
Annex 2: Producing public service media content

Small Screen: Big Debate statement

ANNEX:

Publication date: 15 July 2021

A1. Producing public service content

Section 7 of our [Small Screen: Big Debate statement](#) presents an overview of our assessment of the regulatory rules which govern the relationship between public service broadcasters and the independent production sector. We explain why we think legislation should be amended so the same requirements apply to all PSM content, whether it is commissioned for broadcast TV or online services. We also examine the case for updating our commissioning guidance to PSM providers and look at options for changes to the independent production quota. This annex provides further detail about our assessment, taking into account the responses we have received to our [consultation](#) and [call for evidence](#) on the relationship which between the public service broadcasters and the UK production sector.

Introduction

- A1.1 The UK production sector is a diverse, competitive and internationally successful part of our creative economy, projecting the UK positively around the world. It is based on a mixed system of independent producers of all sizes from all parts of the UK alongside broadcasters' own in-house production arms and subsidiaries.
- A1.2 In February, we published a [call for evidence](#) to understand the continuing effectiveness of regulation on programme commissioning by PSM providers. Our call for evidence asked whether either our [guidance on commissioning of independent productions](#); or the level and scope of the quota which public service broadcasters have for commissioning from qualifying independent producers, should be updated to ensure they remain fit-for-purpose.
- A1.3 We said we would consider the implications any potential changes to the rules could have on the UK production sector. We said we would take into account what amendments would mean for audiences, the financial sustainability of producers and public service broadcasters and to the diversity and attractiveness of the production sector.
- A1.4 As well as considering responses to our call for evidence and [Small Screen: Big Debate consultation](#), our analysis has also been informed by the meetings we have had with a wide range of stakeholders over the past twelve months. These have included industry bodies, broadcasters and a variety of producers and programme makers based across the UK. All highlighted the vital role which public service broadcasting and the regulatory framework has played in the sector's continued success and growth. We want to ensure this relationship remains strong in the future as audience viewing and the wider market continues to evolve.

Regulatory and market context

- A1.5 The success of the TV production industry is not a product of chance – it has grown out of and been supported by a close relationship with the public service broadcasters and a

series of regulatory interventions over the last two decades. The current framework imposes rules on the public service broadcasters to ensure they commission in a way which benefits the UK TV production sector and audiences throughout the UK.

- A1.6 These rules are designed to achieve a number of public and industrial policy objectives set by previous governments. These include:
- a) **promoting cultural diversity and opening up the system to new energies and voices:** the best programme ideas originate from across the whole market and external producers often cater for a wider mix of genres;
 - b) **stimulating small and medium enterprise ('SME') growth, promoting creativity and fostering new talent:** reducing barriers to entry enables independent producers to establish themselves as SMEs, promote British intellectual property, and attract overseas investment to a strong domestic sector;
 - c) **tackling vertical integration:** the vertical integration of broadcasters and producers in the supply market may lead to a lack of diversity of supply and therefore not deliver a broad range of genres or value for money.¹
- A1.7 The current rules derive from the Communications Act 2003. This set out the basis for the two main interventions which apply to public service broadcasters: the Code of Practice requirements, including Ofcom's Guidance on commissioning of independent productions, and the independent production quota.
- A1.8 There are further distinct rules about programming made out-of-London as well as national and regional quotas, which apply to all PSB investment in programmes, including in-house production. Our consultation did not seek evidence on the impact of these rules as our updated Guidance for regional production only came into effect on 1 January 2021.

Codes of Practice and Ofcom's Guidance on commissioning of independent productions

- A1.9 The current framework requires each public service broadcaster to put in place a Code of Practice setting out the principles they will follow when agreeing terms for commissioning independent productions. These codes are designed to secure the high-level outcomes in legislation in line with guidance from Ofcom. They must be submitted to Ofcom for approval.²
- A1.10 The Codes are intended to be available to producers when negotiating deals. In practice, the main public service broadcasters have each generally agreed a set of standard terms (known as the Terms of Trade) with Pact, the largest trade association for the production sector. They have then submitted revised Codes to Ofcom incorporating the individual agreements reached with Pact.

¹ Ofcom, 2015. [Review of the operation of the television production sector](#). P.22, paragraph 3.2.

² S.285 of the [Communications Act 2003](#) [licensed PSBs], para. 8 of Sch. 3 to the BBC Agreement [BBC] and para. 10 of Part 2 of Sch. 12 to the Communications Act 2003 [S4C].

A1.11 Ofcom's Guidance states that:

- a) qualifying independent producers should retain rights in the programmes they make unless these are explicitly sold to a public service broadcaster and/or other party;³
- b) public service broadcasters should not make commissioning conditional on ultimate ownership of all rights; and that
- c) public service broadcasters should not seek to include rights in perpetuity as a matter of course.⁴

A1.12 Reflecting the scope of current legislation, Ofcom's Guidance states that PSB Codes only apply to the commissioning of content which is "intended for use on licensed public service channels" and do not include programmes "commissioned specifically for use on other services" such as on-demand services.⁵

A1.13 We revised our Guidance in 2007, noting the preference of all parties for any additional rights sought by public service broadcasters to be obtained through commercial negotiation, as audience viewing patterns developed.

