



**OFCOM BBC THREE TV CHANNEL COMPETITION ASSESSMENT  
RESPONSE OF ITV PLC TO OFCOM PROVISIONAL DECISION, 16 SEPTEMBER 2021**

This submission is made by ITV in response to Ofcom's consultation on its provisional determination in relation to the BBC Three television channel competition assessment, including proposals to revise BBC Operating Licence requirements and Ofcom's consultation on its review of rules for prominence of BBC Three.

The BBC's proposals and Ofcom's conclusions come at an important time, when Ofcom is considering the future of the BBC's regulatory framework. As ITV noted in its response to that consultation, it is crucial that this framework take into account the BBC's multi-billion-pound public funding settlement and the necessary resulting duties to maximise distinctiveness and to minimise impact on the wider market. Ofcom's proposed approach – to move to a more BBC-led Operating Licence regime which leaves the BBC free to determine its own regulatory framework and performance measures – would provide little protection against the BBC pursuing commercial objectives of share and volume at the expense of distinctiveness.

Against this background, Ofcom's provisional conclusions on BBC Three illustrate ITV's concerns precisely. In particular, and as set out in more detail in this submission:

- Ofcom has provided no assurance that BBC Three will be obliged to deliver on the BBC's own commitments to deliver public value; and
- Ofcom has provided insufficient scrutiny of BBC's market impact model which significantly underplays the impact that the BBC's proposals will have on rivals and hence on fair and effective competition.

Our fundamental difficulty with Ofcom's provisional conclusions is that Ofcom does not appear to be requiring the BBC to deliver its proposals and commitments via obligations in its Operating Licence regime. There are, essentially, no barriers to BBC Three becoming an entirely mainstream commercial service, in direct competition with ITV2 and other free-to-air services serving the same audience and competing for rights to the same shows.

Indeed, in the short time since Ofcom published its provisional conclusions, the BBC has already indicated its direction of travel, acquiring all 189 episodes of the hugely popular *Pokemon* animated series,<sup>1</sup> hiring a new Commissioner of Pop Music TV,<sup>2</sup> and announcing the launch of two new reality dating shows – *I Like the Way You Move*, which pairs professional dancers with non-dancers to “*find their perfect partner on and off the dance floor*”,<sup>3</sup> and *Love in the Flesh* – a “*raunchy dating show*” that is already been referred to as a *Love Island* clone.<sup>4</sup> All of these moves, together with the broader ramping up of US acquisitions (for instance the acquisition of *Gossip Girl* and output deal with FX Studios) indicate, as we feared, that the BBC's primary objective is to maximise audience share of 16-34s in any way possible. It is clear that

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<sup>1</sup> <https://www.toynews-online.biz/2021/08/02/pokemon-is-heading-to-the-bbc-as-iplayer-catches-series-and-movies-for-the-first-time/>

<sup>2</sup> <https://www.bbc.co.uk/mediacentre/2021/sally-wood-appointed-commissioning-editor-pop-music-tv-bbc>

<sup>3</sup> <https://www.atvtoday.co.uk/185584-bbc/>

<sup>4</sup> <https://inews.co.uk/culture/television/love-in-the-flesh-bbc-dating-show-warnings-ripping-off-love-island-itv-licence-fee-1216444>



the BBC sees no barrier to the creation of an entirely commercial service, delivering little or none of the public value that Ofcom highlights in its decision.

It is fundamentally important that there is a full and proper review of the BBC's proposals which, if approved, should be underpinned by appropriate and demanding conditions on the BBC setting out the obligations that BBC Three must deliver, thereby providing certainty the market requires to invest in delivering services for younger audiences and ensuring the delivery of a service which provides a different and distinctive offer to the market.

