



Response to Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice

March 2025

About TAC

1. TAC (Teledwyr Annibynnol Cymru/Welsh Independent Producers) represents independent TV production in Wales. With a value of £460m, our sector is a substantial component of the creative industries, and Cardiff alone has the third largest film and TV cluster in the UK.
2. There are around 50 companies in Wales, ranging from sole traders to some of the leading players in the UK production industry, all providing economic, social and cultural benefits. They produce content for the BBC, ITV, Channel 4, Channel 5 and Sky as well as other commercial broadcasters and platforms. Our member companies produce almost all the content for Welsh-language broadcaster S4C and a variety of radio productions for the BBC. TAC and S4C partner to provide a training programme to help develop talent within the industry.

About this response

3. TAC has significant concerns regarding Ofcom's proposals, on a number of grounds: bundling primary and secondary rights; removing the prohibition on matching rights; the lack of a suitably rigorous impact assessment; and the implication in the consultation that there was prior discussion of these proposals.

Question 1: Do you have any comments on our approach and proposed draft Guidance?

Background on the Codes of Practice

4. The Codes of Practice legislation was introduced in the Communications Act 2003. Prior to their being in place, PSBs had all the negotiating power and had been able to force 'all-rights' deal on producers, taking all IP rights from the producer in perpetuity in exchange for a production fee.
5. This led to a warehousing of rights, where in many cases the PSBs were not exploiting those right to maximum effect through secondary and tertiary sales. It also meant that independent producers could not exploit their own IP, thus preventing them from building their businesses, as well as acting as a significant brake on their being able to secure third-party investment.
6. Following the introduction of the Codes of Practice and accompanying regulatory oversight in the 2003 Communications Act, independent producers were able to maximise the value of each individual PSB-commissioned programme. The UK sector was able to fully realise the potential

economic gain to the UK of leveraging its IP in international markets to full effect. As a result, UK television sector exports have now risen to the point where they stood at £1,818m in 2023-24¹.

7. In Wales alone the TV production sector is worth £460m². As well as contributing to the economy, the sector's businesses also play an important part in preserving and promoting the Welsh language and culture.

Ofcom Proposal on bundling primary and secondary rights

8. At the heart of the principles of the Codes of Practice is the unbundling of rights, with each set of rights needing to be negotiated separately, in order that the broadcaster could not use the leverage of its commissioning the programme to extract bundled rights from the producer.
9. Ofcom proposes to alter this arrangement, to allow the bundling of primary and secondary rights, meaning they would be agreed as part of the same initial deal. In our view this could well lead to the PSBs being to obtain both primary and secondary rights for the same - or similar price - to the current price of the primary rights alone.
10. The overall value of the separate rights will therefore be reduced if individual producers are not able to maximise their potential separately. This could quite possibly have unforeseen consequences, where actors, writers and so on might ask for increased fees to counter the loss in additional revenue, which would be a cost producers would have to pass on to the broadcasters.
11. As part of its rationale for altering the fundamentals of the Codes of Practice, Ofcom states that *"As a result of changes made by the Media Act, the importance of meeting the needs and satisfying the interests of different audiences across the UK is now clearly at the heart of the PSBs' remits"*³.
12. It is not clear to us why Ofcom believes that weakening the value of independent producers in Wales and around the UK, who serve those very audiences, will help to fulfil that objective.
13. Fundamentally the PSBs, as the gatekeepers to the networks and streaming services on which a large majority of producers rely for commissions, have the bargaining power and it is only the protections in the Codes of Practice and regulated Terms of Trade that prevents the UK's TV production sector being once again forced to give up wholesale bundles of rights, thus reducing their value.
14. At a time when there are fewer commissions available, producers will be particularly vulnerable to pressure from broadcasters. any companies have a growing need to gain commissions from wherever they can to continue to employ staff and freelancers. There must be no contracts that make a TV deal conditional on a production company accepting a bundling of rights.

This would have a highly detrimental effect on a range of companies who produce content which the PSBs are required to produce in order to fulfil their remits. Ofcom urgently needs to appreciate the independent sector's role in growing our overall TV industry to be a world leader

¹ [Pact UK TV Export Report 2023-24. Pact, Nov 2024, p2](#)

² [Latest figures show creative boom in Wales boosting the economy. Welsh Government, Nov 2024](#)

³ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p10](#)

and how its proposed changes could undo a lot of successful work done over the last 20+ years in Wales and across the UK to grow our independent sectors.

