



# Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers

Statement

Publication date:

21<sup>st</sup> June 2007



# Contents

Section		Page
1	Executive Summary	1
2	Background	2
3	Statutory Framework	3
4	Responses to Consultation	6
5	Next Steps	14
Annex		Page
1	Guidance	15

## Section 1

# Executive Summary

- Section 285 of the Communications Act requires Public Service Broadcasters (“PSBs”) to have in place Codes of Practice for commissioning from independent producers which have been approved by Ofcom. Section 285 also requires Ofcom to have in place Guidance to assist PSBs in drawing up Codes.
- Ofcom’s original Guidance (from December 2003) identified that new media rights and issues in relation to exclusivity and the duration of rights packages would need to be revisited in due course.
- In the course of Ofcom’s review of the Television Production Sector (“TPSR”) in 2005 both PSBs and producers highlighted to Ofcom that the area of new media rights in particular needed to be revisited.
- The TPSR consultation document in 2006 set PSBs and producers the challenge of developing a new framework to accommodate new media issues or else Ofcom would be required to step in.
- PSBs and producers have reached Heads of Agreement on terms for the exploitation of new media rights.
- In order to ensure that the Guidance remained relevant for PSBs in drawing up new Codes of Practice, Ofcom consulted on proposed modifications to its Guidance to take into account these developments.
- Ofcom has taken into account the responses to the consultation and is now issuing its revised Guidance. Ofcom’s revised Guidance for PSBs in drawing up Codes of Practice for commissioning from independent producers is set out as an Annex to this statement.
- Now that the new Guidance is in place, it is up to the PSBs to submit revised Codes of Practice which comply with the Guidance for Ofcom to approve.

## Section 2

# Background

- 2.1 Ofcom is required under Section 285 of the Communications Act 2003 (“the Act”) to issue and maintain guidance (“the Guidance”) to Public Service Broadcasters (“PSBs”) in drawing up their Codes of Practice for commissioning from independent producers.
- 2.2 Following the outcome of Ofcom’s Television Production Sector Review (“TPSR”) Ofcom considered that there was a need to update the current Guidance (issued in December 2003 ) to take into account developments to the commissioning framework in the three years since the Guidance was originally issued.
- 2.3 In particular Ofcom considered that there was a need for broadcasters to adapt their Codes of Practice to incorporate more fully the developments in relation to the exploitation of new media rights.
- 2.4 In February 2007, Ofcom issued a consultation document which restated the issues that had emerged from the TPSR and discussed how they might be reflected in new Guidance. The consultation also included a draft of revised Ofcom Guidance and invited comments from interested parties.
- 2.5 Ofcom has now assessed the responses to that consultation and is moving to issue its revised Guidance. This statement begins by setting out the statutory framework that applies to both the Codes of Practice and the Guidance. It then goes on to discuss the issues which emerged from the consultation on new Guidance and sets out how Ofcom proposes to respond to the issues raised. The statement also sets out the next steps that PSBs need to take. Finally, as an annex to this statement, Ofcom sets out its new Guidance.

## Section 3

# Statutory Framework

## Section 285

- 3.1 Section 285 of the Communications Act 2003 (“the Act”) provides that the regulatory regime for every licensed public service channel should include conditions, to be set by Ofcom, that ensure the providers of such channels draw up, maintain and comply with Codes of Practice governing the commissioning of independent productions for broadcast on their networks.
- 3.2 Clause 61 of the Agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation (“the BBC Agreement”) regulates the activity of the BBC in commissioning independent productions in the same way that Section 285 of the Act provides for the regulation of licensed public service broadcasters by Ofcom. Paragraph 10 of Part 2 of Schedule 12 to the Act provides that Ofcom shall be able to regulate the activity of S4C in commissioning independent productions in the same manner. In this document, references to section 285 of the Act are to be construed as including the relevant provisions set out above insofar as they relate to the BBC and S4C.

## Scope of the Code

- 3.3 Section 285 of the Act provides that the regulatory regime for every licensed public service channel, the BBC and S4C (“the PSBs”) shall include conditions that Ofcom considers appropriate for securing that PSBs have in place Codes of Practice on the commissioning of independent productions. Section 285 of the Act requires that the Codes should secure that:
- a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;
  - 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;
  - there is what appears to Ofcom to be sufficient transparency about the amounts to be paid in respect of each category of rights;
  - what appear to Ofcom to be satisfactory arrangements are made about the duration and exclusivity of those rights;
  - procedures exist for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it;
  - those procedures include requirements for the monitoring of the application of the code and for the making of reports to Ofcom;

- 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.
- 3.4 These provisions provide a standard framework for what needs to be in each PSB's Code of Practice. This does not however mean that there needs to be a standard industry Code of Practice or that individual Codes of Practice need to be limited to the scope of these provisions. Ofcom considers that the Codes of Practice should be informed by the specific operational features and the particular public service obligations of the individual PSBs.
- 3.5 The Codes are also only intended to apply to commissioning of content from independent producers intended for use on licensed public service channels – it does not apply to material commissioned specifically for use on other services e.g. web-sites, mobile networks or video on demand services.

