

Submission to Ofcom's consultation on  
holding the BBC to account for the delivery of  
its mission and public purposes

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## **Executive summary**

Pact welcomes the opportunity to contribute to Ofcom's consultation on the BBC's operating licence and Ofcom's performance framework to measure and hold the BBC to account in delivering its mission and public purposes.

In general we support the regulatory conditions that Ofcom has set out in this consultation. We are pleased to see a focus on original productions.

However there are some areas in which Pact would like Ofcom to reconsider and amend when finalising the licence and framework in order to provide greater transparency and clarity to licence fee payers and others in the market about the BBC's activities.

Pact supports the BBC's ambition to become more competitive and believes the opening up of competition, as signalled in the renewed Charter and Agreement, will play a fundamental role in further stimulating the broader UK production sector. Therefore it is crucial for Ofcom to set out how Ofcom will enforce compliance by the BBC of the specified requirements this includes schedule 3 of BBC Charter Agreement which sets out the regulatory obligations for the UK Public Service, including obligations to secure competition between external producers and BBC producers in relation to making programmes. It is not enough to just state it will enforce compliance it needs to set out how so that the BBC can plan accordingly.

Pact understands the important role which the BBC plays in the UK broadcasting ecology. A strong properly funded BBC is incredibly important to the UK production sector.

However without oversight that is thorough and comprehensive from Ofcom there is a risk that licence fee payers will not be getting value for money and the creative diversity of productions could be limited. We are particularly concerned about this because the BBC's Annual Plan is also vague on how it will ensure it has clear mechanisms to oversee the opening up of commissioning and how it will be overseen by the BBC Board. This is particularly important as BBC Studios has begun to operate in the market; making programmes for the BBC and other broadcasters. Pact needs assurances that this is being done in a fair and transparent way without State Aid. If both Ofcom and the BBC fail to outline the strong mechanisms needed to ensure transparency within the system then there is a risk that the BBC is failing to operate in a fair way which means it could be subject to State Aid and competition issues.

## 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.
2. The UK independent television sector is one of the biggest in the world. Despite the difficult economic climate, independent television sector revenues have grown to around £3 billion in 2015.<sup>1</sup>
3. In 2015, the BBC spent £443 million on commissions from UK external producers. Last year, the BBC commissioned 46% of eligible television content from external producers<sup>2</sup>.
4. BBC Commissions are important for independent producers as they account for 29% of all UK commissions, making the BBC the biggest buyer of content made by independent producers in the UK.<sup>3</sup>
5. Pact recognises the important role that the BBC plays in the UK television marketplace and how it nurtures and adds to the finely balanced TV production ecology in the UK. We are pleased by the positive trajectory of the new charter whereby the license fee has been secured for another 11 years. The BBC is a positive innovator and experimenter in the marketplace and this is often driven by the content which it commissions from independent production companies.
6. For further information, please contact Pact's Head of Policy, Emily Oyama, at [emily@pact.co.uk](mailto:emily@pact.co.uk) or on 020 7380 8232

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<sup>1</sup> Pact Census 2016

<sup>2</sup> BBC Annual Report 2015/16

<sup>3</sup> Pact Census 2015

## **Consultation questions:**

### **Q.1 Do you agree with our overall approach to setting the operating licence?**

- 1.1. Pact agrees with the overall approach towards a single operating licence we agree in particular with the introduction of a new regulatory condition that focuses on the number of first-run originations across a range of TV-services. However, there are a few issues we would like to raise to ensure Ofcom, as the new regulator, publishes an operating framework that secures effective regulation of the BBC.

### ***The relationship between Ofcom's regulatory responsibilities on the BBC's performance and the BBC's impact on competition***

- 1.2 There is no detail in the draft operating licence or plans around the performance framework as to how Ofcom's regulatory responsibilities on ensuring the impact of the BBC's activities on fair and effective competition is appropriate, intersects with the performance framework. It is clear within the Charter Agreement under clause 4 that the 'operating framework must set out *how* Ofcom will enforce compliance by the BBC of the specified requirements' this includes schedule 3 of BBC Charter Agreement which sets out the regulatory obligations for the UK Public Service, which includes obligations to secure competition between external producers and BBC producers in relation to making programmes.
- 1.3 It is not enough to just state it will enforce compliance through the Agreement it needs to set out *how* so that the BBC can plan accordingly. We believe, because this is currently missing in the operating licence; the BBC has consequently set out a draft Annual Plan which omits any reference to opening up commissioning or the strategies it will employ to ensure there is genuine competition on a fair and level playing field. This is especially important as BBC Studios has already begun to operate in the market producing programmes for the BBC and is beginning to look to produce programmes for other UK and international broadcasters to return value to the BBC. The BBC itself recognised in its regulatory proposal for BBC Studios that it needs to operate on a level playing field with other suppliers. As the BBC Studios Regulatory proposal recognised 'Diversity of supply produces a diversity of ideas and approaches for audiences.' This will help the BBC to meet its mission and public purposes 'enabling the BBC to choose the best

