

## Pact briefing on revised guidance for the Public Service Broadcaster's Commissioning Codes of Practice

### Overview

Ofcom has published their proposals to revise their guidance for Public Service Broadcaster's Commissioning Codes of Practice. The guidance informs how Public Service Broadcasters (PSBs) set out the principles that PSBs will apply when agreeing terms for the commissioning of independent productions, for their licensed PSB channel and now with the Media Act in place, this will also include any content that is deemed PSB i.e. content on the PSBs on-demand player. The commissioning agreements that are negotiated with each PSB are more commonly known as the Terms of Trade and has helped grow the UK's Independent production industry from £1.5billion to £3.8billion since the Codes were introduced in 2003.

If Ofcom's proposals are implemented it could potentially damage and reverse this success and contradict the Government's ambition to grow the UK economy, with the creative industries a key part of their growth plan.

The Terms of Trade were introduced to protect independent production companies from the dominance of the PSBs and create a more balanced power dynamic during negotiations. Despite the introduction of global streaming services and multichannel commissioners, the PSBs remain dominant, in 2023 they continued to represent 83% of demand in the UK market.<sup>1</sup>

### Ofcom's Proposals

#### *Proposals on Bundled Deals*

B. Sufficient clarity about the different category of rights to broadcast<sup>2</sup>

(1) "(1) "The Code should confirm that, **unless the independent producer expressly consents**, negotiations relating to the acquisition of primary rights and the exploitation of such rights in the primary licence will not be linked to negotiations for rights for subsequent exploitation."<sup>3</sup>

(2) "The Code should not prescribe a particular funding arrangement nor allow for any automatic bundling of rights as between primary and secondary exploitation unless this is agreed by both parties. There should be no terms in contracts making them conditional (actually or in effect) on the ~~acceptance by producers of a bundled deal or~~ use of a ~~broadcaster's~~ PSB's own distribution arm<sup>4</sup>"

Ofcom's proposed amendment to the guidance as outline above would remove the absolute prohibition on linked or conditional offers for primary and secondary rights. These would now be permitted under the Terms of Trade so long as 'the producer expressly consents.'

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<sup>1</sup> Pact Census 2024

<sup>2</sup> The words in bold and/or crossed out indicate where new wording has been added or wording has been removed from the guidance

<sup>3</sup> See paragraph 2.24 of draft guidance

<sup>4</sup> See paragraph 2.25 of draft guidance

The revised code would also allow commissioning deals to be conditional on the producer's acceptance of a bundled deal something which was previously prohibited in Ofcom's guidance and which was expressly prevented in negotiations for the Terms of Trade.

#### *Ofcom's justification*

Ofcom state that these proposed amendments would give the PSBs "greater flexibility for the negotiation of a wider set of rights."<sup>5</sup> They go on to state that this amendment would "improve the PSBs ability to compete with global streaming services that are not subject to restrictions on the scope of the rights packages which they are able to negotiate" and that "producers may benefit from higher upfront investments from the PSBs, allowing for content to be commissioned which previously may not have been possible."<sup>6</sup>

#### *Impact on producers*

- Pact is very concerned that Ofcom fundamentally misunderstands the market and the way in which producers and PSBs negotiate. While Ofcom may claim that this proposal would benefit both producers via higher upfront investments and reduced costs associated with less complex negotiations. The permittance of bundled deals would essentially allow the PSBs to obtain both primary and secondary rights for the same and/or similar price to the primary rights now. It also undercuts the producers bargaining power and their ability to raise deficit finance against the secondary market and, ultimately, to make a profit from secondary sales in some instances. It would be extremely difficult to prohibit PSBs from abusing their dominant position because producers have no right to refuse and being seen not to consent to bundling could jeopardise the commission.
- The market has experienced a down turn in the last two years and and we're concerned that Ofcom allowing commissioning deals to be conditional on the acceptance of bundled rights will push already challenged producers into accepting poor deal terms in order to win a commission and sustain their businesses. . Being able to exploit secondary rights in the market has been shown to be vital in order to secure distribution deals and close deficit financing. Producers are already finding it increasingly difficult to fund productions in a challenging market. In the past, the Terms of Trade were demonstrated to release unrealised revenues. Producers are motivated more than any other party to exploit their programmes. PSBs were shown to be warehousing rights – acquiring rights regardless of whether they needed them or not.
- We also note that Ofcom's proposal is in direct contradiction of terms hard negotiate into the Terms of Trade to prevent abuse of bargaining power by PSBs – for example, Channel 5 Terms of Trade prevent them picking up secondary UK rights at the same time as their primary rights; and the BBC iPlayer deal memo allows the BBC to acquire iPlayer uses but not at the same time as discussing the licence fee paid for the programme.

