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Revised Guidance for PSBs on Commissioning Codes of Practice: Responding to Ofcom's Proposals

A report for Pact
prepared by Oliver & Ohlbaum Associates Ltd



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Key Findings

In its consultation on the Guidance for PSBs on commissioning Codes of Practice, Ofcom considers that lifting the current prohibitions on bundling and matching rights would provide greater flexibility in negotiations for both PSBs and producers, reduce the costs of commissioning negotiations and improve the availability of quality of content for audiences. At the same time, Ofcom states that its proposed changes ‘are unlikely to lead to any major deviations from current practice or outcomes’. In this report, we draw on market data and policy analysis to assess the likely impact of the proposals in practice, considering the competitive dynamics in the sector.

We find that the proposals create the risk of serious unintended consequences. These would seem to run counter to Ofcom’s aims and duties around securing the interests of audiences, encouraging investment and innovation, promoting competition and economic growth, and proportionate and targeted regulation. In particular:

- **PSBs could negotiate for a bundle of primary and secondary rights upfront.** There would be no obligation for the PSB to offer to acquire only the primary rights or to do so on fair and reasonable terms
- **Matching clauses could destroy the third-party market for secondary rights.** If the prohibition was removed, there would no longer be a true ‘market rate’ as commercial third parties would avoid making offers rather than disclose their pricing only to lose out to the PSB anyway. Together with changing the provision on bundling, this would strengthen a PSB’s ability to extract all rights at the point of commissioning
- **While PSBs would retain more rights, they would still need to raise the finance to cover the production cost.** If the production is to retain the same budget and creative ambition, the PSB would need to finance its existing commissioning fee and the deficit financing that the producer currently provides. It could also require the PSB to take on the role of assembling other third-party financing to close the budget – meaning an additional administrative burden for the PSB. In the case of a six-part high-end Drama series, a PSB could have to cover or assemble third-party finance for £3.7 million in addition to the existing primary commissioning fee of £5.4 million (illustrative). The PSB might take on more risk on anticipated future earnings; take further investment out of other genres, narrowing the audience offer; or try to further reduce producer margins
- **There is a risk that the PSB does not fully utilise the rights.** Most broadcasters and SVOD services use windowing to maximise the value of programmes and reach different audiences. The producer has the incentives to put together a distribution agreement that maximises these windowing opportunities. There is a risk that a PSB commissioner bundles primary and secondary rights but then ‘warehouses’ the secondary rights, meaning that the programme is unavailable to audiences in periods when it is not on the PSB’s service

£365 million per year of producer revenues would be at risk from 2026 vs the expectation under the status quo – and this impact would carry forward into future years.

PSBs would be worse off, contrary to Ofcom’s objectives. There could be a downward spiral in broadcaster revenues and content investment. Producers with the experience and specialism in high-end Drama and Factual would have an incentive to pivot to supplying SVOD services, or to work in the US – which has a large home market so the rewards are higher. The variety of production companies in the UK would likely decline; it would be harder to enter, grow or diversify, meaning less innovative programme ideas or new talent

Consumers would ultimately lose out. The proposals risk unintended consequences for quality, choice, investment and innovation and therefore fulfilment of the new PSB remit. The current Guidance has allowed negotiated updates to the Terms of Trade over time, with extended programme availability on PSB BVOD services and high quality and diverse programmes on screen. This includes high-end Drama and Factual such as SAS Rogue Heros (Kudos Film and TV for BBC), Red Eye (Bad Wolf for ITV) or The Gathering (World Pictures for Channel 4).

1 Introduction

This report has been commissioned from Oliver & Ohlbaum Associates (O&O) by Pact, the UK Producers Alliance for Cinema and Television.

It relates to Terms of Trade, which is the regulatory framework for commissioning agreements between PSB commissioners and qualifying independent producers (QIs).¹ The Communications Act 2003 requires each PSB to establish a Code of Practice on how they commission programmes from independent producers, in line with Guidance from Ofcom.² The two sides then agree Terms of Trade through commercial negotiations.

Ofcom is consulting on revising this Guidance. The Media Act 2024 provides that PSBs may fulfil their public service remit by making audiovisual content available on-demand, including on their BVOD services. The Act provides that the PSBs may count programmes commissioned for their designated BVOD services towards their independent production quotas and that the Terms of Trade apply to those commissions. Ofcom is consulting on implementing that change. Ofcom is also consulting on changing the Guidance to ‘reflect market developments and current commissioning practices’. Those proposed changes include lifting two prohibitions in the current Terms of Trade regime:

- The prohibition on a PSB linking the acquisition of primary rights to the negotiation of secondary rights, where the producer expressly agrees (bundling)
- The prohibition on a PSB including a requirement in its commissioning contract for matching rights, where a PSB has the right to match a third-party’s offer in relation to secondary rights or to make a counteroffer

Matching rights may refer to:

- **First negotiation rights:** where the producer must first negotiate with the commissioner before seeking external offers
- **Last refusal rights:** where the PSB commissioner would have the right to match the exact terms of a third-party offer before the deal is finalised
- **Last look rights:** where the PSB commissioner can counteroffer instead of exactly matching the third-party offer, giving it increased leverage to negotiate more favourable terms

Both bundling and matching rights make it easier for a commissioner to retain secondary rights in a programme instead of the IP remaining with the producer, as under the current Terms of Trade.

1.1 Scope and methodology

This report provides evidence and analysis in response to Ofcom’s proposals to lift the prohibitions on bundling and matching. We cover:

- Why do we have prohibitions on bundling and matching?
- If the bundling prohibition was lifted, what impact would this have?
- If the matching prohibition was lifted, what impact would this have?
- Conclusions: the implications for Ofcom’s policy objectives

¹ QIs are independently owned companies with no more than 25 per cent ownership by a broadcaster or 50 per cent by two or more broadcasters, and with no more than 25 per cent shareholding in a broadcaster. Communications Act 2003

² Ofcom Guidance for Public Service Broadcasters (PSBs) on Commissioning Codes of Practice

Ultimately, we explain why these prohibitions exist, why they remain relevant, and why Ofcom's proposal to change the bundling and matching provisions would have a negative impact on the UK's PSBs, wider audiovisual ecosystem and ultimately audiences – contrary to the policy objectives.

This report combines qualitative and quantitative analysis, drawing on a literature review, market data and policy analysis. Data sources include Ofcom publications, the *O&O Producers Database*, the Pact Census carried out by O&O.

1.2 About O&O

O&O is a leading independent advisor on the media, entertainment and sport sectors, with practice areas across policy and regulation, strategy, investment and commercial advisory. We have an in-depth understanding of the competitive dynamics of the UK's TV and film industries and have been a specialist advisor on the production sector for over two decades. As part of this, O&O has worked on competition assessments, market sizing and value chain analysis, production and commissioning strategies, buy and sell side transactions and public policy around fiscal incentives, territoriality of rights, and production regulation including the PSB Terms of Trade and production quotas. In doing so, O&O has worked for a broad range of organisations including major broadcaster and VOD commissioners, independent producers, investors, trade associations, Ofcom, DCMS, Screen Scotland and the European Commission.

Why do we have prohibitions
on bundling and matching?

2 Why do we have prohibitions on bundling and matching?

There are well-established prohibitions on bundling and matching rights requirements in the Ofcom Guidance for PSBs on Commissioning Codes of Practice. In this part, we consider the reasons for these provisions, in the context of the overall regulatory framework for Terms of Trade between PSBs and independent producers.

2.1 The UK production sector was subject to market failure

To inform our assessment of whether the current regulation remains fit for purpose, we should briefly consider how and why the rules are in place. Three features of the market structure and the conduct of programme-buyers may prevent viewers' interests from being met, justifying regulatory intervention:

- Negotiating strength of the PSBs
- Vertical integration of the PSBs as broadcaster-producers
- Geographic concentration of production³

Negotiating strength of the PSBs

In its initial reviews of the television production sector and the operation of the Terms of Trade, Ofcom noted how there is a relatively small number of buyers of originated programming but a very large number of producers, providing the PSBs with a strong negotiating position. The extent to which PSBs take advantage of this position may come at the cost of producers and viewers, by affecting the quality, diversity and plurality of external production.

We would add that in the UK television sector, each of the PSBs has differentiated market positioning and associated programme and slot requirements. This means that an independent producer's pitch must be tailored to meet the specific requirements of a given commissioner. Effectively there is only one (or one and a half) buyers for any programme idea. Once the producer finds interest, develops the idea and enters negotiations, it may already be too costly, time consuming or impossible to repurpose the idea and the pitch for another commissioner. This dynamic means the independent producer may find itself in a 'captured seller' situation where the switching costs hinder its ability to negotiate fair and reasonable terms or to turn down the terms offered by the PSB.

Vertical integration

The PSBs, notably the BBC and ITV, are vertically integrated broadcaster-producers. (Today, Channel 5 benefits from some intra-group production and Channel 4 is recently permitted to have in-house production and has a strategy to increase its IP ownership). When combined with market power, vertical integration creates incentives to favour in-house production, which may reduce the diversity and plurality of production and quality and best value for money for audiences. The PSB has a second incentive, which is to maintain scale in order to compete for external commissions from other broadcasters (and today, VOD services).

