

Draft guidance for Public Service Broadcasters on Commissioning Codes of Practice

For commissioning from independent
producers

[Welsh version available](#)

Draft guidance

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1. Introduction

- 1.1 Independent productions are an important element of public service media ('PSM'). They make a vital contribution to the high-quality, creative, and diverse range of content made available by the public service broadcasters to meet the needs and satisfy the interests of audiences across the UK. The PSBs both support and rely on the UK's independent production sector to produce PSM content that meets evolving audience needs and represents the diversity of the UK.
- 1.2 Regulation plays a role in supervising this relationship. The BBC, S4C, and the licensed public service broadcasters (the Channel 3 licensees, Channel 4 Television Corporation ('C4C') and Channel 5) (together, 'PSBs'), must meet quotas which set out requirements on the volume of independent productions they transmit and the amount they spend on them. Each PSB must have and comply with a Code of Practice ('Code') which sets out the principles they apply when commissioning independent productions. The Code must meet certain statutory requirements and also take account of our guidance on these matters.
- 1.3 This guidance and the PSBs' Codes apply to independent productions that are commissioned for a PSB's public service channel(s) or for its designated on-demand player (where the PSB intends the content to count towards meeting programming quotas for independent productions).
- 1.4 We recognise that in commissioning content under the Code, the PSB may seek rights to enable it to deliver the content on other services on which it makes public service content available, such as other broadcast channels and online services. This guidance is therefore intended to operate flexibly, so as to support the ability of the PSB to deliver content in a manner best suited to meet the needs and satisfy the interests of audiences across the UK.
- 1.5 In the remainder of our guidance, we set out details of the legal framework in place, including our duties and the role and objective of our guidance. We then set out the eight key areas the PSB Codes should address.

2. Guidance

Legal framework

Our duties and the role of our guidance

- 2.1 We are required to issue guidance to assist PSBs in drawing up their Codes (Guidance).¹ The Guidance must be general guidance and must not specify particular terms to be included in the commissioning agreements to which the Guidance relates.
- 2.2 Under their respective regulatory frameworks, each PSB's Code must set out the principles which the PSB will apply when agreeing terms for the commissioning of independent productions. The definition of 'independent production' is set out by an [Order](#) made by the Secretary of State under [Section 277 of the Act](#).²
- 2.3 In addition, the Codes should secure, in the manner described in the Guidance, that:
- a) a reasonable timetable is applied to negotiations for the commissioning of an independent production and for the conclusion of a binding agreement;
 - b) there is what appears to Ofcom to be sufficient clarity, when an independent production is commissioned, about the different categories of rights to broadcast or otherwise to make use of or exploit the commissioned production that are being disposed of;
 - c) there is what appears to Ofcom to be sufficient transparency about the amounts to be paid in respect of each category of rights;
 - d) what appear to Ofcom to be satisfactory arrangements are made about the duration and exclusivity of those rights;
 - e) procedures exist for reviewing the arrangements adopted in accordance with the code and for demonstrating compliance with it;
 - f) those procedures include requirements for the monitoring of the application of the code and for the making of reports to Ofcom;
 - g) provision is made for resolving disputes arising in respect of the provisions of the code (by independent arbitration or otherwise) in a manner that appears to Ofcom to be appropriate; and
 - h) that such information about the application of the code as Ofcom consider appropriate is given to persons who make independent productions that are to be commissioned in accordance with the code.³
- 2.4 In this document, we provide guidance in relation to each of these provisions. While they provide the framework for what needs to be in each Code, a Code does not need to be limited to the scope of these provisions.

¹ [Section 285 of the Communications Act 2003](#) (the Act), as amended by the Media Act 2024 (Media Act) (in relation to the Channel 3 licensees, C4C and Channel 5); paragraph 10 of [Part 2 of Schedule 12 to the Act](#) (in relation to S4C); and, in relation to the BBC, [section 198 of the Act](#) and paragraph 8 of Schedule 3 to the Framework Agreement (see also the amendment which will be made by the Media Act to paragraph 1 of Part 1 to Schedule 12 to the Act). In this Guidance, references to section 285 of the Act are to be construed as including the relevant provisions set out above insofar as they relate to S4C and the BBC.

