

Submission to Ofcom's Consultation on BBC
Children's news and first-run UK originated
programmes

pact.

Introduction

1. Pact is the trade association which represents the commercial interests of the independent television, film, digital, children's and animation media production sector in the UK.
2. Pact works on behalf of its members to ensure the best legal, regulatory and economic environment for growth in the sector. Pact has around 500 member companies across the UK and the majority of these are SMEs (small and medium sized enterprises) with a turnover of less than £50m a year.
3. The UK independent television sector is one of the biggest in the world. UK independent television sector revenues have grown from £1.3 billion in 2005 to around £3 billion in 2018 largely driven by a growth in international sales.¹ However, specific data on the current children's and animation production sector revenues, given its smaller size, is not widely available.
4. UK originated children's content is one of the most important areas of public service broadcasting, with the BBC being the largest commissioner of children's content in the UK. Pact has long been concerned about the dramatic reduction in commercial PSB (Public Service Broadcaster) investment over the last ten years or more².

¹ Pact Census Independent Production Sector Financial Census and Survey 2017, by Oliver & Ohlbaum Associates Limited

² Children's television – a crisis of choice: the case for greater commercial PSB investment in Children's TV, Pact and the Ragdoll Foundation (2015)

Overview

- 1.1 UK originated children's content still remains one of the most important areas of public service broadcasting. Any changes to the way the BBC commissions children's content is likely to have a substantial impact on children's TV producers, particularly small producers who are often solely reliant on the BBC for work. Pact has been concerned about the steady decline in spend and hours in children's TV over the past ten years. In 2018, the value of UK children's commissions was 1% of producer's revenue.³ The market is already small for children's content producers, with the BBC being the largest commissioner of children's content.
- 1.2 While we understand the difficulties some of the UK Public Service Broadcasters (PSBs) are having in attracting young audiences; Pact does not believe that only changing how programmes are distributed is the way to rectify this problem. The challenge continues to be mainly an editorial and creative issue. The BBC needs to consider its commissioning direction and whether the ideas and content resonates with young audiences. In their own analysis on their Distribution Policy consultation response the BBC admit that their services are well distributed: 'The BBC performs well on these measures: its services are more widely distributed than any other broadcaster in the UK.'⁴ Ofcom also need to carefully understand the strategic reasoning for this change in the licence. We note that when the BBC previously changed a UK public service namely closing the linear BBC Three it cited that this 'was driven by financial necessity' above anything else.⁵ The language being used in this proposal makes reference to budgetary constraints but focuses on the need to adapt to changing viewer behavior as the main reason for the changes in the licence. Pact would not want the BBC's focus on budgeting to be at the expense of the UK children's content market for this reason it is essential that Ofcom re-examines its initial market impact assessments.
- 1.3 We welcome that Ofcom has acknowledged its legal duty to carry out impact assessments where their policy decisions are likely to have significant effect on businesses⁶ and their BBC Charter duties on fair and effective competition in the UK.⁷ But we are disappointed with the lack of detailed assessment of competition issues. There is a lack of independent research and full impact assessment contained in the consultation and this makes it difficult for Pact to properly assess the impact of these proposals. The proposals would be the first time that online-only commissions would fall under the definition of first-run UK originations; we are concerned that if these proposals were allowed to go ahead this could lead to a change in other genres and services.
- 1.4 Changes in the licence could set a precedent in other genres and indirectly undermine the Terms of Trade. The introduction of the Terms of Trade has been a catalyst for growth in the independent TV production sector. The Terms of Trade are of particular importance to children's TV producers. While high-end drama producers have seen their revenues steadily increase due to the growth in the international market. A vast majority

³ Pact Census 2019, p20

⁴ The BBC's Response the Distribution Policy consultation, June 2018, p4

⁵ Public Value Assessment of the re-invention of BBC Three online and related proposals, p2

⁶ Section 7 of the Communications Act 2003 (the Act)

⁷ Article 45(2) of the BBC Charter

of UK children's TV tends to have limited global appeal as its primarily focused for the UK. While this is good for the UK PSB system, it often means children's producers have to choose between being UK focused or internationally focused. The Terms of Trade allow children's producers to keep their IP and then sell their content to another secondary buyer after a period of exclusivity on the primary buyer's channel. These Terms do not extend to online only commissions for the BBC, and Pact is worried that amending the first-run UK origination definition to allow iPlayer only commissions to count towards the BBC's quota undermines the Terms of Trade to the detriment of the children's TV production sector.

