

Pact's submission to the Ofcom Review of  
Regional TV Production and Programming  
guidance – phase 2

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## Introduction

1. Pact is the UK trade association which represents and promotes the commercial interests of independent feature film, television, digital, children's and animation media companies. Pact has around 500 members across the UK with around 150 based outside London across the UK nations and regions.
2. The UK independent television sector is one of the largest in the world. Independent television sector revenues have grown to around £2.7 billion in 2017, largely driven by a growth in international sales.<sup>1</sup>
3. Pact broadly supports the overall approach that Ofcom has taken in the second phase of this review; agreeing that the current definition and guidance needs clarifying and updating but that there is no evidence at the present time for wholesale change. Pact appreciates the fact that several recommendations we put forward have been taken on board by Ofcom. However, we do question some aspects of the proposals in the response.
4. As expressed during the first phase of this consultation, Pact reiterates that our view of the Made out of London definition and guidance is that it offers balance and flexibility which has benefited companies based across the nations and regions and in London.
5. Pact calls on Ofcom to carry out a Review as to how effective the revised criteria and guidance are in two to three years in order to analyse the enhanced reporting, the results of the additional survey to be carried out around regional production and the changing production landscape, namely:
  - The BBC service licence agreement setting out individual targets for each of the UK nations and English regions
  - Additional local spend announced for the BBC in Wales, Northern Ireland, BBC Scotland including the new channel in Scotland
  - The opening out of both BBC local and network opportunities to competition
  - Channel 4's announcement to increase investment out of London to 50% by 2023

All of these developments are likely to provide more opportunities for production companies across the UK to strengthen Out of London production.

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<sup>1</sup> Pact Financial Census and Survey 2018 (Oliver and Ohlbaum Associates for Pact)

## Response Summary

Pact welcomes the opportunity to contribute to this Review of the Regional TV Production and Programming guidance consultation.

Pact's view of the current Made Out of London definition and guidance is that it offers balance and flexibility which has benefited companies both based in London and the nations and regions, both established companies and new entrants to the market. The evidence shows that the production sector in the nations and regions has increased its share of PSB programming expenditure over the last decade, however total spend on regional productions has fallen.

### Overall approach

Overall, Pact broadly supports the approach that Ofcom has taken in the review, taking steps to update and clarify numerous aspects of the definition and guidance whilst recognising that there is currently no evidence for a wholesale change to the definition. Pact welcomes the fact that several recommendations we proposed have been accepted by Ofcom, including:

- *Criteria overall:* Retaining the choice of two out of three criteria which allows flexibility for companies based across the UK.
- *Criteria and guidance:* Tightening up of the criteria and guidance in several different ways, including clarifying that there are three elements to meeting the substantive base criteria and clarifying the underlying purpose of the guidance.
- *Production budget:* Encouraging, but not stipulating, the use of local production and post production related facilities in the nations and regions, through the guidance.
- *Reporting:* Enhanced reporting by the broadcasters through additional reporting from producers to encourage transparency and compliance.
- *Monitoring:* Increased Ofcom monitoring through introducing 'spot checks'
- *Data transparency:* Out of London register and increased data and transparency through an interactive register.
- *Complaints process:* Publication of a complaints process by Ofcom.

In terms of policing the revised arrangements, it is important for the step change in auditing and policing to be visible to the independent production sector and the market overall. This is important, in order to increase confidence in the criteria and guidance and is particularly the case with regard to interpretation of the substantive base.

### Detailed proposals

There are, however, a number of points of detail where we question Ofcom's proposals and recommend a different approach:

- *Substantive base:* the stipulation that the production in question must be made from that substantive base; we think that this could be restrictive and are concerned that this would undermine the ability of small companies for example, based in Scotland to produce in Manchester. We would not want a situation that forced companies to claim a substantive base for each production by default.
- *Substantive base operational prior to the point of commission:* Pact calls for an element of flexibility here in interpretation from Ofcom particularly where indies are compelled by the broadcaster to take an existing strand and produce this from the nations and regions.

