Statement on revised Guidance for Public Service Broadcasters on Commissioning Codes of Practice

Implementing the Media Act 2024

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Statement

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Annex

1. Overview

1.1 Independent productions are an important element of public service media ('PSM'). They make a vital contribution to the high-quality, creative, and diverse range of content made available by the public service broadcasters ('PSBs') to meet the needs and satisfy the interests of audiences across the UK. The PSBs both support and rely on the UK's independent production sector to produce PSM content that meets evolving audience needs and represents the diversity of the UK.

1.2 This is underpinned by the regulatory framework for PSBs which imposes certain obligations on the BBC, S4C, and the licensed PSBs (the Channel 3 licensees, Channel 4 Television Corporation ('Channel 4') and Channel 5), in respect of independent productions. This includes the requirement that PSBs have a Code of Practice ('Code') which they follow when commissioning independent productions and which reflects guidance from Ofcom ('Guidance').

1.3 Following changes introduced by the Media Act 2024 ('the Media Act') to the regulatory framework for PSBs, including to the statutory provisions applying to the PSBs' Codes, we published a consultation in January in which we set out our proposals to revise our Guidance.

1.4 We received 56 responses to that consultation, including responses from the PSBs and the independent production sector. We also received further comments at stakeholder meetings. We have considered all of the information we received in response to our consultation and are now publishing our final Guidance.

1.5 The revisions we have decided to make implement the Media Act changes and reflect PSBs' greater flexibility and freedom to deliver their quotas for independent productions via their on-demand players. They also incorporate a new transparency measure to ensure that the PSBs provide information to independent producers about the application of their Codes.

What we have decided – in brief

PSBs are required to publish a Code which they follow when commissioning independent productions and which reflects Ofcom's Guidance.

We have revised our Guidance as part of our implementation of changes introduced by the Media Act. The changes we have made:

- update the objectives of the Guidance to take account of the PSBs' revised remits, the heart of which is to meet the needs and satisfy the interests of audiences across the UK;
- reflect the fact that PSBs can use their on-demand players to meet independent production quotas;
- include a provision to ensure that independent producers are made aware of the PSB's Code ahead of negotiating a commissioning contract with that PSB;
- require PSBs to retain sufficient information about commissions to demonstrate compliance with their Codes, rather than sending us annual reports; and
- update the language used in the Guidance to align with current commissioning practice and terminology.

We are not pursuing, at this time, two other proposals on which we consulted, namely: a proposal to remove the prohibition against PSBs seeking ‘matching rights’; and a proposal to relax the prohibition on the PSB seeking to ‘bundle’ primary and secondary rights when negotiating a commission. As the sector reshapes, we will continue to closely assess developments in the production of PSM content for UK audiences.

The Guidance will take effect once the Government has commenced the relevant provisions of the Media Act. We do not expect this to be before 1 January 2026. We will provide an update once we have confirmation. Ahead of the Guidance taking effect, PSBs should obtain Ofcom’s approval for updated Codes which reflect the new Guidance.

The overview section in this document is a simplified high-level summary only. The decisions we have taken and our reasoning are set out in the full document.

2. Background

Introduction

2.1 Ofcom's overarching aim when it comes to regulating PSBs is to further the interests of viewers in accordance with our general duties in section 3 of the Communications Act 2003 (the '2003 Act').[1] Having a sustainable PSB collective, which delivers on its remit – to provide a wide range of informative and entertaining programmes that reflect the diversity of the nations and regions of the UK – is crucial. In fulfilling their remit, PSBs commission much of their content from the UK's independent production sector and this is underpinned by the obligations imposed under the regulatory framework for PSBs. These obligations include a quota for each of the PSBs in respect of the hours of independent productions they transmit. The PSBs must each have a Code setting out the principles they will follow when agreeing terms for commissioning independent productions.[2] The Code must be in line with Ofcom's Guidance.

2.2 The Media Act introduced certain changes to the regulatory framework for PSBs that require revisions to our Guidance. Before outlining these, we explain how programmes are commissioned by the PSBs and some of the changes in viewing patterns and competition which provided the impetus for the Media Act changes that we are implementing.

How programmes are commissioned

2.3 When a PSB commissions content from an independent producer, it will negotiate a licence to acquire specific rights to use the programme that is made. For example, these may include exclusive rights to broadcast a programme a defined number of times, and/or to be available on-demand for a particular period. The rights that are granted in the licence to the broadcaster (the 'primary licence') are known as primary rights. They may also encompass the agreed exclusivity period in which a programme can be 'held back', preventing the producer from selling rights to make the content available on other UK channels or on-demand services. Rights outside of the primary licence are referred to as secondary rights and these may include: the right to sell and distribute content internationally; the right to sell the content formats for adaptation in international markets; and the right to broadcast content on channels or on-demand services other than the original commissioning channel, after any exclusivity period.[3]

2.4 Different types of rights have become more important to PSBs as they have accelerated their digital strategies, making their on-demand players a vital part of how they deliver for audiences. The PSBs have renegotiated their standard commissioning terms over the years and generally obtained more extensive primary rights to show content on their on-demand services.

[1] Further details on these duties can be found in Annex 1.
[2] For the licensed PSBs, see section 285(3) of the 2003 Act; for S4C, see paragraph 10(4), Schedule 12 to the 2003 Act; for the BBC, see section 198 of the 2003 Act and paragraph 8 of Schedule 3 to the Framework Agreement. In this statement, references to section 285 of the Act are to be construed as including the equivalent provisions which apply to S4C and the BBC.
[3] Pact, 2024, Pact Census 2024, p. 6.

2.5 From 2013 to 2023, PSB commissions declined in both the amount and share of total commissioning revenues, dropping from 65% (£1.7 billion) to 51% (£1.5 billion).[4] In contrast, revenue from SVoD and international commissions has accelerated, growing from 24% (£0.6 billion) in 2016 to 39% (£1.1 billion) in 2023.[5] Nonetheless, given the size of their investment, the PSBs continue to play a significant role and remain key players in the UK's successful creative sector, particularly in terms of commissioning in the nations and regions.

2.6 More generally, viewing patterns and competition for content have evolved significantly since the Guidance was last updated in 2007 when many people still relied on analogue television and less than 2% of viewing was time-shifted.[6] 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.[7] This includes a broader growth in the importance of SVoD services for audiences.[8] Related to this, secondary rights have become more significant - for example, producer revenues from international secondary rights, part of which being attributable to the growing SVoD market, grew significantly from £33 million to £64 million from 2013 to 2023.[9]

Role of the Guidance in PSB commissioning and changes made by the Media Act

2.7 Our Guidance provides broad parameters for the negotiation of rights packages by PSBs, to secure, for example, that there is an appropriate degree of transparency about the process, and the rights being acquired. The Guidance, which must be general and must not specify particular terms to be included in PSBs' commissioning agreements[10], sets out how the PSBs' Codes should secure the outcomes listed in section 285 of the 2003 Act.[11] In practice, each PSB has standard commissioning terms known as the Terms of Trade which it has negotiated with producer bodies Pact and TAC (in the case of S4C) in accordance with their Code.

2.8 As a result of changes made by the Media Act, we consulted on the following revisions to the Guidance:

[4] All monetary figures mentioned in this paragraph are converted to 2023 prices using ONS CPI. Note, figures referring to independent producers here include both qualifying and non-qualifying producers (for the purposes of the independent production quota).

[5] Ofcom Analysis using Pact census 2024 (Pact figures converted to 2023 prices using ONS CPI). Note: The 4 PSB network groups includes the main and portfolio channels for the BBC, Channel 4, Channel 5, ITV. For completeness, UK multichannel commissioning during this period declined from 20% (£0.5 billion) to 10% (£0.3 billion).

[6] See Review of the operation of the television production sector (2015) and Barb's Catch-up Viewing.

[7] See for example, Ofcom 2024, Review of Public Service Media (2019-23), Section 3 and Ofcom 2024, Media Nations: UK 2024, TV and video audience trends.

[8] For example, Netflix household penetration has risen from 16% to 58% between Q1 2015 and Q1 2024. Ofcom 2024, Media Nations: UK 2024, Figure 16.

[9] Ofcom Analysis using Pact census 2024 (Pact figures converted to 2023 prices using ONS CPI).

[10] Section 285(7) of the 2003 Act.

[11] Further details of the legal framework are provided in Annex 1.

a) **Capturing content commissioned for on-demand players to meet quotas**: prior to the Media Act, a PSB was only required to have a Code which applied to the commissioning of independent productions for broadcast on its public service television channel(s). The Media Act extended the obligation so that the PSB's Code must apply to the commissioning of independent productions for transmission on their designated on-demand player[12], where that content is intended to count towards the relevant PSB's independent production quota; and

b) **A new transparency requirement that PSBs must fulfil**: the PSB must provide such information as we consider appropriate about the application of its Code to independent producers that it commissions.

2.9 We also proposed:

- to update the objectives of the Guidance to take account of the PSBs' revised remits, at the heart of which is to meet the needs and satisfy the interests of different audiences across the UK;
- to qualify the prohibition on a PSB linking the acquisition of primary rights to the negotiation of secondary rights so that it may be waived with the express consent of the independent producer;
- to remove the prohibition on a PSB including a requirement in its commissioning contract for matching rights;
- that PSBs retain sufficient information about commissions to demonstrate compliance with its Code, rather than sending us annual reports about this; and
- to make minor updates to language used in the Guidance.

2.10 In January we published a consultation and draft Guidance. We received 56 responses to our consultation from the PSBs, the production sector and other groups which we set out in the Table 1. We also received further comments at stakeholder meetings. We have considered all of the information we received in response to our consultation in finalising our Guidance.

Table 1: Consultation respondents

PSBs	Production sector	Other
BBC	Producers Alliance for Cinema and Television ('Pact')	Creative Wales
ITV	Teledwyr Annibynnol Cymru ('TAC')	Ofcom's Advisory Committee for Scotland ('ACS')
Channel 4	43 independent production companies[13]	Ofcom's Advisory Committee for Northern Ireland ('ACNI')[14]

[12] Examples of an on-demand player include BBC iPlayer, Channel 4 On-demand/Stream, and ITV X. Under the amendments made by the Media Act, a PSB can apply to Ofcom for an on-demand player (referred to in the legislation as an 'internet programme service') to be designated so that it may then benefit from new rules in relation to prominence and availability.
[13] See Annex 3 for a list of these companies.
[14] ACNI's comments were included in their response to our consultation on Proposals to update the PSB quotas.

