



Response to Ofcom review of Commissioning for the BBC Public Services

September 2018

Introduction and General Comments

TAC (Teledwyr Annibynnol Cymru) is the membership association for independent television production companies in Wales. There are around 50 companies in the sector, ranging from sole traders to some of the leading players in the UK TV production industry. They produce content for the BBC, ITV, Channel 4, 5 and Sky as well as other broadcasters and content providers. They are also involved in numerous international co-productions and produce the majority of original programmes broadcast on S4C. TAC members are also active in producing content for radio including for BBC Radio Wales, BBC Radio Cymru and UK-wide networks.

TAC welcomes Ofcom's review of Commissioning for the BBC Public Services and this opportunity to comment on the terms of reference (ToR).

Detailed below are some comments in response to specific sections of the Ofcom ToR, which we would be happy to discuss further.

Our overall judgement is that in this phase of the BBC's development, its commissioners have not adjusted sufficiently to the priorities of the current Charter. The BBC needs to act in the spirit, as well as the letter, of the new requirements on competition, the creative industries and the nations and regions.

Comments on specific aspects of the Consultation Document

Section in ToR	TAC Comment
<p>1.4</p> <p><i>Ofcom is responsible for enforcing the requirements placed on the BBC by the Agreement to make programming following a contestable process on FRNDT terms [fair, reasonable, non-discriminatory and transparent].</i></p>	<p>TAC has welcomed this allocation of responsibility to Ofcom since the announcement of the setting up of BBC Studios in 2016. We are aware that Ofcom is currently also consulting on modifying and introducing some new requirements relating to the BBC's commercial activities.</p>
<p>3.4</p> <p><i>... the BBC remains the largest commissioner of original television programmes in the UK and there plays an important part in the creative ecology of the UK. ..opportunities to produce programmes for the BBC are still important for the UK production sector</i></p>	<p>Ofcom is right to state that opportunities to make content are important for the production sector. It is important to note however that while the new Charter means more commissions will be put out for tender, the BBC can on occasion stifle creativity through often simply inviting companies to tender to make the same programme for a slot, rather than issuing a more general call out for ideas which might work in that slot. This could be in a specific genre or on a particular theme, either way it would give greater freedom for the sector to use the creativity which is at the heart of its success.</p> <p>We welcomed the conclusion of Peter Johnston, head of BBC Northern Ireland, in his review of the tendering process in 2017¹, which stated that “The BBC should consider more decommissioning-based opportunities where that makes sense from an audience point of view. Contestable opportunities released in this way will offer a more creative opportunity for all potential producers and will help BBC Content to refresh its portfolio in the right way over time”.</p> <p>There has not yet been sufficient evidence of this approach taking root in the BBC's commissioning, with tenders for programmes such as <i>A Question of Sport</i> being relatively narrow in nature.</p> <p>Adopting Johnston's approach would also enable the successful production company to retain the IP in new creative ideas under the Terms of Trade. TAC has concerns that the BBC is placing existing BBC Studios formats, some of which may be somewhat traditional, tired and outdated out to tender, simply in order to retain the IP rather than utilising the financial tariffs in such slots to supplying the audience with innovative, fresh and original ideas from the independent sector.</p>

¹ Lessons from the first round of tenders – conclusions and recommendations. BBC Commissioning website, November 2017. www.bbc.co.uk/commissioning/news/articles/peter-johnston-conclusions-tenders-november-2017 Accessed 18 Sep 2018

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<p>3.8</p> <p><i>The ability to exploit a successful programme or format is crucial to broadcasters to generate revenue. However, control over these intellectual property rights is also important to producers.</i></p>	<p>TAC members have successfully exploited IP rights in their programmes. It is of paramount importance that broadcasters do not make commissioning contingent on producers waiving these rights, particularly in the case of the BBC as one of the main public service broadcasters. A stronger independent sector will strengthen the quality and supply of programmes to the BBC over the longer term, and the producers' ability to monetise their own IP is critical to this process. Ofcom was asked to review the question of rights ownership as recently as the end of 2015, and it concluded that there was no case for amending the provisions in the Communications Act 2003².</p>
<p>3.14</p> <p><i>Once a successful commissioning decision has been made and agreed by commissioners and controllers, a contract will be negotiated between the BBC and the producer, establishing for example ownership of intellectual property rights.</i></p>	<p>Where Ofcom talks about Terms of Trade being negotiated, clearly the terms of trade protect core IP rights where the idea originated with the producer, but there can be further negotiations if both sides contributed to an idea.</p>
<p>4.18</p> <p><i>... where concerns do arise with the BBC's commissioning activity, we have the regulatory tools to investigate this further. Such an investigation would need to consider whether the BBC had commissioned on an FRNDT basis, and could arise as ... a stakeholder complaint to Ofcom or as an own-initiative investigation into a potential problem.</i></p>	<p>There are ongoing issues where some members feel that unfair practices are being followed. We have in the past heard of unfortunate instances where a production company is called in to discuss the terms of a newly-agreed commission. At this point, the BBC informed the producer that it wished to develop the idea under its own auspices, cutting the production company and most of the key personnel out of the equation altogether. TAC is looking at examples brought to our attention and when there is a serious case backed by evidence we will consider working with the member to take the complaint through the procedures as outlined by Ofcom last year, to test the system.</p> <p>Concerns remain in the sector about the tendering of contracts and the extent of specific competitive advantages that in-house and BBC Studios may have with regards this tendering process.</p> <p>These include the fact that whereas production companies have to buy in legal expertise to ensure they respond correctly to the</p>

