

REVIEW OF REGIONAL TV PRODUCTION AND PROGRAMMING GUIDANCE

RESPONSE BY THE SCOTTISH GOVERNMENT

1 - Key points

- We agree with Ofcom that the overarching policy objective of the guidance should be made clear and that its success should be measured against this.
- However, the objective set out by Ofcom ‘to support and strengthen production in Scotland’ is only achievable in a sustainable way through a greater focus on – and more effective measures to support – Ofcom’s vision of “the development of end-to-end production ecologies in the nations and regions”, which we consider should be the ultimate policy objective, and should be included in the new guidance.
- We note with concern that Ofcom’s research shows that London continues to dominate production across the UK.
- The new proposals may make the existing MoL regime more effective, but will not shift the balance in favour of locally-based companies which add long-term value to the sector.
- Success in Scotland should be measured by progress in redressing the structural imbalance between companies based in Scotland and those based elsewhere.
- To help disperse high-value genres from London, all MoL productions should be required to meet the substantive base criterion and one of the other two criteria, and senior staff must be operationally-independent decision-makers.
- Targets should be set for commissioning by PSBs from Scottish-headquartered companies, to keep rights in the Scottish creative economy and boost authentic representation.
- Ofcom should not drop its commitment to monitor the balance between London-based and locally-based companies.
- On-screen talent is vital for any creative sector and should be included in the production budget criterion.
- Ofcom should work towards a suitable range and balance of genres in each nation/region.
- Programmes designed to tour the UK should not qualify for MoL.
- A way should be found to retain the value of regional ‘in-house’ production in the local sector.
- Nation-specific quotas should be set for ITV and Channel 5.

2 - Rationale

We welcome Ofcom’s proposals to clarify the budget and talent criteria, to require more data about how productions meet the criteria, and to provide for closer oversight of how the PSBs are applying the Guidance. These proposals will go some way to address concerns about the effectiveness of the current regime.

London-headquartered companies continue to dominate UK regional production

But Ofcom's research shows that only a quarter of so-called Scottish production comes from indigenous Scottish companies in 2017 ("MoL commissions from locally headquartered producers in Scotland accounted for around 25% of total Scottish MoL hours in 2017", p 23) and the Oliver & Ohlbaum report concludes that "66% of MoL hours in 2017 were produced by companies with a head office in London" (p 82). It seems clear that there is an underlying structural imbalance in the UK sector in favour of London-headquartered companies which are benefitting from the profits and IP of production across the UK, and that the current regime has failed to bring about an independent, fully-functioning production ecology in Scotland. The survey proposed by Ofcom at 5.84 should include tracking the destination of IP so that this critical element in the screen economy can be monitored.

Firmer action is required

We do not believe the proposals will change this broad picture because:

- (i) London-headquartered companies with no existing base in Scotland may be encouraged to put down roots, leading to an increase in the proportion of MoL content made by regional branch offices of London-based companies.
- (ii) The measures proposed to verify operation of a "substantive base" and define "senior staff" are not sufficiently robust. Suggestions to use domicile for tax purposes or to compile an approved supplier list are discussed but not adopted.
- (iii) To qualify under the present guidance, a production need meet only two of the three criteria - but as PACT's analysis shows: "*high value drama and comedy are much more likely not to meet location criteria ie to move into an area to produce a particular production rather than have a permanent base there. This obviously has an impact on their ability to act as a long term catalyst to that region.*" Meeting the location criterion is critical to ensure genuine economic growth in the region. To bring about dispersal of the UK production industry from London, we propose that the requirement be for a production to meet the location criterion and one additional criterion.

Importance of local companies for success of the sector

The Scottish Government has tasked the recently-launched Screen Scotland in Creative Scotland with doubling production spend and increasing the number of Scottish independent production companies in the UK top 50. This aligns closely with Ofcom's emphasis on the development of "*independent*" "*fully-functioning end-to-end production ecologies*" in the nations and regions (4.50 and 5.82). But we believe Ofcom should take firmer action through the MoL regime to support these ends.

