

RTÉ TV “Code of Fair Trading Practice”

For the Commissioning of TV Programming Material
from Independent Producers.

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Appendix 1: RTÉ Services

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It is recognised by RTÉ that it is in the interests of Irish television audiences that there be a vibrant, competitive and creative independent production sector and that RTÉ as the main public service commissioning broadcaster has an important role to play in achieving that and that it is also in the interests of both RTÉ and the independent production sector that opportunities for commissioned programmes to reach Irish audiences both inside and outside Ireland in all media and formats are adopted and facilitated.

This *Code of Fair Trading Practice* has been drawn up by RTÉ further to section 112 of the Broadcasting Act 2009 (the "Act") and sets out the principles that RTÉ shall apply when agreeing terms for the commissioning of television programming material from independent producers.

In accordance with section 112 of the Act, this *Code* includes reference to RTÉ's approach to multi-annual commissioning, the acquisition of rights (including the duration and exclusivity of the various categories of rights RTÉ intends to acquire), the timetable for contractual negotiations, and the arrangements for resolving disputes arising in respect of the provisions of the *Code*.

In accordance with section 116 of the Act, the making of an independent television programme shall not be regarded as having been commissioned by RTÉ unless, before work on the making of the programme commences, RTÉ has incurred a legal obligation to pay at least 25% of the cost of its making.

In accordance with section 112(4) of the Act, this *Code* has been prepared by RTÉ having considered the *Code of Fair Trading Practice: Guidance for Public Service Broadcasters* published by the Broadcasting Authority of Ireland in April 2011.

1. Commissioning

- 1.1** RTÉ's objectives throughout the commissioning process are to specify its requirements in a transparent manner, to provide independent producers with access to clear information about its commissioning requirements, and to commission independent producers openly and fairly, taking into account RTÉ's statutory obligations and objectives and the quality and price of the programme proposals.
- 1.2** Throughout the commissioning process RTÉ will conduct all discussions and negotiations with independent producers in a timely and professional manner and in good faith and will expect the independent producer to do the same
- 1.3** The RTÉ programme commissioning information website (www.RTE.ie/commissioning) shall contain comprehensive information about RTÉ commissioning practices and requirements, which will include the timetable for assessment and decision making by RTÉ in respect of programme proposals submitted by producers.
- 1.4** The commissioning process will be operated on a rolling basis to facilitate the communication of commissioning priorities (via online commissioning briefs issued from time to time) to the independent sector where discussion, assessment and final decisions on programme submissions can be made all year round.
- 1.5** There may be situations where RTÉ may elect to invite programme submissions from a limited number of producers including situations where there are a limited number of producers with appropriate experience suitable for the relevant project or there are time constraints applicable to the production turnaround on a particular programme or a producer has exclusive rights to a particular format/project that RTÉ wishes to commission.
- 1.6** Following issue by RTÉ of a letter expressing interest in a proposal, then unless the project is one requiring further development (see Endnote i below), RTÉ and the producer will commence negotiations on editorial, financing and contractual matters with a view to concluding a programme production agreement under which the producer will be commissioned by RTÉ to produce and deliver the programme to RTÉ. Typically, and subject to both RTÉ and the independent producer acting in a prompt manner in negotiating and providing information to each other and also to other third party funders (if any) doing the same, the editorial, financial, and contractual negotiations should be completed no later than one month prior to the commencement of recording/principal photography of the programme. It is recognised that in situations where the proposal arises due to an unscheduled event then the foregoing timetable might not be possible. (See Endnote ii below).

2. Editorial matters

- 2.1 RTÉ will have final editorial control over the programmes commissioned from independent producers (see Endnote iii below), including all associated online and interactive elements (subject in the case of the online and interactive elements to section 5.12 & Endnote xi below). All programmes including online and interactive elements commissioned by RTÉ from independent producers will be subject to all relevant RTÉ guidelines and published compliance procedures.
- 2.2 The producer will be responsible for producing and delivering the programme in accordance with the editorial specification agreed with RTÉ which will be included as a schedule to the commissioning agreement. The prior written approval of RTÉ will be required for any significant departure from the agreed programme editorial specification. Changes required by the RTÉ commissioning executive in order that the programme is made to the agreed editorial specification will be carried out by the producer, and at no extra charge to RTÉ.
- 2.3 In the event that the programme is delivered in accordance with the agreed editorial specification and the RTÉ commissioning executive seeks further changes and these further changes involve a cost which was not foreseen in the original agreed budget, RTÉ and the independent producer shall agree additional funding to be made available by RTÉ to cover that cost, any such agreement to be subject to confirmation in writing from RTÉ.
- 2.4 Following final acceptance of delivery of the programme, RTÉ will give the producer reasonable notice of the proposed first transmission date. However, unless RTÉ agrees otherwise, there shall be no obligation on RTÉ to broadcast the programme and should RTÉ decide not to broadcast the programme then the producer shall be fully advised of such decision.

