

Consultation on revised Guidance for
Public Service Broadcasters **on**
Commissioning Codes of Practice.

Submission to Ofcom
March 2025

Introduction.

1. Pact is the UK trade association which represents and promotes the commercial interests of independent feature film, television, digital, children's and animation media companies.
2. The UK independent television sector is one of the biggest in the world, with revenues of £3.61 billion in 2023¹ with production sector revenues growing by 150% since 2003.² Large parts of the resulting revenues are invested back into the development and production of UK content. The sector is a key part of the UK's growth plans as it, along with others in the screen sector, sound recording and music publishing activities industry, saw 8.4% growth in December 2024 offsetting the declines seen in other areas of the service sectors.³
3. The success of the UK independent sector is underpinned by an effective light-touch regulatory regime. The requirement in the 2003 Communications Act for Ofcom to produce guidance for PSBs on their commissioning Codes of Practice, underpins commercial negotiations between Pact, on behalf of independent producers, and each of the PSBs. The framework affords protections for independent producers against the market power of the PSBs, and it requires the PSBs to seek agreement from rights holders when they wish to use additional rights.
4. The fact that the Terms of Trade have evolved over time, and that there has never been a formal complaint about them brought to Ofcom by any party, shows that they continue to operate well.
5. These proposals put forward by Ofcom will undermine the success of this framework.
6. For further information, please contact Pact's Director of Policy, Emily Oyama at emily@pact.co.uk or on 020 7380 8232

¹ Pact Census Independent Production Sector Financial Census and Survey 2024, by Oliver & Ohlbaum Associates Limited, September 2024

² Celebrating 20 years of Terms of Trade, A report for Pact by Oliver & Ohlbaum Associates Limited, January 2024

³ [GDP monthly estimate, UK - Office for National Statistics](#), January 2025

Overview.

The arrangements that frame the Terms of Trade between independent producers and the PSBs, have been an unparalleled success. Independent production companies have delivered some of Britain's best loved programmes and sector revenues have grown steadily over the last decade, despite the recent challenging market conditions.

The proposed lifting of prohibitions on bundling and last matching rights will fundamentally alter the Terms of Trade. It will shift the balance of negotiating power in favour of the PSBs, squeezing independent producers and production budgets and hinder their ability to retain and exploit their intellectual property. Pact has commissioned Oliver & Ohlbaum Associates (O&O) to model the financial impacts, and they found that £356m would be lost in revenue by 2026 if the proposals go ahead.⁴

In an already challenging market where production sector revenues fell by £392 million to £3.61 billion in 2023, these proposals will exacerbate our concerns about the wider diversity of supply of independent producers and make it even more difficult for producers to raise the finance needed for PSB content.⁵

Pact does not agree with Ofcom's rationale for the changes. Namely that increased competition from SVOD services make it harder for PSBs to meet their revised remit⁶ and satisfy audience needs and interests.

Pact considers that Ofcom's analysis fails to acknowledge that UK PSBs do not currently face difficulties in negotiating the acquisition of rights to meet audience needs and interests. Under the Terms of Trade all PSBs have significant video on demand and other uses in the primary window and have evolved with market developments over time.⁷

PSBs continue to be a significant commissioner in the UK market and account for the majority of individual commissions in the UK. In 2023, the PSBs commissioned 95 per cent of individual titles commissioned across the PSB main channels and SVOD services.⁸

Furthermore, the supply side remains highly competitive: several hundred producers of varying size create content for the UK television market. This means broadcasters can easily switch between different producers offering similar content although there does also continue to be considerable specialisation within genres.

⁴ Revised guidance for PSBs on Commissioning Code of Practice: Responding to Ofcom's proposals, O&O, 2025

⁵ **Pact Census 2024**

⁶ This is to reflect the PSB's revised remit based on the Media Act 2024 which focus on allowing PSBs to meet their remit through their on demand services.

⁷ Annexed to this report are all the primary and secondary uses within each Terms of Trade agreement for the PSBs

⁸ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

The combined result of buyer power and a highly competitive environment is that independent producers fear losing commissions if they push back on a broadcaster's specific terms – Ofcom's proposals will exacerbate this making it more likely for independent producers to accept poor deal terms. With smaller to medium sized producers in particular finding it harder to turn down bundled deals.

Independent producers now more than ever need certainty to invest and to take the risks that result in the most innovative programmes. The Terms of Trade provide this certainty by giving producers control over their IP. The original rationale for the introduction of the Terms of Trade - to counterbalance the PSBs' negotiation power against SMEs and vertical integration of broadcaster production arms, and to secure more independent production outside London remains true today.

By giving producers control over their IP, the Terms of Trade has unlocked huge growth across the sector. In 2003 independent production companies were worth just £850 million to our economy. Today, the sector is worth just under £3,61 billion.⁹

The Terms of Trade establishes standard terms which ensures that a specific share of the secondary exploitation gains from commissioning programmes remains with producers. Ownership of the IP is a long-term asset value for the company, critically it can be used to attract capital and investment back into the UK. By attracting external finance by selling or pre-selling their IP, independent producers can take risks and innovate, recouping on development funding invested by the production company into specific projects. It also means PSBs pay less towards their programming thereby providing audiences with diverse and high-quality programming at a lower cost. When independent producers exploit secondary markets, they can also accept low margins on UK domestic commissions as they seek to create high quality programmes that are attractive to the wider market and increase their profits from the back end.

Lifting the prohibitions on bundling and last matching rights removes the ability for recoupment on the backend from a commissioning project. This removes the incentives for producers to attract capital and investment back into their companies. This will diminish SME growth, limiting UK content innovation and audience choice.

Pact's submission will elaborate on these concerns, providing detailed analysis and evidence to support our position, including the research by O&O highlighting the risks of the proposals and why the existing provisions are essential to retain the health and balance of the ecosystem, this is annexed to our response.

⁹ This includes distribution revenues and non-TV commissions which include ancillary rights i.e. online publishing, new media, talent management, promotions, public relations and feature films

Question 1: Do you have any comments on our approach and proposed draft Guidance?

1.1 Pact welcomes the opportunity to respond to Ofcom's consultation on Revised Guidance for PSBs on Commissioning Codes of Practice. Pact has carefully reviewed Ofcom's approach and the proposed draft Guidance. Our response will focus on Ofcom's updates in relation to market developments:

- Allowing PSBs to seek bundling of primary and secondary rights with the independent producer's consent.
- Removing the prohibition on PSBs including matching rights provisions in commissioning contracts.

1.2 Given the fundamental changes to the commissioning codes of practice proposed by Ofcom, we are very disappointed that Ofcom have not consulted with us about the specific proposals on bundling and 'last matching rights' prior to the publication of the draft guidance. Under the Communications Act 2003 (as amended by the Media Act 2024), Ofcom must, before issuing their guidance or revised guidance, consult the providers of licenced public service channels, persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC and S4C.¹⁰

1.3 We disagree with the proposals on lifting the prohibitions on bundling because it will:

- Change the negotiating power to favour PSBs.
- Undercut producers' ability to raise finance in the secondary market. Which will ultimately lead to stifling SME growth.
- Lead to warehousing rights: if a PSB bundles primary and secondary rights at the point of commission it could lead to the secondary rights not being fully utilised by the PSB.