### **Role of the Guidance**

- 3.6 Section 285 of the Act states that “Codes of Practice (should set out) the principles to be applied when agreeing terms for the commissioning of independent productions”. At a minimum therefore the Codes may be relatively high level in nature and set out a broad framework within which more detailed terms of trade and the detail of the commissioning process can be established.
- 3.7 Section 285 of the Act requires Ofcom to issue Guidance to assist PSBs in drawing up their Codes of Practice. The Act stipulates that the Guidance should be “general guidance” and that it should not “specify particular terms to be included in the agreements to which the Guidance relates”. Section 285 also requires Ofcom to consult PSBs and persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC and the Welsh Authority about any revisions to that Guidance. Ofcom's original Guidance was published in December 2003.
- 3.8 Whilst approval of the Codes of Practice established under section 285 of the Act is required from Ofcom, the Guidance itself is of a general nature and is designed to provide the framework for individual PSB's Codes of Practice. The specific terms of individual Codes of Practice will therefore vary and Ofcom will assess their compatibility with the Guidance when approving those Codes of Practice.

### **The Approval Process & Ofcom's Other Duties**

- 3.9 Once the new Guidance has been issued, Ofcom expects PSBs to make revisions to their individual Codes of Practice, where necessary, in order to bring them into line with the new Guidance. The Codes would then be submitted to Ofcom for approval.
- 3.10 In terms of giving approval to any new Codes of Practice, Ofcom would need to take into account not just the requirements of section 285 but also its general duties under the Act.
- 3.11 Section 3 of the Act sets out Ofcom's principal duty which is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 3.12 Section 3 also sets out other duties which Ofcom needs to take into account e.g. to secure “the availability throughout the UK of a wide range of television ... services

which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”; and, to secure “the maintenance of a sufficient plurality of providers in different television ... services”.

- 3.13 In carrying out these duties, Ofcom must also have regard to factors such as the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the UK and the desirability of promoting competition in the relevant markets, the desirability of encouraging investment and innovation in relevant markets and the desirability of encouraging the availability and use of high speed data transfer services throughout the UK.
- 3.14 In terms of approving new Codes of Practice, Ofcom will need to make a judgement as to how best to balance the various duties that it is charged with securing, while at the same time having regard to the various factors which the Act sets out as being desirable.

## Section 4

# Responses to Consultation

- 4.1 Ofcom received 9 responses to the consultation, including responses from all the PSBs and from Pact as the main representative of the independent producers. A number of respondents made their submissions on a confidential basis and this has limited Ofcom's ability to report the views or opinions of specific respondents. In some cases, respondents indicated that their responses could be published once the consultation was complete. In order to address the issue of different sets of responses being available at different points in time, Ofcom decided not to publish any responses which had indicated that they could be made public until the publication of this statement. All such responses are now available on Ofcom's website.
- 4.2 In order to preserve confidentiality of the respondents, Ofcom has chosen to summarise the responses to the consultation according to the section of the Guidance to which comments relate.
- 4.3 The remainder of this section sets out the issues raised in the consultation responses and presents an explanation of how Ofcom is proposing to address those issues. The updated Guidance that takes these points into account is set out in Annex 1.

## Consultation Responses

- 4.4 On a general note, one PSB argued that, given that the recent agreements on Head of Terms (HoT) included provision for a review of those agreements within a relatively short period of time, it would be premature for Ofcom to include in its Guidance any provisions relating to the division and exploitation of new media rights. It argued that since the Codes of Practice are required to set out the principles to be applied, Ofcom should wait until there are full permanent agreements in place before confirming new Guidance.

## Ofcom's Response

- 4.5 Ofcom accepts that the HoT between PSBs and Pact do provide for reviews of the operation of those agreements but it does not accept that this should prevent Ofcom from modifying its Guidance to PSBs.
- 4.6 The Codes of Practice are required to set out the principles that PSBs will use in commissioning independent productions and as such they create the framework within which more detailed commercial negotiations over Terms of Trade between PSBs and producers can take place. The consultation process around Ofcom's Television Production Sector Review ("TPSR") in 2005-06 identified the concern that the framework that had been put in place in early 2004 was not flexible enough to accommodate market and technological developments since then.
- 4.7 The TPSR led to a new understanding around an "enabling" framework which would provide more flexibility in terms of both preserving the exclusivity required by PSBs in the primary licence while preserving the scope for secondary exploitation by producers and expanding it where possible. The TPSR also flagged up the issue that the new framework would necessitate changes to Ofcom's existing Guidance.

- 4.8 Ofcom is making certain modification to its Guidance now in order to allow this new, enabling framework to be put in place. Ofcom does not see any contradiction between making changes to the Guidance now and the fact that producers and PSBs have agreed the need for reviews of the operation of their detailed agreements to take into account market developments going forward.

### **Clarity about the different categories of rights that are available**

#### *Rights versus Windows*

- 4.9 A number of PSBs argued that there was a potential confusion in Ofcom's use of the terms "primary rights" and "primary windows". For instance, one submission made the point that broadcasters acquired certain exclusive rights for use on its services and that some of these rights were defined by reference to a period of time from transmission on a channel – it was not correct to suggest that it only acquired "windows" rather than rights.
- 4.10 In addition several broadcasters asked for clarity on the distinction Ofcom made in its Guidance between rights for linear TV broadcast services and other rights e.g. those for non-linear exploitation. For instance, one broadcaster argued that the linear TV window should cover all means of making programmes available on a core service together with any additional rights necessary to support this activity. Some PSBs also queried why Ofcom's draft Guidance suggested that their Codes of Practice should include a statement as to how the rights that the PSB is looking to secure relate to its public service broadcasting obligations.

#### *Matching rights provisions*

- 4.11 One broadcaster concurred with Ofcom's view on how matching rights work in practice. However, it raised concerns about its ability to protect its brands going forward. It argued that it would prefer not to be in a position to include matching rights provisions as a matter of course but that it should have the freedom to include them where it felt that it was necessary. It indicated that if it did not have this ability then it might need to revisit how it was able to protect its brands.