Geographic concentration

Absent intervention, television production, commissioning and broadcasting tend to be concentrated in London, affecting the diversity of content and perspectives available to audiences and the economic and social impact in the

³ Ofcom, 'Review of the television production sector, Statement', 2006; Ofcom, 'Review of the operation of the television production sector, a report for the Secretary of State for Culture, Media & Sport', 2015

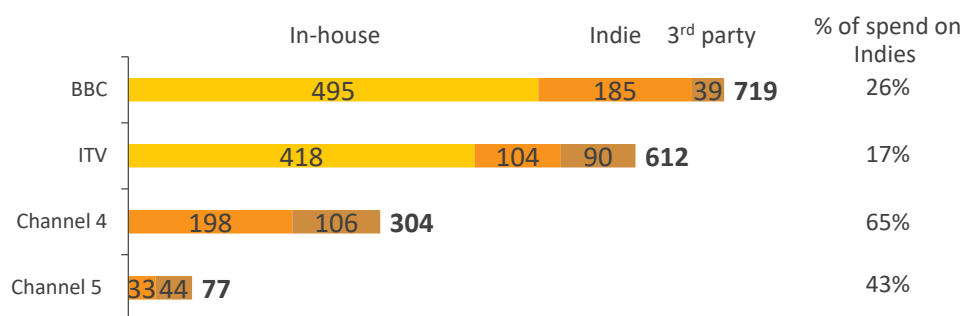
Nations and Regions. Alongside Made outside London production quotas, the Terms of Trade enable Nations and Regions producers to negotiate fair and reasonable terms and develop IP.

2.2 PSB market power meant that independent production would remain squeezed

Absent the Terms of Trade, these features meant that producers had very little scope to negotiate on production fees or take a strong position on back end (post-primary transmission) rights. They remained limited in their market share, had few opportunities to increase their commissioning hours and found it hard to grow from small to medium-sized producers and onwards. This was despite the UK market for original content growing strongly as competition from new entrants increased (at the time, pay TV and DTT channels).

Figure 1 shows independent producers' share of the market in terms of main PSB channel spend in 2001, just before the Terms of Trade were introduced. Independents accounted for just 22 per cent on average of BBC and ITV content investment, with the broadcasters' in-house production accounting for 69 per cent on average.

Figure 1: Sourcing of qualifying programming by network, 2001, £, millions



Source: ITC, Channel 4, BBC, Oliver & Ohlbaum analysis

2.3 Terms of Trade were necessary to unleash the entrepreneurialism of the independent production sector

The framework for the Terms of Trade was introduced by the Communications Act 2003, following a review by Ofcom's predecessor, the Independent Television Commission (ITC)⁴. This assessed the state of the UK production sector, twenty years after the establishment of Channel 4 as publisher broadcaster, and a decade after the introduction of an independent production quota.⁵ These interventions had been designed to introduce diversity of supply, competition and innovation.

However, the ITC found that even with these interventions, the independent production sector had c.500 very small producers, with low fixed margins and little possibility to reinvest in development. To unlock competition, innovation and growth, it was necessary to require PSBs to adhere to Codes of Practice in their negotiations with independent producers. This was introduced by the Communications Act 2003, and Codes of Practice were implemented by the broadcasters based on Guidance issued by Ofcom (the subject of this consultation).

⁴ ITC, 'Programme Supply Review', 2002

⁵ Broadcasting Act 1990 introduced a statutory requirement for PSBs to allocate at least 25 per cent of their qualifying programming hours to independent productions

Under the Terms of Trade, the producer acquires the IP in its creations and licenses exclusive primary rights to the PSB commissioner in exchange for the commissioning fee. The producer retains the secondary exploitation rights and can choose to license these to third parties, which may include the commissioning PSB, through commercial negotiations.

In particular, the Ofcom Guidance includes prohibitions around bundling and matching. Ofcom requires that there should be sufficient clarity, when an independent production is commissioned, about the different categories of rights to exploit the commissioned production. To preserve this clarity, Ofcom considered there should be no terms in contracts making them conditional (actually or in effect) on the acceptance by producers of a bundled deal or on the use of a broadcaster's own distribution arm (bundling). Ofcom also considered that 'matching rights' provisions could stifle competition. At the same time, it made clear that the Codes should not preclude a broadcaster from acquiring different or additional rights' packages should they wish to do so and should the independent producer wish to make them available. This would be through commercial negotiation.⁶

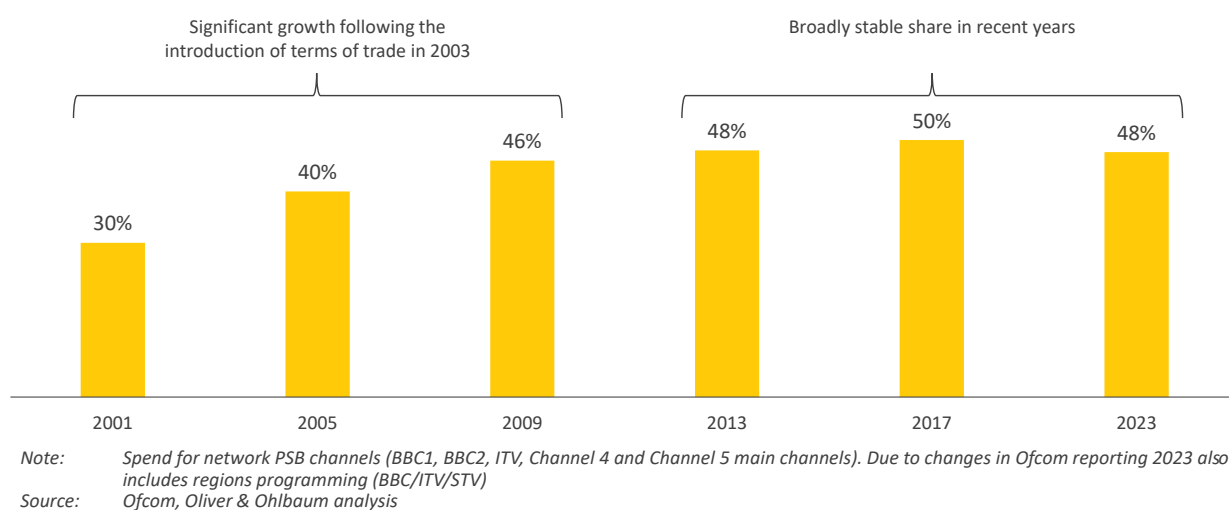
Overall, the UK's approach has brought significant benefits to audiences, the PSB system and the wider UK audiovisual ecosystem:

- The independent production sector is a **force for growth** in the UK creative industries
- UK growth is converted into **global trade success**
- Independent producers are able to offer deficit financing, making quality **PSB commissions viable**
- The independent production sector is **highly dynamic**, with a cycle of creative renewal

2.3.1 The independent production sector is a force for growth in the UK creative industries

Following introduction of the Terms of Trade, independent producers' commissioning income from PSBs rose from c.£700 million in 2002 to £1.35 billion five years later, with a further £158 million from the UK multichannel sector⁷ as further commissioners were attracted to invest by the growing sector. As seen in **Figure 2**, independents' share of PSB commissioning spend rose from 30 per cent in 2001 to 26 per cent by 2009 and then remained broadly stable.

Figure 2: External producer share of PSB first-run origination spend, 2001-2023



⁶ Ofcom, 'Consultation on revised Ofcom Guidance for broadcasters on Codes of Practice', 2007

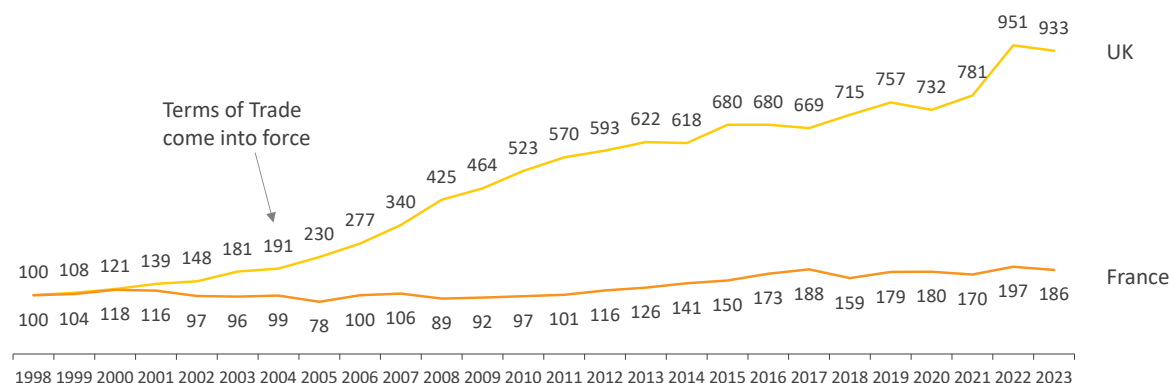
⁷ O&O, 'Call for Evidence: Public Service Broadcasters & the UK Production Sector, A report for Pact', 2021

2.3.2 UK growth is converted into global trade success

Before the Terms of Trade, the PSBs could use their market power to retain rights and, at the same time, keep upfront commissioning payments low. Despite retaining the rights, it was found that they lacked the incentives and entrepreneurial spirit to fully exploit them internationally and capitalise on the value of the IP they held. The Terms of Trade put IP ownership in the hands of producers, and they unlocked 22 per cent CAGR in exports to the rest of the world in the first five years. Because the terms of trade also created a dynamic production market, growth has continued over time.⁸

This level of export growth seen in the UK contrasts sharply with other European countries such as France, which has a strong and partly protected domestic TV content sector – where the same export categories had minus 2.6 per cent CAGR in the same period (notwithstanding other differences like language) (Figure 3).