1.4 We disagree with the proposals on last matching rights because it will:

- Affect a producer's ability to raise finance for future programmes if their relationships with investors or distributors are weakened.
- Restrict the producer's commercial freedom and market access.

1.5 These changes will drastically shift the balance of negotiating power in favour of the PSBs. In practice it would mean independent producers would not only contractually need to let PSBs know what distribution advances they have received from distributors, but the PSB could then acquire those rights for themselves for the same price. Even if the broadcaster were to offer more money for these rights as Ofcom has implied, there is no guarantee that this would be at a market rate. It would be extremely difficult to

¹⁰ S.285 (6)(c) Communications Act 2003

prohibit PSBs from abusing their dominant position. Producers would have no right to refuse, at the point of commission, due to competition from other suppliers and because the project has been invested in for a specific broadcaster it cannot be offered elsewhere. As a result, the UK commissioning model would go back to a cost-plus model whereby producers would return to being work for hire, effectively becoming a service provider to the PSBs.

1.6 Pact will now examine the context to the prohibitions and the key features of the UK commissioning market that led to the interventions.

The importance of prohibitions on bundling and last matching rights

Key features of the UK commissioning market that led to the interventions

1.7 Prohibitions on bundling and last matching rights are important because they ensure fair and equitable negotiations between independent producers and PSBs. They form the backbone to the Terms of Trade which exists to counteract the features of the UK market which continue to remain relevant today, these are:

- a. *Asymmetry in bargaining power between the PSBs and producers:* PSB commissioners have considerable bargaining power within the UK market because of the differentiated PSB broadcasting strategies and differences in their remits. For example, the BBC commissions a diverse range of content across all audiences and genres and remains as essentially the only commissioner of UK originated children's content, whilst ITV tend to commission content that appeals to broader mainstream audiences. Many independents produce programmes with one or one and a half commissioners in mind. Independent producers often tailor developments to specific broadcasters, creating costly barriers to switching and limiting negotiation power.
- b. *The vertical integration of programme production by PSBs broadcaster production arms:* The vertically integrated PSBs have in-house studios, for example BBC Studios or ITV Studios that can produce content for their own associated broadcaster and third parties.¹¹ When Broadcasters also have considerable market power as the four PSBs do in the UK market, vertical integration risks incentivising the PSB to favour their in-house studios for commissions and to maintain scale. This can have impacts on the diversity and plurality of productions and quality for audiences.
- c. *Geographic concentration:* Without the interventions in television production, commissioning and broadcasting tends to be concentrated in London. This impacts the diversity of content and perspectives available to audiences and the economic and social impact in the Nations and Regions. Alongside other

¹¹ We also note that the Media Act lifted the publisher-broadcaster restriction on Channel 4 meaning that Channel 4 can set up its own production arm if it so chooses.

interventions such as the Made out of London Quota, the Terms of Trade enable Nations and Regions producers to negotiate fair and reasonable terms and develop IP.

The features of the market meant independent producers remained limited in their market share and found it harder to grow

1.8 Prior to the Terms of Trade, independent producers 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).

1.9 The Terms of Trade counteracts the above features of the market and as a result:

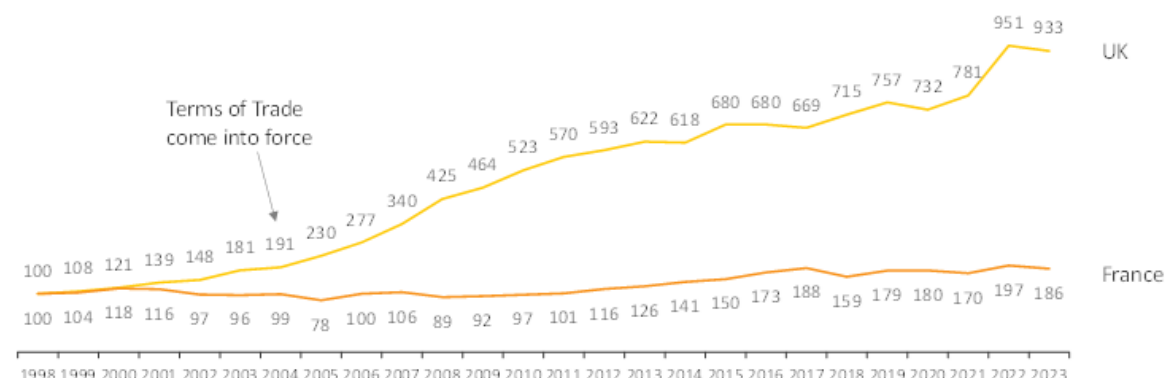
- The independent production sector is a **force for growth** in the UK creative industries: Following introduction of the Terms of Trade, independent producers' commissioning income from PSBs rose from c.£700 million in 2002 to £1.35 billion five years later, with a further £158 million from the UK multichannel sector.¹² Share of PSB commissioning spend rose from 30 per cent in 2001 to 46 per cent by 2009 and then remained broadly stable¹³.
- UK growth is converted into **global trade success**: It unlocked 22 per cent CAGR in exports to the rest of the world in the first five years. It also created a dynamic production market, growth has continued over time.¹⁴ This level of export growth seen in the UK contrasts sharply with other European countries such as France, – where the same export categories had minus 2.6 per cent CAGR in the same period (notwithstanding other differences like language).

¹² O&O, 'Call for Evidence: Public Service Broadcasters & the UK Production Sector, A report for Pact', 2021

¹³ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

¹⁴ Pact UK TV Exports Report

Figure 1. Growth in UK and French TV Exports, Indexed 1998-2024, Index (1998 = 100)¹⁵



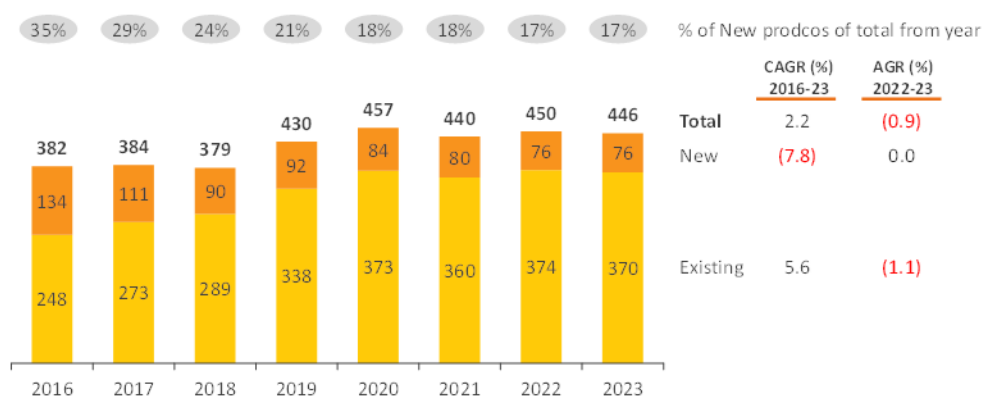
Note: The reported periods in the UK source data changed from calendar to financial years after 2012 – UK figures for 2013 are based on 2012/13 to 2013/14 equivalent growth rate and this method has been carried forward to 2023. A change in methodology in 2016-17 used by Pact led to anomalous data