PSBs	Production sector	Other
Paramount/Channel 5 (‘Channel 5’)		MG Alba
S4C		Royal National Institute of Blind People (‘RNIB’)
		Sandford St Martin Trust (‘SSMT’)

Details of this Statement

2.11 The remainder of this statement is structured as follows:

- Section 3 sets out the key changes in the Guidance we are publishing with this statement, a summary of consultation responses on these issues and our decisions.
- Section 4 explains why we have decided not to proceed with our proposals in relation to bundling and matching rights on which we consulted.
- Annex 1 sets out the legal framework.
- Annex 2 sets out our assessment of the impact of our decisions including on equality and the Welsh language.
- Annex 3 lists the production companies who responded to our consultation.
- Annex 4 sets out details of additional views from respondents and our responses.

Next steps

2.12 The Guidance will take effect once Government has commenced the relevant provisions of the Media Act. We do not expect this to be before 1 January 2026. We will provide an update once we have confirmation. Ahead of the Guidance taking effect, PSBs should obtain Ofcom’s approval for updated Codes which reflect the new Guidance. PSBs should:

a) Consider/and start updating their Codes to reflect the Guidance;
b) Submit draft Codes to Ofcom for approval;
c) Engage with Ofcom as necessary;
d) Once Ofcom is content the draft Codes meet the Guidance, PSBs will be notified of this; and
e) Publish updated Codes and send to independent production companies as necessary.

3. The final Guidance

Introduction

3.1 In this section we set out details of the final Guidance. We summarise the proposals we made in the consultation, the responses we received, and our decisions in relation to the following areas:

a) Implementing the Media Act;
b) Objectives of the Guidance;
c) Reviewing and reporting arrangements and dispute resolution; and
d) Other minor updates.

3.2 We have decided to proceed with the majority of our proposals in these areas, subject to certain drafting amendments for clarity, as explained below. We received a variety of comments on other issues, which we summarise and address in Annex 4.

Implementing the Media Act

3.3 In implementing the Media Act, we proposed two main amendments to reflect the legislative changes made to the legal framework of the Guidance: (i) extending the Guidance to commissions for on-demand players and (ii) new transparency requirements.

3.4 Because the Media Act extends the scope of the Guidance to encompass commissioning for the PSBs' designated on-demand players, we also proposed changes to move away from the focus on the acquisition by the PSBs of rights for linear TV broadcast.

Extending the Guidance to commissions for on-demand players

What we proposed

3.5 We proposed changes to make clear that the Guidance (and PSB Codes) will apply to independent productions intended for:

a) The main PSB channels; or
b) The PSBs' designated on-demand players (where that content is intended to count towards meeting the relevant PSB's programming quotas for independent productions).[15]

What respondents said

3.6 PSBs and Creative Wales provided responses on this topic. Respondents accepted that the Media Act requires changes to the scope of the Guidance to take account of the PSBs' ability to use productions intended for their designated on-demand players to meet the independent productions quota.

[15] See paragraphs 2.5, 2.17-2.18, and 2.20-2.22 of the draft Guidance for examples of this.

3.7 ITV stated that paragraph 2.21 of the draft Guidance went further than the legislation, noting "*Whilst programmes included within designated internet programme services can contribute to quotas, there is no requirement that they must. Similarly, if a production is not intended to originate on a linear PSB channel it sits outside the scope of the quota, and so should also sit outside the scope of the guidance."*[16] (Emphasis as in response).

3.8 Channel 5 asked whether there will be a continuing requirement that a commission with a qualifying independent producer for the main linear PSB channel must be made in accordance with the PSB's Code and the Guidance, or whether this would only be a requirement if the PSB wants the content to count towards its quota.[17]

Our decision

3.9 We agree with ITV's position that under the Media Act changes, the Guidance does not apply where the PSB commissions an independent production for its designated internet programme service and it does not intend to use the commission to count towards its quota for independent productions. This was noted in footnote 7 of the draft Guidance, which stated, "*when we refer to made available on a designated on-demand player, we mean with a view to counting towards the PSB's quota for independent productions*". We are therefore content that the draft Guidance was consistent with the legislation.

3.10 ITV has also queried whether the Guidance applies where a PSB commissions an independent production for broadcast in the first instance on another of its television channels (i.e. not its main PSB channel). Currently, the relevant definition of an independent production is in the Broadcasting (Independent Productions) Order 1991 (the '1991 Order').[18] Where a programme falls within this definition, the PSB must commission it in accordance with its Code and the Guidance if it is to be included in its main PSB television channel.[19] This is the case even if the programme is first shown on another of the PSB's television channels.

3.11 The Government is proposing to revoke the 1991 Order and replace it with new regulations. The draft regulations which the Government has published[20] include a new definition of an independent production and which expressly excludes a programme which has previously been made available in substantially the same form on any of the PSB's qualifying audiovisual services. As matters stand, the PSB's other television channels are not '*qualifying audiovisual services*' for the purposes of this definition. Therefore, under the new regulations (as currently drafted), it remains the case that the PSB must commission the independent production in accordance with its Code and the Guidance if it is to be included in its main PSB television channel, even if the commissioned content is to be shown first on another of the PSB's television channels.

3.12 In response to Channel 5, the PSB must commission an independent production in accordance with its Code and the Guidance where the programme is to be included on its

[16] ITV response to the consultation, p.8.
[17] See Channel 5 response to the consultation, p.3.
[18] Under Article 3 of this order, a commission may fall within the definition of an independent production even if it originated on another of the PSB's television channels before being broadcast on the main PSB television channel.
[19] Section 285(1)(a) of the 2003 Act.
[20] The Broadcasting (Independent Productions) Regulations 2025.

main PSB television channel, regardless of whether the production in question is to count towards the PSB's independent production quota.[21]

3.13 We have therefore not amended the text of the final Guidance on these points, other than to note the Government's proposal to replace the 1991 Order.[22]

Securing transparency for independent producers about the Codes

What we proposed

3.14 We proposed to add the following provision explaining the information we consider that PSBs should provide to independent producers about the application of their Codes. This was to reflect an addition made by the Media Act to the list of matters the Codes must address[23]:

> "*The PSB should make the producer aware of its Code before negotiations have commenced…. The PSB's Code and all relevant documents should be readily available and easily accessible on the PSB's website (the PSB should take into account disabilities and other accessibility needs). The Channel 3 licensee in Wales, C4C, Channel 5 and S4C may publish their Codes in Welsh and English*."[24]

3.15 To reflect changes to 285(6)(c) of the Act, we also replaced 'Welsh Authority' with 'S4C' throughout the draft Guidance.

What respondents said

3.16 S4C expressed support for the amendment.[25]

3.17 Creative Wales said that they disagreed that publishing the Codes in Welsh should be discretionary for the PSBs. They said, "*in the instances of channels commissioning Welsh language content [...] the wording of the consultation [should reflect] the need for the Code of Practice to be made available through the Welsh language*".[26]

Our decision

3.18 In relation to Creative Wales' response, Ofcom does not have the power (under the legal framework relating to the Guidance or otherwise) to impose an obligation on PSBs to publish documents in Welsh. Independent producers in Wales may want to have access to Welsh language versions of the PSBs' Codes. Accordingly, given our general duty when carrying out our functions to have regard to different interests in different parts of UK, in our draft Guidance we proposed that PSBs may publish their Codes in Welsh. However, whilst it is for the PSBs to decide whether they do so, we recognise the value to stakeholders of this and encourage PSBs to do so. Accordingly, we have clarified this in our

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[21] Section 285(1)(a) of the 2003 Act.
[22] See paragraph 2.23 of the final Guidance.
[23] See section 285(3)(h) of the 2003 Act.
[24] See paragraphs 2.42 and 2.43 of the draft Guidance. Where there are related documents referred to in the Code, we proposed that these should have a corresponding weblink to make them accessible – see paragraphs 2.13-2.14 of the draft Guidance.
[25] See S4C response to the consultation, p. 1.
[26] Creative Wales response to the consultation, p. 3.

final Guidance and state that "*we consider that stakeholders in Wales value being able to access a Welsh language version of the Codes of relevant PSBs in Welsh. We therefore encourage the PSBs to publish their Codes in Welsh and English.*"[27]

Other changes to reflect the wider scope of the Guidance

What we proposed

3.19 We proposed to make various updates to the draft Guidance to reflect its wider scope as a result of changes made by the Media Act.[28] In particular, that the Guidance applies where a PSB is commissioning for its designated on-demand player with a view to the commission counting towards its quota for independent productions.

What respondents said

3.20 The PSBs made a number of drafting suggestions focussed on paragraphs 2.16 – 2.18 and 2.21 – 2.22 of the draft Guidance.

3.21 Channel 4 stated that paragraph 2.17 of the draft Guidance could be read as requiring the PSB Code to set out a specific list of the primary rights that the PSB will receive under their licence. It considered this framing was potentially at odds with its Terms of Trade. It also said that the sentence "*The Code should set out how those packages of rights are to be used and exploited"* should be removed, as this implies that rights deals must set prescriptive requirements on how programmes will be used on different services.[29]

3.22 The BBC said in relation to paragraph 2.17 of the draft Guidance that it is the Terms of Trade, not Codes, that set out how packages of rights are to be used and exploited and it would be counterproductive to the aim of allowing PSBs flexibility to include prescriptive information around how packages of rights are to be used and exploited in the Codes.

