



# Consultation on revised Ofcom Guidance for broadcasters on Codes of Practice

Revised Ofcom guidance for broadcasters in drafting  
Codes of Practice for commissioning programmes from  
independent producers

Consultation

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## Section 1

# Executive Summary

- Section 285 of the Communications Act requires Public Service Broadcasters (“PSBs”) to have in place Codes of Practice 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 been able to reach Heads of Agreement on terms for new media rights.
- In light of responses to consultation on the TPSR and the new agreements, Ofcom is proposing to modify its original guidance to ensure that it remains relevant.
- The main modifications to the guidance are in relation to:
  - Clarity in relation to the different categories of rights to be made available;
  - Transparency about the amounts to be paid in respect of each category of rights;
  - Arrangements in relation to the duration and exclusivity of each category of rights; and,
  - Reporting and monitoring arrangements.
- The consultation sets out a discussion of these issues and how Ofcom proposes to modify its Guidance to reflect developments in the sector.
- Attached as an Annex is a draft of Ofcom’s proposed new Guidance for consultation. Ofcom welcomes comments from interested parties on both the scope and content of the draft Guidance.
- Once the Guidance has been confirmed it will then be up to the PSBs to submit revised Codes of Practice which comply with the Guidance for Ofcom formally to approve.

- The consultation period runs for five weeks which is shorter than the standard 10 week consultation period to which Ofcom usually works. However, Ofcom considers that because the issues set out here are of interest to a specific set of stakeholders and because the relevant issues being consulted on are narrowly focused, a full 10 week consultation period is not necessary.

## Section 2

# Introduction

- 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 considers that there is a need to update the current Guidance (issued in December 2003<sup>1</sup>) to take into account developments to the commissioning framework in the three years since the Guidance was originally issued. In particular Ofcom believes there is 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.
- 2.3 This consultation document 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 TPSR and discusses how Ofcom believes that those issues should be incorporated into new Guidance. Finally, Ofcom sets out new draft Guidance and invites comments.
- 2.4 The consultation period runs for five weeks which is shorter than the standard 10 week consultation period to which Ofcom usually works. However, Ofcom considers that because the issues set out here are of interest to a specific set of stakeholders and because the relevant issues being consulted on are narrowly focused, a full 10 week consultation period is not necessary.

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<sup>1</sup> available at [http://www.ofcom.org.uk/tv/ifi/guidance/cop\\_prog\\_ind/indies\\_pdf.pdf](http://www.ofcom.org.uk/tv/ifi/guidance/cop_prog_ind/indies_pdf.pdf)

## Section 3

# The 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<sup>2</sup> 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;

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<sup>2</sup> pursuant to section 362 of the Act, a “licensed public service channel” includes any Channel 3 service, Channel 4 and Channel 5.

- 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 would expect 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”.<sup>3</sup>
- 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<sup>4</sup>.
- 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.

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<sup>3</sup> See section 3(2)(a)-(f) of the Act.

<sup>4</sup> See section 3(4)(a)-(m) of the Act.

## Section 4

# Ofcom's Television Production Sector Review

## Introduction

- 4.1 The Act was passed in July 2003 and Ofcom assumed its duties under the Act on 29<sup>th</sup> December 2003. As part of the preparatory work for the requirements of section 285 coming into force, Ofcom issued Guidance in December 2003<sup>5</sup>. The Codes of Practice were then introduced by the PSBs at the beginning of 2004.

