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BROADCASTING
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OF IRELAND

CODE OF FAIR TRADING PRACTICE:
Guidance for Public Service Broadcasters

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CODE OF FAIR TRADING PRACTICE: GUIDANCE FOR PUBLIC SERVICE BROADCASTERS

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1. Introduction and Legislative Framework

Under the Broadcasting Act 2009 (“the Act”), each public service broadcaster (“PSB”), RTÉ and TG4, is required to prepare and publish a code of fair trading practice, setting out the principles that it shall apply when agreeing terms for the commissioning of programming material from independent producers. The Broadcasting Authority of Ireland (“the BAI”) is required to prepare and issue guidance to PSBs on the format of a code of fair trading practice.

The legislative framework for the BAI guidance and a PSB code of fair trading practice may be summarised as follows:

- Section 112 (1) of the Act requires RTÉ and TG4 each to prepare and publish a code of fair trading practice which sets out the principles that the broadcaster shall apply when agreeing terms for the commissioning of programming material from independent producers.
- Section 112 (2) of the Act provides that the BAI, having consulted with the Minister for Communications, Energy and Natural Resources (“the Minister”), RTÉ, TG4, and independent producers (or such persons appearing to the BAI to represent them), shall, within 12 months of the passing of the Act and every fourth year thereafter, prepare and issue guidance to PSBs on the format of a code.
- Section 112 (3) provides that the BAI issues guidance on the format of a code which shall be general in nature and shall not specify the particular items to be included in the code to which the guidance relates.
- Section 112 (4) requires RTÉ and TG4, having considered the guidance prepared by the BAI, each to prepare a code and to submit it to the Minister for approval.
- The Minister shall, in considering a code, consult with the BAI. On approval by the Minister of a code, it shall be deemed to have come into force and the broadcaster whose code has been so approved, shall comply with that code.
- The Act directs a PSB to include in its code reference to its approach to:
 - (a) Acquisition of rights
 - (b) Multi-annual commissioning, and
 - (c) Timetable for contractual negotiations.

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In meeting the requirements relating to (a) above, a PSB shall address the arrangements it proposes to adopt in respect of the duration and exclusivity of the various categories of rights it intends to acquire.

In addition, a PSB shall ensure that provision is made for resolving disputes arising in respect of the provisions of a code (by independent arbitration or otherwise) in a manner that appears to the Minister to be appropriate.

- The Compliance Committee of the BAI shall, at the direction of the Minister, report to the Minister on compliance by a PSB with its code.
- RTÉ shall co-operate with independent producers in the marketing outside the State of sound broadcasting and television programmes commissioned by RTÉ from independent producers.

2. BAI Approach to Development of the Guidance

The BAI developed this Guidance following extensive consultation with the relevant statutory stakeholders and having had regard to its statutory functions, the objects of the PSBs and the interests of independent producers, viewers and listeners.

Of particular relevance were the following BAI statutory objectives:

- the BAI shall stimulate the provision of high quality, diverse and innovative programming by commercial, community and public service broadcasters and independent producers;
- the BAI shall facilitate PSBs in the fulfilment of their public service objects as set out in the Act;
- the BAI shall provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities;
- the BAI shall promote and stimulate the development of Irish language programming and broadcasting services.

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The BAI was also mindful that in performing its functions, it shall seek to ensure, amongst other things, that measures taken by the BAI:

- are proportionate having regard to its objectives as set out in Section 25 of the Act;
- are mindful of the objects, functions and duties set for PSBs in Parts 7 and 8 of the Act;
- will produce regulatory arrangements that are stable and predictable; and
- will readily accommodate and encourage technological development and its application by the broadcasting sector.

3. Scope of the Guidance

This Guidance applies to a code of fair trading practice to be prepared and published by a PSB pursuant to Section 112 (1) of the Act. A code shall set out the principles that a PSB shall apply when agreeing terms for the commissioning of programming material from independent producers. For the purposes of this Guidance, the making of an independent programme shall not be regarded as having been commissioned by a PSB unless, before work on the making of the programme commences, a PSB has incurred a legal obligation to pay at least 25 per cent of the cost of its making.