#### *Anti-avoidance measures*

- 4.12 Most of the PSBs accepted the principle of an anti-avoidance measure. However, some went on to express the concern that as formulated in the draft Guidance, it led to a degree of uncertainty and in some situations PSBs might fall foul of such a requirement unintentionally. In particular, in relation to the use of rights packages across channels, some PSBs were concerned that agreements which had been freely negotiated could be interpreted as anti-avoidance measures.
- 4.13 One PSB, however, went further in expressing its concerns about the introduction of this principle into the Codes and argued that Ofcom was in fact attempting to extend the scope of the Guidance beyond that envisaged by section 285 of the Act.

### **Ofcom Response**

- 4.14 Ofcom recognises that it is important to be as precise as possible when using the terms "rights" and "windows". However, at the same time Ofcom is limited in its ability to specify the composition of different packages of rights. Section 285 of the Act explicitly prevents Ofcom's Guidance from specifying particular terms to be included in PSB's Codes of Practice, and therefore Ofcom is not in a position to specify that the licence purchased by the commissioning broadcaster should either include or exclude particular categories of rights. References to specific types of rights in the

Guidance are intended to be illustrative and should not be taken to define particular categories of rights.

- 4.15 The Act requires the Codes of Practice to provide sufficient clarity about the different categories of rights to broadcast or otherwise to make use of or exploit the commissioned production that are being disposed of when an independent production is commissioned by a PSB for broadcast on the PSB channel.
- 4.16 Ofcom considers that the starting point in determining rights to be acquired should be the licence that the PSB acquires from the producer for TV broadcast rights in return for the commission. At its simplest, in return for commissioning a programme, the PSB acquires a primary licence relating to the broadcast of that programme on its service. Typically that licence will be of a specified duration; the payment to the producer will provide for a specified number of transmissions on a set of (wholly-owned) channels and there will also be provision for further transmissions of the programme on payment of the relevant repeat fees. It appears to be generally accepted that broadcast TV rights have expanded to include simulcast rights as alternative means of distribution have developed (e.g. Internet, mobile TV etc). These might be termed linear TV rights.
- 4.17 With various technological developments, new categories of rights for non-linear exploitation have emerged and the key issue is the relationship between these rights for non-linear exploitation and the linear TV rights. In particular, it is important to determine how an appropriate degree of exclusivity for the broadcaster around the linear exploitation can be maintained where other rights are being disposed of. Ofcom understands that with the latest agreement on HoT, PSBs have de facto also secured the ability to make programming available on non-linear platforms for certain periods of time. These “windows” are typically linked to the primary broadcast transmission. Thus, PSBs are granted the right to exploit programming across both linear and non-linear platforms within certain time periods. For instance, some PSBs have secured the ability to offer programmes on their own VoD services for up to 30-days after the first broadcast transmission of a programme.
- 4.18 Ofcom has used the term windowing framework to describe how the non-linear exploitation related to the linear exploitation i.e. how a windowing system would operate on top of the linear TV rights. It did not intend to suggest that the linear TV rights that PSBs acquired were in some sense more constrained than was previously the case. Thus the term primary window was intended to refer to exploitation – across both linear and non-linear platforms - around the first transmission of a programme. The exact nature of those non-linear rights will vary over time as the mechanisms for exploiting rights change and develop but a key aspect of the windowing framework would be that the PSB would acquire a certain period of control of the exploitation of these non-linear rights around the primary transmission.
- 4.19 As set out in Ofcom’s draft Guidance, Ofcom expects that the Codes of Practice should set out which categories of rights the PSB is seeking to secure as part of the main commission. As is also made clear in the Guidance, a PSB cannot expect to secure all rights in perpetuity – the Codes of Practice need to set out the principles which the PSB proposes to apply in negotiating with producers over the minimum set of rights that it needs to secure for its public service channels as well as providing for policies to facilitate exploitation by the producer. As is also made clear in the Guidance, the Codes of Practice should not preclude broadcasters from seeking to acquire additional packages of rights through commercial negotiation but they should not make the commission conditional upon securing such rights.

- 4.20 Ofcom has revisited the way in which its draft Guidance was worded and has amended it to try to bring out these points.
- 4.21 Ofcom also received comments in relation to the Codes of Practice requiring PSBs to including a statement as to how the rights which a PSB is seeking to acquire relate to the pursuit of its public service obligations. Given the evolving nature of public service broadcasting, Ofcom considers that on balance it would not be appropriate to require PSBs to set down such a statement in their Codes of Practice. The nature of a PSBs public service obligations could well change over time and it would be overly bureaucratic to require PSBs to seek Ofcom's approval to modify their Codes of Practice in light of such developments. Accordingly, Ofcom has removed this requirement from the Code although PSBs are free to include such statements if they choose.
- 4.22 As regards matching rights provisions, for the reasons set out in its Guidance (i.e. that such provisions could stifle competition), Ofcom proposes to maintain its position that Codes of Practice should not include matching rights provisions or provisions to that effect.
- 4.23 In respect of the anti-avoidance measures which Ofcom had included in its draft Guidance, Ofcom welcomes the fact that most PSBs are happy to endorse this principle. Ofcom had intended to ensure in its draft Guidance that such an arrangement would not cut across existing arrangements, Paragraph 21 of Ofcom's draft Guidance stated that the presence of an anti-avoidance clause should not preclude PSBs and producers from reaching agreements that provide for the use of a programme across different (wholly-owned) channels. In light of the comments from broadcasters Ofcom has looked again at its Guidance and modified it to make this point clearer.

