



Ofcom Review of Regional TV Production and Programme Guidance: consultation

BBC Response

February 2018

Contents

Contents	1
Executive summary / Introduction.....	2
1. Applying the Regional Production Criteria Flexibly	4
2. Changes to Substantive Base Criterion.....	10
3. Response to consultation questions	12
4. Treatment of Network / Nations & Regions co-commissions.....	34

Executive summary / Introduction

The BBC welcomes the opportunity to respond to Ofcom’s Consultation and its proposed changes to the Regional TV Production and Programming Guidance (the “**Ofcom Guidance**”). In particular, the BBC supports Ofcom’s determination to clearly state the overarching policy objective of the regional production regime – “*to support and strengthen the television production sector and creative economies of the UK’s nations and regions*” - and for this to be a benchmark against which to assess any proposed changes to the Guidance.

In response to Ofcom’s Call for Evidence,¹ the BBC suggested that these issues could be best addressed through an industry working group, bringing together stakeholders from across the production and broadcasting industry to develop a common set of standards against which all productions could be measured.

It was against this backdrop that the BBC came together with the other public service broadcasters (“**PSBs**”), to discuss and compare their interpretation of the Ofcom Guidance as it is applied in practice. As a result of these discussions, in December 2018, the PSBs jointly published guidance on its interpretation of the Ofcom Guidance (the “**PSB Guidance**”).² The PSB Guidance was developed to provide greater clarity and practical advice to the UK production sector to ensure a consistent approach to the application of Ofcom’s regional production criteria across the industry. It draws on the extensive experience these broadcasters have in commissioning and producing programmes in all genres across all regions of the UK. As such, it provides the most practical approach to the application of the criteria.

The BBC is, therefore, pleased to see that Ofcom’s proposals are broadly in line with the PSB Guidance. However, some of Ofcom’s proposals depart from the PSBs’ interpretation and risk having unintended consequences. In particular, it is important to acknowledge that the Ofcom Guidelines should not be applied in a ‘one-size-fits-all’ way. Television production varies across genre, location and size of production. It is, therefore, crucial that Ofcom Guidance can be applied flexibly, on a case-by-case basis, to enable the broadcasters to make meaningful and effective investment in regional production ecosystems.

The BBC is particularly concerned that Ofcom’s proposed changes to the substantive base criterion could constitute a significant and destabilising change to the current regime and impact the future development of certain production ecosystems.

¹ [BBC Response to Ofcom’s Call for Evidence: review of regional TV production and programme guidance](#), June 2018

² [Joint broadcaster guidance for application of regional production definitions](#), December 2018

This submission sets out the BBC's comments on Ofcom's proposals. We address each of Ofcom's questions below, but first we discuss:

- Why it is essential that the regional production criteria can be applied flexibly when required; and
- The BBC's concerns relating to Ofcom's proposed changes to the substantive base criterion.

1. Applying the Regional Production Criteria Flexibly

Ofcom acknowledges that TV production in the UK nations and regions is primarily driven by PSBs. As outlined in the BBC's response to Ofcom's Call for Evidence, the BBC, as the biggest commissioner of TV content in the UK's nations and regions and a major producer in the UK's nations and regions via BBC Studios, plays a substantial role in supporting the continued growth and sustainability of regional TV production.

Support for regional production is fundamental to the BBC's Mission and Public Purposes which include a duty to "*reflect, represent and serve the diverse communities of all of the United Kingdom's nations and regions and, in doing so, support the creative economy across the United Kingdom*".³ And the BBC takes its responsibilities seriously. This is demonstrated by the broad range of activities the BBC has engaged in to boost regional production. The BBC now:

- Makes more programmes outside London than any other broadcaster.
- Accounts for more than 80% of network TV spend in the devolved nations.
- Invests around half a million pounds a year supporting the business and ideas development of small Indies – the vast majority out of London.
- Actively supports relevant training and skills development initiatives.
- Allocates £2m a year to support additional effort to support nation and regions portrayal and has writers rooms based in all three devolved nations and the North of England.

But the BBC cannot do this alone. Developing regional production requires a partnership between the BBC, other broadcasters, the production industry and local economies.

In April 2018, Charlotte Moore, the BBC's Content Director, gave a speech at the Creative Cities Convention in Leeds in which she discussed BBC initiatives to grow the production skill base outside London. The success of these initiatives depends, she said, on "*creative partnership between broadcasters, producers, investment agencies, local authorities, colleges and businesses. Everyone plays their part – and together our impact will be even more powerful*".

What makes these partnerships successful is the ability to flex and adapt to the unique needs of each individual production and the unique characteristics of each regional production ecosystem. Not only do we believe in this, we are acting on it in most of the ecologies outside London. For example:

³ Article 6(4) of the [BBC Charter, 2016](#)

- We have set up new Writers Rooms to discover, develop and champion new and experienced writing talent in all three nations, in addition to the existing ones in the Nations and Regions.⁴
- We have invested in a Comedy Writers programme in Scotland.⁵
- The BBC has funded five bursaries for out of London production companies as part of the Indie Lab ‘business accelerator’ programme.⁶
- The BBC, in partnership with the Scottish Government launched a hub of the National Film and Television School at the BBC’s studios in Glasgow.⁷

Where possible, the BBC seeks to grow local economies by working closely with existing production talent and existing companies to develop commissionable ideas. This works where an ecosystem already supports strong established companies with experience delivering to commissions and a broad talent base to support those commissions.

An example of this is North West England region which is cited in O&O’s Report as being “*the most active region with roughly £550m of origination spend in 2017*”.⁸ It is clear that the BBC decision to move several core departments to Salford has been the catalyst for substantial growth and development of independent production talent in the region. As set out in more detail in the BBC’s response to Ofcom’s Call for Evidence and the O&O Report, the BBC’s investment created substantial new employment in the creative sector and resulted in ‘network effects’; the BBC’s presence attracting other media organisations and helping to establish MediaCity as a hub for firms with creative and digital capabilities.

But the success of the North West cannot be replicated everywhere. Furthermore, the development of regional production cannot and should not be restricted to ‘big bang’ interventions such as the BBC’s move to Salford or Channel 4’s anticipated move to Leeds. In regions that don’t have sufficient pre-existing scale to attract and retain the quality of talent needed for BBC TV programmes, intervention needs to be more ‘grass-roots’.

“We know smaller ecologies have smaller talent pools, and we sometimes need to invest in training, development, and shadowing skills to get there. And we know that when facilities and specialist production companies are in short supply it can hold things back. So we need to create an industry wide dialogue that is open and honest – and focused on moving things forward. We need to work in

⁴ <https://www.bbc.co.uk/writersroom/>

⁵ <https://www.bbc.co.uk/mediacentre/latestnews/2018/scottish-comedy-writersroom>

⁶ <https://www.weareindielab.co.uk/>

⁷ <https://www.bbc.co.uk/mediacentre/latestnews/2017/scotland-film-tv-school>

⁸ [O&O, Regionality trends within the UK productions sector: report for Ofcom](#), September 2018

partnership with funding agencies, local authorities, local businesses, skills and trade bodies, schools and colleges.” (Charlotte Moore, Leeds, April 2018)

One approach that the BBC has found to be particularly effective when it comes to spreading investment around the UK is to relocate existing productions to a new region - seeding the local production ecology (which may be thin on the ground or failing to thrive) with talent and expertise from outside the region, including from London. This approach is also referred to as ‘lift and shift’.

