant stakeholders, including the BBC, to ensure that this continues. However, the Welsh Government's position in relation to digital radio switchover has not changed. The Welsh Government has consistently stressed that we would not be in favour of digital switchover for radio until there is a guarantee of at least 97% coverage for DAB throughout Wales. The DAB service in Wales should not be worse than Welsh AM/FM radio coverage at present and should be available in areas where currently the national radio stations can only be received on the AM spectrum.

Despite improvements in coverage of DAB in some parts of Wales, there is still a long way to go before it would be appropriate to consider digital radio switchover in Wales.

Telecoms

General

We broadly welcome the Annual Plan in relation to telecoms.

The emphasis on creating the right conditions to support network investment reflects our own ambitions both in terms of mobile and fixed connectivity. So too is the focus on the need to balance encouraging effective competition to deliver investment with securing positive outcomes for consumers in the shorter term.

The recognition that mobile coverage in some parts of the UK is still relatively low and the very real risk that rural consumers will continue to experience difficulties in using mobile services mirror our concerns in Wales. Likewise the recognition that many UK homes have a download speed of less than 10Mbps.

Our response focuses on ensuring that the activity planned during the next year helps support infrastructure investment in Wales, but also to ensure that the outcomes of your work are fit for Wales.

Regulation in Wales

This is an area that was raised in our response to the consultation on the Annual Plan last year and has been made subsequently in a number of different fora.

The Annual Plan should make clear that in developing new regulatory approaches that they are appropriate for the market, topography and population density in Wales in terms of promoting competition and supporting improvements in network coverage and capacity in terms of mobile and fixed line communications.

When considering its position regarding a particular market, Ofcom often offers a binary choice between deregulation and continuing ex ante regulation. A more innovative and creative approach may be required where the geography and population density within parts of the UK lead to market failure in some locations that is not reflected in a macro-level assessment of that market as a whole. Large tracts of rural Wales, for example, are likely to benefit from continued (or even increased) ex ante regulation for a range of telecoms services while the same services could potentially be deregulated in Cardiff.

Mobile Action Plan for Wales

We welcome the reference to the Mobile Action Plan for Wales and the continued commitment to collaborate with the Welsh Government to improve mobile voice and data connectivity. However, we would like to see a reference to working more closely to understand the opportunities, and challenges, of geographically differentiated regulation to create the right conditions to support network investment to improve mobile connectivity and mitigate the risk that rural consumers will continue to experience difficulties in using mobile services.

700Mhz Spectrum

The award of the 700MHz spectrum has great potential to deliver usable and reliable mobile voice and data coverage in rural areas. To this end we would like to see appropriate geographic coverage obligations attached to the auction. To ensure the obligations are fit for Wales we would like to see a commitment included in the Annual Plan to engage with the Welsh Government and other stakeholders in Wales in the design of the auction.

Other mobile interventions

We would like to see Ofcom to set aside some resources to investigate other regulatory interventions to improve mobile coverage in rural areas. Mast sharing continues to be an issue that is raised with Welsh Government as is mobile roaming. Are there measures that Ofcom could introduce to further encourage or compel mast sharing? Despite opposition from industry, roaming, albeit on a geographically differentiated basis, remains an attractive proposition. It would be useful to understand the impact of roaming and how Ofcom could use the regulatory tools at its disposal to introduce it.

Competition Assessment of the Business Connectivity Market

An assessment of the business connectivity market is welcome. It would be useful for the assessment to focus on those areas of the country where there is little or no diversity of supply, in particular where there is latent demand or likely future demand for enterprise level connectivity. It would also be helpful to assess whether specific regulatory interventions need to be introduced in these areas to encourage competition.

Openreach reform

As highlighted in our response to last year's annual plan we would welcome a greater focus on scrutiny of the performance of Openreach by Ofcom. This is particularly pertinent in light of the legal separation of Openreach from BT.

From correspondence and representations we have received missed engineers appointments and the inability of customers to be able to communicate directly with Openreach continue to cause frustration.

In reforming Openreach there is not only a need to ensure that the separation from BT is properly monitored but also that Openreach deliver their key objectives and become more open and transparent with end users.

Dark fibre remedy

A dark fibre remedy would undoubtedly help increase competition to Openreach and help to increase diversity of supply particularly for alternative providers and large organisations.

Universal Service Obligation

It would be helpful to have more information about the role of Ofcom around the design and introduction of the regulatory USO in the Annual Plan specifically how Ofcom will engage with stakeholders including the Welsh Government.

Innovation

We recognise the fast paced nature of change in technology in telecommunications the challenge this poses to regulators. It would be useful to see in the Annual Plan how Ofcom intends to innovate to keep pace and how it will engage with stakeholders at home and abroad to develop innovative solutions.

Ofcom also need to ensure that regulation does not stifle innovation in the telecoms sector. It would be helpful in the plan to see what work Ofcom is doing to encourage and to identify and remove barriers to innovation.

Copper/Fibre substitution

We would welcome Ofcom's view on how regulation can, as part of a wider suite of measures across Government, Industry and Regulator, to stimulate and encourage copper-fibre substitution over the next ten years so that the UK fixed line market follows the global trend toward ubiquitous full fibre connectivity. The EU has set an ambition to see all European Households with access to minimum 100Mbps services by 2025, and while advances to copper connectivity may see such service being viable over FTTC in time, the reality is that, ultimately, future bandwidth requirements will require full fibre. There is an opportunity and a need to proactively pre-empt this trend through policy, regulation and investment decisions. This is an area that should take prominence in future Annual Plan publications.