

Ofcom Consultation on its Review of Regional TV Production and Programming Guidance

ITV PLC response

Overview

We set out in this submission our response to the detailed and technical questions raised by Ofcom's proposed changes to the technical guidance on the application of the Out of London quotas. We have no objection to some of Ofcom's changes but have some significant concerns about others. Before getting into the detailed responses, we thought it might make sense to set out some high level comments about the overall exercise.

ITV's large scale and broad presence in the creative sector in the UK's nations and regions put us in a different league from other commercial broadcasters and online competitors

ITV does not simply meet a production quota; we make a sizeable investment in people, communities and the creative industries all around the UK. This includes our own productions made at hubs in Greater Manchester and Leeds, our investments in production companies and capital infrastructure throughout the UK, our 17 different regions and nations news services, the 2,151 ITV group employees outside London (nearly half our total UK employees), and our support to help local businesses grow through our regional TV advertising business.

Our widespread impact in the Nations and Regions – along with the other PSBs – is in stark contrast to that of the wider television sector and the global online and media companies increasingly dominating the domestic landscape

Ofcom acknowledges that production in the nations and regions “is primarily driven by the PSBs” and notes our combined spend of over £1.1bn outside London in 2017. This PSB spend in the Nations and Regions is the same as the total spend on all original content by non-PSBs¹. There is no directly comparable assessment of the contribution made by non-PSBs outside London (and COBA's recent report on multichannel investment is also notably silent on the issue) but it's safe to assume their contribution is limited. Ofcom estimates total non-PSB spend to be in the region of £0.3bn (which includes investment by PSB portfolio channels).

Equally, while the likes of Netflix and Amazon continue to increase their content investment their role in supporting sustainable production in the nations and regions is at best unclear. This limited contribution from the broader market is reflective of the challenges and costs involved in increasing production in certain genres in the nations and regions, even when underpinned by the already substantial investment in content and infrastructure by the PSBs. In other words, there should be much to celebrate in the current contribution of all the PSBs to TV production outside of London.

Ofcom's review shows the current Out of London (OOL) intervention is already effectively delivering the policy intent

PSBs account for most of the UK TV investment in the Nations and Regions of the UK. The proportion of total PSB spend outside London has increased and the number of active production companies in the Nations and regions is growing. Ofcom has not identified any

¹ COBA. Content Report 2019. Total Investment in UK content made by COBA member (exc. sports rights)

citizen or consumer detriment arising from the current regime nor any under-delivery of the policy intent as set by Parliament. Accordingly, it is hard to see the case for the major changes to the OOL guidance which Ofcom is putting forwards.

Ofcom's proposals risk further straining the economics of commercial PSB at a time when the benefits of PSB status are, if anything, in decline

ITV is proud to be a PSB and is keen to remain one. ITV remains committed to playing a major role in the UK's Nations and Regions – and in PSB more broadly. We are subject to extensive obligations – in national, international and regional news, in current affairs, for originations, independent production, regional production, and of course out of London production.

However, as Ofcom has previously observed, it is important that there is a sustainable balance between the costs and benefits of being a PSB. At a time of unprecedented competition for audiences and revenues and when there is regulatory pressure on the product categories that can be advertised on TV (with the recent restrictions on gambling advertising in live sport being the latest example) it is important to ensure that additional costs are not added to the PSB licences.

Ofcom was clear in the relicensing process that the benefits and obligations of our PSB licence were approximately in balance. Against this backdrop, we believe that Ofcom should avoid risking an increase in the cost and complexity of meeting our PSB obligations, hampering our ability to deliver our PSB remit and meet the needs of our audiences throughout the UK.

We are concerned that Ofcom may have underestimated the impact of its proposals and the additional costs it is likely to impose on PSB

The regional production quota system for PSBs depends inherently on the definitions set in the criteria, which give the quotas meaning; the quotas and the criteria are inter-dependent. Ofcom's proposed changes are extensive, and likely to increase cost for broadcasters by [X], reducing schedule flexibility, and increasing the compliance burden. This is against a backdrop where ITV is already delivering a very significant contribution outside of London.