- Production fee being excluded from the budget: this should be excluded apart from where it can be demonstrated as contributing to the nations and regions.
- Usual place of employment: further clarity is requested around definitions here.

### Is London dominating regional production?

It appears from the consultation document, that Ofcom is not in a position to fully answer this question which sits behind the consultation. There are some interesting indicators from the O&O research such as the fact that 66% of Made out of London hours are produced by companies with a London headquarters. London producers also dominate in certain genres e.g. comedy, entertainment, factual entertainment and drama – whilst nations and regions companies are making specialist factual.

Pact welcomes Ofcom plans for a production survey that will investigate further how broadcasters can deliver faster, longer term change in the nations and regions. The survey will 'benchmark the mix of London and nations and regions talent and resources employed on regional productions and in the commissioning of them'; Pact is keen to work with Ofcom on shaping the questions and will of course promote the survey to its membership and engage in the debate.

Pact calls on Ofcom to carry out a Review of the revised criteria and guidance in two to three years' time in order to reflect; the enhanced reporting starting from January 2019, the results from the survey to be carried out around regional production and the changing production landscape should be factored in also.

With regard to the £1.4billion spent on TV production in the nations and regions in 2017, accounting for around 40% of total UK spend. We would expect to see this figure increase over time and we call on Ofcom to monitor this and report on progress.

### Industry guidance

We are keen that Ofcom and the broadcasters work together to produce a single set of guidelines for suppliers. We note that Ofcom's approach is that its guidance (being consulted on at the moment) is the main guidance and that the broadcasters will need to amend their guidance in order to bring this in line with Ofcom's. We indicate in this response where we support the broadcasters' approach on certain issues rather than Ofcom's.

Pact would ask to be consulted on the guidance and have the opportunity to input into the final version before it is published.

### ITV and Channel 5

Pact also calls on Ofcom during the discussions in the run up to ITV and Channel 5's licence obligations in 2023 discuss further what more they can do to come closer to matching the current commitments and level of investment by BBC and Channel 4. Pact calls on ITV and Channel 5 to start thinking and planning now about how they can improve their level of Out of London investment in time for 2023.

As Ofcom's report outlines, ITV's level of investment Out of London was previously at 50% and Channel 5 at 35%. New obligations under a revised service licence could be introduced over an appropriate period of time to allow the broadcaster to adapt strategies and implement.

## **Consultation questions**

### **Qu 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)**

Pact agrees that the additional wording on page 1 of the Annex proposed by Ofcom offers helpful background and context to the purpose of the regional production obligations made under the Communications Act 2003. The additional clarifications relating to each of the three criteria are helpful and welcome from Pact's perspective:

- Substantive base by referring to a 'degree of permanency', 'authentic presence' and 'contributing to the creative economy on an ongoing basis'.
- Production budget: the wording encourages, but does not stipulate, the use of local post production facilities in line with Pact's recommendation.
- Production talent: encouraging job opportunities in the nations and regions and attracting talent to those areas.

We call for Ofcom to work with the broadcasters to agree a single set of guidelines for industry for producers to follow with input from Pact. The broadcaster guidelines, as Ofcom is aware, are not in line with the Ofcom guidelines.

### **Qu 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.**

### **Qu 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.**

Pact supports the clarification that all three aspects of the substantive base criteria should be met, which is in line with Pact's recommendations.

#### **Definitions of 'executives' and 'senior personnel'**

Pact recommends that Ofcom goes one step further in its definitions and uses the indicative list of job titles as outlined in the broadcaster guidance on page 5. We believe that this adds useful clarity. The list of jobs titles as the broadcaster guidance states 'should not be prescriptive' but is for 'illustrative guidance'.

#### **Operational prior to the point of commission**

With regard to the proposal for the substantive base to be operational prior to the point of commission, Pact calls for flexibility from Ofcom here in interpretation of the definition. We appreciate the aim of this proposal is to prevent so-called 'pop-ups' from occurring in the future. We also appreciate that Ofcom is looking for input from Pact and producers, so it can fully assess the likely impact on the market.

