

# EndemolShine UK

## Submission to Ofcom's further consultation on new broadcasting rules protecting participants in TV and radio programmes

Endemol Shine UK (ESUK) is part of Endemol Shine Group, a global content creator, producer and distributor with 120 production labels in more than 20 operating countries and a portfolio extending across scripted and non-scripted genres, digital and gaming operations. Endemol Shine Group has recently been acquired by Banijay.

As we mentioned in the previous consultation response, ESUK and its production labels take the welfare and wellbeing of their programme participants very seriously across the range of their programming and have always aimed to put in place an appropriate level of safeguards, which we have continued to develop and refine with experience over years of programme-making.

We have set out below our thoughts on the questions posed in the most recent consultation.

## Consultation Questions

### Introduction

Endemol Shine UK has seen a draft of the proposed response to the consultation being submitted by Pact on behalf of UK television's independent production sector and generally endorses the points made by Pact within that response. There are however some specific points that we would like to raise or highlight separately, as set out below.

### Qu 1: Do you agree with our proposed approach to the:

- a) **Additional measure of informed consent set out in Practice 7.3;**
- b) **New Practice 7.15; and**
- c) **New Rule 2.17?**

- 1.1 We agree with the overall approach of Ofcom's proposal to deal with the subject of participant welfare by means of expansion of Section 7 of the Broadcasting Code ("**Code**"). We also welcome that new Practice 7.15 is still phrased in terms that "due care" is to be taken over the welfare of participants who are either defined in the Code as "vulnerable people" or may be at risk of harm as a result of taking part in a programme. It is important that the measures introduced neither place a disproportionate or unjustified burden on broadcasters or producers nor hamper freedom of expression or programme making. We would want to see that any Guidance issued by Ofcom to accompany the new measures would continue to allow a proportionate and flexible approach to their implementation. We also note that Practice 7.3 already acknowledges that there may be programmes for which public interest considerations override the standard position. This is an important general principle which needs to be similarly acknowledged in relation to the other new provisions being proposed.
- 1.2 In the previous consultation, Ofcom confirmed that the word "due" was to be read, as elsewhere in the Code, to mean appropriate to the particular circumstances. We welcome the similar approach adopted in this consultation in relation to new Practice 7.15 – that the relevant evaluation will be of the potential risks associated with the person involved, the programme and the nature of how they will be taking part in it. However we would appreciate clarification from Ofcom as to whether it intends any practical difference between the two analyses of the word "due".
- 1.3 We would like to reiterate some of the points made both by Pact and in our response to the previous consultation:-
  - 1.3.1 It is key that there is close collaboration between broadcasters and producers in agreeing the appropriate approach to participant care in relation to each individual programme;

- 1.3.2 costs attaching to additional measures agreed in relation to participant welfare must be properly funded; and
- 1.3.3 sufficient time must be allowed in the commissioning process to enable a proper analysis of the needs for each programme.