3. Financial matters

- 3.1 A producer may not use RTÉ's name for the purposes of raising finance from other sources without the prior written agreement of RTÉ.
- 3.2 RTÉ will expect that the independent producer shall submit a detailed draft production budget to RTÉ for review and negotiation and that the independent producer shall respond promptly and fully to any RTÉ queries and requests for further information and backup, it being recognised that delays in communication of information by either party will have a bearing on timeline for conclusion of negotiations between RTÉ and the independent producer See Endnote iv below.
- 3.3 Budgets will include allowance for a production fee, production fees to be in line with rates to be published by RTÉ from time to time following consultation with Screen Producers Ireland. See Endnote v below.

- 3.4** Budgets will include provision for an overhead, such overhead to be in line with an overhead rate to be published by RTÉ from time to time following consultation with Screen Producers Ireland.
- 3.5** RTÉ may in some situations agree when negotiating the production budget with the independent producer that the budget may include a contingency payable by RTÉ (i.e. an agreed calculated sum that would be payable by RTÉ to cover potential costs that are not provided for in the agreed production budget). The contingency payable by RTÉ should not be included in the producer's cash flow, and will be retained by RTÉ until required. If the contingency payable by RTÉ is not required then it will be retained by RTÉ. Where a programme is co-funded by RTÉ with other parties it is acknowledged that alternative contingency arrangements may be agreed.
- 3.6** RTÉ's approach to multi-annual and volume commissioning is that RTÉ will seek to conclude such deals where RTÉ feels they are editorially and financially justified.
- 3.7** The producer will be responsible for producing and delivering the programme in accordance with the agreed production budget. See Endnote vi below.

4. Production matters

- 4.1** RTÉ will expect the independent producer to comply with all applicable laws and codes in the course of production of the programme including without limitation compliance with all applicable health & safety legislation, employer legislation and tax legislation and to provide proof of such compliance when requested by RTÉ.
- 4.2** RTÉ will expect producers to effect production related insurances (the terms and level of such cover to be subject to RTÉ approval in each case) to be in place on all productions and to provide RTÉ with proof of same.
- 4.3** RTÉ will expect independent producers to report the progress of productions by submitting progress and cost reports at intervals and in a form to be agreed with RTÉ. RTÉ will also expect that independent producers will make full and timely disclosure to RTÉ of all matters that may be relevant to the production of the programme including any problems or issues that may arise during production.
- 4.4** On occasions where a producer materially defaults on the producer's obligations under the commissioning agreement, and the independent producer fails to remedy same then RTÉ, in addition to any other rights it may have in respect of the default, will normally expect to have the option of either taking over or abandoning the production of the programme having regard to the rights of other co funders and/or broadcasters involved in the production approved by RTÉ.
- 4.5** RTÉ will expect the producer to undertake in the commissioning agreement that the programme will be original and that nothing in the production of the programme or the programme itself (including where the producer delivers promotional materials,

in any such promotional materials) will breach any applicable laws and codes or bring RTÉ into any disrepute and further that the producer will clear all third party rights for the purposes of the exploitation set out in clause 5 below save where it is specifically agreed to the contrary by RTÉ.

4.6 RTÉ will expect to rely on all the contractual provisions and warranties given by the producer under the commissioning agreement. RTÉ may agree, on a case by case basis, to include provision in the production budget for reasonable and necessary legal fees that may be incurred by the producer for the purposes of the production of the programme. For the avoidance of doubt, any such provision may not be used by the producer to cover legal costs incurred by the producer as a result of the default or negligence of the producer. The producer will keep records of all agreements and clearances relating to the production of the programme and will provide copies of all these documents on delivery of the programme to RTÉ. RTÉ may on occasion require a right of prior approval over certain production agreements and clearances. Where legal difficulties arise as a result of the failure by the producer to secure all necessary agreements and clearances, and where such difficulties require the engagement of professional legal advice either from legal advisers based in RTÉ or from external professionals the costs of such services shall be borne by the producer. Where RTÉ, as publisher/broadcaster becomes party to any legal action, or threat of action or Broadcasting Authority of Ireland Compliance Committee submission, as a result of matters relating to a programme, the producer of that programme shall co-operate fully and in every way with RTÉ in responding and dealing with such matters. It is in the interests of both RTÉ and the producer that any such problems are anticipated and dealt with prior to transmission. The producer, therefore, must ensure that RTÉ is advised of any possible legal problems well in advance of transmission in order that steps may be taken to avoid subsequent difficulties.

