



**Ofcom Call for evidence:
Public service broadcasters and the UK production sector**

About us

1. Directors UK is the professional association of UK screen directors. It is a membership organisation representing the creative, economic and contractual interests of over 7,500 members — the majority of working TV and film directors in the UK.
2. Directors UK collects and distributes royalty payments and provides a range of services to members including campaigning, commercial negotiations, legal advice, events, training and career development. Directors UK works closely with fellow organisations around the world to represent directors' rights and concerns, promotes excellence in the craft of direction and champions change to the current landscape to create an equal opportunity industry for all.
3. Directors UK welcomes the opportunity to respond to Ofcom's consultation '*Public service broadcasters and the UK production sector*'.

Overview

4. On the whole we believe the current system of regulation for independent productions and the Terms of Trade system works well and has been successful for the UK production sector. Thanks to the Codes of Practice and transparency surrounding the commissioning process, and the Terms of Trade ensuring producers earn a share of 'back end', the UK has a thriving and vibrant production sector, made up of a mix of PSBs, and large and small independent production companies.
5. From the perspective of Directors UK's membership of working directors, this provides varied opportunities to secure work. From the point of view of creating a competitive market-place in which there is incentive to invest in and make quality work, this has been successful, with the independent production sector revenues growing from £850m to over £3bn¹. There is also a positive effect for audiences, who have a greater variety of quality, UK-originated work to enjoy and choose from. As highlighted in the EY report, the success of the current UK system has been recognised globally:

"The specific terms of trade in UK broadcasting law, where IP goes to producers, gives producers an incentive to sell content abroad to generate revenue. This model is strong and doesn't exist in many other countries, and contributes positively to UK creative exports" –Dr David Fernández Quijada, European Broadcasting Union (EBU)²

"The UK PSBs and the terms of trade have helped the UK production sector to grow its revenues and become a powerhouse globally. This has driven a virtuous circle in terms of talent, attracting more investment." –Media expert, multinational media company³

6. We would therefore advise caution in making unnecessary or radical changes to the current system for PSBs and independent production, as we would not want this to undermine one of the key strengths in our sector. If there are to be any future changes these must be subject to thorough market impact assessments and consultation.
7. The changes to rights and usage windows due to changing consumption behaviours should, in theory, continue to be addressed through negotiations for rights between the PSBs and

independent producers in exchange for receiving a fair value for the rights, as part of their Terms of Trade discussions. This value should then be passed on to the underlying rightsholders (e.g. writers, directors) through a similar rights negotiation, offering fair value for those underlying rights. This is key to the success of the UK production market and retention of creative talent.

8. Our main concern is that the new global SVOD platforms and services, who are increasingly investing in and commissioning work in the UK, are not subject to the same regulations and Code of Practice or Terms of Trade obligations as the PSBs. Their approach was outlined in the Mediatique report: *“non-PSBs are seeking to secure greater rights ownership across multiple windows, following the US model whereby suppliers are effectively producers for hire.... There is no obligation on competing broadcasters (e.g., Sky, Discovery) or other players (e.g., Netflix, Amazon) to protect the residual intellectual property rights of commissioned producers.”*⁴
9. If this system prevails it risks undermining the unique strength of the UK production sector, and is creating an imbalance for the PSBs. However, we would be concerned if the decision to level the playing field for PSBs resulted in removing the Code of Practice and Terms of Trade obligations for PSBs, as it risks reducing incentives for independent production companies to continue to invest and compete in the UK market. As PSB budgets decline, independent production companies often put in their own money, or raise funding from 3rd parties, for commissions. Without the returns from back-end there may be less incentive for independent production companies to invest in new PSB content, particularly as new entrants to the market are prepared to pay significantly more than the PSBs for new content.
10. For the health of the industry, and for audiences, we want there to be a varied and vibrant creative production sector in the UK. A sector that is willing to innovate and take risks on content such as *Fleabag*, *I May Destroy You*, *It’s a Sin*. And one that encourages production companies to operate and invest in work across the UK. To do this independent production companies need to be fairly rewarded and incentivised to continue to create work for UK PSBs and audiences.
11. Ofcom could consider extending the reach of their guidance to include UK-originated commissions from current non-PSBs. We recognise the risk highlighted in the Mediatique report *“that non-PSB providers would look elsewhere to secure content if they were able to secure better terms (e.g. in-house production, international production). In addition, this would not lead to incremental value to the PSBs themselves.”*⁵ However, one of the reasons the UK is attractive to non-PSB commissioners is due to the quality and talent the UK offers, as a result of its mixed ecology of PSB and a strong independent production sector.
12. As a final note, should the outcome of the Ofcom *Small Screen, Big Debate* consultation result in a change to what is considered to be PSB/PSM, and who are considered to be PSB/PSM providers, then the guidance/rules may need to be revisited in that light to consider any obligations that may need to be extended or adapted.