A1.14 Since then, the public service broadcasters and Pact have agreed changes to Terms of Trade agreements with individual broadcasters generally seeking different rights arrangements to suit their circumstances and business strategy. In recent years, these negotiations have generally seen public service broadcasters seeking to extend the length of time programmes are available on their on-demand platforms.

Independent production quota

A1.15 Each year, at least 25% of qualifying programming commissioned by public service broadcasters for each licensed public service channel must consist of "a range and diversity of independent productions."⁶ This has helped ensure that public service broadcasters commission from a wide range of producers and are not overly reliant on companies they own or their own in-house production teams. The public service broadcasters have consistently exceeded the quota since it was introduced as shown in Figure A2.1 below.⁷

³ The definition of an 'independent producer' is one who is not an employee of a broadcaster; does not have a shareholding greater than 25% in a broadcaster; and is not a body corporate in which a broadcaster has a shareholding greater than 25% (or in which two or more broadcasters have aggregate shareholdings greater than 50%).

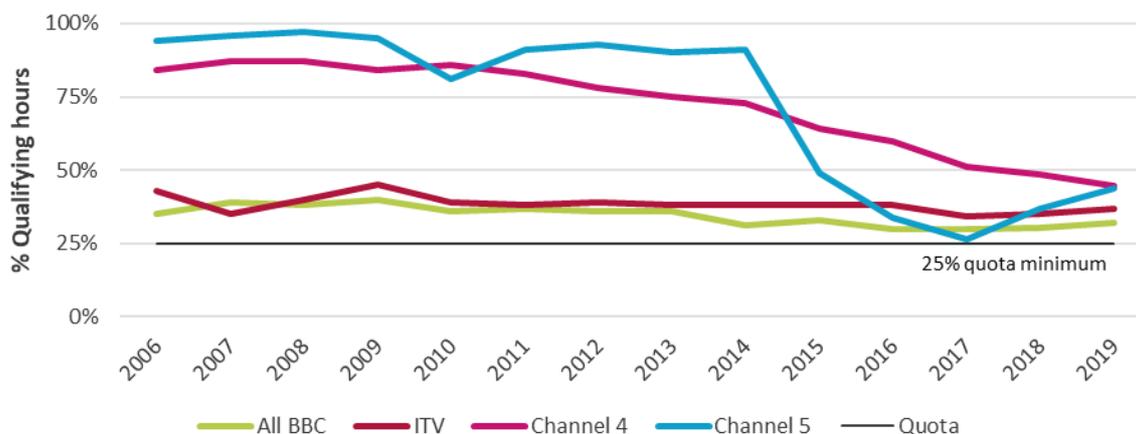
⁴ Ofcom, 2007. [Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers](#), p.19-22, paragraphs 18, 27 and 39.

⁵ Ofcom, 2007. [Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers](#), p.18, paragraph 9.

⁶ s.277 of the Act. Equivalent provisions also apply to the BBC and to S4C. 'Qualifying programmes' refers to those programming hours that can be used to count towards the quota for independent productions. The definition of qualifying programmes has been drawn relatively widely, so as to capture as many programmes which are originally produced as possible (excluding, for example, repeats and other programs that the broadcaster has acquired but not produced or commissioned). Certain other categories such as news are also excluded. The same definition applies for both the Codes of Practice requirements and independent production quota.

⁷ Ofcom/broadcasters, 2020. [PSB annual compliance report](#).

Figure A2.1: Share of qualifying hours produced by qualifying independents, by each PSB



Source: Ofcom/broadcasters

Market context for production

A1.16 Since our last review of the production sector in 2015, there has been significant change for producers and commissioners. These important trends have helped inform our analysis.⁸

Changing viewing habits mean that content is valuable for longer

A1.17 Audiences have continued to increase their use of on-demand and subscription services. Since 2015, the number of UK households subscribed to an SVoD has trebled.⁹ This shift in viewing is also affecting how audiences watch PSM content on their own on-demand services. For example, the BBC said in its latest annual report that viewers made 6.1 billion requests to stream programmes on iPlayer in 2020/21, a 28% increase on the year before.¹⁰

A1.18 While on-demand viewing has surged, broadcast TV viewing has gradually started to decline, particularly among young audiences (as seen in Figure A2.2). Enders Analysis has forecast that the Covid-19 pandemic will accelerate the transition from broadcast TV viewing to on-demand streaming, meaning that the “decline [of TV viewing] will go further than previously expected.”¹¹ Enders estimates the share of annual video viewing accounted for by broadcast TV will fall from 30% in 2019 to 12% in 2027 for people aged 16-34, and from 57% to 33% for those aged 35-54.¹²

⁸ Further evidence is set out in Section 3 of our [main statement](#) and [Annex 7](#) of the December consultation.

