

Draft Order laid before Parliament under sections 277(12), 309(5) and paragraphs 1(13) and 7(11) of Schedule 12 of the Communications Act 2003, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2009 No.

BROADCASTING

The Broadcasting (Qualifying Programmes and Independent Productions) Order 2009

Made - - - - - ***
Coming into force - - - *In accordance with article 1*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 277(2), 309(2) and 402(3) and paragraphs 1(2) and 7(2) of Schedule 12 to the Communications Act 2003(a) as extended by the Communications (Jersey) Order 2003(b), the Communications (Bailiwick of Guernsey) Order 2003(c), the Communications (Bailiwick of Guernsey) Order 2004(d) and the Communications (Isle of Man) Order 2003(e).

In accordance with sections 277(11) and 309(5) of and paragraphs 1(13) and 7(11) of Schedule 12 to the Communications Act 2003 the Secretary of State has consulted OFCOM, the BBC and the Welsh Authority.

In accordance with sections 277(12) and 309(5) of and paragraphs 1(13) and 7(11) of Schedule 12 to the Communications Act 2003 a draft of this Order was laid before and approved by resolution of each House of Parliament.

(a) 2003 C.21
(b) SI 2003/3197 amended by SI 2004/308
(c) SI 2003/3195
(d) SI 2003/307
(e) SI 2003/3195

Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the Broadcasting (Qualifying Programmes and Independent Productions) Order 2009 and shall come into force on the day after the day on which it is made.

(2) This Order extends to the Channel Islands and insofar as it is made in exercise of the powers conferred by sections 277(2) and 402(3) of the 2003 Act, to the Isle of Man, and any reference to the “United Kingdom” in this Order shall be construed accordingly.

(3) In this Order:

“AVMS” means Directive 89/552/EEC of the European Parliament and of the Council 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services^(a)

“the 1990 Act” means the Broadcasting Act 1990;

“the 2003 Act” means the Communications Act 2003

“programme” does not include an advertisement or any separate item whose duration is two minutes or less.

“relevant broadcaster” means, subject to paragraph (6), a person who provides a television programme service in which a percentage of qualifying programmes must be independent productions and “relevant television service” means that service;

(4) A programme may be treated as being made by a particular person even if more than 75% of the duration of the programme includes images or images and sounds which have been provided by some other person but only if;

- (a) The images or images and sounds are not broadcast live; and
- (b) Changes of substance (whether by means of editing or otherwise) have been made to such images or images and sounds.

(5) A programme that was intended to be first shown commercially in cinemas can be treated as having been commissioned by a broadcaster.

(a) As amended by Directive 97/36/EC of 30 June 1997 and Directive 2007/65/EC of 11 December 2007 and now consolidated and known as the Audio Visual Media Services Directive.

(6) Where articles 2(1) and 3(15) apply to a regional Channel 3 service, references to a relevant broadcaster shall include references to a holder of another regional Channel 3 licence or any person acting on behalf of that other Channel 3 licence holder.

Meaning of “qualifying programmes”

2.—(1) In sections 277 and 309(1) of and paragraphs 1 and 27 of Schedule 12 to the 2003 Act “qualifying programmes” means, subject to paragraph (2), all the programmes included in a relevant television programme service which fall within any of the following descriptions –

- (a) A programme which has been made either by a relevant broadcaster or by a person commissioned by that broadcaster;
- (b) A programme which has been made by a relevant broadcaster together with any other person or by a person commissioned by a relevant broadcaster together with any other person, provided that not less than 25 per cent of the actual cost of the production of the programme has been borne or provided by the relevant broadcaster; and
- (c) A programme which includes images or images and sounds that have been provided by a person other than a relevant broadcaster or a person commissioned by that broadcaster where –
 - (i) Those images or images and sounds consist of live coverage of an event;
 - (ii) Those images or images and sounds do not exceed 75 per cent of the duration of the programme; and
 - (iii) The remainder of the programme (including any sound commentary added to those images or images and sounds) has been made by a relevant broadcaster or a person commissioned by that broadcaster.

