

Equity is the trade union representing over 46,000 people working in the UK's film, television, theatre, dance, variety and music industries. Our membership includes actors, singers, dancers, stage managers, stunt performers, audio artists, theatre directors and many other performers and creative workers. The BBC is one of the most important engagers of Equity members because of the investments it makes in talent and commissioning content and the public provision of services.

Equity broadly appreciates the desire of the BBC (and other partners) to develop BritBox so that consumers can easily access UK content and programmes when wanted, in line with changing viewing habits that's been lead by the SVODs, especially those of younger audiences; and the opportunities it provides to brand and provide a home for UK content. However, its support is contingent on assurances that it will operate in an open and commercial market and that BritBox will remain a commercial entity that is entirely separate from its Public Service arm. It is also contingent on how effectively Ofcom monitors and regulates the boundary as part of its Trading and Separation requirements to ensure these subsidiaries remain separate and takes remedial action if this boundary is crossed.

As set out in Equity's submissions to Ofcom's consultations on the iPlayer proposals, its key concerns relate to how these proposals will affect commercial revenues in the secondary market – on how it will affect revenues from other uses or onwards sales of programmes, i.e. to other channels or platforms or on DVD or Blue Ray – that will affect the royalties and secondary payments that rightholders would have otherwise received, that are vital to the ability of performers to make a living. As BritBox will be a fully commercial entity, Equity therefore expects that sales of programmes to it will be treated in the same way as sales to other VOD platforms, as a genuine third-party transaction by which the BBC pays market value and rightholders are fairly compensated.

In terms of the proposed changes to the programme release policy (as outlined on p10, para 1.40) we have no opposition to the opening of the sales window as long as the market rate is honoured and BritBox, or other qualifying SVODs, pay a fair price for the use of works in that window.

However, there is a lack of clarity about how it will operate, which have the potential to create an unfair competitive advantage in purchasing content as a result of the future entity's relationship with the Public Service. Equity's concerns are as follows:

- 1. The BBC's proposed changes to the Public Service programme release policy**

Equity agrees with Ofcom's assessment in paragraph 1.18 that this change of policy is a potential cause of concern, but disagrees with its conclusion that it would not represent a market distortion, and asks that the final terms and implementation of this policy is included in Ofcom's regulatory oversight.

As set out by Ofcom, the BBC is proposing to make changes to the Public Service programme release policy to enable the release of BBC commissioned content to SVODs that meet certain qualifying criteria from months 12-18 of the currently exclusivity window. Ofcom says it expects that BritBox will qualify for early access to the BBC commissioned content after this change, but the qualifying criteria make it highly likely it would be the only purchaser that would meet these conditions, which

would enable it to drive down the price. To qualify, the platform or broadcaster must “invest in and support the UK creative industries”, agree to carry “prominent and approved” BBC branding on its content and provide the BBC with data on a programme’s consumption and performance. The latter, in particular, is a condition very few – or indeed none - of its rivals are likely to meet. Such a policy is likely to close down early release sales to other SVODs prior to month 18, that could harm revenues in the secondary market – particularly at a point that could potentially be more advantageous for getting a good price – that determines the royalties and secondary payments to underlying rightholders.

Ofcom is supportive of these conditions for early release, which are laudable objectives, such as requirements for ensuring content carries prominent and approved BBC branding, and which includes rules to which public service broadcasters are already subject. Some of these rules are covered by Ofcom’s proposals for legislation to rightly ensure that shows made by UK broadcasters are not buried deep in the on-demand services of its competitors. However, this does not refute the accusation made by some within the industry that this criteria has been introduced by the BBC to service its own commercial activity and to give BritBox an advantage over streaming rivals such as Netflix.

In its submissions to Ofcom’s consultations on the BBC’s proposals for iPlayer, Equity highlighted a lack of information about how its proposals related to those for Britbox. This assessment now clarifies BBC plans, which states: “We understand that a key aim of Britbox will be for relevant programmes .. to move seamlessly from TV transmission to BBC iPlayer or ITV Hub, onto BritBox” (para 1.2). Equity shares widely held concerns about whether there is a budget for BritBox to deliver on this aim and if so, how much it is able to pay for these rights at the market rate.

Ofcom has concluded that the risk of this policy is limited as producers will be able to sell the rights rule-free after 18 months. However, Equity shares concerns, that these changes could give BritBox an early advantage over rivals and about other potential factors that could require or drive sales to BritBox during the 12-18 month window. As part of its role in ensuring that BritBox cannot have an unfair competitive advantage, Ofcom must monitor sales during this window to ensure that BritBox has not been able to exploit its position to drive down the price; for example, that BBC has not been able to create commissioning terms that oblige producers to sell content during the 12-18month window.

## **2. Original content**

It is noted that although ITV’s CEO, Carol McCall, has said the intention is for BritBox to invest “in new British originated content in the future”, no standalone programmes have yet been commissioned and the issue of original commissions has not been covered in this paper.

Equity urges Ofcom to undertake the following measures if it confirms its decision that the BBC’s involvement in BritBox is not a material change to its commercial activities, to ensure there is no unfair advantage or market distortion due to the relationship between the commercial activities and the Public Service:

1. It is welcome that Ofcom has put into place Trading and Separation requirements to regulate the boundary between the commercial activities and the Public Service and

that these requirements address concerns around “ensuring there are no inappropriate flows of information between the Public Service and the commercial subsidiaries; regulating the pricing of goods and services sold across the boundary; and ensuring that each commercial line of business earns a commercial rate of return”. In relation to regulating the pricing of goods and services sold across the boundary, to ensure it does not constitute a non-arms length sale, we ask that this will include ensuring that negotiations and acquisition of content for use on the service is done at fair market rates.

Equity also asks that this involves monitoring sales – particularly that it includes sales to other platforms - during the 12-18month window, and after month 18, and that Ofcom speaks to producers and underlying rightsholders to assess if the change in the programme release policy has given BritBox a competitive advantage that distorts the market.

2. Equity asks that Ofcom additionally conduct a timely review of BritBox, and the combined effect of it and the recently approved iPlayer proposals, that assesses the impact on fair and effective competition and on the secondary rights market. There are too many uncertainties in the proposals to confirm a decision that would mean the BBC could proceed with its involvement in BritBox “without a further assessment under the Charter” (p.1); an assessment would need to be made before 2027. As Equity set out in its submission to Ofcom’s second Competition Assessment of the BBC’s iPlayer proposals, the implementation of those proposals should be subject to a timely review to assess impacts and to take remedial action if the effect is more negative than anticipated, and the impact of Britbox must be part of this assessment – the iPlayer proposals and those for BritBox cannot be viewed in isolation.