- 1.5 The proposed changes are not compliant with the BBC's Codes of Practices, which are "only intended to apply to commissioning of content from independent producers intended for use on licensed public service channels – it does not apply for material commissioned for use on other services."⁸ We believe that extending the first-run UK origination definition to allow iPlayer only commissions contradicts the Codes of Practice, which were put in place to ensure fair and transparent relations between independent producers and the BBC. Therefore, this change will indirectly deny Terms of Trade for these commissions.
- 1.6 Pact is concerned that this move to online-only commissions will be at the expense of the CBBC and CBeebies budgets, which have been steadily declining. The BBC's proposal to commission more online-only content is not an additional investment in high-quality content, which the children's sector needs. Rather it's a change in where and how they spend their budget. The BBC have not set out how the costings of their plans, or how they plan to pay independent children's producers for extra usage of their IP through repeats, or extended iPlayer use.
- 1.7 Given the ambiguous nature of the BBC plans Pact questions the effect that the proposed additional performance metrics will have in holding the BBC to account. In Ofcom's 2019 Annual Report of the BBC, Ofcom highlight examples of where the BBC has not taken into account the need for engagement with third parties, for example the BBC's iPlayer plans. The BBC have not taken into account the possible impact that their proposals will have on independent children's producers; in their request to Ofcom, the BBC do not mention independent producers at all, or give any reassurances that they will be compensated fairly for additional use. Given the BBC's failure to even consider what impact their proposals will have on independent children's producers, we find it difficult to trust the BBC's assurances on its commitment suppliers.
- 1.8 Ofcom has duties in relation to independent producers under Clause 285 of the Communications Act 2003. Ofcom's proposed safeguards offer no protection to independent children's producers from the unfair, backdoor commissioning practices that these proposed changes would allow. Pact cannot and will not support these proposals without changes to ensure that the Terms of Trade would also apply to online-only commissions.

⁸ Ofcom Guidance for Public Service Broadcasters in drawing up Codes of Practice for Commissioning from independent producers, p4

Consultation Questions

- 1. Do you agree with Ofcom's provisional assessment and its proposed changes to the Operating Licence for Children's news on CBBC? If not, please explain why, providing appropriate supporting evidence where possible.**

2.1 Pact has no particular comments to make here.

- 2. Do you agree with Ofcom's provisional assessment and our proposed changes to the definition of a first-run UK origination in respect of children's content and additional condition to safeguard the provision of some first-run UK originated children's content on the linear services? If not, please explain why, providing appropriate supporting evidence where possible.**

3.1 Pact does not agree with Ofcom's proposed changes to the definition of first-run UK originated children's content and would question how well the proposed safeguards will work in practice. The current definition of first-run UK origination in regard to children is still fit for purpose and we query any proposed change without seeing further additional evidence of the benefits. There is very little evidence contained in Ofcom's consultation document, and the BBC do not provide any evidence that exclusive iPlayer only commissions will draw in bigger audiences to iPlayer, or benefit independent children's producers.

Financing and Budgets

3.2 Broadcasters very rarely fully finance productions they commission. Children's producers now use a variety of financing sources to minimise the cost to the broadcaster, including co-production deals, tax credits, secondary right sales and sometimes income from merchandising. While merchandising used to comprise a key component of financing for children's programming, the market has become increasingly challenging largely due to a rapid decline in toy sales. Children's producers now often bridge the gap in the production budget through UK secondary and international sales, if the programme has global appeal. Pact has heard from children's producer members that UK secondary and international sales are becoming increasingly unlikely due to the BBC's reluctance to waive their 5-year holdback period. After five years, only the programmes that are globally successful that appeal to international audiences, such as *Peppa Pig*, retain their value and remain attractive to other secondary buyers. Pact believes the BBC will become increasingly unlikely to waive the holdback period if they are permitted to count iPlayer only commissions towards their quota as producers are not protected under the Terms of Trade for iPlayer only commissions.