We would be keen to continue a dialogue with Ofcom around the likely impact of its proposals – we are currently not clear about the basis on which it asserts that there will be limited impact. [X] However, the precise impact is difficult to estimate due to the number of different changes Ofcom has proposed, the way in which these changes would interact, how they might interact with other content quotas, and the limited visibility we have of our forward schedules from 2020 onwards.

[X], the revised guidance may actually unintentionally hamper production in the Nations and Regions

We have some concerns that Ofcom's proposals are likely to increase barriers to entry for start-ups and discourage investment in the Nations and Regions by London-based firms, reducing competition. They risk taking money out of broadcaster production budgets to meet increased data collection, reporting and compliance costs, also increasing costs for independent producers. And they risk limiting the ability of broadcasters to commission the best ideas, a risk explicitly identified by Ofcom itself when relicensing ITV in 2013.

The changes proposed are unnecessary and will deliver little citizen or consumer benefit

The current system of out of London production has been in place for more than a decade and is working well. Ofcom has not set out why the changes it is proposing will improve overall outcomes for citizens and consumers. Its rationale for change appears to rely on anecdotes received during its review (and repeatedly referenced in its consultation) rather than substantive evidence of harm.

Any changes should be introduced from 2021 at the earliest

Once Ofcom has issued its final revised Guidelines, broadcasters will need to undertake detailed compliance work in order to assess the impact on a programme by programme basis. This could take some months.

Once this assessment is complete, for any OOL programmes that look unlikely to remain qualifying under the new rules, a further period of time will be necessary to make changes to programme production to ensure compliance.

In the event that such changes prove impossible, [§].

Implementation as early as January 2020 therefore runs the real risk of making it impossible for broadcasters to comply or to comply at a reasonable cost. Even if compliance might be possible [§], such a rapid pace of change is likely to impose unnecessary and disproportionate cost given the lack of flexibility involved and costs already incurred.

Ofcom should mitigate these risks by ensuring:

- Changes come into effect from January 2021 at the earliest;
- Any commissions made before the completion of Ofcom's current process should have compliance assessed against the rules in place at the point of commission; and
- Any returning series which have incurred substantial capital investment should be exempt for the payback period of that investment.

Response to Ofcom's consultation questions

1. Do you agree with our proposed change to articulate the intention of the regional production obligations at the start of the Guidance? (See wording at Annex 7).

ITV has no comments on Ofcom's proposed changes in this section.

2. Do you agree with our proposed changes to the substantive base criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

3. Do you agree with the suggested explanatory notes for the substantive base criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

The introduction of 'Explanatory Notes' is unduly complex and increases uncertainty

ITV is concerned by Ofcom's proposal to put in place 'guidance on its guidance' in the form of *Explanatory Notes*. Such an approach appears unnecessarily complicated as broadcasters and producers would have to factor in three separate documents – broadcast licences, Guidance, and Explanatory Notes – which seems likely to lead to greater uncertainty rather than greater clarity.

While broadcasters must 'have regard' to Ofcom Guidance, the legal status of separate explanatory notes in the event of any complaints or compliance procedure is unclear. Ofcom should as a minimum make clear the extent to which it regards its *Explanatory Notes* as having the same status as the Guidance itself, or something with less weight.

A more fundamental issue, though, is that the reason these additional *Explanatory Notes* may have appeared necessary to Ofcom in the first place is that the revised Guidance actually reduces clarity and, in some cases, may have a negative impact on the delivery of policy. Rather than increasing the complexity of the intervention through additional separate text, Ofcom should ensure that its Guidance is clearly worded, practical to implement, and does not have unintended consequences.

Once Ofcom has put in place such clear Guidance, the PSBs appear better placed to explain how they will collectively interpret individual elements within Ofcom's Guidance. As our recently-published guidance to producers² demonstrates, broadcaster-led guidance is likely to be more comprehensive and derived from direct experience (Ofcom has provided guidance on only a handful of issues) and so prove more effective for producers and industry.