### **Public Value**

Ofcom's conclusions on public value are based on a number of key assumptions about the nature of the proposed BBC service. In this respect, Ofcom rightly states:

*"we do not share the BBC's conclusion that the proposed changes would, in and of themselves, 'safeguard [its] ability to deliver the Mission and Public Purposes to all audiences'... the extent of the public value delivered will depend on the quality and range of the content that the BBC commissions and makes available for the BBC Three channel."*

It is absolutely correct that that Ofcom's decision should be linked to the features of the service that are actually delivered. However, ITV is concerned that the BBC's commitments are not matched by clear obligations to deliver on those commitments and there is nothing holding the BBC to its commitments on public value.

### **News and Factual Content**

News is an important part of the BBC's distinctive offer and a hallmark of all its services – TV, radio and online. Ofcom, therefore rightly, points to the BBC's commitment to provide news and current affairs targeted specifically at younger audiences as a key part of the BBC Three proposal. In particular, Ofcom highlights the BBC's aspiration to include *"a nightly news bulletin, presented by young people, currently planned for each weekday evening"* on the new BBC Three linear service.

However, Ofcom's proposed amendment to the BBC Operating Licence simply states that *"the BBC must ensure it shows news every weekday (except Public Holidays)"*. This obligation does not require the BBC to produce original content for the channel or even to produce something suitable for the target audience - to showcase young talent or to create content that speaks to younger audiences at a convenient time for them in the evening schedule.

While we understand Ofcom's reticence at being overly prescriptive and inhibiting innovation, what has been presented in the provisional decision gives the BBC too much discretion. Indeed, Ofcom's proposed requirement could be met simply by showing a short simulcast or clips package from another service – *the Six O'Clock News* on BBC One or *Newsround* for example and even then, not necessarily in peak time.

For these reasons, ITV suggests that Ofcom's proposed operating licence requirement be amended as follows:



In respect of BBC Three, the BBC must ensure it shows original news intended to appeal particularly to 16 to 34 year olds every weekday (except Public Holidays) particularly during peak time and at other times when the core audience is available to view.

### ***First Run UK Originations***

Ofcom also notes the importance of first-run original commissions to deliver social and economic value:

*“As well as the importance of UK originated content, we continue to hold the view that the BBC’s provision of first-run UK content is also important for distinctiveness... the BBC’s PIT set out that 24% of output 7pm to 12pm would be first run programming... We consider that this could have been misleading to stakeholders and it was unlikely to have been clear that the use of this term in their consultation and the PIT was intended to refer to acquisitions in addition to first-run BBC commissioned originations”.*

Ofcom is right to call out this reference by the BBC to first run content. We had absolutely understood this reference, in the context of origination, to be a reference to original, first run UK content. It is extraordinary that in fact the 24% first run proposal could be met entirely by newly acquired US content, leaving no first run UK content in peak time at all on BBC Three. Given the lack of transparency in the BBC’s own application, it’s even more vital that Ofcom includes adequate commitments in the Operating Licence.

Ofcom proposes a requirement that original productions represent 75% of programming hours. In relation to first-run originations, the BBC is simply required to ensure it *“provides first-run UK originations that are intended to appeal to 16 to 34 year olds across a mix of different genres”*. These provisions are not linked, which means the BBC is ostensibly free to satisfy its original productions quota with repeats, with a potentially very small number of first run UK originations. In response to Ofcom’s consultation on the BBC PIT, ITV raised concerns that the BBC may be incentivised to drive viewing by ‘premiering’ BBC One content on BBC Three. There is nothing in Ofcom’s proposals that would prevent this.

Furthermore, Ofcom proposes no obligation as to quality (i.e. budget set aside for), volume or scheduling of first-run originations. As a result, the BBC is ostensibly free to spend most of its budget on US acquired content for prime-time broadcast, leaving minimal budget for first-run UK original commissions that could languish at the edges of the schedule.

Indeed, notwithstanding the BBC’s proposals for content that reflects and portrays under-represented audience groups, including thought provoking factual content as well as commissioning original content from producers outside the M25, none of these features are reflected in the proposed Operating Licence requirements.

