

BBC iPlayer Competition Assessment: draft response to Ofcom's provisional determination

Introduction

- 1 We welcome the opportunity to respond to this consultation and provide evidence of the significant harm that the BBC's proposals will do to competition in the UK production sector.
- 2 NBCUniversal is owned by Comcast Corporation and is one of the world's leading media and entertainment companies. We have major film and television production and distribution operations in the UK and employ over 1,300 people here. NBCUniversal is one of the biggest investors in UK film and television content, having invested more than \$1 billion over the past three years. Our International Studios division has produced over 1,100 hours of original premium content for audiences worldwide through entities including Carnival Films and Monkey Kingdom, along with joint ventures Working Title TV and Heyday TV.
- 3 NBCUniversal currently holds 33 Ofcom TLCS licences for general entertainment and business news TV channels operated from London. We also have four notifications for On Demand Programme Services regulated by Ofcom.
- 4 We use our response to this consultation to share important evidence of the implications that proceeding with these proposals will have on businesses operating in the UK production sector. We therefore focus on Questions 6.1, 6.2, 7.1 and 7.2.
- 5 We understand that Ofcom is minded to proceed with the BBC's proposals on the assumption that there will be no negative impact on competition. However, it appears to present relatively scant evidence to support this position.
- 6 We believe that Ofcom's assumption is incorrect and in this response we explain why. We are concerned that the proposals could be seriously detrimental to the production sector, particularly for producers seeking to raise deficit finance. Given the potential seriousness of these impacts, we think the bar for evidence should be much higher, and unless there is good evidence that there will not be a problem Ofcom should reconsider its provisional determination. At a minimum, stronger measures are needed to mitigate the competition impacts identified.

Comments on Ofcom's provisional conclusions

- 7 Ofcom's provisional conclusion is that the overall intensity of competition within the production sector is unlikely to be significantly harmed by the BBC's proposals. It draws this conclusion from the following assessments:
 - i A modest change in the revenues flowing into the production sector is unlikely to significantly change its competitive intensity
 - ii Ofcom does not believe that the proposals will increase the BBC's buyer power given competition from other broadcasters and on-demand providers
 - iii The amount paid for primary rights will increase to offset any fall in secondary rights values
 - iv The secondary rights market in the UK is unlikely to be materially affected

- 8 Our response considers each of these assertions in turn and presents new evidence that, taken as a whole, challenges Ofcom's conclusion that competition will not be harmed.

A modest change in the revenues flowing into the production sector is unlikely to significantly change its competitive intensity

- 9 This assessment is made looking at the production sector as a whole, when what is needed is an assessment of the impact on the sub-sectors that will be most affected – specifically high-end scripted programmes where producers depend on their retained rights to finance increasing deficits. These represent the most popular content on iPlayer, accounting for seven of the top 10 programmes on the platform last year.ⁱ
- 10 In our experience, BBC funding typically accounts for less than 50% of production costs for deficit-funded, high-end television programmes. A substantial increase in the rights taken by the BBC as proposed would consequently reduce the value of the rights retained by the producer and thus reduce the producer's ability to raise the necessary deficit finance from other sources, including secondary markets in the UK. Given the importance of pre-sales in production financing, this increase in the BBC's rights could alter the balance of risk for producers and mean that some parts of the production sector could be hit much harder than others – with potentially serious impacts on business viability and hence competitive intensity within the sector.

Ofcom does not believe that the proposals will increase the BBC's buying power or position in the market given competition from other broadcasters and SVOD providers

- 11 We acknowledge that SVOD providers are playing an increased role as commissioners of UK-originated content. However, their role is still modest compared with the amounts spent by the four PSBs, which accounted for 83% of primary rights revenue for independent production companies in 2018ⁱⁱ. It is also not clear that increased demand from commercial broadcasters will significantly impact the distinct market for PSB content.
- 12 The main commissioners of high-end drama – the BBC, ITV, C4 and Sky – have different editorial mandates, and shows are typically developed for a broadcaster on a bespoke basis making it challenging for producers to move a show from one broadcaster to another. With such a limited set of buyers available, producers have closer relationships with individual broadcasters and cannot easily produce and sell content to another PSB in response to market changes. Within these different PSBs, the BBC accounts for half of expenditure on first-run UK-originated content (£1.28bn out of total PSB expenditure of £2.6bn)ⁱⁱⁱ, and is likely to remain the most significant commissioning presence for the foreseeable future.
- 13 The BBC's leading role in the market gives it significant scope to dictate terms to production companies despite the competition from other PSB, SVOD and commercial broadcasters. Indeed, the BBC's primary rights payments have steadily diminished as a share of budget despite this additional demand for content. The BBC is expecting that higher production costs (e.g. driven by talent inflation) should be the producer's responsibility to finance. A competitive production market has meant that producers have not had sufficient bargaining power to even maintain primary rights payments as a share of budget. By way of example, on recent BBC dramas produced or co-financed by NBCU, the BBC's contribution has been between 30 – 40% of the gross budget, leaving significant deficits in the hands of the producer.