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

- Independent producers make high quality PSB commissions viable through deficit financing: Ownership of secondary IP in PSB commissions under the Terms of Trade has incentivised the independent production sector to innovate with new production finance models. Through deficit financing independent producers take on legal and financial risk knowing that they will benefit from any value that arises from the back end i.e. exploitation of secondary rights internationally and in the UK. Upfront producer investment via deficit financing reduces the cost of the programme for PSBs – or enables them to put more value on screen for the benefit of audiences.
- The independent production sector is **highly dynamic** with healthy competition on the supply side and low barriers to entry: The Terms of Trade and other interventions of the regulatory framework encourage producers to enter the market as it rewards innovation and efficiency creating path routes to growth. The table below shows the high concentration of producers and there has been a stable number entering the market despite challenging economic environment.

¹⁵ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

Figure 2. No of new producers 2016-2023¹⁶



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

Having established the current context, we will now go on to examine why Ofcom's rationale for lifting the prohibitions on bundling and last matching rights is misguided.

Ofcom's rationale for lifting the prohibitions on bundling and last matching rights

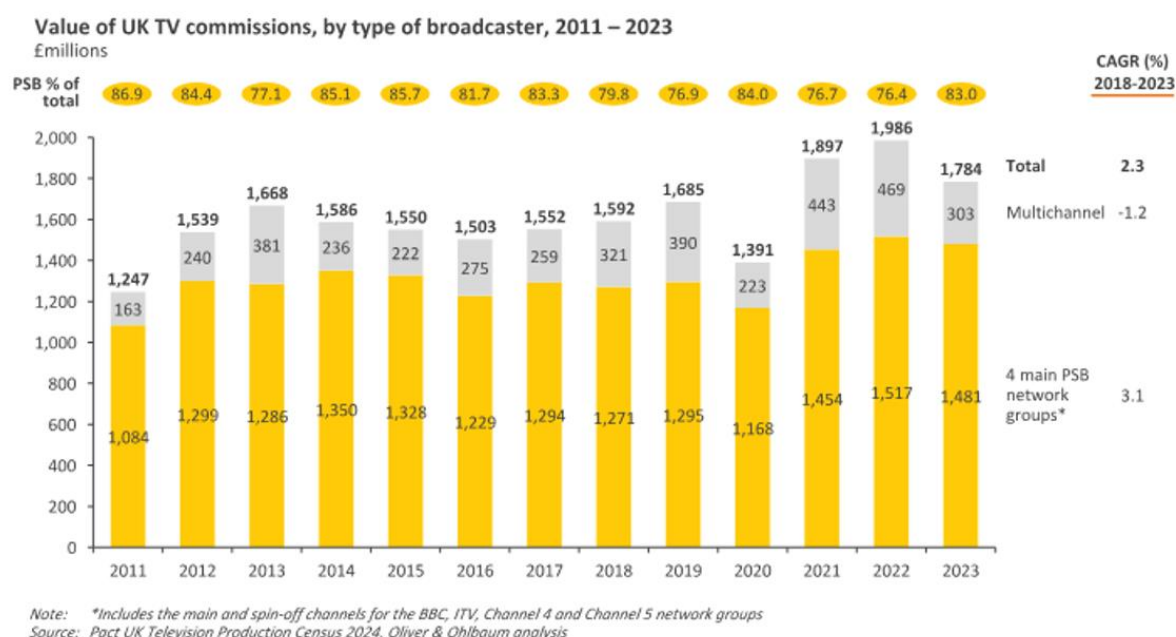
The rise in SVOD commissions does not necessitate a relaxing of prohibitions

1.10 The consultation document outlines the following rationale for lifting the prohibitions: *'the reduction in the share of independent commissions represented by PSBs and the significant increase in independent commissions from SVODs and other international content commissioners.'*¹⁷ We acknowledge that the wider market, when encompassing international revenues, has seen new service providers investing in content. However, we are yet to see evidence of how this alters the asymmetry that exists between PSBs and the independent production sector as well as other factors within the market. Rising levels of SVOD commissioning investment does not detract from the PSBs' market power in UK commissioning. As you can see below the four PSBs continue to represent the majority of the UK market:83%.

¹⁶ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

¹⁷ Consultation on revised guidance for Public Service Broadcasters on Commissioning Codes of Practice, Ofcom, 2025, P13

Figure 3. Value of TV commissions by type of broadcaster, 2011-2023¹⁸



PSB commissioners have considerable bargaining power within the UK market because of the differentiated PSB broadcasting strategies and differences in their remits, while there continues to be a handful of commissioners for the highly competitive supply base we outlined above, with several hundred producers competing to find broadcasters and SVOD services to commission programmes from them.

- 1.11 There is also little overlap between PSBs and SVOD commissioning strategies. SVODs differ in budget, genre and style often commissioning content that may cater to local tastes but ultimately with a global audience in mind. SVOD services form a very small part of the independent sector's commissioning revenues. Pact commissioned O&O to look at the implications of Ofcom's proposals looking at the current market. They found that, when we look at UK commissions by type of commissioner PSBs continue to dominate with 95 per cent of individual titles commissioned across the PSB main channels and SVOD services.¹⁹ Last year 1,391 commissions came from the PSBs compared to 30 commissions from the SVODs.²⁰

PSB in house studios adds another competitive level

- 1.12 In addition to the highly competitive supply base independent producers are also having to compete with a PSB's own in-house production arms. Broadcasters may be more likely to commission programmes from their own production arms in the

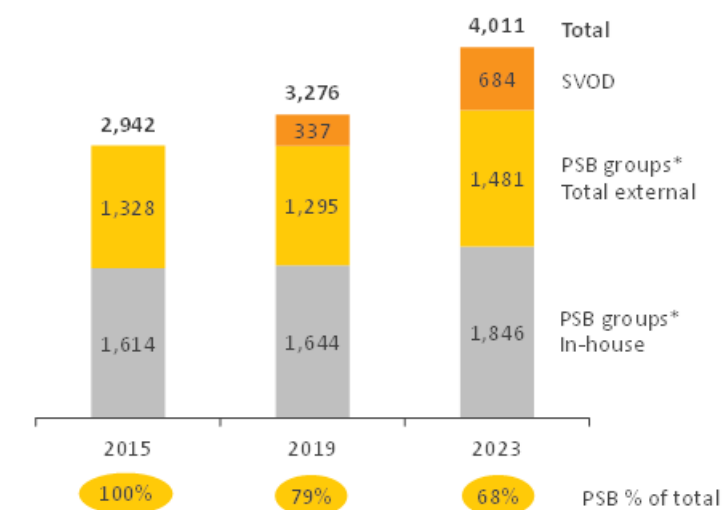
¹⁸ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