4.7 RTÉ will expect the programme will be produced and delivered by the independent producer in accordance with the technical specifications and delivery material requirements set out in the RTÉ standard delivery schedule for independent commissioned programmes.

4.8 All credits must comply with RTÉ credit guidelines and the producer will submit a list of all proposed credits for prior written approval by RTÉ.

5. Programme rights

5.1 In situations where RTÉ is the primary funder of the commissioned programme (i.e. RTÉ is the source of at least 51% of the funding), RTÉ will expect in consideration of the RTÉ production funding that the producer shall deliver programme materials to RTÉ in accordance with RTÉ delivery requirements and that the producer shall grant to RTÉ certain rights described as Primary Rights (see clause 5.6 below). In situations where RTÉ is not the primary funder of the commissioned programme (i.e. RTÉ is the source of between 25% and 50% of the funding), the provisions of clause 7.2 shall apply.

5.2 The producer shall retain ownership of the copyright in the produced programme

throughout the world (unless otherwise agreed by the producer) and of all rights not granted to RTÉ as Primary Rights. The rights retained by the Producer are described as "Secondary Rights". See Endnote vii below.

5.3 The Secondary Rights shall be retained by the producer for exploitation throughout the world in perpetuity subject to:

5.3.1 RTÉ shall have a right of reasonable approval over any proposed exploitation of the Secondary Rights in the island of Ireland to ensure RTÉ's reasonable commercial, editorial and reputational interests are protected and

5.3.2 In the case of any exploitation outside the island of Ireland of the Secondary Rights, RTÉ shall not have a right of approval in respect of such exploitation by the producer (subject to RTÉ premiere rights referred to in clause 5.3.3 below) but the producer shall make best endeavours to ensure that the exploitation shall be carried out to maximise overall commercial revenues while offering fair value to the viewer/consumer and shall not be carried on in a manner which may cause offence, bring RTÉ into disrepute or diminish RTÉ's reputation in any way or give rise to an appreciable risk that editorial decisions relating to the content of the programme may be thought to be influenced by commercial considerations and for that purpose the producer shall notify to RTÉ the essential deal terms regarding any such deals on conclusion of such deals, and

5.3.3 RTÉ shall have the right to the premiere world broadcast of the programme and neither the producer nor any third party may broadcast or exploit the programme and the Secondary Rights outside the island of Ireland prior to 28 days after the first broadcast of the programme by RTÉ unless otherwise agreed by RTÉ in writing.

5.3.4 The programme and all associated materials and products shall throughout the world, unless RTÉ agrees otherwise in writing, carry the RTÉ logo in such form as is required under RTÉ brand guidelines as may be amended by RTÉ from time to time, and

5.3.5 RTÉ shall receive on an ongoing basis 50% or, where the programme is partly funded by parties other than RTÉ, a lower percentage reflecting RTÉ's proportionate contribution to the programme budget, calculated as a proportion of 50% (the "Applicable RTÉ Share", subject to section 7.3) of the net revenue (gross revenues less bona fide costs) throughout the world in perpetuity from all exploitation of the Secondary Rights. This is in order to deliver value back to the licence fee payer and as an acknowledgement of the investment and added value that RTÉ makes to the programme. The producer shall send RTÉ accounting statements and any payments due to RTÉ on a calendar quarterly basis for 24 months and thereafter on a six monthly basis and RTÉ shall be entitled to audit the producer (including receiving copies of all agreements and related correspondence regarding exploitation of the Secondary Rights).

5.4 If RTÉ wishes to acquire the right to exploit any Secondary Rights from the producer, that shall be subject to further and separate negotiation between RTÉ and the producer. RTÉ shall have a right of 14 day first negotiation in respect of acquiring those rights, such 14 day right of first negotiation to begin on notice from producer to RTÉ or vice versa. In the event that

- (a)** RTÉ does not make an offer in writing to the producer within that 14 day period specifying the particular Secondary Rights that RTÉ wishes to acquire and the proposed acquisition terms, then after the expiry of that 14 day period the producer shall be free to negotiate and agree terms with third parties in respect of the exploitation of those rights any such agreement(s) with third parties to be subject to the provisions of section
- (b)** RTÉ does make an offer in writing to the producer within that 14 day period specifying the particular Secondary Rights that RTÉ wishes to acquire and the proposed acquisition terms but the producer refuses RTÉ's offer then (subject to the provisions of clause 5.3 above) the producer may negotiate and conclude deals with third parties in respect of such rights.