3.23 The BBC also said that paragraph 2.18 of the draft Guidance was too granular for the Code, stating that the Guidance should require the Code to recognise that "*exercise of the primary rights should cover initial uses and involve a mechanism for reuse payments*".[30]

3.24 In relation to paragraph 2.21 of the draft Guidance, the BBC requested minor drafting amendments to "*retain consistency between broadcast content and content made available on-demand and prevent scope creep.*"[31]

3.25 ITV similarly stated that paragraphs 2.17-2.18 of the draft Guidance were too specific and outdated.[32] It said this did not fit the reality of how audiences now consume content and

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[27] See paragraph 2.45 of the final Guidance.
[28] For example, at 2.17-2.22 of the draft Guidance.
[29] See Channel 4 response to the consultation, p. 5.
[30] BBC response to the consultation, p. 2.
[31] BBC response to the consultation, p.3. (amendments in bold):
"*Independent productions commissioned by another channel or service (e.g. a joint venture channel) but intended for broadcast on the main public service channel ~~(or made available on a designated on-demand player)~~ **or intended to be made available on the PSB's designated on-demand player** will ~~also~~ be subject to the Code.*
[32] At p. 9. of its response to the consultation, for example, ITV said that the draft Guidance still appears to be based in part on the way in which rights were sold previously, for instance that rights are acquired in discrete "*packages*" or that there might be an "*initial window of exploitation centred on the first transmission of an independent production on the main public service channel or release on the designated on-demand player.*" c

the fact distribution is now more wide-ranging, both in terms of services and platforms used and the length of availability. It noted, *"whilst Ofcom's guidance does not necessarily preclude this, the degree of specificity in paragraphs 2.17 and 2.18 may stray beyond what is necessary, particularly to the extent that it requires rights for linear, on demand, repeats etc to be dealt with separately within PSB Codes*".[33]

3.26 The BBC and Channel 4 both said the last sentence of paragraph 2.22 of the draft Guidance should be removed. The paragraph said: "*However, this would not prevent the PSBs from seeking to develop arrangements for use of independent productions commissioned for the PSB channel or designated on-demand player on other platforms or wholly-owned channels. If this is the case, the Code should set out the approach to be used for such arrangements*."

3.27 Channel 4 said this this sentence did not align with their way of defining rights in their Terms of Trade and believe this requirement prevents a *"flexible, cross-platform approach."*[34] The BBC considered it was "*too detailed*."[35]

Our decision

3.28 It was a common theme of a number of responses that the draft Guidance is too prescriptive. Some of the concerns raised relate to the statutory requirements that the Codes must secure, for example providing sufficient clarity about the different categories of rights being acquired, and the duration and exclusivity of rights. We have therefore not adopted stakeholder comments suggesting changes which would be contrary to the statutory requirements, such as the BBC's proposal to replace wording about different types of uses with a general statement that the exercise of the primary rights should cover 'initial uses', the BBC and Channel 4's suggestion that the last sentence of paragraph 2.22 of the draft Guidance should be removed, and the BBC's comment that it is the Terms of Trade that set out how packages of rights are to be used and exploited.

3.29 However, in response to stakeholder comments, we have made changes to address the linear focus of some drafting, and where there is scope to make it less restrictive and to improve clarity. The main changes we have made are:

a) We have removed references to language that stakeholders considered was restrictive and outdated, such as reference to 'packages of rights', 'first transmission' and 'initial window of exploitation' from paragraphs 2.17, 2.18, and 2.34 of the draft Guidance.[36] We consider that the amendments provide additional clarity for stakeholders and avoid the implication, as suggested by Channel 4, that Codes must set out unduly prescriptive detail as to how programmes will be used on different services.
b) We have adopted the BBC's suggested minor amendment for paragraph 2.21 of the draft Guidance.[37] On reflection, we considered that this provided additional clarity in terms of the scope of the legislative requirement.
c) We have amended the final sentence of paragraph 2.22 of the draft Guidance as follows to align it more clearly with the objective of providing clarity on the allocation of rights between broadcasters and producers, and use of different distribution platforms: "*If*

[33] ITV response to the consultation, p. 9.
[34] Channel 4 response to the consultation, p. 6.
[35] BBC response to the consultation, p. 2.
[36] See paragraphs 2.19, 2.20, and 2.35 of the final Guidance.
[37] See paragraph 3.24 and footnote 31 for more detail. Also see amended paragraph 2.23 of the final Guidance.

this is the case, the Code should ***ensure that there is transparency about how the rights acquired in accordance with the Code are*** ***~~set out the approach~~*** *to be used* ***~~for such arrangements~~****."*[38]

3.30 A number of stakeholders commented on the use of primary and secondary rights as terms in the Guidance. We discuss these comments in more detail in Annex 4. In light of these comments, we have added an additional paragraph to explain what these terms mean as a general matter.[39] We agree with stakeholders that it is not for Ofcom to specify in the Guidance which rights should fall within the primary licence as this is a matter for negotiation.

Objectives of the Guidance

3.31 We explained in the consultation that we had reviewed the objectives in light of market developments and the changes made by the Media Act. We said that as a result of the changes made by the Media Act, the importance of PSBs meeting the needs and satisfying the interests of different audiences across the UK is now at the heart of their remits. This was reflected in the high-level objective we proposed for Ofcom in drawing up and revising the Guidance.[40]

3.32 We also proposed to amend the objectives that the PSBs should seek to secure in their Codes[41] to provide a greater focus on facilitating the PSBs to fulfil their revised remits. For example, we proposed changes which highlighted the importance of the PSBs satisfying different audiences across the UK and that commissioning contracts should be responsive to changing audience needs.[42]

What respondents said

3.33 Five respondents (BBC, ITV, Channel 4, S4C, and MG Alba) provided comments on our proposed objectives and overall were broadly positive.

3.34 The BBC suggested that the high-level objective should be amended to include a reference to enabling PSBs to compete effectively in the UK market which they said would be in line with Parliament's intent when passing the Media Act.

3.35 MG Alba noted that the proposed high-level objective does not mention language and, in particular, that it does not mention a recognised regional or a minority language like Scottish Gaelic. They said "*if the intention of [paragraph] 2.10 [of the draft Guidance] […] is to summarise the detailed public service remit provisions in section 264 of the Communications Act 2003 as amended by the Media Act 2024 then we consider that the summarised wording and the general reference to audiences across the UK does not cover all the requirements set out in subsections (5) and (6) and, crucially for us, does not capture the more expansive requirements and inclusions in section 264 new subsection (5) relating to a recognised regional or minority language*".[43] It expressed concern that this omission meant that the full requirements of section 264 of 2003 Act, as amended by the Media Act,

[38] See paragraph 2.24 of the final Guidance.
[39] See paragraph 2.18 of the final Guidance.
[40] See paragraph 2.10 of the draft Guidance.
[41] See paragraph 2.11 of the draft Guidance.
[42] See paragraphs 2.16, 2.19, and 2.36 of the draft Guidance.
[43] MG Alba Response to the consultation, p. 2.

were not captured. It said it would prefer to see a direct reference to "*language*" or a footnote referring to the requirements of section 264(5) and (6) of the 2003 Act.

Our decision

3.36 We have carefully considered the BBC's proposal to add a reference to enabling PSB competition to Ofcom's high-level objective. We have decided not to do so since our high-level objective is intended to relate to the PSBs' overarching remit to meet the needs and satisfy the interests of audiences across the UK. In any event, Ofcom's principal duty when carrying out its functions includes furthering the interests of consumers, where appropriate by promoting competition.

3.37 In relation to MG Alba's comment, the purpose of the Guidance is to set out the manner in which the PSBs' Codes must secure the statutory requirements in relation to the commissioning of independent productions in section 285 of the Act. These do not concern specific types or genres of content that may be commissioned. While Ofcom's high-level objective is informed by the PSBs' collective remit to meet the needs and satisfy the interests of audiences, it would be inconsistent with the statutory framework for the Guidance to include more specific goals, as MG Alba has suggested.

3.38 After considering stakeholder responses, we have adopted the objectives on which we consulted in the Guidance.[44]

Reviewing and reporting arrangements and dispute resolution

3.39 We proposed minor drafting amendments to the reviewing and reporting arrangements and dispute resolution provisions which we discuss in this section.

Reviewing arrangements under the Code and reporting information to Ofcom

What we proposed

3.40 In our consultation, we clarified that if a PSB wishes to modify their Code, or a linked document where this would impact the information the PSB is required to provide under this Guidance, they must seek approval from Ofcom.[45]

3.41 We also proposed to clarify that it may be appropriate for Ofcom to revise the Guidance from time to time for a number of different reasons compared to the existing position where we may revise the Guidance following an issue raised in an application by a PSB to modify its Code.[46]

3.42 In relation to requirements for monitoring and compliance, we proposed to move away from an annual reporting requirement and to instead require PSBs to retain information

[44] See paragraphs 2.11, 2.12, 2.17, 2.21, and 2.38 of the final Guidance.
[45] See paragraph 2.38 of the draft Guidance.
[46] See paragraph 42 of the current Guidance.

which we can request. We proposed that PSBs retain this information for a minimum of three years.[47]

3.43 We considered that the changes would remove the burden of an annual reporting requirement under the Code and less onerous information retention measures would allow us to maintain oversight in a more targeted way. We said we would continue to engage with stakeholders on a regular basis to ensure we are aware of any issues, so that these may feed into our PSM reviews. Further, we would continue to receive reports from PSBs in accordance with our other functions, including information we collect to inform our annual statutory reporting on the broadcasting sector, as well as data from broadcasters that demonstrates their compliance with quotas.

What respondents said

3.44 We received comments from ITV, S4C, the BBC as well as SSMT on this topic. The PSBs who commented on this topic were supportive of our proposal to move away from an annual reporting requirement to more targeted requests for information and the requirement to retain information for compliance.

3.45 On the other hand, SSMT was in favour of the PSBs publishing information to demonstrate compliance with the guidance. In particular, SSMT set out that qualitative measures regarding the fulfilment of PSM social, cultural and democratic purposes should be introduced into the Guidance. It specifically wished to see information identifying specific genres and proposed that the PSBs should retain information to demonstrate compliance with the Code for five years.

