

Creative Scotland response to Ofcom's *Consultation on the Channel 3 and Channel 5 proposed programming obligations ahead of a new licensing period*

Background

Creative Scotland is Scotland's national development agency for the arts, culture, film, TV and creative industries. Formed in July 2010, the organisation was born out of the merger of the Scottish Arts Council and Scottish Screen but it presents the opportunity to deliver a new model for cultural investment and advocacy. Our priorities are:

- Identifying, supporting and developing quality and excellence in the arts and culture;
- Promoting understanding, appreciation and enjoyment of the arts and culture;
- Encouraging as many people as possible to access and participate in the arts and culture;
- Increasing the diversity of people who access and participate in the arts and culture;
- Realising the value and benefits nationally and internationally of arts and culture;
- Encouraging artistic and creative work that contributes to an understanding of Scotland's national culture;
- Promoting and supporting industries and commercial activity based on the application of creative skills; and
- Providing advice to Scottish Ministers relating to the creative industries specialising in the arts and culture.¹

Creative Scotland welcomes this opportunity to contribute to the Ofcom consultation on the Channel 3 and Channel 5 proposed programming obligations for the period beyond expiry of their current licences on 31 December 2014.² We have three main comments:

- **Whilst the second of the two main options suggested by Ofcom for the Channel 3 Border region's news and current affairs is to be preferred, neither provides an adequate long term solution to the current anomaly of viewers in the south of Scotland having no access to Scottish programming, particularly news and current affairs - an all Scotland licence should be the preferred approach;**
- **We do not believe Channel 5 should be relieved of its Out of London obligations; and**
- **The deficiencies in these current proposals from Ofcom indicate that there is a clear need for a thorough review of the broader context of**

¹ Creative Scotland, *Investing in Scotland's Creative Future – Corporate Plan 2011-2014*, March 2011, p. 3, at <http://www.creativescotland.com/sites/default/files/editor/Corporate-plan-spreads-11-3.pdf>.

² Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

PSB (public service broadcasting), including its values, objectives and obligations, in advance of a new Communications Bill.

South of Scotland viewers' access to Scottish programming

Ofcom's section 229 report to the Secretary of State in 2012 noted that STV had called for a single Scotland-wide Channel 3 licence to end the anomaly through which viewers in the south of the country have no access to Scottish programming, particularly news and current affairs. Further, STV had stated that it was ready to make available its news and/or non news material for relay in the Border Scotland region. However, ITV plc had rejected the need for a separate Scottish Channel 3 licence, suggesting that the Scottish Borders would be better served under its proposed regional service than as *"a subordinate part of a large nation dominated by the news agenda of two very large cities"*.³

We note that in this current consultation Ofcom has now dropped the option of auctioning a new all-Scotland licence to replace the existing licences held by STV and the area of southern Scotland currently served by ITV. Ofcom explains that the following concerns lay behind its decision⁴:

1. There could be a disproportionate level of disruption for both viewers and licensees;
 2. The sustainability of the existing Channel 3 licences could be at risk;
 3. STV is exceeding its current licence obligations;
 4. The key cause of viewers' dissatisfaction in the south of Scotland is the lack of coverage of their own region rather than the lack of Scotland news;
 5. A service covering both central and southern Scotland could focus on the major population centres further north.⁵
- **While we recognise that any solution to the Borders issue will inevitably involve a level of compromise across the preferred outcomes of different broadcasters, viewers⁶, and indeed Government, we are not convinced that Ofcom's analysis has arrived at an appropriate balance of interests in deciding to reject the option of a new all-Scotland licence.**

1. Disruption

- **We do not consider that there is a risk of 'disproportionate disruption' resulting from an all-Scotland licence, contrary to Ofcom's assessment. Ofcom's assessment appears to undervalue the full significance of the current level of Scottish devolution and the extent to which the UK network news and current affairs programmes do not report on significant issues affecting citizens' lives in Scotland on devolved matters such as health, education and justice – perhaps understandably**

³ Ofcom, *Licensing of Channel 3 and Channel 5: A report to the Secretary of State under section 229 of the Communications Act 2003, May 2012*, p. 40, pars. 5.6-5.8, at http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf.