### **Transparency over the amounts to be paid in respect of each category of rights.**

#### *Indicative tariffs*

- 4.24 PSBs commented on two specific aspects of the draft Guidance dealing with pricing and indicative tariffs. The first issue was that the draft Guidance referred to the Codes of Practice including indicative tariff ranges whereas the previous Guidance had only required indicative tariff ranges to be developed. On this issue one PSB indicated that it was not objecting to the principle of indicative tariff ranges but that incorporating indicative tariffs into the Code itself would reduce the flexibility for the broadcaster to change the indicative tariff ranges in that it would have to seek Ofcom approval.
- 4.25 The second issue raised related to the Guidance suggesting that prices could increase or decrease over time in relation to the rights acquired. Broadcasters suggested that this drafting should be removed although they accepted the principle of the operation of the price mechanism over time. One broadcaster suggested that Ofcom's drafting implied that the prices paid for rights might be expected to increase "as a matter of course" if the rights secured accounted for the bulk of the overall value in a programme.
- 4.26 Another submission argued that indicative tariffs needed to be structured so as to avoid "tariff hopping" to reduce programme budgets. It expressed the concern that the tariff ranges were too broad and that there was not a sufficient spread across the tariffs. The submission called upon Ofcom to look more carefully at how tariffs are

arrived at in order to facilitate a “proper negotiation” between parties. It argued further that “primary tariffs should apply to primary commissions” and that Ofcom should adopt a market based approach to everything beyond the primary tariff in order to establish the true value of rights.

- 4.27 The same submission also did not accept that the Codes of Practice should detail any risk-sharing mechanism. At the same time it argued that it was not clear what Ofcom’s proposed risk sharing mechanism would be.

### **Ofcom’s Response.**

- 4.28 On the issue of the interaction between the indicative tariff ranges and a PSB’s Code of Practice, Ofcom recognises that a PSB needs the flexibility to be able to modify its indicative tariff ranges without having to revise the whole Code and to re-submit it to Ofcom for approval. Ofcom has therefore modified the Guidance to make this point clear. Ofcom considers that, for the time being, the requirement for transparency would continue to be satisfied by means of a combination of the PSB setting out a methodology for the calculation of indicative tariff ranges and the publication of indicative tariff ranges but making it clear that the indicative tariff ranges do not need to form part of the Code of Practice per se.
- 4.29 In order to fulfil the requirement of providing transparency the methodology for the calculation of the indicative tariff ranges will need to be relatively detailed. It may also set out the factors that the PSB will take into account when negotiating the price of a specific commission so that the producer can make an assessment of the approach that the PSB has used to value different categories of rights.
- 4.30 As regards the drafting of the Guidance in relation to the operation of the price mechanism, it was not Ofcom’s intention to imply that prices had to rise over time as a matter of course. Ofcom accepts that it is necessary to take into account a whole range of factors in arriving at the market price for a programme commission. Ofcom was seeking to ensure that if over time PSBs were acquiring a broader set of rights for use around the primary transmission (e.g. as other means of exploitation develop over time) and where those rights represent the bulk of the commercial value in a programme then the additional rights acquired would be reflected in the amount that broadcasters paid. Recognising that making an assessment of the value of different packages of rights at the point of commission is difficult, Ofcom suggested that risk-sharing mechanisms might be one way of addressing this issue.
- 4.31 On the question of the appropriate risk-sharing mechanism, Ofcom has not proposed that such mechanisms be detailed in the Codes of Practice. Ofcom’s Guidance merely suggests that broadcasters and producers ought to be able to agree “appropriate risk-sharing mechanisms to deal with [the] uncertainty.” As such Ofcom did not have a particular model of risk-sharing in mind – that would be left to commercial negotiation between broadcasters and producers and thence reflected in Terms of Trade.

### **Satisfactory arrangements are made in relation to the duration and exclusivity of packages of rights**

#### *Early release policies*

- 4.32 Some broadcasters argued that if, as Ofcom had proposed, early release policies were to be incorporated into the Codes of Practice the freedom of the PSBs to

amend those policies would be limited as they would need to obtain Ofcom approval for any change to the policy.

- 4.33 Two of the broadcasters expressed reservations about PSBs being required to have holdback or early release policies at all. One stated that it did not wish to set out the principles it would use in this context while the other indicated that it considered that such a step would remove the flexibility to adapt to situations where content might be exploited.

#### **Ofcom's response**

- 4.34 In relation to the issue as to whether an Early Release or Holdback policy should be incorporated into a PSB's Codes of Practice, Ofcom recognises that incorporating these policies into the Codes of Practice would limit the PSB's ability to vary such policies without having to seek Ofcom's approval. Ofcom has therefore modified the Guidance to make clear that the Codes of Practice need to refer to the fact that PSBs will publish meaningful policies dealing with the waiving of holdback provisions e.g. the policy would have to go further than saying that the PSB would consider requests to waive their holdback provisions on a case by case basis. The policies should set out how they will deal with the requests from independent producers to waive their rights to exclusivity and also set out the factors that the PSB will take into account. However, the policies themselves would not form part of the Codes of Practice.
- 4.35 On the question of the principle of PSBs having holdback or early release policies in place, section 285 of the Act requires the Codes of Practice to address the issue of arrangements for the exclusivity and duration of each category of rights but gives Ofcom discretion as to how this is achieved. Given that a number of PSBs have voluntarily developed formal policies to deal with requests to waive their exclusivity, Ofcom does not consider that it is unduly onerous to propose such an approach. The idea of developing and publishing a formal policy setting out the principles that the PSB will use in considering such requests is also likely to ensure that the PSB develops and applies a more consistent approach. The nature of the Holdback or Early Release policy may clearly be influenced by the length of the licence period.