¹⁹ IBID

²⁰ Screen sector clusters: securing sustainability and growth, O&O report, 2025

expectation of more favourable terms. Ofcom needs to acknowledge this impact on the market. As identified in the previous section the existence of a PSB's own in-house studio means they have the incentives and the means to prioritise their own acquisition of IP and work for third party services. The regulatory regime specifies that those publicly funded or owned PSBs would need to apply fair trading rules in order to commission their own production arms. However, even with this in place there could still be an incentive for PSBs to commission their own entities in the hope of more favourable terms. Figure 4 shows in 2023, total commissioning investment by the PSB groups was £3.33 billion while total commissioning investment by SVOD services was £684m. 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. While over half, at 55 per cent, was with PSB in-house Studios, mainly BBC Studios and ITV Studios. This share has risen over time.

Figure 4. Value of UK TV commissions by type of commissioner, 2015-2023, £millions²¹

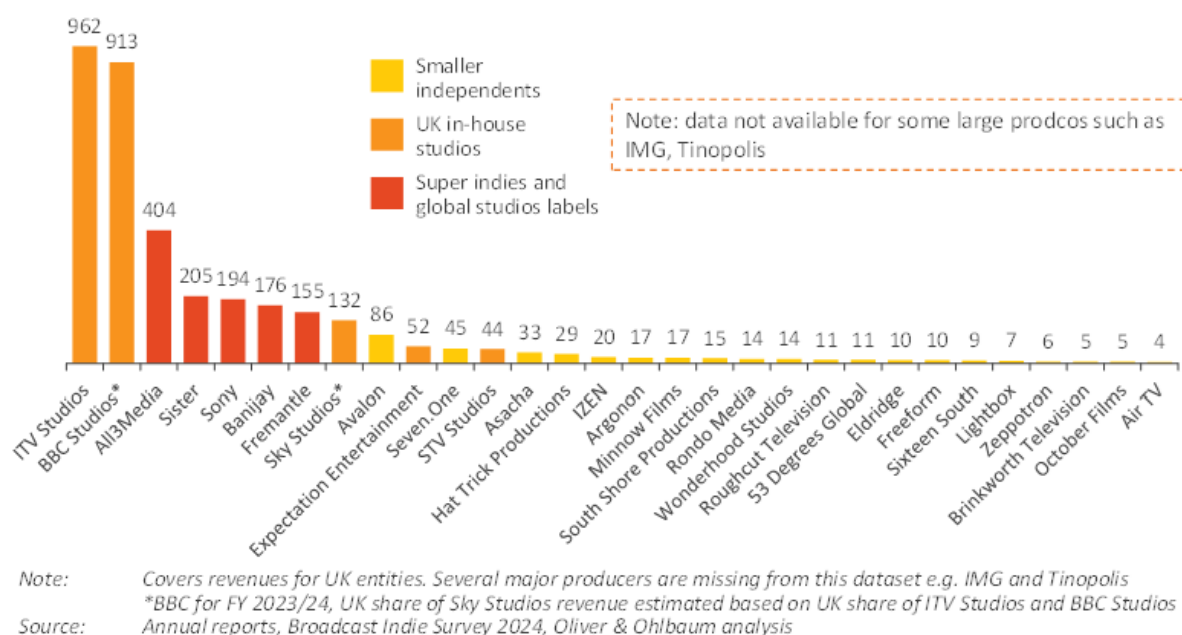


Note: Including PSB and SVOD (all services tracked by Ampere) commissions (including returning series) of UK producers only, no multichannel. Excluding spend on news, sports, and film. *PSB groups include the main and portfolio channels of the BBC, ITV, Channel 4 and Channel 5
Source: Ampere Analysis, Pact UK Television Production Census 2023, O&O Programme Database, Oliver & Ohlbaum analysis

O&O also found that the BBC and ITV Studios remain double the size of the 'super indies' in revenue terms and much larger than all other producers.

²¹ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

Figure 5. UK production company revenues, top 30, 2023, £millions²²



1.13 The evidence in the previous paragraphs above shows that PSBs continue to operate in differentiated markets with specific remits and commissioning models which rarely overlap with SVOD commissioning models. The significant increase in independent commissions from SVODs and other international content commissioners cannot be solely relied on to assess the UK TV commissioning market. Other elements of the market need to be examined in tandem notably the volume and type of PSB commissions and the continued impacts of vertical integration within the PSBs.

Are current prohibitions limiting PSBs ability to deliver their new remit?

The Terms of Trade already allow PSBs flexibility to negotiate rights and meet audience needs

1.14 Ofcom's other main reason for lifting the prohibitions is their view that the restrictions make it difficult for PSBs to commission content on terms that deliver for viewers.²³ The main evidence point noted in the consultation is stakeholder engagement. This comes as the Media Act has revised PSB's remits to include a requirement to provide content across a range of different services, as set under section 264(4) of the 2003 Act.

²² Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

²³ Consultation on revised guidance for Public Service Broadcasters on Commissioning Codes of Practice, Ofcom, 2025, P13

- 1.15 The UK PSBs do not currently face difficulties in negotiating the acquisition of rights to meet audience needs and interests. The current Ofcom Guidance on PSB commissioning has shaped a system which has created Terms of Trade which differ by PSB. Each specific Terms of Trade grants the PSBs exclusivity with regard to certain rights. There are many examples of how negotiations have led to the transfer of rights that broadcasters considered valuable on commercial terms. For example, different arrangements exist for VOD rights, for example: BBC has Unlimited on-demand rights; exclusive for 12-month or 24-month period, depending on the premier channel.
- 1.16 Annexed to our response are clear explanations of all the Terms of Trade agreements with the PSBs highlighting how it currently allows PSBs significant usage of rights within the primary window.

Lifting bundling prohibitions

- 1.17 Ofcom's proposed amendment to the guidance would remove the absolute prohibition on linked or conditional offers for primary and secondary rights. These would now be permitted under the Terms of Trade so long as 'the producer expressly consents.' Ofcom fails to understand that at the point of commission it is extremely hard for a supplier to not consent. At that point they may have invested many £1000's into a bespoke project for that particular broadcaster and slot in the knowledge that if they refuse then an alternative supplier may accept. This means that not only do they lose their investment but also as the project is specific it cannot be offered to another buyer in the market. Consequently, the commissioning broadcaster is placed in a dominant position as all bargaining power is with them. This is why prohibitions on bundling were introduced in the first place. All broadcasters can seek to acquire other rights post the point of commission on commercially negotiated terms or as per the conditions of their specific Terms of Trade.

