

Public service broadcasters and the UK production sector

Response from ViacomCBS and Channel 5

16 March 2021

ViacomCBS welcomes the opportunity to respond to Ofcom's call for evidence on public service broadcasters and the UK production sector.

For three decades ViacomCBS has been the most successful international supplier of pay-TV channels to the UK market, in particular MTV, Nickelodeon, and Comedy Central. The purchase of Channel 5 in 2014 not only extended the ViacomCBS footprint into free-to-air, public service commercial television, it represented a step-change in our ambitions for our UK business: to invest in more local original programming, to create synergies between our pay and free channels, and to export more programmes and formats globally.

Since 2014 Channel 5 has successfully carved a position in the market as a major factual channel alongside investment in drama, kids, news and current affairs to provide UK audiences with a rounded schedule, but with a major focus on the domestic UK social agenda.

Summary of our position

- ViacomCBS supports the ongoing regulation of PSB's relationship with the independent production sector. The codes of practice alongside the independent production quota placed on PSBs have helped to secure investment, promote competition, and support the incredible growth of the UK production sector in the past 15 years.
- PSBs remain the enduring cornerstones of the UK broadcasting ecology and critical investors in the creative economy. PSBs offer a rich diet of UK programming across a multiplicity of genres universally and free to everyone. Regulation must not inhibit Channel 5 and the other commercial PSB's ability to invest in UK original content and meet its PSB obligations.
- Regulation must ensure that PSB remains commercially viable in the medium to long term as audiences, along with the advertising revenue that funds commissioning, move away from linear broadcasting to commercial catch-up, SVOD and user-generated content services, as well as destination BVOD services like My5.

- Changed audience viewing patterns have taken place during a period of significant consolidation in the independent production sector and the emergence of new commissioners, with significant market power. Outside the scope of regulation these novel commissioners have the financial power to shift market norms and business practices. In this context a re-calibration of the existing legislation, alongside revised guidance from Ofcom that better reflects current market dynamics, would be timely.
- Specifically, we would recommend that Ofcom update its 2007 guidance to PSBs so that primary rights agreed between broadcaster and independent producer: better reflect viewer expectations, enabling audiences to manage the wealth of choice they are now faced with across a huge variety of platforms and providers; ensure that PSBs can more easily meet the costs of commissioning by gaining revenue that has moved online that would historically come to the broadcaster through linear exploitation; and ensure that PSBs are not put at a commercial disadvantage in comparison to their global SVOD counterparts that sit out of scope of regulation.
- Further, alongside this, we believe there is a strong case for a revenue-cap mechanism to prevent very large producers qualifying as ‘independent’ as the current situation undermines the policy objective to support SME producers. This should be introduced with a commensurate reduction in independent producer quota obligation.
- These changes to regulation of the independent production sector should be made in upcoming legislation where applicable as part of Ofcom’s proposed transition to a model of Public Service Media (PSM). Moving forwards we would propose that Ofcom is responsible for overseeing the key market interventions (production quotas, definitions, guidance that frames Terms of Trade) so that regulation can react dynamically to changing market conditions.

Answers to questions

Question 1: Given changes to audience consumption patterns and wider market developments, is there any aspect of Ofcom’s Guidance on commissioning of independent productions which Ofcom should update to ensure it remains fit-for purpose?

The 2003 Communications Act requires the PSBs to have codes practice which they are required to publish setting out the principles they will apply when agreeing terms with independent producers. PSBs put these codes in place based on guidance from Ofcom that was last updated in 2007. The UK independent production sector has grown from a £1.1billion sector in 2003 to having revenues of £3.3 billion in 2019¹ of which international revenues make up over £1billion increase of 11% on 2018, and a rise of 30% over the past five years².

¹ PACT, ‘The Pact UK Production Census’ Friday 2nd October 2020

² Ibid.

Channel 5 believe it is beneficial for both PSBs and production companies that there is a framework for commissioning agreements and negotiation of rights. Transparency has helped ensure that negotiation takes place in good faith between parties – this is of particular benefit to small independent producers. In this regard, the Ofcom guidance, and the underlying regulation that supports it, works well.

Within Ofcom's 2007 guidance it is clearly articulated that PSBs cannot expect to automatically secure all rights in perpetuity or make a commission conditional on obtaining secondary rights. Any secondary rights the broadcaster would like (beyond primary rights around linear transmission) must be acquired through separate commercial negotiation.

Section (b) of the guidance outlines 'primary rights' as those rights for exploitation on linear TV, together with simultaneous streaming around the first transmission of a programme plus a specified number of repeats and possibly catch-up. These are distinct from 'secondary' non-linear rights. Whilst in 2007 guidance using this approach delivered for all stakeholders – broadcaster, producer, viewer – we no longer believe this is the case in the context of changed viewer expectations and a shift of broadcasters revenues away from linear transmission. The global commissioners and producers have had a huge impact over the last 14 years and the market has radically shifted so the value of the first linear transmission (or any linear transmission at all in some demographics) has significantly reduced.

