

BBC response to Ofcom's consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice

Introduction

The BBC welcomes the opportunity to respond to this consultation. We recognise the role that the regulatory framework for commissioning, including this Guidance and the Codes of Practice and Terms of Trade, has played in the growth of the UK production sector and ultimately in delivering great content from across the UK to audiences in line with our Mission and Public Purposes. We remain committed to supporting a flourishing production sector, including continuing to support the regulatory framework. In 2023/24, 39% of our relevant TV programme hours were made by qualifying independent companies (exceeding our independent productions quota by 14 percentage points).

As Ofcom recognises, there have been significant market developments since the Guidance was last updated in 2007. While the PSBs are still the bedrock of the screen sector, accounting for just over half of total commissioning revenues in 2023, we have significantly less bargaining power, with much more competition in the markets for audiences, talent, and ideas.¹ As Ofcom notes, viewing habits also have evolved significantly: in 2007, video on-demand was in its infancy, while today there is almost an hour of in-home BVoD, SVoD, and AVoD viewing each day on average.²

For example, rather than enjoying PSB-commissioned content almost solely through the linear broadcast schedule, viewers increasingly view PSB content through on-demand services such as BBC iPlayer. Viewers expect the on-demand services of PSBs to have deep archives, with classic programmes and boxsets of current series.

Indeed, these changes were the impetus for the Media Act: as noted in the 2022 Broadcasting White Paper:

“rapid changes in technology, viewing habits, and the entrance of global players have introduced new challenges for British broadcasters. Against that backdrop of rapid change, we need to take action to support British broadcasters in meeting the most pressing of those challenges, to protect our mixed ecology, and ensure public service broadcasters remain at the heart of our plans”.³

It is therefore right that Ofcom considers changes to its Guidance for Public Service Broadcasters on Commissioning Codes of Practice, and we support many of the changes that it is proposing. Modernising the rules will help to ensure this regulation remains fit for purpose, enabling the BBC to continue to serve all audiences through the provision of high-quality TV content and deliver value for Licence Fee payers.

Comments on Ofcom's proposals

¹ Ofcom analysis, quoted in consultation document para 2.8.

² Ofcom, Media Nations 2024.

³ 'Up next – the government's vision for the broadcasting sector' (2022).

Removal of references to the Terms of Trade

We agree with Ofcom's view that *"it would not be appropriate for the Guidance to be unduly prescriptive about the way in which the PSBs' Codes must meet the statutory requirements. Similarly, it is important that the Codes are sufficiently flexible to accommodate different circumstances and the evolution of relevant markets"*.⁴ However, we believe that there are a number of areas where the draft Guidance remains too detailed and prescriptive, in particular where it references the Codes.

We don't believe it works to simply substitute references to the Terms of Trade with references to the Codes. The BBC's Code of Practice sets out the principles which are to be applied when the BBC is agreeing terms around commissioning independent productions, while the Terms of Trade is the standard framework agreed with the production sector that sets out the key commercial provisions of those terms. The Terms of Trade are therefore rightly more granular than the Codes, are periodically reviewed, and may contain variations across different services and content genres, e.g. the BBC has agreed different terms for Children's content, for BBC Three, etc.

Therefore, it is more appropriate that much of the detail that Ofcom is proposing should be set out in the Code and therefore subject to approval by Ofcom, should rather be set out in the Terms of Trade.

We have set out below the paragraphs where we believe that the Guidance is too prescriptive.

- Para 2.17 – it is the Terms of Trade, not the Codes, that sets out how packages of rights are to be used and exploited. As noted above, while our Code of Practice has remained the same since [insert], the Terms of Trade have varied significantly over time and across different services and types of content, therefore it would be counterproductive to this flexibility to include prescriptive information around how packages of rights are to be used and exploited in the Codes.
- Para 2.18 – this information is too granular for the Codes. The Guidance should require the Code to recognise that exercise of the primary rights should cover initial uses and involve a mechanism for reuse payments.
- Para 2.22 and 2.23 – the requirements set out in these paragraphs are too detailed to be set out in the Codes.
- Para 2.28 – the methodology for preparing the indicative tariffs are published separately by the BBC as part of the tariffs, not included in the Code. The final phrase *"as well as arrangements for rights on different platforms"* should be deleted as this is inconsistent with the stated objective for platform neutrality in paragraph 2.11.

⁴ Consultation document, para 3.5.

- Para 2.31 – this paragraph is too detailed and out of date. Ofcom should remove final two sentences from the point “*However, we also recognise that at the point of commission...*”.
- Para 2.32 and 2.33 – the details set out in these paragraphs are included in the Terms of Trade not the Codes.