Pact's key concerns with lifting bundling prohibitions

Undercuts producers' bargaining power and stifles SME growth and diversified supply

- 1.18 The permittance of bundled deals would essentially allow the PSBs to obtain both primary and secondary rights for the same and/or similar price to the primary rights now. This means that distributors would carry out the work entailed in assessing the value of the rights on offer and provide this commercially sensitive information to the PSB who could then pick and choose which programmes to acquire rights without competition. This would undercut the producers' bargaining power and their ability to raise deficit finance against the secondary market, particularly when it comes to rights to sell and distribute internationally which is where many independent producers make a return on their investment. The return on investment is key towards stimulating the

growth of small and medium-sized enterprises, promoting creativity and fostering new talent.

1.19 Even if the broadcaster were to offer more money for these rights as Ofcom has implied, there is no guarantee that this would be at a market rate.

1.20 As a result, the UK commissioning model would go back to a cost-plus model whereby producers would return to being work for hire, effectively becoming a service provider to the PSBs, with no guarantee that the initial upfront production fee would have larger margins. This is what happened to the market prior to the Terms of Trade where producers transferred the 'bundled' copyright (including secondary rights) to broadcasters in return for revenue to cover costs and a fixed margin that declined over time as commissioning broadcaster sought to reduce costs by squeezing the producer's margins to a degree that the sector by 2001 was unsustainable.

1.21 The market has experienced a downturn in the last two years, and we're concerned that Ofcom allowing commissioning deals to be conditional on the acceptance of bundled rights will push already challenged producers into accepting poor deal terms in order to win a commission and try sustain their businesses.

1.22 Undercutting independent producers through bundled deals will remove the incentives for producers to invest in innovation due to loss in revenues especially in an environment where they accept lower margins from PSBs. Exploitation of secondary rights are key incentives for independent production companies to invest in and nurture their own ideas and businesses which has an impact on the long-term growth of the sector. With a lack of back end, the vibrant sector and market growth of UK talent we see today will most likely disappear. Some members have provided their thoughts on the market and their thoughts on how bundling would impact their business:

Small producer-distributor:

"As well as the direct impact on producers being forced to grant valuable rights for no extra value, the impact on the UK's very healthy content distribution business that has grown so successfully from selling UK productions overseas. Our own distribution business would be severely damaged since the content we sell, commissioned by Channel 4 or 5 is so highly sought after overseas".

Medium sized producer-distributor:

"This would be a large step to turning back the clock to pre-2004 Terms of Trade where, with a few exceptions, the PSBs enjoyed de-facto exclusivity over producers' rights. Why would OFCOM want to reverse what has been one of the UK's most successful entrepreneurial business stories over the last 20 years?"

Larger producer distributor:

"The PSBs remain an attractive partner for independent producers, in large part because of the opportunity to retain secondary rights, ensuring a robust pipeline of innovative and exciting projects being pitched into the PSBs. Undermining this arrangement may lead independent producers to seek other homes for projects."

PSBs paying below the market price for the bundled deal could impact programme quality and the long-term health of the sector

1.23 PSBs paying below the market price for secondary rights would also result in a programme of lower creative ambition, and therefore impact audience choice and the wider sector. Independent producers would not be incentivised to bring innovative and quality ideas particularly if the back end is cut off and they are not rewarded for their success. This affects both the programme in question and the health of the sector overall as it occurs across a range of PSB commissioners and output. It would have a negative impact on PSBs and their audiences in terms of choice, quality, investment and innovation.

1.24 As O&O has noted *'beyond high end commissions, PSBs continue to invest in other genres such as long-running Factual and Entertainment programmes that are relatively timeless and perform well on their BVOD services. The proposed change to the prohibition on bundling rights could apply to any genre or budget range. Independents making Factual and Entertainment programming are more likely to be medium or small in terms of turnover and to rely to a greater extent on PSB commissions. Such producers may find it even harder to turn down the terms of a bundled offer.'*²⁴

Lead to warehousing rights further reducing audience access to content

1.25 If a PSB bundles primary and secondary rights at the point of commission, it could also lead to the secondary rights not being fully utilised by the PSB. Known as 'warehousing' it means that a programme would become unavailable to audiences when it is not on a PSB service.

1.26 The risk of warehousing is also more significant where the PSB's distribution arm is required to be used by the independent producer as part of its terms. PSB distribution arms may be less incentivised to exploit secondary rights due to conflicting interests. For example, if it was a valuable right they may have other strategic reasons to prevent a competitor from acquiring the content even at a high valuation especially if this could detract from the broadcasters' channel or service.

²⁴ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

1.27 We know that PSBs want exclusivity of content for their BVOD services rather than on third party platforms where they think it will dilute their brand recognition. PSBs think that controlling these rights in this way will ensure content remains on their BVOD services.²⁵ However the current Terms of Trade for all PSB's grants significant and renewable rights to the PSBs for the BVOD services .

1.28 For producers the risk of warehousing becomes particularly acute when a programme fails to do well initially in the first window but could have found a new audience if licensed to another service, it also denies any revenues that would happen within the secondary market.

1.29 Independent distributors and producers do not have the conflicting incentives that the PSBs may well have. Producers sell to the broadcaster or SVOD service that values them the most, this therefore maximises the value of the rights, competition should deliver a fair market price and the most motivated distributor to exploit the secondary use of the content.

1.30 Furthermore, independent distributors working with small to medium sized producers tend to be more specialised in terms of their knowledge of content markets than a broadcaster and may be better able to recognise the potential for a piece of content.

Lifting last matching rights prohibitions

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

1.32 In their 2007 consultation Ofcom stated that they consider "such clauses [matching rights provisions] could have the effect on foreclosing the access of third party service providers to content rights and of dampening competition for rights."²⁶ Ofcom go on to state that "if a third party service provider knows that at the end of what might be a time-consuming commercial negotiations with a producer, the producer still has to go back to the original commissioning PSB and give them the option to match the negotiated terms and conditions, then it is less likely to enter into negotiations in the first place."²⁷

²⁵ For example, the BBC response to the Ofcom Call for Evidence on the UK production sector, 2021

²⁶ Consultation on revised Ofcom Guidance for broadcasters on Codes of Practice, Ofcom, 2007, P10

²⁷ IBID

Pact's key concerns with lifting last matching rights prohibitions

Affects a producer's ability to raise finance for future programmes if their relationships with investors or distributors are weakened.

1.33 We're concerned that this proposal would deter third party buyers such as the independent distributors²⁸ and streamers from entering into a negotiation with the producer in the first place.