The requirement for an existing substantive base will have a chilling effect

Ofcom has proposed changes to its guidance that will require a substantive base to be "*operational prior to the point of commission*" which, it argues, will "*eliminate the use of pop up offices.*" Ofcom itself recognises that this change is "*considerable.*"

² https://www.itv.com/_data/documents/pdf/OOL_PSB_%20Guidance_Doc_FINAL_Dec_2018.pdf

This change will require newly-established independent producers and offices of London-based firms to have won previous work from their substantive regional base prior to the point of their first OOL commission (to meet the substantive base criteria), or to immediately meet the two spend criteria (with no fall back in the event of challenges during production). ITV is concerned about the likely impact of this which is, as Ofcom suggests, considerable.

The proposals will make starting a new regional business more difficult

Starting a new business is challenging at the best of times. Ofcom's proposals make it more difficult for people to launch regional production companies by preventing them from meeting one of the three criteria from the outset.

Ofcom itself has been clear that:

"...requiring relevant productions to comply with two out of the three criteria is to provide flexibility for producers to use some London-based resources, without thwarting the policy objective of the statute, which is to buttress and strengthen regional production in the UK."

To deny the very newest producers this critical flexibility seems counterintuitive. It is also likely to increase costs for regional producers who, required to meet both spend criteria without fall-back, could face higher costs for suppliers and staff (this is certainly ITV's experience across a range of suppliers and skillsets, given the generally smaller local economies).

These higher costs may undermine their ability to bid successfully against established producers operating without these restrictions, who may therefore be able to offer a more competitive price for a similar commission. At a time of tight budgets and pressure on the advertising market, such an impact should not be ignored.

Whilst the proposed *Explanatory Notes* suggest the potential for some limited exceptions for start-ups ("*...may not always be the case...*"), this wording offers no certainty that start-ups would always be viewed differently. Indeed, it seems to suggest Ofcom actually expects most start-ups to have won previous work from their substantive regional base prior to the point of their first OOL commission. Such an expectation, requiring newly-established producers to first win non-PSB commissions or PSB London commissions, or to meet the other two criteria, appears somewhat unrealistic.

With the burden on broadcasters to ensure compliance, Ofcom's approach would appear to place undue risk on broadcasters using newly established firms for OOL commissions given the unequivocal nature of the Guidance itself versus the unclear nature of the Explanatory Notes (legal status uncertain, as noted above). We would be unlikely to use a newly-established producer, with no track record of production, were we wholly reliant on them meeting the two spend criteria with no recourse to substantive base. Their establishment of a perfectly legitimate substantive base is an important element of the risk management of such a project, and should be recognised as such by the Guidance.

The proposals disincentivise London-based producers to create regional bases

The proposal will also discourage London-based producers from establishing operations in the Nations and Regions, given Ofcom states unequivocally that such bases would not initially be recognised as substantive for the purposes of OOL quotas:

*“...in the case of start-up and fledgling companies, the early substantive base from which the initial commission was pitched may be as modest as a home office or kitchen table...this **would not** be the case where established companies are looking to expend into the nation and regions.”*

This position fundamentally misunderstands how new bases are established by existing producers. Even for successful London-based producers, expansion into the nations and regions still carries significant risk and requires substantial investment. Indeed, such a venture is still often regarded as a ‘start-up’ operation, and just as reliant on winning commissions to deliver the expansion as standalone start-ups. As such, just like standalone start-ups, these new operations are frequently lightly resourced until commissions are won and permanent hires can be justified and funded. We could not justify the extensive capital investment required to open a new substantive base absent a commission to underpin it.

[X]

Ofcom’s proposals would require London-based firms to use their newly-established regional bases to first win non-PSB commissions or PSB London commissions, or to immediately meet the other two criteria, heightening compliance risk. As for start-ups, this again reduces flexibility for producers, potentially increases costs, and may leave newly-established producers at a competitive disadvantage. As such it will potentially reduce investment in the Nations and Regions (as London-based firms choose not to establish bases), reduce competition in the Nations and Regions (as fewer bases are established), and limit broadcaster access to the best ideas.

Ofcom suggests that “...if a company chooses to make the temporary office permanent, it would count towards the substantive base criterion for its next commission...” However, it’s not clear why a company would go to the trouble and expense of establishing a substantive base if it were already able to be immediately compliant against the other criteria. Ofcom’s proposed change could reduce incentives to establish substantive bases in the nations and regions, potentially increasing the number of OOL commissions run from London.