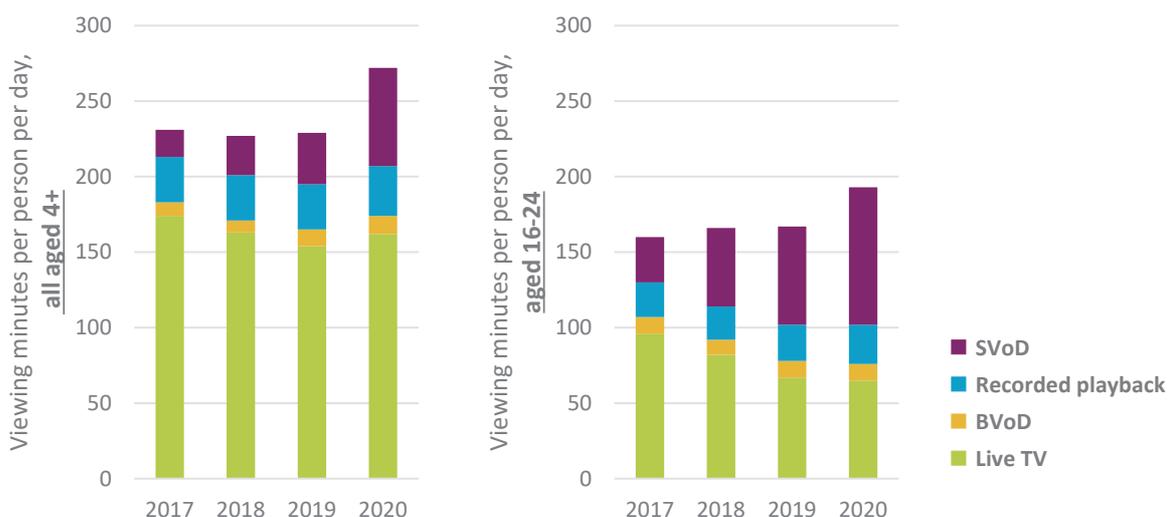
⁹ BARB Establishment Survey.

¹⁰ BBC, 2021. [BBC Group Annual Report and Accounts 2020/21](#), p.9.

¹¹ Enders Analysis, 2021. Video viewing forecasts: Trends accelerated.

¹² Enders Analysis, 2021. Video viewing forecasts: Trends accelerated. Figure 11.

Figure A2.2: changes in TV viewing patterns



Source: Ofcom estimates of audio-video viewing. Modelled from BARB, Comscore and Touchpoints data

A1.19 For many types of programming, the first broadcast transmission accounts for a much smaller share of total viewing than in the past. Many programmes also attract significant viewing on-demand long after their first broadcast. For example, Channel 4 has been clear that archive content including *The Inbetweeners*, *Scrubs* and *Friday Night Dinner* has been responsible for much of the growth in viewing on All 4.¹³

A1.20 Consequently, commissioners are increasingly looking to sign deals which reflect the growing importance of on-demand rights. Mediatique considers it is common for commissioners other than the public service broadcasters, to look for at least five years of on-demand rights as well as long periods of exclusivity within the UK.¹⁴ The exact arrangements tend to vary, depending on commercial negotiations.

The public service broadcasters continue to be key to the success of the sector, but UK production income from a diverse range of sources is growing

A1.21 Public service broadcasters work with more producers and commission a greater number of hours of content than anyone else.¹⁵ We repeatedly heard in meetings with small producers that they find public service broadcasters to be the most easily approachable commissioners. Several said that public service broadcasters provided important support and guidance, particularly to less-established producers, although some also felt their commissioning processes could be drawn out and bureaucratic.

A1.22 Partly as a result of regulation, public service broadcasters provide a unique level of commitment to UK producers. Channel 4 is required to commission all of its original

¹³ Channel 4, 2021. [Emerging Better Together, Channel Four Corporation Report, 2020](#), p.71.

¹⁴ Mediatique report for Ofcom, 2020. [State of the markets in which BBC Studios operates](#), p.62-65.