A sizeable proportion of audiences no longer view linear transmission as their primary opportunity to watch a programme, but instead expect to view a programme as much as twelve months after linear premiere at no additional cost. The BBC iPlayer has set the standard for normal practice in this PSM space itself having recently expanded its offer on iPlayer to a standardised 12 month non-linear window post broadcast for all commissions, regardless of funding mechanism, to meet the demands of audiences. This change was assessed at the time by Ofcom and found to be in the interests of viewers and additive to the PSB ecology.

Commercial PSBs like Channel 5 have a remit to offer a rich diet of UK programming across a multiplicity of genres, universally and free to everyone. We also have a duty to ensure that we continue to deliver this remit by anticipating and reacting to changing viewer expectations. Presently, without a guaranteed and reasonable window of non-linear distribution included in the 'primary rights' acquired through commissioning for high cost productions where we are not the only funder of the programme (but do provide first free-to-air linear window) we are not always able to meet those viewer expectations and demands.

As Ofcom is aware, commercial PSB relies on advertising revenue so that it can invest in UK originated content. Channel 5 reinvests 70% of its revenues back into UK content origination. But, competition for viewers and advertising spend has increased with the growing dominance of advertising-funded online digital services and a declining linear TV advertising market. A situation compounded in light of Brexit uncertainty and the Covid-19 pandemic. The traditional relationship between commissioner and supplier is predicated on a model whereby revenues from primary transmission, repeats and catch-up are sufficient to fully fund original production. This is no longer

the case as advertising spend and viewer habits shift to online where there is significantly greater competition for audience attention. An adjustment is required so that PSBs are properly compensated for their value contribution (which is not always purely monetary) and able to make investments based on acquiring a reasonable package of rights and reliable expectations of future returns.

We note that Section 285 of the Communications Act explicitly prevents Ofcom's Guidance from specifying particular terms to be included in PSB's Codes of Practice, but current guidance does acknowledge that simultaneous streaming and repeats form part of the primary rights negotiation in addition to linear transmission. Additional exploitation models should also be included in 'primary rights' and not subject to additional payment so the PSB has the opportunity to recoup the financial risk taken by fully funding the content in the first place.

Such an approach would help address declining linear advertising revenues for PSBs whilst ensuring they meet viewer expectations to watch content free via PSB affiliated BVOD services post-linear broadcast.

Question 2: Is there any change to the independent production quota which Ofcom should recommend to Government as part of its 'Small Screen Big Debate' programme?

The 2003 Communications Act mandates a production quota on PSBs that ensures 25% of programming each year is commissioned from an independent producer. Despite the negotiating strength of PSBs having been significantly weakened over the past decade, due to vertical consolidation in the production sector and the emergence of global SVOD commissioners, we do not believe the quota should be abolished.

Channel 5 is a big supporter of the independent production community and feels strongly that this type of intervention should be maintained as part of any future framework for the regulation of production sector. The production quota aims to promote diversity of content and suppliers by incentivizing new entrants into the market with a guaranteed share of commissioning from the PSBs. The quota obligation is also effective in limiting the effects of vertical integration in the sector, thus keeping a check and balance on PSB strength in the market.

We cannot comment for other PSBs, but Channel 5 has encountered no significant challenges in meeting its quota obligation. We have no objection to the current level of quota in the context of current regulation objectives, but believe it should be reduced, to 15 or 10 per cent. commensurate with a revenue cap for the definition of independent producer as set out in our answer to question 3.

Question 3: Do you have any recommendations for potential changes to the definitions of ‘qualifying programmes’ or ‘independent production’ which Ofcom should recommend to Government as part of its ‘Small Screen Big Debate’ programme?

The 2003 Communications Act defines an ‘independent producer’ is one who is not an employee of a broadcaster; does not have a shareholding greater than 25% in a broadcaster; and is not a body corporate in which a broadcaster has a shareholding greater than 25% (or in which two or more broadcasters have aggregate shareholdings greater than 50%).

As Mediatique identified in their 2015 report on the independent production sector, there are broadly three categories of producer in UK market. There is: a small group of large vertically integrated companies that do not benefit from the Terms of Trade as they are not classified as independent³; a group of very large so-called ‘super indies’ that qualify as independent as they have no links to UK broadcasters; and a long tail of smaller independent producers – the vast majority qualifying as independent.

The purpose of defining ‘independent’ in this way in 2003 was to ensure that smaller producers receive protections from the terms of trade, but those that benefit from additional market power resulting from vertical integration with a broadcaster, do not. However, not all consolidation in the market has been vertical, and it has resulted in a group of very large companies remaining inside the protection of the regulatory regime. This undermines the policy objective to support SME producers.

To address this we are supportive of revenue-cap mechanism, managed by Ofcom, to prevent very large producers qualifying as ‘independent’. We appreciate that such an intervention would affect a relatively small number of companies, but with a small number of production companies (so-called super indies) responsible for a significant share of commissions, in terms of market power it would be a very narrow but impactful intervention. If the primary objective of regulatory intervention on the production sector is to inhibit the market power of PSBs against smaller production companies, then such an intervention is necessary.

As noted in our response to question 2, we believe that such a mechanism should be introduced with a commensurate reduction in the production quota as determined by Ofcom.

³ Whilst production sector regulation does not technically apply to these non-qualifying producers, in reality they have benefitted from a halo effect of the regulation. Terms of Trade have become a market norm to the extent that they are able to impose terms of trade fundamentals when negotiating with PSBs.