This ‘seeding’ approach can work not only to create new production ecosystems but also to expand capabilities within an existing ecosystem: introducing new techniques and styles of production; or expanding the range of local talent to new genres or sub-genres. For example, introducing a ‘fixed rig’ series to a new location can provide valuable experience for local talent/production companies to expand beyond more traditional observational documentaries.⁹

In response to Ofcom’s Call for Evidence, the BBC cited multiple examples of how relocating a returning series can help strengthen and grow regional production in a new location:

- Establishing *Casualty* and *Doctor Who* in Wales provided the vehicle for production drama talent to locate there and develop more indigenous local production ecosystem.
- The move of *Egg Heads* and *Weakest Link* to Scotland led to the creation of a quiz genre-specialism utilizing the studio complex in Glasgow.
- The move of *Defenders UK* to Wales, enabled production company Raw Cut TV to establish a new subsidiary, Tomos TV in Cardiff which was able to seek further commissions from the BBC and other broadcasters.

A recent example of how the BBC has used ‘lift and shift’ successfully is the relocation of the *Great British Menu* to the Midlands.

Case Study: *Great British Menu*, BBC Two



The *Great British Menu* is a long running series on BBC Two in which top British chefs from different regions of the UK compete for the chance to cook the courses of a four course banquet. The series launched in 2006, produced by Optomen, an

⁹ <https://rts.org.uk/article/how-fixed-rig-has-transformed-factual>

independent production company based in London. To date, the *Great British Menu* has been produced from Optomen's production offices in London.

In 2018, the BBC negotiated for the series to relocate to the Midlands, requiring significant investment by Optomen: locating and fitting out a suitable new production facility incorporating fully functioning kitchens, assembling a new production team and support services.

Given the risk associated with this investment, Optomen was not willing to move outside of London without a firm commitment from the BBC. The BBC was able to offer a commission for three series/years and an upfront payment to cover initial capital costs. On the basis of this deal, Optomen had the confidence to dispose of its London studio and make the move to the Midlands.

Ofcom's own evidence demonstrates that the Midlands has struggled to sustain a competitive production ecology:¹⁰

- In 2017, there were only two active production companies in the Central Midlands, down from six in 2008.
- In 2017 only 2% of first run network originations were produced in the Midlands.
- Production in the Midlands heavily skews towards soaps.

For these reasons, it would not have been realistic for the BBC to partner with an indigenous production company or to expect an existing production company to establish a new base without a guaranteed commission. But, by relocating the *Great British Menu* to the Midlands, the BBC and Optomen provided a valuable boost to the local production ecology. Optomen has created 50 new production roles in the region which will last for three years; helping to strengthen local production skills-base and expanding the repertoire of local production talent from soaps to factual entertainment.

Moreover, the move has enabled Optomen to bid from that base for other business from the BBC and other broadcasters. Since establishing their new base, Optomen has gained two new commissions for programmes made from its Midlands base: one for Channel 4 and another for BBC Three. As a result, Optomen sees this move as a really positive commercial opportunity which the initial *Great British Menu* commission made possible.

¹⁰ [O&O, Regionality trends within the UK productions sector: report for Ofcom](#), September 2018

It is clear that London still plays a major part in the development of regional production bases. Ofcom cites data which shows that:

“over a third of nations and regions hours come from independent producers headquartered in London ... the proportion of hours and spend accounted for by companies with no presence outside the M25 is small [and] 79% of hours made by external companies with an HQ in London were attributed to an office outside the M25.”

It is clear that regional production can be stimulated through the creation of new substantive bases outside London, regardless of where a group HQ is located. For example, empowering a London-based company to create a new base outside London shows the positive role that London can play on developing and growing production capacity in the regions. This is recognised by Ofcom which states in its consultation:

“companies choosing to set up additional offices in the nations and regions can play a part in the development of production centres in those areas and should contribute to the local economy and production industry in a similar way as locally headquartered companies.”

Importantly, creating a new substantive base should not require large-scale systemic change, such as the creation of MediaCity in Salford or the relocation of Channel 4 to Leeds. Regional production should also involve smaller scale interventions that can be utilised nimbly and efficiently, in particular in areas that cannot support large scale interventions.

For example, the BBC is unique amongst the PSBs as being subject to quotas on the proportion of hours and spend generated in each nation. The quotas, which require the BBC to meet a different volume of hours/spend in each of the four nations, reflect that it is not possible to apply a ‘one-size-fits-all’ approach to the different production ecologies. The quotas for English regions outside the M25 (30% of network programme hours; 28% of production spend) reflects the well-established production bases that the BBC and other production companies have built in England outside London. By comparison, the quota for Northern Ireland (2% of network programme hours; 3% of production spend) reflects the fact that the production ecology of that region is smaller and requires smaller-scale intervention, such as the creation of new substantive bases to support a new commission or the relocation of an existing series.

This example demonstrates how important it is for the BBC to have a range of interventions at its disposal to suit the individual needs of each regional production ecology. If the policy objective is to support and grow a sustainable production industry outside London, the regulatory framework must acknowledge and support

this type of intervention; supporting existing companies, including London-based companies, to strengthen and expand their activities to new area.

2. Changes to Substantive Base Criterion

Given this background, the BBC is concerned by Ofcom's proposed changes to the "substantive base" criterion which appear to narrow the definition in a way that could inhibit producers from establishing new bases and, thereby, narrow the range of regional production intervention available to broadcasters and production companies.

Ofcom proposes:

- For a production to qualify under its "substantive base" criterion, "*the base should already be operational prior to the point of commission*"; and
- New explanatory notes state: "*We would expect a substantive base to be up and running with executives running the regional business and senior personnel seeking commissions from that base. It is likely that the company will have made programmes from that base previously; although we recognise that this may not always be the case for start-up companies*".

Ofcom states that the proposal is designed to prevent temporary or 'pop-up' offices from qualifying under this criterion but notes that "*it is difficult for us to ascertain the level of any potential negative impact*".

The BBC understands and agrees with this objective but is concerned that Ofcom's proposals go far beyond what is necessary to meet the aim and could restrict the range of production companies that broadcasters could partner with for regional productions. In particular, and for the reasons stated above, the BBC fears that this proposal could inhibit or disincentivise the creation of new substantive bases to support new commissions or the relocation of existing series. These smaller-scale interventions are crucial for the development of regional production in regions that cannot take advantage of large structural investments.

Had Ofcom's proposed definition been in place at the time, Optomen's Midlands base may not have counted towards the regional quota because it was established *after* the BBC awarded Optomen the *Great British Menu* commission. As a result, the Midlands would have missed out on the benefit that this production has brought to the region, through new production roles and the creation of a substantive base that is already bringing new commissions to the region.

In addition, it is possible that Ofcom's proposal could have the additional unintended consequence of entrenching genre-specific silos. For example, if it were necessary for a substantive base to be established prior to commission, production companies specialising in a particular genre, but which did not have established bases in a particular region, would effectively be off-limits. This could result in

genre-specific silos developing and limited ability to cross-pollinate expertise between regions.

For these reasons, the BBC proposes that for a production to qualify under the “substantive base” criterion it should be sufficient that the base be operational / up and running prior to the start of production and that Ofcom’s Guidance should be changed accordingly.

The BBC accepts that there may be circumstances where a new base subsequently ceases to be substantive; for example, where a relocated series is cancelled shortly after a commission is granted. In this situation, broadcasters should be prepared not to count the production toward their regional production quota and retrospectively adjust their reporting. For example, where a new base fails to remain substantive base after a year from the commencement of production, the broadcaster should investigate to see whether the initial production should count towards the quota. This proposal is supported by PSBs commitment to conduct regular audits, as set out in the PSB Guidance.

One such example is *I Love my Country*, a comedy panel game show produced by Avalon from a base in Scotland. At the time of commissioning, there was a genuine intent to establish a permanent base. But when the show was cancelled after a single series, the base failed to thrive. As a result, the BBC took the view that the base could no longer be considered substantive and removed the programme from its regional production quotas.

From the BBC’s experience, retrospective cancelling of a regional production is a rare occurrence. As a result, the risk that counting such productions distorts the calculation of regional quotas is far outweighed by the need to ensure that all forms of legitimate regional production can qualify under this criterion.