¹⁵ See A7.38 – A7.39 of our 2020 annex, [The role of PSBs in the UK TV production sector](#), for further details.

programming from external sources,¹⁶ while the BBC's public purposes require it to support the creative economy across the UK. The current Agreement between the BBC and the Secretary of State also commits it to making 100% of relevant programming contestable to external production companies by the end of 2027.¹⁷ In 2019, just over half (54%) of the BBC's network hours were produced externally.¹⁸

- A1.23 Commissions from public service broadcasters play a particularly important role in supporting independent producers based outside of London.¹⁹ Channel 4 has committed to increase its spend on first-run original content in the nations and regions to 50% by 2023.²⁰ The BBC has set a target of at least 60% of network TV commissions by spend to be made outside London, by the end of the Charter period in 2027. The BBC has also made further genre-specific commitments and pledged to “rebalance our network TV commissioning power across the UK to create a new ‘Pan-UK commissioning model’ that situates more decision-making outside London”.²¹ In stakeholder meetings, Welsh producers talked favourably about their relationships with S4C.
- A1.24 Although the public service broadcasters remain the largest commissioners in terms of volume, real PSB spend has been in gradual decline (see Figure A2.3). In 2019, for the first time, the public service broadcasters collectively accounted for under half (48%) of all independent production primary commissioning income.²² A report commissioned by Pact found the share of total spend on UK productions accounted for by public service broadcasters (including their commercial portfolio channels) had declined from around 86% in 2004 to just over 50% in 2019. The report forecasts this share to decline to around 36% by 2030.²³ The BBC has also announced that it will commission ‘fewer, but bigger’ titles citing budgetary pressures.²⁴

¹⁶ C4C is not allowed to be involved in the making of programmes to be broadcast on Channel 4 except to such extent as Ofcom may allow (s.295 of the Act). The Government's [consultation](#) on the ownership and remit of Channel 4 includes a question whether the publisher-broadcaster restriction should be removed to increase Channel 4's ability to diversify its commercial revenue streams.

¹⁷ Article 6(4) of the BBC Charter and para. 7, sch. 3 of the BBC Agreement.

¹⁸ BBC, 2020. [BBC Commissioning Supply Report 2019](#), p.16. Note this calculation is based on hours eligible for the independent production quota and excludes news, and all programming on BBC News and BBC Parliament.

¹⁹ See A7.40 – A7.45 of our 2020 annex, [The role of PSBs in the TV UK production sector](#), for further details.

²⁰ EY report for Channel 4, 2021. [Channel 4's contribution to the UK](#), p.1.

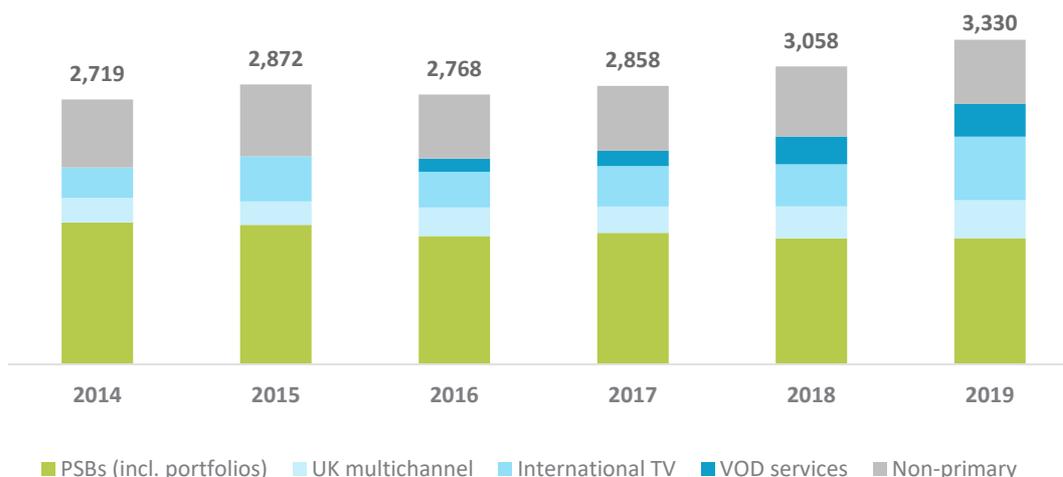
²¹ BBC, 2021. [The BBC across the UK 2022-2027](#), p.4-5.

²² Oliver & Ohlbaum report for Pact, 2020. [UK Television Production Survey: Financial Census 2020](#), p.10 and 16. This includes their commercial portfolio channels. Primary rights refer to the terms on which a programme can be made available for the first time. For example, this can include a defined number of broadcasts, or a particular period in which the programme can be shown on-demand. Primary rights also encompass the agreed period in which a programme can be “held back” from being exploited by others.

²³ This estimate includes spend on in-house commissions and from the independent production sector. Oliver & Ohlbaum report for Pact, 2021. Call for Evidence: Public Service Broadcasters & the UK Production sector.