Some Out of London production companies support this proposal; others think that the point of 'commission' can be arbitrary and for some the focus is more on achieving an ongoing

substantive base into the future. It may be that ‘at the point of contract signing’ may offer more flexibility to companies than at the point of commission. We are keen that small and start up companies are not disadvantaged in any way.

This proposal causes problems for some London based companies that have an existing returning series and are asked by the broadcasters to make the next and continuing series out of London. These companies need time to adapt given that large teams have been trained in the skills specific to the projects. It may be difficult for them to meet the substantive base criteria straight away and difficult to meet the local talent criteria spend because of the need to train people up over a period of time.

Pact raised issues in its original submission about broadcasters moving an existing strand to the regions. We support a mixed economy including investment from London in addition to the securing of long running returning series in the nations and regions to help build capacity. We asked that Ofcom show flexibility around this application of the ‘prior to the point of commission’ criteria, particularly when it is required by the broadcaster as a condition of the commission.

### Production in question made from the substantive base

The stipulation that the production in question must be made from the substantive base should only apply where a production is claiming a substantive base and this should be clarified in the text of the guidance. Pact would not support any move that made the substantive base obligatory as a criteria. It is important to still retain flexibility for example, for small companies based in Scotland to produce in Wales or for Manchester based production companies to produce in Northern Ireland without having to set up an additional substantive base.

### Explanatory notes

Pact also welcomes the additional wording added in the guidance to the substantive base definition. References such as a ‘degree of permanency’, an ‘authentic presence’ and ‘contributing to that local area’s creative economy on an ongoing basis’ are welcome and give greater context to how the criteria and guidance should be interpreted. This is important because for some companies the issue is about longevity and how a base is contributing to the nation or region over time. Pact asks Ofcom to provide further information as to how these criteria will be assessed and reported on.

### Usual place of employment

Pact would welcome further clarity from Ofcom about its interpretation of ‘usual place of employment’. Pact supports the reference in the broadcaster’s guidance to ‘the majority of working month or week’. This is one area that auditing should be careful to police. We appreciate that Ofcom did not opt for the Pact proposal of tax residency but we support the broadcasters approach in its guidance setting out the ‘majority of working time’ and identified by the individual’s home address. We call for Ofcom to include these definitions in its own guidance.

**Qu 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.**

**Qu 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.**

Pact supports the decision to keep the production budget target at 70% and the reasoning behind this.

#### Production fee

Pact supports the approach of the broadcaster guidance here. That the production fee should generally be excluded, apart from where the fee is claimed from a substantive base and demonstrably benefits the nation or region and can be agreed with the broadcaster in advance.

We recognise that Ofcom is aware that there may be unintended consequences as a result of this proposal and is looking for input from industry in order to fully assess the impact. The production fee tends to be around 10% of the budget and can be between 8-12% depending on the deal agreed. If this production fee is for a production company with a base in the nations and regions then the fee and this part of the budget will be genuinely spent out of London. The risk and potential repercussion is that London based companies will benefit and gain an advantage over producers based in the nations and regions, because the fee will be deducted from the regional spend from the start.

Pact prefers the pragmatic approach that the Broadcasters have taken in their guidance indicating that the fee should be included where it can be demonstrated that it will 'benefit regional production' and that 'this should be agreed at the point of commission with the relevant broadcaster'.

#### International spend

Pact appreciates why Ofcom are proposing to allocate international spend to the production budget but not class this as regional spend (apart from where regional staff are working abroad as these salaries still benefit regional production and associated travel costs at the point of sale). However, we do not believe it makes sense for international spend to be essentially allocated as London spend.

We are also concerned about the possible risk to disincentivising international filming because this would be to the detriment of the sector's future development, particularly amongst companies in the nations and regions.