² Review of the operation of the television production sector: A report for the Secretary of State for Culture, Media & Sport. Ofcom, 23 Dec 2018

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	<p>tendering process, such expertise is available to in-house/BBC Studios producers without this necessarily being classed as additional overhead.</p> <p>Secondly, we understand that the BBC has allocated a very significant (in the tens of millions) development budget for BBC Studios, which is a large sum of money not available to the independent production sector.</p> <p>Thirdly, we believe in-house/BBC Studios has access to some audience data that is not available to the external production sector – such data allows in-house/BBC Studios to design new programme ideas and adjustments with a greater level of insight.</p> <p>Our members have understandable concerns as to whether or not these and other concerns can offer a truly level playing field between BBC in-house and BBC Studios, and independent production companies, competing for the same contracts.</p>
<p>5.30</p> <p><i>Access to commissioners is often key to producers ... However, access to commissioners could also skew a producer's ability to get its ideas noticed. We would therefore expect the BBC to carefully consider how it can engage with a wide range of producers (including producers from all nations and regions across the United Kingdom) so that there is genuine competition between them on an FRNDT basis.</i></p>	<p>We are pleased that Ofcom recognises the importance of the contribution of production companies in the nations and regions to the BBC's commissioning process. However, it remains the case that BBC commissioners' level of engagement with the home-grown production sector in Wales could be considerably improved. It is vital to ensure a specific focus on Wales by a decision-making commissioner on the ground.</p> <p>TAC is working to establish closer links, but it is a painstaking process, and we would appreciate the opportunity to widen the network of commissioners our members can access. Without a more open communications and relationship-building process, it will be difficult to ensure all BBC commissioners have a full understanding of the production potential in the nations.</p> <p>Working with a more diverse cross-section of production companies from across the UK, and improving working relationships with them as a whole, would provide the BBC with increased opportunities to ensure representation throughout the nations and regions. Furthermore, the voices and stories sourced from the nations and regions would be heard by a wider audience, and it is an ideal platform to introduce and develop new talent.</p> <p>These aims were reiterated by Charlotte Moore, BBC Director of Content, at the Institute of Welsh Affairs' Media Summit in March 2017, though this does not seem to have translated into a significant priority for the BBC to date. TAC strongly supports putting them into action and is happy to facilitate progress whenever possible.</p> <p>We welcome this recent statement by Director General Tony Hall in his speech to the RTS London conference in September 2018:</p>

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	<p>“... to truly reflect the whole of the UK in our output, the BBC not only needs to invest more, it needs to do so outside the M25. That will mean more money spent around England and the Nations”³.</p> <p>However, it is very important that as soon as possible, more detail is provided on how this new spend will be allocated, in particular how much of it will go into content production, and which genres will benefit from this additional spend. All of these factors will determine the extent to which the extra funding helps fuel further creativity from a wide range of sources.</p> <p>Currently the BBC tends to engage with out-of-London production companies on an ad hoc basis, and TAC has had to proactively lobby the BBC to deliver more engagement. We recognise the positive reaction to our engagement, and for example, Alice Webb, Director of BBC Children’s and BBC North, organised a meeting with producers last year following an initial meeting. However, we would like to see the BBC being systematically proactive in organising this type of engagement.</p> <p>One solution is for Ofcom to require the BBC to publish an annual timetable of planned commissioning meetings to be held in each nation during the coming year. This will focus the BBC on making sure it has regular planned engagement and also allow producers to plan sufficiently ahead to ensure that they can attend.</p> <p>The possibility of video contact should also be a more widely offered option, and videocasting of commissioning events a standard provision.</p> <p>TAC appreciates that BBC Wales has increased its programme budget levels since March 2017. These increase have been beneficial to BBC Wales in attracting more interest from network and improving production standards.</p> <p>There has been an increase in BBC Wales commissions being subsequently broadcast by one of the network channels Original productions for BBC Wales are commissioned on a smaller budget than those for network, and while there is a tariff of 10% extra payment for the producer if a production going to network, this does not equate to the budget of an original network production.</p> <p>A BBC Wales production subsequently being broadcast on a UK-wide network represents high value and low cost to the BBC, but could give rise to the perception that the producer is being short-changed. There is a concern among some producers that they are being discouraged from taking their ideas to network commissioners – and that those commissioners and network schedulers are waiting to see what content BBC Wales commissions so that they can as it were ‘pick them up cheaply’.</p>