#### *Proposals on matching rights*

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| "The Code should not preclude a PSB from acquiring different or additional rights packages should they wish to do so and should the independent producer wish to make |
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<sup>5</sup> Consultation on revised guidance for Public Service Broadcasters on Commissioning Codes of Practice, Ofcom, 2025, P14

<sup>6</sup> IBID

them available. A PSB should always be able to seek to secure more rights packages subject to commercial negotiation. **However, PSBs should not seek to secure “matching rights” provisions which have that effect. We believe that such provisions could stifle competition.”<sup>7</sup>**

Ofcom are proposing to remove the current prohibition on the PSBs to seek ‘matching rights.’ In Ofcom’s current guidance for the PSBs, the PSBs are not permitted to seek matching rights provisions.

In their 2007 consultation Ofcom stated that they consider “such clauses [matching rights provisions] could have the effect on foreclosing the access of third party service providers to content rights and of dampening competition for rights.”<sup>8</sup> Ofcom go on to state that “if a third party service provider knows that at the end of what might be a time-consuming commercial negotiations with a producer, the producer still has to go back to the original commissioning PSB and give them the option to match the negotiated terms and conditions, then it is less likely to enter into negotiations in the first place.”<sup>9</sup>

#### *Ofcom’s justification*

Ofcom state that “there is no longer a sufficient case for believing, as a general principle, that the inclusion of matching rights provisions in PSB commissions might have a material adverse impact on competition.”<sup>10</sup> This is because multichannel providers and SVODs are able to spend ‘twice as much as the PSBs on UK-originated drama.’

Ofcom go on to state that they now believe that matching rights may also have the benefit of securing (or making it easier to secure) the consistent presence of independently produced content on PSBs, therefore better serving the viewer interest.’ In their view, the removal of the prohibition on ‘matching rights’ provisions are unlikely to have a material adverse effect on competition and ‘may have other benefits in some contexts.’<sup>11</sup>

#### *Impact on producers*

- Ofcom’s proposal to remove the prohibition on the PSB’s to seek matching rights represents a fundamental change to the commissioning codes of practice guidance, and ultimately the Terms of Trade.
- While Ofcom are right in saying the market has changed since 2007, with the introduction of global streaming services and multichannel commissioners, we strongly disagree with Ofcom’s assertion that the removal of the prohibition on ‘matching rights’ won’t have a material adverse effect on competition.<sup>12</sup> We also take

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<sup>7</sup> See paragraph 28 of the current Guidance and paragraph 2.26 of the draft Guidance.

<sup>8</sup> Consultation on revised Ofcom Guidance for broadcasters on Codes of Practice, Ofcom, 2007, P10

<sup>9</sup> IBID

<sup>10</sup> Consultation on revised guidance for Public Service Broadcasters on Commissioning Codes of Practice, Ofcom, 2007 P15

<sup>11</sup> IBID

<sup>12</sup> Matching Rights are not unique to the contract law of television. The request for such a right is usually resisted strongly because:

1. They must be precisely drafted. So that like is compared with like.
2. They undermine the ability of the seller to get a proper rate in the market because the third party purchaser knows that they are effectively bidding against themselves.
3. They give rise to behaviour that is potentially anti-competitive because, in this case, the PSB distributor will see all the offers of their commercial competitors.

issue with Ofcom's assessment of UK-originated drama spend and multichannel providers and SVODs role in this, basing their analysis on the last four years is not proportionate given that it is in relation to short term market fluctuations that followed the post covid boom in production.