All production activity in Scotland brings benefits in the form of employment and skills development, but it is indigenous external producers (IEPs) – i.e. Scottish-based independent companies – which retain profits and intellectual property in Scotland and have the greatest potential to add long-term value, while the profits and IP of London-headquartered companies may be more likely to revert to London. Practical measures should therefore be introduced to support and develop IEPs, setting appropriate targets for PSB commissioning from IEPs and putting measures in place to allow progress to be tracked, to ensure that the full value of production activity is returned to the Scottish economy. We doubt that Ofcom's proposal to encourage PSBs to "*consider how they can reduce their reliance on London talent*", and monitor progress, will bring about significant change in the short term.

Strengthening local creative sectors will involve supporting all elements of the production process including on-screen talent. Equity's proposal that on-screen talent should be included in the production budget criterion, and that at least one local casting session should take place where a programme is to be made, would significantly support Ofcom's objectives and we ask that these suggestions are considered more carefully (see response to questions 4,5 below).

Overall intention of the regime

We believe the overall intention of the regime should be to strengthen indigenous production in the UK's nations and regions. Ofcom should set a target of 75% of productions to be commissioned from indigenous companies in the nations; or at least ask PSBs to adopt voluntary targets and then monitor progress towards them.

In light of this we consider it wrong for Ofcom to drop its commitment to "monitoring the balance" between "productions originated by regionally-based and London-based producers". It should at least commit instead to consider further regulation if insufficient progress is made towards independent, fully-functioning ecologies.

Range of genres

A "fully-functioning" creative economy must be able to produce across a full range of genres. However Ofcom notes that "*commissions allocated to Scotland... include a large volume of sport*" while the BBC reports that "*the vast majority of BBC quizzes now come from Scotland*". Both genres have their place, but are among the least beneficial for long-term value and cultural representation. Against this, there has been relative under-provision of Scottish network drama in recent years. We support BECTU RPG's recommendation that Ofcom "*analyse the relative amount of sports events programmes made as part of MOL production quota against those made within London, and determine whether sports events programmes should be treated as a special category in fulfilling MOL quotas.*" We believe Ofcom should work towards a suitable range and balance of genres in each nation/region.

Representation should be integral

We consider the BBC's denial of a link between production activity and authentic representation to be a fundamental mistake. Ofcom's Review of Representation and Portrayal on BBC TV reveals how sensitive audiences are to authenticity and the factors which influence it (pages 31-39), aptly summing up by quoting a member of a focus group in Glasgow: "*If it's produced by Scottish people, Scottish actors, then it feels more authentic... done by a London scriptwriter, and done by a London production company, that's different*".

Commissioning from 'indigenous' companies will not guarantee more authentic portrayal and representation. But creative teams familiar with the relevant social and cultural background are more likely to achieve it. Directors UK says "*only 1 out of 6 of the productions commissioned by BBC Scotland drama [in the 2016-17 MoL register] were made by a Scottish based director*". This may help to explain why research for the Ofcom Representation review found that only 39% in Scotland considered that the BBC broadcast a good range of content "that represents where they live".

We believe that creating independent, fully-functioning production ecologies would help the UK PSBs to produce more authentic representative content from the nations

and regions. It would therefore be beneficial for Ofcom to draw together its strands of work on regional production and representation.

An industry-wide effort

We support the BBC's view that it will require an "industry-wide effort" to achieve sustainability across all nations and regions. All parts of the sector should be expected to make a contribution. Respondents to the consultation raised questions about the roles of in-house production departments, post-production, and ITV and Channel 5. We believe these should be given greater consideration.

We are concerned that the discussion of in-house production at 2.16 focusses on volume of programming and not the destination of IP of such content. It would be helpful to consider how the long-term value of in-house production (especially BBC Studios) can be captured and exploited within a regional production ecology.