⁴ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 28, par. 4.19, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>

⁵ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 26, Figure 5, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

⁶ With respect to PSB, a further distinction also needs to be drawn between viewers in their role as consumers and viewers in their role as citizens.

so in view of the comparative number of viewers in Scotland compared with those in England.

The influential 2008 report commissioned by the BBC Trust from Professor Anthony King of the University of Essex highlighted the overwhelming inadequacy of the BBC – and other - network news in reflecting the very extensive proportion of news stories which address areas which are currently devolved to Scotland.⁷ And while there has been some improvement since 2008, the *UK wide* networks – including the BBC's - cannot be regarded as an adequate source of Scottish national news for viewers in Scotland. Neither of the two options⁸ now proposed by Ofcom provides any certainty that this glaring deficiency will be rectified, although the second option might offer more of a possibility of improvement, if combined with a requirement that ITV should provide separate transmission for the Scottish and English parts of the region on DTT.

- **It would also appear that, despite the comments of the Secretary of State that quality and plurality of news provision is of the utmost importance, and Ofcom's own comments supporting this view⁹, the damaging effects of the lack of *plurality* of PSB news and current affairs**

⁷ Research conducted by a team from Cardiff University for the King Report also highlighted the full scale of the inadequacy of coverage of the devolved Nations on the BBC's supposedly UK wide television network news bulletins: "During the four weeks that were monitored during October and November, the Cardiff team identified 136 stories on the BBC network that dealt with education and health: that is, with arguably the two most important policy fields that are largely devolved to Scotland, Wales and Northern Ireland. Of the 136 stories, all 136 dealt with England alone. None dealt with education or health in one of the devolved nations." [see BBC Trust, *The BBC Trust Impartiality Report: BBC NETWORK NEWS AND CURRENT AFFAIRS COVERAGE OF THE FOUR UK NATIONS*, 2008, p.30, at http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/impartiality/uk_nations_impairity.pdf]. Nor was the BBC unique among broadcasters; in fact: "Although the BBC network's performance in reporting the whole UK was less than wholly satisfactory, the BBC's performance was nevertheless consistently superior to that of other broadcast outlets when relevant comparisons were made. In other words, the BBC needs to be judged by its own high standards, not by comparison with other broadcasters." [⁷ BBC Trust, *The BBC Trust Impartiality Report: BBC NETWORK NEWS AND CURRENT AFFAIRS COVERAGE OF THE FOUR UK NATIONS*, 2008, p.30, at http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/impartiality/uk_nations_impairity.pdf .]

⁸ The two options now proposed by Ofcom are:

Option 1: 'appropriate coverage' of Scottish issues in 30 minutes of daily news specific to Borders viewers in the early evening and a weekly half hour Borders current affairs and politics programme, of which two thirds to three quarters would be focused on southern Scotland, reflecting the political debate in Scotland in particular.

Option 2: As Option 1, but with the proposed weekly half hour Borders current affairs and politics programme replaced by a requirement for ITV to provide 90 minutes per week of non-news regional programming in or near peak-time. This *could* be produced by ITV in partnership with STV or indeed could see ITV scheduling STV's *Scotland Tonight*, in which case ITV may wish to split the Border DTT into English and Scottish sub-regions. As the PSB licence relates to DTT only, ITV would have to decide whether it wished to do the same for satellite transmissions.

see Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, pp. 28 – 29, pars. 4.20 – 4.22, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>

⁹ See Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 3, par. 1.11, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/> : "In her letter to us in November 2012, the Secretary of State noted that under ITV's proposals, viewers in the south of Scotland would not receive the same level of programming about Scotland as those living in central and Northern Scotland (who are served by the STV licensees). She said that the quality and plurality of news provision was of the utmost importance."

coverage for Borders viewers in Scotland does not appear to have been given sufficient weighting in the assessment of proportionality.

2. Sustainability

Creative Scotland fully understands that Ofcom does have to take into account the financial sustainability of licences in reaching its decisions. It is therefore essential to ensure that those PSB obligations which are included in the licence are proportionate and do not endanger sustainability, and also that these conditions should prioritise the most significant aspects of PSB.