Ofcom explains that it will *“keep under review”* its decision not to impose specific quotas for first run original content. Ofcom also expects the BBC in its next Annual plan to *“set out in detail ... the volume of new UK content that it is commissioning for the channel, and report on delivery of this”* and *“articulate[e] how it would deliver high-quality distinctive output across different genres”*. This is not sufficient protection against the BBC’s slide into mainstream commercial programming, particularly acquired US material.



ITV appreciates that Ofcom's role is to review and stress test the BBC's own analysis of public value and not to conduct its own analysis to determine whether the BBC could have delivered greater public value through its proposals. However, if Ofcom's conclusions are based (as they are) on particular features of the BBC's proposals, it is crucial that the BBC is under an obligation to deliver those specific features.

For these reasons, ITV suggests that Ofcom should require that a certain proportion of original first run productions be scheduled in peak viewing time, as is the case for BBC One, BBC Two and BBC Four. Furthermore, the BBC should be required to report to Ofcom on the proportion of its content budget is used for the acquisition of non-UK content.

To reiterate what we said in response to the BBC's initial PIT consultation: the BBC has set out some clear aspirations for the new BBC Three services and we applaud many of these aspirations – they are exactly what a publicly funded broadcaster should do with the freedom that public funding offers. But if these features are not hard-wired into delivery obligations in the regulatory framework for the channel, they should not form part of Ofcom's assessment since it's perfectly possible that they may not be delivered.

## **Market Impact**

ITV raised a number of important concerns relating to the BBC's modelling of market impact. We are still very concerned that the BBC has underestimated the impact that its proposals will have on competing services, including ITV. In particular, the following concerns do not appear to have been addressed in Ofcom's provisional conclusions.

### ***Flawed BBC Counterfactual***

In response to Ofcom's consultation on the BBC's PIT and in our meeting with the Ofcom case team, ITV queried the validity of the BBC's counterfactual, i.e the projected volume of viewing to BBC Three absent the proposals. We said in our meeting with the case team [CONFIDENTIAL]. We suggested that Ofcom should publish the underlying data or, at the very least, interrogate the BBC's analysis.

Since the BBC's data was not published in Ofcom's provisional conclusions and its analysis seems to have been accepted by Ofcom without question, we have tried to 'reverse-engineer' this data to check their accuracy:

- The Annex to Ofcom's consultation states the projected BBC Three viewing share in 2022 for 16-34s "*absent [a] linear channel*" (i.e. in the counterfactual), would be 2.9%.<sup>5</sup>
- BARB data shows that across the first half of 2021, total viewing for 16-34s in the UK was 3.9bn hours of which 0.14bn hours (3.5%) was attributed to BBC iPlayer.<sup>6</sup>
- Using BARB data (and absent any increase in overall iPlayer viewing) the BBC's modelling implies that BBC Three's share of viewing in the counterfactual would be 0.11bn (i.e. 2.9% of 3.9bn).

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<sup>5</sup> Para A1.91 and Figure A8.

<sup>6</sup> Source: BARB Dovetail. BBC Online and BBC Non Linear viewing are the closest measurement available of BBC iPlayer without access to the BBC's own internal data. These BARB measurements will also include post-28 day PVR playback and any viewing to any other platforms where content has been distributed non-exclusively, i.e. *Peaky Blinders* can be watched on both iPlayer and Netflix. Therefore this 3.5% is very much a high-end estimate.



- This means that, on the basis of the BBC's modelling (and absent any increase in viewing) BBC Three viewing would represent 83% of all BBC iPlayer viewing by 16-34s.

ITV does not believe it is credible that BBC Three represents 83% of all iPlayer viewing by 16-34s for the following reasons:

- BARB data (included as an Annex to this submission) shows that of the top 20 shows for 16-34s, on iPlayer in H1 2021, only two were BBC Three titles.
- These titles together represent less than 7% of all iPlayer viewing for 16-34s.
- One (non-BBC Three) show, *Line of Duty*, alone represents 15% of all BBC iPlayer viewing by 16-34s.