Figure 3: Growth in UK and French TV Exports, 1998-2024, Indexed (1998 = 100)



Note: The reported periods in the UK source data changed from calendar to financial years after 2012 – UK figures for 2013 are based on 2012/13 to 2013/14 equivalent growth rate and this method has been carried forward to 2023. A change in methodology in 2016-17 used by Pact led to anomalous data

Source: BTDA / TRP / UKTI / PACT, CNC, Oliver & Ohlbaum analysis

2.3.3 Independent producers offer deficit financing, making quality PSB commissions viable

Ownership of IP in PSB commissions under the Terms of Trade has enabled the independent production sector to innovate with new production finance models, including deficit financing. This is where the producer contributes to the upfront finance for a production, taking on legal and financial risk on the basis that it will be able to benefit from any value that arises from the secondary exploitation window in the UK and internationally. With producers willing to contribute up front, this reduces the cost of the programme for the primary commissioner – or enables them to put more value on screen for the benefit of audiences.

The use of deficit finance has increased over the years and plays an important role in allowing PSB commissioners to offer high-quality original content, despite overall content budgets reducing. We will return to deficit financing when we discuss the matching and bundling provisions of Ofcom's Guidance in the next part.

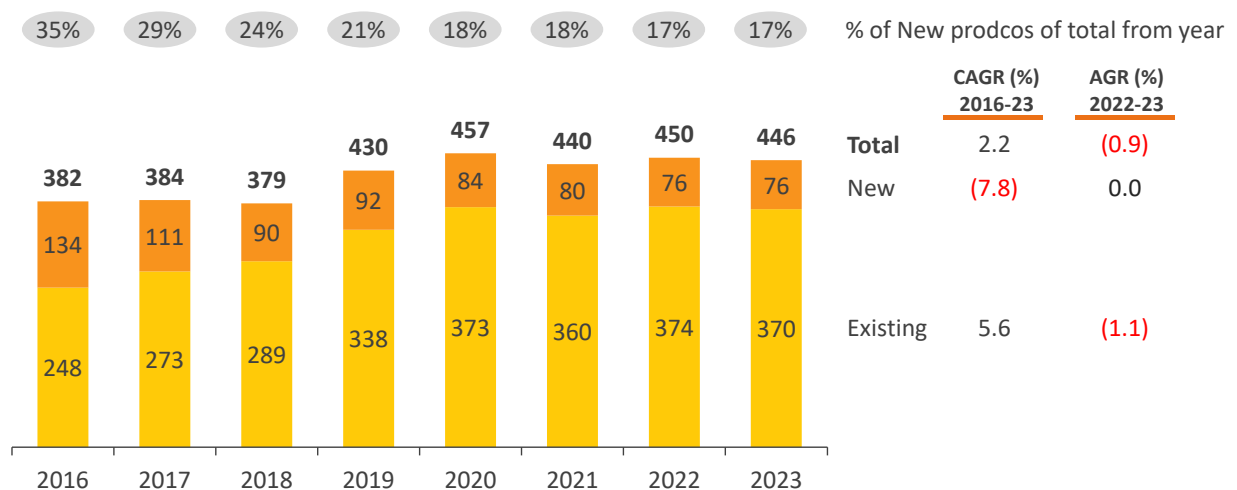
⁸ Pact UK TV Exports Report

2.3.4 The independent production sector is highly dynamic, with a cycle of creative renewal

The Terms of Trade and wider regulatory framework create incentives for producers to enter the UK market, reward innovation and efficiency, create access to funds and a route to growth, and provide a path to exit through sale to a larger independent or broadcaster Studio.

In turn, acquisitions enable larger producers and in-house Studios to access fresh ideas and maintain levels of dynamism and creativity. Creative talent has the incentives and the means to spin-off or found a new start up, and the cycle of creative renewal continues. In contrast to other countries, with somewhat protectionist regimes, the UK approach enables small independents to grow into medium-sized companies and onwards. Equally, the UK's approach accepts that some companies exit each year in response to market forces (although the current commissioning downturn has been especially fast and deep, which may mean some independents with prospects do not have time to adapt). As shown in **Figure 4**, 17 per cent of producers were new entrants in 2023 and some had exited or merged compared to 2022, illustrating the cycle of creative renewal.

Figure 4: Number of new producers, 2016-2023

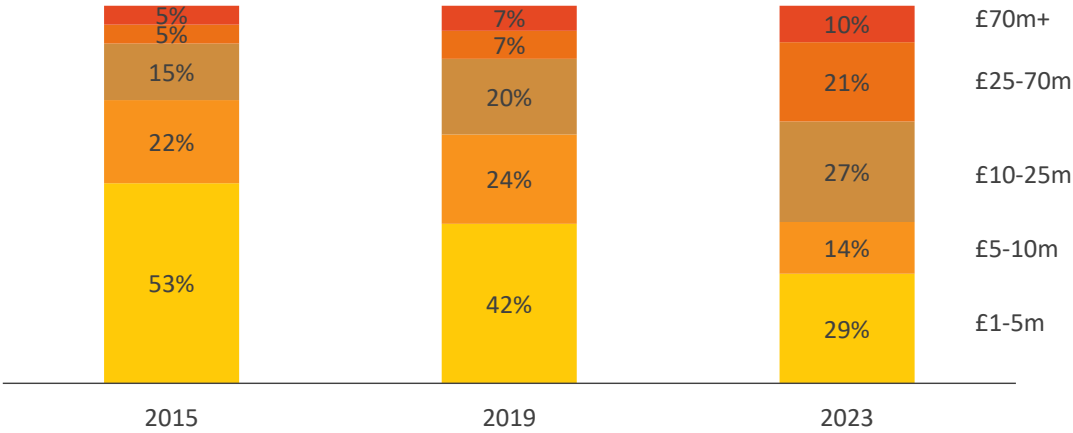


Note: Excludes companies who produce news, current affairs, sports, and film. Only includes companies who have been commissioned by main 5 PSB channels BBC1, BBC2, ITV, Channel 4 and Channel 5.

Source: O&O Producer Database, Oliver & Ohlbaum analysis

As seen in **Figure 5**, there is a balanced mix of independent producers of different sizes in the UK. In contrast, many major European countries that rely on a somewhat protectionist approach are characterised by a few large producers and a very long tail of small producers that find it hard to grow.

Figure 5: Distribution of the number of independent production companies, by turnover bracket, 2015-2023



Note: Individual companies belonging to a larger group are only counted as part of the group. In addition to the companies above, based on analysis from Broadcast, we estimate there are circa 225+ small producers with an annual turnover of less than £1m. Percentages may not add up to 100% due to rounding of figures

Source: Broadcast, Pact UK Television Production Census 2024, Oliver & Ohlbaum analysis

The PSBs have market power in commissioning; what has changed?

3 The PSBs have market power in commissioning; what has changed?

In this part we consider what has changed in the television production sector and whether this justifies deregulation around matching and bundling, as proposed in Ofcom's consultation.

3.1 Ofcom's current consultation refers to rising levels of SVOD commissioning investment

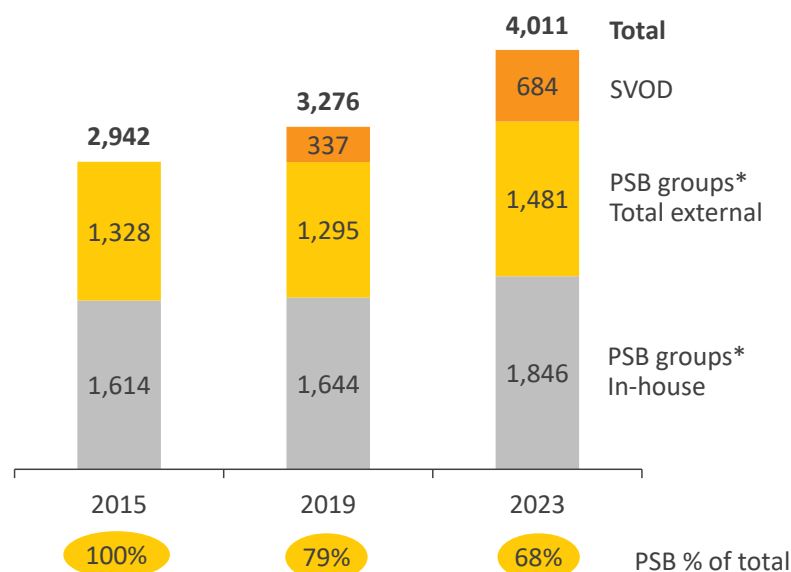
The consultation refers to 'the reduction in the share of independent commissions represented by PSBs and the significant increase in independent commissions from SVOD services and other international content commissioners'. It also states that growth in total independent producer revenues from international commissions has accelerated. Ofcom's implication seems to be that the PSBs are now less important as commissioners from independent producers, yet it also notes that the 'PSBs are the cornerstone of the UK's successful production sector'.⁹

It is essential to look further into these statements and to properly assess the market developments and their regulatory implications, if any.

3.1.1 We need to consider what is being invested in, and from which types of producer

Firstly, by the 'share of independent commissions', Ofcom is referring to *total investment*. In 2023, total commissioning investment by the PSB groups was £3.33 billion while total commissioning investment by SVOD services was £684 million (**Figure 6**). Of this, 45 per cent of the PSB network group investment was with external producers – which is both independent producers and third party PSB Studios. Over half, at 55 per cent, was with PSB in-house Studios, mainly BBC Studios and ITV Studios. This share has risen over time.