## The Television Production Sector Review

- 4.2 The TPSR<sup>6</sup>, which commenced in 2005, concerned the key aspects of the television production sector comprising programme-making activity both within the main broadcasters (in-house production) and outside (external production – qualifying and non-qualifying independent producers). It sought to explore the key developments in the sector, and how the interests of television viewers – as both consumers and UK citizens – were met by the industry. A particular focus was on the operation of the commissioning system between producers and broadcasters as governed by the Codes of Practice.
- 4.3 Given that only a relatively short period of time had elapsed since the Codes of Practice were introduced, it was difficult for Ofcom to provide a comprehensive assessment of the financial and economic impact of the new arrangements. Nonetheless, as far as was practicable to do so, Ofcom conducted an assessment of the operation of the Codes of Practice as part of the TPSR.
- 4.4 Ofcom's general view – through discussions with independent producers, broadcasters and other industry participants – was that the Codes of Practice (and the associated new terms of trade) were generally regarded as working well in relation to scheduled broadcast television. The Codes of Practice were described as instrumental in shaping a more mature industry and in introducing more constructive and professional relationships between broadcasters and producers. It was also felt that the new environment made production companies more attractive to investors. As such, the Codes of Practice had helped to underpin the growth in the sector discussed in the consultation document.
- 4.5 There were, however, a number of concerns voiced by both broadcasters and producers. In particular the issue of new media rights – specifically the distribution of TV programmes on alternative distribution platforms such as the Internet and mobile networks – was raised consistently in Ofcom's interview programme and wider external engagement. Both broadcasters and producers told Ofcom that this issue had not been suitably resolved under the Codes of Practice and terms of trade introduced in 2004. There was what appeared to be a lack of consistency and clarity in the approach to ownership and control of new media rights across the sector.

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<sup>5</sup> Ofcom: "Guidelines for broadcasters in drafting codes of practice for commissioning programmes from independent suppliers." (December 2003)

<sup>6</sup> The consultation document and final statement for Ofcom's Television Production Sector Review can both be found at: [www.ofcom.org.uk/consult/condocs/tpsr/](http://www.ofcom.org.uk/consult/condocs/tpsr/).

- 4.6 This was not entirely unexpected. At the time the original Guidance was issued in December 2003, Ofcom had anticipated that this could be an issue for the industry as there appeared to be both a general lack of awareness of the significance of new media issues and no consensus on the extent of their importance in 2003. The Guidance set out its position in relation to new media rights in the following terms:

“Primary rights might also be defined to include certain new media rights, including simulcast streaming on the internet and interactive and on-line applications. Where such rights are not included in a primary “bundle”, it may be acceptable for broadcasters to impose a delay in the use or sale of rights for distribution of programmes over other media, such as the internet, in order to protect the value of at least the initial broadcasts on the television networks” (Guidance, Para 18).

- 4.7 The Guidance indicated that this was an area that Ofcom would keep under review.

“Given the inclusion of new media rights into the definition of primary rights is a new and developing area, this is an issue that Ofcom proposes to keep under review”.  
(Guidance Para 19)

- 4.8 The issues raised by broadcasters and producers in the course of the TPSR mainly concerned the lack of clarity about the definition of new media rights and the way in which they could be exploited.
- 4.9 Broadcasters expressed the concern that the existing Codes of Practice would not be sufficiently flexible to deal with rapid technological and market changes and that the Codes of Practice limited their ability to extend programming to new media platforms to meet audience expectations. On the part of producers, PACT expressed a concern that broadcasters were trying to bundle new media rights into the primary licence in a way which went further than provided for in the Guidance.
- 4.10 These concerns about clarity, flexibility and control were echoed in discussions not just with individual producers and broadcasters, but also with third party operators (e.g. mobile network operators) that provide alternative networks for the distribution of content.
- 4.11 As a result, Ofcom concluded that there was a general view that the current approaches to new media rights set out in the Codes of Practice have been overtaken by market and technological developments, and that there is a genuine risk that arrangements put in place through Codes of Practice originally drawn up at the end of 2003 would not prove sufficiently flexible to accommodate these developments. There was also a general view that Ofcom had a role to play in trying to find a way forward for the industry.
- 4.12 As part of the wider consultation on the TPSR, Ofcom considered the options for addressing these issues and the best means of moving towards a more flexible framework for commissioning, in the light of changing distribution technologies and rapidly developing market conditions. Ofcom made it clear at the outset that it was not seeking to prescribe a solution to this issue: rather, the intention was to put forward a set of core principles, and thereby to set out a potential framework for negotiation. Ofcom proposed that the final details of any solution – including specific terms – should be the subject of commercial negotiation, rather than regulatory intervention.