Given the rise in international filming over the last ten years and companies taking advantage of international tax reliefs, Pact calls on Ofcom to show an element of flexibility here so that, particularly in borderline cases, broadcasters can judge on a case by case basis where productions may still meet the regional criteria ie. companies are based in the nations and regions but involve international filming. The Pact's Annual Financial Census demonstrates that the growth in independent sector revenues are coming from international

markets<sup>2</sup> and we would be concerned at any move that made out of London companies less ambitious to work internationally and, as a result, less competitive.

We are aware that BBC are operating a definition of 'Made out of the UK' productions after informal consultation with Ofcom. We would welcome this definition being opened up to wider consultation in order for Pact to consult members and provide input.

#### Travel expenses

Ofcom proposals are too restrictive here and the wording is not entirely clear. The Ofcom interpretation linked to 'local travel' is too restrictive and there should be more flexibility here particularly if the starting point of the journey is in the nations and regions.

The revised guidance seems to suggest that travel expenses for example, of an employee based in the regions travelling to London to take part in training or an edit would not be classed as regional spend when it can be demonstrated that this spend is benefitting regional talent and production. There are also instances when, for example with quiz programmes, when participants are brought in from across the UK (not including London) that this should be classed as regional spend as it is outside London.

**Qu 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.**

**Qu 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.**

Pact agrees with keeping the definition the same here at 50% and the reasoning behind this.

It would also be useful for Ofcom to explain in the guidance *why* the definition does not include on-screen talent – because there are other means for dealing with portrayal on screen and the criteria and definition are about dealing with incentivising strengthening of production and talent outside London. These are questions that producers periodically ask so it would be useful to clarify this on the face of the guidance.

We appreciate the flexibility for companies to assess who on the staff it would specify as regional talent in the spirit of the guidance; the option of not introducing rigid processes is welcome from our perspective. This aspect should be part of the auditing and checking process also.

#### Usual place of employment

We support the broadcasters guidance here which offers further detail and clarity around what is meant by 'usual place of employment', how this is defined and checked by the broadcaster with oversight by Ofcom. In terms of freelancers, where the home address is not clear then producers/broadcasters should opt for the usual place of employment. This revised guidance should not undermine the concept that if freelancers live outside the M25 they qualify regardless of where the most recent engagements have been.

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<sup>2</sup> Pact Financial Census and Survey 2018 (Oliver and Ohbaum for Pact)



Production talent and creative roles

Ofcom's definition of 'production talent' on page 10 appears too rigid and we would welcome more flexibility, as reflected in the broadcaster's guidance. It should be more about roles that contribute to the 'production making process' rather than purely creative – a driver might also be a runner for example, contributing to the production.

**Qu 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.**

Yes, Pact supports the proposal to exclude self-promotional content given the examples and rationale given and believes that this is in line with respecting the purpose of the definition.

**Qu 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.**

The proposals here seem sensible. From our perspective, it is useful to distinguish between multi-English region or Multi-nation outside England as this has been raised by producers before in the context of Channel 4 meeting its nations target (9% by 2020). This will provide clarity to producers.

We appreciate that Ofcom rejected the Pact proposal to allocate spend on a pro-rata basis considering that this would not be 'appropriate or proportionate'. However, the issue remains of long running series being allocated to a particular nation which may meet the letter but not the spirit of the criteria. It would be helpful if Ofcom agreed to monitor this issue over time as part of the auditing process and reconsider as the new reporting and tightened regime bed in over the next few years.

**Qu 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:**

**a) data gathering and reporting by the broadcasters;**

Pact welcomes the move to more reporting from the broadcasters from January 2019. We would like both Ofcom and the broadcasters to monitor implementation and ensure that there remains an 'appropriate balance between providing transparency and ensuring confidence in the system'. We agree that enhanced reporting will encourage compliance.

Ofcom should keep an eye on how this is implemented, ensure consistency between the broadcasters and that producers are not being disproportionately burdened. Pact wants to ensure that a balance is retained between valuable increased reporting so that we have more information about what is happening in the market and where investment is going,

without placing disproportionate reporting burdens on business potentially impacting on competition, commercial sensitivities and data protection issues.