³ Tony Hall. Speech to the Royal Television Society London Conference 18 Sep 2018.
<https://www.bbc.co.uk/mediacentre/speeches/2018/tony-hall-rts> Accessed 20 Sep 2018

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	<p>Producers in Wales are (quite rightly) succeeding in winning commissions destined for premier transmission on BBC Wales. Notwithstanding this, where those commissions are transferring to network, clearly an initial investment from the BBC network budget towards the production of the programme to equate to network tariff rates would have enabled an even higher quality of production, as well as a fairer rate paid to the production companies supplying that such programmes to the BBC.</p> <p>To this end, TAC would like to see more transparency around network commission budgets in comparison to nations' programme tariffs, which could be achieved by having a published table of rates.</p> <p>If a programme is a co-commission between BBC Wales, and BBC network, it may be fairer also for BBC Wales if the investment from the two commissioning departments is equally split, rather than BBC network simply providing a 10% uplift payment on the original commissioning price.</p> <p>The BBC's engagement with the production sector appears to act in the letter, but not always the spirit, of Out-of-London commissioning. One example is a recent tendering process for a production which the BBC specifically stated was to be produced within Wales. Each tendering company was asked to outline in detail the extent of commitment such a commission would contribute towards the long term sustainability of the production sector in Wales.</p> <p>However, at a BBC briefing to the shortlisted companies, TAC understands that fewer than half of the companies present were existing production businesses based in Wales; the remaining companies having their substantive base outside of Wales. Companies from outside of Wales were essentially being given the opportunity to win the production on the basis that they would subsequently set up a satellite operation in Wales (and indeed were given a three month window to achieve this) to ensure minimum compliance with the tender requirements. We also note that this meeting was held in a central London location, rather than in Wales, where the production was to be made.</p> <p>The concern here is twofold: firstly, that any profits made by companies with a substantive base outside of Wales would not stay in Wales and benefit the Welsh economy and consequently there would be little or no residual investment in talent and development of the creative sector in Wales; and secondly, that companies setting up satellite offices within Wales have been historically more likely to draw upon talent from outside that nation, as well as using facilities such as post-production resources from outside of Wales. Our members are concerned that some local suppliers already based in Wales are missing out on some of these opportunities.</p>

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	<p>In addition, more could be achieved with the BBC's ability to set a criterion that certain commissions should solely be produced in Wales, a key aim of which is that there is a residual benefit to the creative sector in Wales.</p> <p>TAC believes that this should also apply to BBC Wales in the commissioning of its output from companies willing to genuinely re-invest the benefits of all its commissions into Wales. It should not be acceptable for funding allocated to commission content for the nations and regions to be channelled out to companies with substantive bases in London. Such a strategy appears contradictory to the BBC's aspirations to develop a UK-wide production sector, and its public purpose commitments regarding the nations and regions and the creative industries.</p>
<p>6.19-6.28</p> <p><i>Commissioning information provided to Ofcom</i></p>	<p>Without wishing to make the data provision process too onerous, TAC would support collection of the following by Ofcom:</p> <ul style="list-style-type: none"> - 6.20 measuring progress towards meeting the BBC's progress towards meeting the contestable requirements; - 6.21 assessing the BBC's compliance with FRNDT commissioning; - 6.25 evidence that genuinely competitive processes lead to a range and diversity of producers making BBC programmes across genres; - 6.27 information related to the number of pitches submitted to the BBC and the proportion which were successful; also monitoring the levels of producer participations and the conversion of pitches and bids into successful commissions; - Budget comparators for nations and regions and network channel. <p>The above measures are important to provide an overall picture of how the BBC is acting to establish a level playing field, and so that we can to some extent measure its performance.</p>