## Outcome of Negotiations

- 4.13 During late May and early June 2006, the BBC, ITV and Channel 4 all separately reached agreement on news Heads of Terms with Pact which incorporated new approaches to the exploitation of new media rights. Following on from the agreements on Heads of Terms, Ofcom understands that the next step is for the PSBs to transcribe the principles set out in the Heads of Terms into long-form contractual amendments to their existing Terms of Trade and to the Codes of Practice to take account of the resulting changes.
- 4.14 In order to take account of the developments in relation to new media rights, Ofcom is now proposing to update the Guidance. Ofcom does not believe that a general revision of the Guidance needs to be undertaken, rather that specific sections of the Guidance need to be revised to take into account developments in relation to new media exploitation.
- 4.15 Set out below is a discussion of how Ofcom believes the specific sections of the Guidance need to be modified in light of these developments. The discussion below focuses on the modifications or extensions to the Guidance, recognising that key aspects of the existing Guidance are also retained.

## Clarity over the different categories of rights that are available

- 4.16 The existing Guidance refers to the need for PSBs to be clear about the rights that are included in the primary licence. The Guidance is also clear that the Codes of Practice relate to material commissioned by licensed public service channels, the BBC and S4C.
- 4.17 Ofcom is proposing to extend this section of the Guidance in a number of ways to address the developments in the industry. In the first instance, given the move to a windowing structure for exploitation Ofcom would expect a PSB's Code of Practice to set out the windowing framework that the PSB is proposing to use going forward i.e. it should focus on the nature of the exploitation windows for different types of content. Ofcom also proposes that the Codes should contain a statement which links the windowing approach to the fulfilment of the PSB's public service obligations.
- 4.18 The Code of Practice should also set out how the use of ancillary rights such as clips, previews, web-site material etc is to be managed.
- 4.19 In order to address issues around secondary exploitation the Codes of Practice should also be clear how issues such as repeats and returning series are dealt with within the windowing framework.
- 4.20 The PSB should, as far as possible, attempt to ensure that their Code of Practice is flexible enough to accommodate new forms of content exploitation in the future e.g. being clear that exploitation across subsequent new distribution media should be a matter for negotiation as those new media platforms emerge. The PSB cannot expect to secure ownership or control of all new media rights as a matter of course within the primary package of rights - Ofcom would expect that where new rights packages are created in the future, there should be provision for PSB and producer to negotiate over their exploitation.
- 4.21 As defined in the Act, the Codes of Practice are intended to apply to commissioning for a licensed public service channel. However, this is not to say that the PSB cannot also use the Code of Practice for the commissioning of programmes for other

channels if they wish *provided* that the PSB does not seek to make the commission for the licensed public service channel conditional on also acquiring the rights for use on non-PSB services. However, in a number of instances, Ofcom is aware that PSBs have already negotiated arrangements with Pact relating to the use of programming across a number of related channels e.g. where the licence allows x number of transmissions on Channel A and/or y number of transmissions on Channel B. It is not Ofcom's intention to undermine these sorts of arrangements i.e. where they have been freely negotiated.

- 4.22 The Codes of Practice may also allow PSBs to seek to negotiate with the producer for other rights packages. However, the Code of Practice should not include matching rights provisions or provisions which have that effect. Ofcom considers that such clauses could have the effect of foreclosing the access of third party service providers to content rights and of dampening competition for rights. For instance, if a third party service provider knows that at the end of what might be time-consuming commercial negotiations with a producer, the producer still has to go back to the original commissioning PSB and give them the option to match the negotiated terms and conditions, then it is less likely to enter into negotiations in the first place.
- 4.23 Ofcom also proposes that the new Guidance should now include an anti-avoidance measure to prevent circumvention – either accidentally or deliberately – of the application of the Codes of Practice. For instance, if a PSB considered using another of its channels or service to act as the commissioner for material which was intended to receive its first transmission on the licensed public service channel, then Guidance is clear that Code of Practice should apply to all material that receives its first transmission on the PSB service. Similarly, the Codes of Practice also should apply to material which is intended to receive its second transmission on the PSB within a very short period after first transmission on a secondary channel and where the PSB has contributed the major part of the funding.