5.5 RTÉ will co-operate with the producer in the marketing outside Ireland of the programme.

5.6 Primary Rights means the following rights:

5.6.1 The right during the period commencing on signature of the commissioning contract between the producer and RTÉ and ending five years after the earlier of the following two dates: (a) the date of first broadcast of the programme by RTÉ or (b) the date which is 6 months after the date of accepted final delivery of the programme to RTÉ (the "Initial Term");

5.6.1.1 To make the programme (including extracts/clips) available on RTÉ Services (defined in Appendix 1) on a linear and non-linear basis.

5.6.1.2 In the course of exploiting any Primary Rights, to promote the programme in all media including support websites/social media, and to use programme material (including extracts/clips) in such promotion.

5.6.2 In the case of television programmes, the option during the sixty (60) day period prior to the end of the Initial Term to re-licence the programme for further transmission on RTÉ's scheduled broadcast services subject to payment to the producer of an amount in line with RTÉ acquisition rates at that time for programmes of a similar nature. In the case of a returning series, RTÉ will have the option to renew the exclusive licence for all previous series while the programme is still being commissioned.

5.6.3 The following archive rights (the "Archive Rights") during the copyright

period of the programme:

- (a)** The right to retain a copy of the programme in the RTÉ Archive,
- (b)** The right to make the programme (including extracts/clips) available on a non-exclusive basis pursuant to RTÉ's statutory archive usage scheme (with prior consultation with and approval in writing of the producer). See Endnote viii below.
- (c)** The right to make the programme available on a non-exclusive permanent basis after the Initial Term for viewing/listening (but not for permanent download) on an RTÉ owned or branded archive site available in the island of Ireland, provided that:
 - (i)** Where the producer confirms to RTÉ that inclusion of the programme on such an archive site after the Initial Term will prejudice the successful commercial exploitation of the programme then a reasonable holdback on the availability of the programme to such archive site after the Initial Term will be agreed in good faith; and
 - (ii)** The producer shall be entitled to receive further payment if RTÉ notifies the producer that RTÉ wishes to make the programme permanently or temporarily available in that manner - such payment, where applicable, may take the form of a 50% or, in the case of programmes partly funded by one or more third parties the Applicable RTÉ Share (as defined above, subject to section 7.3) of net revenues from pay per view or subscription income paid by a viewer for the right to view/listen to that programme on such site, or payment of an amount in line with RTÉ rates at that time for programmes of a similar nature included on such sites and
- (d)** The right to use short extracts, not exceeding ten minutes in the aggregate in respect of any programme, from a commissioned programme in review programmes and awards programmes.

5.6.4 The right for the copyright period of the programme to use some or all of the content of a commissioned programme in a separately produced programme subject to payment to the producer of a usage fee in accordance with normal rates paid by RTÉ for such usage applicable at the time of such usage.

5.7 The usage referred to in clause 5.6.1 of the programme during the Initial Term shall not involve an additional payment to producer except:

- (a)** In the case of usage referred to in Appendix 1 part (iv)(d)
Or
- (b)** Where the access to viewer to view/listen to the programme on the RTÉ Service is on a pay subscription or pay per view basis (i.e. there is a specific payment by viewer for the right to watch the specific programme), in which case RTÉ's "net revenue" (See Endnote ix below) from such payments attributable to the programme shall be subject to a 50/50 split or, in the case of programmes partly funded by one or more third parties, the Applicable RTÉ Share split (as defined above, subject to section 7.3) with the producer).

The programme shall be available to the viewer on RTÉ Services during the Initial Term in a manner to be decided by RTÉ including the decision whether the programme should be available free to user or through subscription or pay per view at some point during the 5 years. It is acknowledged that availability of the programme on any RTÉ owned and/or branded diaspora services intended for availability (in Irish and English language) outside the island of Ireland is subject to the provisions of Appendix 1 parts (iv)(a), (b), (c) and (d).