(2) “Qualifying programme” shall not include any programme which falls within any of the following descriptions:

- (a) A programme which has previously been shown in substantially the same form on the relevant television programme service;

- (b) A programme which consists, wholly or mainly, of news;
- (c) A programme constituting part of a series of programmes which –
 - (i) Consist, wholly or mainly, of news or items relevant to news,
 - (ii) Are presented live, and
 - (iii) Are usually shown on at least four days in each of the weeks when they are shown;
- (d) A programme provided by or on behalf of the Open University^(a) or [National Open College Network^(b)]; and
- (e) A broadcast on behalf of a political party or any statement by a Minister of the Crown within the meaning of the Ministers of the Crown Act 1975 or by the Scottish Ministers.

3.—(1) In sections 277 and 309(1) of and paragraphs 1 and 7 of Schedule 12 to the 2003 Act “independent productions” means any programme which –

- (a) Falls within the definition of “qualifying programmes”;
- (b) In the case of a programme to which article 2(1)(a) or (b) applies, was made by an independent producer (as defined by paragraph (5)) or,
- (c) In the case of a programme to which article 2(1)(c) applies, was made by an independent producer (as defined by paragraph (5)), or was made as respects that part of the programme referred to in article 2(1)(c)(iii), by an independent producer;
- (d) Was made under the terms of a contract which complies, where appropriate, with the conditions specified in paragraph (2); and
- (e) Was not made in the circumstances specified in paragraph (3).

(2) The condition referred to in paragraph (1)(d) is that any contract between a broadcaster and a producer containing obligations which are capable of remaining in force for more than five years and which concern directly, or indirectly, the making of programmes (but not the use made of them) must provide a mutual right to terminate those obligations at intervals of not more than five years (but without prejudice to any rights that have accrued at the date of termination).

(a) Incorporated by Royal Charter (RC000391), an exempt charity in England and Wales and a charity registered in Scotland (SC038302).

(b) Registered company in England and Wales (No. 03829217) and a charity registered in England and Wales (No. 1079785).

(3) The circumstances referred to in paragraph (1)(e) are those where a broadcaster has required the person with whom the broadcaster has entered into a contract to make a programme to use the production facilities of that broadcaster or not use the production facilities or some other broadcaster, and that requirement –

- (a) Was a condition on which the contract was granted; and
- (b) Is not a pre-existing contractual obligation.

(4) In paragraph (3) “production facilities of a broadcaster” means:

- (a) Any premises or equipment which may be used to make programmes and which are owned or leased by that broadcaster or are otherwise under that broadcaster’s control; and
- (b) Any person who is employed by, or has contractual obligations to, that broadcaster in connection with the making of programmes except any person who is employed, or has contractual obligations, to be seen or heard (or both) on programmes.

(5) In this article “independent producer” means a producer –

- (a) Who is not an employee (whether or not on temporary leave of absence) of a broadcaster;
- (b) Who, subject to paragraph (7), does not have a shareholding greater than 25 per cent in a broadcaster; and
- (c) Which is not a body corporate in which any one UK broadcaster has a shareholding greater than 25 per cent or in which any two or more UK broadcasters together have an aggregate shareholding greater than 50 per cent.

(6) Where a producer has a shareholding greater than 25 per cent in a broadcaster, the producer shall be an independent producer where –

- (a) The producer is incorporated under the laws of an EEA State; and
- (b) The television services which the broadcaster provides are provided exclusively for reception in non-EEA states and are not received directly or indirectly in any EEA State.

In applying sub-paragraph (a) no regard shall be had to persons connected with the producer or to the state under the laws of which that connected person is incorporated or the state where that connected person has his principal place of business.

(7) In paragraphs (5) and (6), any reference to a broadcaster or producer includes a reference to a person connected with, respectively, a broadcaster or producer.