The amount paid for primary rights will increase to offset any fall in secondary rights prices

- 14 As summarised above, the BBC has significant bargaining power and has little incentive or ability to increase the amount it pays for primary rights. In fact, the long-term trend since the BBC first negotiated

the terms of trade with independent producers in 2004 is a falling contribution to production costs. At the time the terms of trade were signed, the BBC would typically contribute 85% or more of the total production budget. For more recent NBCUniversal shows, this has fallen to between 30% and 40%. This has occurred despite the emergence of significant new funding sources and increased demand from commercial broadcasters and SVODs. SVODs invested a minimum of £150m on primary commissions of UK independent productions in 2017 – a 16% increase on the previous year.^{iv}

- 15 We therefore disagree with Ofcom's conclusion that any fall in the value of secondary rights will be '*at least partially, offset by: (i) a rise in primary rights payments by the commissioning broadcaster; and / or (ii) a rise in other sources of funding (e.g. investment in international rights or a rise in self-funding by the production company)*'.
- 16 On the first of these points around primary rights, it is in fact more likely that the BBC will seek to acquire additional primary rights without paying anything extra, in exactly the same way that they expect production companies to absorb increased production costs. We consider Ofcom's assessment to be excessively optimistic and unsupported by clear evidence. On the second point around alternative sources of funding, it is not possible for production companies to simply increase their contribution to production costs without any commensurate increase in the value being created, especially if there is a decrease in the value of other rights.

The secondary rights market in the UK is unlikely to be materially affected

- 17 The consultation document acknowledges that the value of secondary rights may be affected by the proposed changes because extending the BBC iPlayer window reduces the number of potential viewers in the secondary window. Although not directly comparable, it is worth noting that the BBC's January consultation on its iPlayer proposals noted that where a BBC Three programme is available for 12 months, more than a third of viewings take place after 6 months.
- 18 From our extensive experience of selling content on domestic and international secondary markets, we would expect the impact of this change on secondary sales to be significant and to easily outweigh any possible benefits, put forward in the consultation document, from the BBC entering the market for older content.
- 19 We believe that Ofcom's provisional conclusions significantly downplay this issue. Critically they do so not on the basis of firm evidence but rather due to a lack of evidence. This is a material shortcoming in Ofcom's analysis given the serious consequences for the UK production sector described above. Given the vital importance of understanding the impact of the proposed changes on secondary rights prices, it is essential for Ofcom to carry out further in-depth analysis into this issue before adopting any final conclusion.

Conclusions

- 20 The BBC's proposal to extend the iPlayer window to 12 months has the potential to seriously affect competition in the production sector. We assess that the overall impact of the changes could be significant across the whole sector, particularly for businesses that operate predominantly in the PSB market. A fall in the value of programme rights is likely to result in fewer productions being made and a reduction in the number of businesses operating in the sector.
- 21 This result - fewer high end productions being made for UK PSBs as production companies face increased challenges in raising the necessary deficit finance – could in turn have an impact on the viewer and calls into question the long-term public interest of proceeding with the proposals in their current form.

- 22 If, however, the decision *is* to proceed with the extension of the iPlayer window, Ofcom must at a minimum take forward measures to mitigate any unintended consequences, particularly at a time when the production sector faces wider economic risks from Brexit and a challenging business climate. NBCUniversal urges Ofcom to consider the following additional conditions:
- i **An extension of the iPlayer window should only be by mutual agreement with the producer, including as to commercial terms.** The producer should be entitled to freely negotiate terms of any such extension, including additional consideration payable by the BBC, the length of the iPlayer window, the level of iPlayer exclusivity, and a reduction in any UK holdbacks against the producer's exploitation (including as to on-demand).
 - ii **A reduction in holdback periods in return for extending the iPlayer window** to allow producers to exploit remaining value of secondary rights at an earlier point, including SVOD and other forms of on-demand. For example, the producer should be entitled to commence exploitation of on-demand rights by a certain point following release of the first episode by the BBC.
 - iii **The iPlayer window, if granted by the producer, should end no later than 12 months from the BBC's first release of the first episode**, in line with industry windowing practice. This is particularly important for multi-episodic dramas aired on a weekly basis by the BBC.
 - iv **A commitment from the BBC to pay all guild payments and rights clearance costs** for any extension of the iPlayer window to avoid these additional costs falling on producers rather than on the broadcaster that is plainly benefitting from the longer period of exclusivity.
 - v **Limiting the extension of the iPlayer window to the current season** rather than enabling the BBC to stack several seasons of a series on the iPlayer that would further damage secondary market prospects.
 - vi **A moratorium on any further changes of this type for a period of five years or the duration of the current BBC Charter** to provide production companies with a stable environment in which to operate and the opportunity to determine the medium-term impacts of the changes.
- 23 We think the benefit of these measures is that they would provide the bare minimum of protection for the UK production sector without materially affecting the objectives of the original BBC proposal. We urge Ofcom to consider some combination of the options set out above, and we are happy to discuss these ideas in more detail if it would be useful.

ⁱ <https://www.bbc.co.uk/mediacentre/latestnews/2019/iplayer-2018-stats>

ⁱⁱ <http://www.pact.co.uk/asset/EB1DF9E3-A894-4098-8EFDC86EE6CCFE81/>

ⁱⁱⁱ https://www.ofcom.org.uk/__data/assets/pdf_file/0019/103924/psb-annual-report-2017.pdf

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