This proposal would ensure broadcasters have sufficient flexibility to count new bases towards their quota while still ensuring the ongoing positive contribution to the local production centre or broader creative economy. In addition, requiring a base is substantive prior to the start of production and monitoring to ensure it continues to be substantive (as per the compliance requirements in the PSB Guidelines) would address Ofcom’s main concerns: preventing temporary or ‘pop up’ offices from qualifying under this criterion and ensuring production companies are aware that circumventing the guidelines would not be tolerated. In addition, Ofcom continues to have the power to investigate any concerns and apply sanctions if it feels quotas have been applied improperly.

3. Response to consultation questions

In the following sections, we respond in detail to each of the questions in Ofcom's consultation.

1. Do you agree with our proposed change to articulate the intention of the regional production obligations at the start of the Guidance? (See wording at Annex 7).

The BBC supports this proposed change and sees Ofcom's Guidance as a useful tool to encourage an industry-wide commitment to sustainable out of London production. The BBC has always strived to work within both the letter and spirit of the Guidance and clearly articulating the overarching objective of the regime can only help to ensure Ofcom's Guidance is interpreted clearly and applied consistently.

Indeed, Ofcom's proposal echoes the approach taken in the PSB Guidance, which sets out the overarching principle governing how Ofcom's Guidance is interpreted:

“Every production qualifying as ‘out of London’ should make a meaningful contribution to the overarching ambition to support talent development and strengthen regional production in the UK.”

2. Do you agree with our proposed changes to the substantive base criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

We address each of Ofcom's proposed changes in the following sub-sections.

(i) Production in question must be made from that substantive base

The BBC agrees with Ofcom's proposal that for a production to meet the “substantive base” criterion “*the production in question must be made from [a] substantive base [outside the M25]*” and believes it provides valuable additional clarity. However, it is important that this change does not inadvertently prevent or discourage filming on location – “*from*” should not be interpreted to mean “*at*”. For example, it should be acceptable for a programme made from a substantive base in Glasgow to involve filming on location in Aberdeen.

(ii) The base should be operational prior to the point of commission

As stated above, the BBC proposes that new bases should qualify as substantive if they are in operation prior to and remain substantive for a year from the start of *production*, which reflects the BBC's current interpretation of Ofcom's Guidance.

(iii) All three elements of the criteria must be met

The BBC welcomes Ofcom's clarification but does not consider this to be a change. The BBC has always applied this interpretation to the criteria. Indeed, this approach is shared by the other PSBs and, therefore, reflected in the PSB Guidance which states:

"All three sub-criteria should be met for a production to qualify as a substantive base. However, it is possible for a single individual to meet the requirements for more than one sub-criteria (for example in smaller companies)."

(iv) Aim

The BBC supports and welcomes the greater clarity given by Ofcom's proposal to include a new paragraph articulating the aim of the substantive base criterion.

3. Do you agree with the suggested explanatory notes for the substantive base criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

While the BBC broadly supports Ofcom's objective to provide greater clarity, it is not clear that these explanatory notes achieve that aim or that they are necessary in light of the PSB Guidance.

The explanatory notes address a limited range of questions and for some, simply state that the matter should be determined on a case by case basis. It is the BBC's view that *every* aspect of Ofcom's Guidance should be determined on a case by case basis, in particular to recognise the unique characteristic of individual productions and genres. In this respect, the BBC agrees with Ofcom when it states that application of the guidelines "*can be highly dependent on a range of factors specific to individual productions and granular regulation in this area may well be counterproductive*".

It is the BBC's view, shared with the other PSBs, that broadcasters (with over a decade of experience interpreting Ofcom's Guidance) in partnership with producers (who understand the unique circumstances of production) are better placed to interpret Ofcom's Guidance within the context of individual productions.

It was against this background, and the call from industry for greater clarity in the interpretation of Ofcom's Guidance, that the PSBs came together and developed the PSB Guidance which sets out their interpretation of Ofcom's existing guidance and industry best practice.

In light of this industry-led intervention, the BBC questions the value of Ofcom's explanatory notes. The BBC suggests that the PSB Guidance be given time to 'bed in'

with the production industry before seeking to introduce any additional explanatory notes.

The BBC also suggests that Ofcom include additional wording in the Guidance stating that interpretation of the Guidance may vary by the individual circumstances of each production and needs to be evaluated on a case-by-case basis at the broadcaster's discretion.

(i) How many individuals need to be employed to meet the criterion?

Ofcom's proposal states that this is a matter to be determined on the circumstances of the production in question. The BBC agrees with this interpretation, including that it should be possible for a single individual to meet the requirements of more than one role (as noted in response to question 2(iii) above).

This is in line with the approach taken by the BBC and the other PSB. The PSB Guidance states:

"The number and title of relevant roles will depend on the scale and genre of the production in question and will be determined at the broadcaster's discretion."

The BBC takes the view that, simply stating that the matter is to be determined on a case by case basis provides no additional clarity and is, therefore, unnecessary. As explained above, the BBC would prefer to see a general statement noting that the Ofcom Guidance is to be interpreted on a case-by-case basis at the broadcaster's discretion.

(ii) Substantive base does not need to be its own legal company and the use of SPVs

Ofcom proposes that to meet the substantive base criterion, a base need not be its own legal company and that where a production is made by an SPV, it must still meet all the element of the substantive base criterion. The implication of these proposals is that the designation of the substantive base criterion should be based on the individual circumstances of each production. This is in line with the approach taken by the BBC and the other PSB. The PSB Guidance states:

"Location/address of any SPV is not relevant for determining substantive base. The focus for the criteria is on the location of the production activity."

However, Ofcom's proposed explanatory notes state that *"if an SPV is temporary in nature... it is less likely that it would meet all elements of the criterion"*. The BBC disagrees with this proposal. If a production meets all the elements of the substantive base criterion it should be irrelevant whether any SPV is temporary in nature. For example, it is common for production companies to create an SPV to take

advantage of favourable tax treatment for a specific production. This should not prevent a production meeting the substantive base criterion if all the elements of the test are met.

As above, the BBC takes the view that simply stating that the matter is to be determined on a case by case basis provides no additional clarity and is, therefore, unnecessary. The BBC would prefer to see a general statement noting that the Ofcom Guidance is to be interpreted on a case-by-case basis at the broadcaster's discretion.

(iii) Which jobs count as 'executive' / 'senior personnel'?

Ofcom proposes further clarity on the meaning of "executive" and "senior personnel".

The BBC accepts Ofcom's proposal and notes that this interpretation is similar to that used by the BBC and the other PSBs, as is reflected in the PSB Guidance:

"An "Executive" should be someone senior enough to have a material influence in managing the regional business. Their primary role may be either editorial or commercial but does not necessarily require involvement in the production in question. However, an Executive managing the regional business can also be involved in the production in question (for example in a smaller company)."

Senior personnel can be someone *"with material influence over the production"*

However, the BBC would prefer to see a general statement noting that the Ofcom Guidance is to be interpreted on a case by case-by-case basis at the broadcaster's discretion. In particular, Ofcom should make clear that it is possible for a single person may perform more than one role on a particular production or within a single production company.

(iv) 'operational prior to the point of commission'.

Ofcom states *"we would expect a substantive base to be up and running with executives running the regional business and senior personnel seeking commissions from that base. It is likely that the company will have made programmes from that base previously"*. Ofcom accepts that *"this may not always be the case with start-ups"*. The implication of this proposal is that new regional bases set up by existing companies could not always qualify under the criteria.

As explained above in section 2, if the purpose of the regional production regime is to create new production ecosystems and strengthen existing production ecosystems, broadcasters should therefore be able to support producers establishing a new substantive base on the basis of a new commission or relocated existing

series. The BBC therefore disagrees with this proposal and proposes it should be sufficient that a base is operational prior to the start of *production*.