- **However, as we explain elsewhere in this paper, we do not believe the dropping of the all-Scotland licence option is consistent with the objective of prioritising the most significant aspects of PSB to ensure the sustainability of licences.**

3. STV exceeding its current licence obligations

- **The relevance of STV exceeding its current level of obligations (which both STV and Ofcom regard as sustainable) to Ofcom's decision to drop the all-Scotland licence is unclear to us.**

However, we note Ofcom's observation that, because STV's actual provision of regional content significantly exceeds its current requirements, STV would be able to trim provision in the event of adverse commercial circumstances¹⁰ We believe a more positive explanation of STV's voluntarily exceeding its requirements in this area is that it recognises the valuable strategic contribution such programming makes to its business.

As the BBC has remarked, its (Scottish) nations-only services are much more wide-ranging than the equivalent services in England, are clearly valued very highly by viewers, and their performance is strong and improving.¹¹ We also note that STV is planning to exceed its required targets for 'other' further scheduled programming and that the 2013 STV schedule will be rich, varied and reflect the distinctive cultures, institutions and communities across Scotland, touching on topical events where relevant and ensuring a strong mix of programming and a distinct schedule for Scotland.¹²

And in 2008, in the context of assessing the outlook for Border Television (then already owned by ITV plc), the Scottish Broadcasting Commission (SBC) noted that, while Border Television had been in many respects a successful and popular supplier of Scottish programming within its transmission area, "there was also potentially a strong argument in favour of one Channel 3 licence for all of *Scotland, with an obligation to provide news at the current level of regionality and to produce programmes which reflect the full cultural and geographic diversity of Scotland.*"¹³

¹⁰ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 20, par. 3.38, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

¹¹ BBC, *'Delivering Quality First' in Scotland*, 2012, p. 12, at http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/bbc_deliveringqualityfirst_strategy_scotland.pdf.

¹² STV, *STV Statement 2013*, at http://www.stvplc.tv/content/mediaassets/doc/STV%20Statement%202013_FINAL.doc.pdf.

¹³ Scottish Broadcasting Commission, *Interim Report on Cultural Phase*, 2008, p.12, par. 2.14, at <http://www.scottishbroadcastingcommission.gov.uk/Resource/Doc/4/0000359.pdf>.

The SBC also noted that Border at that time acquired much of the local programming output of STV for use in the Scottish parts of its franchise area, although this was not a licence obligation, concluding that there was a powerful argument that Scottish viewers in the Border Television area should receive as much Scottish content as viewers in the rest of Scotland and should be covered by the requirements applied to the national franchises of STV, HTV and UTV.¹⁴ It is not obvious why these arguments should have diminished in force since 2008.

- **The importance of programming other than news and current affairs also needs to be stressed and from a Creative Scotland perspective, we wish to see the full range and diversity of Scotland's arts and culture reflected on what continues to be our most pervasive media.**

4. Viewer concern over lack of regional coverage rather than lack of Scotland news

Market research suggesting that Border viewers in Scotland are more concerned about lack of regional coverage rather than lack of Scotland news is cited by Ofcom as a factor in dropping the all-Scotland option. A similar argument was used by ITV plc in opposing a Wales-only licence (as well as opposing a Scotland-only licence). ITV argued that there was not, to its knowledge, significant viewer demand for a separate licence for the Welsh service. It stated that as it already had a clear set of licence obligations for its service in Wales, it did not see how a specific licence which excluded the West of England would impact on viewers either positively or negatively.¹⁵

However, in marked contrast to its stance towards similar arguments made by ITV plc against the case for an all-Scotland licence, Ofcom stated that - while noting ITV plc's arguments - it saw no reason to alter its earlier assessment that it would be correct to separate Wales formally from the regional Channel 3 licence for the west of England.¹⁶ Ofcom contended that different factors applied in Scotland, stating that STV already offers a service covering most of Scotland that provides coverage of Scottish news and current affairs in addition to regional material, but that in the south of Scotland, the amount of content which the licensee is required to provide is more limited.¹⁷ In practice, the key difference between Scotland and Wales is not about details of licences but about the underlying transmission infrastructure. At present this has the capability without further work to provide separate transmission to Wales. With relatively little further effort and cost, when set against the certainty of a 10 year licence, it would be possible to build on existing infrastructure to provide separate transmission to Scotland and this should be a priority.

- **Ofcom's emphasis on the more limited 'regional' requirements in the current Borders licence conditions seems to us less of an argument about the underlying principles of why Scotland should be treated**

¹⁴ Scottish Broadcasting Commission, *Interim Report on Cultural Phase*, 2008, p.11, pars. 2.12 – 2.13, at <http://www.scottishbroadcastingcommission.gov.uk/Resource/Doc/4/0000359.pdf>.