ideas for its audiences from a market that includes a vibrant independent sector and a thriving BBC Studios.'<sup>4</sup> We must remind the BBC of the regulatory obligations to open up competition and its indie production quota otherwise there is a risk that all their commissioning strategies help to favour BBC Studios – which we know the BBC already see as a 'vital pipeline of talent, expertise and dedication to all forms of television programming'<sup>5</sup> We believe the wider production sector is also equally reputable and it is competition that will help the BBC realise its mission and public purposes for the next 10 years. This is particularly important to avoid State Aid issues which BBC Studios could be subject to if the BBC was seen to be operating in an unfair manner by utilizing lower running costs for example and thereby in turn undercutting the market to make programmes.

1.4 It is vital that the requirement to open up the BBC's content (TV and digital) commissioning to greater competition is fully overseen so that the BBC understands that there are clear obligations linked to every channel. Firstly, on meeting the requirement to open up content commissioning (including its online services) and secondly on meeting the independent production quota requirement. How each of these requirements intersects with the operating licence and subsequent performance framework needs to be fully explained. Pact calls for an annex to reference the independent production quota requirement and the new requirements to open up commissioning as set out in the BBC Agreement.

1.5 The previous BBC operational licences had an explicit reference to the independent production quota. This meant that the BBC Trust understood that their regulatory responsibilities for the BBC also covered how competition intersects with the performance framework. With the independent production quota applying to total number of hours commissioned the BBC is able to use a single channel within its family to fulfil its obligation. This could also apply to how the BBC plan to open up commissioning. This could result in bona fide indies who are already having to compete against larger highly resourced NQIs, only being commissioned for lower cost genres. The quota and the new requirement to open up commissioning acts as an incentive to encourage indie commissioning across the board and without it not only could indies suffer commercially but viewers may suffer from limited creative output from a limited scope of companies.

1.6 It is unacceptable that Ofcom will only enforce compliance by the BBC with regulatory requirements which apply to the BBC on opening up content commissioning and the independent production quota directly through the

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<sup>4</sup> BBC Submission to the BBC Trust 4CC process for BBC Studios, p4

<sup>5</sup> BBC Annual Plan 2017/18

Charter or Agreement. Without a reference in the operating licence, there is a risk that specific indie quotas and the new 100% target would be overlooked when the BBC uses the operating licence to plan its commissioning strategies.

### **Out of London**

- 1.7 We support the levels of quotas outlined by individual nation and region which are in line with previous quotas. We welcome the reference to 'different production centres' within each nation and region and a recognition that BBC investment in the English regions for example should not just be focused around Salford Media City but should extend to Leeds, Sheffield and the North East too. The quotas set out are fair and should be considered as a floor by the BBC rather than a ceiling.
- 1.8 That said, the Out of London quotas highlighted in the new operating licence are not explicitly linked to each BBC channel. This means it is possible that quota requirements could be met by loading onto one channel over and above others or within slots that are less attractive. We urge Ofcom to ensure the full scope of opportunities is available to nations and regions and that the Out of London quotas are linked to each BBC channel.
- 1.9 Pact also calls for a more detailed reporting structure to be introduced with regards to compliance under the quotas in the BBC's Annual report. We acknowledge that the BBC already has a responsibility to report on how it is delivering value and quality for licence fee payers, and how it is meeting its quota obligations, by presenting its Annual Reports to the UK government and the devolved administrations, and we welcome the BBC's continuation to deliver this in recent years.
- 1.10 This is important in terms of the BBC meeting its obligations in the nations and regions, whilst continuing to respect the BBC's independence. We also note that it is now a requirement within the BBC's Charter.
- 1.11 However, in order for the BBC to meet these obligations it needs to be able to assess the long-term value of the BBC's investments outside of London. We would strongly welcome more detailed reporting by the BBC in terms of its Out of London commissioning obligations linked to hours and content spend.
- 1.12 We also support Ofcom's intention to consult on the Out of London definition later in the year and look forward to responding to this once next steps are established. Pact's focus in this area is achieving real diversity of supply and sustainable businesses in the UK's nations and regions.