#### **Requirements for monitoring of the application of the Codes and making reports to Ofcom**

- 4.36 A number of PSBs argued that the reporting requirements set out by Ofcom went further than was required by the Act and in particular required PSBs to supply Ofcom with confidential data in respect of prices for individual commissions.

#### **Ofcom's Response**

- 4.37 As set out in the TPSR, producers have expressed concerns about the potential for "netting off" by PSBs across the board i.e. PSBs reducing the amounts they offer for programmes based on their view as to the amount a producer might expect to achieve from secondary sales. Such an approach could impose deficit-financing on producers rather than letting them decide if they want to invest more in a programme than a broadcaster is prepared to offer.
- 4.38 As also reported in the TPSR, Ofcom did not find any systematic evidence of such an approach but reported that it would keep the situation under review. Ofcom has collected data from broadcasters across a range of different metrics, e.g. not just whether programmes had been commissioned within the tariff range but also an analysis of the distribution of prices paid across the tariff range. The latter measure

would act as a measure to ensure that broadcasters were not simply commissioning at the bottom end of the appropriate price range.

- 4.39 Other data that Ofcom considers relevant includes data on the number of instances where broadcasters have commissioned outside the tariff-ranges as well as data on the operation of the dispute system and also data on how broadcasters are performing against the timescales for the commissioning process that are set out in the Codes.
- 4.40 Ofcom considers that collecting such data is important for maintaining confidence in the system. Ofcom recognises that PSBs consider prices paid for individual commissions to be commercially sensitive and so are reluctant to provide such data to Ofcom. However, Ofcom is not necessarily looking for detail on individual commissions but is looking for data on whether the price paid was in tariff range and an analysis of the distribution of prices paid across a tariff range. Ofcom considers that this information can be provided to Ofcom without the need to divulge prices for specific commissions. Ofcom therefore considers that supplying the data set out in the Guidance is relevant to monitoring the application of the Code and does not cut across legitimate concerns about commercial sensitivity.

### **Other Issues**

- 4.41 Scottish Media Group (“SMG”) argued that the definition of “broadcaster” in The Broadcasting (Independent Productions) Order 1991 (as amended) did not correctly transpose the definition of “broadcaster” within the relevant European Directive (the TWF Directive). It noted that Ofcom had declined to recommend any changes to the definition of independent producer.
- 4.42 The SMG submission went on to note that for the purposes of the operation of the ITV Networking Arrangements, ITV Network was required to apply its Code of Practice to all producers i.e. regardless of whether they were qualifying or non-qualifying independents. It argued that Ofcom should impose a similar requirement on all the other PSBs so that the BBC, Channel 4 and five would not be able to apply different approaches in dealing with SMG as a producer compared to dealing with qualifying independent producers. The SMG submission argued that if all producers needed to be protected vis a vis ITV, then all producers also needed to be protected against the other PSBs’ negotiating strength.
- 4.43 British Music Rights (“BMR”) – an umbrella organisation that represents the interests of composers, songwriters, music publishers and their collecting societies – made a submission which asked Ofcom to help draw up a voluntary Code of Conduct in relation to the terms on which broadcasters commissioned music from composers, songwriters and performers. The submission included guidelines that the BMR had already agreed with the BBC in relation to commissioning music for BBC programmes.

### **Ofcom’s Response**

- 4.44 As regards the issues raised by SMG on the definitions of broadcaster and independent producer, Ofcom considers that these issues were beyond the scope of the consultation. Ofcom’s consultation related only to changes to its Guidance on the Codes of Practice required by section 285 of the Act. Ofcom does not consider that the issue of the definition of broadcaster or independent production contained in the Broadcasting (Independent Productions) Order 1991 is relevant to its consultation.
- 4.45 In relation to the other points raised by SMG, Ofcom notes that the requirements of section 285 of the Act apply only in relation to PSBs commissioning from

independent producers. The specific requirement on ITV Network stems from the separate requirements in relation to the operation of the ITV networking Arrangements under section 293 of the Act. In the 2005 Review of the Networking Arrangements Ofcom concluded that the principles from the Code of Practice required under s.285 should also apply to the Network Centre Code of Practice so that all producers would be treated on an equivalent basis.

- 4.46 Ofcom does not have equivalent regulatory powers in respect of other PSBs so it is not in a position to require PSBs to treat qualifying and non-qualifying independent producers on a non-discriminatory basis. Ofcom has previously noted that it would not seem sensible for a PSB to operate different commissioning systems according to the status of the producer as this would amount to an inefficient duplication of commissioning arrangements. PSBs need to manage commissioning arrangements to the extent that they need to meet other regulatory requirements e.g. the independent productions quota, but Ofcom would hope that PSBs seek to commission the best quality productions regardless of their provenance.
- 4.47 In terms of the issue raised by the BMR, Ofcom does not have any statutory powers to seek to extend the Codes of Practice framework approach to other aspects of the commissioning process beyond the immediate relationship between PSBs and producers. However, Ofcom notes that the industry had already been able to reach agreement with the BBC on guidelines and so it would expect that other PSBs would be prepared to engage constructively with the BMR in discussing these issues.

## Section 5

# Next Steps

- 5.1 Now that new Guidance is in place, the next steps would be for each PSB to carry out a review of its existing Code of Practice in light of both the revised Ofcom Guidance and also its agreement with Pact in respect of new Terms of Trade.
- 5.2 Once those reviews have been carried out, the PSBs should then submit the revised Codes of Practice to Ofcom for formal approval. As set out in Section 3 (above) Ofcom's approval process will need to take into account not just the requirements of section 285 of the Act but also its general duties under the Act.