- 5.8** RTÉ's Primary Rights will be exclusive within the island of Ireland during the Initial Term (including any agreed extensions thereof) subject to clause 5.9 below.
- 5.9** After a period of two years has elapsed from the first RTÉ broadcast of the programme (or, if a series, two years from the first RTÉ broadcast of the final episode of the last series of the programme commissioned by RTÉ), the producer may approach RTÉ with proposals for exploitation of the programme within the island of Ireland on other third party services/platforms but excluding any television platforms in or outside Ireland that compete directly with RTÉ or that have a negative material impact on RTÉ audience figures. RTÉ will have a right of reasonable approval over any such proposed exploitation to ensure RTÉ's reasonable commercial, editorial and reputational interests are protected. In the case of approval being given, the programming will carry clear branding identifying RTÉ as the commissioner of the programme and RTÉ shall receive 50% or in the case of programmes partly funded by one or more third parties, the Applicable RTÉ Share (as defined above) subject to section 7.3 share of any revenues from such exploitation.
- 5.10** RTÉ shall retain the existing right to sell any advertising and sponsorship around the programme (including any product placement) and retain revenues from such activities (subject in the case of broadcast sponsorship to a finder's fee of up to 15% (inclusive of all agency fees) where the producer sources such sponsorship with RTÉ prior written approval) and also the right to run competitions in and around the programmes. Where SMS/IVR revenues from competitions (or from voting on vote programmes) then such revenues will, after deduction of costs and 15% fee, be divided 30% to producer/70% to RTÉ.
- 5.11** It is recognised that RTÉ needs to take account of developing technologies and new media and for that purpose, by prior agreement with the producer RTÉ may use programmes and programme material on a trial and non-profit basis in testing such new technologies and new media. No payment will be payable to producers for use of programmes and programme materials in such tests unless RTÉ requests the producer to carry out re-versioning of the programme or of programme material for such purpose, in which case RTÉ will pay the producer agreed re-versioning costs.
- 5.12** During the Initial Term RTÉ will have the exclusive right in Ireland to create and maintain website(s) (including pages on social media such as Facebook and YouTube), in respect of the programme. In the event that RTÉ requests the independent producer to do any additional work and delivery items for the

purposes of the programme website(s) RTÉ and the producer will discuss in good faith a fee for such additional work and delivery items. See Endnote x below.

- 5.13** Subject to the provisions in clause 5.14 below in respect of formats, RTÉ will be granted the option to re-commission the programme (including any spin-offs from that programme), such option normally to be exercisable by RTÉ not later than 6 months (unless otherwise agreed) after the broadcast by RTÉ of the last episode of the preceding series. If RTÉ does not exercise such option within that period then the producer shall be entitled to make alternative arrangements for the production of further programmes with third parties.
- 5.14** Where an original programme format is exclusively created by the independent producer then the format rights will remain vested in the producer and may be exploited by the producer, subject
- (a) To the rights granted to RTÉ in connection with the production and exploitation of the RTÉ programme based on the format for broadcast in Ireland, and
 - (b) To RTÉ's right of prior approval (not to be unreasonably withheld) where the producer proposes during the Term of Primary Rights to licence the format to any competitor of RTÉ whose signal is receivable in Ireland (including UK broadcasters whose channels are available in Ireland) where such production might conflict with the Primary Rights for Ireland granted to RTÉ (see Endnote xi below).

The producer and RTÉ will agree an exploitation strategy to co-ordinate the sale of the RTÉ programme so that the sale of the RTÉ programme internationally will not adversely affect the sale of the format rights by the producer or its agent internationally.

RTÉ will have an ongoing right to commission further episodes or series of the programme, such right normally to be exercisable by RTÉ not later than 6 months (unless otherwise agreed) after the first RTÉ broadcast of the programme (or of the last episode thereof if a series). RTÉ agrees that in the event that RTÉ does not indicate its 'in principle' decision to commission a subsequent series (or spin-off if applicable) within such option period, the independent producer will thereafter be entitled to produce and exploit a subsequent programme with/for third parties (subject to any rights RTÉ may have in the format).

RTÉ will be entitled on RTÉ request to receive a development credit (in a form "Developed in association with RTÉ"/ "Developed with the support of RTÉ and Created with the support of RTÉ") in the screen credits (customary size and position for a development credit) of all such subsequent programmes produced without RTÉ involvement.

- 5.15** In the case of formats originated by producers where RTÉ is the first broadcaster to commission and broadcast the format, RTÉ shall be entitled to receive up to 15% of all consideration received by the producer from the

exploitation of the format rights in all media throughout the world in perpetuity excluding for the avoidance of doubt (i) any revenues paid to the producer by RTÉ arising from the exploitation of the programme commissioned by RTÉ, (ii) production fees paid to the producer where the producer is commissioned to produce programmes based on the format and (iii) fees and expenses paid by a third party licensee of the format rights to the producer in respect of individual consulting producer fees PROVIDED that such production fees and consultancy fees and expenses are in line with custom and practice in the international television format licensing industry.

- 5.16** Where the programme format is jointly created by RTÉ and the independent producer then RTÉ and the independent producer will jointly own and control the format and there will be no exploitation of the format rights by either RTÉ (subject to the rights granted to RTÉ in connection with the RTÉ programme) or the independent producer except in accordance with a separate agreement to be negotiated in good faith.
- 5.17** Where the programme format is exclusively created by RTÉ or by a third party other than the producer then RTÉ reserves the right to apply different terms to the commission.