4. Guiding Principles

A principles-based approach informed the development of this Guidance.

The key principle underpinning this Guidance and a PSB's code of fair trading practice is set out below. The other principles which the BAI believes should underpin a PSB's code of fair trading practice are also set out.

Key Principle underpinning BAI Guidance and a PSB Code of Fair Trading Practice

The BAI acknowledges the vital contributions of both independent producers and PSBs to the programme-making process. These include, *inter alia*, creative input, time and resource investment, finance, production staff, production facilities and the expertise of key personnel.

The aim of this Guidance is to ensure that the contribution of each party to the programme-making process is recognised. The BAI encourages negotiations between

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a PSB and an independent producer to be conducted in good faith and to accommodate the interests and needs of both the PSB and the independent producer.

In recognition of the various contributions to the process by both an independent producer and a PSB, the key principle underpinning this Guidance and a code of fair trading practice is that, generally, an independent producer should own the rights in a programme which is commissioned from that producer unless those rights are explicitly acquired by a broadcaster or another party or parties.

Other Principles underpinning a PSB Code

Flexibility

A code should be sufficiently flexible to be able to adapt and respond to changing market conditions, technological developments and the evolving interests and needs of the audiences being served.

Certainty and Transparency

In balancing the need for flexibility on the broadcaster's part, an independent producer, in engaging with a PSB, should have a level of certainty with regard to the terms and conditions upon which programmes are commissioned. In addition, the principle of transparency should underpin the operations of the broadcaster in its dealing with independent producers.

PSB Objects

A code of fair trading practice may include relevant provision(s) in order to facilitate a PSB in achieving its public service objects under the Act.

Commercial Obligations and Expectations

Recognising the statutory obligations of a PSB in respect of its public service objects and recognising also the legitimate commercial expectations of a PSB and an independent producer, a code shall provide for a sharing between the independent producer and a PSB of the profits from any commercial exploitation of the programme to be commissioned.

5. Guidance on the Format of a PSB Code

The structure of this Guidance has regard to the provisions of Section 112 of the Act which indicates certain matters to be addressed by a PSB in a code of fair trading practice.

5.1 Categories of Rights

5.1.1 The BAI recognises that categories of rights may vary in different circumstances and between one broadcaster and another. However, a PSB code of fair trading practice shall contain a clear statement of the various categories of rights including primary rights and other categories of rights that may be applicable.

5.2 Primary Rights

5.2.1 In setting out a clear statement of the rights to be included in primary rights, a code shall provide for the acquisition by a PSB of all platform transmission rights for the island of Ireland for a period of years and for such number of transmissions as may be agreed between the parties.

5.2.2 If appropriate, separate, additional limited rights, may be included in primary rights to provide for the fulfilment of a PSB's object in respect of the provision of a service or services, in so far as it is reasonably practicable and having the character of a public service, which shall serve Irish communities outside of the island of Ireland. These rights should not comprise more than those required for the fulfilment of a PSB's plans to deliver upon its statutory object unless agreed otherwise between the parties.

5.2.3 Typically, the BAI considers that a primary rights period should be a period of five years unless otherwise agreed.

5.2.4 A code shall outline the process whereby a PSB may seek to extend its primary rights arrangement, the period covered by such an extension, and the terms of such an extension. It is expected that negotiations in this respect would take place through the regular commercial negotiation process.

5.3 Other rights

5.3.1 A code shall provide for the means by which a PSB and an independent producer shall separately negotiate rights other than primary rights should the

PSB wish to acquire such rights and should the independent producer wish to make them available.

- 5.3.2 A code shall not allow for any automatic bundling of rights as between primary and other rights unless by agreement between both parties.

5.4 Production Funding

- 5.4.1 In the interests of transparency, a code shall set out a PSB's principles on, and approach to, the negotiation of production funding to be provided by a broadcaster.