² See [The Broadcasting \(Independent Productions\) Order 1991 \(legislation.gov.uk\)](#)

³ Section 285 of the Act.

- 2.5 The Code applies where the PSB is commissioning an independent production to be included on its main public service channel(s)⁴ or on its on-demand player which has been designated under the Act,⁵ and where the PSB intends the commissioned content to count towards meeting programming quotas for independent productions. The Secretary of State has power under the Act to make an order extending the application of the Code to other audiovisual (AV) services.
- 2.6 In drawing up our Guidance, we have acted in accordance with our principal duty in section 3(1) of the Act 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, when carrying out our functions.
- 2.7 In carrying out our functions, we are also required to secure the objectives in section 3(2) of the Act, including: *“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 *“the maintenance of a sufficient plurality of providers in different television ... services”*. We have also had regard to the matters in section 3(4), including:
- the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the UK;
 - the desirability of promoting competition in the relevant markets; and
 - the desirability of encouraging investment and innovation in relevant markets.
- 2.8 Ofcom is empowered to require the PSBs to submit their draft Codes and any revision to them to Ofcom for approval. In terms of giving approval, we will take into account the requirements of section 285 and our general duties under section 3 of the Act, as set out above.
- 2.9 We are required to consult PSBs and persons who make independent productions (or persons appearing to Ofcom to represent them), the BBC, and S4C about any revisions we propose to make to this guidance.⁶

Objective of this Guidance

- 2.10 In light of these functions and duties, the PSBs’ revised remits (including their ability to provide their services across a range of audiovisual (‘AV’) services), and given our ultimate aim when regulating the PSBs to further the interests of viewers, our high-level objective for the Guidance is: to support the PSBs in fulfilling their individual remits and the public service remit, meeting the needs and satisfying the interests of different audiences across the UK; and meeting their quota obligations in respect of independent productions.
- 2.11 In revising their Codes and applying them when negotiating commissions of independent productions, the PSBs should have regard to the need for the following:

⁴ These channels are all BBC television channels, S4C, each of the regional Channel 3 services of the Channel 3 licensees, Channel 4 and Channel 5.

⁵ A designated on-demand player – known as an internet programme service or IPS - includes an IPS provided by the BBC and, where Ofcom considers appropriate, an IPS provided by another PSB (or a person associated with that PSB) which meets the conditions set out in Section 362AA(3) to (5) of the Act. A designated IPS benefits from prominence and availability on regulated connected TVs.

⁶ Section 285(6)(c) of the Act.

1. a flexible framework that is platform and technology neutral;
2. clarity on the commissioning process, allocation of rights between broadcasters and producers, and use of different distribution platforms;
3. not distorting the commissioning decision as between internal and external producers;
4. preserving the exclusivity in distribution required by broadcasters in the primary licence, while preserving the scope for secondary exploitation by producers;
5. facilitating the exploitation of a range of AV services for the distribution of the content, with a view to meeting the needs and satisfying the interests of as many different audiences across the UK as practicable; and
6. furthering the interests of viewers, by supporting investment and innovation in content available to viewers, and efficient exploitation and distribution.

Issues the Codes should address

2.12 We now discuss the key issues to be addressed by each Code.

a. Reasonable timeframes for negotiations and conclusions of binding agreements

- 2.13 An important objective of each Code is to secure a clear and transparent process for commissioning. Accordingly, PSBs should set out: their overall approach to the commissioning process in their Code or related documents on their website (and include the relevant web links to such documents in their Code); the different stages of the commissioning process; reasonable timeframes for each stage of the commissioning process; and responsibilities in the organisation for dealing with it. It should be made clear if different timetables or process might apply to different genres of programming.
- 2.14 PSBs 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 easily accessible by producers (for example, by way of an Annex or web link). These more detailed guidelines could include information on specific steps in the commissioning process such as the time period between the submission and response to development proposals, the time period after commission approval during which final editorial specification is established and proposed turnaround time for rejected proposals.
- 2.15 A PSB's Code should set out how it 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 PSB in question e.g. it may depend on factors such as the materiality or nature of the PSB's production business and the scope for conflicts to arise.

b. Sufficient clarity about the different categories of rights to broadcast

- 2.16 A key principle underlying our approach to the Codes is that producers should retain rights in the programmes unless these are explicitly sold to a PSB and/or to other parties. We also expect PSBs to be able to acquire the rights they need to deliver on their remits and meet changing audience needs.