## Annex 1

# Guidance



## Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers

## INTRODUCTION

### Ofcom's Objectives

1. The Codes of Practice for commissioning from independent producers used by licensed public service channels, the BBC and S4C ("PSBs") create a framework within which the PSBs commission programming from independent producers. That framework needs to adapt as the services offered by PSBs develop and as alternative means of distributing public service broadcasting content emerge. Since the introduction of the Codes of Practice at the beginning of 2004 a significant development in content markets has been the introduction of "new media" services (e.g. mobile TV, Video-on-Demand (VoD), TV over the Internet etc).
2. Over time these services may become more significant as a means for viewers to access content services and specifically public service broadcasting services. At the same time, the development of these services could represent a significant challenge to the existing system of public service broadcasting and the existing relationships between PSBs and producers.
3. Section 285 of the Communications Act ("the Act") sets out the key aspects of the commissioning framework for PSBs. In that context and given that Ofcom's ultimate aim is to further the interests of viewers, Ofcom has two high level objectives:
  - To secure the current volume and value of original commissioning in the UK TV sector;
  - To remove barriers which prevent the development of new and emerging markets for the distribution of TV content on alternative (new media) platforms.
4. Against that background, Ofcom considers that the framework created by the Codes of Practice structure should:
  - set a flexible framework that is platform and technology neutral. Neither this Guidance nor the Codes of Practice are likely to be able to cover every eventuality so the Codes of Practice need to make provision for changes in the relevant market(s);
  - seek to provide greater clarity and certainty on the use of alternative distribution platforms in the primary licence in a way that should assist the development of the market;
  - not distort the commissioning decision as between internal and external producers;
  - preserve the exclusivity in distribution required by broadcasters in the primary licence, while preserving the scope for secondary exploitation by producers and expanding it where possible;
  - incentivise all parties to exploit new platforms and markets for distribution, rather than increasing either motives or means of restricting opportunities to develop new distribution mechanisms; and

- aim to further the interests of viewers, by maintaining investment in and encouraging further exploitation of programmes, and by protecting the value of content creation and distribution by the industry.

## STATUTORY BASIS

5. Section 285 of the Act provides that the regulatory regime for every licensed public service channel should include conditions, to be set by Ofcom, that ensure the providers of such channels draw up, maintain and comply with Codes of Practice governing the commissioning of independent productions for broadcast on their networks.
6. Clause 61 of the Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation ("the BBC Agreement") regulates the activity of the BBC in commissioning independent productions in the same way that Section 285 of the Act provides for the regulation of licensed public service broadcasters by Ofcom. Paragraph 10 of Part 2 of Schedule 12 to the Act provides that Ofcom shall be able to regulate the activity of S4C in commissioning independent productions in the same manner. In this document, references to section 285 of the Act are to be construed as including the relevant provisions set out above insofar as they relate to the BBC and S4C.

## Scope of the Code

7. Section 285 of the Act provides that the regulatory regime for the PSBs shall include conditions that Ofcom considers appropriate for securing that PSBs have in place Codes of Practice for the commissioning of independent productions. Section 285 of the Act requires that the Codes should secure that:
  - a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;
  - 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;
  - there is what appears to Ofcom to be sufficient transparency about the amounts to be paid in respect of each category of rights;
  - what appear to Ofcom to be satisfactory arrangements are made about the duration and exclusivity of those rights;
  - procedures exist for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it;
  - those procedures include requirements for the monitoring of the application of the code and for the making of reports to Ofcom;
  - 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.

8. These provisions provide a standard framework for what needs to be in each PSB's Code of Practice. This does not however mean that there needs to be a standard industry Code of Practice or that individual Codes of Practice need to be limited to the scope of these provisions. Ofcom considers that the Codes of Practice should be informed by the specific operational features and the particular public service obligations of the individual PSBs.
9. The Codes of Practice are also only intended to apply to commissioning of independent productions intended for use on licensed public service channels. They do not apply to independent productions commissioned specifically for use on other services e.g. web-sites, mobile networks or video on demand services.

## Role of the Guidance

10. Section 285 of the Act states that "Codes of Practice (should set out) the **principles** to be applied when agreeing terms for the commissioning of independent productions" (emphasis added). At a minimum the Codes need to address the seven issues set out above in order to establish a broad framework within which more detailed terms of trade and the detail of the commissioning process can be established. The Codes of Practice may also cover additional issues should a PSB consider this to be appropriate.
11. Section 285 of the Act requires Ofcom to issue Guidance to assist PSBs in drawing up their Codes of Practice. The Act stipulates that the Guidance should be "general guidance" and that it should not "specify particular terms to be included in the agreements to which the Guidance relates". Section 285 also requires Ofcom to consult PSBs and persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC and the Welsh Authority about any revisions to that Guidance. Ofcom's original Guidance was published in December 2003
12. While the approval of the Codes of Practice covered by these Guidelines is required from Ofcom, the Guidance itself is not binding upon the broadcasters involved.
13. Ofcom considers that the Codes of Practice should be readily available for independent producers to consult in order to ensure that the level of transparency envisaged by section 285 of the Act is achieved. Ofcom considers that the precise means of publication and dissemination of the Codes of Practice are a matter for the PSBs to determine. Ofcom notes however the current practice of making all the relevant documents available in one place on PSBs' websites and understands that this arrangement works well.