In addition, the BBC would strongly resist any implication that Ofcom's explanation "*it is likely that that the company will have made programmes from that base previously*" introduces a new element to this criterion. It should be sufficient to demonstrate, on the facts of the case, whether the production meets the three elements of the criterion.

4. Do you agree with our proposed changes to the production budget criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

A production "budget" is the financial plan outlining expected expenses before a production commences. This may be different from "spend", i.e. what is actually spent on a production. For example, a production may go 'over-budget', meaning that spend exceeds budget or items budgeted may subsequently be deemed unnecessary.

As the purpose of this criterion is to recognise the money spent on a regional production that has a positive impact on the local production ecology, the BBC suggests that "spend" is a more appropriate measure than "budget". Indeed, the BBC's approach to compliance looks not at what a production plans to spend but what is actually spent on a production. This approach is standard for the industry as is reflected in the PSB Guidance which states:

"Costs should be counted as actual spend on the production rather than budgeted spend"

"Production companies are wholly accountable for ensuring all spend and reporting are compliant with the Ofcom Definitions, and they warrant to do so within their contracts"

We note that this approach to the second criterion also addresses Ofcom's concern (in relation to its proposed approach to production fee) that "*[i]f there are circumstances where the production goes over budget and the production company chooses to use some of its production fee to cover these costs, it would then be acceptable for such spend to be designated as an additional part of the production budget and subject to the 70% calculation*".

The BBC suggests that that the wording of this criterion (and any accompanying explanatory notes) should be amended accordingly. Therefore, we have used "spend" throughout the remainder of this document in relation to this criterion.

We address each of Ofcom's proposed changes in the following sub-sections.

(i) Production fee

Ofcom proposes that the production fee (i.e. the profit element in any production) is excluded from the production spend when calculating whether the 70% threshold has been met.

BBC recognises that there has historically been certain inconsistency across the industry in how production fees have been counted when applying this criterion and welcomes more clarity to ensure a consistent approach between different productions and production companies.

Excluding the production fee seems the cleanest and simplest way to achieve clarity and consistency. However, the BBC has sympathy with established local independent companies who feel their production fee is invested locally to the benefit of the local economy and have allocated production fee to substantive base in the past.

The BBC considers that Ofcom should allow a degree of flexibility, by acknowledging the possibility for production fee to count toward the criterion where it can be demonstrated that the production fee has made a contribution to the creative economy in the UK's nations and regions. This approach is reflected in the PSB Guidance which states:

“Production fee should generally be excluded for the purposes of calculating this criteria unless it is likely that the production fee will benefit regional production. This should be agreed at the point of commission with the relevant Broadcaster.”

(ii) Third party funding

The BBC agrees with Ofcom's proposal that the 70% should be counted against the entire production spend, including any funding from third parties. This reflects how the BBC has historically accounted for programmes that involve co-financing arrangements. The source of funding often has little bearing on how production spend benefits local production ecologies.

However, it would not be appropriate to count expenses related to delivery outside the UK within the overall production spend, whether co-funded or not. This is reflected in the PSB Guidance which states:

“Because the Ofcom Definitions concern production spend in the UK, significant costs associated with delivery to or re-versioning of programmes for ex-UK audiences should be excluded from production spend. Where this is applicable to a production, further guidance should be sought from the relevant broadcaster.”

The BBC feels that while this is the correct interpretation of Ofcom Guidance, it is not necessary for Ofcom to directly address this point in its Guidance or explanatory notes given that this is the approach taken by all the PSBs, as reflected in the PSB Guidance.

(iii) Aim

The BBC supports Ofcom's proposal to include a new paragraph to articulate the aim of the production spend criterion and welcomes the greater clarity it will provide.

5. Do you agree with the suggested explanatory notes for the production budget criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

Our comments made in response to question 3 about the need for explanatory notes in light of the PSB Guidance, apply equally here. We suggest Ofcom include additional wording in the Guidance stating that the interpretation of the Guidance may vary by the individual circumstances of each production and needs to be evaluated on a case-by-case basis at the broadcaster's discretion.

The following sub-sections provide additional comments on each of Ofcom's proposed explanatory notes.

(i) Costs associated with travel

The BBC agrees with Ofcom's proposal to classify local travel as regional costs. However, where a producer reasonably incurs travel expenses relating to the production itself, these should also be classified as regional costs. This can happen, for example where a production involves filming on location either in another UK nation/region or outside the UK. This is particularly the case for programme that involves filming in unique locations, as the following examples illustrate:

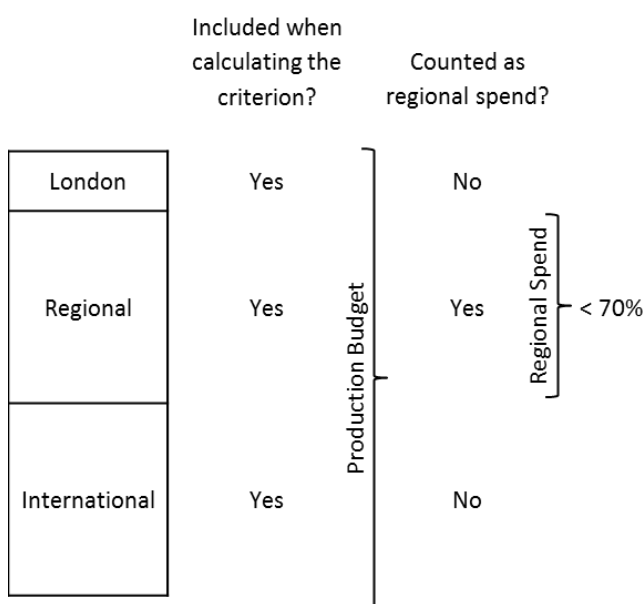
- The BBC's period drama *Poldark* has a production base in London but also films from a studio in Bristol and on locations in Cornwall. This production, therefore involves travel between London and those other locations. Under Ofcom's proposal, since this is not 'local' travel within the South of England, travel expenses would not count towards the 70% threshold.
- The BBC's nature programme *Grizzly Bear Cubs and Me* is a co-production between Hello Halo in Scotland and Oak Island Films in Bristol. Production involves travel to Russia to film in the bears' natural habitat. Under Ofcom's proposals, associated travel expenses would not count towards the 70% threshold.

Including these costs when calculating the production spend criterion but not counting them as regional costs is equivalent to treating them as 'London spend'.

This, we believe is a misrepresentation of the reality of these types of production. Costs reasonably incurred in the making of a regional production should not be considered London spend.

In addition, costs associated with filming on location can represent a significant portion of a production spend. By preventing regional producers from counting spend on non-local travel within the 70% threshold, these productions are unlikely to qualify as regional productions as the following diagram demonstrates:

Figure 1: Ofcom’s proposed treatment of international travel expenses



The impact of Ofcom’s proposal would, therefore, be to remove one of the key competitive advantages that regional production companies have against London-based producers. If this inhibits regional companies from bidding for commissions that involve on-location filming, these programmes could become the exclusive preserve of London production companies. This would be bad for the production industry, bad for broadcasters and runs counter to Ofcom’s stated aim, to “*deliver genuine investment in TV production outside of the M25.*”

Ofcom’s rationale for including local travel in the calculation of regional costs is that “*these costs typically would contribute to the local creative economy*”. The BBC sees this as rather a narrow interpretation of the policy objectives of the regional production regime. If Ofcom’s Guidance is to be an effective lever for delivering support for a sustainable production industry outside London, it should be interpreted in a manner which enables regional production to be the most competitive and flexible.

For this reason, the BBC proposes that any travel reasonably incurred in the course of a regional production should count as a regional spend. This approach is reflected in the PSB Guidelines which states:

“Travel expenses can be included in the calculation of production spend where they are reasonably incurred in the costs of making a programme. These should be allocated to a region based on the starting point of any journey, or the location of any relevant accommodation.”

Basing travel on the starting point of any journey addresses Ofcom’s concern that costs incurred transporting talent/equipment from London should not form part of regional spend.