3.3 Pact is also concerned about the BBC's plans to fill gaps in the linear schedule with repeats.⁹ Any increase of repeats will diminish the value of secondary UK rights, making it more even more difficult for producers to bridge the gap in the production budget, or break even. As previously mentioned, any increase of usage through repeats need to be properly compensated to make up for the loss of secondary

⁹ BBC Children's news and first-run UK originations, Ofcom, p20

revenue. Pact is also not convinced how Ofcom's plans to guard against an increase in repeats will work in practice. While we always welcome additional monitoring, Ofcom must set out detailed plans on how they plan to address any potential unacceptable rise in repeats. Simply monitoring the volume of repeats is not enough given the impact this will have on children's producers UK secondary sales. In absence of detailed safeguards, Pact is not confident in Ofcom's ability to hold the BBC to account and step-in if needed.

3.4 Online-only commissions tend to have lower tariffs than content commissioned for linear broadcast. While the budgets for short-form content are usually lower than for long form content; Pact has not seen evidence of online-only commissions being less expensive to produce. This will make it more difficult for the producer to find the necessary finance for a production. If the producer cannot find the funding needed to bridge the gap between the commissioner's tariff and the full production budget, producers often end up forgoing any revenue, or cutting their research and development budget. Ofcom are proposing that half of the BBC's quota hours should be allowed to be met with iPlayer only commissions, meaning far less linear commissions will be available. We have reservations about a rise in iPlayer only commissions given our members experiences with BBC Three commissions. Which have been characterized by low tariffs and the BBC demanding additional rights and extensive and usage. If producers do not keep their rights, or are not able to fully monetise them after a period of exclusivity on iPlayer, it's difficult to see how they will be able to sustain a viable business especially when the BBC accounts 95% of the entire spend in children's programming.¹⁰

The Terms of Trade

3.5 The Terms of Trade were brought in to address a market failure and the significant buyer power that still exists within particular genres, and as a result the UK independent production sector is now worth over £3 billion.¹¹ Without the protection of the Terms of Trade, children's producers will be subject to the same conditions pre-2003 for iPlayer only commissions. As O&O highlighted in a Pact commissioned piece for the BBC iPlayer submission: 'the Terms of Trade are important in supporting producers starting up new indies in the UK and attracting investment capital which in turn helps to keep the programme making sector dynamic and innovative and prevents it from becoming over consolidated. This dynamism both helps to reinforce the UK's position as a major global TV content hub, with all the super indies maintaining a sizeable UK presence, and benefits the PSB broadcasters in terms of the range of ideas coming forward and the sector's capacity to innovate.'¹² Global companies and international broadcasters, are drawn to the UK because of the quality of British PSB content, which has been driven by the introduction of the Terms of Trade. In 2018, third party spend on children's content was £42m.¹³ Pact would not

¹⁰ O&O Report – 'Proposed changes to the BBC iPlayer: Supporting Pact's response to Ofcom's call for evidence', p18

¹¹ Pact Census 2019

¹² The BBC's proposed extended iPlayer Window and the implications for Terms of Trade Intervention, Oliver and Ohlbaum Associates, July 2019

¹³ Ofcom Media Nations Report 2019, August 2019, p55

want to see this investment go elsewhere because of significant changes in the commissioning of UK children's content.

3.6 The Terms of Trade currently do not extend to iPlayer only commissions and allowing them to count towards the quota could result in backdoor commissioning practices becoming widespread for BBC commissions. Commissioning not conducted under the Terms of Trade places producers at a disadvantage when negotiating with the BBC, and usually results in producers being unable to retain all of their rights. If children's iPlayer commissions were to become subject to these practices, this could potentially drive producers away from the BBC. Independent children's producers help the BBC fulfill its mission and public purposes by producing high-quality popular content that promotes PSB values. It is in both the BBC's and the producer's interest to maintain the Terms of Trade.

3.7 Ofcom state in their consultation document that 'where there are hours in the CBBC and CBeebies schedule that are no longer allocated to first-run UK originated content, the BBC would plan to fill these with repeats.'¹⁴ This is essentially a grant of extra usage and Pact is concerned that this will not result in an increase in payments to children's producers; the BBC makes no mention in its own proposal to Ofcom how they plan to pay for their proposals, or how much repeats will increase by. Any additional usage of producer's content needs to be subject to negotiations and Pact is concerned that Ofcom is enabling the BBC to demand extra usage for no extra compensation to the producer.