Linked to this, Ofcom’s *Explanatory Notes* suggest that the number of individuals who need to be employed to meet this criterion may vary depending on whether a company is a new start-up or more established. As set out above, ITV would approach the opening of a new regional base as very much a start-up. As such, we would expect any such venture to be treated accordingly.

There is also a technical issue with the drafting. Ofcom’s proposals prevent a base from becoming qualifying until it has won a second commission from that base, but also require a base to be substantive before the point of commission to meet the substantive base criteria. These two elements of the Guidance are in tension. Ofcom, if it decides to retain this proposal (which we suggest above it should not), should ensure this issue is resolved. It also needs to explain to broadcasters at what precise date a base is viewed as substantive if it is to require this as a data point as it currently suggests.

Ofcom's suggestion this is a clarification rather than a change is open to question

Ofcom states that:

"Given that the criterion already requires that a substantive base should be seeking commissions to qualify as such, our position is that the current wording already implies the office should be operational prior to the commission in question being obtained."

But what the Guidance actually says is that "...relevant productions must meet two out of the following three criteria..." Self-evidently, a production cannot meet any criteria until the production itself actually exists.

As noted above, the reality is that it is much more likely for a substantive base to be operational with a commission to support it, than operating as such without any work. The current guidance therefore clearly allows productions to be created at newly-established bases. It is vital that this position continues to encourage new start-ups and investment by London-based firms.

We are a little concerned here that Ofcom may have based its proposal here more on anecdotal suggestions that some companies open 'pop up' or 'brass plate' offices to deliver commissions which are not the regular place of employment of senior staff and/or not the base of people seeking new commissions. However, we are not aware of firm evidence of such behaviour (which, for clarity, would also be a concern to ITV). Ofcom is clear that "*a high hurdle must be overcome before [it] regulate[s].*" It is not completely clear to us that hurdle has been cleared.

Ofcom can already enforce against this issue under the current Guidance

Ofcom states that the change is driven by stakeholder concerns about the "*criterion being applied incorrectly*" and the substantive base definition "*being undermined by "brass plate" and "pop-up offices" claiming to be substantive bases.*" Whilst no concrete examples of such behaviour have been given, even were such behaviour to be proven then this would already be a breach of the current guidance which requires bases to be substantive.

As such, this issue (if it exists) can already be dealt with by Ofcom under the current system. Additional regulation is therefore not necessary to prevent the potential harm that Ofcom has identified.

A lower impact alternative is available

Overall, this proposed change will dampen competition in OOL production by discouraging entry through the establishment of new production companies or new regional bases for London firms.

If Ofcom remains concerned about the potential for "pop-up" bases then we suggest it targets its intervention directly at that phenomena (i.e. the closure of a base post-broadcast) rather than the proxy that is the establishment of bases pre-broadcast. For instance, broadcasters might be required to ensure producers provide them with an

“evidenced intention to maintain the base post-broadcast” with documentation available for Ofcom on request.

The requirement for a production to be ‘made from’ the substantive base is unclear

Ofcom should clarify what ‘made from’ means given the bulk of production does not take place literally within corporate offices. Drama, for example, is heavily location-based. Ofcom should clarify that the production should be ‘managed from’ or ‘run from’ the substantive base rather than ‘made from’.

4. Do you agree with our proposed changes to the production budget criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

5. Do you agree with the suggested explanatory notes for the production budget criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

The overarching aim of the production budget criteria

Ofcom suggests that “...to satisfy this criterion, a supplier should be making a significant financial contribution to the creative economy in the UK’s nations and regions – for instance, through the use of local or regional production related facilities.” There are a number of issues with this.

Firstly, this aim lacks clarity in relation to who the ‘supplier’ is. It is the production itself that must ‘satisfy the criteria’ but the use of ‘supplier’ perhaps suggests Ofcom is referring to the companies used by the producer. Such lack of clarity will make compliance impossible. We suggest that ‘supplier’ is amended to ‘production company’.