3.46 In relation to our proposal that PSBs seek approval from Ofcom when modifying a linked document where this would impact the information PSBs are required to provide under this Guidance, the BBC suggested that we remove this. The BBC were concerned that "*this provision would introduce a more onerous approach than the current one and would for example cover website information, which we don't believe is appropriate.*"[48]

Our decision

3.47 As noted, the statutory requirements for the PSBs' Codes are concerned with commissioning independent productions and not content genres. SSMT's suggestion for qualitative measures regarding the fulfilment of PSM social, cultural and democratic purposes therefore goes beyond the statutory framework for the Guidance.[49]

3.48 We considered SSMT's suggestion that information should be retained by the PSBs for five years rather than three. SSMT did not provide reasons why five rather than three years is more appropriate. As set out in our consultation document, we initially considered whether a period of five years would be appropriate.[50] However, we were conscious of the regulatory burden this longer period would have on PSBs, which remains the case. We

[47] See paragraph 2.39 of the draft Guidance.
[48] BBC response to the consultation, p. 4.
[49] PSBs may include genre information in explaining how they have met their remit and how they plan to do so in their Statements of Programme Policy ('SoPPs'). We recently consulted separately on proposed guidance for SoPPs.
[50] See paragraph 3.39 of the consultation.

have concluded that three years remains an appropriate time frame for PSBs to retain this information.

3.49 In relation to the BBC's comment about the increased burden of requiring PSBs to seek approval when they make changes to linked documents, this only applies where changes are made to linked documents which would "*impact the information the PSB is required to provide under [the] Guidance.*"[51] The scope of the requirement on PSBs therefore remains the same and, in our view, remains appropriate. This means that changes which affect information required under the Guidance must be approved.

3.50 Having considered the responses provided by stakeholders, we have decided to proceed with our proposals.[52] We consider our decision to gather information from PSBs rather than relying on annual reports should improve our ability to gather information in a targeted manner. We will request information about commissioning practices which PSB's are required to retain, as and when we need it so that we can monitor commissioning practices.

Dispute resolution

3.51 PSBs are required to have provisions for the resolution of disputes in their Codes. In this section of the Guidance, we proposed minor drafting changes.[53] In our consultation, we noted that one of the PSBs had queried the practicality of the draft Guidance that "*a non-executive director of a PSB could be brought in as final arbiter in a dispute*", and said that we welcomed views on this point. [54]

3.52 ITV highlighted that it is not aware of any disputes ever having arisen nor do such disputes seem likely in practice. Given this, ITV said it was keen that Ofcom "*does not impose a regulatory cost in pursuit of a system for which there is no demand- the impact would not only be on smaller producers*".[55] However, ITV said to the extent the Code appears to allow for a range of solutions, they were content with the current drafting.[56]

3.53 We have decided to proceed with our proposals to make minor drafting changes to this provision.[57]

Other minor amendments

3.54 We proposed some minor changes to the Guidance to reflect the evolution of technology and industry practice and to streamline drafting. We proposed to:

a) remove or amend obsolete terminology;[58]

[51] Paragraph 3.35 of the consultation.
[52] See paragraphs 2.40 and 2.41 of the final Guidance.
[53] We proposed only minor tweaks to the drafting of the guidance, changing 'broadcaster' to 'PSB' and 'Codes of Practice' to 'Code'. See paragraphs 2.40 – 2.41 of the draft Guidance.
[54] See paragraph 2.41 of the draft Guidance.
[55] ITV response to the consultation, p. 8.
[56] At p. 9 of its consultation response, ITV noted that, in relation to the use of Non-Executive Directors for instance, the Guidance is not prescriptive, saying only that: "*One other possibility might be that a non-executive director of a PSB could be brought in as final arbiter in a dispute.*"
[57] See paragraphs 2.42 and 2.43 of the final Guidance.
[58] See paragraph 3.45 of the consultation for examples.

b) remove paragraph 30 of the current Guidance in the interests of streamlining the drafting;
c) remove the first part of paragraph 40 of the current Guidance;[59]
d) make further minor amendments;[60]
e) remove some examples which we considered no longer reflects industry practice;[61]
f) remove reference to Terms of Trade in the draft Guidance, since the role of the Guidance is to set a framework for Codes, rather than the Terms of Trade;[62]
g) change the structure of the draft Guidance so that the legal framework is set out at the beginning, making purpose and scope clearer;[63] and
h) simplify the subheadings provided at (a)-(g) of the current Guidance, which were previously a direct quote from legislation, to make the document more user friendly.

3.55 We received very few comments on these specific proposals[64] and have decided to proceed with the changes in our final Guidance. We received a variety of comments on terminology and other issues, which we summarise and address in Annex 4.

[59] See paragraphs 3.47 and 3.48 of the consultation.
[60] See paragraph 3.49 of the consultation.
[61] See paragraphs 3.50 and 3.51 of the consultation.
[62] For example, at paragraphs 10 and 25 of the current Guidance.
[63] See paragraphs 2.1-2.9 of the draft Guidance.
[64] Creative Wales said they "*recognise the value*" of the proposed changes. Channel 5 stated they were in favour of removal of references to 'new' distribution platforms. BBC commented on the removal of references to Terms of Trade which we address at paragraph 3.28. The BBC commented on paragraph 2.36 of the draft Guidance in response to our proposals which were detailed under this heading in the consultation. We address this at paragraph A4.43. ITV felt the language used in paragraphs 2.17 and 2.18 of the draft Guidance should be further updated. We address this at paragraph 3.30.

4. Proposals we are not pursuing

Introduction

4.1 In this section we set out why we have decided not to pursue two of our consultation proposals:

a) qualifying the prohibition on a PSB linking negotiations for the acquisition of primary rights to negotiations for acquiring secondary rights (known as bundling) so that the prohibition may be waived with the express consent of the independent producer; and
b) the removal of the prohibition on PSBs seeking 'matching rights', which would enable them to match third-party offers for certain rights to content they have commissioned.

4.2 We summarise below our proposals, the responses we received and our reasoning for not pursuing them in the final Guidance.

Qualifying the prohibition on bundling

What we proposed

4.3 Currently, PSBs are prohibited from linking negotiations for the acquisition and exploitation of primary rights to negotiations for secondary rights.[65] In our consultation, we proposed to qualify these constraints.[66] We proposed that linked negotiations may only progress with the express consent of the independent producer, which we considered allowed independent producers to reject any such proposals from a PSB.

4.4 The aim of our proposal was to provide PSBs with greater flexibility to negotiate a wider set of rights, taking account of when and how audiences access such content.[67] We made the proposal in light of the shift in the viewing habits of audiences to online platforms and the evolution in funding mechanisms for commissions by PSBs (for example, with the emergence of co-productions and deficit funding).

4.5 We said that qualifying the constraints could allow PSBs to commission programming across a wider set of services in conjunction with funding partners. We also said that producers may benefit from higher upfront investments from PSBs (jointly with funding partners), allowing for content to be commissioned which may not have otherwise been possible. Additionally, we considered that there may be reduced costs due to less complex or fewer rounds of negotiation for both parties.

What respondents said

4.6 PSB responses were generally supportive of our proposal, with the BBC and Channel 4 highlighting that bundling would enable them to explore a wider range of deal structures. ✂.

4.7 The BBC said that the proposal would incentivise producers to bring more expensive creative ideas that require third party funding to a PSB. In such cases, a PSB could help

[65] See paragraphs 26 and 27 of the current Guidance.
[66] See paragraphs 2.24 and 2.25 of the draft Guidance.
[67] See paragraphs 3.27 and 3.28 of the consultation.

"*broker effective editorial and windowing arrangements with the third-party investor*" which would also benefit the producer.[68] The BBC said its intention would not be to secure international rights and said that the proposal would ultimately benefit UK audiences by ensuring they have access to content on PSB services.[69]

4.8 On the other hand, Pact, TAC, the 43 production companies who responded to our consultation, Creative Wales, ACNI, and ACS raised concerns regarding the impacts of the proposal.

a) These respondents said that PSBs have significant bargaining power at the point of commissioning and producers would feel pressured to accept a bundled deal or risk losing the commission. They argued that the proposal would undercut producers' ability to raise finance in the secondary market, particularly regarding international rights.
b) Multiple respondents also argued that if the PSBs were to ask for more rights under a bundling arrangement, they would offer a lower than market rate for these rights.[70]
c) Multiple respondents also argued that bundling may lead to 'warehousing' of rights by the commissioning PSB, where the secondary rights are not fully utilised by the PSB.[71] Pact said that this risk was even more significant where a PSB's distribution arm would be required to be used by the producer as part of its terms.[72]
d) Pact further argued that the combined impacts of the bundling proposal alongside lifting the prohibition on matching rights would "*destroy the third-party market for secondary rights*"[73], suppress prices, and reduce investment.[74] They expressed concerns that this would ultimately impact the quality of programming, and further impact PSBs' revenues.[75]
e) Creative Wales, TAC, ACNI and ACS additionally expressed concerns that production companies in Wales, Northern Ireland and Scotland respectively would suffer specific negative effects as a result of the proposal, because they said that these likely to be smaller, and sometimes specialist, businesses with a weak bargaining position.[76]

Our decision not to pursue the proposal

4.9 While we do not agree with all the views presented to us on the potential adverse impacts of the proposal,[77] taking into account all responses on this issue, we consider that the extent of the potential benefits is uncertain.

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[68] BBC response to the consultation, p. 3.
[69] BBC response to the consultation, p. 3-4.
[70] For example, see Pact response to the consultation, paragraph 1.19; TAC response to the consultation, paragraph 9; Creative Wales response to the consultation, p. 1; ACS response to the consultation, p. 2; Fremantle UK response to the consultation, p. 2.
[71] We received 13 responses on this issue. See, for example, Pact response to the consultation, paragraphs 1.25-1.30; 3 minutes West response to the consultation, p. 1; Strong Film + Television response to the consultation, p. 1; Treason Films Ltd. response to the consultation, p. 1; True North Productions response to the consultation, p. 1; Vox Pictures response to the consultation, p. 1.
[72] Pact response to the consultation, paragraph 1.26.
[73] Pact response to the consultation, paragraph 1.41.
[74] See Pact response to the consultation, paragraphs 1.41-1.47.
[75] See Pact response to the consultation, paragraphs 1.48-1.49.
[76] Creative Wales response to the consultation, p. 1; TAC consultation response, p. 2 and p. 5; ACS response to the consultation, p. 2; ACNI response to Ofcom's consultation on proposals to update the PSB quotas, p. 2.
[77] For example, in its response, Pact disputed our analysis of the market arguing that PSBs still retain significant bargaining power as they differ in broadcasting strategy and remit from SVoDs, and, whilst costs are high for a

4.10 Although PSBs have expressed support for our proposal, the responses did not include significant details of the scale or likelihood of potential benefits, nor did any PSB suggest that there was a pressing case for relaxing the prohibition on bundling.