⁹ Ofcom, 'Review of Public Service Media (2019 – 23)', 2025

Figure 6: Value of UK TV commissions, by type of commissioner, 2015 – 2023, £ millions

*Note: Including PSB and SVOD (all services tracked by Ampere) commissions (including returning series) of UK producers only, no multichannel. Excluding spend on news, sports, and film *PSB groups include the main and portfolio channels of the BBC, ITV, Channel 4 and Channel 5*

Source: Pact UK Television Production Census 2023, O&O Programme Database, Oliver & Ohlbaum analysis

Moreover, we need to consider what is being invested in, and from which types of producer:

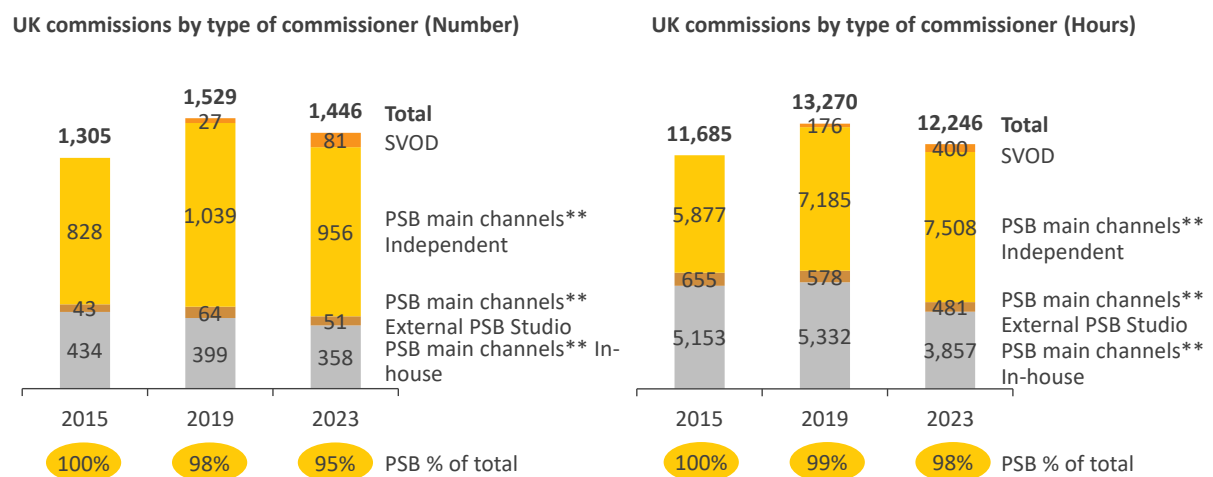
- Reflecting their public service remits and the commercial PSB business models of generalist programming to support mass reach advertising, PSBs commission a broad variety of programming from all sizes of independent producer and in a wide range of genres, budget levels and locations
- Due to their different business models and legitimate commercial incentives, SVOD commissions are complementary and distinctive from PSB commissions. SVOD services tend to commission in a narrower range of genres, notably in premium Drama and high-end Factual, which can compete for domestic audiences as well as working in other markets. Especially for drama, these can be very high budget and, given the increased levels of financial risk per commission, with experienced and established producers
- Multi-channel broadcasters based in the UK focus on bringing audience choice through access to international programming and archive favourites. Commissions are designed to provide a differentiating factor and raise the profile of the brand. While they may be in a range of genres and budget levels according to the channel's focus, total investment per broadcaster is therefore lower than the PSBs
- In its figures on 'international commissioning', Ofcom has included channels and VOD services that commission from UK producers to serve a primary market that is abroad, for example CBC/Radio-Canada, the Canadian PSB. While this investment is also welcome, it is unlikely to be competing with a UK PSB for a given commissioning idea

So the UK market benefits from a mix of commissioner types, each operating in separate markets and providing a complementary range of content to UK consumers. These differentiated positions come at different budget ranges, and so considering total investment is unhelpful – total spend on SVOD commissions is relatively high, but that is not the whole story.

Investment is not the only relevant metric. The PSBs are responsible for the majority of individual commissions – and therefore for the majority of individual projects and related negotiations for a producer. On the other hand, SVOD commissioners invest substantial average expenditure per programme compared to the rest of the sector. This means that their total investment relates to fewer individual commissions and involves fewer individual producers. As mentioned above, multichannel providers also aim to commission a few stand-out originals per year. In 2023, the PSBs commissioned 95 per cent of individual titles commissioned across the PSB main channels and SVOD services (**Figure XX**).¹⁰

Thirdly, we need to consider the volume of commissioning in hours. PSB commissions tend to include long-running series and returning series, which provide a steady flow of work allowing producers to reinvest in development and grow. As a result, the PSBs account for the vast majority of commissioning in terms of hours. In 2023, the PSB main channels accounted for 98 per cent of hours commissioned across the main PSB channels and SVOD services (**Figure 7**).¹¹

Figure 7: Value and volume of UK TV commissions, by type of broadcaster, 2015 – 2023, £ millions, hours



*Note: Including PSB and SVOD (all services tracked by Ampere) commissions (including returning series) of UK producers only, no multichannel. Excluding spend on news, sports, and film *PSB main channels include BBC One and Two, ITV, Channel 4, Channel 5*

Source: Pact UK Television Production Census 2023, O&O Programme Database, Oliver & Ohlbaum analysis

3.1.2 SVOD and other international commissioners are not generally exerting competitive pressure on PSBs at the point of commissioning

The relevant question for this consultation is whether SVOD or multi-channel services exert competitive pressure on PSBs at the point of commissioning, when they are negotiating terms with independent producers.

The differentiated commissioning groups are looking for differentiated programming

As we have seen, there is little overlap between the commissions that the PSBs are negotiating and those that SVOD services are negotiating, in terms of genre, budget range and type of producer. In terms of SVOD and multi-channel services, there are also fewer individual titles and hours commissioned each year, i.e. fewer opportunities for producers.

¹⁰ Multi-channel not included in this chart due to data availability in the consultation timeframe

¹¹ Ibid.

It goes further than this – even where there is shared interest in a genre, as discussed in the previous part, while one or ‘one and a half’ commissioners might be interested in the initial idea, UK broadcasters are differentiated from one another and from SVOD services in the UK market. An initial idea, for example to adapt a particular book, might be of interest to more than one commissioner, but once a pitch has been developed for a particular PSB, the treatment, talent, budget and financing are adapted to them.

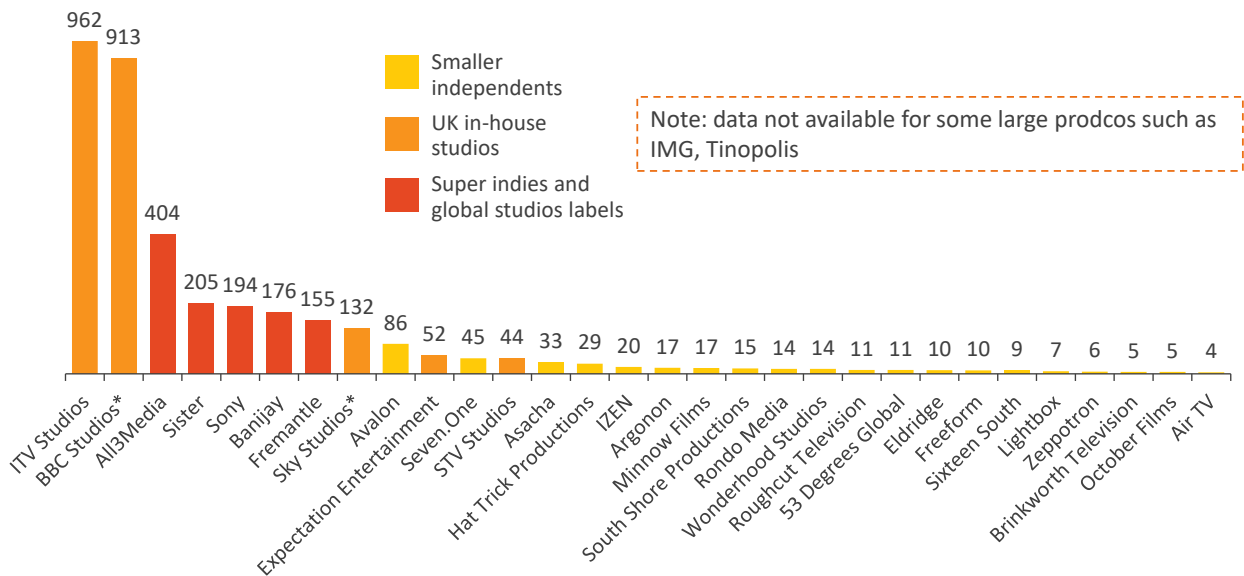
This can result in a captured seller situation, where the switching costs hinder the producer from walking away from the terms offered. Indeed there are very few examples of programmes moving from one PSB to another or from a PSB to an SVOD for a newly commissioned series – and those are Entertainment formats, which can be more easily adapted (Great British Bake Off, Taskmaster); Black Mirror hadn’t been optioned by Channel 4 (which played its part by taking an initial risk) and it became more international in flavour after moving to Netflix to allow it to serve a UK audience and also travel well. Productions moving to another broadcaster for a new season commission is a feature of the US market where – unlike in the UK – services aim to occupy similar market positions.

Buyers are few and differentiated, but the production sector is highly competitive

While there may be effectively only one buyer, there are many sellers. This means it is crucial for independent producers to maintain strong relationship with commissioners, and especially the major commissioners. In practical terms, this means being as flexible as possible with a commissioner because if they are not, and don’t accept the terms on offer, they might lose not only the commission in question, but also the possibility of future commissions.

Adding to the level of competition on the supply side is the existence of a PSB’s own in-house Studios, and the Studios of other PSBs. As noted in Part 2, the PSBs have the incentives and the means to prioritise their own acquisition of IP and work for third party services. As seen in **Figure 8**, the BBC and ITV Studios remain over double the size of the ‘super indies’ in revenue terms and much larger than all other producers.