²⁴ BBC, 2021. [BBC Annual Plan 2021/22](#), p.22. Declining real commissioning budgets for PSB programming have been accompanied by the growth of so-called third-party finance. This term catches all additional production spend which supplements the direct commissioner's spend such as co-productions, High End TV tax-credits, distribution advances and deficit finance. In 2019, total PSB third party funding reached £549m in 2019, with 68% of this drama. (Source: Ofcom/broadcaster data)

Figure A2.3: independent producer revenues 2014-19 in real terms (£m)



Source: Pact Census 2020. NB: Pact defines “independent producers” as production companies which are not wholly owned by UK broadcasters

A1.25 In contrast to the public service broadcasters, other commissioners have increased their spend on UK productions. Notably, spend on original British content by Sky or Netflix is now on a scale comparable to or greater than some of the public service broadcasters.²⁵ Over the past five years, commissioning revenues from overseas grew by 28% year-on-year, including a 40% increase in 2019.²⁶

The majority of production revenues are earned by very large producers

A1.26 The independent production sector comprises a broad and diverse set of companies, ranging from small specialists with a handful of staff to multinationals groups making programmes across a full range of genres. Pact told us that its active TV producer membership grew to 903 when it offered free membership at the height of the pandemic, before falling to 583 by May 2021 when membership fees were re-introduced.

A1.27 Although the industry is home to a large number of producers, the majority of revenues flow to a relatively small group of companies.²⁷ Pact figures suggest that of its 583 members in May 2021, 357 reported annual turnovers below £500,000. In comparison, Broadcast turnover data suggests that the ten largest companies accounted for about half of independent producer revenues in 2019. The Pact Census estimates in 2019 all

²⁵ In 2019, total spend on first-run programming (including on nations and regions and portfolio channels) was £1,439m for the BBC, £958m for ITV, £483m for Channel 4, and £118m for Channel 5. Sky [plans](#) to double its original spend – which was about [£500m annually in July 2018](#) – by 2024. Netflix was [reported](#) to have spent £750m on UK productions in 2020. The [2020 Pact Census](#) states in 2019 UK independent production generated £390m commissioning turnover from UK non-PSBs and £337m from international VoD services, compared to £77m from Channel 5, £332m from Channel 4, £326m from ITV, and £561m from the BBC. (Source: Ofcom/broadcaster data).

²⁶ Oliver & Ohlbaum report for Pact, 2020. [UK Television Production Survey: Financial Census 2020](#), p.22.

²⁷ For further details on the structure of the production sector see A7.27 – A7.30 of our 2020 annex, [The role of PSBs in the UK TV production sector](#).

producers with annual turnover below £25m accounted for around a third (36%) of independent producer revenues and those with turnover below £5m for 8%.²⁸

- A1.28 Since our last review, the UK production sector has continued to evolve. While consolidation by global players and large ‘super-indies’, and between distributors and producers continued, a steady flow of start-ups and spin-offs also entered the sector.²⁹ Some of these mergers and acquisitions by large international groups resulted in significant changes in qualifying independent status of producers. O&O analysis produced for Pact suggests the number of SMEs entering and leaving the market remained balanced between 2015 and 2019.³⁰

Responses to Ofcom’s call for evidence and our conclusions

- A1.29 It was clear from responses to our call for evidence that there were two main areas of interest – our guidance to public service broadcasters about commissioning from independent producers and the independent production quota.

Ofcom’s guidance on the commissioning of independent productions

Stakeholder views

- A1.30 Almost all respondents agreed a regulatory approach based on guidance from Ofcom continued to be helpful to both commissioners and producers. However, there were divergent views on the effectiveness of the current Guidance given evolving market conditions.
- A1.31 Pact questioned the case for change. They argued the current regulatory regime had already proved flexible enough for deals between public service broadcasters and independent producers to be revised over time. They said the ability of the system to meet changing audience needs was evidenced by the agreements Pact had made in the last two years with both Channel 4 and the BBC in which both broadcasters had negotiated extended on-demand rights.³¹
- A1.32 Pact and TAC believed changes to the Guidance could upset the existing balance in negotiations between producers and commissioners, with potentially significant effects on production sector revenues. Pact said many producers rely on intellectual property rights to support investment in their businesses and considered the UK creative economy would be impacted both on- and off-screen if producers were unable to do so in future. Pact and TAC both pointed to the fragility of the production sector following the Covid-19 pandemic,

²⁸ Oliver & Ohlbaum report for Pact, 2020. [UK Television Production Survey: Financial Census 2020](#), slide 13. In the UK, sections 382 and 465 of the Companies Act 2006 define an SME as a company with a turnover of not more than £25.9m, a balance sheet total of not more than £12.9m, and not more than 250 employees.

²⁹ Oliver & Ohlbaum report for Pact, 2021. Call for evidence: Public service broadcasters & the UK production sector; [Mediatique report for Ofcom, 2020. State of the markets in which BBC Studios operates](#), p.41-43.

³⁰ Oliver & Ohlbaum report for Pact, 2021. Call for evidence: Public service broadcasters & the UK production sector.