15. Ofcom cites as a factor in this proposal changing market conditions, which have caused *“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”*⁴.
16. While there are more organisations commissioning content, the content commissioned by the VOD platforms is: a much smaller number of commissions than that commissioned by PSBs; a much narrower range of programmes; and from a range of producers across the world.
17. VOD platforms’ deals with independent producers are unregulated and while there has been a little more flexibility from the traditional ‘all-rights’ deals from the streamers, this is by no means the norm. EU TV producers are reported as stating this is decreasing, with the latest the European Media Industry Outlook stating that *“[a survey] showed a relatively strong perception by producers that streamers have been increasingly demanding full ownership”*⁵. Therefore, the ability for UK companies to hold onto their rights when dealing with UK PSBs remains as crucial as ever.
18. It is important to note that, as Ofcom will be aware, PSBs often no longer fully fund projects. They do instead expect producers to find the additional funding through other avenues. This is normally achieved by getting other broadcasters on board and making presales to third party funders. If Ofcom’s proposals are carried through, the ability to do this could disappear, due to producer not having the same flexibility over their rights. This would therefore impact negatively upon the PSB’s own ability to commission such content, as they would not be able/willing to fully fund them.

Removing the Matching Rights prohibition

19. Ofcom is also proposing to remove the prohibition on PSBs requiring a ‘matching right’ in its negotiations with independent producers, stating that *“viewing patterns and competition for content have evolved significantly since 2007. Now, when multichannel and SVoD providers collectively are able to spend twice as much as PSBs on UK-originated drama and include providers operating with global content budgets in the billions,³⁸ we consider there is no longer a sufficient case for believing, as a general principle, that the inclusion of matching rights provisions in PSB commissions might have a material adverse impact on competition”*⁶.
20. The basis for Ofcom’s position - that there is more competition with the presence of the streaming platforms – is not in our view sufficiently robust to justify these proposals. Multichannel and SVOD providers are internationally-focussed, have no PSB requirements or obligation to work with UK producers, therefore that is not a legitimate comparison. Removing the prohibitions on the PSBs to seek ‘matching rights’ would necessarily require that information, such as the amount invested in productions by third parties such as distributors and which specific rights were being negotiated, would have to be made available to PSBs. This

⁴ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p13](#)

⁵ [The European Media Industry Outlook. European Commission, May 2023, p43](#)

⁶ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p15](#)

would break commercial confidentiality and could well lead to a chilling effect on such third-party investment.

Stakeholder Consultation

21. TAC notes that the Ofcom consultation states: *“We spoke with PSBs, Pact, and TAC last year to understand views on the current Guidance. There is support for the Guidance, but stakeholders have said there is scope to bring it up to date to reflect the current practices in the sector, particularly when it comes to some of the language used”*⁷.
22. Furthermore, we also note that Ofcom’s consultation principles, as set out in Annex 4, state that *“Whenever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines, If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation”*⁸.
23. It is regrettable that, despite the fundamental importance and implications of its proposals, Ofcom does not appear to have adhered to its principles on this occasion. While we have had various meetings with Ofcom representatives over the last 12 months, TAC has no recollection of the proposals set out in this consultation previously being put to us prior to the consultation being published.
24. During a conversation on the current Public Service Media (PSM) Review, held between Ofcom and TAC at Ofcom Wales’ offices in October 2024, we were asked for a general view on the Terms of Trade and responded very clearly that prior to their being introduced, the sector had not been able to grow or attract investment, due to it not being able to exploit its IP. We emphasised that the Codes of Practice and regulatory regime needed to remain in place in their current form, in order that Welsh TV production sector could continue to grow and develop new ideas and formats to sell domestically and internationally. This is important to bring money into the Welsh and UK economy and maintaining the production supply base which is responsible for so much of the UK PSBs’ content.
25. We have not at any time advocated any move towards the bundling of rights or allowing matching rights. We have instead stressed the importance of the current CoPs/TOTs arrangements and how well they have worked over the last 20 years.
26. We are concerned that, contrastingly, these proposals give the impression of having been suggested to Ofcom by some or all of the PSBs during prior conversations of which we were not aware. Ofcom refers to stakeholders wanting to change ‘some of the language used’ however, its proposals go beyond ‘language used’, striking at the heart of what the regulatory regime around PSBs and independent producers were designed to, and did, accomplish.