Figure 8: UK production company revenues, top 30, 2023, £ millions



Note: Covers revenues for UK entities. Several major producers are missing from this dataset e.g. IMG and Tinopolis
*BBC for FY 2023/24, UK share of Sky Studios revenue estimated based on UK share of ITV Studios and BBC Studios
Source: Annual reports, Broadcast Indie Survey 2024, Oliver & Ohlbaum analysis

3.2 It has been suggested that the existing Guidance would hinder the PSBs in delivering their new remits

The consultation states, ‘Audiences are watching more content online, with on-demand viewing, including of back-catalogue content, playing a much more significant role than in the past’. Ofcom seems to be implying that the current Guidance is hindering the PSBs from delivering their remits by retaining PSB commissions on their BVOD services long-term and that this is out of step with viewing habits.

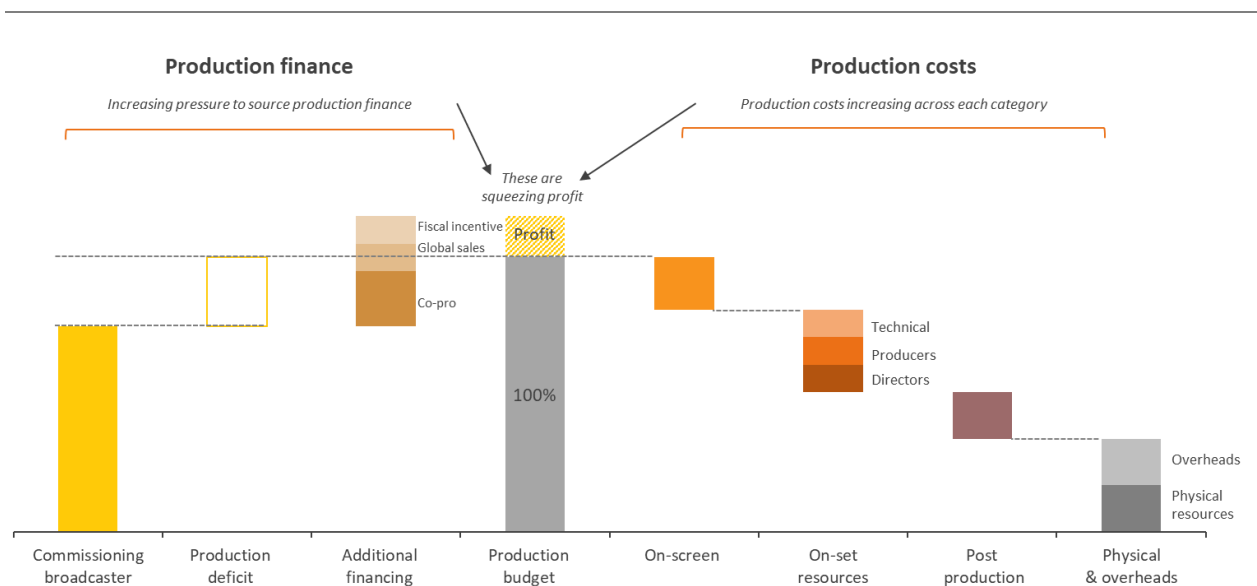
3.2.1 In fact, independent producers play a vital role in enabling PSBs to offer audiences programmes that they otherwise could not afford

Regulatory certainty under the Terms of Trade has enabled independent producers to innovate with funding models. By doing so, they have played a vital part in enabling UK broadcasters to offer their audiences high quality programming that they otherwise could not afford, across linear and on-demand.

In exchange for the right to commercially exploit secondary rights, the producer takes on legal and financial risk in closing the production budget. This involves assembling a mix of third-party investment, including deficit financing from the production company, co-commissioning contributions, loans, tax credits, distribution agreements and pre-sales. This represents the Terms of Trade working as intended: as the market has evolved, this model has become even more critical in supporting PSBs’ ability to deliver their remits, particularly as their revenues face increasing pressure.

As seen in **Figure 9**, the gap between the commissioning broadcaster’s fee and the total production budget must be closed by the producer, which only turns a profit after recouping production costs. This comes with significant risks – while retaining IP ownership is valuable when a work is a success commercially, returns in TV and film have always been unpredictable. Producers must balance risk, relying on the profits from the ‘hits’ covering the costs of those that underperform.

Figure 9: Production finance and cost illustrative schematic diagram



Source: Oliver & Ohlbaum analysis

We can see how PSB budgets are under pressure from declining linear advertising revenues, real terms decline in the licence fee and wider economic turbulence, increasing the incentives for PSBs to use their competitive position

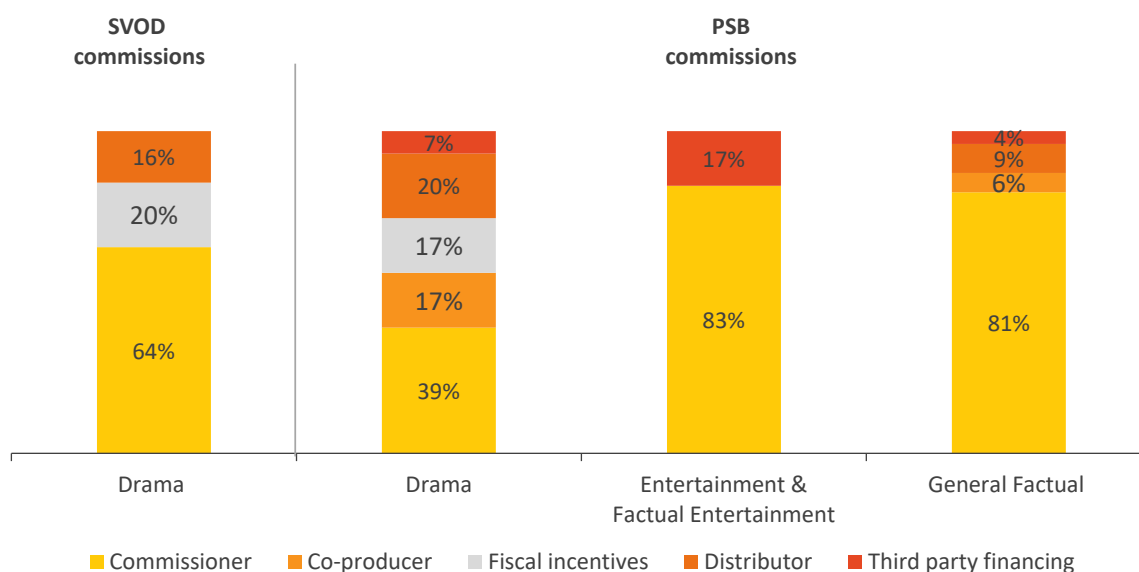
in negotiations with producers. Producers also face inflation and skills shortages in the sector and the wider economy, while the prolonged commissioning slowdown means that commissions have become scarcer for many, and revenues are under pressure.

In interviews with producers in 2023, we heard how there are significant differences in finance models for scripted and unscripted content, and between different types of commissioner.¹² **Figure 10** shows indicative contributions towards the production budget for projects across a range of genres for PSB and SVOD commissioners, based on an O&O producer survey.

In all cases, the PSB commissioner is relying on the producer to provide deficit financing and to bring together other third-party funding to close the budget. For scripted content, in particular high-end dramas, our research suggests that PSB commissions typically need a mix of sources of production finance, including third-party financing and co-production funding, with the PSB commissioner contributing an average of 39 per cent of the production budget across the producers specialising in drama that completed the survey. As the ambition, appeal and associated budgets for scripted content have increased and PSB budgets have decreased, the producer's ingenuity in raising financing is vital to getting UK stories on screen.

While SVOD services can fund the majority of their drama commissions (often at very high budgets) in return for rights, PSBs fund less and rely on co-producer funding and third-party financing in addition to the distribution sales and fiscal incentives common to both. The rights package is commensurate with this.

Figure 10: Indicative contribution of producer revenues from commissions, selected genres, PSB vs SVOD, % of revenues



Source: Fly Research, (Drama PSB, n=8, SVOD, n=5, Ent/Fact Ent, n=7, General Factual, n=8), Oliver & Ohlbaum analysis

For lower budget unscripted content, such as Entertainment and Factual Entertainment genres, there is more limited potential for secondary revenues and international sales. Nonetheless, for the producers specialising in non-scripted content who responded to our survey, third-party financing was also required. SVOD services are much less present in these genres.

¹² Oliver & Ohlbaum Associates, 'Understanding the UK's TV Production Sector', a report commissioned by Ofcom, 2023

Children's content has financing challenges. Based on previous producer interviews, we understand that PSB commissioners typically only contribute between 50-60 per cent of funding towards a programme's budget. After the real terms tax credit, producers are left with a c20-30 per cent portion of their budgets to finance (live action and animation respectively). This must be done through producer deficit financing and methods such as distributor advances, which are challenging to secure for children's content and particularly for smaller production companies. This is especially acute for live action children's content where productions are culturally specific (animation can be more easily language versioned, supporting international sales) and affected by cost inflation and resource pressures in adult drama.¹³ At present, the BBC is the main commissioner of UK children's content.

Meanwhile, scripted comedy might not qualify for the high-end TV tax credit due to the £1 million/ hour budget threshold. In that case, in an illustrative scenario, around three quarters of the budget may be covered by the PSB commissioner, requiring the producer to assemble the remainder. Again, scripted comedy budgets have been affected by resource pressures in drama, where there is an overlapping skill set, as well as risk aversion from distributors and international buyers that see scripted comedy as culturally specific and have re-focused on local or globally flavoured works. The BBC is the largest commissioner of scripted comedy in the UK.