4.11 The Guidance is not prescriptive as to the nature of primary and secondary rights, and, as demonstrated by the evolution in the primary rights acquired by PSBs since the Guidance was last updated in 2007, the Guidance allows for flexibility in the nature of the rights that can be acquired under the primary licence. Primary rights encompass any rights which the independent producer agrees to make available to the PSB as a result of the commission (which we discuss in further detail in Annex 4). The BBC recently updated its Code amending, amongst things, text regarding arrangements with funding partners which is an example of the flexibility afforded by the current Guidance.[78] We therefore consider there is flexibility within the current Guidance which does not create a significant barrier to the PSBs pursuing alternative funding structures.

4.12 Weighing this alongside the concerns highlighted by other stakeholders on the potential negative effects of the proposal, we have decided not to implement the proposed change at this time.[79]

Removal of the prohibition on matching rights

What we proposed

4.13 The current Guidance prohibits a PSB from securing matching rights provisions or provisions which have that effect.[80] In our consultation, we proposed to remove the prohibition such that PSBs would have the ability to match third-party offers for certain rights to content they have commissioned.[81]

4.14 We proposed that matching rights may benefit PSBs by better enabling them to secure the ongoing availability of content on their platforms, where there may otherwise be competing offers from other third-party buyers after the expiration of a primary licence. We said this would also help PSBs better serve audience interests, particularly where that content has become associated with the PSB. Additionally, given the evolution in viewing patterns and increased competition for content from other buyers (e.g. SVoDs), we said that there was no longer a sufficient case for believing that enabling a PSB to secure matching rights might have an adverse effect on competition.

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producer to switch to another broadcaster, PSBs can switch to another producer or their in-house studio with ease. We consider that while PSBs are a key commissioner in the UK production sector, SVoDs and multichannels are commissioning more UK content from an increasingly diverse range of genres, while PSBs are shifting towards commissioning programmes with a focus on 'high-impact' content, to compete with global players for audiences. Many producers are looking to adapt to the shifting market to supply across multiple commissioners and genres. Further related evidence is set out in our Public Service Media Review.

[78] See paragraph 3.3 of the BBC's Code

[79] In light of our decision not to proceed with the bundling proposal and in the interests of consistency, paragraph 2.27 of the final Guidance reads as follows: "*The Codes should not prescribe a particular funding arrangement nor allow for any automatic bundling of rights as between primary and secondary exploitation ~~unless this is agreed by both parties~~*." (words in strike out are in the current Guidance but have not been retained).

[80] Paragraph 28 of the current Guidance.

[81] Paragraph 2.26 of the draft Guidance.

What respondents said

4.15 PSBs expressed varying levels of support for the proposal, with some stating that there was ambiguity in the types of matching rights and the stages in the programme's lifecycle at which matching rights could apply. PSBs highlighted that not all matching rights (e.g. at the funding stage before final commissioning) may deliver the benefits that we had anticipated in the consultation. Some PSBs requested further clarity around our intention in this respect.

a) The BBC noted that matching rights should be an option at the end of the licence period for programmes initially commissioned and made for the PSB. However, it noted that allowing matching rights for first-time commissions carried risks, such as, a potential detrimental effect on third-party funding.[82]
b) Channel 4 similarly noted that while the proposal may allow a PSB to secure a consistent presence of independently produced content, the impacts may differ based on the different stages of a programme's lifecycle to which matching rights may apply.[83]
c) Channel 5 welcomed the change regarding matching rights. However, it noted that for long-running franchises, there would likely be competition from a range of buyers suggesting that matching rights provision for a PSB may not be sufficient for it to retain content on its service.[84]
d) ITV said that ✂[85]

4.16 Pact, TAC, the 43 production companies who responded to our consultation, Creative Wales, ACNI, and ACS raised concerns regarding the proposal.[86] We summarise these concerns below:

a) The respondents said that matching rights are 'anti-competitive', deterring third party buyers such as independent distributors from entering into a negotiation with the producer in the first place, as they would not want to disclose their pricing only to lose out to a PSB. This would affect a producer's ability to raise finance for future programmes.
b) Pact further stated that this would weaken the producer's relationships with distributors and restrict the producer's commercial freedom.[87]
c) Multiple production companies and Pact raised concerns that where PSBs know how third-party buyers value the projects, they are likely to choose the more profitable one to exercise their right to match, leaving the distributors with less profitable and riskier projects (i.e. 'cherry-picking').[88]

[82] See BBC response to the consultation, p. 4.
[83] See Channel 4 response to the consultation, p. 5. and p. 6.
[84] See Channel 5 response to the consultation, p.4.
[85] ✂
[86] Pact also set out other impacts of matching rights (in conjunction with the bundling proposal) which we have already stated in paragraph 4.8 (d). TAC, Creative Wales, ACNI and ACS also had similar concerns for matching rights as with bundling, as set out in paragraph 4.8 (e).
[87] Pact additionally submitted results from a survey they undertook with 18 distributors – see Pact's Annex 2 Survey of Distributors.
[88] For example, Pact response to the consultation, paragraph 1.37; Arrow International Media Ltd. response to the consultation, p. 2.

d) Dartmouth Films highlighted that if a production is being made under the Global Screen Fund, it has to have non-UK partners. In these cases, it argued, if a UK based PSB matched one of the other international funders and by doing so, disqualified the film for funding in that territory, their whole finance plan would collapse.[89]

Our decision not to pursue the proposal

4.17 While there may be benefits to PSBs and audiences from our proposal,[90] the consultation responses suggested that matching rights is a complex issue and that a blanket removal of the prohibition on matching rights may not deliver the benefits to audiences that we had initially anticipated.

4.18 A blanket removal may inadvertently lead to matching rights being applied at other stages of the programme's lifecycle, such as the funding stage, with unintended negative consequences. It is our understanding that the production sector respondents, Creative Wales, ACNI, and ACS, have largely interpreted matching rights to apply at the funding stage. Consequently, they have outlined their concerns about this having adverse impacts in relation to the funding of independent productions.

4.19 We also note that some PSBs have expressed reservations about the extent of the benefits of our proposal, specifically where they face competition from and are likely to be outbid by other bigger and better funded commissioners (e.g., SVoDs).

4.20 Given the reasons above, we have decided not to take the proposal forward in our final Guidance.[91]

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[89] See Dartmouth Films response to the consultation, p. 2.

[90] Specifically, there may be benefits when matching rights apply at the end of the primary licence period for a PSB to be able to retain the programme for its audience.

[91] We have removed the words "*We believe that such provisions could stifle competition*" from paragraph 2.28 of the final Guidance. We explain our position in this statement and the inclusion of a rationale within the Guidance is not required for the purposes of that document.

A1. Legal framework

A1.1 In this annex, we summarise the statutory provisions which are relevant to this statement and the corresponding Guidance.

A1.2 We first set out Ofcom's general duties under section 3 of the 2003 Act and other duties which we must fulfil when carrying out functions. We then describe the statutory framework applicable to PSBs which is relevant to our Guidance and the PSBs' Codes.

Ofcom's general duties

A1.3 Ofcom's general duties when carrying out its functions are set out in section 3 of the 2003 Act and include its principal duty to further the interests of citizens in relation to communications matters and consumers in relevant markets, where appropriate, by promoting competition.

A1.4 In carrying out our functions, we are required to secure certain objectives, including:

- the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
- the maintenance of a sufficient plurality of providers of different television and radio services; and
- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services.

A1.5 We must also have regard to a number of matters including:

- the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the UK;
- the desirability of encouraging investment and innovation in relevant markets; and
- the desirability of promoting competition in the relevant markets; and
- In performing its general duties, Ofcom must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice.

A1.6 In addition to Ofcom's general duties, the following statutory duties are relevant for the purposes of this statement.

Economic growth duty

A1.7 Section 108 of the Deregulation Act 2015 sets out Ofcom's duty to have regard to the desirability of promoting economic growth when exercising its regulatory functions. In order to consider the promotion of economic growth, Ofcom will exercise its regulatory functions in a way that ensures that:

- regulatory action is taken only when it is needed; and

- any action taken is proportionate.[92]

A1.8 The government's statutory guidance on this duty recognises drivers of economic growth to include innovation and competition.

Public sector equality duty

A1.9 Section 149 of the Equality Act 2010 (the 2010 Act) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation, and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

A1.10 Section 75 of the Northern Ireland Act 1998 (the 1998 Act) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and have regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom's Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the 1998 Act.

Welsh language duty

A1.11 The Welsh Language (Wales) Measure 2011 established a legal framework to impose duties on certain organisations to comply with standards in relation to the Welsh language. The standards issued to Ofcom are listed in Ofcom's compliance notice effective from 25 January 2017.

A1.12 The Welsh Language Policy Making Standards require Ofcom to assess (a) opportunities for persons to use the Welsh language, and (b) treating the Welsh language no less favourably than the English language, when formulating a new policy or reviewing or revising an existing policy.

The relevant statutory framework as regards PSBs

A1.13 The PSBs have a number of different regulatory obligations. These include:

- their collective remit to make available a broad range of audio-visual content which meets the needs and satisfies the interests of as many different audiences as possible, considering when and how the programmes are accessed, as well as the nature of the programmes and the subject matters covered by them;[93]

[92] Section 108(2)(b) of the Deregulation Act 2015.
[93] Section 264(4) of the 2003 Act. In addition, the range of content the PSBs, taken together, make available must include material meeting the requirements in section 264(4) – (6) of the 2003 Act. These include making available an appropriate range of independent productions with an appropriate combined duration (section 264(5)(d)(i)).