³¹ [Pact response to call for evidence](#), p.7-11.

arguing that further disruption caused by amendments to the Guidance could limit the sector's ability to recover.³²

- A1.33 In contrast, Channel 4 and ViacomCBS highlighted the increasing importance to them of on-demand rights and archive content in order to meet audience needs. They suggested they were at a commercial disadvantage to other players in the market who were able to secure more extensive rights packages than they were under the current framework.³³ For example, Channel 4 argued that it had been forced to trade away longer exclusivity periods for the content it commissioned in order to build up its All 4 service. This led to misattribution of its programming to other commercial providers, negatively affecting audience attitudes to public service content and masking its true value and appeal.³⁴
- A1.34 The BBC noted Ofcom's Guidance had not been revised since 2007, when there was a much clearer delineation between primary and secondary rights. The BBC said that no longer matched how many people now choose to watch TV. They said that revising the Guidance to reflect current market conditions would enable them to update their agreements with the sector when they needed to do so.³⁵ ITV also stated that modernised Guidance would allow them to pursue more "purposeful commissioning", focusing first on commissioning content its audiences want to see and only then working out how to best use its broadcast and online services to maximise its reach.³⁶
- A1.35 Screen Scotland considered alternatives approaches would be more appropriate to ensure PSM providers remain competitive but any changes must be very carefully thought through.³⁷ Voice of the Listener & Viewer (VLV), said the regulation needs to be revised to ensure the rules do not discriminate so heavily against the public service broadcasters and to support the sustainability of the PSB system.³⁸

Ofcom's response

- A1.36 In our last review of the production sector in 2015, we said public service broadcasters increasingly required additional rights to meet changing audience needs.³⁹ We also noted that public service broadcasters generally negotiated these rights separately to the 'primary' TV broadcasting rights which form the basic package they acquire from a producer.⁴⁰
- A1.37 As on-demand viewing has grown, the broadcasters' own on-demand services have become increasingly important for maintaining their connection with audiences. In many cases, the first transmission of a programme accounts for a much smaller share of its total

³² [Pact response to call for evidence](#), p.7-11. [TAC response to call for evidence](#), p.2-3.

³³ [Channel 4 response to call for evidence](#), p.42-45; [Viacom call for evidence response](#), p.2-4.

³⁴ [Channel 4 response to call for evidence](#), p.44.

³⁵ [BBC response to call for evidence](#), p.4.

³⁶ [ITV response to call for evidence, Annex 3](#), p.4.

³⁷ [Screen Scotland response to call for evidence](#), p.1-2.

³⁸ [VLV response to call for evidence](#), p.5.

³⁹ Ofcom, 2015. [Review of the operation of the television production sector](#). p.30, paragraph 4.12

⁴⁰ Ofcom, 2015. [Review of the operation of the television production sector](#). p.28, paragraph 4.2.1

viewing than in the past. Many programmes available on-demand attract significant numbers of viewers long after their first transmission.

- A1.38 Stakeholders we spoke to for this review told us that the exact rights different commissioners look for vary, depending on their individual business strategies. The length of time during which content can be streamed has become increasingly important for all. Research we commissioned from EY suggested that many overseas public service broadcasters “emphasised the importance... in having the rights to make content available on their video-on-demand services for a longer period in response to growing ‘binge viewing’ behaviours and box set watching among audiences.”⁴¹
- A1.39 We recognise that public service broadcasters will need to use different platforms to reach all audiences, including showing programming exclusively online. There is a risk that maintaining a broadcast TV-focused approach could have the effect of stifling innovation. We recommend that Government modernises legislation to ensure that the same requirements apply to all PSM content, regardless of whether it has been commissioned for broadcast TV or online.
- A1.40 In any event, as the market changes the contractual terms between public service broadcasters and independent producers need to be updated to deliver for audiences. Although broadcasters and producers have agreed changes from time to time, we are concerned that in some cases negotiations have not moved swiftly enough.
- A1.41 It is important that PSM providers and producers reach timely agreements to ensure audience needs are met. If agreements cannot be reached, PSM providers can seek approval from Ofcom to make changes to their Codes. Ofcom will approve suitable changes and update our guidance if necessary.

Independent production quota

- A1.42 Our call for evidence asked stakeholders for their views on whether there should be changes to the level of the independent production quota or to the definition of an independent producer and qualifying programming.

Stakeholder views

- A1.43 Many stakeholders, including producers and most public service broadcasters, thought the quota, continued to be effective in supporting policy objectives. For example, Pact said the quota had created opportunities for new talent by helping to ensure that those public service broadcasters with large in-house production teams and/or production arms were not completely reliant on them.⁴²
- A1.44 BBC said that, while it fully supported the retention of the quota at the current level, there was a case for replacing channel-based requirements with a single quota across all qualifying programmes and all TV output. It did not consider that changes to the definitions

⁴¹ EY report for Ofcom, 2020. [International perspectives on public service broadcasting](#), p.12

⁴² [Pact response to call for evidence](#), p.23.

of an independent producer or qualifying programming were necessary “to allow the BBC to continue supporting British talent and supporting a diverse creative economy.”⁴³