More substantively, the economic benefits of a production are not limited to the ‘creative economy’. As such, this criteria should not be assessed only against such a criteria, which would could exclude spend in sectors such as transport, catering, construction, security, health and safety, legal and finance, for example. Such sectors account for a significant volume of OOL spend, and are a legitimate and necessary part of programme expenditure. Ofcom should therefore revise the aim to better reflect the genuine benefit to local economies in their entirety that is delivered through OOL productions. We suggest amending ‘creative economy in the UK’s nations and regions’ to ‘local economies in the UK’s nations and regions’.

Production fee

Ofcom’s proposed approach to exclude production fee is in line with ITV and ITV Studios’ current practice. As such, Ofcom revised wording has no impact on ITV or our productions for other broadcasters.

We have taken this approach historically as production fee is effectively ‘location-less’ spend. It maximises the amount of the remaining production budget that must be spent OOL and so ensures an effective contribution to local economies. It also ensures that all

companies, regardless of the location of their substantive base, are required to spend the same amount in order for a production to qualify as OOL.

However, we recognise others may take a different approach. The wording in our joint guidance with the other PSBs seeks to balance this risk, ensuring that the focus of all productions is on maximising the benefit to economies across the nations and regions.

Third party funding

ITV reads Ofcom's clarification ("For the purposes of this calculation, any funding from third parties should be included as part of the production budget.") to mean that it is the production budget in full, whether funded by the PSB or the producer, which should be assessed. This is because criterion b) refers to a percentage of the production budget. Ofcom's proposed approach to assess the whole programme budget, rather than just the PSB contribution (if lower than the full budget) is in line with ITV and ITV Studios' current practice. As such, Ofcom revised wording has no impact on ITV or our productions for other broadcasters. We do, though, suggest Ofcom clarifies that this is about programme budget.

Travel and transport costs

Ofcom proposes to exclude travel and transport costs for: a) any journeys to or from London, and b) any spend on transporting talent/equipment to and from countries outside the UK. This produces some very strange results:

- Domestic travel: the cost of travel between, for example, London and Bristol on Great Western Railway (operated by UK-owned, Scotland-based First Group) by someone living and working in Bristol would return as London spend. Travel by someone living and working in London but traveling solely in the regions on, say, German-owned Arriva franchise Northern Rail would count as regional spend.
- International travel: the cost of travel between, say, Manchester and Paris would return as London spend.

ITV goes to great lengths to ensure that local transport firms – both for people and equipment – are based in the nations and regions, even where journeys begin or terminate in London. Such spend is clearly beneficial to the local economies in the nations and regions, and should be recognised as legitimate OOL spend. Preventing this spend from being recognised as regional could result in spend moving back into London in the event that proved cheaper or more operationally efficient.

A blanket exclusion would also make it harder for productions to qualify if using specialist expertise or equipment not available within the UK (or available only in London). This is because the production is effectively penalised twice, with the cost of using such expertise or equipment already excluded in its entirety and the cost of transporting that talent/equipment now also returning as London spend (even if the spend is with a regional firm).

The exclusion of all transport costs, even when predominantly outside of London or benefiting local companies or staff, should be removed. Instead, as is current practice, we

suggest Ofcom allows a sensible allocation of such costs. For instance, allowing half the cost of any travel to and from London, or to and from countries outside the UK.

Overheads

Ofcom seems to assume that, absent a substantive base, no overheads are incurred in the Nations and Regions, so requiring all such spend to be returned as London spend. This is not the case. For instance, ITV productions in London may use resources based in our Manchester office, such as finance, casting and music.

Overheads such as these, genuinely incurred in the Nations and Regions by London-based producers, should, as now, be classed as regional spend. As with travel, if Ofcom remains of the view that it is appropriate to exclude PSB spend on overheads, then it should be removed from the calculation entirely rather than returning as London spend.

Spend abroad

Ofcom proposes in its *Explanatory Notes* that spend outside the UK should be allocated as part of the production budget but not classified as regional spend. Ofcom states that this is to ensure that productions where the majority of spend is abroad do not return as regional, which it argues would be the result were international spend excluded in calculating compliance with the production budget and talent spend criteria.