### ***Digital commissioning and BBC online***

1.13 We are disappointed that there are not more explicit requirements or regulatory conditions that set out the BBC's requirement to secure competition for 100% of relevant online material by 31<sup>st</sup> December 2027<sup>6</sup> or even a staged approach to this target. Pact welcomes initial discussions with BBC that indicate they are planning to move towards meeting the 100% target well before 2027. This again links back to the point about how this operating licence fails to set out how Ofcom's responsibilities for overseeing performance intersects with their regulatory responsibilities for ensuring the BBC's activities has no adverse impact on fair and effective competition.

1.14 Previously we have welcomed the BBC's Executives commitment to improve its operational effectiveness on digital by :

- communicating the quota and performance objectives more widely within the market;
- ensuring the decision making processes are fully- rolled out across the organisation;
- ensuring that commissioner contact details are readily available and up to date;
- replacing existing reporting metrics in a way that is more meaningful to the industry
- working with the industry to explore new models in which they can exploit their intellectual property rights.

1.15 Pact also welcomes initial discussions with the BBC that indicate they are planning to move towards meeting the 100% target well before 2027. Although plans on how it will strategically meet this are outstanding in the current draft of the BBC's Annual Plan published in July. We understand that it will be the responsibility of the BBC Board to oversee but we are unsure how this will be practically realised as in both the Annual plan and operating licence there no clear outline of how commissioning will be opened up to competition. We want to be assured that there will be a back stop with Ofcom. Furthermore the BBC will set their commissioning strategies based on the operating licence and as a consequence they need to be reminded about their obligations to meet the 25% independent quota requirement, the new regulatory requirement to open up BBC content commissioning to full competition by the end of the charter which includes online materials( this

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<sup>6</sup> This includes all online material included in the UK Public Services

refers to digital first and online content). This needs to be referenced explicitly in the operating licence again within an annex. This will help reflect the charter and agreement's commitment towards digital commissioning and opening this up to 100% competition within the charter period.

- 1.16 Pact also considers that Ofcom should immediately carry out an adhoc review on BBC3 given that after the Trust agreed to the BBC Executive's proposals to move it entirely online. A review is now outstanding<sup>7</sup> and we consider Ofcom should be responsible for carrying out a review based on its responsibilities for performance and competition. At the time of the BBC Trust consultation on the proposed service licence amendments for changes to BBC Three Pact was opposed to the move to an online only service especially given that the terms of digital content rights were assigned in perpetuity for digital content. Pact and the BBC have reached agreement on commissioning terms applicable to so-called long-form content ( which is also transmitted on BBC1 or 2). Given the proportion of the BBC3 content spend dedicated to online only content (short-form) it is necessary for online content to receive the same operational oversight. The contract terms issued to online content continue to be an issue for our members and we believe Ofcom should use their powers to carry out adhoc reviews to make sure the full impact of BBC three moving to an online environment is reviewed.

**Q.2 Do you agree with the approach we have proposed for public purpose 1, including the high-level objectives and regulatory conditions we are proposing?**

- 2.1 Pact has no views on this.

**Q.3 Do you agree with the approach we have proposed for public purpose 2, including the high-level objectives and regulatory conditions we are proposing?**

- 3.1 Pact does not support the approach Ofcom has taken on public purpose 2 because it continues to lack clarity on how competition intersects with the performance framework. As previously identified it is difficult to understand how this public purpose interplays with Ofcom's regulatory responsibility to ensure the BBC's activities do not have an adverse impact on fair and effective competition.

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<sup>7</sup> The BBCTrust endeavoured to undertake a review of BBC Three within 18 months of their final decision made 26 November 2015



- 3.2 This is particularly important for children's content makers because the new charter heralds a new era for in-house children's – as over time the BBC will need to make opportunities available in children's commissioning – at least 40% will become contestable by 2019 – a longer lead in time compared to other genres but nevertheless they will need to compete. As a result we will need to make sure there are clear mechanisms to oversee how this requirement will be met in relation to each specific channel. If a reference to the requirement to open up commissioning and the various timescales according to different genres are included ( including children's) we will be more assured that the BBC will have a clear steer from Ofcom that these need to be considered when they are planning their commissioning strategies.
- 3.3 BBC has long been an important commissioner of children's content. We support the increased quota hours for both Cbeebies and CBBC and the requirement for original production as % of hours of all programming as well as a set percentage for first run UK originations across Daytime and Peak slots.
- 3.4 Furthermore we recognise that according to Ofcom's PSB children's report in 2013 CBBC and Cbeebies are already producing 400 hours and 100 hours of original content respectively. Even though these quotas are not particularly challenging we support this approach and it will help BBC investment not fall below a certain level of commitment in the future, within the context of wider cuts to BBC funding. As it is likely that children's content will shift to an increase in commissioning of 'online first' content to the IPlay service (for potentially lower fees and without terms of trade for digital), Pact would be keen to see that investment in original content is maintained too, not just hours.