6. Dispute Resolution

- 6.1** In the event of a dispute arising between RTÉ and an independent producer about the application of the Code itself, rather than the terms of a specific negotiation, the independent producer shall refer the dispute to the RTÉ Managing Director, Television. Both parties shall negotiate in good faith to resolve any such dispute.
- 6.2** If bi-lateral negotiations under 6.1 above cannot resolve the dispute within 28 days then both parties will agree to put the dispute to mediation by an independent mediator to be agreed in good faith by RTÉ and the producer,
- 6.3** Both parties will pay their own costs and will seek to ensure that costs are minimised so that neither the independent producer nor RTÉ is disadvantaged by the expense.

7. Reservation

- 7.1** The arrangements in this Code may be revised by RTÉ in the case of commissions of programmes where:
- 7.1.1** Underlying rights are purchased by RTÉ from a different entity than the independent producer who is contracted to produce the programme e.g. sports programming, international formats, certain live event shows, etc.

7.1.2 An independent producer is given a commission by RTÉ based on an RTÉ created format/programme/idea/brand;

7.2 In the case of commissioned programmes where RTÉ is not the primary funder (i.e. RTÉ is the source of between 25% and 50% of the funding), RTÉ will negotiate the following matters with the producer with due reference to the respective reasonable requirements and commercial expectations of RTÉ and the other funders of the programme:

- (i) Number of RTÉ transmissions (subject to a minimum of 5 (including off-peak narrative repeat within 7 days) plus 30 day catch-up window after each transmission on RTÉ Services in the island of Ireland) during the Initial Term, with any availability for RTÉ diaspora services to be negotiated on a case by case basis)
- (ii) RTÉ 50% share of revenues under clauses 5.3.5, 5.6.3(b), 5.7 and 5.9 to be reduced pro rata to RTÉ's proportionate contribution to the programme budget, calculated as a proportion of 50%.

Other matters that may be appropriate for negotiation having regard to the specific circumstances of a programme may include for example whether the programme will be available for licensing by RTÉ pursuant to the RTÉ statutory archive usage scheme, whether clause 5.4 shall apply to the Secondary Rights to the programme and whether RTÉ premiere broadcast right under clause 5.3.3 shall apply within a reasonable timeframe e.g. within 12 months of accepted delivery to RTÉ

7.3 It is recognised that for the purposes of negotiating RTÉ's share of revenues under clause 5.3.5, the full extent of RTÉ's financial and non-financial contributions (e.g. agreement of RTÉ to sponsorship in the case of programmes with enhanced sponsorship and/or product placement) to the financing of the programme shall be taken into account in good faith by the producer provided it is acknowledged by RTÉ that there is a maximum cap of 50% on RTÉ share.

7.4 The arrangements in this Code do not preclude RTÉ and an individual independent producer from concluding an agreement covering a broader or different range of provisions to those outlined above, should they both wish to do so.

Endnotes

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- i. In the case of some submissions the proposal might not be ready to enter into production immediately and may require further development in advance of production. In such cases RTÉ may agree at that point to provide development funding pursuant to a development contract. RTÉ will decide whether or not to commission the programme within an agreed length of time, not to exceed 6 months (12 months in the case of drama projects) unless otherwise agreed between the parties after accepted delivery by RTÉ of the final development work commissioned by RTÉ from the producer.
 - ii. RTÉ will have no liability for any costs or obligations incurred by the producer should the producer commence production or incur production costs prior to final agreement on, and signature by RTÉ and the producer of, the commissioning agreement.
 - iii. It is acknowledged that there may be instances where RTÉ may agree that alternative edits or versions of any programme may be delivered to third party financiers or licensees.
 - iv. The level of RTÉ's funding will be influenced by a range of factors including but not limited to: the complexity/duration/scale of the production (number of days of filming/recording, location of filming/recording etc.); use of archive/third party owned material; use of on and off screen/air talent; use of CGI; detailed technical delivery requirements and schedule requirements; number of episodes in a series; level of any production funding from other production funders; whether the programme is a new or returning series, whether it is an Irish or overseas production; total volume of programming commissioned by RTÉ from the producer.
 - v. The matters that RTÉ shall take into account in negotiating production fees in the case of each production shall include criteria such as (i) amount of the production budget, (ii) the complexity of the production, (iii) duration and scale of the production, (iv) the originator of the programme concept, (v) the total volume of work commissioned by RTÉ from an individual producer, (vi) whether the programme is part of a multi-annual deal. In cases where RTÉ is not the primary funder of the commissioned programme RTÉ will consider in good faith appropriate derogations from the aforementioned rates.
 - vi. RTÉ will have no liability for any unauthorised overspend by the producer or for any extra costs incurred by the producer if the agreed budget turns out to be insufficient. In the event that RTÉ changes the transmission date for a programme and this has a material effect on the cost of the production then RTÉ will cover additional costs approved by RTÉ. RTÉ will pay the production funding in accordance with the agreed cash flow subject to RTÉ being in receipt of proper invoices and a current tax-clearance certificate from the independent producer at each payment stage. No production funding payments will be made by RTÉ prior to signature of the commissioning contract. Cost reports must accompany each payment request other than the signature payment. Cost reports should