- We're concerned that this proposal could deter third party suppliers such as the multichannel commissioners and streamers from entering into a negotiation with the producer in the first place. When the codes of practice were introduced in 2007, the PSBs typically fully funded productions. However, as the cost of production has increased, the PSBs now usually only fund a certain percentage of the production budget, meaning producers have to raise finance in the market usually through a combination of the tax relief, distribution advances, deficit financing and other third-party sources of financing. Pact estimates that no PSB drama is now fully funded by PSBs. The ability for producers to raise this finance is contingent on the ability to retain the intellectual property through the Terms of Trade and subsequently exploit these secondary rights in the market. This ensures that producers are able to get a fair market price for selling their rights and can enter into a fair negotiation. However, if the commissioning PSB has the right to acquire these rights in return for matching those offered by a third party, this can result in de facto exclusivity by the PSBs; effectively shutting out other third parties and ultimately reducing the value of these rights. Something, which we would argue, is anti-competitive and anti-growth.

### **Pact's concerns around due process**

Under the Communications Act 2003 (as amended by the Media Act 2024), Ofcom must before issuing their guidance or revised guidance, consult the providers of licenced public service channels, persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC and S4C.<sup>13</sup> Given the fundamental changes to the commissioning codes of practice proposed by Ofcom, we are very disappointed that Ofcom have not followed due process and consulted with us prior to the publication of the draft guidance.

Ofcom's consultation contains a lack of research and any substantial impact assessment on how these proposed changes would impact the production sector, producers' ability to negotiate and competition within the market. We're concerned that due regard to competition and the sustainability of the production sector has not been taken into account by Ofcom.

Ofcom also has a statutory duty to have regard to the desirability of promoting economic growth when exercising certain regulatory functions.<sup>14</sup> Ofcom must consider the importance of the promotion of economic growth and ensure any regulatory action taken is necessary and proportionate. Little consideration seems to have been given to promotion economic growth, something which is a key policy for the Government.

The production sector is vital to the sustainability of the PSBs, something which Ofcom seem not to have understood whilst drafting the revised guidance. Damaging the competitiveness of the independent production sector ultimately weakens the PSBs and their content offering to viewers.

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<sup>13</sup> S.285 (6)(c) Communications Act 2003

<sup>14</sup> Under section 108 of the Deregulation Act 2015. The Economic Growth (Regulatory Functions) (Amendment) Order 2024 applies the duty set out in section 108 to Ofcom

## Terminology

### *What are bundled deals?*

Bundled deal means that the primary and secondary rights and exploitation are both included in the commissioning agreement as part of the same deal.

### *What are matching rights?*

Matching rights means that if the owner and the purchaser cannot agree on terms of the acquisition of certain rights, the purchaser has the right to acquire the rights in return for matching the same terms as those offered by a third party.

### *What are primary rights?*

Primary rights have no fixed legal definition for all PSBs. It can be said the rights that a PSB must acquire from the producer to be able to include the audiovisual work in the programmes of one or another of its TV channels or services made available to the public to fulfill its public service remit. This may include linear, VOD and digital distribution as well as educational rights. The Primary rights of the PSBs vary under the Terms of Trade.

Primary rights typically grant the broadcaster with a period of exclusivity for a limited period of time.

### *What are secondary rights?*

Secondary rights are an ambiguous term. It may mean the rights retained by the producer and includes the rights to use the audiovisual work through distribution channels and territories which are not covered by the commissioning broadcaster. It can also mean ancillary rights such as publishing or merchandising. It can also mean a sale to a secondary broadcast channel such as a satellite or cable service.