⁷ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p9](#)

⁸ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p30](#)

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

Impact Assessment

27. We note that the Impact assessment states that *“We expect there may be some potential for PSB gains and corresponding losses for producers in some instances for some proposed changes”*⁹. Given the difficult state of the UK production sector at present, and its importance in terms of being a source of ideas, talent and perspectives from around the UK, we are disappointed that Ofcom feels ‘losses’ for the independent production sector is an acceptable outcome.
28. A decrease in the profitability of the independent production sector, not least in the nations, will dampen the UK’s creativity and economy. The impact assessment contains no detailed analysis of the likely effect on the independent production sector, and overall UK economy, of the changes proposed allowing the bundling of primary and secondary rights and also removing the matching rights prohibition. Ofcom needs to conduct a detailed assessment, outlining the potential impact to revenue and jobs, prior to reaching any decision on these proposals.

A2.8 Updates in response to market developments:

29. In terms of the bundling of primary and secondary rights, Ofcom states 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”*¹⁰.
30. We do not agree. Any ‘flexibility’ would be on the side of the broadcaster and we have a great concern that, as stated above, PSBs’ market power would be exploited to reduce the value of producers’ IP rights to the companies from whose ideas the PSBs are benefiting.
31. While there can be a cost to negotiations, these are marginal and TAC has never stated to Ofcom that they are something which producers are having difficulties meeting. Instead, producers are quite clear that they consider any costs to be worthwhile in order to secure a deal that allows them to maximise the commercial benefits of their IP.
32. We do not agree that ‘market developments’ provide a robust rationale for fundamentally weakening producers’ rights. There is a danger in over-playing the role in the market of streaming platforms, as changes in global and national economic certainty (e.g. advertising downturns/inflationary increases) and market dynamics lead to peaks and troughs in commissioning, as well as that commissioning might take place. Streaming platforms will shift and adapt their commissioning strategies, including from one nation to another, based on a number of factors.
33. For example an over-reliance on the US at a time when that nation is focussing on domestic industry and international tariffs it is not clear the extent to which it may re-focus TV and film production more from within its own shores.

⁹ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p25](#)

¹⁰ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p26](#)

34. It should also be noted that some EU stakeholders are calling for UK works to no longer be included within the European Works quota in the Audio-Visual Media Services Directive (AVMSD). If this were to be the case, it could lead to a significant loss of income due to fewer UK-originated works being made available in the EU by platforms.
35. Ofcom proposes to alter the objectives of the Codes of Practice to include PSBs having regard to “*supporting investment and innovation in content available to viewers*”. However, this objective is inconsistent with the proposed bundling of rights. To reduce the value of independent producers’ rights through bundling would almost certainly reduce third-party investment in the independent production sector. It would also reduce the amount of money available for producers to themselves invest in developing new talent and ideas. This would be particularly acute among smaller production companies who would not have the same leverage in negotiations with PSBs.
36. If Ofcom’s proposals are due to the changes in viewing habits and new platforms being available, and therefore attempting to future proof the rights on content, it might be preferable to negotiate with the creative unions to make changes to the individual contracts, rather than imposing one major overall change that will negatively impact on the independent sector.

Welsh language

37. Ofcom states in its Impact assessment that “*we consider our proposals are likely to have positive effects or increased positive effects on opportunities to use Welsh and treating Welsh no less favourably than English*”¹¹.
38. We do not agree. Introducing measures which diminished the ability of the independent TV production sector in Wales to be profitable would therefore be detrimental to the Welsh language and culture.
39. The indigenous independent production sector in Wales is crucial to the maintaining and growth in the Welsh language, not least as the provider of almost all of S4C’s commissioned content. Furthermore, Welsh production companies, based all around the nation, are embedded in their communities and therefore help to propagate the language and to support others working in the creative industries. This includes performers, writers, artists, designers, composers and musicians, all of which similarly are engaged in promoting the use of the Welsh language.

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¹¹ [Consultation on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice. Ofcom, Jan 2025, p27](#)