### **Transparency over amounts to be paid for each category of rights**

- 4.24 The existing Guidance required PSBs to develop and publish a list of indicative tariffs relating to fees for primary rights. The Guidance also suggested that the Codes of Practice should include the broad methodology that the PSBs had used to draw up the indicative tariffs.
- 4.25 The issue of pricing is a complex area and Ofcom is aware that there is still considerable uncertainty as to the value of different categories of new media rights. For instance, although there is a general recognition across the industry that new distribution platforms have the potential to pose a threat to the traditional business models for linear viewing, it is not clear what the extent of this threat might be or how quickly the market might tilt in any particular direction.
- 4.26 Data submitted by broadcasters during the course of the TPSR drew on the experience of the impact on viewing patterns in PVR homes. That evidence suggested that the availability of services which allowed people to move away from linear viewing - such as catch-up services or video on demand ("VoD") - could well have an impact on traditional services. However, the extent of the impact was likely to depend on the nature of the VoD services available e.g. whether free catch-up or paid-for VoD and also there was some evidence which suggested that the overall amount of viewing in PVR homes actually increased.
- 4.27 The data submitted by broadcasters also suggested that - at least for specific series within certain genres - there was a possibility that increased exposure of the

programming e.g. through repeats of programmes, could in fact increase sales of DVDs. If this analogy carried over into non-linear viewing then it was not clear that the availability of non-linear services would *automatically* have a negative impact on subsequent exploitation e.g. on sales of DVDs.

- 4.28 At the same time it was clear that the data on these sorts of issues did not all point in the same direction. For instance, data compiled for Pact suggested that the exploitation of content through VoD services would have the potential to impact on the value of subsequent forms of exploitation such as DVD sales. Producers were also concerned that extensive exploitation of content in the primary window by broadcasters could have an impact on the revenue generated from secondary exploitation unless the duration of holdback periods were reduced.
- 4.29 More recently, work carried out as part of Ofcom's work on the Market Impact Assessment for the BBC iPlayer<sup>7</sup> confirmed that the markets for on-demand services were still at a very early stage in their development. However, modelling undertaken as part of the MIA indicated that linear TV viewing could fall by 20-30% in the next 5 years although that reduction in linear viewing would be largely replaced by increased use of on-demand services. Indeed the work on the MIA found that there was likely to be a significant increase in the overall level of viewing as audiences made greater use of PCs and portable devices outside the home.
- 4.30 Against this background of uncertainty and change and given that there is little in the way of actual information on the "value" of different categories of rights, Ofcom does not believe that it would be appropriate or realistic for Ofcom to require Codes to specify exact pricing for individual categories of rights. Ofcom considers that an important aspect of the Codes to date has been the fact that the PSBs have been required to publish indicative tariffs and a methodology which sets out how those tariffs are derived. Those tariffs have provided an important degree of transparency and clarity for producers: they provided a clear indication of the sorts of prices that the PSB was prepared to pay for different genres and thus helped the producer to make an initial appraisal of the sort of price that PSB would negotiate around.
- 4.31 Ofcom considers that - for the moment - transparency is achieved by requiring the PSBs to publish indicative tariffs and the methodology used to derive them. The tariffs will need to be comprehensive in terms of applying to the different genres and sub-genres across which PSB is commissioning and the methodology needs to be sufficiently detailed to allow the producer to make an assessment of the approach that the PSB has used to value different categories of rights.
- 4.32 Clarity over the different packages of rights combined with the publication of indicative tariffs for the rights that are exploited in the primary window should provide a basis which would allow proper, market-based valuations of different categories of rights to emerge and proper markets for these rights to begin to develop.
- 4.33 As a result the proposed modifications to this section of the existing Guidance are more about ensuring that the Codes of Practice retain a degree of flexibility for the broadcaster in negotiating prices but at the same time encourage more market based valuations of different categories of rights to emerge.

