

*Championing  
excellence and diversity  
in broadcasting*



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**RESPONSE FROM VOICE OF THE LISTENER & VIEWER  
TO OFCOM'S CALL FOR EVIDENCE:  
PUBLIC SERVICE BROADCASTERS AND THE UK  
PRODUCTION SECTOR**

**16 March 2021**

## Information about the VLV

1. The Voice of the Listener & Viewer (VLV) is an independent, not for profit membership-based charity, free from political and sectarian affiliations. VLV supports high quality broadcasting which maintains the democratic and cultural traditions of the UK. We support the independence and integrity of the BBC and encourage work which demonstrates commitment to the principles of public service broadcasting (PSB). VLV is a charitable company limited by guarantee (registered in England and Wales No 4407712 - Charity No 1152136).

## Introduction

2. In its submission to Ofcom's fourth PSB Review, VLV has highlighted its concerns about the sustainability of the PSB system. In this context VLV believes the existing Terms of Trade requirements should be reassessed to ensure their original goals are being met and to explore whether they could be redesigned to better support the PSB system.
3. VLV's concern is to protect the interests of audiences which are distinct from the interests of broadcasters or independent producers. It is beneficial for audiences that the independent production sector thrives and that there is a range of independent producers in the UK for a number of reasons, namely:
  - A range of independent producers ensures a greater plurality of suppliers for the PSBs and other UK broadcasters.
  - This helps ensure a greater range of content is available for audiences.
  - It also helps ensure a wider range of views and voices which leads to better representation of the UK and its population.
  - The success of the independent production sector in the UK has benefitted the UK economically and provided employment and training for citizens.
4. The Terms of Trade requirements introduced in 2003 aimed to address an imbalance in the bargaining power between independent producers and the PSBs, which had considerably more power than the independent producers, and to improve the competitiveness of the UK production sector. Before the Terms of Trade were introduced the previous norm was that PSBs made commissioning conditional on owning the majority if not all the rights to content they funded.
5. Since then the independent production sector has grown and thrived alongside PSB and other in-house production<sup>1</sup>. When the terms of trade were first negotiated the UK independent production industry was in its infancy and needed financial and structural support. This is no longer the case for all independent producers, especially the larger ones which may be part of larger corporations. It is now the PSBs which need more support.

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<sup>1</sup> *Small Screen: Big Debate Consultation – Annex 7. The role of PSBs in the UK TV production sector*, Ofcom, December 2020, para A7.4

6. VLV notes that the Terms of Trade apply only to the PSBs which disadvantages them in the market when other platforms are allowed to negotiate freely with independent producers. There is no obligation on competing commercial broadcasters or streaming platforms to protect the residual intellectual property rights of commissioned producers.
7. Market dynamics have changed since the Terms of Trade were introduced with the arrival of global commissioning platforms and the development of the UK commercial broadcasting sector. We note that the UK 'independent production sector now generates more than half its revenues from international commissioners, UK multichannels, and secondary rights'<sup>2</sup>. It is clear that the balance of power in the market has changed. This is no longer a buyers' market as more outlets have been created, reducing the power of the PSBs.
8. Despite these shifts in the market VLV notes that the PSBs still remain the largest investors in UK independent production and are particularly important for smaller production companies. PSB commissioning of content from independent producers not only supports growth of the independent sector across the UK, it also ensures that audiences have access to content which reflects the nations and regions of the UK.
9. Due to a reduction in income for all the PSBs since 2010 VLV notes that PSB spend on independent productions has fallen at an average rate of 2% per year between 2006 and 2019<sup>3</sup>. The sustainability of the PSB system is being questioned. If it does fail, this will be disastrous for the independent production sector.
10. Due to consolidation of the independent production sector VLV notes that the majority of independent production revenue goes to very large producers<sup>4</sup>. VLV also notes that the majority of the largest production companies in the UK are not UK-owned but are international conglomerates, such as Sony, RTL and NBC.<sup>5</sup> Despite the fact that most of the 'super indies' do not meet the criteria to be qualifying independent production companies and therefore do not benefit from the Terms of Trade, VLV is concerned that the balance of power between UK broadcasters and independent producers has shifted so that larger, global producers have become the more powerful entities in the marketplace.
11. VLV is concerned that further consolidation in the independent production sector may lead to a reduction in the diversity of companies competing for PSB commissions which could impact on the range and originality of available ideas and content for audiences.

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<sup>2</sup> *Small Screen: Big Debate Consultation – Annex 7. The role of PSBs in the UK TV production sector*, Ofcom, December 2020, para A7.34

<sup>3</sup> *Small Screen: Big Debate Consultation – Annex 7. The role of PSBs in the UK TV production sector*, Ofcom, December 2020, para A7.35

<sup>4</sup> According to Mediatique estimates, almost two-thirds of independent sector revenues are generated by producers whose annual turnover is greater than £25m per annum (*Small Screen: Big Debate Consultation – Annex 7. The role of PSBs in the UK TV production sector*, Ofcom, December 2020, para A.7.28) and that the largest 'super-indies' account for c.38% of all revenues (*State of the markets in which BBC Studios Operates*, Mediatique, December 2020, Figure 19).

<sup>5</sup> *Small Screen: Big Debate Consultation – Annex 7. The role of PSBs in the UK TV production sector*, Ofcom, December 2020, para A7.29

12. Recent Enders Analysis' research<sup>6</sup> provides evidence that the distinctiveness of UK content is being undermined by the preference of the global streaming services for content which is less culturally specific. In light of this research it is even more important that the sustainability of the PSBs is ensured so that they are better able to fully fund content from UK independent producers so that its UK distinctiveness is not watered down.