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?

13. In general we don’t believe the guidance needs a substantial overhaul. The guidance recognises the need for clarity and transparency in the commissioning relationships and processes between PSBs and independent production companies. This principle is still relevant in the current media landscape, and given the focus on “high level outcomes” the language used in the guidance does not seem overly prescriptive such that it prevents these Codes being adapted to accommodate changes in the media market. In general, the guidance gives a framework

within which the PSBs can develop their Codes of Practice, but which gives enough flexibility for future adaptation, subject to Ofcom's approval of the Codes.

14. However, some of the terminology or definitions of PSB channels as "licensed" or "linear" in the guidance does need updating to reflect the changes in the market affecting PSB audio-visual commissioning and the rise in BVOD commissioning.

15. For example, Section 9 of Ofcom's guidance:

*"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."*⁶.

16. PSBs are increasingly starting to commission programmes directly for their on-demand services. The BBC has recently announced its iPlayer focussed commissioning strategy⁷; Channel 4 recently launched its 5-year digital strategy⁸; and ITV has said its evolving strategy would see it "start commissioning shows primarily for Hub rather than for linear channels"⁹. Increasingly PSB VODs are becoming an extension of the core licensed linear channels, as opposed to simply being "catch up" services. The definition within the guidelines regarding what the Codes of Practice apply to should be updated to reflect this shift in commissioning practices from the PSBs. If not updated, this would leave independent productions outside the scope of the Code of Practice for works commissioned for on-demand/digital.

17. The Ofcom guidance also recognises the differences in value between different uses of work, and recognises that acquiring additional rights has value. These are fundamental principles which Directors UK supports. As media platforms and commissioning practices change it is important to retain the value of these rights in these new uses. Any future changes to the guidance or surrounding regulations must continue to protect/support this principle.

18. As highlighted earlier, as it is likely that programmes will be increasingly commissioned for on-demand use first, the guidance will need to be updated to reflect the inclusion of commissioning for PSB on-demand services, to ensure that these are considered within the Broadcasters' Commissioning Code of Practice and as part of the negotiations of rights with independent production companies.

19. For example, Section 19 of Ofcom's guidance:

*"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)."¹⁰*

20. The changes to Terms of Trade agreements over rights and usage windows due to changing consumption behaviours, should continue to be addressed through negotiations for rights between the PSBs and independent producers in exchange for receiving a fair value for the rights. But it is important to ensure that the Guidance accommodates the shift to on-demand commissioning so that this is included within those negotiations.

21. As highlighted in para 12 above, should the outcome of the Ofcom *Small Screen, Big Debate* consultation result in a change to what is considered to be PSB/PSM, and who are considered to

be PSB/PSM providers, then the guidance/rules may need to be revisited in that light to consider any obligations that may need to be extended or adapted.

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?

22. We do not have any recommendations for changing the independent production quota.
23. We would caution Ofcom and the Government to fully consider the market impacts of any proposed changes to production quotas.

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?

24. We do not have any recommendations for changes to the definitions of 'qualifying programmes' or 'independent productions'.
25. There may be a need to revisit the definition, or provide clarification, surrounding the term "broadcaster", in that it specifies this in relation to providing a "television service" and "television receiving apparatus".
*"(7) In this article – "broadcaster" means, subject to paragraph (5) above, a person who **provides a television service** (that is to say a service providing to members of the public images or images and sounds **for reception on television receiving apparatus**, whether provided by broadcasting or by other means) whether in the United Kingdom or elsewhere;"¹¹*
26. Consideration may need to be given as to whether the interpretation of this definition of "broadcaster" as a television service, is broad enough to include other screens/devices/platforms that receive and distribute audio-visual content.
27. As highlighted earlier, should the outcome of Ofcom's *Small Screen, Big Debate* consultation result in significant changes to what constitutes Public Service Media/Public Service Broadcasting, or who can be considered to be Public Service Broadcasters/Providers, then these definitions may need to be reviewed to ensure they reflect this.

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