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<sup>7</sup> BBC new on-demand proposals – Market Impact Assessment. (Ofcom 2007)

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

- 4.34 The existing Guidance requires a Code of Practice to specify the duration of the primary rights licence as well as clarifying that PSBs should not seek to include rights in perpetuity as a matter of course. The Guidance makes clear that there should be room for a PSB to seek to acquire additional rights in a programme but that should be the producer's choice and also a matter for commercial negotiation.
- 4.35 The TPSR drew attention to the changing nature of the relationship between the intensity of exploitation around the primary transmission and the duration of the exclusive licence that a PSB acquired when it commissioned a programme. The conventional practice had been for the PSB to acquire an exclusive 5-year licence in a programme where the licence would cover the primary transmission and a specified number of repeats. Typically the PSB would be able to acquire more repeats within the licence period on payment of a specified repeat rate and would also be able to acquire a 2-year extension to the licence on specified terms. Secondary exploitation of the programme within the UK within the licence period would only be allowed if the commissioning broadcaster was prepared to give agreement – i.e. to waive their holdback.
- 4.36 In practice under the Codes of Practice several – but not all - the PSBs had moved to introduce formal holdback policies (or early release policies) which set out the terms and conditions in which they were prepared to waive the holdback within the licence period to allow early secondary exploitation in the UK. *De facto* this had tended to reduce the period of exclusivity for those PSBs from 5-years down to around 2 years although the fact that the primary licence was for 5-years meant that the PSBs were still able to influence the extent of secondary exploitation.
- 4.37 It is anticipated that the move to a windowing structure could lead to more intensive exploitation of programming in and around the primary window: e.g. in addition to the first linear broadcast transmission on television, there would be opportunities for viewing via catch-up or VoD services across a range of platforms for a period of time around that first transmission.
- 4.38 In order to address this change in the nature and pattern of exploitation of content in a windowing framework, the Guidance has changed to formalise the use of holdback/early release policies and to provide incentives for PSBs and producers to work together to provide for the secondary exploitation of content. Ofcom considers that the introduction and use of holdback/early release policies requires PSBs to think more systematically about the way in which they wish to use commissioned programming and the safeguards that they need to maintain e.g. in relation to branding, scheduling etc.

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

- 4.39 The original Codes of Practice set out a range of different information reporting arrangements. Given that the Codes of Practice have now been in place for a number of years and Ofcom has a better understanding of what information is useful and relevant in this area, Ofcom is proposing to move to standardise the information reporting requirements across all PSBs.
- 4.40 As set out in the TPSR, Pact and individual producers had raised concerns that the PSBs were seeking to “net off” potential revenues from secondary exploitation i.e.

PSBs were seeking to reduce the amount that they paid for primary rights on the assumption that producers would recoup a proportion of the production cost from exploitation of rights in the programme once it was made and transmitted. At the time of the TPSR Ofcom did not find any *prima facie* evidence of this practice but indicated that it was an area that it wanted to keep under review. The move to standardise these reporting requirements is part of that process.

- 4.41 The Guidance has been modified to set out a full list of the information Ofcom requires PSBs to submit to Ofcom and a timescale for the delivery of that information.



## Annex 1

# Responding to this consultation

## How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 28th March 2007**. Ofcom considers that because the issues set out here are of interest to a specific set of stakeholders and because the relevant issues are narrowly focused, a 10 week consultation period is not necessary.

Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/cop/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.

For larger consultation responses - particularly those with supporting charts, tables or other data - please email [jonathan.porter@ofcom.org.uk](mailto:jonathan.porter@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Jonathan Porter  
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Content & Standards  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Fax: 020 7981 3806

Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

It would be helpful if your response could include direct answers to the question asked in this document, which is listed at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Jonathan Porter on 020 7783 4199.

## Confidentiality

We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

Following the end of the consultation period, Ofcom intends to publish a statement in late April/early May 2007.

Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.

If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
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Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## **Annex 2**

# **Ofcom's consultation principles**

Ofcom has published the following seven principles that it will follow for each public written consultation:

### **Before the consultation**

Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### **During the consultation**

We will be clear about who we are consulting, why, on what questions and for how long.

We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

We will normally allow ten weeks for responses to consultations on issues of general interest.

There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### **After the consultation**

We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).

We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.

The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.

We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).

Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

## Annex 4

# Consultation Question

In light of the discussion set out in the main body of the consultation document, Ofcom invites comments on the scope and content of the draft guidance.

## Annex 5

# Draft Guidance for consultation



Ofcom Guidance for PSBs in  
drafting 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 they commission programming from independent producers. That framework needs to adapt as the service 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. Ultimately Ofcom's intervention in this area aims to further the interests of viewers. In this, Ofcom has two key 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:
  - Against a backdrop of uncertainty, 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



- Ultimately 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 legal distribution by the industry.