Objectives of the Guidance

We agree with the majority of changes Ofcom has made to the objectives. We suggest that the high-level objective includes a reference to enabling PSBs to compete effectively in the UK market. This would be in line with Parliament’s intent when passing the Media Act, which was supported by policymakers across the House. For example, during the Act’s passage, the then Culture Secretary noted that “The Bill will [support broadcasters] by levelling the playing field, removing threats to their sustainability, and opening up new opportunities to maximise growth and unlock potential”.⁵

Changes made by the Media Act

Para 2.21 of the draft Guidance includes a change made by the Media Act. In order to retain consistency between broadcast content and content made available on-demand and prevent scope creep, the BBC believes that Ofcom should express this amendment to the paragraph as follows: “*Independent productions commissioned by another channel or service (e.g. a joint venture channel) but intended for broadcast on the main public service channel or intended to be made available on the PSB’s designated on-demand player will be subject to the Code.*”⁶

Primary and secondary rights

We strongly support many of Ofcom’s proposed changes in section B of the draft Guidance. When the Guidance was last revised in 2007, there was a much stronger delineation between primary and secondary markets. We agree with Ofcom that, in order to provide content in a way that meets the needs of as many different audiences as possible, it is important for the PSBs to have flexibility in how we acquire rights: as such, we welcome the statement in para 2.16 that “*We [Ofcom] also expect PSBs to be able to acquire the rights they need to deliver on their remits and meet changing audience needs.*”

We also welcome the change to para 2.24, allowing negotiations for both primary and non-primary rights to be conducted by the independent producer simultaneously. This recognises the reality that often a commission can only proceed when all the funding is in place; it is not a sequential pattern of negotiations. We agree that “*both PSBs and producers are [...] likely to benefit from such an amendment*” as it helps incentivise producers to bring the more expensive creative ideas to PSB commissioners, and PSBs can help broker effective editorial and windowing arrangements with the third party investor. We do not agree with concerns that have been raised that PSBs will look to

⁵ DCMS, ‘[Media Bill to maximise potential of British TV and radio](#)’ (November 2023).

⁶ BBC proposed amendments underlined.

secure more primary rights, such as international rights (we note the safeguards relating to this in para 2.25 of the draft Guidance, with our caveats). Ultimately, we believe that this change will benefit UK audiences by ensuring that they are more likely to have access to the best homegrown content on PSB services.

We agree in principle that linking the primary and non-primary rights should require agreement from the independent producer, however it is unclear what Ofcom means when it suggests that an independent producer should “*expressly consent*” in this context. Instead, the Guidance should refer to “*agreement by parties including the independent producer*”, which is more in line with the contractual language used throughout the Guidance.

Ofcom should also remove the first sentence of para 2.25, which duplicates matters already covered by para 2.22 and the amended para 2.24.

Matching rights

Ofcom has removed the “matching rights” provision in para 2.26. We agree with Ofcom that, in the face of significant SVoD buying power, it would be beneficial for PSBs and audiences if it was “*easier to secure [...] the consistent presence of independently produced content on PSBs, therefore better serving viewer interest where that content has become associated with the PSB*” (consultation document, para 3.33).

However, matching rights can apply at different points in time. We agree with the concerns that have been raised by other stakeholders that matching rights for first-time commissions risk having a detrimental impact on the market by making it less attractive for third-party funders to consider investing upfront in programmes due to the increased risk that they could be forced out at the point of commission. This is not an effect that the BBC would want to see and consider that this type of matching right should continue to not be permitted.

However, we consider it important for audiences and Licence Fee payers that programmes initially commissioned and made for the BBC can continue to remain available on the BBC’s services for as long as the BBC considers this beneficial to the audience (and similarly for other PSBs). Therefore, in the context of the end of the licence period, we consider that a matching right should not be prevented by the regulation.

Compliance, monitoring, and reporting

We welcome some of the changes that Ofcom has made in sections E and F of the draft Guidance, which allow for a more flexible, futureproof, and proportionate approach. We suggest that Ofcom removes the requirement for PSBs to seek approval when we want to modify “*a linked document where this would impact the information PSBs are required to provide under this Guidance*” (draft para 2.38). This provision would introduce a more onerous approach than the current one and would for example cover website information, which we don’t believe is appropriate. We believe that oversight and monitoring requirements are sufficiently covered in para 2.37.

Other

- Ofcom should amend para 2.15 of the draft Guidance so that it says “A PSB’s Code should set out *that* it will ensure an adequate separation of responsibilities for programme commissioning from the management and operation of in-house production activities, where they exist.” This is more futureproof than the current drafting. Sections E and F of the Guidance set out how compliance and monitoring will be achieved.
- The BBC does not support the principle that programme release policies should “be intended to enable rather than restrict early exploitation” (draft Guidance, para 2.34). The focus should be a presumption of exclusivity rather than a presumption of release, to reduce the scope for the value of a PSB’s initial investment to be diminished – in line with the high level objective of the Guidance “to support the PSBs in fulfilling their individual remits and the public service remit”. We believe that the language in para 2.11 of the draft Guidance noting that the PSBs should have regard for “preserving the scope for secondary exploitation by producers” is more balanced.
- We also have some concerns about the addition of the word “competition” in para 2.36. Without further qualification, this contradicts the rest of the paragraph, which makes clear that PSBs are “entitled to a degree of exclusivity”, which inherently involves some foreclosure of competition (offset by the benefits of organisations being able to agree exclusive deals). We are not clear what risk to competition this is intended to mitigate, especially as Ofcom acknowledges the increase in competition from global players.