However, as Ofcom observes, in order to count as regional productions programmes must be made in the UK. Programmes made outside the UK cannot be considered “relevant programmes” and should be excluded from calculation of the quotas. Our joint guidance with the other PSBs explains that in determining whether a programme is made outside the UK we may consider a range of factors including (but not limited to): the location of filming, the location of post-production, the location of the production company, the degree of spend abroad, and the extent of talent employed outside of the UK.

Applying such a test to Ofcom’s example (where only 20% of a production’s budget was spent in the UK) would clearly result in that production being classified as ‘made out of the UK’ and so excluded from the quota calculation. Ofcom’s concern is therefore misplaced, as such outcomes are already precluded due to the statutory framework.

However, where a programme is genuinely made in the UK we think it would make sense to exclude international spend when assessing whether a production meets the two spend criteria. This would ensure that producers in the nations and regions – who are just as ambitious and internationally focused as London-based firms – would be able to compete on a level playing field with London firms for commissions with an element of international filming. The allocation of all international spend to London, even if only 10-20% of a programme’s total budget, immediately puts such a constraint on producers as to make compliance with OOL requirements incredibly challenging, a point made by a number of respondents to Ofcom’s initial *Call for Evidence*. Instead, as long as a programme has been assessed as made in the UK, international spend should be excluded from assessing the commission’s compliance with the spend criteria.

6. Do you agree that the off-screen talent criterion should remain the same? If not, please explain why, providing appropriate supporting evidence where possible.

7. Do you agree with the suggested explanatory notes for the off-screen talent criterion (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

ITV is concerned about the focus on “creative job opportunities” as currently drafted. Whilst we can to some extent understand concerns about non-production roles, such as catering or security, we would expect all production roles to qualify, regardless of the ‘creativity’ of those roles.

By way of example, Production Co-Ordinators, Production Managers and Production Accountants are all critical to the production of programmes and to the creative process but would not necessarily naturally be described as “creative” roles. Having people trained in these roles in the regions is critical to creating thriving TV production regions.

There can even be some circumstances where roles that might seem to naturally fall out of scope can nonetheless actually be a legitimate part of production spend, [X], for instance. As ever, flexibility is key to avoid unforeseen consequences that might negatively impact on productions and sustainable industry across the UK.

We suggest Ofcom removes all reference to “creative” from its guidance to instead ensure “genuine job opportunities in TV production” regardless of their place in the production value chain.

8. Do you agree with our proposed change to exclude self-promotional content from the calculations? If not, please explain why, providing appropriate supporting evidence where possible

ITV strongly disagrees with Ofcom’s proposals.

Nightscreen was an openly-agreed part of ITV’s new licence

Ofcom has long been aware of the role of ITV Nightscreen in enabling ITV to meet its Out of London quota. It is included each year in ITV’s data returns and published by Ofcom in its *Made Out Of London Register*.

The legitimacy of its role in ITV’s PSB licence has also been explicitly considered by Ofcom on multiple occasions. Its 2012, its Section 229 report³ to the Secretary of State on channel 3 relicensing noted that:

“Channel 3’s Nightscreen, an animated sequence containing programming information aired during late night slots, alone accounted for approximately 40% of the Channel 3 out of London programming by volume in 2010.”

Ofcom went on to conclude that ITV’s service (including Nightscreen) would:

³ https://www.ofcom.org.uk/data/assets/pdf_file/0021/24078/c3_c5_licensing.pdf

“...continue to make a sufficient contribution to the fulfilment of public service purposes.”

The Secretary of State agreed, and allowed Ofcom to proceed with the relicensing of ITV’s PSB service. As part of the renewal process, Ofcom explicitly considered and consulted on the role of Nightscreen, noting in its consultation on proposed programming obligations⁴⁴ that:

“ITV exceeds the quota through a combination of high and low value productions, ranging from Nightscreen, an animated sequence containing programming information aired during late night slots, and flagship, high value content, such as Coronation Street and Emmerdale.”

Ofcom decided not to make changes to our requirements as it saw:

“...no compelling reasons either to increase or reduce the current obligations.”

Indeed, Ofcom went further, noting that:

“...an increase [in ITV’s Out of London requirements] would diminish the discretion Channel 3 licensees have about where to commission or produce programmes, which could impact their ability to manage their businesses commercially, and hence to provide an attractive service to viewers.”