We accept that this analysis ignores the impact of an increase in overall iPlayer viewing and improvements to BBC Three performance between H1 2021 and 2022 (the period modelled by the BBC) absent the current proposals. There may be some uplift in BBC Three viewing given the increase in BBC Three's budget (which we note is unconnected with the present proposals). However, given that BBC Three's projected budget (£72.5m per year) represents less than 4% of the overall BBC TV content budget,<sup>7</sup> and less than 8% of the BBC One content budget,<sup>8</sup> we believe the BBC's estimate that BBC Three could obtain 83% of BBC iPlayer viewing without a linear channel seems highly unlikely.

This analysis is crucial to the BBC's overall market impact analysis. By overstating BBC Three's share of on-demand viewing (i.e. the counterfactual), the increment in viewing attributed to the proposal (i.e. the difference between the factual and counterfactual), and therefore the impact on competitors and on fair and effective competition is understated.

In fact, both the BBC's and Ofcom's estimate of BBC Three's share of 16-34s viewing following a relaunch of a linear BBC Three service, (the 'factual' - 4.3% and 4.6% respectively) is higher than the estimate used in ITV's model (2.6-3.2% depending on EPG position). Yet Ofcom's estimate of the financial impact of the proposal on ITV (~£15m per annum) [CONFIDENTIAL].

ITV does not have access to BBC Three viewing data and cannot, therefore, provide an alternative counterfactual. But this discrepancy, together with concerns about the foundation for the BBC's counterfactual should be sufficient to call into question Ofcom's conclusion on market impact.

### ***The strategic importance of younger audiences***

In response to Ofcom's consultation on the BBC's PIT, ITV raised concerns about the BBC's approach of looking at market impact across ITV's entire portfolio of channels. We explained that this approach ignored the strategic importance of younger audience – that they drive higher advertising revenues and are important for the future sustainability of TV services.

It is widely accepted that digital advertising is now the primary video advertising rival to TV advertising for younger audiences. In particular, online advertising on services like Google/YouTube,

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<sup>7</sup> According to the [BBC Annual Report and Accounts 2020/21](#) the BBC's overall TV content budget was £,1358m in 2020/21

<sup>8</sup> According to the [BBC Annual Report and Accounts 2020/21](#) BBC One had a content budget of £924m in 2020/21



Facebook/Instagram and SnapChat are competing for broad, brand advertising. In addition, and in particular for younger audiences, brands increasingly want the ability to create campaigns for a specific audience segment which is harder to deliver via multigenre, broad reach TV channels. As a result, channels aimed at niche high value audiences, like ITV2, are crucial.

Indeed, given further pressures on broadcast advertising markets (particularly with the prospect of a pre-9pm HFSS TV advertising ban) it is particularly important that the BBC's proposals should be different from and distinctive to the commercial market and that the BBC is held to those obligations by Ofcom. The risk otherwise is that the BBC's service will have a disproportionate market impact.

We raised these concerns with Ofcom and are, therefore, surprised to read Ofcom's conclusion that:

*"based on the relatively small potential reduction in viewing minutes, the impact on advertising revenues is likely to be relatively small" and "it [is] unlikely that the BBC's proposal by itself would significantly impact on the viability of those commercial TV services that are more likely to be affected".*

It seems to us that assessing whether commercial channels would cease to be viable as a result of the launch of a new BBC service is setting the bar of significant adverse market impact unacceptably high.

#### ***BBC's ability to distort content acquisition markets***

In response to Ofcom's consultation on the BBC's PIT, we raised concerns about the ability for the BBC to bid for commercial (particularly US acquired) content that could easily find a home on commercial free-to-air-services. We drew particular attention to the BBC's recent acquisition of *Gossip Girl* which saw the BBC offer significantly above the market.

Ofcom considered the relaunch of BBC Three as a linear channel as unlikely to result in significant adverse impact in this area, on the basis that (i) the increase in budget was not contingent on relaunching a broadcast TV services; (ii) there is *"a large amount of popular international content available for acquisition"*; and (iii) the BBC had made commitments relating to the volume of 'original' content that it would air on the channel.