According to Ofcom figures, the PSBs received total third-party contributions of £674 million in 2023. This represented 20 per cent of total PSB origination spend, up from 9 per cent a decade before. Drama's share of total third-party spend reached 74 per cent in 2023, up five per cent on 2022.¹⁴

3.2.2 The current rules do not stop PSBs from making programmes available across their BVOD services, in line with their new remits

The terms of trade are a negotiated outcome between the commissioning PSB and the independent production sector and may be different for each PSB relationship. This creates an industry-led and flexible process where terms can be adjusted over time to reflect changes in the PSB framework, consumer expectations, the wider TV sector or the funding model for new programmes.

There will be a change in 'primary rights' as a result of the Media Act implementation. The Act recognises that commissions by a PSB's BVOD service may count towards its PSB production quotas and be covered by the Terms of Trade. The scope of the primary rights have been updated over time as distribution methods and audience behaviour have evolved. If PSBs want additional content availability beyond the agreed primary window, they may acquire it through commercial negotiation.

The success of this approach has been borne out by agreements under the existing PSB remits, with the BBC for BBC iPlayer, Channel 4 for its BVOD player and in 2023 with ITV for ITVX. These address e.g. online premiers, flexible windowing (series stacking, boxsets), functionality (live restart), extended online availability, options to acquire additional periods at a specified rate, and revenue sharing agreements for subsequent commercial exploitation by the independent producer. Clearly, the existing rules allow commercial negotiation and equitable outcomes for both sides of the market. The PSBs have continued to build their BVOD services, including the size of their programme catalogues, attracting rising reach and consumption.¹⁵ Channel 4 is known as 'the UK's biggest free streaming service'.

Some have asked whether commercial negotiations move fast enough. It could be argued that if negotiations went too quickly it would be a sign of a strong imbalance in negotiating power. Instead, the current regulatory framework

¹³ O&O, 'Prospects for UK originated children's content, A report for Pact', 2022

¹⁴ Ofcom Media Nations 2024

¹⁵ BBC Annual Plan 2024, ITV Annual Plan 2024

aims to secure a balanced negotiating position between the sides in the wider interests of promoting investment, innovation and efficiency in the sector. At present it is incumbent on both sides to negotiate at the speed necessary to secure an equitable and comprehensive outcome, at which point agreement will be reached.

Importantly, the PSBs can select which programmes to license in the secondary window when they already know if they have been a ‘hit’ and have longer term appeal and continue to resonate with audiences. While some rights might be more expensive once a programme is known to be a hit, the PSB has not lost funds on programmes that turned out to be less successful, i.e. they are not taking on the upfront financial risk on this. Rather, that rests with the producer. This also means that the related commercial negotiations are targeted.

3.2.3 SVOD services are also evolving

Ofcom’s consultation implies that PSBs need to emulate SVOD programme catalogue strategies. However, the approach of SVOD services continues to evolve to best meet consumer demand.

While the licence fee and broadcast advertising revenues have come under pressure in the UK, there has been a global commissioning slowdown with SVOD services taking measures to cut costs and drive profitability. This has included reducing the total number of commissions (in addition to the impact of the writers and performers strikes). SVOD services are shifting away from the ‘walled garden’ model of exclusively retaining their own content. Instead, they are licensing programmes to other VOD services and broadcasters (e.g., WBD, Disney) to reach wider audiences and maximise IP value.

The SVOD approach to commissioning agreements is also reported to be evolving, depending on the individual commissioner, the project and respective appetites for risk. As SVOD services have shifted to focus on profitability, industry sources have noted how the global SVOD model ‘has really now developed into a much more flexible approach’, with providers open ‘to look at ways in which to acquire or co-commission against multiple territories, taking licences instead of ownership in perpetuity [and] sharing rights and revenues in more flexible ways’.¹⁶

Moreover, because PSB services and SVOD services are distinctive, audiences favour them for different reasons and different moments. We know that audiences especially appreciate PSB BVOD services for carrying programmes ‘made for UK audiences’, that help them to ‘understand what is going on in the world’, that bring the nation together’ and that ‘feature my region or country’. Meanwhile, audiences especially appreciate the ease of use and choice brought by SVOD services.¹⁷

3.2.4 PSBs acquiring secondary rights for their BVOD services upfront raises vital questions for future programme funding

As we have seen, the PSB benefits from the fact that the producer is able to leverage the secondary exploitation rights to bring together funding, close the production budget and get the programme made. This means licensing the programme to different third-party services in different windows and in different territories, to maximise the licensing value. Terms have been included in Codes of Practice so that PSB commissions retain their branding when appearing on SVOD services in the UK, as the result of negotiations.

¹⁶ Variety ‘U.S. Streamers and Studios More Flexible in Engaging with European Producers’ – Locarno StepIN Takeaways, Nick Vivarelli, 2022

¹⁷ Ofcom PSB Tracker

For the PSB to acquire BVOD rights or an extended licence for the UK, it would need to be able to supply similar levels of funding – otherwise the programme could not be made in the first place or could not be made to the same level of creative ambition. We discuss this further in the next part.

If the bundling and matching prohibitions were lifted, what impact would this have?

4 If the bundling and matching prohibitions were lifted, what impact would this have?

In this part we set out the implications of these proposed changes and how the delivery of the PSBs' new remits and, ultimately, benefits for UK consumers and citizens, would be affected. While removing each of the prohibitions would impact the market through different mechanisms, they contribute to the same overall impact – i.e. their removal would support PSBs in retaining more rights to independently produced content. We have therefore not distinguished the two when discussing the overall implications.

4.1 Broadcasters would change their approach to negotiations, taking more rights

We understand that the PSBs are in favour of removing these prohibitions and, indeed, the prohibitions exist as part of the Terms of Trade because the broadcasters would otherwise be able to use their market power to seek bundling and matching rights at the point of commissioning. It is therefore fair to assume that the broadcasters would 'make the most' of these changes were they to take effect.

4.1.1 Bundling of rights would enable PSBs to extract more rights in negotiations

PSBs would negotiate for a bundle of both primary and secondary rights at the point of commissioning. While Ofcom proposes that this would only be the case where the producer explicitly agrees, there would be no obligation on the PSB to offer to acquire only the primary rights or to do so on fair and reasonable terms. The PSB might offer only a bundled rights deal where it paid below market rates for secondary rights. This seems very likely to be the case, given that the PSBs could currently acquire the rights at market rates – so the motivation for a change in the regulatory environment can only be to provide the opportunity for PSBs to capture more rights more cheaply.

4.1.2 Matching clauses would destroy the third-party market for secondary rights

If the prohibition on matching rights were removed, there would no longer be a true 'market rate' as commercial third parties would likely avoid making offers rather than disclose their pricing only to lose out to PSBs anyway. Matching rights restrict producers' commercial freedom, limit market access, slow negotiations and delay deals, and discourage third-party buyers who may be unwilling to bid knowing the commissioner could match their terms without competition. Matching rights can also affect a producer's ability to finance future programmes if their relationships with investors or distributors are weakened.

Removing the matching rights prohibition could undermine the third-party market by discouraging competition, allowing PSBs to acquire rights below market rates. If the bundling prohibition were also lifted, it would further strengthen PSBs' ability to extract all rights at the point of commissioning.

4.1.3 PSBs could therefore obtain more value without having to pay for it

If PSBs faced no or little competition for secondary rights, they would be in a position to leverage market power to acquire UK secondary and international finished programme rights at the point of commissioning, and at below market value. While the consultation implies that the relevant secondary rights relate to the UK to benefit the PSBs' BVOD services, the proposed changes would also extend to international rights, which are relevant to distributor advances and international sales to close programme budgets. As a result, these changes would undermine the market for both UK secondary and international finished programme rights.

4.2 While PSBs would retain more rights, they would still need to raise the finance to cover the production cost

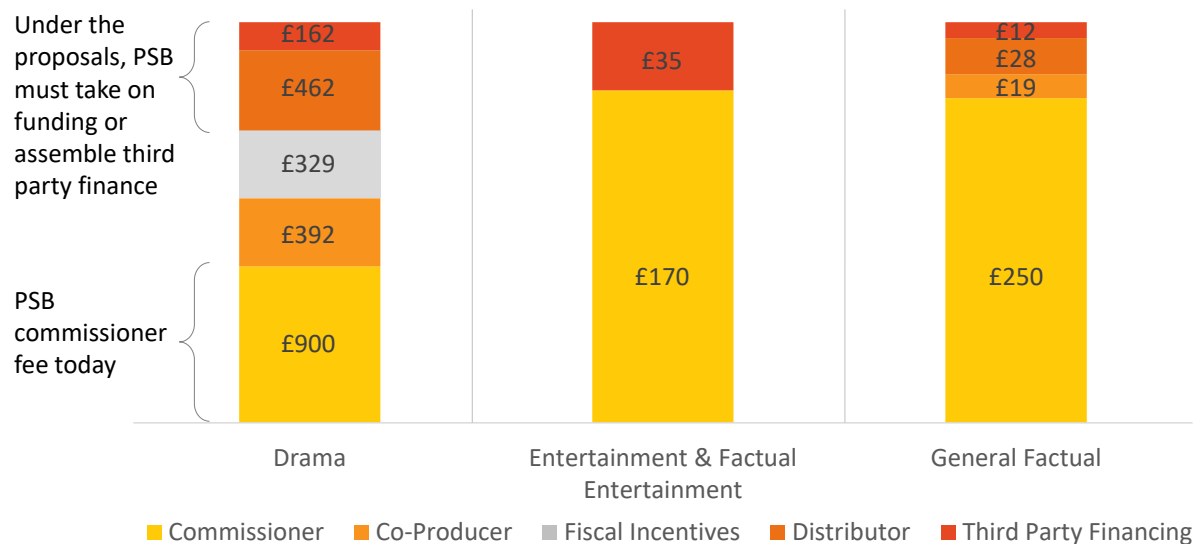
Of course, retaining the rights is one thing, but some of the value associated with those rights is required upfront to cover the cost of production. PSB producers would therefore have to raise finance to fill the gap. This would expose them to a level of uncertainty and risk beyond what they choose to take on currently.