¹⁵ Ofcom, *Licensing of Channel 3 and Channel 5: A report to the Secretary of State under section 229 of the Communications Act 2003*, May 2012, p. 41, par. 5.10, at http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf.

¹⁶ Ofcom, *Licensing of Channel 3 and Channel 5: A report to the Secretary of State under section 229 of the Communications Act 2003*, May 2012, p. 41, par. 5.12, at http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf.

¹⁷ Ofcom, *Licensing of Channel 3 and Channel 5: A report to the Secretary of State under section 229 of the Communications Act 2003*, May 2012, p. 41, par. 5.13, at http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/c3_c5_licensing.pdf.

differently from Wales than a statement about the actual problem which needs to be rectified and which is encapsulated in the deficiencies of the current Borders licence agreement.

ITV plc has also commented that regulatory intervention should not skew outcomes to a level which results in gross inequalities in provision between one group and another.¹⁸ In our view, though, this principle needs to be viewed in the context of the significant distinction between the requirements of (devolved) nations from those of regions in the provision of PSB. The ITV local and BBC Scotland news services are *not* substitutes for each other, as Border viewers are reported as (correctly) identifying in Ofcom's market research. And while the ITV network news may be a substitute for the BBC UK network news, it is not a substitute for the BBC Scotland news.

- **Consequently, we are not persuaded by Ofcom's rationale for the difference in its approach to the case for an all-Scotland licence from the case for an all-Wales licence. We are concerned that it has placed too much emphasis on its interpretation of bespoke consumer research and too little emphasis on the hugely important issues of plurality, citizenship and the core democratic and cultural aspects of PSB.**

Nor are we clear about the message which ITV plc is attempting to convey via its reference to the actual viewing figures in Scotland of the 'Scotland Tonight' programme at 10.35pm showing that it is drawing a relatively small audience share **in Scotland** [ITV's emphasis], whereas the network programmes running at the same time as 'Scotland Tonight' in Border Scotland are attracting around twice the audience share.¹⁹ This is not surprising. There is little doubt that STV could increase its viewing share significantly by replacing news – which is a key part of its PSB obligations - with other, more popular programme genres at 10.35pm or indeed at other times in the schedule. This is irrelevant to the issue which is under consideration and which the Secretary of State has stressed as being of the utmost importance, namely ensuring the quality and plurality of PSB news provision for a devolved Scotland.

5. Viewer concern over focus on Scottish central belt

The market research commissioned by Ofcom found that respondents were concerned that a possible future scenario in which Border Scotland was combined with the STV Central region would be dominated by Edinburgh and Glasgow to the detriment of coverage of their own area, as they believed it is currently dominated by the cities of North-East England and/or Carlisle.²⁰ These are important concerns which are deserving of further exploration, but they need to be interpreted carefully. And as Professor Philip Schlesinger has noted in a post on the 'Advice to Ofcom' Blog, the research was based on 24 participants divided into four groups, "...a tiny number and at best the findings can be indicative", although he also advises that "*the*

¹⁸ Ofcom, *ITV's Proposals for Nations and Regions News for a New Channel 3 PSB Licence*, 2013, p.7, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/> .

¹⁹ Ofcom, *ITV's Proposals for Nations and Regions News for a New Channel 3 PSB Licence*, 2013, p.8, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/> .

²⁰ Ofcom, *ITV's Proposals for Nations and Regions News for a New Channel 3 PSB Licence*, 2013, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/> .

*study is worth reading, not least because it tries to grapple with the diversity of localism.*²¹

- **We note that, in discussing the option of moving the schedule by 30 minutes, Ofcom stresses the importance it attaches to ensuring adequate reach and impact for news as a key element of PSB provision.²² It seems to us that Ofcom should attach at least as much importance to ensuring that there is near universal availability to viewers in Scotland of at least two sources of Scottish national news, covering those significant devolved issues which are usually ignored or given marginal coverage on the UK network news.**

Channel 5's Out of London production obligations

We note that Channel 5 has argued that it should be freed from its requirement that Out of London (OOL) productions should account for at least 10% of its programme expenditure and output, in view of the number of well-established production hubs across the UK and the scale of recent investment by BBC and Channel 4. We also note Ofcom's comments that the actual volume of OOL programming required from Channel 5 is modest, as acquired programming is excluded from the quota calculation, and that Ofcom is not persuaded that the current obligation is unsustainable for Channel 5.²³

We support Ofcom's stance on this matter. From a Scottish perspective, the OOL PSB quotas play an essential part in supporting a successful, but still fragile production presence.