1.34 When the Codes of Practice were introduced in 2004, the PSBs typically fully funded productions. However, as the cost of production has increased, the PSBs now usually only fund a certain percentage of the production budget, meaning in some genres producers have to raise finance in the market. While the deficit will vary depending on the cost of the production, genre and the commissioning PSB, deficits are becoming increasingly common practice even in genres which were typically 100 per cent PSB funded, such as entertainment. Pact surveyed a number of the UK's top distribution companies that make up approximately 49 per cent of the distribution market to better understand production finance and deficits. The table below sets out the average deficit range for the key PSB genres.

Genre	Deficit
Drama	10 - 50%
Comedy	10 - 50%
News and Current Affairs	Typically 0% ²⁹
Entertainment Formats	0 - 20% ³⁰
Unscripted	0 - 50% ³¹

1.35 Talking to one larger production distributor company they noted, "The vast majority of UK PSB programming is not fully financed by the relevant PSB. The titles produced or distributed require substantial financing, primarily in the form of Distribution Advances. In general, scripted series have the largest deficits. For example, a recent high-end drama production saw the BBC fund only 29 per cent of the total production budget. Deficits for unscripted programming are also growing, notably in the premium Natural History space, where an upcoming natural history documentary series, will be only 20 per cent funded by the BBC." Figure 6 shows how deficit financing is prevalent across a range of genres in both PSB and SVOD commissioning.

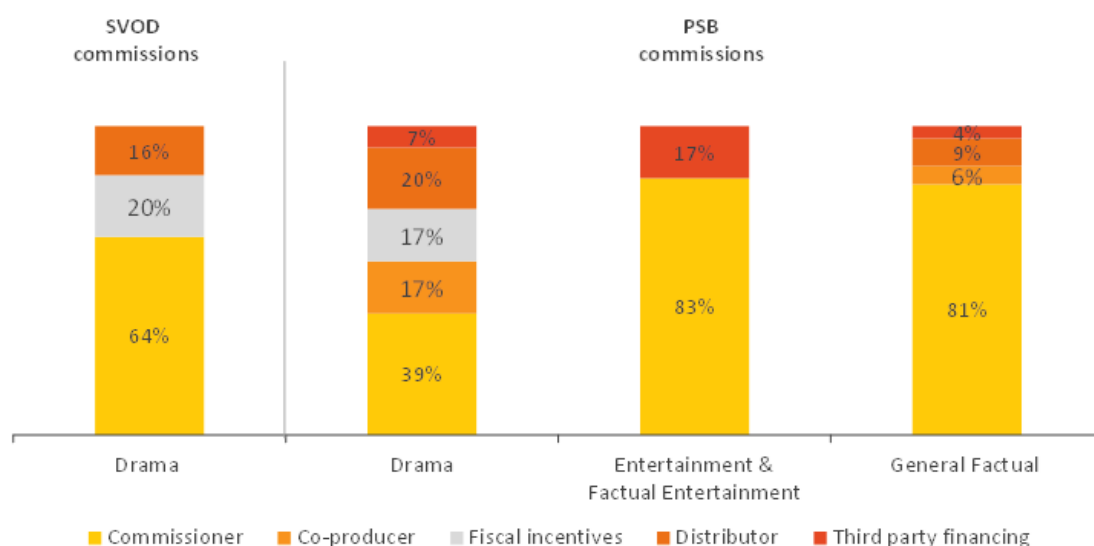
²⁸ Distribution companies that are not part of a broadcaster such as BBC Studios and ITV Studios

²⁹ Typically fully funded by the commissioning broadcaster with very little, if any, commercial revenue

³⁰ Deficits are unusual but are becoming more common

³¹ This is largely dependant on the commissioning broadcaster.

Figure 6. Indicative contribution of producer revenues from commissions, selected genres, PSB vs SVOD, % of revenue³²



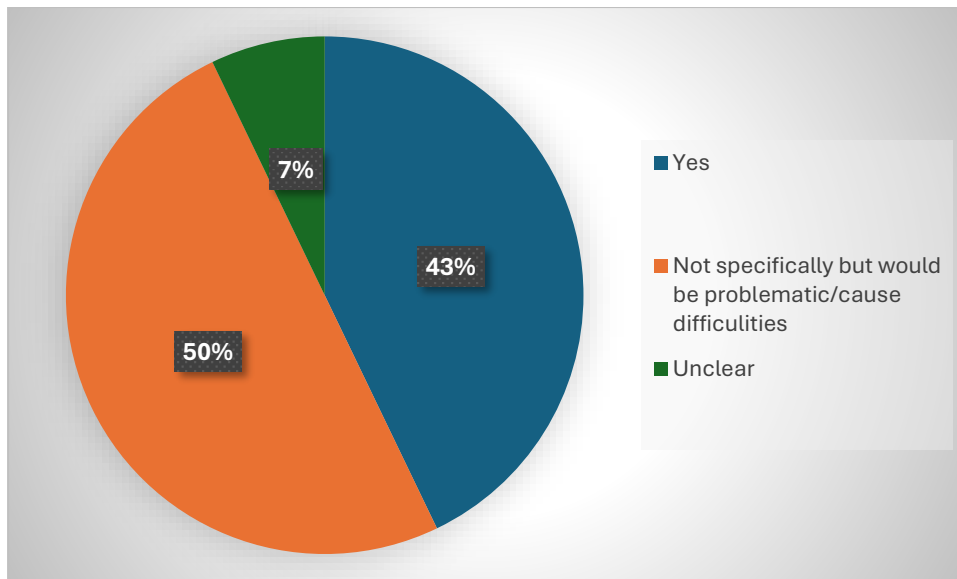
Source: Fly Research, (Drama PSB, n=8, SVOD, n=5, Ent/Fact Ent, n=7, General Factual, n=8), Oliver & Ohlbaum analysis

1.36 In another question to distributors, we found that 43% of distributors said that Ofcom implementing matching rights, would stop them offering finance/advances with another 50 per cent saying it could cause issues with deals or problems with financing.³³ Talking to a larger distributor in detail they calculated that the proposals would roughly take away 25 per cent of the current investment in the market.

