The BBC's response to Ofcom's call for evidence: Public service broadcasters and the UK production sector

31 March 2021

Executive Summary

1. The BBC continues to support the regulatory framework for the production sector, including the independent production quota, as valuable market interventions. As a whole the framework has contributed to a thriving British production sector, with record-breaking revenues driven by great shows that reach a global audience.[1] We are proud to work with more British indies than anyone else, and are committed to supporting the sector in a wide variety of ways, including our increased small independent producer fund.
2. As Ofcom's call for evidence acknowledges, the market has changed substantially since the rules were first introduced in 2004. According to Pact's data, PSBs accounted for 64% of total commissioning spend with indies in 2019 compared to 90% in 2008. In 2007 video on demand was in its infancy and other PSBs – also covered by these rules – were the BBC's main competitors. Today there is increased competition in the market - for audiences, talent, and ideas.
3. We welcome Ofcom's intention to look at its guidance in light of these market changes and recommend that Ofcom modernises these rules. This will help to ensure this regulation remains fit for purpose and that the BBC can continue to serve audiences when we commission programmes from qualifying independent producers, and ultimately deliver value for money for licence fee payers. Ofcom's current guidance reflects the market of over 15 years ago where the UK media ecology was very different, characterised by clearly delineated primary and secondary markets for TV programmes and where the majority of value lay in initial linear transmissions of programmes mainly on the PSBs.
4. The BBC fully supports the retention of the 25% independent production quota for PSBs. Last year we exceeded this quota by 7 percentage points, with 32% of BBC programmes made by qualifying independent producers. Indeed in the past 10 years, the BBC's performance against this quota has never been below 30%. However, the increasing importance of on-demand viewing means that the separate quotas for BBC One and BBC Two no longer reflect how we commission or how much of our audience views our content. We are now commissioning and curating programmes for the maximum impact across BBC iPlayer and our broadcast portfolio – benefiting both audiences and the industry. The need to then retrofit these decisions into a channel-based quota system increases planning complexity and cost, and can lead to undesirable scheduling decisions. As such we think it would be appropriate for Ofcom to recommend to the UK Government that as part of the mid-term charter review these separate channel quotas should be replaced with a single quota of 25% across all qualifying programmes and all TV output.

[1] O&O, Pact Census, 2020

Introduction – our role as a commissioner

5. We continue to support this regulation, including the concept of terms of trade, whereby qualifying independent producers retain ownership over the IP they create in their PSB commissions. This framework shares value between PSB commissioners and independent producers, leading to a virtuous circle as producers are incentivised to develop better ideas, ultimately benefitting PSBs, our audiences and the UK's creative economy. The original intention of the regulation was to ensure that the creative ecology was maintained – we agree that not only has it been maintained but it has flourished.
6. The UK is seen globally as a great place to make programmes and part of the foundation of this are existing regulatory interventions including the terms of trade. PSBs are key to making the production sector an attractive investment proposition, and inhabit many roles including commissioning, building a skills base for the sector, and supporting distinctively British content.[2] The Pact UK Production Census shows that independent TV production sector revenues reached a new record of £3.3 billion in 2019 – driven by international revenues breaking £1 billion for the first time – an increase of 11% on 2018, and a rise of 30% over the past five years.[3]
7. The BBC is the biggest single investor in original British content. In 2019, we spent more than £1.4 billion on original UK television content, working with more producers than ever before, more new producers, more producers based in the Nations and Regions and more qualifying independent producers.[4] We compete 100% of new commissions and work with a wide and diverse supply base, as well as showcasing the great programmes that independent producers have made for us. In 2019, 54% of BBC commissions were indie productions, of which 77 were first time commissions and 57% of producers were from outside London.[5]
8. Our investment in TV production also attracts investment from others. In 2019 over £1.2bn of third-party production spend was directly attributable to the BBC's investment.[6] And we also support the sector through funds such as our Small Indie producer Fund and our diversity and portrayal funds. A 2021 report by KPMG found that "*By commissioning and developing creative content under preferential terms of trade the BBC supports the industry both through the investment it makes directly and by providing a wide-reaching, globally recognised platform for this IP, enhancing the opportunities for its value to be maximised, e.g. through the follow-on sale of programmes and formats worldwide and favourable terms of trade relating to this.*"[7]
9. In responding to the unprecedented challenges of Covid-19 we have gone even further, underscoring our commitment to the sector and the wider creative economy across the whole of the UK. We doubled our investment in the Small Indie Fund aimed at companies with a turnover of less than £10m. Two thirds of the companies helped have been out of London. We have supported smaller and out of London