detail expenditure to date, creditors outstanding, and a detailed estimate of the costs to complete the production. Cost reports, together with copies of the production bank account statements and bank reconciliation, must accompany the final payment amount.

- vii.** Secondary Rights includes rights such as international television sales rights to the programme and merchandising rights (such as DVD/permanent paid digital download, toys, tie-in publishing/books/magazines, tie-in soundtracks, tie-in live events both inside and outside the island of Ireland , online and interactive rights (other than to the extent that such rights are granted to RTÉ as part of the Primary Rights) and any other rights (including ancillary rights of all kinds and the reversionary interest in all Primary Rights granted to RTÉ) now known or hereafter invented (other than to the extent that such rights are granted to RTÉ as part of the Primary Rights) (unless otherwise agreed by the producer) and those Secondary Rights may be exploited by the producer subject to the provisions of paragraph 5.3 and , in the case of formats, subject to the provisions of clauses 5.14, 5.15, 5.16 and 5.17.
- viii.** In such cases RTÉ Archives and the producer will each agree fees with the third party seeking to licence the programme (including extracts/clips), provided that in the case of a full television programme (as opposed to extracts/clips from such television programme), no licence of such full programme may be done in a manner that breaches any rights of RTÉ in respect of such programme, and further that if RTÉ does not exercise RTÉ's option under clause 5.6.2 then after that the producer may licence that television programme for broadcast by other broadcasters in Ireland, the programming to carry clear branding identifying RTÉ as the commissioner of the programme and RTÉ shall receive 50% or, in the case of programmes partly funded by one or more third parties, the Applicable RTÉ Share (as defined in 5.3.5 and subject to section 7.3) of net revenues from such exploitation.
- ix.** For this purpose "net revenue" shall mean:
 - (a) in the case of pay per view, the gross fee paid by the subscriber/viewer to view the specific programme and,
 - (b) in the case of a subscription service a share of the general subscription fee paid to access the service that is attributable specifically to the viewing of the specific programme,

In both cases less taxes (where applicable), distribution costs (e.g. duplication and ingestion costs, streaming costs, music clearance and any other third party clearance costs such as third party archive/actors etc.), third party distribution fees (e.g. Apple distribution fees) and an RTÉ overhead/distribution fee of 25% to cover admin , and servicing, promotion, operations.

The foregoing definition of net revenues shall be reviewed by RTÉ in good faith 18 months after the adoption of this Code by RTÉ, any changes introduced by RTÉ to such definition following such review to operate on a prospective basis. RTÉ shall send the producer accounting statements and any payments due to the producer on a calendar quarterly basis for 24 months and thereafter on a six monthly basis and the producer shall be entitled to audit RTÉ (including receiving copies of all agreements and related correspondence regarding the

revenue payable to the producer in respect of the programme).

- x. In addition, the independent producer will be entitled to exploit short clips of the programmes on the producer's own corporate promotional website for corporate promotional purposes only. In the event that RTÉ decides not to establish website(s) in Ireland for the programme, RTÉ may in its discretion and on the independent producer's request permit the independent producer to establish and maintain a programme website on such terms as may be agreed between RTÉ and the independent producer, keeping in mind that RTÉ needs to be satisfied that programme websites do not contain material of a nature that will bring the programme or RTÉ into disrepute and that RTÉ policy is to promote the RTÉ Player as the on-line interface for RTÉ viewers. Subject to the holdback in clause 5.3.3, where a programme is licensed for television broadcast in a territory outside the island of Ireland, the independent producer may establish and maintain a programme support website for the purpose of promoting and transmitting the programme in that territory only (i.e. geo-blocked to that territory), such website(s) not to contain material of a nature that will bring the programme or RTÉ into disrepute.
- xi. This right of prior approval in the case of UK broadcasters will lapse one month following first RTÉ broadcast of the last episode of the initial RTÉ programme or series based on the format with the provisos that the producer will procure that
 - (a) The presenter of the RTÉ programme/series will not present any other version prior to such time as RTÉ elects not to commission the RTÉ version anymore and
 - (b) The UK broadcaster will not at any stage schedule any UK version for broadcast against any RTÉ broadcast run of any version of the programme commissioned and broadcast by RTÉ).