We agree with the respondents who urge Ofcom to encourage wider provision of post-production facilities and VFX outside of London. We would welcome proposals from Ofcom on how this might be brought about. There should be a level playing-field for all stages in the production process including post-production. We welcome the acknowledgement at 4.50/4.51 that "there should be a greater focus on ... how regional production centres can become fully functioning" and that "there is scope for more action by the broadcasters to deliver faster, longer-term change". But we ask Ofcom to consider what action could be taken to bring this about.

Finally, Ofcom notes that ITV and C5 spend on MoL productions has been declining and that neither has nation-specific quotas. We continue to believe that Ofcom should set such quotas. As regulator for the UK broadcasting sector, Ofcom should take a more pro-active role in delivering these desirable policy outcomes.

3 - Responses to individual questions

Q.1 – Overall intention

We agree it is helpful to articulate the intention of the obligations in the new Guidance and Notes in Annex 7 as proposed, however the commitment to "continue to monitor the balance in regional production between regionally-based and London-based producers" (Annex 7, paragraph 12.1) should be retained.

We welcome the commitment to conduct a survey to establish a factual evidence base on the resourcing split between London and the nations and regions in order to assess developments over time; and the commitment to "consider whether further regulation is necessary" if it is of the view that "after recent market developments have had time to bed in... not enough progress is being made in this area" (5.84-6). IP is a critical resource for developing the sector and the survey should include tracking its destination.

We welcome and support Ofcom's statement of its aims in this area and suggest they be included in the Guidance so that all involved in the sector are fully aware of the importance accorded to them by Ofcom.

Qs 2,3 – Proposed changes to the substantive base criterion

We agree that the new requirement on the substantive base criterion should help eliminate ‘pop-up’ production offices but are concerned that (a) it will not prevent ‘lift and shift’ and (b) asking London-headquartered companies to commit more deeply or withdraw may have the unintended consequence of increasing their regional footprint.

Lift and shift

It is disappointing that no measures are proposed to discourage “lift and shift” which as the Scottish Parliament Culture committee pointed out has been a particular focus of concern in Scotland. The committee was sceptical that the practice brought sustainable and strategic benefits. Ofcom should clarify in the explanatory notes that “lift and shift” should only be used where commissioners can demonstrate clear strategic benefits for a particular nation/region.

Regional footprint of London-headquartered companies

The BBC appears aware of a risk (see p 7 of its submission) that tightening this criterion could lead to a more restricted supply base. It says such a move could, depending on the exact measures adopted, “preserve the current supplier base” leading PSBs to “limit their ambitions of programmes commissioned from that area” and “restrict opportunities to expand into new genres”. It is concerned that given the “high degree of specificity over the BBC’s quotas, such a move would, in effect, provide a commissioning guarantee for certain companies, no matter the level of quality or price they offered – and with little natural incentive to drive creativity”.

We believe firmer action could be taken to focus PSB commissioners on developing ideas rooted in the creative economies of the nations and regions. A possible solution would be to introduce a target for commissions from indigenous external producers.

In any case, increasing the volume of production alone is not a sufficient objective for regional production policy. The objective should be to develop end-to-end production ecologies which can create and return long-term value to nation/region economies.

This is a key objective for the new dedicated screen agency Screen Scotland which aims to increase the number of large-scale independent production companies based in Scotland from 2 to 6 by 2022/3. But it will be much harder to achieve if regulation does not provide a level playing field for indigenous companies. London-based companies have advantages of scale which Ofcom should ensure do not work to exclude indigenous businesses. For the “healthy competition” Ofcom desires (4.49) there must be equality of opportunity for all potential entrants and in all respects, including retention of profits and IP.

Post-production

This principle applies equally to the availability of post-production facilities. To address the problem noted at 4.49 that post-production resources are not always available locally, Ofcom should consider what regulatory measures would bring about a more equitable geographical distribution of these resources.