**Q.4 Do you agree with the approach we have proposed for public purpose 3, including the high-level objectives and regulatory conditions we are proposing?**

- 4.1 Pact has limited views on the high-level objectives and regulatory conditions under public purpose 3 and distinctiveness because quality content is subjective and therefore difficult to define. However, we think it is worth noting that diversity of supply will encourage increased diversity and creative content so it is worth recognising the role of other regulatory responsibilities that Ofcom holds with regards to competition and how this can impact on distinctiveness. For this reason it would be worth again highlighting the need to include the regulatory obligations linked to schedule 3 under the BBC

Agreement on opening up competition and on the indie production quota to ensure this is looked at in relation to distinctiveness.

- 4.2 That said we believe the process Ofcom has identified is practical and it makes sense to use an existing evidence base through the various Ofcom reviews and audience research it carries out. We also commend Ofcom's push for an increase in original productions and agree that this will help the production sector considerably including the range of voices it could help elevate. However this can only be achieved if transparency around fair and effective competition is maintained along with an explicit recognition of the need maintain a 25% independence quota.
- 4.3 Pact considers that decisions about what the BBC commission rightly remains a matter for commissioning editors and channel controllers at the BBC. We therefore agree that Ofcom has, as far as possible, left the elements within public purpose 3 as high level objectives in order to give the BBC sufficient strategic discretion to secure their delivery.

**Q.5 Do you agree with the approach we have proposed for public purpose 4, including the high-level objectives and regulatory conditions we are proposing?**

- 5.1 Pact supports both BBC production resources Out of London and building sustainable growth for the creative industries across the UK. To this end we agree with the more detailed targets and provisions outlined for specific genres for the nations and regions. However we would like to reiterate that this should be a floor and not a ceiling and we would urge Ofcom to ensure the BBC achieves well over this target. We agree that it is appropriate that the BBC should set out more detail provisions for specific genres in the annual plan. The key for Pact will be how this investment is spent through the consultation around the Ofcom Out of London guidance which we will welcome later this year.
- 5.2 Pact also agrees with the diversity procedures outlined. Pact fully supports the BBC's aims around diversity and approach for suppliers which takes into consideration the gaps and barriers for separate genres and type of programming.
- 5.3 We believe however that the BBC does need adequate resources in place to help suppliers to interpret and meet targets. This should include allowing suppliers to join BBC diversity schemes, providing on and off screen help and support for programme makers as well as ensuring that the measures in place are working adequately. Channel 4's creative diversity and 4 talent teams

have helped suppliers to reach Channel 4 targets and we believe that a similar approach at the BBC is vital if we are to work in collaboration to reach the BBC's diversity targets and aims.

5.4 Pact continues to work alongside the BBC and others in the industry to promote and support greater diversity on and off screen. We are involved in the pan-industry monitoring system Diamond, we run our own entry level industry schemes in London and Scotland and we also work closely with other bodies such as Directors UK, Creative Skillset and the Cultural Diversity Network (CDN), of which Pact CEO John McVay is the current Chair to promote diversity.

**Q.6 Do you agree with Ofcom's approach to how we will set and amend the operating licence, as set out in Annex 5?**

6.1 Pact agrees with the procedures outlined when Ofcom want to amend the licence and we welcome the fact that it will consult on any changes to the licence especially if this is a considerable change.

**Q.7 Do you agree with our proposed overall approach to performance measurement?**

**Q.8 Do you agree with the proposed framework of: availability; consumption; impact; contextual factors?**

**Q.9 Do you agree with Ofcom's approach to how we will set and amend the performance measures?**

7.1 Pact has limited views on performance measurement but believes the proposals seem reasonable and agree that Ofcom is using an evidenced based approach. However, as we have previously outlined, we believe distinctive content is subjective and should ultimately be left to the discretion of commissioning editors.