## STATUTORY BASIS

5. Section 285 of the Communications Act 2003 (“the Act”) provides that the regulatory regime for every licensed public service channel<sup>8</sup> 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 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;

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<sup>8</sup> pursuant to section 362 of the Act, a “licensed public service channel” includes any Channel 3 service, Channel 4 and Channel 5.

- 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 are also only intended to apply to commissioning of content from independent producers intended for use on licensed public service channels – they do 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

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 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.
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.

## Specific Issues to be addressed by the Codes

13. 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;**

*[No Change to Existing Guidance]*

14. 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.
15. 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.

16. 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**

17. 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 broadcaster and/or to other parties.
18. A broadcaster's Code of Practice should contain a clear statement of the nature of the windowing framework within which a broadcaster is proposing to operate when it comes to commissioning. The Code should set out the minimum set of rights that a broadcaster is seeking to acquire for exploitation in the primary window and should make a distinction between the rights required to secure 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 make clear that over time there may be a need to revisit the scope of the primary window as new distribution platforms emerge.
19. The Codes should relate primarily to commissioning by broadcasters of content for use across their licensed public service channels: that is, material which is commissioned by or first transmitted on wholly owned licensed public service channels. The Codes should include a clear statement as to how the rights that the broadcaster is looking to secure relate to the pursuit of their public service broadcasting obligations.
20. However, to avoid any attempt to circumvent the purpose of the Codes, material 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, material that receives its first transmission on a secondary channel but is intended to be repeated on the licensed PSB service very shortly after that and where the PSB service has paid a major part of the costs will also be subject to the Codes.
21. However, that would not prevent the PSBs from seeking to develop arrangements for use of material 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.

22. 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. what is the maximum amount of time from any one programme that constitutes a clip etc or be clear that this will form part of the Terms of Trade.
23. The Codes should make clear the principles which will address how repeats are dealt with within the windowing framework
24. The Codes should make clear the principles which will address how returning series and strands are dealt with within the windowing framework
25. The Codes should confirm that negotiations relating to the rights exploitation in the primary window 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, format rights, merchandising. Ofcom would not expect PSBs to seek to extend the scope of their control over the way in which such rights are exploited within the primary window beyond current agreed restrictions.
26. The Codes should not 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.
27. 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**

28. 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.
29. 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.
30. In order to provide a degree of transparency in terms of establishing a starting point for commercial negotiations, the Codes should include a list of indicative tariff ranges for different genres/sub-genres of programming.
31. 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 window. 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.

32. Broadcasters 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
33. 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.
34. Going forward, it is likely that the price mechanism will be important in adjusting to reflect the value of programme material to a broadcaster, particularly in securing its public service obligations. Where the broadcaster may be acquiring a limited set of rights, then *over time* it would be reasonable to expect the overall contribution they make to the full costs of production to reduce as the value of new categories of rights becomes more apparent. Similarly, over time, where the rights that a broadcaster is securing account for the bulk of the overall value in a programme, then the price they might pay might be expected to increase. 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 broadcasters 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**

35. 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.
36. The Codes should set out the duration of the primary 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 does vary by genre this should be made explicit.
37. Where there are categories of rights which are subject to holdback arrangements, the Codes should set out the nature of the restrictions on the exploitation of those rights in the form of a formal holdback/early release policy. That policy should set out the principles under which the PSB is prepared to waive its exclusive holdback to allow for early secondary exploitation by the producer.
38. 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.

39. 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 recognise that broadcasters are concerned that, where exploitation of new media rights in programmes 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;**

*[No change to existing Guidance]*

40. 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.
41. 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**

42. 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 for the primary window or additional rights for secondary exploitation as well); the number of instances when the broadcaster has exercised its right to renew the original licence; the price paid for the commission (and where it sits in the relevant tariff range); the duration of the rights; whether the broadcaster has waived their exclusive holdback etc.
43. The reports should also include a summary of how any disputes have been dealt with and should also provide for a review of the broadcaster's compliance with their commissioning timetables.
44. 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. Ofcom would expect 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.**

*[No change to existing Guidance]*

45. 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.
46. 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**