Other considerations in relation to the substantive base criterion are:

Usual place of employment

We consider Ofcom's definition of 'senior personnel' as "those individuals who have a significant leadership role and/or are responsible for making executive decisions" as too loose (Guidance p 8). The Guidance should make clear that senior staff must be autonomous decision-makers.

Particular importance of this criterion

PACT's analysis concludes that "*high value drama and comedy are much more likely not to meet location criteria ie to move into an area to produce a particular production rather than have a permanent base there. This obviously has an impact on their ability to act as a long term catalyst to that region.*"

Meeting the substantive base criterion in these genres is critical to bringing about genuine economic growth in a nation/region, as well as promoting authentic representation. But Ofcom proposes to continue the rule that a production need meet only two of the three criteria. To disperse production in these vital genres across the UK we propose that in order to qualify, productions in these genres should be required to meet the substantive base criterion and one of the other two criteria.

Explanatory notes

We welcome the more detailed explanatory notes on the application of specific criteria (Annex 7) which we agree are likely to improve delivery of the various policy intentions.

Terminology

We support the view of Ofcom's Advisory Committee for Wales that referring to production in the UK nations as "regional" is no longer appropriate and we recommend that the Guidance is retitled accordingly.

Qs 4,5 – Proposed changes to the production budget criterion

In general we consider the proposed changes fair and appropriate. However we believe the ambition here needs to be greater and should seek to capture all the economic inputs and outputs of production, i.e. including the profit, IP and other forms of long-term value which are essential elements of an end-to-end production ecology. It should therefore include the production fee.

On-screen talent

It is disappointing that Ofcom proposes to continue the exclusion of on-screen talent from the production budget criterion, and has declined to adopt Equity's suggestion that broadcasters be obliged to undertake at least one local casting session to provide opportunities for on-screen talent based in the nations and regions who are looking for work. On-screen talent is a vital element in the creative sector and on-screen talent based in Scotland should be able to access appropriate opportunities to develop their careers here. We do not agree with Ofcom's reasoning that such an obligation is disproportionate in the context of a regional development policy and we ask that Ofcom reconsider this.

Overhead costs

We are also concerned that overhead costs "associated with keeping a base in the nation/region operation" may be classifiable as 'regional spend'. Ofcom should monitor these very closely to ensure that London-based operations do not allocate corporate costs to nation/region offices which are then counted towards quotas.

Qs 6,7 – Proposed changes to the off-screen talent criterion

We agree that on balance it is in the spirit of the legislation for the off-screen talent criteria to remain the same.

Q.8 – Proposed change to exclude self-promotional content

We support the proposal to exclude self-promotional content from the calculations.

Q.9 – Proposed changes to the allocation categories

These changes help to clarify this complex area. However there is a genre of programming like *Question Time* or *Top Class* which seeks by its nature to represent as many areas of the UK as possible. They cannot contribute significantly to the long term development of any *one* region and should be excluded from the regime. Instead of using the substantive base criterion as a default, Ofcom should set a minimum level of contribution to a *single* regional economy, failing to meet which a programme cannot qualify as MoL.

Q.10 – Views on planned changes to compliance and enforcement processes

Gathering data and reporting

As noted in our response to Q1, we consider that Ofcom's commitment in the existing Guidance (at 12.1) to monitor the balance between London-based and indigenous companies to prevent dominance by the former should be retained and that Ofcom should agree voluntary targets with PSBs to develop indigenous production where these do not already exist. Broadcasters should be asked to gather data and report on their progress towards these targets.

Publication of data

We welcome the proposals for enhanced publication of data which will help clarify the actual position in each nation/region.

This should include the number of programmes in each series, and their duration; transmission dates and slot; genre; approximate budget or standard genre tariff; and location and registration of the production company and company status.

Categorisation of the data should also include whether production is by in-house or external, and whether the production company is headquartered in the nation/region.

**Scottish Government
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