Appendix 1

In the case of television programmes, "RTÉ Services" means:

- (i) The television channels currently known as 'RTÉ One', 'RTÉ Two', 'RTÉ Two HD', "RTÉ One +I ", "RTÉ Junior" and all and any other existing or future television channels that are licensed or authorised to broadcast by RTÉ (where any such licence or authorisation is legally required) on all platforms and media where such television channels are transmitted and made available pursuant to RTÉ's statutory obligations, any such television channels intended for audiences outside the island of Ireland rather than audiences within the island of Ireland to be a diaspora service subject to the terms of Appendix 1 part (iv) below.
- (ii) Any content service distributed in the island of Ireland by means of electronic communications network as defined in the Broadcasting Act 2009 including the internet, websites, digital text services or mobile telecommunication services, or content zones which are now or hereafter wholly or partly owned or controlled or operated or branded and/or provided by RTÉ or any subsidiary of RTÉ and/or any entity from time to time in common ownership with RTÉ
- (iii) Any RTÉ-branded content service distributed in the island of Ireland by means of electronic communications network as defined in the Broadcasting Act 2009 including the internet, direct-to-consumer on-demand mobile telecommunication network or internet services and third party branded direct to consumer content provision portals that make RTÉ content available to the public.
- (iv) Any RTÉ owned and/or branded diaspora services intended for availability (in Irish and English language) outside the island of Ireland provided that:
 - (a) Availability of the programme on any such diaspora services will be subject to sub-clauses Appendix 1 parts (iv) (b), (c) and (d) below. Where a programme is available the availability window for such diaspora services will be limited to a window commencing with the simultaneous transmission of the programme by RTÉ on RTÉ services in Ireland and ending 30 days thereafter (such 30 day availability window on the diaspora service to be on an exclusive basis in the case of the first transmission of the programme and on a non-exclusive basis in the case of subsequent transmissions of the programme).
 - (b) Where the producer can confirm at the time of the first transmission of the programme by RTÉ on RTÉ services in Ireland that inclusion in any such diaspora services will prejudice the successful commercial exploitation of the programme outside the island of Ireland then a reasonable holdback on the availability of the programme on the diaspora services will be agreed in good faith. In addition, where at any time subsequent to first transmission the producer reverts to RTÉ with confirmation that continued inclusion on such diaspora services will prejudice the successful commercial exploitation of the programme outside the island of Ireland then a reasonable holdback on the

further availability of the programme on the diaspora services will be agreed in good faith, it being acknowledged that such holdback shall not commence until at least 21 days after receipt by RTÉ of the confirmation unless RTÉ agrees otherwise in writing.

- (c) For the purposes of sub-clause (b) above, the confirmation may for example be provided by way of showing that such holdback is required due to the reasonable requirements of a co-funding broadcaster/distributor or programme sales agent that provides foreign sales estimates showing potential sales and revenues or such other information/material which reasonably demonstrates it.
- (d) In the case of any programmes that are made available by RTÉ (subject to the restrictions in Appendix 1 parts (iv)(a), (b) and (c) above) on any RTÉ free-to-air broadcast television channel intended for audiences outside the island of Ireland, RTÉ shall pay the producer an additional licence fee in respect thereof that is in line with licence acquisition fees paid in the relevant territory to licence (as opposed to commission) completed programming of a similar nature/genre by channels having similar audience share in the relevant territory to the audience share of the RTÉ free-to-air broadcast television channel in that relevant territory. For the avoidance of doubt, this additional payment provision does not apply to availability on any RTÉ diaspora services that are not transmitted on a free-to-air broadcast basis by way of terrestrial, cable and satellite television e.g. it does not apply to availability on an RTÉ Player delivered over the internet, which availability is governed by clause 5.7.

For these purposes, "Channel" and "Service" shall include without limitation any RTÉ branded websites, the RTÉ Player, apps, internet channels, portal sites, content zones, information or entertainment services provided to mobile devices, content service distributed by means of any electronic communications network as defined in the Broadcasting Act 2009 including the internet and any other form of media (linear or non-linear and including streaming and temporary download for catch up viewing but not a paid permanent digital download) now known or hereafter invented for the purpose of communicating to the general public live or recorded visual images and/or sounds and/or reproductions of literary, dramatic, musical or artistic works, films, broadcasts sound recordings and any other form or description of information.