4.2.1 PSBs would likely struggle to find the additional funding needed for production

Ofcom's consultation implies that PSBs should be able to acquire a bundle of rights for high-end drama and factual, since it compares PSB and SVOD services, and the latter tend to focus on those genres. Assuming the production is to maintain the same budget and level of creative ambition, this would require the PSB to be able to finance both its current primary commissioning fee and the deficit financing that the producer currently contributes. In recent years the share of the budget provided by producers, via deficit finance, has steadily increased. It could also require the PSB to take on the responsibility of assembling other third-party financing to close the budget – as this role currently sits with the producer in exchange for secondary rights.

Ofcom suggests that allowing the PSBs more flexibility under Terms of Trade could reduce the administrative burden of negotiations, but this does not take account of the resources required to assemble production financing. The figure below sets out the extent to which the PSB would need to provide additional finance and/or raise third party finance to get some illustrative productions created (**Figure 11**).

Figure 11, Indicative contribution of commissioners towards hourly budgets, selected genres, PSB, £000s



Source: Fly Research, (Drama n=8, Ent/Fat Ent n=7, General Factual, n=8), Oliver & Ohlbaum analysis

The above use a reasonable illustration of a PSB tariff considering current published tariffs. If we look at the Drama example, this takes an hourly rate for high-end Drama towards the higher end of the BBC and ITV tariffs (£900k/hour). If we assume a six-part series of one-hour episodes, this would require the PSB to cover or assemble third party finance for £3.7 million, in addition to the existing primary commissioning fee of £5.4 million, to close the budget and make a programme of the same quality and creative ambition. Given the budgetary pressures on PSBs, it is not clear that this is available. Under the current regime, PSBs could choose to buy additional rights at the fair market rate so the fact that bundling is being suggested seems to imply that there is a lack of available finance or a lack of appetite for risk.

4.2.2 PSBs could aim to address the programming finance challenge in different ways

As discussed, if PSBs took the rights, they would need to make up the lost producer funding to close the budget and get programmes made – either directly or by assembling additional sources of third-party finance. There are a few ways they might approach this.

Borrow, or bring forward spending against anticipated future earnings from the rights

The commissioner uses future revenue projections from any international sales, secondary windows or licensing IP (e.g. related merchandise) to secure upfront funding. It borrows against future earnings through pre-sales agreements, bank loans or internal cash flow allocation (using expected revenue to justify upfront spending, especially where it has a Studio with a distribution arm). This means that the commissioner takes on the financial and legal burden of assembling the financing from the producer and takes on the risk – if the programme underperforms, anticipated earnings may fall short, leading to losses. The commissioner would need to smooth such losses by following this approach across a portfolio of programmes, hoping that some will be commercially successful and make up any losses.

Adjust schedules to free up budget

As part of ‘fewer, bigger, better’, PSBs have the broad strategy to move investment out of daytime and mid-budget Factual programming and into fewer commissions in high-end Drama with some high-end Factual, with some long-running, lower budget unscripted strands that are fairly timeless. This is already happening to help PSBs manage constrained budgets and drive viewing on their BVOD services. This option could be taken a step further, in theory, displacing lower priority content to free up budget and using the funding to top up the producer’s current contribution, while taking more rights.

Try to reduce producer margins further

Instead of seeking external funding, the commissioner could negotiate lower producer fees to reduce costs. The producer margin is the profit that the producer expects to make from the commission. Therefore this approach transfers financial pressure to the producer. We understand that producer margins have been under pressure because of the pandemic, writers and actors strikes, cost inflation in the sector and wider economy, and the commissioning slowdown. While providing short-term savings for the commissioner, further pressuring producer margins may result in longer-term harm to production companies and their ability to benefit PSBs and audiences: producers may struggle to invest in innovation and programme R&D or struggle to sustain their businesses.

4.2.3 But they don’t seem to have the appetite for the risk associated with this

As we have discussed, under the status quo, PSBs could acquire the rights at fair market rate, providing more finance for productions and benefitting from the back end. But they don’t. What these proposed changes imply is that PSBs could only make this work if they acquired the rights below market rate, squeezing the producers, so that they can benefit from any upside in the secondary rights value beyond the cost associated with closing the production budget.

The different incentives of PSBs compared to producers also means there is a risk that rights would not be fully utilised if retained by the PSBs. Most broadcasters and SVOD services use windowing to maximise the value of programmes. This means that programmes are available on one service for a period, and then ‘rested’ to refresh demand and/or licensed to another service to reach a different audience. The producer has the incentives to put together a distribution agreement that maximises these windowing opportunities. There is a risk that a PSB commissioner bundles primary and secondary rights but then ‘warehouses’ the secondary rights, meaning that the programme is unavailable to audiences in periods when it is not on the PSB’s service. The PSBs have indicated that

they want exclusives for their BVOD services and that having programmes originally commissioned by the PSB on third-party services dilutes their brand recognition.¹⁸

This may be a bigger risk where a programme is not especially successful for the PSB but could have found its audience if licensed to another service. The risk of warehousing will also be more pronounced where the PSB includes the requirement that its in-house Studios handle the distribution in its bundling terms, as the distributor would not have directly competed for those rights and their exploitation may therefore not be a priority or a good fit with their distribution business and network. When the producer offers the programme to different third-party distributors, competition should deliver an appropriate price and the most motivated and efficient distributor.

4.3 There would be several negative implications for the UK production sector

There is no upside for producers of the proposed removal of the prohibitions on bundling and matching. The proposed changes are designed to help broadcasters – albeit, in the next section, we see that it would harm broadcasters too. As well as suffering a loss of revenue associated with a weakened rights position, producers would experience and other negative impacts, which we have explored below.

4.3.1 Independent producers could see a revenue loss of up to £365m, in 2026

In **Figure 12** we have illustrated the revenue at risk were the prohibitions to be lifted. In doing so, we have not conducted a detailed forecasting exercise for the sector as a whole, but we must acknowledge that the sector currently faces pressures, with a decline in both domestic and international commissions to 2023, and although data are not yet available, we expect that this may have continued into 2024. In setting out the status quo forecast we have assumed the total independent production market would contract by 0.5 per cent per year to 2026 – and, to keep things simple, that the mix of revenues would remain the same as seen in 2023, acknowledging the pressures on programme spending from all buyers.

The figure shows that starting in 2026, the revenue at risk to the independent production sector would be £365 million per year vs the expectation under the status quo – and this impact would carry forward into future years. This is due to the impact of the proposals on UK secondary and international finished programme revenues. Of course, there could be some phasing of the impact but we have illustrated the revenue at risk from 2026, since the change in the rules could feed immediately into negotiations and affect production activities from next year. This £365 million at risk per year includes around £227 million relating to PSB commissions with qualifying independent producers, which would be highly at risk,¹⁹ with the remainder coming from non-qualifying indies and non-PSB commissions, since other producers could no longer use PSB terms as a reference point.²⁰

¹⁸ For example, the BBC response to the Ofcom Call for Evidence on the UK production sector, 2021

¹⁹ In estimating the split of production value between QI and NQI to facilitate the illustration of the potential impact by 2026, we have assumed that 25 per cent of spend on indie commissions by PSBs is with NQIs – this is based on the latest available year of data.

²⁰ To be conservative, we have assumed that secondary rights accrue to PSB commissions in the same ratio as the mix of PSB to multichannel UK commissions, even though it is likely that the PSB commissions account for a disproportionately large share of secondary rights value.

Figure 12, Independent producer TV-related revenues, by type and source, 2023 and 2026, £ millions

4.3.2 The proposals would remove independents' incentives and ability to invest in programme R&D

Investment in programme ideas is a key characteristic of the UK production market. The existing economics means that producers are incentivised to invest in new ideas and to innovate, knowing that they can benefit from any future success via back-end rights. Under the proposed changes, as we have set out, the dynamics would change – broadcasters would retain back-end rights and producers would essentially become production for hire entities and not share in the success of their creations.

In this scenario, independent producers would be financially worse off, as we saw in the previous section, and therefore less able to invest in R&D. But since they would not own the IP, they would have less reason to. In fact, to the extent they would be incentivised to invest in R&D, producers operating on a 'cost plus' basis would be incentivised to produce programmes for sale to the highest bidder; we discuss this in more detail in Section 4.4.2.

4.3.3 Producers might suffer changes to other established terms

Under the existing Terms of Trade, producers already pay a share of back-end revenues to PSB broadcasters, where they have successfully exploited their secondary rights for PSB commissions. The respective shares are determined under the Terms of Trade, but it is possible that the PSBs might seek to establish more favourable terms, to cover any eventualities where they don't themselves take the UK secondary or international rights as part of their commission.