- A1.45 In contrast, ViacomCBS suggested changing the definition of independent production so that regulation focused on supporting smaller producers.⁴⁴ Other stakeholders agreed, arguing that a focus on support for SME producers could potentially increase the diversity of content commissioned, helping to meet the policy objective of support for a diverse and vibrant range of voices.⁴⁵ ITN and STV, both non-qualifying producers under the existing regime, suggested the distinction between qualifying and non-qualifying independent producers should be revised to remove the disadvantages they face, relative to qualifying independents.⁴⁶
- A1.46 The Media Reform Coalition suggested including diversity requirements in order to qualify as an independent producer. Ofcom could then monitor diversity not just for public service broadcasters, but for the production companies that the public service broadcasters are commissioning from, to ensure PSM is “open, inclusive and representative.”⁴⁷

Out-of-London, regional and national production

Some stakeholders proposed incorporating a geographic element to the independent production quota. Proposals included a network production quota in the Nations and Regions, a new definition for qualifying independent producers to include broadcaster-owned companies that were creating jobs in the Nations and Regions and updating Ofcom’s Guidance to include a more precise requirement for regional spending.⁴⁸

As indicated above, there are distinct rules about programming made out-of-London as well as national and regional quotas, which apply to all PSB investment in programmes, including in-house production. These rules complement the independent production quota.

Following our [Review of Regional TV Production and Programming Guidance in June 2019](#), our updated guidance for regional production only came into effect recently, on 1 January 2021. Consequently, we think it is too early to assess the impact of the revised guidance. However, we acknowledge the number of stakeholders who have raised concerns within this area and will continue to assess the effectiveness of regulation in supporting commissioning across the nations and regions.

⁴³ [BBC response to call for evidence](#), p.5.

⁴⁴ [Viacom call for evidence response](#), p.5.

⁴⁵ [VLV call for evidence response](#), p.5; [Screen Scotland call for evidence response](#), p.4-5; [Media Reform Coalition call for evidence response](#), p.6.

⁴⁶ [ITN response to call for evidence](#), p.2; [STV response to call for evidence](#), p.5.

⁴⁷ [Media Reform Coalition response to call for evidence](#), p.4-6.

⁴⁸ [Ofcom’s Advisory Committee for Scotland response to call for evidence](#), p.2; [Indie Club, p.2 Campaign for Regional Broadcasting Midlands call for evidence response](#), p.3-4.

Ofcom's response

- A1.47 Since its introduction, the independent production quota has been an important policy lever to guarantee public service broadcasters commission from a wide range of producers. It has created opportunities for new talent by helping to ensure that the public service broadcasters with large in-house production teams and/or separate production arms do not rely solely on them.
- A1.48 In 2015, we said regulation had proved critical in incentivising small producers to enter the market, stimulating talent coming into the sector and helping those businesses to grow. Although the quota did not explicitly require the use of SME producers, we said the fact that some of the largest independents were owned by broadcasters, and therefore did not qualify for the quota, helped to balance the effects of vertical integration.
- A1.49 As we set out in our main statement, to reach audiences and adapt to further changes in technology and markets, PSM providers need some flexibility. They need to be able to provide content across different platforms and services to best meet audience needs. There is a risk that maintaining a broadcast TV-focused approach to regulation could have the effect of stifling innovation.
- A1.50 In looking again at the independent production quota, we have taken this into account. Over time we consider it will be necessary for the quota to operate in a way which is consistent with PSM commissioning across both broadcast TV and online services. This is in line with our position on the Codes of Practice as discussed at paragraph A2.39.
- A1.51 In light of stakeholder comments, we have considered and assessed three options for achieving the policy aims of the quota. Our assessment of each of these options is set out below.

Limits on the size of qualifying independent producers

- A1.52 Some stakeholders suggested the quota could focus more directly on supporting SME producers, potentially helping to increase the diversity of content commissioned and encourage new entrants to the sector.⁴⁹
- A1.53 However, as discussed above, we have no strong evidence that the quota in its current form is failing to stimulate the growth of SME producers. Many of the existing programmes through which the obligation is currently met are made by larger qualifying producers. Changing the qualifying criteria to exclude them could have negative effects for audiences, reducing the ability of public service broadcasters to commission shows from companies with proven track records. Revising the quota definition to support SMEs could also result in additional compliance and monitoring costs or encourage circumvention of a revised size-based quota, creating an extra regulatory burden and possible risk of gaming.

⁴⁹ Under current legislation, the same independent production definition applies to both quota eligibility and Code of Practice requirements. Whether to retain a common definition or not for both the quota and the Code of Practice requirements would need to be considered further.

A1.54 Viacom suggested it would be suitable for a quota with a revised focus on SMEs to be set at a lower level, between 10% and 15% of qualifying programming. However, we are conscious that revising the quota down in this way would make it a more limited backstop against vertical integration.

Replacing the quota with separate obligations on the public service broadcasters

A1.55 ITN and STV suggested amending the definition of “independent producers” as they argued smaller non-qualifying producers were unfairly disadvantaged in comparison with the larger independents.