- 2.17 A PSB's Code 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 set out how those packages of rights are to be used and exploited. For instance, there might be an initial window of exploitation centred on the first transmission of an independent production on the main public service channel or release on the designated on-demand player. The Code would need to address the exclusivity and duration of these and other rights packages within the licence period (see below).
- 2.18 The Code should also set out the principles as to how on-demand programming, repeats on linear, returning series and strands (programmes that are linked by a theme, narrative, or approach) are to be dealt with within the initial window of the licence period.
- 2.19 The Code may reserve the right of the PSB to revisit the scope of the primary rights package as distribution platforms and audience demand or needs change.
- 2.20 The Code should relate primarily to independent productions which are commissioned for transmission on the PSB's main public service channels (or made available on a designated on-demand player⁷).
- 2.21 Independent productions commissioned by another channel or service (e.g. a joint venture channel) but intended for broadcast on the main public service channel (or made available on a designated on-demand player) will also be subject to the Code. Similarly, independent productions that receive their first transmission on a wholly-owned secondary channel but are intended to be repeated on the main PSB service (or made available on designated on-demand player), and where the PSB service has paid a major part of the costs, will also be subject to the Code.
- 2.22 However, this would not prevent the PSBs from seeking to develop arrangements for use of independent productions commissioned for the PSB channel or designated on-demand player on other platforms or wholly-owned channels. If this is the case, the Code should set out the approach to be used for such arrangements.
- 2.23 As part of the original commission, PSBs may expect to be able to acquire rights to be used for promotional purposes (e.g. clips, previews, web-site material etc). The Code should set out how the PSB approaches particular promotional uses.
- 2.24 The Code should confirm that, unless the independent producer expressly consents, negotiations relating to the acquisition of primary rights and the exploitation of such rights in the primary licence will not be linked to negotiations for rights for subsequent exploitation. By agreement, certain categories of rights already tend to rest with the producer e.g. international secondary rights and merchandising. We would not expect PSBs to seek to extend the scope of their control over the way in which such rights are exploited beyond that which is agreed in the primary licence.
- 2.25 The Code should not prescribe a particular funding arrangement nor allow for any automatic bundling of rights as between primary and secondary exploitation unless this is agreed by both parties. There should be no terms in contracts making them conditional (actually or in effect) on the use of a PSB's own distribution arm.
- 2.26 The Code should not preclude a PSB from acquiring different or additional rights packages should they wish to do so and should the independent producer wish to make them

⁷ When we refer to made available on a designated on-demand player, we mean with a view to counting towards the PSB's quota for independent productions.

available. A PSB should always be able to seek to secure more rights packages subject to commercial negotiation.

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

- 2.27 This provision is designed to ensure that a producer has a reasonable amount of information about the range of prices, indicative tariffs, that the PSB would typically offer for particular genres of programming and the factors that a PSB is likely to take into account in negotiating prices. This information should be available before negotiations take place.
- 2.28 In order to provide sufficient transparency, PSBs should set out in their Code details of 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 PSB will use to value different categories of rights. The Code should also set out the arrangements that the PSB will use for publishing a list of indicative tariff ranges for different genres/sub-genres of programming as well as arrangements for rights on different platforms.
- 2.29 As set out above, the Code should also set out the factors that PSBs will take into account in negotiating actual prices for individual commissions. However, the final prices for specific commissions, however, will be a matter for commercial negotiation.
- 2.30 The methodology used by the PSB in calculating its indicative tariff ranges should be flexible enough to take into account changes in the value of the primary rights in the programme acquired by the PSB.
- 2.31 Where programming may have limited value post-transmission so that the producer has little or no prospect of generating further revenues from the sale of secondary rights, the indicative tariff ranges should be sufficiently broad to be capable of encompassing the typical full production costs for such programming. However, we also recognise that at the point of commission, it may not be clear how much value could be attributed to secondary and subsequent exploitation. PSBs and producers ought to be able to agree appropriate risk sharing mechanisms to deal with this uncertainty and PSBs should not, therefore, move to reduce the price they pay for programming in anticipation of potential market developments.

