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The Rt. Hon. Stephen Crabb MP
House of Commons
London
SW1A 0AA

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Dear Stephen,

Broadcasting in Wales

We appreciate being able to contribute to your Committee's inquiry into broadcasting in Wales and wanted to update you on our response to the Committee's recommendations.

We note that while the majority of your recommendations are aimed at Government, there are three recommendations directly for Ofcom. Since the publication of your report, the Media Bill has been introduced to Parliament. This landmark piece of legislation is anticipated to have a significant impact on broadcasting in the UK, including in Wales. Consequently, we have considered your recommendations in light of the Bill's proposals.

"We are concerned about streaming companies demanding such a high proportion of advertising revenue in return for hosting PSB programmes on their sites. We call on Ofcom to examine these practices and to publish its findings by April 2024 on whether further regulation is needed to ensure fair and reasonable terms for PSBs. (Paragraph 39)"

We have interpretated the above recommendation as referencing connected TV platforms that are in scope of the of the Media Bill, so the presence of PSB on-demand players or apps on Smart TVs and other connected TV platforms. As such, we think the regulatory framework the Bill is set to introduce should address the concerns of the Committee.

In Ofcom's *Small Screen: Big Debate* published in 2021, we identified a risk that certain 'carriage' terms between online platforms and the PSBs could undermine the ways in which commercial PSBs generate revenue from their on-demand and streaming services. We found that the commercial PSBs had so far negotiated exemptions from the requirement to share proportions of advertising inventory that certain platforms include in their standard terms. However, we stated that failure to negotiate such exemptions and agree mutually beneficial deals in future could have implications for audiences continued easy access to PSB content online and the ability of the PSBs to invest in content.

The new prominence regime set out in the Media Bill has been designed to ensure that designated PSB services are both made available and prominently displayed on the major connected TV platforms operating in the UK, including the global platforms, and importantly on terms that are fair and reasonable. To this end, underpinning the must offer/must carry and prominence requirements, the Bill specifies as an objective that the arrangements negotiated between the PSBs and the platforms falling in scope of the regime should not adversely affect the ability of the former to fulfil their public service remits. This should encourage mutually acceptable terms being reached between platforms and PSBs, prohibiting charges for offering or carrying PSB content, including preventing the imposition of terms that the commercial PSBs would not otherwise sign up to, as it would put at risk their financial model for fulfilling their remits.

Ofcom will produce guidance setting out further detail as to what arrangements would be considered consistent with this and the other objectives of regime, which include the need to prevent disproportionate impacts on platform innovation. We will consult on this guidance to ensure it is effective and proportionate following the Bill's enactment.

"We recommend that Ofcom resume offering FM licences, particularly targeting local and community radio stations. (Paragraph 102)"

As previously detailed to the Committee in a letter on 14 August 2023, we are currently prioritising the rollout of small-scale DAB (SSDAB) over further rounds of analogue licensing. This is because it enables us to meet as much demand as possible from both community radio and smaller commercial radio stations, while making the most efficient use of finite radio spectrum. Our aim is to promote a diverse range of radio services, and SSDAB provides a low-cost route for community, local or specialist music services to broadcast on digital radio.

We consider it is currently in the interests of UK audiences as a whole to focus our resources on SSDAB as it will ultimately offer audiences more stations, more efficiently, and in more locations, than FM can. We reviewed our policy of SSDAB prioritisation in May 2022, and believe that our current approach is appropriate given the level of demand we have seen for SSDAB to date. However, we regularly review our priorities taking account of matters such as trends in listener behaviour and other market developments as well as of course our statutory duties to secure a wide range of radio services and make efficient use of spectrum. We are currently consulting on our proposed 2024/25 Plan of Work, which outlines our priority to continue licensing further SSDAB services.

To update the previous figures we provided to the committee: to date, Ofcom has awarded 89 small-scale radio multiplex licences across the UK, 43 of which are now on air (small-scale radio multiplexes are required to launch no more than 18 months after the award of the licence). To date we have awarded seven small-scale multiplexes in Wales, of which two (Cardiff and Wrexham) are now on air, between them delivering 21 radio programme services.