- 1.4 We note that in paragraph 2.15 of the consultation Ofcom states that these proposals will, in principle, apply to all contributors to programmes, including actors, presenters and reporters. We agree with the point made in Pact's submission (and raised in our previous submission in relation to the definition of participant) that there should be acknowledged exceptions to the application of the new Practices, to make it clear that they only apply to members of the public taking part in the relevant programmes. As we mentioned before, they should not apply to paid professionals and other on-air staff, including presenters, reporters, panellists, actors, performers, comedians, musicians, dancers and believe this should also include celebrities and other public figures. We acknowledge Ofcom's comment that those professional/paid contributors' welfare interests would be likely to be covered in their contractual arrangements, but that is not the sole extent of it. They would be further protected by unions, their agents or representatives as well as by separate employment-related and health and safety legislation. We believe those are the appropriate means for their interests to be protected rather than the revised/new Practices being proposed under the Code and Ofcom's jurisdiction.
- 1.5 We recognise that Ofcom has taken the view that all types of programmes should be covered by the new Practices and that the accompanying Guidance is the appropriate place to deal with programme genres where the risks involved may be negligible. We are still concerned that including programming such as news, current affairs, audience phone-ins and other programmes involving questions from members of the public, live reporting and vox-pops within the regime covered by the Practices may have a stifling effect on the inclusion within them of participants with more complex needs or backgrounds. It is notable that the example of "low risk" programming given in the proposed risk matrix is of one where an interviewee takes part in a news item or current affairs programme item. Under that Guidance, a producer would still potentially be expected to take account of each of the before, during and after production elements listed in the Guidance. We do believe that this could affect both the readiness of producers to include some potential participants and the consequent diversity of voices in the relevant programme. It is also the case that the production timescale for these programmes is often too short to enable a full evaluation of an individual contributor against the proposed new Practices. We would therefore repeat our request that programmes within those genres listed above be excluded from the Practices.
- 1.6 It is also important that there is an acknowledgement within the Guidance accompanying new Practice 7.15 that the collection of background information about potential participants will need to be balanced with other considerations, in particular those relating to data protection. The suggested risk matrix includes reference, for example, to the collection of medical history information for "medium risk" shows (with the example given being a dating programme). The collection of information from potential participants will need to be both justified and proportionate. It seems unlikely to us that the ICO would condone the collection of a significant amount of personal and particularly special category information for a dating show. Equally

there should be some acknowledgement of the limits of a production team's ability to uncover all relevant information about an individual through the types of checks they are legally permitted to carry out. We would request that the Guidance addresses and clarifies these issues.

- 1.7 Finally, in relation to new Rule 2.17, while we acknowledge the positive intention behind the suggestion of providing additional information to viewers, we believe that examples of the kind which involve reference to support being provided to identified individuals create a difficult tension between the desire to reassure audiences and privacy/data protection considerations for the individual concerned. Information about any medical or mental health support being received would almost certainly constitute special category data.

**Qu 2: Do you agree with the proposed wording of the:**

- a) **Additional measure of informed consent set out in Practice 7.3;**
- b) **New Practice 7.15; and**
- c) **New Rule 2.17?**

- 2.1 As set out above, we believe that the wording of Ofcom's accompanying Guidance is as important as the wording of the Practices and Rule in order to facilitate a flexible and proportionate implementation of the new measures and avoid any unintended narrowing of the diversity of participants in programmes.
- 2.2 We agree with the suggestion in Pact's response that the words "if necessary" should be added to the new wording proposed for Practice 7.3 before the phrase "any steps the broadcaster and/or programme maker intends to take to mitigate these".
- 2.3 We note that the drafting of the proposed risk matrix in the Guidance for Practice 7.15 mirrors closely the text of the existing guidelines put in place by ITV. However we would appreciate either additional examples of the high/medium/low risk programming being provided – or no examples at all. We repeat our point that we believe the current example of low risk (interviewee taking part in a news item or current affairs programme) should actually fall within an excluded genre of programming. However leaving that to one side, the current spread between that and the example of a contestant on a dating programme being medium risk seems to us to be very wide and does not assist in an assessment of where the boundary between the two lies. The examples potentially describe the extremes of the two categories, with no further indication of other programmes that may fall within one or the other. It would be helpful either to have some further clarity/additional examples or to be less prescriptive about where those two types of programming would sit.
- 2.4 In addition, in relation to Practice 7.15, for which the risk matrix is principally written, the Guidance is proposed as a suggestion:-

"When considering the level of risk associated with a person's participation in a programme, broadcasters may find it helpful to use a risk matrix. The matrix set out below is not prescriptive and broadcasters may want to develop their own methods for determining risk."

However in the Guidance suggested in relation to Practice 7.3 the wording is prescriptive about the use of the matrix:-

“Broadcasters and/or programme makers should refer to the risk matrix in the Guidance to 7.15 when identifying the potential negative consequences arising from a person’s participation and what steps might be required to mitigate these.”

It does not seem right to us that Guidance should be presented as an optional approach in relation to the Practice for which it is created, yet prescriptive in relation to another Practice. We would request that the Guidance for 7.3 be revised to allow for the same flexibility of approach as currently applies to 7.15.

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