- 5.4.2 Typically, a production fee shall be included in production funding.

5.5 Commercial exploitation and RTÉ co-operation

- 5.5.1 Recognising the statutory obligations of a PSB in respect of its public service objects and recognising also the legitimate commercial expectations of PSBs and independent producers, a code shall provide for a sharing between an independent producer and a PSB of the profits from any commercial exploitation of a programme to be commissioned.

- 5.5.2 Pursuant to Section 112(12) of the Act, RTÉ shall specify in its code the mechanism for cooperation with independent producers in the marketing outside the State of sound broadcasting and television programmes commissioned by the broadcaster from independent producers.

5.6 Archiving

- 5.6.1 A code shall provide that a contract between a PSB and an independent producer in respect of the commissioning of a programme should oblige the independent producer, to the extent that it is in its power to do so, to confer on a PSB such rights in respect of the programme as shall enable a PSB to comply with the obligations placed on it by the Act, including, in particular, the provisions of Sections 111, and 114 (1) (e) or 118 (1) (e).

5.7 Usage

- 5.7.1 A code shall provide that a commissioning PSB shall, either during or after the term of the primary rights agreement, be permitted to broadcast short extracts from a commissioned programme.
- 5.7.2 A code shall provide a mechanism which facilitates the use by a commissioning PSB, of some or all of the content of a commissioned programme, in a separately-produced programme. Agreement on usage rates shall be addressed at contract stage.

5.8 Multi-annual Commissioning

5.8.1 A code shall clearly set out the principles which underpin the approach of a PSB to multi-annual commissioning.

5.9 Timetable for Contractual Negotiations

5.9.1 A PSB shall set out in its code or in a related document its terms of business in relation to the commissioning of programmes. Areas to be addressed typically include:

- The process for submission of commissioning proposals
- A broad overview of the timetable for the assessment and decision-making process in respect of such proposals
- Identification of the person or persons in the organisation responsible for decision-making, and
- The process and timetable for the negotiation and conclusion of contracts.

5.9.2 A code shall commit to the expeditious completion of contract negotiations between parties. Typically, an independent producer and a PSB should expect that all contract negotiations would be concluded at least one month prior to the commencement of recording/principal photography of the commissioned programme.

5.10 Dispute resolution

5.10.1 Pursuant to Section 112 (9) of the Act, a PSB shall, either in its code or a related document, set out procedures for the resolution of a dispute arising in respect of the provisions of its code. The mechanism proposed for resolving such a dispute, whether by mediation, arbitration or otherwise, shall be clearly specified. It is not envisaged that the BAI shall act as a mediator or arbiter in any dispute.

5.10.2 Any dispute resolution procedure shall ensure that costs are minimised, so that neither an independent producer nor a broadcaster is disadvantaged by the expense of such a procedure.

5.11 Amendments to a PSB Code of Fair Trading Practice

5.11.1 In the event that a PSB wishes to revise and publish an amendment to its code pursuant to Section 112 (11) of the Act, the Minister shall consult with the BAI

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on any proposed revisions. In consulting with the Minister, the BAI shall have regard to whether or not the proposals are consistent with BAI Guidance. A broadcaster shall provide the BAI with any or all information which may assist it in its evaluation of any proposed new or revised code.

5.12 Report to the Minister on compliance by a PSB with a code

5.12.1 Should the Minister direct the BAI Compliance Committee to report on compliance by a PSB with its code pursuant to Section 112 (10) of the Act, it is expected that the relevant broadcaster shall co-operate with the Compliance Committee in respect of any request for information. This may include, without limitation, information on the number and nature of independent commissions, the timeframe for the conclusion of contracts, the nature and duration of rights and the nature and resolution of disputes which have arisen.

6. Provision for Review of Guidance

In line with the provisions of Section 112 (2) of the Act, the BAI shall undertake a review of the Guidance no later than four years after the publication of the Guidance.