## Specific Issues to be addressed by the Codes

14. We now follow the structure set out in the Act to discuss the key areas to be covered by each Code of Practice.

### **(a) a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;**

15. An important objective of each Code is to secure a clear and transparent process for commissioning. Accordingly, broadcasters should set out their overall approach to the commissioning process in their Code or related documents; the route through their organisations that an external programme proposal will take;

a broad timetable for the process; and responsibilities in the organisation for dealing with it. Different timetables or processes might apply to different genres of programming.

16. Broadcasters should also explain if they propose to make available more detailed guidelines about the commissioning process, including a more detailed timetable. Such detailed guidelines should be capable of being easily accessed by producers and might be attached to the Code. These more detailed guidelines are likely to include information on the specific steps in the commissioning process such as the interval between the submission and response to development proposals, the period after commission approval during which final editorial specification is established and proposed turnaround time for rejected proposals.
17. A broadcaster's Code should set out how broadcasters will ensure an adequate separation of responsibilities for programme commissioning from the management and operation of in-house production activities, where they exist. The assessment of the adequacy of separation would depend on the broadcaster in question e.g. for smaller licensees, it may not be practicable to have separate in-house /external commissioning editors for regional production.

**(b) that 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**

18. A key principle underlying Ofcom's approach to the Codes of Practice is that producers should retain rights in the programmes unless these are explicitly sold to a PSB and/or to other parties.
19. A broadcaster's Code of Practice should contain a clear statement of the primary rights that a PSB is proposing to acquire when it commissions an independent production. The Code should make a distinction between the rights required to be secured for linear TV broadcast services (e.g. first broadcast transmission together with simultaneous streaming over other distribution platforms such as the Internet or mobile devices plus a specified number of repeats) and other rights e.g. those for non-linear exploitation. The Code should also set out how those packages of rights are to be used and exploited. For instance, there might be expected to be an initial window of exploitation centred on the first transmission of an independent production on a licensed public service channel. The Code would need to address issues to do with the exclusivity and duration of these and other rights packages within the licence period (see below).
20. The Codes would also need to set out the principles as to how repeats, returning series and strands are to be dealt with within this windowing framework over the licence period.
21. The Code can reserve the right of the PSB to revisit the scope of the primary rights package as new distribution platforms emerge.
22. The Codes should relate primarily to commissioning by broadcasters of independent productions for use across their licensed public service channels: that is, independent productions which are commissioned by or first transmitted on wholly owned licensed public service channels.

23. However, to avoid any attempt to circumvent the purpose of the Codes, independent productions commissioned by another channel or service (e.g. a joint venture channel) but intended for first transmission on the licensed public service channel will also be subject to the Codes. Similarly, independent productions that receive their first transmission on a wholly-owned secondary channel but are intended to be repeated on the licensed PSB service shortly after, and where the PSB service has paid a major part of the costs, will also be subject to the Codes.
24. However, this would not prevent the PSBs from seeking to develop arrangements for use of independent productions commissioned for the PSB channel on other wholly-owned channels e.g. one transmission on the main channel being equivalent to (say) 3 transmissions on a secondary channel, provided that such use was clearly spelt out. If this is the case, the Codes should set out the approach to be used for such arrangements e.g. defining the numbers of transmissions against specific channels.
25. As part of the original commission, broadcasters may expect to be able to acquire rights to be used for promotional purposes (e.g. clips, previews, web-site material etc). The Codes should set out the current practice of the PSB in relation to the definition of particular promotional uses e.g. indicating how clips are defined or being clear that this will form part of the Terms of Trade.
26. The Codes should confirm that negotiations relating to the acquisition of primary rights and the exploitation of such rights in the primary licence will not be linked to negotiations for rights for subsequent exploitation. By agreement, certain categories of rights already tend to rest with the producer e.g. DVD rights, foreign version rights and merchandising. Ofcom would not expect PSBs to seek to extend the scope of their control over the way in which such rights are exploited beyond current agreed restrictions.
27. 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. There should be no terms in contracts making them conditional (actually or in effect) on the acceptance by producers of a bundled deal or on the use of a broadcaster's own distribution arm.
28. The Codes should not preclude a broadcaster from acquiring different or additional rights packages should they wish to do so and should the independent producer wish to make them available. A broadcaster should always be able to seek to secure more rights packages subject to commercial negotiation. However, broadcasters should not seek to secure "matching rights" provisions or provisions which have that effect. Ofcom believes that such provisions could stifle competition.

**(c) that there is what appears to Ofcom to be sufficient transparency about the amounts to be paid in respect of each category of rights**

29. Ofcom considers that the purpose of this clause is to ensure that a producer has a reasonable amount of information, before commencing negotiations with a PSB, about the range of prices that the PSB would typically offer for particular genres of programming and also the factors that a PSB is likely to take into account in negotiating prices. That is, a producer should have a reasonable idea of what the starting point for commercial negotiations might be and also the variables that will influence the final price.