As Ofcom has already pointed out in its provisional conclusions, *"the extent of the public value delivered will depend on the quality and range of the content that the BBC commissions and makes available for the BBC Three channel"*. However, under Ofcom's proposed conditions, commitments to broadcast UK originated content could be satisfied with repeats or content rebroadcast/simulcast from another BBC service. In addition, obligations on the number of *hours* of UK originated content broadcast on the services say nothing about the amount of *budget* that the BBC is required to spend on commissioning and acquiring UK content. As currently drafted, there is nothing in the proposed conditions for BBC Three to prevent the BBC spending the vast majority of its content budget on popular US shows to air in prime-time slots.

Furthermore, we would also challenge Ofcom's statement that there is a large amount of popular international content available for BBC Three. [CONFIDENTIAL]. We are keen to understand what evidence supports Ofcom's conclusions.



Recently, Tim Davie was asked by the DCMS Select Committee what controls were in place to stop BBC Three simply buying US content to drive youth appeal. He responded:

*“It is not a sustainable position for the BBC to be wholly reliant on acquisitions. As part of the filling a schedule and making sure iPlayer has enough volume, it is not inappropriate that we make the right tactical acquisitions, but they are not the core strategy of the BBC”*

ITV applauds Mr Davie’s sentiment but the choice of words does not inspire confidence, particularly the reference to the BBC not being “*wholly reliant*” on acquisitions. There are strong grounds to suggest that the BBC, as a publicly funded PSM provider, ought not be reliant on acquisitions at all. If the Licence Fee is the venture capital for the UK creative industries, every pound spent on US acquired material is a pound that leaves the UK creative economy and is not spent on material that portrays the lives and interests of the people of the UK who pay for the BBC. Indeed, in the past, US-acquired shows *Family Guy* and *American Dad* were the mainstay of BBC Three schedules, driving almost of third of BBC Three viewing. We are very concerned that the BBC is on track to go even further down this road with a relaunched BBC Three with nothing in the service licence or regulatory framework to stop them.

If, as ITV suspects, Ofcom’s conclusions are based on promises that the BBC has made in relation to its aspirations for the BBC Three service then it is crucial that these precise features are included, in an appropriately demanding form, in the BBC’s formal regulatory obligations.



**Annex: Top 20 BBC iPlayer Titles, H1 2021 (BBC Three titles)**

	Total Sum of Viewer Minutes (000s)		% of all BBC iPlayer viewing	
	All 4+	16-34	All 4+	16-34
Line of Duty	4678419	1266300	14.71%	15.37%
Pretty Little Liars	1463540	705437	4.60%	8.56%
Waterloo Road	884706	465564	2.78%	5.65%
RuPaul's Drag Race UK	839746	452217	2.64%	5.49%
Peaky Blinders	961613	397782	3.02%	4.83%
Top Gear	384935	237343	1.21%	2.88%
Death in Paradise	906690	203321	2.85%	2.47%
Call the Midwife	659298	192726	2.07%	2.34%
Still Game	502977	174070	1.58%	2.11%
The Serpent	1423737	167151	4.48%	2.03%
Doctor Who	451792	165889	1.42%	2.01%
The Fall	495668	122621	1.56%	1.49%
Sherlock	344771	101428	1.08%	1.23%
My Family	278064	95871	0.87%	1.16%
Not Going Out	430464	93821	1.35%	1.14%
Merlin	260398	88291	0.82%	1.07%
Ashes to Ashes	195217	72085	0.61%	0.87%
Glow Up: Britain's Next Make-Up Star	211030	67238	0.66%	0.82%
Spooks	262887	67113	0.83%	0.81%
Doctor Foster	126429	63466	0.40%	0.77%
			BBC Three shows as % of all BBC iPlayer viewing	
All BBC iPlayer viewing	31807431	8241127	3.30%	6.30%

Source: BARB, Jan-Jun 2021. Sum of all minutes viewed to BBC non-linear and BBC Online programmes