We note that these proposals should be read in conjunction with the BBC’s proposal (see response to question 8 below) that programmes made exclusively outside the UK should be excluded from consideration under the criteria.

(ii) Overheads

The BBC agrees with Ofcom’s proposal that overhead costs associated with keeping a substantive base in the nations/regions operational should be classified as regional spend, which reflects the approach taken in the PSB Guidance which states:

“Overheads are expenses relating to overall business operations which cannot be allocated in total to a specific production. As such, it is appropriate to include relevant overheads in the calculation of production spend. To reflect the impact on regional production, overheads should be reasonably apportioned to the location(s) to which each overhead relates (which might be the substantive base and/or one or more production bases).”

However, the BBC is concerned that overheads should be allocated appropriately to the circumstances of each production. Ofcom states “[where a] production company has multiple offices across the UK, and overhead costs are split between these offices (including possibly in London) London). In such cases, we would expect the company where possible to pro-rata the costs by location.” The BBC calls for greater clarity in how such costs would be pro-rated. For example, where a company has five regional bases of which only two incur overheads relating to the production, these expenses should be pro-rated between the two regional bases rather than between all five of the company’s bases.

The BBC proposes the following approach:

- Where costs are incurred for a regional production (overhead or otherwise) they should be considered regional spend.

- Where overheads are relevant for more than one production/base, they should be appropriately pro-rated between those bases which are relevant (not necessarily all those owned/controlled by the production company).

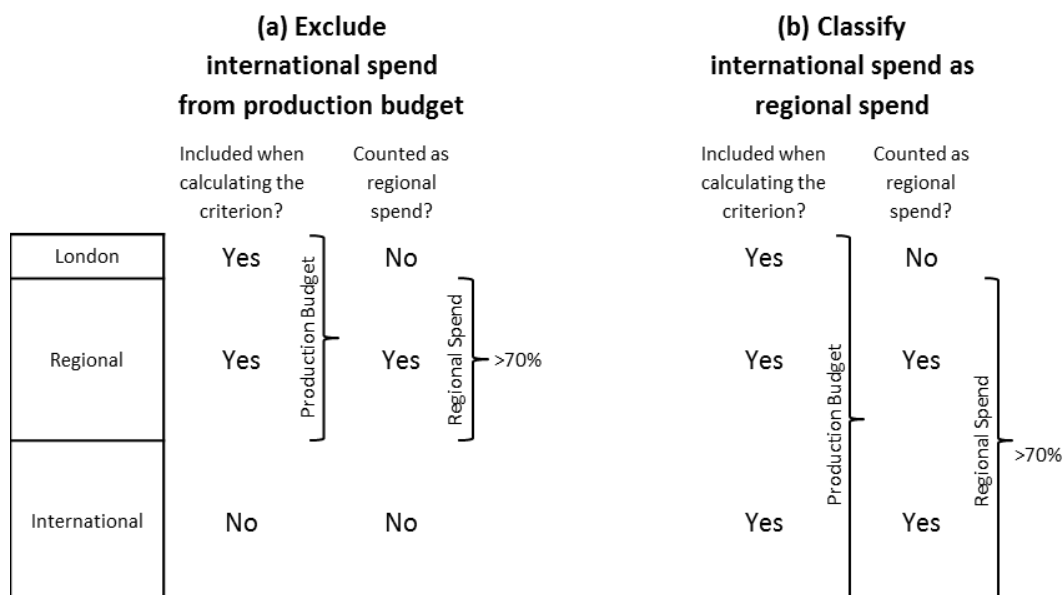
(iii) International spend

As explained in response to question 5(i) above, Ofcom’s proposal to include international spend in the production spend but not classify this as regional spend, risks these expenses being classified, by omission, as ‘London spend’. Not only does this misrepresent the nature of the production but (as explained above) risks genuine regional productions not meeting the 70% threshold to qualify as ‘out-of-London’.

For programmes that involve filming outside the UK, international spend can represent a large proportion of production spend. Just as with travel, when expenses relating to filming outside the UK are reasonably incurred in the making of a regional production, application of the criteria should not prevent that production from being classified as a regional production.

For this reason, the BBC proposes that international spend should be ‘neutralised’ so as not to distort the calculation of this criterion. This could be achieved by either (a) excluding international spend from the production spend; or (b) classifying these expenses as regional spend. These options are illustrated in the following diagram:

Figure 2: Options for treating international spend



The approach taken in the PSB Guidance is that where international expenses are reasonably incurred in the making of a programme, these should be *included* in the calculation of the criterion and counted as regional spend (option b). This reflects current broadcaster practice, as endorsed by Ofcom as an appropriate interpretation

of the current Ofcom Guidance. However, Ofcom's consultation provides an opportunity to reconsider this approach. The BBC believes that because this expenditure is unlikely to benefit production in the UK or the local economy that surrounds a particular production, it would be more appropriate to *exclude* international spend from calculation of the criterion (option a) and suggests that Ofcom changes its Guidance accordingly.

We note that these proposals should be read in conjunction with the BBC's proposal (see response to question 8 below) that programmes made exclusively outside the UK should be excluded from consideration under the criteria.

6. Do you agree that the off-screen talent criterion should remain the same? If not, please explain why, providing appropriate supporting evidence where possible.

BBC agrees that no changes are required to the off-screen talent criterion.

Ofcom proposes to include a new paragraph setting out the aim of this criterion. While the BBC agrees with the intent of this proposal, we are concerned that wording represents the opportunities created by regional production too narrowly. In particular, Ofcom refers to "*genuine creative job opportunities in TV production*" (emphasis added).

Regional productions create opportunities to develop more than just creative roles, including for example, craft roles and production management roles. The BBC is strongly of the view that developing all production-related talent outside London is important, not just 'creative' roles. As a result, the BBC suggests deleting this word from the aim. We address this issue further in response to question 7(i) below.

7. Do you agree with the suggested explanatory notes for the off-screen talent criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

Our comments made in response to question 3 about the need for explanatory notes in light of the PSB Guidance, apply equally here. We suggest Ofcom include additional wording in its Guidance stating that the interpretation of the Guidance may vary by the individual circumstances of each production and needs to be evaluated on a case-by-case basis at the broadcaster's discretion.

The following sub-sections provide additional comments on each of Ofcom's proposed explanatory notes.

(i) Definition of 'production talent'

The aim of the regional production regime is to strengthen and grow production ecosystems outside London including to ensure genuine job opportunities in TV production in the nations and regions. As a result, the BBC disagrees with Ofcom's proposal to limit the definition of production talent to roles that are "*generally recognised as part of the creative programme making process*". Ofcom's Criteria should be applied in a way that recognises the value created by *all* roles on a production.

We agree it may be correct to exclude service roles such as catering, security and location facilities (although these expenses could correctly be classified as regional spend under the production spend criterion if they are sourced locally and benefit the local economy). However, developing strong and sustainable regional production ecosystems require support for a wider range of production roles than just "creative" roles. Restricting this criterion only to creative roles risks regional productions being reliant on London-based talent for other roles, which runs contrary to the aims of the regional production regime.

For this reason, we propose this criterion covers all roles directly involved in the production of the programme in question. Together with creative roles, this would include all craft skills (e.g. camera operators, lights, sound engineers) and also production management roles (e.g. production execs, production managers, runners, researchers, line producers, etc.) so long as they are involved directly in the production in question.

This approach is reflected in the PSB Guidance which states:

"Production talent includes those roles directly involved in the production of the programme. This should not include service roles (e.g. catering or security), although these are relevant to the application of criteria 2 (production spend).

Production companies should be able to identify relevant roles for each production and should take due care that their reporting in this area adheres to the spirit of the Ofcom Definition, including when spend is incurred via third party providers/sub-contractors (see above).

Employment status is not relevant to determining application of the criteria."

(ii) Freelance talent hired through a studio or service company.