(8) Where the percentage in sections 277(1), 309(2) and paragraphs 1(2) and 7(2) of Schedule 12 to the 2003 Act exceeds 10 per cent then in relation to any quota over and above that 10 per cent a UK Independent Producer (as defined in paragraph (9)) qualifies as an Independent Producer (as defined in paragraph (5)).

(9) A producer may be regarded as a UK Independent Producer in relation to a third party programme if –

- (a) the producer is a body corporate in which one holder of a regional Channel 3 licence has a shareholding greater than 25 per cent, but no other shareholders in that body corporate are connected to that regional Channel 3 licence holder; and
- (b) that body corporate is not connected to the holder or holders of more than one other regional channel 3 licence.

(10) A UK Independent Producer is not an independent producer for the purposes of article 5 of AVMS.

(11) For the purposes of paragraph (9), “third party programme” means any qualifying programme, other than one where the relevant broadcaster is the holder of the regional Channel 3 licence mentioned in paragraph (9).

(12) In paragraph (9):

- (a) Any reference to a programme to which article (2)(1)(c) applies, is to that part of the programme referred to in article 2(1)(c)(ii), but
- (b) Article 1(6) does not have the effect in the application of article 2(1) for that or, except where indicated, any other of the purposes of this paragraph or paragraph (9).

(13) The following persons shall be treated as connected with a broadcaster or producer:

- (a) A person who controls the broadcaster or producer respectively;
 - (b) An associate of the broadcaster or producer or of a person falling within sub-paragraph (a);
- and

(c) A body controlled by the broadcaster or producer or by an associate of the broadcaster or producer.

In this paragraph “associate” has the same meaning as in part 1 of schedule 2 to the 1990 Act, except that in relation to paragraph (6)(a), paragraph 1(2) of part 1 of that schedule shall apply to a broadcaster, but not a producer.

(14) In paragraphs (5), (6) and (9), any reference to a person having a shareholding in a body corporate greater than a percentage specified in that paragraph is a reference to a person:

- (a) Holding or being beneficially entitled to more than the specified percentage of shares in that body, or
- (b) Controlling more than the specified percentage of voting power in that body.

A person holds or is beneficially entitled to shares, or controls voting power, in a body corporate whether he does so alone or jointly with one or more other persons and whether directly or through one or more nominees.

(15) Where a programme has been made by a producer (whether alone or together with any other person) who would not otherwise be treated as an independent producer in relation to the making of that programme, that producer shall be treated as being an independent producer if –

- (a) The producer was commissioned to make the programme (whether alone or together with any other person) by a relevant broadcaster,
- (b) The producer was an independent producer at the time of the commission,
- (c) A relevant broadcaster commissioned the producer in good faith in the expectation that the producer would be an independent producer when making the programme; and
- (d) The programme was made within 2 years of the date on which it was commissioned.

Any reference to a programme to which 2(1)(c) applies, is to that part of the programme referred to in article 2(1)(c)(iii).

(16) For the purposes of paragraph (15), a producer is commissioned to make a programme on the date on which the producer becomes subject to a contractual obligation to make that

programme whether that obligation is subsequently varied or supplemented by further contractual provisions relating to the making of the programme.

(17) In this article:

“broadcaster” means, subject to paragraph (7), a person who provides a television service whether in the United Kingdom or elsewhere but does not include a person who provides in the United Kingdom or elsewhere only a teletext service or any other service consisting wholly or mainly of visual images which are neither still pictures nor comprised within sequences of visual images capable of being seen as moving pictures, whether provided by broadcasting or by other means;

“control” has the same meaning as in Schedule 2 to the 1990 Act;

“producer” means, subject to paragraph (7), a person who undertakes the arrangements necessary for:

(i) The making of a programme, or

(ii) In the case of a programme to which article 2(1)(c) applies, part of a programme;

“regional programme”, in relation to a regional Channel 3 service, means a programme included, or to be included, in that service with a view to its being of particular interest to persons living within the area for which the service is provided;

“television service” means a service that provides to members of the public images or images and sounds for reception on television receiving apparatus, whether provided by broadcasting or other means;

“UK broadcaster” means any broadcaster who provides a television service intended for reception in, or in any area of, the United Kingdom (whether or not that service is also intended for reception elsewhere).