We can see no compelling change in circumstances since then that should have changed Ofcom’s position on the risks of an increase in ITV’s obligations. As Ofcom itself acknowledged only last year, the PSBs

“...now face a number of challenges as the broadcasting landscape undergoes fundamental change. Major growth in the use of online and connected devices, driven by technological innovation, has enabled the entry of big new global players and shifts in viewing habits away from scheduled television.”

As Ofcom has previously observed, it is important that there is a sustainable balance between the costs and benefits of being a PSB. At a time of unprecedented competition for audiences and revenues and when there is regulatory pressure on the product categories that can be advertised on TV (with the recent restrictions on gambling advertising in live sport being the latest example) it is important to ensure that additional costs are not added to the PSB licences.

Ofcom was clear in the relicensing process that the benefits and obligations of our PSB licence were approximately in balance. Against this backdrop, we believe that Ofcom should avoid risking an increase in the cost and complexity of meeting our PSB obligations, hampering our ability to deliver our PSB remit and meet the needs of our audiences throughout the UK.

[✂]

Regardless of which approach we adopt, Ofcom’s proposals appear to alter the PSB compact

During the relicensing process, Ofcom acknowledged that the obligations and benefits of ITV’s PSB licence would be broadly in balance over the course of the licence. The future

⁴⁴ https://www.ofcom.org.uk/data/assets/pdf_file/0022/63058/c3-c5-obligations.pdf

impact of these proposals is hard to accurately quantify, given the difficulties noted above. What is clear is that they represent an additional constraint on ITV versus multichannel broadcasters and will increase compliance costs (explored in more detail below). These additional costs will alter the balance between the benefits and obligations of our PSB licences, putting additional strain on the licence economics at a time when other pressures cumulatively risk disrupting the licence costs and benefit balance.

9. Do you agree with our proposed changes to the allocation categories (see wording at Annex 7)? If not, please explain why, providing appropriate supporting evidence where possible.

ITV has no comments on the proposed allocation categories.

10. While we are not obliged to consult on our internal processes, we would welcome stakeholders' views on any adverse consequences we have not identified that may occur as a result of our planned changes in relation to our compliance and enforcement processes, namely: data gathering and reporting by the broadcasters; more comprehensive data publications; proactive monitoring by Ofcom; and a clear articulation of the complaints process.

Data collection, retention and spot checks

ITV collects all the data required of it by Ofcom for reporting and compliance purposes and will continue to do so. However, ITV has a number of concerns about Ofcom's proposed changes to data collection, reporting, monitoring and compliance.

Lack of clarity

Ofcom appears to be introducing a requirement for the PSBs to collect unspecified further data that is not required to be reported to Ofcom on a routine basis but may potentially be required by Ofcom on an ad hoc basis.

ITV would welcome clarification about what information Ofcom regards as suitable for compliance purposes, what information it expects PSBs to collect but not report, what such information should be used for by broadcasters (we do not require it for business purposes), what it will require during spot checks, and how citizens and consumers will benefit versus the cost (and implications for programme budgets).

Inappropriate data collection from independent producers

Ofcom seems to indicate that the broadcasters should determine which information it is appropriate for independent producers to provide to them (or retain). We are concerned about the appropriateness of requiring independent producers to provide commercially sensitive information about their businesses to us. We are equally concerned about being asked by other broadcasters to provide such information to them in relation to ITV Studios.

Disproportionate cost

This requirement, linked to Ofcom's view that producers should be unable to offer only a legal warranty or declaration of compliance, will inevitably result in a substantial increase in administration costs for ITV and producers to minimise the legal risk. Ofcom states that these costs will be "both proportionate and appropriate" but appears to have made no assessment of what the costs will be – nor of the benefits that the retention of such data will deliver. As such, it is unclear how it has reached this judgment. At any level, such costs will impact programme budgets and profitability while it is unclear how citizens and consumers will benefit.

Ofcom states that it intends to request "additional information" from broadcasters through spot checks but has given no indication of what data it will require. Again, it regards this as "proportionate" but again it is unclear on what basis it has reached this view. ITV is concerned that the costs of such monitoring may be substantial. Ofcom has provided insufficient information for us to make even a tentative estimate of cost and practicability.

