

Consultation response form

Question	Your response
Question 1: Do you have any comments on our approach and proposed draft Guidance?	Confidential? – N The Advisory Committee for Scotland (ACS) is one of a number of committees and advisory bodies, established under the Communications Act (2003) to inform the work of the Ofcom Board and Executive. The ACS is one of four committees representing each of the UK's nations, specifically to '<i>advise Ofcom about the interests and opinions, in relation to communications matters, of persons living in Scotland.</i>' Therefore, the responses below highlight specific considerations particular to Scotland wherever possible. This submission draws on the knowledge and expertise of ACS members and is informed by our individual experience and through discussion at our meetings. It does not represent the views of Ofcom or its staff. We recognise that the approach and guidance offered in this consultation has a UK wide focus. However, we are of the opinion that the changes suggested will have a disproportionate impact on the Scottish independent sector, which is why we have decided to respond. The independent production sector in Scotland is small and fragile. Therefore, any seemingly small change can have large repercussions and unintended consequences. We believe that there are a number of important issues that need to be considered, in this Scottish context. We have serious reservations regarding Ofcom's proposals to revise their Guidance for Public Service Broadcaster's Commissioning Codes of Practice and disagree with: - a) Allowing PSBs to seek bundling of primary and secondary rights with the independent producer's explicit consent. b) Lifting the ban on PSBs including matching rights clauses in commissioning contracts. We believe that these changes will detrimentally threaten the financial health & sustainability of the Scottish and the UK's independent production sector, damaging both diversity and the quality of the UK public service broadcasting and impacting negatively on audiences. It will result in favouring the negotiating balance to the PSBs thereby putting independent producers under pressure

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	and heavily limiting their ability to retain and exploit their intellectual property. The retention of intellectual property rights by Scottish production companies is seen as one of the key areas of growth by the sector, delivering sustainability and ongoing profitability. Without the ability to retain and exploit rights, this could result in both the failure of independent companies to compete effectively for commissions and negatively impact on their opportunity to grow their businesses. This shift will lead to a decrease in diverse content supply, reduce working capital for production companies thereby inhibiting innovation and creativity within the Scottish & UK content market, and will ultimately narrow the range of content available to PSB commissioners and audiences. Bundling: Allowing bundled deals would enable PSBs to acquire both primary and secondary rights at a similar price to what they currently pay for primary rights. This undermines producers' bargaining power, making it harder for them to secure financing for deficit funding from the secondary market and, ultimately, to profit from secondary sales. It would be challenging to prevent PSBs from exploiting their dominant position, as producers would have no right to refuse. Not consenting to bundling could put their commission at risk. In addition, it would also force producers into agreeing to unfavourable terms just to secure a commission and keep their businesses afloat. Matching Rights: This clause means that if a producer seeks funding from third parties (e.g., a distribution advance), they are contractually required to disclose the offer to the commissioning broadcaster. The broadcaster can then acquire those rights for the same price the producer was offered by the third party. In practice, this leads to third parties being hesitant to make offers because: a) They don't want their terms shared with broadcasters, and b) The broadcaster can acquire the rights regardless of the third-party offer. We are extremely concerned that this proposal could discourage third-party suppliers, such as multichannel commissioners and streaming platforms, from engaging in negotiations with producers in the first place. If the PSB has the right to match any third-party offer, it could result in de facto exclusivity for the PSBs, effectively excluding other potential buyers and ultimately reducing the value of these rights. This would be both anti-competitive and anti-growth. It is possible that the larger independent production companies will be able to bargain effectively with the PSBs. However the Scottish production sector is made up of small and sometimes specialist companies, who will not have that bargaining power. We believe therefore that if these changes are implemented, the Scottish production sector will be disproportionately affected which ultimately will challenge its sustainability and ability to grow.

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Question 2: Do you have any comments on our impact assessments in relation to our proposals, as set out in Annex 2?	Confidential? – N As above

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