- their programming quotas,[94] including a quota to include in their broadcast public service channel or their designated online player, independent productions (as defined in the 1991 Order made by the Secretary of State).[95]

A1.14 Under their respective regulatory frameworks, each PSB is required to have a Code, which must set out the principles which the PSB will apply when agreeing terms for the commissioning of independent productions.[96]

A1.15 The Codes must secure, in the manner described in Guidance issued by Ofcom the following outcomes:

a) a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;
b) there is what appears to Ofcom to be sufficient clarity, when an independent production is commissioned, about the different categories of rights to broadcast or otherwise to make use of or exploit the commissioned production that are being disposed of;
c) there is what appears to Ofcom to be sufficient transparency about the amounts to be paid in respect of each category of rights;
d) what appear to Ofcom to be satisfactory arrangements are made about the duration and exclusivity of those rights;
e) procedures exist for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it;
f) those procedures include requirements for the monitoring of the application of the code and for the making of reports to Ofcom;
g) provision is made for resolving disputes arising in respect of the provisions of the code (by independent arbitration or otherwise) in a manner that appears to Ofcom to be appropriate; and
h) that such information about the application of the code as Ofcom consider appropriate is given to persons who make independent productions that are to be commissioned in accordance with the code.[97]

A1.16 We are required to issue guidance to assist PSBs in drawing up their Codes (Guidance).[98] The Guidance must be general guidance and must not specify particular terms to be included in the commissioning agreements to which the Guidance relates.

[94] For the licensed PSBs, see, e.g., section 277 of the 2003 Act; for S4C, see paragraph 7 of Part 2 of Schedule 12 to the 2003 Act; for the BBC, see paragraph 1 of Part 1 of Schedule 12 to the 2003 Act and paragraph 6, Schedule 3 of the Framework Agreement. The Framework Agreement will need to be updated by the Secretary of State to reflect the legislative amendments made by the Media Act.
[95] The Government is proposing to make new regulations which revoke the 1991 Order. The draft regulations, The Broadcasting (Independent Productions) Regulations, can be found here Media Act: supporting documents - GOV.UK. It needs to be laid before Parliament and requires approval by both Houses of Parliament.
[96] See section 285(2) of the 2003 Act for the licensed PSBs; for S4C, see paragraph 10(3)(c) of Schedule 12 to the 2003 Act; for the BBC, see paragraph 8(2) of Schedule 3 to the BBC Framework Agreement. Amendments made by the Media Act to Schedule 12 of the 2003 Act will, in due course, place the requirement for the BBC to comply with a Code on a statutory basis (see amendments made to paragraph 1(1)(a) of Schedule 12, not yet in force). As above, the Framework Agreement will need to be updated by the Secretary of State to reflect the legislative amendments made by the Media Act.
[97] Section 285(3)(h) of the 2003 Act.
[98] Section 285 of the 2003 Act.

A1.17 We are required to consult PSBs and persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC and S4C about any revisions we propose to make to this guidance.[99]

[99] Section 285(6)(c) of the 2003 Act.

A2. Assessing the impact of our decisions

A2.1 In this Annex, we set out the assessment of the impact of our decisions including the impact on equality and the Welsh language. The impact assessments consider the changes we are taking forward in the final Guidance as outlined in the main body of this statement. We have taken account of relevant stakeholder responses when arriving at our final impact assessments, as discussed in the main body of this statement.

A2.2 Specifically in relation to two of our consultation proposals, qualifying the prohibition on bundling and the removal of the prohibition on matching rights, several stakeholders highlighted the adverse impacts on the production sector, with Creative Wales and TAC expressing concerns on the disproportionate impact on the Welsh production sector with subsequent implications for Welsh language content.[100] Given that we are not pursuing either proposal in the final Guidance (see section 4), we have not considered these responses further in our impact assessments.

Impact assessment

A2.3 Section 7 of the Communications Act 2003 requires us to carry out and publish an assessment of the envisioned impact of implementing a change which would be likely to have a significant impact on businesses or the general public, or when there is a major change in Ofcom's activities. Impact assessments help us to understand the policy decisions we have decided to take and why we consider those decisions best fulfil our applicable duties and objectives in the least intrusive way.

A2.4 We have considered the potential impacts of our changes – in particular, on audiences, PSBs and producers. We have considered these impacts relative to an alternative where we make only the narrowest set of changes necessary for our Guidance to be consistent with the amendments made to the legal framework by the Media Act.

A2.5 We are required to update our Guidance as part of our work to implement the Media Act. While the requirement to produce Codes is not new, the changes brought about by the Media Act will involve changes to types of commissioning covered by Codes and the addition of a new principle the Codes must achieve.

A2.6 For the avoidance of doubt, we have not assessed the impact of the changes made by, or that are required by, the Media Act.[101] These relate to the extension of the PSB's Code to commissions of independent productions for its designated on-demand player, where that

[100] Pact raised specific concerns that our impact assessment of the two proposals lacked quantification and that it did not sufficiently consider the impacts on competition and sustainability of the production sector, or the promotion of economic growth. With regards to Pact's specific concerns, we consider that generally, in accordance with our Impact Assessment Guidance, we will give appropriate weight to all impacts whether we have quantified these or not. We also consider that our principal duty is to further the interests of consumers, where appropriate by promoting competition. In our impact assessments in this document, we have considered impacts on and the need to balance these for audiences, PSBs, and the production companies.

[101] This is in line with our Impact Assessment Guidance which states that an impact assessment will not be required when legislation requires us to intervene in a particular way (although we may carry out an impact assessment where we have discretion over the precise manner in which we intervene).

content is intended to count towards the PSB's independent production quota. In relation to the new transparency requirement, whereby the PSB must provide information about the application of its Code to independent producers that it commissions, we have discretion on the precise implementation of this. Thus, we have included this in our impact assessment.

A2.7 In addition to implementing the legislative changes introduced by the Media Act, we have made further changes; the impacts of which we assess below. We have made updates to the objectives of the Guidance to better align with the revised remit of PSBs under the Media Act. Further, as the Guidance has not been updated since 2007, we have made updates to the reviewing and reporting arrangements and other minor changes to the language to improve clarity and better reflect current industry practices.[102]

Assessment of overall impacts

A2.8 Overall, we expect our changes are unlikely to lead to material deviations from current practice or outcomes. We consider that the aggregate impact of the changes will be positive, proportionate, and will fulfil our objectives in the least intrusive way. The most direct impacts fall on PSBs and producers, although we note that some of the relevant benefits would pass through indirectly to audiences (e.g. our revised objectives have a greater focus on supporting PSBs in meeting the interest of viewers.) Drawing from our discussion in section 3, our view as to the likely impact of specific changes is set out below.

Assessment of impacts of specific changes

A2.9 **Transparency related amendments:** Our change to ensure the Codes are transparent by requiring PSBs to include Codes and relevant documents on their website (see paragraph 3.14 and footnote 23) is likely to benefit producers by making information more easily accessible relative to current practice. Any increase in the administrative burden for PSBs is likely to be minimal and we expect the net impact to be positive. We do not expect this to result in any detrimental impact on audiences.

A2.10 **Revising the objectives of the Guidance:** Our revised objectives have a greater focus on supporting the PSBs in fulfilling their revised remits so as to further the interests of viewers (see paragraph 3.34). We expect any impact from our changes to objectives to be beneficial for PSBs, independent producers, and audiences. This is because the fulfilment of the PSB remit involves support for both independent production sector and ensuring that viewer interests are met.

A2.11 We have made other changes to the text to better align with the revised objectives, for example, PSBs' commissioning contracts and the rights they seek to acquire should be responsive to changing audience needs (see paragraph 3.35). While we do not expect any significant impacts, we consider the changes will be beneficial, by clarifying the importance of rights packages evolving in line with audience needs while balancing the interests of PSBs, producers and audiences.

A2.12 **Reviewing and reporting arrangements:** We have decided to make minor amendments to this section of the Guidance:

[102] We have also made minor changes to the drafting of dispute resolution within the final Guidance as proposed at consultation. Given these are minor drafting amendments, we consider the impacts of these under 'Other minor amendments' within the impact assessment here.

a) We have clarified that where PSBs make modifications to any document linked to the Code, they must seek approval from Ofcom if that document contains information that PSBs are required to provide under this Guidance (see paragraph 3.43). As explained, this is not a change to the current requirement and therefore does not give rise to any additional impacts.

b) We have also clarified that it may be appropriate for Ofcom to revise the Guidance from time to time rather than only when an issue is raised by a PSB (see paragraph 3.44). We consider the overall impact of this change is likely to be positive because it will help to ensure that the Guidance adapts to developments in technologies and industry practices, benefitting the PSBs, producers and audiences. We consider that these benefits outweigh the potential for some administrative burden for PSBs where revisions to the Guidance leads to additional reviews of their Codes.

c) In relation to reporting arrangements, we have amended the Guidance to require that PSBs retain necessary information to demonstrate compliance with the Code for a minimum period of three years rather than produce and submit an annual report (see paragraph 3.45). We consider this will reduce the administrative burden on PSBs relative to the current arrangements to produce and submit annual reports. We do not anticipate any impacts from this change on producers or audiences.

A2.13 **Other minor amendments:** We have made a number of other minor updates to the Guidance (see paragraphs 3.57 and 3.58). We expect any impacts arising in relation to these changes to be positive by making the Guidance easier to understand for PSBs, producers and other stakeholders.

Equality impact assessment

A2.14 Section 149 of the Equality Act 2010 (the 2010 Act) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to protected characteristics under the 2010 Act.[103] The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

A2.15 Ofcom has separate but complementary duties under Northern Ireland's equality legislation.[104] This requires Ofcom to screen policies for their impact on equality of opportunity and/or good relations in each of the nine equality categories identified for Northern Ireland.

A2.16 We have given careful consideration to whether the changes we have made to the Guidance will have a particular impact on persons sharing protected characteristics (including race, age, disability, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership and religion or belief in the UK and also dependents and political opinion in Northern Ireland), and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations.

[103] These protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
[104] Section 75 of the Northern Ireland Act 1998.

This assessment helps us comply with our duties under the Equality Act 2010 and the Northern Ireland Act 1998.

A2.17 We consider that some of our changes are likely to have a positive impact on certain groups - specifically, groups with accessibility requirements. This is because we are requiring that the Code and all relevant documents to be readily available and easily accessible on the PSB's website, and that the PSB should take into account disabilities and other accessibility needs. We consider that the other changes we have made are likely to have a neutral impact in respect of persons sharing other protected characteristics.