[2] Enders, UK's Creative Industries: Boosting the regional economy, 2021
[3] O&O, Pact Census, 2020
[4] BBC, Commissioning Supply report 2019
[5] Ibid.
[6] KPMG, An Assessment of the Economic Impact of BBC, 2021
[7] KPMG, An Assessment of the Economic Impact of BBC, 2021

companies, by helping with cash flow and covering additional Covid-19 related costs of production beyond what can be absorbed in the original price, to help productions get back up and running. In 2020 we increased our development spend by over 20% year on year to support the sector.

The UK market has changed – with PSBs joined by other large commissioners

10. There have been huge shifts in the structure of the industry and audience habits in the 17 years since these rules first came in, and it is right that Ofcom now seeks to reflect these in its approach to PSB regulation.

11. As Ofcom's call for evidence acknowledges, the market has changed substantially since the rules were first introduced in 2004. According to Pact's data, PSBs accounted for 64% of total commissioning spend with indies in 2019 compared to 90% in 2008. In 2007 video on demand was in its infancy and other PSBs – also covered by these rules – were the BBC's main competitors. Today there is increased competition in the market – for audiences, talent, and ideas.

12. We note the policy objective of the framework as set out in 2015 by the Secretary of State to "*promote cultural diversity and to open up the production system to new energies and voices; to stimulate the growth of small and medium sized enterprises (SMEs); promoting creativity and fostering new talent; and to tackle vertical integration within the UK programme supply market*".[8]

13. An important question is how to ensure that PSBs are able to keep commissioning the content that British audiences want to see in the ways they want to watch it, on sustainable terms. As the media market evolves at pace, it is imperative that the BBC and other PSBs have the flexibility necessary to be able to respond and to compete effectively, provide value for money to the public and maintain the activeness and dynamism of the sector.

The role of rights for PSBs and other commissioners

14. The rights we acquire are a key part of our approach to commissioning. There is a fundamental divergence between PSBs – regulated by Ofcom's guidance – and the global streaming giants. While PSBs typically acquire a 'primary' package of rights within the UK market for a limited number of broadcast transmissions and a limited on-demand window, the digital streamers look to buy up global rights in perpetuity at the point of commission.

15. When Ofcom introduced its guidance for PSBs on drawing up codes of practice on commissioning, our main competitors were other PSBs, similarly captured by this regulation. There was also a much clearer delineation between primary and secondary markets, with the latter dominated by physical product sales and programme repeats on multichannel broadcasters, which mirrored the distinctions in Ofcom's guidance. This was five years before Netflix launched its on-demand service in the UK. Today the BBC – and other PSBs – are increasingly competing against SVOD services that in eyes of audiences are competitors for our broadcast channels and BBC iPlayer.

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[8] Ofcom, Review of the TV Production Sector, 2015

16. Different buying models have huge implications for audiences – SVOD provides audiences with continued availability, often exclusively, for long periods of time. The research we conducted for our recent BBC iPlayer Public Interest Test clearly showed this change. As we set out "*Audiences welcomed increased availability, and noted that it would bring BBC iPlayer into line with other VOD services, as well as providing a greater breadth of content to watch, and so encourage them to visit*".[9]

17. Furthermore, under the current model, producers can sell PSB commissioned content to SVOD services in the secondary window – typically after only 18 months for BBC commissions. This often leads to misattribution by audiences for a number of titles, especially when audiences first discover the content via SVOD. As we set out in our main response to Ofcom's PSB review, we lose between 50-70% of the credit for our commissions when audiences view them on third party platforms or SVODs like Netflix.[10] Instead, audiences attribute programmes they consume on SVOD services back to the platform or service, not to the BBC.