The BBC agrees with Ofcom's proposal that, regardless of where a studio or service company is based, to be considered under this criterion, freelance talent must live outside of the M25. This interpretation is reflected in the PSB Guidance which states:

"For production talent employed by the production company, the usual place of employment is considered to be the location where an individual is based for the majority of their working time.

The definition of ‘majority of their working time’ may vary by circumstance and needs to be evaluated at the broadcaster’s discretion but could include, for example, the majority of time across a year, or the majority of time across a week on a regular basis. Application of this criteria should also take account of flexible and part-time working.

Freelancers, by definition, often do not have a ‘usual place of employment’. Where this is the case, usual place of employment should be the individual’s home address. Business agent’s address or PO Boxes do not apply.

A production company must use reasonable endeavours to ensure that the location provided by production talent is accurate.”

The BBC notes that this interpretation should also apply to the production spend criterion. Production expenses relating to the hiring of production talent should only qualify as regional spend if the individual in question is based outside the M25. In the case of freelancers, this is likely to be their home address.

8. Do you agree with our proposed change to exclude self-promotional content from the calculations? If not, please explain why, providing appropriate supporting evidence where possible.

The policy intent of the regional production regime is to support and strengthen the television production sector and creative economies of the UK’s nations and regions. As a result, only programmes that can deliver on this objective should be included in the quotas.

For this reason, the BBC agrees that self-promotional content should not count towards the regional production quota. But it would be equally inappropriate for this content to be allocated (by omission) to London, as this could distort application of the quota. The BBC, therefore, agrees with Ofcom’s proposal to “*exclude such content from the quota calculations in the future*”.

The BBC believes that this reasoning should also apply to other programme-types that are unlikely to deliver on the policy objective of the regional production regime. Specifically:

- **Acquisitions:** the regional production regime concerns the production of commissioned programmes where the broadcaster reports the programme as part of its original production quota. Programmes that are acquired should, therefore, be excluded from the calculation of regional production quotas.
- **Programmes made exclusively outside the UK:** the policy objective of the regional production regime is to build production talent in the UK outside London. Programmes that are made wholly outside the UK should therefore be excluded from the calculation of regional production quotas.

This suggestion reflects the approach which the BBC and other PSBs have informally agreed with Ofcom to date and should be reflected through amendments to paragraph 12 of Ofcom's Guidance, including to make clear that this represents Ofcom's interpretation of "relevant productions" in paragraph 6 of Ofcom's Guidance:

"12. Ofcom accepts that it would be impractical to expect network news operations to be based outside London. News programmes are therefore excluded from the ~~calculation~~ definition of relevant productions. Any self-promotional content, acquired content or programmes made outside the UK should also be ~~is also~~ excluded from the ~~calculation~~ definition of relevant productions. As noted above only first-run programmes can be counted towards the regional production quota."

The BBC also suggests Ofcom reflect in its Guidance the approach it has previously agreed with the PSBs to determining whether a programme is made outside the UK that, namely that a programme would be excluded from quota calculations if it met two of the following criteria:

- Production location (i.e. the location of the base actually managing the production) is not in the UK;
- More than 50% of the spend (excluding on-screen talent, archive material and copyright/sports right costs) is spent outside the UK; and
- More than 50% of the talent (excluding on-screen talent) are usually employed outside the UK.

9. Do you agree with our proposed changes to the allocation categories (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

In response to Ofcom's Call for Evidence, the BBC suggested that changes were required to address problems in allocating productions that cannot be matched against a specific quota for a nation or region. This is particularly acute for the BBC which, alone, must meet an additional "English Regions" quota. The BBC is therefore glad to see that this issue is being addressed in Ofcom's present consultation but feels that elements of Ofcom's proposal are unnecessarily clunky.

First, Ofcom proposes that programmes that have a substantive base outside the M25 but which meet the relevant criteria in different nations/regions should be allocated to the region/nation of the substantive base (meaning that multi-nation/region categories are only used for programmes that do not meet the substantive base criteria). The BBC agrees with this proposal.

As an exception to this first proposal, where a programme has a substantive base outside the M25 but meets the two other criteria (production spend and off-screen

talent) in the same nation/region (which is different from that of the substantive base) the programme would be allocated to the nation/region where the spend/talent criteria are satisfied. The BBC agrees with this proposal.

Second, Ofcom proposes that programmes which do not meet the substantive base criterion, but where the other criteria are met in different nations/regions, should be allocated to one of three new multi-region/nation categories: “Multi-English region”, “Multi-nation outside England” and “Multi-nation/region”.

The BBC is grateful to Ofcom for proposing a solution that enables these Multi-English Region productions to be counted towards the BBC’s English Regions quota. However, this outcome could be achieved much more simply and without the need to create additional and unhelpful categories. The BBC proposes, as an alternative, that these programmes are allocated to the nation/region where the largest share of the production spend occurred. Production spend is, in the BBC’s view, the clearest indicator of regional investment after substantive base. Where this results in a programme being allocated to one of the English regions, the BBC is able to count this against its English Regions quota.

The additional benefit of this solution is that all productions can be allocated to a specific and identifiable nation/region. For example: *Poldark* is filmed in a variety of locations across England, from a substantive base in London. Under Ofcom’s proposals, this programme would be considered ‘multi-English region’ as it meets the production spend and off-screen talent criteria across a number of English regions. However, the production spend is mostly spent in South of England (with studios in Bristol and location filming in Cornwall) where most of the filming takes place. Allocating this programme to “Southern England” reflects the importance of that location to the programme and of that programme to the creative economy in that area.

The use of unhelpful multi-nation/region categories obscures the positive impact that regional productions have on specific areas. As such, their use should be kept to a minimum. Otherwise, there is a risk that the positive impacts of the regional production regime are less clear to stakeholders in the nations and regions which benefit for this investment.

For these reasons, the BBC suggests that Ofcom adopts the BBC’s proposed approach.

10. While we are not obliged to consult on our internal processes, we would welcome stakeholders' views on any adverse consequences we have not identified that may occur as a result of our planned changes in relation to our compliance and enforcement processes, namely:

In response to Ofcom's Call for Evidence, the BBC called for Ofcom to make changes to improve the level of transparency in the regional production regime and, thereby, improve confidence that the system is working. In particular the BBC proposed that:

- Broadcasters are required to collect more granular data from production companies to demonstrate compliance;
- Broadcasters report more information to Ofcom on an annual basis; and
- Ofcom's reporting should be more granular, clearer in criteria labelling and allow those who are interested to interrogate the data more easily.

The BBC, therefore, welcomes the further attention that Ofcom has given to these issues and supports those proposals which make positive steps towards greater transparency. We comment in more detail on Ofcom's specific proposals in the subsections below.

However, the BBC remains of the opinion that the best way to provide clarity to the sector is through the development of common industry standards. It was with this objective in mind that the BBC came together with the other PSBs to develop the PSB Guidance which, amongst other things, sets out the broadcasters' approach to compliance.

In particular, the PSBs agree with Ofcom's observation that *"we do not consider it to be sufficient to merely rely on a warranty or declaration from the supplier and we strongly encourage the PSBs to consider what information they feel should be available to them to support compliance"*. In line with this, the PSB Guidance sets out a clear explanation of the compliance processes that the PSBs expect producers to follow, at the start of production, during production, on programme delivery and after the programme is delivered. This includes the requirement to:

"maintain adequate documentation evidencing compliance with the relevant criteria, which the broadcaster shall be entitled to request/review at any time in order to conduct appropriate assessments, both during production, on delivery and after the Ofcom MOL register is published, of compliance. Relevant documentation shall be retained by producers for at least six years in lines with rules on retention of company documents."

Ofcom should ensure any changes it makes to its own internal processes are compatible with the PSB Guidance and not seek to make changes that cut across processes being developed by the industry itself. Notably, the PSBs have limited

resources to handle any and every query from stakeholders. Any process developed by Ofcom should ensure PSBs are only required to address genuine, substantive complaints that are worth investigating.