A1.56 This concern is long-standing. A 2002 report by the Independent Television Commission on the UK programme market anticipated the quota would be a temporary measure, whose justification “is likely to diminish over time as new broadcasters emerge as more significant buyers of original UK content, and as independent producers themselves become stronger.”⁵⁰

A1.57 Removing the quota may partially address these concerns and more generally remove any disadvantages non-qualifying producers face relative to qualifying producers. Given the industry has grown into a well-established and diverse sector since 2002, there is now arguably a stronger case for doing so than before.

A1.58 However, we would need to ensure that the policy objective of addressing potential harmful effects from vertical integration is met, but this could be achieved through alternative measures. One approach would be through separate external commissioning requirements on public service broadcasters. These would limit the scope of individual public service broadcasters to restrict their commissions to producers with whom they had a direct affiliation. While this option would serve as a softer control on the risk of vertical integration, this risk is not as significant as in the past, given that independent producers now form a large and established part of the production sector.

A1.59 The introduction of external commissioning requirements could have other consequences. For example, it would potentially reduce the opportunities available for SME producers, risking a decline in the diversity and range of voices in public service content. As the BBC and Channel 4 are already subject to external commissioning requirements, this option may only involve new requirements for the Channel 3 licensees, Channel 5 and S4C.⁵¹ We recognise the potential effects of this option would be quite different on individual public service broadcasters. ITV, which has been clear about its goal to become a “leading creative force in global content production,” would potentially be particularly affected.

Maintaining the status quo

A1.60 The quota has supported the long-term development of the independent production sector and has retained the support of a number of stakeholders, including BBC, ITV, Channel 4, and Pact. We have no evidence to suggest that it is leading to significant

⁵⁰Independent Television Commission, 2002. A Review of the UK Programme Supply Market.

⁵¹ S.295 of the Act [Channel 4]; and para. 7, sch. 3 of the BBC Agreement [BBC].

harmful distortions in the production sector and as we highlighted in our consultation, the UK TV production sector is diverse, competitive, and internationally successful.⁵²

- A1.61 Maintaining the status quo would ensure the quota continues to act as a protection against vertical integration risks, by ensuring that independent producers are guaranteed a minimum level of commissioning from public service broadcasters. It contributes to diversity of content, supporting a goal of the quota to promote cultural diversity. Smaller qualifying independents producers are also protected from competing with in-house PSB production arms for 25% of PSB commissioning, providing support for SMEs in this sector.
- A1.62 We recognise the quota has some weaknesses. It applies to both large and small independent producers, and therefore does not offer specific support to SMEs, who still have to compete directly with larger producers. Also, given quota eligibility is determined by the definition of an independent producer, the 25% ownership threshold for falling within that definition means that as ownership structures change for independent producers, the qualifying or non-qualifying status of a producer can change frequently. As a result, quota compliance for public service broadcasters can be sensitive to these changes in ownership structure (e.g. a change in ownership of a large independent producer, could, in principle, cause that producer to lose its qualifying status, and so push a public sector broadcaster below the 25% threshold).

Conclusion on the independent production quota

- A1.63 The independent production quota has been crucial in supporting the long-term development of the independent production sector. Our review shows it continues to retain the support of stakeholders from across the industry. On the basis of our analysis and the responses we have received, we have no evidence to suggest the quota in its current form is having a harmful impact on the growth or creativity of the production sector.
- A1.64 Measures such as the quota will continue to be important if regulation is to play its part in meeting policy objectives including incentivising diversity, encouraging creative talent to join the industry and promoting growth. It is likely that commissioning spend by public service broadcasters will continue to be focused on programming suitable for a broadcast TV schedule for some years.
- A1.65 As we explain in our *Small Screen: Big Debate* statement, we expect increasing numbers of viewers to spend more time watching on-demand services. The focus of commissioners and the level and proportion of programme budgets committed to online content will therefore shift. The need for a regulatory approach which has the ability to adapt without limiting innovation, is only likely to grow.
- A1.66 We think the current quota is likely to remain fit for purpose for some time. However, because the quota is specified in legislation any amendments require legislative change. As we explained in **Section 5** of [our statement](#), we consider legislation should be updated to provide greater flexibility to be able to reflect the growing importance of online content

⁵² Ofcom, 2020. [Small Screen: Big Debate, Annex 7: The role of PSBs in the UK TV production sector](#), paragraph A7.2.

delivery. In the case of the quota, this should also give Ofcom the responsibility to update obligations when necessary to ensure policy objectives, such as promoting creativity and stimulating the growth of SMEs, continue to be met. It will be important to provide certainty for the market and also ensure that regulation does not prevent changes which are in the interests of viewers.

Recommendations to Government

New legislation is needed to update the rules on production of PSM content, so that:

- PSM requirements for commissioning from independent producers apply to both broadcast TV and online services;
- There is flexibility to change the rules in line with market trends and policy objectives.