30. Ofcom expects that over time a greater degree of understanding of the value of different categories of rights will emerge as packages of rights are increasingly traded. However, Ofcom recognises that there may be considerable uncertainty as to the value of different categories of rights and therefore does not consider it appropriate to be prescriptive about the way in which different categories of rights should be priced.
31. In order to provide a degree of transparency in terms of establishing a starting point for commercial negotiations, PSBs should set out in their Codes the broad methodology that they will use in drawing up indicative tariffs. The methodology needs to be sufficiently detailed to allow the producer to make an assessment of the approach that the broadcaster has used to value different categories of rights.
32. The Codes should also set out the arrangements that the PSB will use for publishing a list of indicative tariff ranges for different genres/sub-genres of programming. Ofcom does not consider that the indicative tariff ranges themselves need to form part of the Codes but together the methodology and the indicative tariff ranges are intended to satisfy the requirements for transparency as required by the Act.
33. Ofcom is aware that certain types of programming may well have little additional value post-transmission, whereas other types of programme are likely to have greater potential for other forms of exploitation outside of the primary licence. Where programming may have limited value post-transmission, the tariff ranges should still be sufficiently broad to be capable of encompassing the typical full production costs for such programming.
34. The Codes should also set out the factors that broadcasters will take into account in negotiating actual prices for individual commissions. The final prices for specific commissions, however, will be a matter for commercial negotiation.
35. Going forward, the methodology used by the PSB in calculating its tariffs will need to be flexible enough take into account changes in the value of the primary rights in the programme acquired by the PSB. For instance, where the PSB may be acquiring a limited set of rights, then over time it is likely that programme prices will need to adjust to reflect the value of the rights acquired by the PSB. However, Ofcom also recognises that at the point of commission, it may not be clear how much value could be attributed to secondary and subsequent exploitation. Ofcom considers that 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.

**(d) that what appear to Ofcom to be satisfactory arrangements are made about the duration and exclusivity of those rights**

36. The Codes should specify the duration of the overall licence that a broadcaster acquires. Broadcasters should have only one automatic right to extend the licence period. Any subsequent extensions would be on commercially negotiated terms subject to the needs of returning series and strands.
37. The Codes should set out the duration of the initial window and the holdback period in respect of the acquired rights. It is not the case that the duration of these windows has to be the same for every genre or category of rights but

where the duration of the windows do vary this should be made explicit e.g. where the initial window for the exploitation of video-on-demand rights is limited to a fixed period of time around the initial transmission.

38. Where there are categories of rights which are subject to holdback arrangements, the Codes should make it clear that the PSB will put in place a formal holdback/early release policy which sets out in a meaningful way the principles that the PSB will apply when considering requests to waive its exclusive holdback to allow for early secondary exploitation by the producer. The formal policies do not need to form part of the Codes themselves but an underlying principle should be that such policies should be intended to enable rather than restrict early exploitation.
39. Although PSBs should not seek to include rights in perpetuity as a matter of course, the Codes should not exclude alternative licensing arrangements. It can thus be the case that commercial discussions between a producer and broadcaster can conclude with a producer agreeing to assign all the rights in a programme to a broadcaster but that should be the producer's explicit choice. The Codes should not preclude such arrangements but they should be negotiated arrangements rather than an automatic entitlement.
40. Ofcom recognises that broadcasters are concerned that the exploitation of new media rights by producers might have the potential to affect their ability to maintain and develop their brand and channel proposition. Ofcom also recognises that broadcasters are concerned that, where exploitation of new media rights in independent productions they have originally commissioned takes place outside their control, there could be important implications for their underlying business models. Broadcasters therefore have a legitimate right to seek to protect the value of their brand and are entitled to a degree of exclusivity in relation to the rights that they acquire. However, broadcasters should not use this to foreclose the development of new markets by producers and third parties.

**(e) that procedures exist for reviewing the arrangements adopted in accordance with the code and demonstrating compliance with it;**

41. In order to ensure effective oversight and monitoring of the application of the Codes of Practice, Ofcom believes that there needs to be a system of both internal review and external scrutiny. Ofcom expects the Codes of Practice to set a mechanism whereby the broadcaster and Ofcom can jointly review the operation of the Code.
42. Broadcasters cannot reserve the right to modify their Codes unilaterally. If a broadcaster wishes to modify their code they should seek the formal approval of Ofcom. In the event that such an application, Ofcom will also consider whether the issue raised by the broadcaster is such as to require a more formal revision of the Ofcom guidance.

**(f) that those procedures include requirements for the monitoring of the application of the code and for the making of reports to Ofcom**

43. In order to ensure effective oversight and monitoring of the application of the Codes of Practice, Ofcom believes that it will be necessary for broadcasters to provide for reporting arrangements and reports which – at a minimum – set out data on the number of commissions undertaken in a given period by genre; the nature of those commissions (e.g. whether rights have been acquired for the

primary licence only or additional rights for secondary exploitation have been acquired as well); the number of instances when the broadcaster has exercised its right to renew the original licence; where the price paid for the commission sits in relation to the relevant tariff range; and the duration of the rights.

44. Ofcom would also expect the PSB to report on the operation of its early release policies.
45. The reports should also include: a review of the broadcaster's compliance with its commissioning timetables; and, a summary of the operation of its dispute procedures e.g. the number of disputes, how they have been dealt with etc.
46. The Codes should also set out a timetable for submitting formal annual reports to Ofcom. Ofcom would expect to receive those annual reports by the end of the first quarter of the following calendar year e.g. if the new Guidance was in operation, Ofcom would have expected to receive annual reports from broadcasters for 2006 by the end of March 2007.

**(g) that 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.**

47. The Codes of Practice should make provision for a dispute resolution mechanism in the event of a dispute arising between broadcaster and producer, about the application of the Code itself, rather than the terms of a specific negotiation.
48. It is not envisaged that Ofcom will have a role as final arbiter in any dispute. This means that, for example, if mediation has not resolved the dispute, a broadcaster and producer may need to be prepared to go to independent arbitration or mediation to settle a dispute. Broadcasters should consider how best to ensure that the costs of resolving the dispute are minimised, so that smaller independent producers are not disadvantaged by the expense of following any such procedures. One other possibility might be that a non-executive director of a broadcaster could be brought in as final arbiter in a dispute.

**ENDS**