The BBC disagrees with Ofcom's assertion that it is not obliged to consult on how it will handle complaints regarding the regional production obligations.

First, these are not internal processes, but an external complaints process related to enforceable licence conditions. It is clear that Ofcom sees this as an integral part of its approach to the regulation of re

Second, how Ofcom handles complaints will have direct implications for industry stakeholders, including PSBs and production companies.

Third, Ofcom has typically consulted on its complaints and enforcement processes for specific pieces of regulation. For example:

- Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action;¹¹
- Procedures for enforcement of BBC competition requirements: A consultation on Ofcom's proposed procedures for enforcement of BBC competition requirements;¹²
- A consultation on new procedures for handling content standards complaints, investigations and sanctions for BBC programmes;¹³
- Procedures for handling content standards and licensing investigations and sanctions: A consultation on revising the procedures for TV, radio and video-on-demand services;¹⁴
- General Procedures for investigating breaches of broadcast licences: A consultation on proposals to publish General Procedures for investigating breaches of broadcast licences;¹⁵ and
- Enforcement Guidelines: Ofcom's guidelines for the handling of competition complaints and complaints concerning regulatory rules.¹⁶

¹¹ [Procedures for enforcement of requirements in the BBC Agreement and compliance with Ofcom enforcement action](#), January 2017

¹² [Procedures for enforcement of BBC competition requirements A consultation on Ofcom's proposed procedures for enforcement of BBC competition requirements](#), January 2017

¹³ [A consultation on new procedures for handling content standards complaints, investigations and sanctions for BBC programmes](#), January 2017

¹⁴ [Procedures for handling content standards and licensing investigations and sanctions A consultation on revising the procedures for TV, radio and video-on-demand services](#), January 2017

¹⁵ [General Procedures for investigating breaches of broadcast licences A consultation on proposals to publish General Procedures for investigating breaches of broadcast licences](#), July 2013

¹⁶ [Enforcement Guidelines Ofcom's guidelines for the handling of competition complaints and complaints concerning regulatory rules](#), July 2012

The BBC therefore looks forward to seeing further detailed proposals and reserves its right to comment more fully in due course.

a) data gathering and reporting by the broadcasters;

In July 2018, Ofcom wrote to broadcasters informing them of new reporting requirements for programmes to qualify under the criteria. These new requirements went into effect in January 2019. While these new requirements are likely to address Ofcom’s concerns, it is too early to tell whether they will deliver the greater clarity called for by the industry.

As discussed above, the PSB Guidance sets out detailed guidance on the information broadcasters expect producers to retain, in order to evidence compliance. Again, it is too early to tell whether these measures are sufficient to ensure broadcasters are able to evidence compliance with the criteria.

In light of these recent developments, the BBC feels it would be premature to introduced further data gathering or reporting requirements at this time and the BBC is gratified to see that Ofcom’s proposals in this area are limited.

Ofcom proposes to introduce a single new reporting requirement: for productions meeting the substantive base requirement, Ofcom proposes to require PSBs to report the date on which the substantive base was established.

As discussed in detail above, the BBC takes the view that a production base should be able to qualify as substantive if it is established prior to the commencement of *production*, which would make this suggested change redundant.

b) more comprehensive data publications;

As noted above, the BBC, in its response to Ofcom’s Call for Evidence, called for more granular reporting by Ofcom including the ability to interrogate the data more easily. The BBC, therefore, supports Ofcom’s proposal to make its reporting more comprehensive and interactive. The digital report illustrated at Annex 8 of Ofcom’s consultation represents a significant improvement.

Before finalising the format of this report, the BBC suggests a small change that, it hopes, will resolve industry confusion between “qualification” (i.e whether a programme qualifies as a production made outside London); and ‘allocation’ (i.e. the region/nation to which the programme is allocated for the purposes of determining PSB quotas).

The current format of the report provides (i) the “region” to which the programme is allocated; and (ii) a ‘yes/no’ list of the criteria on which the production qualifies. In the BBC’s experience, this leads to confusion. Stakeholders may believe that

broadcasters have claimed that the production in question met the criteria *in* the region specified.

For example, a production made from a substantive base in Northern Ireland, may be allocated to Scotland if that is where the production spend and off-screen talent criteria are met. An industry stakeholder could misread the report, interpreting it to say that the production base was in Scotland. Similar examples in the past have led to industry concern that the criteria are being misapplied, potentially leading to distrust of the regime and broadcasters.

Ofcom can remedy any confusion by changing the headings on its interactive register and stating the nation/region in which each criterion has been satisfied. Figure 3 illustrates the BBC’s suggestion, using the sample interactive register provided in Annex 8 of Ofcom’s consultation:

Figure 3: BBC Suggestion for Format of Interactive Register

Broadcaster	Programme Title	Region to which production is allocated	Production company	Programme qualifies as MOL on the basis of...		
				Substantive base	Production spend	Production talent
BBC	Question Time	Scotland	Mentorn	Scotland	Multi-region	Scotland
BBC	Escape to the Country	South of England	Boundless	South of England	Multi-region	Multi-region

c) proactive monitoring by Ofcom

Ofcom proposes to introduce more proactive monitoring including ad-hoc spot checks on titles submitted as regional productions “*where we will request additional information about productions to ascertain their regional production credentials*”.

As noted above, the BBC remains of the opinion that the best way to provide clarity to the sector is through the development of common industry standards. It was with this objective in mind that the BBC came together with the other PSBs to develop the PSB Guidance which sets out, amongst other things, a clear expectation that production companies maintain adequate records and a clear right for a broadcaster to audit those records when they consider appropriate.

The BBC takes the view that these measures are sufficient to meet Ofcom concerns and suggests that Ofcom allow time for these processes to bed down before putting in place new, and potentially onerous monitoring requirements.

In particular, the BBC would be concerned if Ofcom required broadcasters to maintain documentation on each programme over and above what is reported annually to Ofcom. This could represent a significant administrative burden. If such a requirement involved broadcasters holding substantial amounts of personal data (e.g. names and addresses of production talent) and/or business-sensitive information (e.g. detailed budgets), this would be highly inappropriate and could potentially put broadcasters in breach of other rules such as those covering data protection and competition law.

For these reasons, the BBC would be concerned should Ofcom intend to introduce additional monitoring requirements and reserves its right to comment on the detail of any proposals in due course.

d) Ofcom Proposal: Ofcom-commissioned survey of producers of regional productions and PSBs

Ofcom proposes to commission a survey of regional producers and broadcasters in order to obtain “*a detailed understanding of the mix of London and nations and regions talent and resources employed in the making and commissioning of regional productions, and to benchmark progress to date*”.

We disagree with this proposal for two reasons:

First, Ofcom is mistaken in its belief that such a survey could “*serve as a useful resource for the PSBs*”.

The BBC assumes that any survey would draw from information currently held by industry stakeholders including the BBC. Much of this information is widely available to those involved in day-to-day production. The BBC itself has significant institutional knowledge collated over the fifteen years that the regional production regime has been in operation. The BBC assumes that the other PSBs have similar resources. As a result, it is not clear that the proposed survey would be of any value to the PSBs, being, at best, a sub-set of information already in their possession. Moreover, collating such information is likely to represent a significant administrative burden for broadcasters and the production industry.

Second, the BBC considers that Ofcom’s proposal exceeds the bounds of its appropriate regulatory authority and strays into matters which are the appropriate preserve of government and public policy.

The regional production regime was introduced through legislation by the government at the time as a mechanism to stimulate the creative economy and bring jobs and skills to the nations and regions. In pursuance of this aim, the Communications Act 2003 and BBC Agreement gave Ofcom the power to set conditions appropriate for securing that a suitable proportion of PSB programming

is made outside the M25 area. Ofcom's power is, therefore, limited to setting appropriate quotas for out-of-London production.