Revocation

4.—(1) The Broadcasting (Independent Productions) Order 1991(a), the Broadcasting (Independent Productions) (Amendment) Order 1995(b) and the Broadcasting (Independent Productions) (Amendment) Order 2003(c) are revoked.

[] 2010

Ben Bradshaw

Secretary of State for Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Order)

This Order, made under sections 277(2), 309(2) and 402(3) of and paragraphs 1(2) and 7(2) of Schedule 12 to the Communications Act 2003, revokes and replaces with modifications the Broadcasting (Independent Productions) Order 1991, the Broadcasting (Independent Productions) (Amendment) Order 1995 and the Broadcasting (Independent Productions) (Amendment) Order 2003. The modifications, set out in Article 3, extend the definition of independent producer to include a UK independent producer.

This Order defines the expressions “qualifying programmes” and “independent productions” for the purposes of sections 277(2), 309(2) and 402(3) and paragraphs 1(2) and 7(2) of Schedule 12 to

(a) SI 1991/1408
(b) SI 1995.1925
(c) SI 2003/1672

the 2003 Act and should be read in conjunction with the Ofcom Guidance, dated 6 October 2009, on compliance with Articles 4 and 5 of AVMS which amongst other things, makes provision as to the proportion of a broadcaster's programmes which are to consist of works created by producers who are independent of broadcasters.

Article 2(1) of this Order defines "qualifying programmes" as programmes which are made by a relevant broadcaster or by a person commissioned by him whether they are made or commissioned by the relevant broadcaster (sub paragraph (a)) or, subject to the specified financial contribution, by that broadcaster together with some other person (sub-paragraph (b)). The definition includes programmes consisting of live coverage of events when such coverage has been provided by a person other than the broadcaster or a person commissioned by him provided the conditions in article 2(1)(c) are satisfied. Article 2(2) excludes certain descriptions of programmes from this definition. The reference to actual cost in Article 2(1)(b) is to distinguish it from budget cost.

Article 3(1) of this Order defines "independent productions" as those qualifying programmes which have made by an independent producer as defined (subject to special provision in respect of programmes falling within article 2(1)(c)) and which satisfy article 3(2) (which concerns long term contractual obligations between producers and broadcasters) and do not contravene article 3(3) (which concerns requirements to use a broadcaster's production facilities, as defined, or not to use those of another broadcaster). Paragraph (5) defines "independent productions" for these purposes and paragraphs (6) and (7) supplement that definition. Paragraph (8) extends the definition of independent producer in relation to third party programmes and in circumstances where the relevant statutory quota exceeds 10% and in relation to any quota over and above 10% to include a "UK independent producer". Paragraph (9) defines a "UK independent producer" as one in relation to a third party programme to a body corporate in which one holder of a regional channel 3 licence holds more than 25% of the shares provided that none of the remaining shareholders are connected to that regional Channel 3 licence holder and that body corporate is not connected to the holder or holders of more than one regional channel 3 licence. Paragraph (10) states that a UK independent producer is not an independent producer for the purposes of AVMS. Paragraph (11) defines "third party programme" for the purposes of paragraph (9) and paragraph

(12) further refines the definition of programme for the purposes of paragraph (9). Paragraph (13) defines when a person is connected with a broadcaster or a producer. Paragraph (14) explains what is meant by shareholding for the purposes of paragraphs (5), (6) and (9). Paragraph (15) sets out when a producer will be treated as independent when that producer would not otherwise be treated as independent. Paragraph (16) sets out when a producer is commissioned and paragraph (17) continues the definitions for Article 3.