d. Satisfactory arrangements about the duration and exclusivity of rights

- 2.32 The Code should specify the duration of the overall licence that a PSB acquires. PSBs should have only one automatic right to extend the licence period. Any subsequent extensions should be on commercially negotiated terms subject to the needs of returning series and strands.
- 2.33 The Code should set out the duration of the initial window and the holdback period in respect of the acquired rights. It is not the case that the duration of these windows has to be the same for every genre or category of rights but where the duration of the windows does vary this should be made explicit.
- 2.34 Where there are categories of rights which are subject to holdback arrangements, the Code should make it clear that the PSB will put in place a formal holdback/early release policy

which sets out clearly the principles that the PSB will apply when considering requests to waive its exclusive holdback to allow for early secondary exploitation by the producer. The formal policies do not need to form part of the Codes themselves but an underlying principle should be that such policies should be intended to enable rather than restrict early exploitation.

- 2.35 Although PSBs should not seek to include rights in perpetuity as a matter of course, commercial discussions between a producer and PSB can conclude with a producer agreeing to assign all the rights in a programme to a PSB. The Code should not preclude such arrangements but they should be negotiated arrangements rather than an automatic entitlement.
- 2.36 PSBs have a legitimate right to seek to protect the value of their brand in delivering their remit and are entitled to a degree of exclusivity in relation to the rights that they acquire to meet audience needs. However, PSBs should not use this to foreclose competition or the development of new markets by producers and third parties.

e. Procedures for reviewing the arrangements in the Code and compliance with it

- 2.37 In order to ensure effective oversight and monitoring of the application of the Codes, there need to be appropriate systems in place. We expect the Codes to set a mechanism whereby the PSB and Ofcom review the operation of the Code.
- 2.38 If a PSB wishes to modify their Code, or a linked document where this would impact the information PSBs are required to provide under this Guidance, they must seek approval from Ofcom. In the event of such an application, we will consider whether the Code aligns with the provisions of this Guidance. In doing so, we will engage with the PSB to understand the details of the proposed changes. We will also consider whether the issues raised by the PSB require us to revise the Guidance. We may also consider it to be appropriate to revise the Guidance from time to time outside of these circumstances.

f. Requirements for monitoring and reporting to Ofcom

- 2.39 In order to ensure effective oversight and monitoring of the application of the Codes, PSBs must collect, record and retain sufficient information to demonstrate compliance with the provisions set out in the Guidance. This information should be retained for a minimum of three years. Examples of the kind of information could include the prices paid for commissions and the relevant indicative tariff ranges, and the duration of rights.

g. Appropriate resolution of disputes

- 2.40 The Code should make provision for a dispute resolution mechanism in the event of a dispute arising between a PSB and independent producer, about the application of the Code itself, rather than the terms of a specific negotiation.
- 2.41 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 PSB and producer may need to be prepared to go to independent arbitration or mediation to settle a dispute. PSBs 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 PSB could be brought in as final arbiter in a dispute.

h. Appropriate information is given to independent producers regarding the Code

- 2.42 The PSB should make the producer aware of its Code before negotiations have commenced. As set out above, for example under a), the Code should contain a clear and transparent process for commissioning.
- 2.43 The PSB's Code and all relevant documents should be readily available and easily accessible on the PSB's website (the PSB should take into account disabilities and other accessibility needs). The Channel 3 licensee in Wales, C4C, Channel 5 and S4C may publish their Codes in Welsh and English.