Ofcom states "*we are of the view that more can be done to support the development of independent, end-to-end production ecologies in the nations and regions*". This implies a desire by Ofcom to benchmark compliance and/or future regulation against the proposed survey. This would, in the BBC's view, constitute a fundamental change in the regulatory regime from regulation by quotas to regulation by outcomes. Ofcom has no authority to change its approach to regulation in this way.

In its March 2018 Call for Evidence, Ofcom correctly identified that "*regional production requirements are principally industrial policy interventions*". Whether the current regime continues to meet public policy goals is a matter for government, with any changes made through legislation. In the absence of any guidance or direction from government, the BBC sees little need for a costly and pointless survey. For these reasons, the BBC believes that Ofcom's time and resources are better deployed elsewhere.

e) a clear articulation of the complaints process.

Ofcom proposes to include details of its complaints process in the final version of its Guidance. Ofcom states at paragraph 20 of the draft Guidance:

"we will summarise for stakeholders our complaints process for regional productions and regional programmes and will publish this here in the final version of the Guidance when we publish the Guidance Review Statement."

The BBC supports proposals that would assist stakeholders alerting Ofcom to problems with the regional production regime; in particular flagging productions that they think may not have been delivered in line with Ofcom's Guidance. To this end a transparent complaints procedure is a positive development.

It is difficult for the BBC to comment in the absence of specific proposals. However, the BBC would expect any complaints process to carry the hallmarks of fairness and transparency, including a commitment from Ofcom to deal with any complaint fairly. This should include notifying broadcasters of any issue relating to their programmes, including sufficient detail to enable proper investigation and always giving broadcasters the right to make submissions in relation to any complaint.

The BBC looks forward to providing additional comments on Ofcom's proposals once these are published.

11. Do you agree with our proposal for the new Guidance and majority of changes to take effect from January 2020?

Ofcom proposes that its new Guidance should take effect from January 2020, meaning that for programmes that broadcast from 1 January 2020 to be counted within regional/national production quotas, they would need to adhere to Ofcom's new Guidance.

Ofcom states in its proposed Annual Plan for 2019/20 that it intends to issue a statement relating to the present consultation in "Q1 2019/20".¹⁷ Assuming that this proposal does not change in the final version of the Annual Plan, the earliest that Ofcom expects to publish its statement is, therefore, April 2019. Given that the present consultation closes on 27 February 2019, this is an ambitious timetable. In particular, Ofcom has yet to publish details of its complaints process cited at paragraph 20 of the Ofcom Guidance. As noted above, the BBC would expect Ofcom to seek stakeholder views on this before publishing the final Guidance.

In addition, Ofcom's current proposals would require significant changes to the way in which productions apply the criteria. If Ofcom decides to pursue these changes, the industry would require sufficient time to adapt their processes. In any event, by April 2019, the BBC estimates that over 60% of the programmes slated for broadcast 2020 will have already been commissioned, meaning that these programmes may not meet the new Guidance.

For these reasons, the BBC suggests that any changes should be effective for programmes broadcast from 1 January 2021, but it should be acceptable for broadcasters to apply the existing Guidance to productions commissioned before this date.

¹⁷ [Ofcom Proposed Annual Plan 2019-20](#), December 2018

4. Treatment of Network / Nations & Regions co-commissions

We consider that Ofcom should apply the same approach to the treatment of co-commissions between BBC Network channels and BBC Nations & Regions opts as it has in amending the Operating Licence in relation to the launch of the new BBC Scotland channel.¹⁸

In that decision, Ofcom amended the Operating Licence to allow:

- expenditure on programmes co-commissioned by Network channels and Nations & Regions opts to be allocated to a service in proportion to the percentage contribution it made to the total expenditure; and
- hours of content co-commissioned for the BBC Scotland channel and UK Public Television Services (such as BBC One, BBC Two and/or BBC Four) to be counted against the Scottish and UK-wide made outside the M25 network hours quotas when a programme premieres on the BBC Scotland Channel.

We consider that this approach would also beneficially be extended more widely to co-commissions between BBC Network channels and Nations & Regions opts.

First, we think that this approach increases public value for audience. Where a programme would specifically appeal to both a regional/national and UK-wide audiences, we consider that the public value of the programme can be maximised by being able to premiere the programme on the regional/national service and then show it on relevant network channel. This is because:

- the national/regional audience will benefit from the programme being shown first on the service designed for them, and thereby creating incremental public value; and
- the UK-wide audience loses nothing.

Second, this approach will create the appropriate incentives to encourage co-operation between BBC Network Channels and BBC Nations & regions opts to the benefit of audiences and the creative economy in the Nations & Regions.

Finally, we consider that this is what the Communications Act 2003 and the Framework Agreement envisages. Paragraph 7 of Schedule 2 of the Agreement requires Ofcom to impose on the BBC requirements relating to programme making in the nations and regions, i.e. a suitable proportion of all the network programmes made in the United Kingdom are made outside of the M25 area, that a suitable

¹⁸ [The new BBC Scotland Channel: Decision on the variation to Ofcom's Operating Licence for the BBC's public services](#), 31 January 2019

proportion of all the network programmes made in the United Kingdom are programmes made in Scotland, Wales and Northern Ireland, and that these represent a suitable range of programmes.

Paragraph 7(3) of Schedule 2 of the Agreement defines network programmes as:

“programmes made for viewing on any of the UK Public Television Services, other than programmes made for viewing only on a variation of such a service that relates to one of the following- (a) Northern Ireland, (b) Scotland, (c) Wales, (d) any region of England.”¹⁹

Clause 75 of the Agreement states:

“the UK Public Television Services” means those UK Public Services which consist of television programme services, and “UK Public Television Service” means any of those services.²⁰

As is clearly set out in the schedule 1 part 1 of the Agreement the UK Public Television Services are BBC One, BBC Two, BBC Four, BBC Parliament, BBC News, CBBC, CBeebies, and BBC Alba. From 24 February 2019, this list has included BBC Scotland.

Paragraph 7(3) of the Agreement states that a programme is a network programme if it is made for viewing on any of the UK Public Television Services (see above) unless it is “made for viewing only on a variation of such a service that relates to one of the following (a) Northern Ireland, (b) Scotland, (c) Wales, (d) any region of England”, i.e. the national and regional opts, such as BBC One Scotland, BBC One London, etc.

Therefore, it must follow that a programme made for viewing on UK Public Television Service and “a variation on such a service” (i.e. an opt) must be a “network programme” for the purposes of paragraph 7 of schedule 3 of the Agreement.

However, Ofcom’s guidance on regional production states that to count programmes must be ‘first run’.²¹ In its review, Ofcom has proposed defining this as:

“First-run UK originations: Programmes commissioned by or for a licensed public service channel with a view to their first showing on television in the United Kingdom in the reference year.”²²

¹⁹ [Agreement](#), Schedule 2, Paragraph 7(3).

²⁰ [Agreement](#), Clause 75.

²¹ [Regional production and regional programme definitions: Guidance for public service broadcasters](#), Ofcom, p.1-2.

²² [Glossary - Review of Regional TV Production and Programming Guidance](#), December 2018.

We assume the definition of first-run is intended to prevent network programmes being counted towards the regional production quotas more than once, e.g. if the programme is repeated. This is clearly correct. However, this would (a) frustrate the Agreement's clear intention that the definition of a network programme includes programmes shown on both opts and network services; (b) dis-incentivise national / network co-operation; and (c) therefore, prevent the BBC maximising public value as described above.

Therefore, the BBC proposes that an appropriate definition would be

“First-run UK originations: Programmes commissioned by or for a licensed public service channel with a view to their first showing on a network television service in the United Kingdom in the reference year.”

This would prevent inappropriate double counting but, consistent with the Agreement, it would support the increased public value and co-operation the BBC would like to achieve.