"Brass-plating allows broadcasters to meet their regional production criteria while using production companies that may not be based in Wales. Ofcom acknowledges that relying on the "substantive base" criterion alone provides an opportunity for the system to be manipulated. We recommend that Ofcom examine whether this Broadcasting in Wales criterion alone should be sufficient to qualify a production as being based in Wales. We call on the Government to amend the Draft Media Bill to address this problem. (Paragraph 142)"

As detailed in a previous response to the Committee of 12 July 2023, we realise that brass-plating is a concern for our stakeholders. However, to date we have received very few reports of such suspected activity. We are confident that our regulatory framework and the revised Made Outside London Guidance is robust and fit for purpose, however we do keep the production sector and our Guidance under regular review.

We also have a number of checks in place to help identify possible abuse of the regional production criteria, including:

- We undertake an annual assessment of the Made Outside London Titles Register data, conducting quality assurance and spot-checks (where required) on the information supplied to us by the PSBs in their annual regional production returns.

- We assess any reports or complaints we receive.

- We gather information from our wide network of stakeholders in the nations and regions on the composition and activities of the production sector outside of London.

We last conducted a significant review of the guidance in 2019[1], and subsequently strengthened the criteria that define a regional production, including the substantive base criterion. While we will consider an appropriate time to conduct the next such review, we continue to work with the sector on addressing concerns around potential abuse of these rules.

Points of accuracy regarding our Made Outside London register

Separately, we noticed some inaccuracies relating to our Made Outside London register in your report, and thought it might be helpful to note these here.

Paragraph 139 of the report states that "PSBs have production quotas, set by Ofcom, for the proportion of programmes made outside the M25. Ofcom's requirements are that a company must have "a substantive base" with an unspecified number of senior personnel located in a place; have 70% of their production expenditure spent in the location (not including the on-screen talent) and at least 50% of off-screen production staff must be usually employed in the UK but outside London."

As written, this implies that in order to qualify as 'Made outside London' a production must meet all three of the criteria, which is not the case. In the updated Regional production and programming Guidance, Ofcom states that "In order to count towards the regional production quota by hours, relevant productions must meet *two out of the following three* criteria" of 'substantive base', production spend and off-screen talent. Ofcom believes that requiring productions to meet two out of the three criteria safeguards the regime's overall aim – to support and strengthen the production sector and creative economies of the UK's nations and regions – whilst allowing enough flexibility to account for a range of production types and programme-making arrangements.

Paragraph 141 of the report states that "Ofcom acknowledged that five out of seventy-one productions relied on only one criterion to claim to be based in Wales, which could allow the system to be manipulated".

This is incorrect. We said in our original response that, in reference to 2021 data concerning Welsh productions, "Five titles (7%) [were] reliant upon the substantive base criteria *in combination with either talent or spend to qualify as a regional production*, and thus be in a position to potentially "game" the criterion". This was referring to the five titles in 2021 which qualified on *two* criteria only

[1] The updated Guidance came into effect with regards to titles broadcast from 1 January 2021.

– with one of those criteria being a substantive base in Wales (and the other being production spend *or* off-screen talent, which were also met in Wales).

There are a small number of instances where productions are made by a company with a substantive base in Wales but where one or both of the other two (talent and spend) criteria are met, but not fully met in any one location in the UK. In these cases our Guidance allows for these titles to be allocated to Wales. This allocation process ensures that, where possible, titles can be allocated to a particular nation or macro-region. In our 2021 Statement, we said that:

> "While we recognise in these cases very little or none of the production budget and/or expenditure on talent may have occurred in that location, if an office is genuinely meeting the substantive base criterion in that nation or macro-region then ultimately that production should be making a contribution to that area's creative economy, through the money the production company receives, and also by creating job opportunities at that base through that production. As such, we believe it is legitimate for such titles to be allocated to that relevant nation or region."

Any production company seeking to manipulate the criteria would have to run the substantial risk of being 'caught out' either by the commissioning broadcaster – who is ultimately responsible for ensuring productions are truly 'Made Outside London' and who are bound by the conditions of their licences to provide Ofcom with accurate information on their activities – or by Ofcom during the course of our quality assurance and spot-checking processes. As part of these checks, titles where the substantive base differs to the production spend and off-screen talent criteria is considered.

I hope you find this information helpful and we look forward to continuing to engage with your Committee on matters relating to broadcasting as well as Ofcom's other areas of work.