Figure 7. Pact Distribution Survey 2025

³² Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

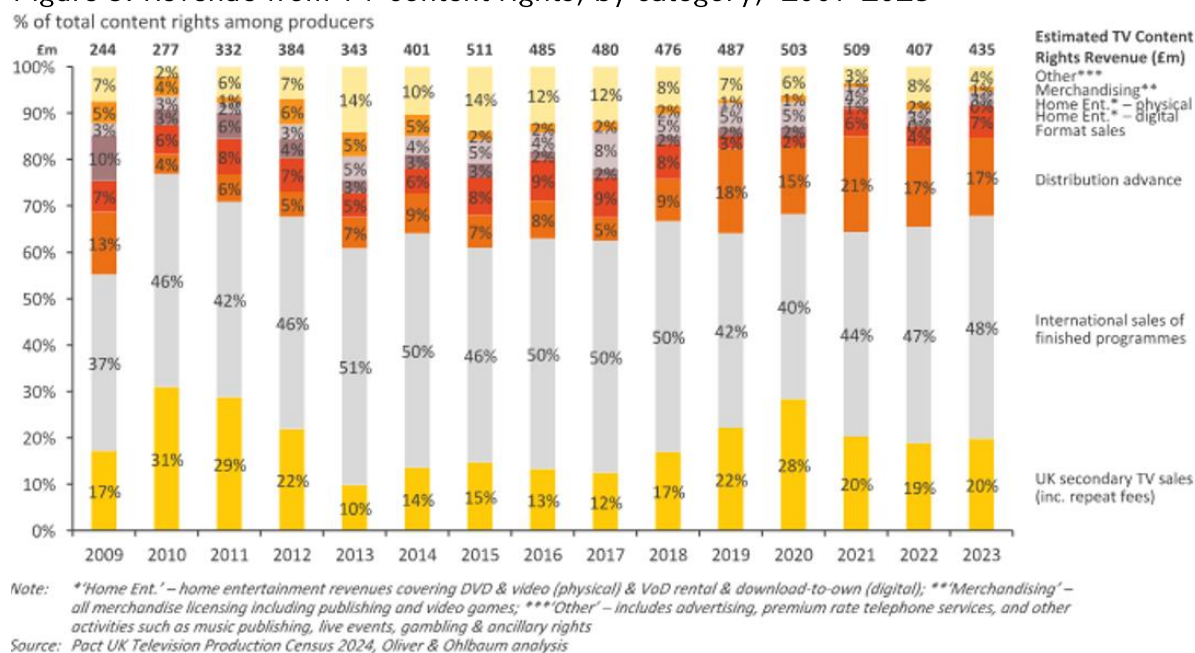
³³ Pact survey methodology consists of surveying 48.8% of the top 18 Distributer market



1.37 If last matching rights were to be allowed, it would risk lowering the amount of distribution advance that producers could get for future projects. By contractually requiring the independent Producer to disclose the deficit funding offer to the PSB it would allow the PSB to leverage this information to strategically choose the most commercial projects without maximising income for the producer. Ultimately as the 'last matching right' becomes known in the market independent distributors would cease to offer distribution advances for the rights.

1.38 **Figure 8** shows the revenue producers receive from distribution advances have increased by 8 per cent since 2018. This means that producers have increasingly been deficit financing productions on the back of distribution advances. Distribution advances are beneficial in order to ensure the project is made. If the commissioner matches a third-party distributor offer the producer loses out on the distributor's expertise and the distributor pulls out of future negotiations because its offers may be undercut without competition.

Figure 8. Revenue from TV content rights, by category, 2009-2023³⁴



Restricts the producer's commercial freedom and market access,

1.39 The ability for producers to raise finance through distribution advances is contingent on the ability to retain the IP through the Terms of Trade and subsequently exploit these secondary rights in the mainly international market. This ensures that producers are able to get a fair market price for selling their rights and can enter into a fair negotiation. However, if the commissioning PSB has the right to acquire these rights in return for matching those offered by a third party, this will result in de facto exclusivity by the PSBs; effectively shutting out other third parties and ultimately reducing the value of these rights and investment. Something, which we would argue, is anti-competitive and anti-growth.

The combined impacts of lifting bundling and last matching rights

1.40 In this section we will look at the combined impact of removing both the current bundling and matching prohibitions for the UK production sector, PSBs and wider TV sector and, ultimately, audiences. Primarily by summarising O&O's findings.

Lifting both the bundling and last matching rights prohibitions will destroy the market for UK secondary and international finished programmes

1.41 Overall, several effects will take place when the combination of bundling and last matching rights is removed:

³⁴ Pact Census 2024

- *PSBs would acquire more rights for below market rates:*
 - 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.
 - Given it is being bundled at the point of commissioning, the PSB will have negotiating power to only offer a bundled rights deal where it paid below market rates for secondary rights.
 - The consultation implies that relevant secondary rights relate to the UK because it is needed to benefit the PSBs' VOD services. The change to the provisions would also cover international rights, which are relevant to distributor advances and international sales to close the production budget.
- *It would destroy the third-party market for secondary rights:*
 - PSBs paying below the market price for bundled deals would be exacerbated by the removal of last matching rights because there would no longer be a 'market rate'.
 - Knowing that broadcasters have matching rights, independent distributors would simply not make an offer – as they would not want to reveal what they were willing to pay only to lose out in any case.
 - Last matching right would ultimately affect a producer's ability to finance future programmes if their relationships with investors or distributors are weakened.
- The PSBs would need to pay more than they do today for the primary commission (the PSB would have to find additional funding in order to close the production budget. This may not be a maximisation of investment that the market could make and could lead to a reduction in the quality and creative ambition of the programme while also denying the producer the revenues required to re-invest and innovate as they would be operating on a cost plus model with their margins controlled by the commissioning PSB.

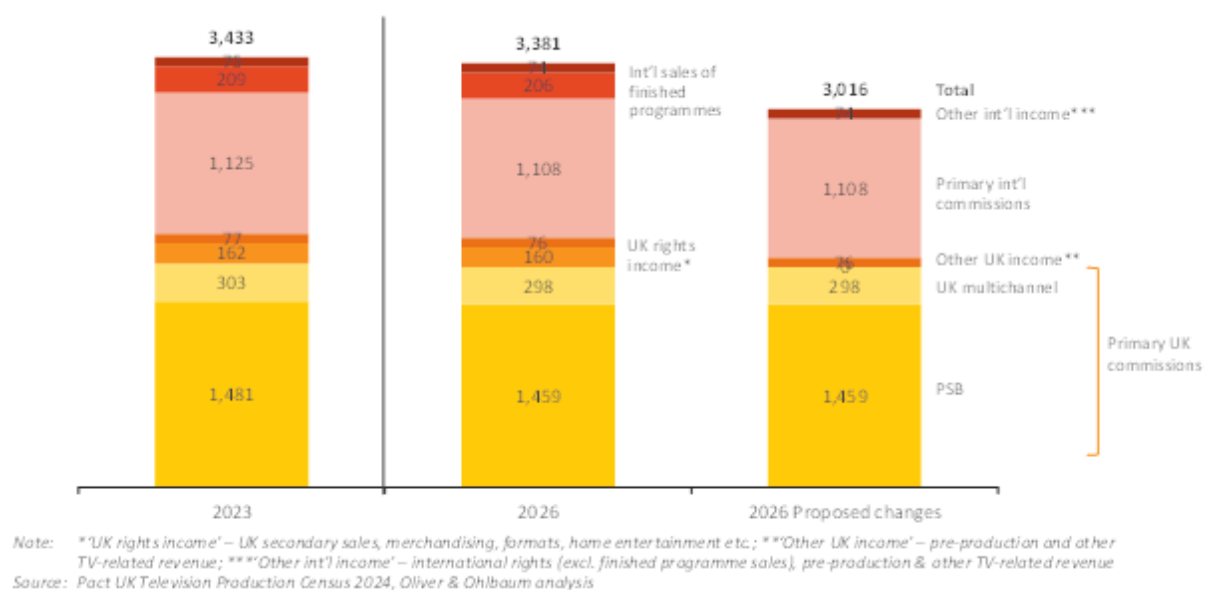
Independent producers could see a revenue loss of up to £365m, in 2026

1.42 As previously outlined, the ability of producers to own IP is crucial to the functioning of the market; by raising capital they are incentivised to invest in new programme ideas. This benefits PSBs because in doing so, they are also able to share in the cost of programming and get more value on screen. Damaging producers' ability to own IP would seriously impair their ability to invest in content, and to share the cost of production.