The BBC's Proposals

3.8 In the BBC's Annual Plan 2017/18, they announced an additional £34m into children's content and services across 3 years. The BBC said that this will see the BBC's budget for children's programming reach £124.4m by 2019 – 20.¹⁵ Pact was pleased with this announcement and has been making the case for over ten years about the need for additional investment in children's content. However, we have yet to see any evidence of this in the children's content budgets. In 2017/18, the BBC spent £69.9m on content for CBBC and £29.9m on CBeebies content.¹⁶ In 2018/19, the BBC spent £62m on CBBC content and £30m on CBeebies content.¹⁷ It is difficult to see where this additional £34m investment is going when content budgets are still declining across the BBC's children-focused channels. Given the importance of children's content in fulfilling the BBC's mission and public service purposes, Pact would argue that this public commitment of £34m could be used to commission separate content for the online and linear platforms.

3.9 Pact is also concerned that moving content online will undermine universality. High-quality PSB children's content that is free to access plays an important role in many children's learning and language development, especially pre-school children. We

¹⁴ BBC Children's news and first-run UK originations consultation document, Ofcom, p20

¹⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0009/112212/BBC.pdf

¹⁶ BBC Annual Report 2017/18

¹⁷ BBC Annual Report 2018/19

share Ofcom's concerns about BBC iPlayer and the linear channels becoming a two-tier service and believe this would be detrimental to UK children.

3.10 The BBC state on its CBBC commissioning website that they are "intending to find the funds to investigate what more we can do with short form."¹⁸ On the same commissioning page under 13-16s (iPlayer only originations), the BBC state that they "have limited funds for this age bracket although are looking to do more to balance out the top end of CBBC with a larger volume of iPlayer exclusives in the near future." They then go on to say that they "don't have a huge amount of audience data as yet." Pact questions why the BBC are prioritising short-form content and iPlayer only originations commissions while simultaneously arguing in their proposals that they don't have the budgetary flexibility for these. Pact would argue that the BBC are either going ahead with their proposals without Ofcom approval, or they do in fact have the budget to meet their regulatory requirements and commission additional content.

3.11 In Ofcom's consultation document, the BBC claim that they would have been able to count an additional 5 hours and 40 minutes of children's iPlayer only content towards their quota. We would query why this research has not been made available to stakeholders, especially given Ofcom stated that "the BBC needs to be much more open to engagement with third parties potentially impacted by changes to licence-fee funded services."¹⁹ Of this 5 hours and 40 minutes of content, Ofcom note that some of this is short form. It's difficult to properly assess how much short-form content will be commissioned given that actual figures are not provided. Pact shares Ofcom's concern regarding an increasing amount of short form content being commissioned to count towards the BBC's quota. However, it is difficult for us to know how much short-form content would be 'too much' for Ofcom. Ofcom needs to set clear levels and markers on how much short-form is acceptable.

Impact on the Market

3.12 The proposed changes are likely to have a lasting, substantial impact on the market which it may not recover from. The BBC is in a unique position in the UK PSB system with Ofcom 'expecting the BBC to lead the way in producing high-quality children's programmes.'²⁰ Pact recognises that children's viewing of TV on a TV set has declined over the years, but the PSBs' share of that viewing has remained broadly stable.²¹ Which is why we believe that a strong focus on distribution policy is not the way forward to attracting audiences. For example, BBC Three has seen its reach halve since moving online in comparison to its last full year of broadcasting,²² with only 8% of 16 – 34-year olds using BBC Three each week.²³ Despite initial core objectives of the Channel being to 'reach a wide range of 16-34 year olds in the UK each week.'²⁴ And predictions of 'a c21% increase in BBC Three online viewing via

¹⁸ <https://www.bbc.co.uk/commissioning/tv/articles/cbbc>

¹⁹ Ofcom's Annual Report of the BBC, October 2019, p4

²⁰ Ofcom's Children Content Review Update, July 2018, p15

²¹ Ofcom Children's Content Review Update, July 2018, p14

²² Ofcom's Annual Report on the BBC, October 2019, p12

²³ BBC Annual Report 2018/19, July 2019, p60

²⁴ Public Value Assessment of the re-invention of BBC Three online and related proposals, p22

BBC iPlayer ²⁵A leaked internal BBC document showed that ‘iPlayer is failing to make up for BBC young viewer losses on linear and their output is not standing up against tough international competition.’ ²⁶ Pact is concerned that amending the definition of first-run UK origination will negatively impact the financing and budgets of children’s productions, undermine the Terms of Trade and producer’s ability to monetise their IP. Given how marginal the children’s market is already, this should be cause for concern for Ofcom.