4.4 PSBs and consumers would be worse off, contrary to Ofcom's objectives

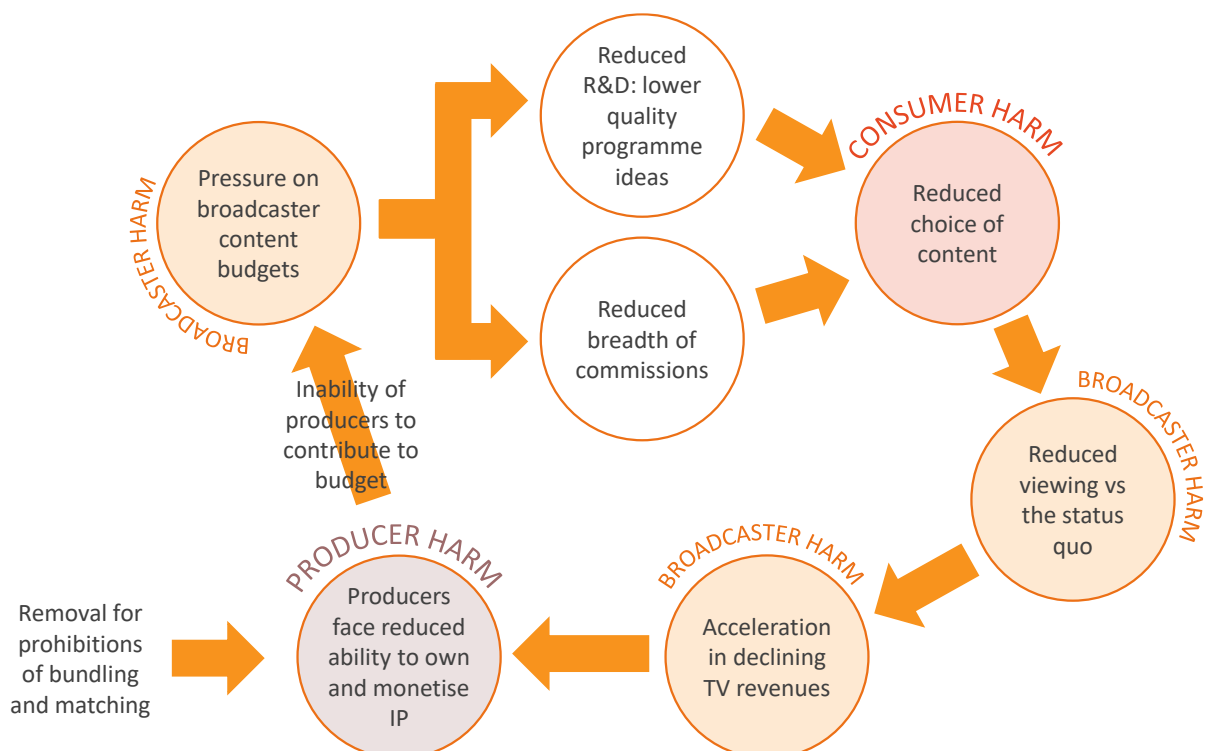
As mentioned above, in addition to negative implications for independent producers, the PSBs, wider AV sector and ultimately consumers, could be affected.

4.4.1 A downward spiral could be triggered in broadcaster revenues and content investment

In considering the potential impact of the proposed changes, it is worth remembering that UK PSBs are under some pressure. There is a risk that a gradual decline in viewing to UK broadcasters puts pressure on revenues or willingness to pay, which squeezes content budgets. We understand that a shift in viewing habits and revenue pressure is the reason for Ofcom's interest in this area. As we have seen, broadcasters have been relying on increasingly complex approaches to production finance – facilitated by independent producers' ingenuity and motivation as IP owning entities; the proposed changes would reverse this.

However, rather than supporting PSBs to deliver their updated remit, the proposals could trigger a downward spiral, harming the sector as a whole (see Figure below). Ultimately, if producers' ability to retain and monetise their IP is curtailed, over time the PSBs would miss out on the innovation and entrepreneurialism that the independents have contributed to the sector. This would reduce the quality of ideas and thus the quality of the programming available to broadcasters. We might also see a further narrowing of the content offered by broadcasters, as they displace more mid- or lower budget content to free up funds to close the production budgets on productions in a narrow range of genres and budget levels – discussed in Section 4.2.2.

Any decline in the quality and breadth of PSBs' content offer would contribute to a further decline in UK broadcaster viewing. This would, in turn, reduce broadcasters' revenues, affecting their ability to invest in content. And, with producers unable to contribute to production costs in the way that they do today, the cycle of declining content quality, spend and revenues would continue.



Illustrating what this could mean for the PSBs is difficult because the relationship between viewing time and revenue – and associated content budgets – is complex. But the point remains that the industry faces an existing cycle of pressures, and the proposed changes would have unintended consequences by increasing that pressure, rather than relieving it.

4.4.2 Producers would have an incentive to pivot to supplying SVOD services

Today, producers are incentivised to make the best programmes they can for PSBs under the Terms of Trade. If they no longer had access to ownership of secondary rights, for producers with experience supplying the narrower range of genres and budget ranges commissioned by SVOD services, targeting them with ideas and development investment could become more appealing.

So PSBs may move away from some categories of programming, displacing investment in day-time content to help cover the cost of higher value high impact programming – only to find that competing for those programmes becomes more challenging and that with some exceptions, the programme ideas for higher end shows become less reflective of the daily lives and concerns of the UK's Nations and Regions.

Meanwhile, the variety of production companies would likely decline, especially mid-sized producers. This risks creating two closed pools of producers – those specialised in very high-end Drama and Factual, and those specialised in low budget unscripted. It would be very difficult for producers to grow, or to diversify into other genres. The incentives to enter the sector would be reduced. This could reduce levels of innovation and competition in the production sector, including for PSB Studios that rely on producer acquisitions or talent to refresh their creativity.

We may also find that independent producers, directors and writing talent that are ambitious or in global demand relocate to the USA due to its large home market, commissioning opportunities for the global giants, and greater rewards.

This would, of course, be a significant loss for UK broadcasters and consumers who currently benefit from a range of innovative programming tailored to them, from a broad range of producers.

4.4.3 Accelerating such a downward spiral could have knock-on effects for the wider AV sector

While TV ad revenues have been under pressure in recent years, TV remains vital to advertisers as a means of delivering mass market campaigns quickly in a high-quality context. As long as that remains the case, and TV can do this better than online video alternatives, then we would not expect to see any seismic shifts in the revenues entering the TV sector and ultimately funding content production. In fact, while we have seen a period of contraction in TV revenues, we might expect to see a stabilisation as broadcasters transition viewing to their BVOD services – capturing more online viewing – while also developing their ability to monetise BVOD viewing.

But disruption to today's finely balanced ecosystem might lead to a bigger shift. If UK broadcaster viewing continued to decline, there would come a point when it no longer provided the mass market reach valued by advertisers. If this were the case, advertisers could conclude that their money is better deployed elsewhere, most likely across various forms of online video.

If the UK production sector and the UK's major broadcasters were weakened, over time the UK would become less attractive for inward investment. Absent distinctive local talent and expert partners to anchor investment in the UK, it can move around in response to international competition in studio investment and fiscal incentives.

Such developments would contribute to a 'worst case' outcome for the whole sector.

4.4.4 Consumers would ultimately be harmed

Ofcom's overall regulatory objective is to secure the interests of viewers as both citizens and consumers. As such, the ultimate aim of the Guidance and overall Terms of Trade should be to ensure that viewers receive the types of television content that meet their underlying needs and expectations.

However, as we have set out, the proposals risk unintended consequences for quality, choice, investment and innovation and therefore fulfilment of the new PSB remit. The current Guidance has allowed negotiated updates to the Terms of Trade over time, with extended programme availability on PSB BVOD services and high quality and diverse programmes on screen. This includes high-end Drama and Factual, where the current approach to Terms of Trade has enabled the PSBs to secure programmes such as SAS Rogue Heros (produced by Kudos Film and TV, distributed by Epix, commissioned by the BBC); Red Eye (produced by Bad Wolf, distributed by Sony, commissioned by ITV) and The Gathering (Produced by World Pictures, distributed by ITV, commissioned by Channel 4). Importantly, the current rules support investment in programmes that reflect daily lives and concerns across the UK and deliver public value.

4.4.5 Conclusion: the implications for Ofcom's policy objectives

Ofcom seems to cite the growth of SVOD services and propose such deregulation to support PSBs to control the use of more secondary rights in the UK market to help defend audience and revenue share and, potentially, to help create 'national champions' in the global content market.

However, this misunderstands the market. The likely outcomes would in fact be negative for the health of the PSB system as well as for the independent production sector, given that the current success is based on interdependence. By setting up a new market dynamic, these changes would trigger a steady decline, ultimately affecting audiences:

- Qualifying independent producers would see their rights ownership curtailed and overall income reduced. The incentives for market entry or spin-offs, and the route to growth out from the SME segment, would be weakened
- We could see a return towards the state of the sector before regulation, with producers operating on a 'work for hire' basis, with limited prospects for growth. Independent producers, directors and writing talent that are ambitious and in global demand would be likely to relocate to the USA due to its large home market, commissioning opportunities for the global giants, and greater rewards
- Without a vibrant and diverse independent production sector as supported by the current regulatory framework, it is doubtful whether the PSB Studios could successfully replicate the sector's levels of innovation and creativity internally and maintain this over time
- With lower market entry and growth by new independent producers, the broadcasters could not rely on sustaining their vitality through acquisitions. Instead, we would expect a gradual impact on the PSBs' ability to commission the most innovative and diverse ideas for UK audiences and a corresponding fall in international demand for PSB exports
- SVOD and multi-channel inward investors are not bound to produce in the UK. Deregulation could lead to a gradual decline in the attractiveness of the UK market in terms of levels of creativity, skills and potential producers or co-commissioners

Overall, these unintended consequences would seem to run counter to Ofcom's aims and duties around securing the interests of audiences, encouraging investment and innovation, promoting competition and economic growth, and proportionate and targeted regulation.



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