**b) more comprehensive data publications;**

Pact pushed for the original publication of the Made Out of London programme register in 2010 in order to encourage transparency around reporting. In 2013, we also called for programme titles to be added to the publication of the register to further improve transparency. We obviously support the publication of an enhanced register on an annual basis.

We welcome the steps to incorporate hours and spend information. This is not directly in line with what Pact asked for in terms of hours and spend reporting relating to individual titles on the register. However, we appreciate that mapping onto the register, hours and spend information from the media nations report is a fair compromise and should help improve data transparency.

We appreciate the interactive nature of the register which is a good idea and offers more transparency. We welcome further covering analysis of the register in the future so that producers can appreciate at a glance how trends are changing e.g. Analysis by nation/region or genre. Pact would welcome further clarity around whether the point we raised around 'series, programme or insert within a programme' will be clarified in the next publication of the register so it is clear how the regional strands are being recorded.

With regard to the future Ofcom survey, Pact has consistently argued over time that two aspects are needed if we are genuinely to achieve sustainability of production in the nations and regions:

- i) Securing returning series for producers in the nations and regions in order to help them build sustainable businesses and offer local talent ongoing and meaningful careers
- ii) Broadcasters and particularly local and opt out services commissioning in a way that helps companies develop content for not just local but national and international audiences to bring in valuable investment.

**c) proactive monitoring by Ofcom; and**

We appreciate that the model in the future will be the broadcasters taking the lead in collecting more information with Ofcom providing oversight through committing to carrying out 'spot checks'. This, in conjunction with increased reporting requirement and audits by the broadcasters, will be valuable in providing checks and balances to a system that previously had very little oversight. This policing and auditing is crucial, many producers believe, to improving confidence in the system. We called for Ofcom to be more proactive in coordinating compliance processes around the definition.

**d) a clear articulation of the complaints process**

Pact welcomes the Ofcom decision to publish more information about a formalised complaints procedure. As previously stated, this should provide a route for producers to raise concerns in the knowledge that they will receive a prompt acknowledgement of the complaint and proposed follow up within a defined time period e.g. three to six months.

We would welcome the opportunity to comment on the process too; it should balance the need for producers and others to raise legitimate concerns around individual shows, with the rights of broadcasters and producers to not be burdened by unsubstantiated claims.

**e) Pan industry guidance on the criteria and reporting**

We welcome the majority of the clarifications to the Ofcom guidance. However, more work now needs to be carried out to amalgamate the Ofcom guidance with the broadcaster's guidance. It would be more straightforward for producers to have one set of guidance rather than two.

Pact recommends that the following aspects of the existing broadcaster guidance should be incorporated into the Ofcom guidance:

- Page 4 & 8: definition and explanation of 'usual place of employment' being the majority of working time and/or identified by the individual's home address.
- Page 5/6: Definitions around 'executives managing the regional business', 'senior personnel involved in the production in question' and 'senior personnel involved in seeking programme commissions'.
- Page 6: production fee; welcome broadcaster approach where it can be demonstrated that the production fee will benefit regional production then it should be included in the regional budget.
- Page 7: Travel expenses: Ofcom proposals are too restrictive here. The wording seems to suggest that travel expenses of an employee based in the regions travelling to London to take part in training or an edit, for example, would not be classed as regional spend. There should be more flexibility here particularly if the starting point of the journey is in the nations and regions.
- Page 8: production talent and creative roles; Ofcom's definition is too rigid here and we would welcome more flexibility, as reflected in the broadcaster's guidance.

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

Yes, Pact supports the sentiment for bringing in the changes promptly whilst giving broadcasters and producers some time to adapt to the revised regime.

However, we ask Ofcom to bear in mind that many shows will have already been commissioned before January 2020 and some will be well into production already. Producers should not be asked to retrospectively comply with significantly different criteria to those that applied at the point of commission.

Publication of the revised guidance should happen at the earliest opportunity to ensure that these cross-over issues are mitigated and producers have the maximum opportunity to plan and prepare accordingly.