18. We have taken steps, working constructively with the sector, to evolve our approach to rights over time. We have recently agreed new Terms of Trade with Pact to support our ambitions for BBC iPlayer. We will need to continue to evolve our services over time to ensure we keep delivering audience value, and this will mean we also need to keep our commissioning arrangements under review.

Question 1: Given changes to audience consumption patterns and wider market developments, is there any aspect of Ofcom's Guidance on commissioning of independent productions which Ofcom should update to ensure it remains fit-for-purpose?

19. We agree with Ofcom that media markets and audience expectations are changing quickly and PSBs need to be able to respond.

20. We consider that Ofcom's current guidance is now out of step with the global, digital market it seeks to regulate. Specifically we note that Ofcom's current guidance is overly long and prescriptive. In particular, it is essentially 'linear' focussed, and assumes a very clear distinction between 'primary' and 'secondary' rights which Ofcom has recognised does not reflect how many people now watch TV. It sets a clear expectation that the majority of value is realised through an initial linear transmission, which was true in 2007 when the guidance was last revised but – and as we have set out in our main response to Ofcom's PSB review – is increasingly not how the market works.

21. We would therefore welcome Ofcom modernising its guidance so it more appropriately and accurately reflects the market today, enabling us to continue to evolve our agreements with the sector in future, when we need to.

Question 2: Is there any change to the independent production quota which Ofcom should recommend to Government as part of its 'Small Screen Big Debate' programme?

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[9] BBC, iPlayer Public Interest Test, 2019

[10] BBC, Response to Ofcom's PSB Review, 2021

22. We are committed to continuing to work with as broad and diverse a supply base as possible. On the basis of current definitions, we consider the existing requirement for the BBC to ensure that qualifying independent producers deliver 25% of relevant broadcasting time across all of our output remains fit for purpose. As such the BBC fully supports the retention of the 25% independent production quota for PSBs.

23. Last year we exceeded this quota by 7 percentage points, with 32% of BBC programmes made by qualifying independent producers. Indeed in the past 10 years, the BBC's performance against this quota has never been below 30%. As Ofcom's PSB review makes clear, the future for PSBs is increasingly on-demand. The increasing importance of on-demand viewing means that the separate quotas for BBC One and BBC Two no longer reflect how we commission or how much of our audience views our content.

24. In 2020, the BBC announced a re-organisation of the Content division that will bring a new approach to commissioning designed to reflect changing audience behaviour, fuel the growth of BBC iPlayer and strengthen its content portfolio.[11] We are now commissioning and curating programmes for the maximum impact across BBC iPlayer and our broadcast portfolio – benefiting both audiences and the industry.

25. The need to then retrofit these commissioning decisions into a channel-based quota system increases planning complexity and cost, and can lead to undesirable scheduling decisions. As such we think it would be appropriate for Ofcom to recommend to government that as part of the mid-term charter review these separate channel quotas should be replaced with a single quota across all qualifying programmes and all TV output.[12] This would support operational flexibility and increase our ability to commission the best programmes whilst maintaining our commitment to the independent production sector.

Question 3: Do you have any recommendations for potential changes to the definitions of 'qualifying programmes' or 'independent production' which Ofcom should recommend to Government as part of its 'Small Screen Big Debate' programme?

26. We do not believe that changes are required to these definitions to allow the BBC to continue supporting British talent and supporting a diverse creative economy. We will continue to support a broad and diverse supply base and take steps to nurture the UK creative economy, including specifically out of London. We believe this is a core part of our remit as a licence fee funded PSB and a key enabler of us continuing to offer something distinctive for our audiences.

27. If Ofcom does consider that the evidence presented by other stakeholders is sufficient to justify a change to these definitions to continue support the creative ecology in the UK, we would expect it to carefully consider all consequential impacts. For example, changes to definitions of 'qualifying indie' or 'non-qualifying indie' would affect PSB delivery against the existing quota level and the application of

[11] BBC, Television restructure announcement, 2020

[12] This would require changes to Schedule 3, Clause 6, paragraphs 3 and 4 of the BBC Agreement. We suggest Ofcom recommends that these changes are made as part of the mid-term review.

existing terms of trade. We also use these definitions – as agreed with Ofcom – as a guide to the programmes included in our contestability requirements, so there may be wider impacts for the BBC in this respect as well.