Proposal for further survey

Ofcom states that it intends to:

"...commission a survey of both producers of regional productions and the PSBs..."
and that this *"...data will provide a factual evidence base on the resourcing split between London and the nations and regions, against which it will be possible to assess developments over time."*

ITV does not believe that such a survey has merit. It will provide at best a partial snapshot of resourcing at a single point in time. How such a snapshot would be deployed and interpreted is unclear, as Ofcom has not articulated how such a survey would be used. Ofcom has already carried out nearly two years' worth of review driven by, and focused almost entirely on, the views of the production sector. Rather than extending this process indefinitely and imposing further costs on broadcasters and producers, Ofcom should focus on policy outcomes for citizens and consumers.

Furthermore, such a survey does not seem to be required in order for Ofcom to meet its statutory duties, particularly given the extensive additional data Ofcom appears to be requiring from PSBs and producers.

Ofcom suggests that the review would also: *"...serve as a useful resource for the PSBs to draw upon in designing their future regional strategies and training initiatives."* ITV is comfortable that it has all the information necessary for it to design and implement its own corporate strategy without such a survey.

Requirement for broadcaster 'strategic reviews' and the threat of further intervention

We are also concerned that Ofcom seems to suggest (in paragraphs 5.83-5.86) that more production should be moved out of London in future, with the threat of further substantial revisions to the guidance if this does not occur. Ofcom's review has provided no evidence that OOL production needs to increase. Indeed, its evidence suggests that the intervention is working well. What is clear, however, is that broader changes in regulation (notably

around advertising rules) and increasingly intense global competition are putting pressure on PSB licence economics. It is therefore unreasonable to expect businesses to not only meet their regulatory obligations, but also to deliver unspecified and vague aspirations beyond this whilst no such expectations are placed on the broader market or the, often larger, global firms competing against the PSBs for audience and revenue.

Complaints procedure

ITV is unclear as to why Ofcom intends to include its internal complaints procedure within Guidance intended for broadcasters. Whilst greater clarity on complaints processes could be useful – it’s hard to comment when no information about this has been provided – the Guidance is not the right place for it. If Ofcom intends to introduce a new procedure for OOL specifically then it should consult on that, providing full information.

11. Do you agree with our proposal for the new Guidance and majority of changes to take effect from January 2020? Please provide reasons and evidence in support of your response(s)

ITV strongly disagrees with Ofcom’s proposals coming into effect from January 2020.

The proposed deadline offers insufficient time to achieve compliance

Ofcom’s review and amended guidance will not be finalised until spring 2019 at the earliest, perhaps later. This leaves little more than 6 months between the completion of Ofcom’s review and revised requirements coming into effect.

Once Ofcom has issued its final revised Guidelines, broadcasters will need to undertake detailed compliance work in order to assess the impact on a programme by programme basis. This could take some months.

Once this assessment is complete, for any OOL programmes that look unlikely to remain qualifying under the new rules, a further period of time will be necessary to make changes to programme production to ensure compliance.

[X]

Implementation as early as January 2020 therefore runs the real risk of making it impossible for broadcasters to comply [X].

By contrast, Ofcom allowed Channel 4 nearly six years to comply with the increased ‘Out of England’ quota (from 3% to 9%) imposed through relicensing. This was because Ofcom recognised “...C4C’s intention to meet an increase in the quota through developing sustainable, indigenous production, and that setting the increased quota to apply earlier than C4C’s proposed date of 2020, or setting binding interim targets to the quota, would tend to act against this intention.” Given Ofcom’s stated intention is for the current review to deliver more sustainable production in the Nations and Regions then it should, by its own logic, ensure sufficient time is allowed for that to occur.

Ofcom's approach changes the rules for programmes already commissioned

[✂]

A more proportionate approach to implementation

ITV instead proposes that:

- Changes come into effect from January 2021 at the earliest;
- Any commissions made before the completion of Ofcom's current process should have compliance assessed against the rules in place at the point of commission; and
- Any returning series which have incurred substantial capital investment should be exempt for the payback period of that investment.