- **The OOL quotas are a vital element of the UK's broadcasting ecology and a decision to reduce or eliminate Channel 5's OOL modest obligation would set an unwelcome precedent.**

The broader context of PSB (public service broadcasting)

The concerns we have raised in this paper, particularly around Ofcom's proposals regarding Border's PSB obligations, raise a number of broader, more fundamental questions about PSB. It could be construed that some of Ofcom's proposals are driven by expedience, particularly in view of the emphasis placed on avoiding disruption as part of the explanatory rationale. This is understandable to some extent, but surely inappropriate in the context of the 10 year licences which are to be awarded. As one leading academic has pointed out in relation to the Borders issue, were the border to become an international frontier after 2014, at least some of the news supplied daily to the Borders and Dumfries and Galloway would come from England until at least 2024.²⁴

²¹ Schlesinger, Philip, *Viewers in the Border region want local news*, Advice to Ofcom Blog, 27 November 2012, at <http://advicetoofcom.org.uk/blog/2012/11/viewers-border-region-want-local-news>.

²² Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 34, par. 5.12, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

²³ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 10, pars. 2.37-2.40, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

²⁴ Schlesinger, Philip, *Viewers in the Border region want local news*, Advice to Ofcom Blog, 27 November 2012, at <http://advicetoofcom.org.uk/blog/2012/11/viewers-border-region-want-local-news>.

We are aware that the Department for Culture, Media and Sport held a number of PSB seminars last year, with the intention that these should feed into the Communications Review. However, we were concerned to read that DCMS had apparently concluded, on the basis of responses to the Open Letter which launched this review, that it was clear that root and branch reform of communications regulation is not required to achieve these aims.”²⁵ We believe that the issues raised in the current Ofcom consultation on Channel 3’s and Channel 5’s proposed programming obligations suggest otherwise.

- **There is a need for a thorough review of PSB, including its values, objectives and obligations, not only in advance of the imminent Communications Bill but also to inform the licence renewal process.**

The review should examine both the ‘poetry’ *and* the ‘pipes’ of PSB (to borrow a phrase used by the first Ofcom CEO). And it should seek to answer questions such as: whether there is justification for different stances on all-nation Channel 3 licences between Scotland and Wales; the impact of Local TV on existing PSB provision; whether or not ‘over delivery’ against PSB obligations should be interpreted as an indication that the current obligations should be increased; whether broadcasting policy is giving sufficient weight to the needs of the bulk of UK viewers who live outside the M25; and whether the current licence renewal approach is too favourable to incumbent licensees.

For example, we note Ofcom’s statement that:

*“Channel 3 licensees have not proposed any changes to their Out of London productions obligations, and we see no compelling reasons either to increase or reduce the current obligations. A reduction would lessen the contribution that Out of London productions make to the scale of regional production across the UK, while an increase 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.”*²⁶

- **Is Ofcom really convinced that the current PSB trade off between the sustainability of regional production and the commercial viability of licences is absolutely correctly balanced? Surely this would be a surprising outcome, given all that has changed since the current levels of obligation were established?**

Other Issues

We note that UTV and STV have proposed that peak time should be extended to run from 6pm to 11pm, so that they may meet some of their regional peak-time obligations by showing programmes between 10.30pm and 11pm.²⁷

- **We agree that, unless there is convincing viewer data to support significant geographical differences in the de facto definitions of ‘peak time’, then any proposed changes to the current definitions need a**

²⁵ DCMS, *About the Communications Review*, <http://dcmscommsreview.readandcomment.com/about-the-communications-review/>, 2012.

²⁶ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 7, pars. 2.19-2.21, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>.

²⁷ Ofcom, *Channel 3 and Channel 5: proposed programming obligations*, 2013, p. 32, par. 5.4, at <http://stakeholders.ofcom.org.uk/consultations/c3-c5-obligations/>

better understanding of the impact on viewers, as well as on costs and revenues.

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