Welsh language

A2.18 The Welsh language has official status in Wales.[105] To give effect to this, certain public bodies, including Ofcom, are required to comply with Welsh language standards in relation to the use of Welsh, including the general principle that Welsh should not be treated less favourably than English in Wales.[106] Accordingly, we have considered the potential impact of our review on (i) opportunities for persons to use the Welsh language; and (ii) treating the Welsh language no less favourably than the English language.

A2.19 To the extent we have discretion in the formulation of the changes to the final Guidance, we have considered the potential impacts on opportunities to use Welsh and treating Welsh no less favourably than English where relevant. In particular, in relation to the requirement that PSBs publish their Codes, we have encouraged the PSBs to publish their Codes in Welsh and English. We consider the changes are likely to have positive effects or increased positive effects on opportunities to use Welsh and treating Welsh no less favourably than English.

[105] Section 1(1), Welsh Language (Wales) Measure 2011.
[106] The Welsh language standards with which Ofcom is required to comply are available on our website.

A3. Production companies who responded to our consultation

A3.1 The following production companies responded to our consultation[107]:

- 3 Minutes West
- 72 Films
- Arrow International Media
- Beagle Media
- Brinkworth Productions
- Buccaneer
- Content Kings
- Dancing Ledge
- Dartmouth Films
- Drama Republic
- Element Pictures
- Firecrest Films
- Fremantle UK
- LA Productions
- Magical Society
- New Light Studio
- Noho Film & TV
- Old Hall Films
- Planispheres
- Red Planet Pictures
- Redeeming Features
- Roughcut TV
- Strong Film & TV
- The Illuminated Film Company
- Treason Films Ltd
- True North Productions
- Vox Pictures
- Woodcut Media

[107] Three additional production companies responded but requested that their full responses remain confidential. Three production companies requested that their names be removed from their published responses. We have marked these responses as 'Name withheld' accordingly for publication. A further nine production companies did not confirm the confidentiality status of their responses. As such, we have also treated these responses as confidential.

A4. Additional comments from respondents

A4.1 We received a number of comments on the draft Guidance which were ancillary to the key issues discussed in sections 3 and 4 of this statement. In this annex, we set out our responses to these ancillary comments, explaining where we have made changes to the Guidance in response and where we have not. The comments discussed in this annex cover a variety of issues, but we have grouped them and our responses into:

a) Other responses on changes made to reflect the wider scope of the Guidance; and
b) Other stakeholder comments.

a) Other responses on changes made to reflect the wider scope of the Guidance

A4.2 We received a range of comments from PSBs on issues relating to defining primary and secondary rights, and the prescriptiveness of the Guidance, each of which we discuss in turn.

Defining primary and secondary rights

What respondents said

A4.3 ITV made the following comments in relation to primary and secondary rights:

- They suggested that the current concept of 'primary' rights should be replaced with the concept of 'principal' rights which they say is less suggestive of the rigidly channel-based, time-based world in which 'primary' was conceived. They stated: "*As before, producers will retain all other rights, which we might label 'residual' rights - i.e. those that do not form part of the 'principal' package*".;[108]
- They stated that ✂.

A4.4 ITV said it should not be for Ofcom to determine which rights are within the primary licence, in relation to the following statement in the draft Guidance: "*by agreement, certain categories of rights already tend to rest with the producer e.g. international secondary rights and merchandising. We would not expect PSBs to seek to extend the scope of their control over the way in which such rights are exploited beyond that which is agreed in the primary licence*".[109]

A4.5 Channel 4 said that whilst it is clearly necessary for PSB Codes to clearly set out the respective rights of PSBs and producers, they urged Ofcom to clearly set out that it is acceptable for respective rights to be defined negatively – i.e. with reference to what is not included, as well as positively.

[108] ITV response to the consultation, p. 2.
[109] See paragraph 2.24 of the draft Guidance. Discussed in ITV's response to the consultation, p. 9-10.

A4.6 In their response, the BBC said that when the Guidance was last revised in 2007, there was a "*much stronger delineation between primary and secondary markets*"[110] and that, in order to provide content in a way that meets the needs of as many different audiences as possible, it is important for PSBs to have flexibility as to how they acquire rights.

A4.7 Channel 5 said they are not always able to meet viewer expectations and demands without a "*guaranteed and reasonable window of non-linear distribution included in the 'primary rights' for high-cost productions*".[111] They said their reading of the proposals is that Ofcom expects digital distribution to be included within the primary rights negotiation without separate, additional payment to producers for such distribution.

Our responses

A4.8 The outcomes which the PSBs' Codes must secure under section 285(3) of the 2003 Act includes providing, when commissioning an independent production, sufficient clarity about the different categories of rights being acquired. The provision does not specify the types of rights that should be included in a commissioning contract. It therefore allows for flexibility in the nature of the rights to be acquired in any commission.

A4.9 The draft Guidance did not provide any fixed definition in terms of the type of rights that will be granted in a primary licence; primary rights encompass any rights which the independent producer agrees to make available to the PSB as a result of the commission. Today, they are likely to include rights to make the programme available on on-demand players and potentially other platforms to meet audience demand. Secondary rights are defined by what is not included in the primary licence between the independent producer and the PSB. The two categories are flexible in nature – what is captured by them depends on the negotiated contract.

A4.10 We therefore consider the concepts of 'primary' and 'secondary' rights used in the draft Guidance match ITV's concepts of 'principal' and 'residual' rights and the only difference is in the terminology used. We are not persuaded that there is a case for changing the terms used in the Guidance, given that primary and secondary rights appear to be terms well understood and used by stakeholders.[112]

A4.11 We therefore consider that use of the terms 'primary' and 'secondary' rights in the final Guidance remains appropriate. As explained in section 3, we have added a new paragraph[113] to add clarity around the meaning of primary and secondary rights within the context of the Guidance.

A4.12 In light of the requirement for the PSBs' Codes to secure sufficient clarity about the different categories of rights being acquired, we agree with ITV that it is not the role of the Guidance to ensure what should or should not be rights in the primary licence. The example given in the draft Guidance about certain rights tending to rest with producers, e.g. international secondary rights and merchandising[114] was provided for illustrative

[110] BBC response to the consultation, p. 3.
[111] Channel 5 response to the consultation, p. 2.
[112] By way of example, the terms are used and defined in accordance with the approach in paragraph A4.9, in the glossary to the Pact Census, Pact Census 2024, p. 6.
[113] See paragraph 2.18 of the final Guidance.
[114] See paragraph 2.24 of the draft Guidance.

purposes and does not preclude other agreements between the PSB and the independent producer being reached. We therefore have retained this example in the final Guidance.[115]

A4.13 In relation to ITV's comment about the potential form of a primary licence, as noted, it is not the role of the Guidance to determine what rights should be included in the primary licence, nor how they should be structured. However, the PSBs' Codes must secure that there is sufficient clarity about the rights being acquired and the duration and exclusivity of such rights, in the manner described in the Guidance.

A4.14 In relation to Channel 4's comment, it is for the PSB to determine how its Code secures clarity about the rights being acquired by the PSB in accordance with the Guidance.

A4.15 In response to the BBC's comment, we agree that there is a need for flexibility in terms of the rights that PSBs acquire in the primary licence so that they can meet audience needs. Nonetheless, the legislative framework (as described in Annex 1) requires that the PSBs each have a Code that secures the objectives set out in section 285 of the Act, in the manner described in the Guidance.

A4.16 Channel 5's reading of Ofcom's draft Guidance is not correct. In line with the position in the current Guidance, the commercial terms for the rights acquired in the primary licence are a matter for negotiation between the parties, albeit that the PSB must provide in its Code sufficient transparency about its methodology for calculating indicative tariffs.[116]

Comments about the prescriptiveness of the Guidance

What respondents said

A4.17 The BBC, ITV, and Channel 4 all stated that the requirement that "*the Code should set out how the PSB approaches particular promotional uses*"[117] was too prescriptive. ITV stated that this was "*unduly constraining given the speed with which content distribution and promotion is changing*".[118] Channel 4 said that the requirement was not in line with current practices.[119]

A4.18 We received a number of other comments from PSBs about the prescriptiveness of paragraphs 2.17 – 2.22 of the draft Guidance. These comments are detailed in section 3, together with changes we have made in response to those comments.

Our responses

A4.19 We consider it is appropriate for the PSBs' Codes to deal with promotional use to provide clarity about the rights being acquired when commissioning an independent production, as required by section 285 of the 2003 Act. The draft Guidance required the PSB to set out in their Code their approach to particular promotional uses, without further specificity as to how the PSB should do this. It therefore provides flexibility and allows for any changes to the PSB's approach over time. The proposed amendment in the draft Guidance provides more flexibility than previously as it simply requires PSBs to set out their "*approach*" to

[115] See paragraph 2.26 of the final Guidance.
[116] See paragraph 2.30 of the final Guidance.
[117] See paragraph 2.23 of the draft Guidance.
[118] ITV response to the consultation, p. 7.
[119] See Channel 4 response to the consultation, p. 6.

promotional uses, as opposed to providing rigid definitions. We have therefore decided to retain the drafting in the final Guidance.[120]

b) Other stakeholder comments

A4.20 We received a number of comments on other points concerning the draft Guidance, which we have grouped by reference to the relevant outcome addressed by the Guidance in accordance with section 285 of the 2003 Act. We also received a comment regarding accessibility. In each case, we set out a summary of the comments and our responses to them.

Reasonable timeframes for negotiations and conclusions of binding agreements

Ensuring adequate separation

A4.21 The BBC requested that paragraph 2.15 of the draft Guidance be amended as follows: "*A PSB's Code should set out* ***~~how~~ that*** *it will ensure an adequate separation of responsibilities for programme commissioning from the management and operation of in-house production activities, where they exist*."[121]

A4.22 Adopting this change would remove the need for PSBs to provide an explanation as to *how* they ensure an adequate separation of responsibilities, which we do not consider to be appropriate. Where a PSB fulfils this requirement through another reporting mechanism, it is open to the PSB to provide its explanation by reference to that other mechanism. We have therefore decided to retain the drafting in the final Guidance.[122]

Sufficient transparency about the amounts to be paid for each category of rights

A4.23 In relation to the requirement that the Codes should provide details of the "*broad methodology*" that the PSB uses to draw up indicative tariffs,[123] the BBC said that the methodology for preparing the indicative tariffs is published separately by the BBC as part of the tariffs, not included in the Code. The BBC also said that the requirement in the draft Guidance for the PSB to set out in its Code arrangements for rights on different platforms should be deleted as this is inconsistent with the stated objective for platform neutrality in paragraph 2.11 of the draft Guidance.