Ofcom’s Proposed Safeguards

3.13 Pact is disappointed that neither Ofcom or the BBC have published a full impact assessment or any additional research into the economic and market impacts of the proposals. Without this information, it is difficult for Pact to fully assess impact that these proposals would have. We raised similar worries with the BBC’s public interest test for extended iPlayer availability, and issue with Ofcom’s consultations on extended BBC iPlayer availability. The BBC have also failed to properly engage with third parties on their proposals to change its Operating Licence in relation to children’s. In Ofcom’s Annual Report of the BBC 2018/19, the BBC were criticised for doing this, and the BBC have failed to take this into account.

3.14 We do not agree that the proposed additional conditions to the BBC’s Operating Licence are appropriate. While we acknowledge the BBC’s desire to commission iPlayer only content, we believe that this will be done to the detriment of linear commissions; and as we have outlined above this will have a substantial impact on the viability of the children’s production sector. Allowing half of the BBC’s quota to be met by iPlayer only commissions without an impact assessment and a full of understanding of how it will play out within the market is irresponsible.

3.15 Pact is supportive of Ofcom’s proposed additional monitoring and reporting measures. The proposed additional monitoring and reporting must be undertaken more effectively to mitigate potential risks, and this information must be published and available to stakeholders.

3.16 Pact cannot support the proposed amendments to the BBC’s Operating Licence in relation to children’s given the lack of impact assessment, additional research, and appropriate safeguards. We are also concerned that Ofcom acknowledge that “there is currently limited evidence to demonstrate that children are increasingly consuming content on BBC iPlayer and that they would actively seek such content out”²⁷ but accept the BBC’s proposed changes to the Operating Licence regardless.

3. Do you agree with Ofcom’s provisional assessment and proposed changes to the first-run UK originations quota for Children’s content on CBBC? If not,

²⁵ Public Value Assessment of the re-invention of BBC Three online and related proposals, p67

²⁶ ‘BBC facing linear viewing crisis for young viewers’, Broadcast, December 2019

²⁷ BBC Children’s news and first-run UK originations, Ofcom, p23

please explain why, providing appropriate supporting evidence where possible.

4.1 Pact understands the logic behind reducing the first-run UK originations quota for CBBC content given the proposed reduction in news hours. We would stress that this reduction must be because of the BBC Children's news proposals rather than a reduction in other CBBC content.

4.2 We do not agree with the proposed change to the definition of hours. Ofcom have said that they would be concerned if the BBC started commissioning more short form content at the expense of long-form. However, there is nothing in Ofcom's consultation document that safeguards against a rise in short form commissions. There is nothing in the proposed amendments to the BBC's Operating Licence to stop the BBC fulfilling their quota by commissioning only short form content. Pact would urge Ofcom to put robust measures in place to prevent this happening.

4. Do you agree with Ofcom's provisional assessment on the cumulative impact of the variations as a whole? If not, please explain why, providing appropriate supporting evidence where possible.

4.1 Pact agrees with Ofcom's provisional assessment on the cumulative impact of the variations as a whole.

5. Do you agree with our proposal for the transitional arrangements? If not, please explain why, providing appropriate supporting evidence where possible.

6.1 Pact has no issues with the proposed transitional arrangements for the CBBC News condition.

6.2 Pact does not agree with Ofcom's proposal to allow the new first-run UK originations definition and the quota to apply for the full 2020 calendar year. We would not support any move which would allow the BBC to count iPlayer only commissions towards their regulatory quotas.

6.3 While we appreciate that Ofcom have published this consultation shortly after the BBC's updated request in early November 2019. We are disappointed with the lack of independent research and full impact assessment, and the 4-week consultation period also makes it difficult for Pact to properly analyse the impact of these proposals.