1.43 Audiences have enjoyed higher quality content as a result of the third-party investment. In total, the PSBs received third party contributions of £674m in 2023 of which 20 per cent came from deficit financing and advances from independent producers.³⁵ Take away this investment and broadcasters would get a worse product pushing audiences away from UK broadcasters, and contributing to a downward spiral of declining viewing, revenue, and content budgets.

1.44 By 2026, under these proposals, O&O therefore expect to see a severe decline in commissioning spend with a decline in producer revenues of c£356 million in 2026 compared to O&O's forecast under the status quo.³⁶

Figure 9. Producer TV-related revenues, by type and source, 2023 and 2026, £ millions



Producers would not be able to invest in programme R&D

1.45 With the revenues likely to be reduced for producers there will be less going into R&D but given that producers would not control the IP it is likely that they would be incentivised to instead to produce programmes for those commissioners/services where they could achieve the largest margin. Ofcom's proposals if introduced would effectively remove from the PSB's the key incentive for producers owning and controlling IP. This is why many producers seek a commission with a UK PSB as this is in their long term financial interest. This USP for the UK PSBs has ensured that the majority of UK producers will always seek to take their best ideas to the PSBs first.

³⁵ Media Nations report, Ofcom, 2024

³⁶ Revised guidance for PSB commissioning Codes of Practice: Responding to Ofcom's proposals, O&O 2025

1.46 PSBs may also move away from some categories of programming such as daytime programming to make up the budgets for high end drama and/or other premium content. But as PSBs compete for these programmes with SVOD services with deeper pockets they would begin to find it harder to attract producers who see PSB commissions as unattractive because of there being no opportunity for secondary exploitation.

1.47 As PSBs move away from certain categories of programming it would dramatically shift the make-up of the independent production sector into a two-tier system where producers catering to a high end premium genre would target SVOD services and a handful of PSB commissions whilst the remaining pool of producers would specialise in providing low budget unscripted content. This would make it difficult for producers to grow and diversity into other genres.

Audiences would suffer a loss of value on screen and a loss of original UK content

1.48 Ofcom's proposals will make it even harder for PSBs to meet audience expectation and their remits because producer's who rely on their back end would not be able to retain and monetise their IP. Over time the PSBs would miss out on the innovation and entrepreneurialism that the independents would have contributed to the sector. This is because the revenue split that Producers currently enjoy would be taken away. It's uncertain whether PSBs would have the ability to fully realise the value of the rights and deliver on the return on investment that they might currently be getting through the revenue splits that exist today between themselves and producers. This would reduce the quality of ideas and thus the quality of the programming available to broadcasters and viewers. 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.

1.49 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.

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

Ofcom's consultation contains no substantive research or detailed impact assessment on how Ofcom's proposals will impact competition and the sustainability of the

production sector. The proposed changes would impact the producers' ability to negotiate and compete within the market. Ofcom also has a statutory duty to have regard to the desirability of promoting economic growth when exercising certain regulatory functions.³⁷ Ofcom must consider the importance of the promotion of economic growth and ensure any regulatory action taken is necessary and proportionate. Little consideration seems to have been given to the promotion of economic growth, something which is a key policy for the Government.

- 2.1 We will examine the brief impact assessment in relation to Ofcom's proposals on bundling and last matching rights and explain why it is insufficient.
- 2.2 In Ofcom's impact assessment they outline the overarching changes to the guidance as being *'unlikely to lead to any major deviations from current practice or outcomes.'* They also consider that, *'the aggregate impact of the proposed changes will be positive, proportionate, and will fulfil our objectives in the least intrusive way.'* And that *'The most direct impacts fall on PSBs and producers, although we note that some of the relevant benefits may pass through indirectly to audiences (e.g. greater flexibility in negotiations for primary and secondary rights improving the availability or quality of content). We expect there may be some potential for PSB gains and corresponding losses for producers in some instances for some proposed changes.'*
- 2.3 Following this statement there is no quantification or analysis of how the changes would be positive or negative. Ofcom have seriously miscalculated the likely impacts of these proposals, as we have already outlined. If these proposals go ahead, it is likely that we would see a reduction in revenue of £356m by 2026 and a consequent loss in the cultural diversity of the sector. Audiences would ultimately be harmed and far from more content being secured PSBs would begin to see less high-quality content being delivered.
- 2.4 With regards to bundling and allowing terms to make it conditional Ofcom expect these changes will *'provide greater flexibility in negotiations for PSBs and producers and in addition should also increase efficiency of negotiations for both parties.'* And that *'some producers may be concerned that this change could weaken their ability to retain and exploit secondary rights.'* They also *'consider that both PSBs and producers would, taken as a whole, likely benefit from these amendments, given the greater flexibility they would have to negotiate bundled deals and the potential for reduced costs of negotiations for both sides.'* This is short sighted and an inadequate analysis of the impacts on the market, it fundamentally misunderstands how negotiations work and shows that Ofcom's duty towards competition is being ignored. As we have shown in previous sections, bundling will prevent a competitive market for secondary rights

³⁷ Under section 108 of the Deregulation Act 2015. The Economic Growth (Regulatory Functions) (Amendment) Order 2024 applies the duty set out in section 108 to Ofcom

within the PSB system because it is likely that a PSB could acquire the rights at below market rates.

- 2.5 Furthermore, we take issue with Ofcom's assumption that there are any burdens on producers during negotiations. There is no burden under the current system for independent producers. Pact disagrees with this and would like to know what section of the production sector would find it easier in a system that one distributor we surveyed called 'well established'. Pact considers the proposals would lead to no negotiations happening at all. Currently most of the administration and delivery cost is handled by the distributor with little burden on the producer. The proposals would see no upside benefit for the majority of producers with viable commercial businesses.
- 2.6 In terms of last matching rights Ofcom considers that this *'will provide the benefit of securing (or making it easier to secure) the consistent presence of independently produced content on PSBs, therefore better serving the audience interest where that content has become associated with the PSB.'* Again, we take issue with that fact that Ofcom has not considered their competition duties at all. A last matching right will contractually require a distributor to reveal their commercially sensitive data to the PSB commissioner without revealing to anyone else in the market. It would give a considerable advantage to the PSB commissioner that would shut out commercial third parties.