A4.24 Channel 5 raised similar concerns, noting that whilst they do publish tariffs, in practice pricing each programme is treated on a case-by-case basis based on the budget required to meet its editorial objectives.[124]

A4.25 In relation to the BBC's comment that it publishes information about the broad methodology used to draw up indicative tariffs separately from the Code, this is an option available to PSBs if the separate document is clearly linked to the Code. As explained in paragraph 3.43, the PSB must follow the approval process for any changes to linked

[120] See paragraph 2.25 of the final Guidance.
[121] BBC response to the consultation response, p. 5.
[122] See paragraph 2.16 of the final Guidance.
[123] See paragraph 2.30 of the draft Guidance.
[124] See Channel 5 response to the consultation, p.3.

documents which would impact the information PSBs are required to provide under the Guidance.

A4.26 We do not agree with the BBC's suggested deletion. While the focus of the Guidance is on commissions where the PSB acquires rights for its main TV channel and/or its designated on-demand player, the Guidance anticipates that the PSB may also acquire rights for other platforms. It is therefore appropriate for the Guidance to state that the PSB should set out in its Code arrangements for such rights which we have decided to retain in our final Guidance.[125] We do not consider this is inconsistent with the objective of platform neutrality.

A4.27 In relation to Channel 5's comment, the requirement for the PSB's Code is to provide the broad methodology used to prepare indicative tariffs. This allows for pricing of individual commissions to be negotiated on a case-by-case basis.

A4.28 ITV, Channel 5 and the BBC all commented on the section of the draft Guidance which deals with tariff ranges for productions that have limited post- transmission value. ITV said that it should be made clear in the Guidance that the tariff range should be sufficiently broad to be capable of covering the typical full production cost should apply only where PSBs can economically fund a particular genre in full.[126]

A4.29 Channel 5 said that it typically covers the full cost of production and assumes all the risk regardless of secondary value. It said that where it could not do so, it generally used third party distributors and tax credits to make up the shortfall.[127]

A4.30 The BBC said the section was out-of-date and suggested that the following sentences should be removed: *"…at the point of commission, it may not be clear how much value could be attributed to secondary and subsequent exploitation. PSBs and producers ought to be able to agree appropriate risk sharing mechanisms to deal with this uncertainty and PSBs should not, therefore, move to reduce the price they pay for programming in anticipation of potential market developments*."[128]

A4.31 Having considered these comments, we do not consider that changes are required to this section of the Guidance.[129] Channel 5's comment demonstrates that there is no requirement on the PSB to fund a production in full and that it is open to the PSB to seek alternative funding arrangements as part of its negotiations with the independent producer.

Satisfactory arrangements about the duration and exclusivity of rights

Automatic right to extend licence period

A4.32 Both Channel 4 and Channel 5 commented on the provision which states that PSBs should have only one automatic right to extend the licence period.[130] Channel 4 stated that the provision does not account for the fact that licence periods differ between PSBs and instead suggested that the Guidance should require clarity from PSBs regarding the

[125] See paragraph 2.30 of the final Guidance.
[126] ITV response to the consultation, p. 10.
[127] Channel 5 response to the consultation, p. 3.
[128] BBC response to the consultation, p.3 and paragraph 2.31 of the draft Guidance.
[129] See paragraphs 2.29-2.33 of the final Guidance.
[130] See paragraph 2.32 of the draft Guidance.

approach to licence extensions. Channel 5 also commented on this provision and the limitations it imposed.[131]

A4.33 In relation to these comments, the extent to which the limitation on automatic extension is a material constraint is not clear, given the flexibility that PSBs have to negotiate the length of the licence period. It only limits the number of automatic extensions and it remains open to the PSB to negotiate further extensions. Further, removing the provision could allow the PSBs to acquire rights in perpetuity automatically, rather than by negotiation. The current Guidance does not permit this and we consider this restriction remains appropriate.[132] Therefore, we have decided to retain this provision.[133]

Holdback/early release policies

A4.34 Channel 4 commented on the requirement in the draft Guidance about the PSB putting in place a policy in respect of holdback/early release arrangements. Channel 4 referred to changes that it has made to its terms of trade to reduce the exclusivity period, rather than having a longer period and an early release policy. It said that it would be disproportionate to require it to have an early release policy when this is not its current commercial practice.

A4.35 The BBC also commented on this aspect of the draft Guidance, specifically the requirement that an underlying principle for early release policies should be "*to enable rather than restrict early exploitation.*"[134] The BBC said that it does not support this principle and that instead-there should be "*a presumption of exclusivity rather than a presumption of release, to reduce the scope for the value of a PSB's initial investment to be diminished*".[135]

A4.36 In response to Channel 4's comment, it is not mandatory for the PSB to have a holdback/early release policy under the draft Guidance. The need for such a policy only arises where categories of rights are subject to a holdback. It is therefore open to the PSB to draft their Code or have terms of trade which avoid the need for an early release policy. However, if it opts to include a hold back period following exploitation of the primary rights, we consider it is appropriate for the PSB to put in place a policy to explain how it will respond to requests for early release. This helps to ensure clarity as to the duration and exclusivity of rights being acquired by the PSB, in accordance with section 285(3) of the 2003 Act. It also aligns with the objectives in the Guidance for the PSBs' Codes, such as preserving the scope for secondary exploitation, facilitating the use of a range of services for content distribution to meet the needs of audiences and efficient exploitation of content.

A4.37 However, we expect the nature and extent of the policy will depend on the nature and extent of the holdback. For example, if the duration of the holdback and/or the scope of the rights covered are very limited, this is likely to reduce the need for a detailed policy. Where the PSB includes information about its early release policy within its terms of trade, a separate policy document setting out the information may not be required, provided the information provided gives the independent producer clarity as to the duration and exclusivity of rights being acquired.

A4.38 In relation to the BBC's comment, we disagree that an early release policy with an underlying principle of enabling early exploitation risks diminishing the value of the PSB's

[131] See Channel 5 response to the consultation, p. 4.
[132] See paragraph A4.40 and A4.41 below.
[133] See paragraph 2.34 in the final Guidance.
[134] See paragraph 2.34 of the draft Guidance
[135] BBC response to the consultation, p. 5.

initial investment. The PSB is not precluded from including in its policy other considerations which it may wish to take into account in addition when making a decision on early release. These could include any potential impact on the PSB's investment in the commission.

A4.39 After considering stakeholder comments, for the reasons explained above, we have therefore decided not to amend this provision in the final Guidance.[136]

Rights in perpetuity

A4.40 In relation to the provision of the draft Guidance which says that PSBs must "*not seek to include rights in perpetuity as a matter of course*"[137], Channel 4 said: "*whilst we agree with this principle, we would note that our current agreement states that our clips on social platforms will remain in perpetuity unless the producer specifically asks us to remove them. It would not be a sensible use of resources for Channel 4 to remove all promotional clips for programmes simply because a licence period has elapsed: indeed, this could be to the detriment of producers, as clips can continue to generate revenues that shared between Channel 4 and the producer*."[138]

A4.41 We note that this provision in the draft Guidance does not preclude the PSB acquiring rights in perpetuity but says that the PSB should not seek to do so as a matter of course. It is open to the PSB to negotiate an arrangement of the type described by Channel 4 with the independent producer. We therefore have not changed this provision in the final Guidance.[139]

Exclusivity

A4.42 The BBC suggested that the draft Guidance is contradictory in stating that PSBs are entitled to a degree of exclusivity in relation to the rights that they acquire but should not use this to foreclose competition.[140] The BBC said foreclosure of competition is inherent in exclusivity.[141]

A4.43 We do not believe that "*a degree of exclusivity*" necessarily harms competition. It is well-established that exclusivity can be beneficial for competition, but there can also be circumstances where it can be anti-competitive (e.g. depending on the market position of the rights acquirer and the scope of the rights acquired). We therefore disagree that this aspect of the draft Guidance highlighted by the BBC, is contradictory. It confirms that exclusivity is permissible provided it does not prevent or materially restrict or distort competition or the development of markets. It is for the PSBs in the first instance to make the assessment that their agreements are compatible with competition law. To provide further clarity, we have made a minor adjustment to the wording as follows: "*However, PSBs should not use this to foreclose ~~competition or~~ the development of new markets by producers and third parties **or harm competition***"[142] (deletion in strikethrough and addition in bold).

[136] See paragraph 2.36 of the final Guidance.
[137] See paragraph 2.35 of the draft Guidance.
[138] Channel 4 response to the consultation, p. 7.
[139] See paragraph 2.37 of the final Guidance.
[140] See paragraph 2.36 of the draft Guidance.
[141] See BBC response to the consultation response, p .5.
[142] See paragraph 2.38 of the final Guidance.

Accessibility

A4.44 The RNIB agreed with our reference to accessibility in the draft Guidance.[143] However, its request that the Codes call for accessibility, in particular with reference to onscreen text and audio led content is outside the scope of the legal framework for the Guidance. The statutory framework does not cover editorial matters concerning content or content accessibility.[144]

A4.45 These matters are addressed by other legislative provisions. For example, the 2003 Act sets out accessibility requirements for broadcast channels, and the Media Act introduces accessibility requirements for on-demand services being used by PSBs to contribute to the fulfilment of their public service remit.[145] Ofcom has recently revised its best practice Guidelines which aim to ensure high quality access services and include recommendations on the consideration of accessibility early on in the production process (including at commissioning).

[143] See paragraph 2.43 of the draft Guidance: *The PSB's Code and all relevant documents should be readily available and easily accessible on the PSB's website (the PSB should take into account disabilities and other accessibility needs).*

[144] See RNIB response to the consultation, p. 1.

[145] The accessibility requirements for the BBC are set out separately in the Charter and Agreement.