**Question 1: Given changes to audience consumption patterns and wider market developments, is there any aspect of Ofcom's Guidance on commissioning of independent productions which Ofcom should update to ensure it remains fit-for-purpose?**

13. VLV agrees with the principle that the Guidance on commissioning of independent productions should be flexible, platform and technology neutral so it can adapt as services offered by the PSBs develop.

14. We agree with Ofcom's objectives – namely to:

- 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.

15. VLV does not consider that Ofcom's Guidance needs to be updated.

**Question 2: Is there any change to the independent production quota which Ofcom should recommend to Government as part of its 'Small Screen Big Debate' programme**

16. VLV believes that the existing independent production quota (25%) set in the Communications Act 2003 is appropriate.

**Question 3: Do you have any recommendations for potential changes to the definitions of 'qualifying programmes' or 'independent production' which Ofcom should recommend to Government as part of its 'Small Screen Big Debate' programme?**

### **Qualifying programmes**

16. VLV understands that 'qualifying programmes' refers to all programmes provided on a PSB channel that have either been made or commissioned by that PSB Provider, excluding news<sup>7</sup>.

17. If PSB is redefined as PSM, as recommended in the *Small Screen: Big Debate* consultation, i.e. content provided by one of the existing PSBs across all platforms, then the definition of 'qualifying programmes' for the Terms of Trade will need to be adjusted to reflect that redefinition.

### **Independent Production**

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<sup>6</sup> *Outsourcing culture: When British shows aren't 'British'*, Enders Analysis, March 2021

<sup>7</sup> <https://www.legislation.gov.uk/ukxi/1991/1408/made>

18. VLV understands that independent producers are producers who are not employees of a broadcaster; do not have a shareholding greater than 25% in a broadcaster; and which are not a body corporate in which any one broadcaster has a shareholding greater than 25% or any two or more broadcasters have an aggregate shareholding greater than 50% (where “broadcaster” essentially means a broadcaster intending to broadcast to the UK)<sup>8</sup>.

### VLV Comments

19. VLV believes that the Terms of Trade need to be revised so that they do not discriminate so heavily against the PSBs in the marketplace and to support the PSB system which is under financial pressure due to declining income.

20. Such changes would be an effective means to increase revenue to the PSBs and improve the sustainability of the PSB system. As stated above, if the PSB system fails due to a lack of sustainability this will be disastrous for the independent production sector and for citizens in the UK.

21. VLV notes that in its *TV Production Sector Review* in 2015, Ofcom identified ‘two options that might merit further consideration: tightening the definition of a qualifying independent producer and reform to the rights and revenue shares between PSBs and producers’<sup>9</sup>.

22. In the 2015 Review Ofcom suggested that if there was concern that larger producers were being inappropriately protected by the regulatory regime, ‘then an appropriate response would be to tighten the definition of a qualifying independent producer. A size cap could be introduced to ensure that, in future, only SME producers qualify. This option would maximise the opportunity available to small producers to ensure new entrants continue to come into the market’<sup>10</sup>. VLV believes it is time to revisit this proposal.

23. VLV also agrees with the more recent conclusions in the Mediatique report which is an Annex to the PSB Review, *Future models for the delivery of public service broadcasting*, that ‘there is scope for policy makers to take a more targeted approach...For example, Terms of Trade could be applied only to productions made by companies below a certain size that would be deemed worthy of greater regulatory protection. The production sector would likely resist this strongly, and there may be conflicting incentives for production companies that would otherwise seek to secure scale’<sup>11</sup>.

24. VLV notes that smaller production companies have less experience and fewer resources to maximise their growth by selling content to broadcasters or other aggregators in post-primary windows and internationally. The Terms of Trade should focus on supporting these companies and exclude larger companies which have more resources and experience<sup>12</sup>.

25. While VLV acknowledges that some large production companies are not defined as qualifying independent producers and the PSBs are free to negotiate terms on a

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<sup>8</sup> <https://www.legislation.gov.uk/ukxi/1991/1408/made>

<sup>9</sup> *Review of the operation of the television production sector*, Ofcom, 23 December 2015, para 1.24

<sup>10</sup> *Review of the operation of the television production sector*, Ofcom, 23 December 2015, para 1.25

<sup>11</sup> *Future models for the delivery of public service broadcasting*, Mediatique, December 2020, para 5.32

<sup>12</sup> *State of the markets in which BBC Studios Operates*, Mediatique, December 2020, page 5

fully commercial basis, there are others which do qualify as independent producers, especially those owned by international corporations. VLV believes that the definition of a 'qualifying independent producer' should be amended.

26. New criteria should be introduced to limit the size of independent production companies which receive preferable Terms of Trade in order to ensure this policy intervention supports only SME companies. We would propose a sliding scale which would be transparent and apply to all companies based on turnover.
27. Additionally, in light of the change in market dynamics, VLV believes that the PSBs should retain a larger share of the IP rights of content they fund, in order to ensure the longer term sustainability of the PSB system. Again VLV would propose a sliding scale which would be transparent and apply to all companies based on turnover. Smaller production companies should retain more IP rights than larger companies.
28. We appreciate that the timing of such a review of the Terms of Trade agreements will be unwelcome because the final PSB Terms of Trade agreement, with the BBC, was signed in 2020.
29. In order to mitigate the impact of these changes on independent producers, the definition of 'qualifying programmes' could be amended so that it applies to all UK broadcasters. However, VLV recognises there are risks in this approach - it is possible that non-PSB providers would look elsewhere to secure content where they were able to secure better terms. While this would level the playing field between the PSBs and the remainder of the UK market, it would not lead to incremental value to the PSBs themselves<sup>13</sup>.

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<sup>13</sup> *Future models for the delivery of public service broadcasting*, Mediatique, December 2020, para 5.32