

## MEDIA BILL

### Memorandum from the Department for Culture, Media and Sport to the Delegated Powers and Regulatory Reform Committee

#### A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Media Bill. The Bill was introduced to Parliament on 8 November 2023. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power is being sought and explains the nature of, and the reason for, the procedure selected.
2. In line with the Committee's November 2021 *Guidance for Departments on the role and requirements of the Committee*, this memorandum includes discussion of powers conferred on the Office of Communications ("OFCOM") to issue guidance and codes of practice etc. to provide the Committee a comprehensive overview of the delegated powers in the Bill.

#### B. PURPOSE AND EFFECT OF THE BILL

3. On 28 April 2022, the Government published [Up next – the Government's vision for the broadcasting sector](#). This White Paper set out the Government's vision for the broadcasting sector, and the steps the Government intends to take to further support public service broadcasting ("PSB") across the UK.
4. In that context - and as informed by the findings of the [Digital Radio and Audio Review](#), published in October 2021 - the overall purpose of the Bill is to reform the legal framework for the regulation of PSB and radio in the UK, to enable UK public service broadcasters ("PSBs") and UK radio to thrive in the long-term. The Bill will mean audiences can more easily access and enjoy quality, British-originated content and it will help to maintain a strong and diverse British broadcasting ecology.
5. The Bill is structured in 7 Parts and 12 Schedules. The Parts are as follows:
  - a. **Part 1 – Public Service Television** contains provisions that update the legislative framework for PSB, including provision to facilitate the delivery of public service content through digital platforms.
  - b. **Part 2 – Prominence on Television Selection Services** contains provisions that will mean that public service content is prominent online, which means it is available and easy to find across a range of television platforms that UK viewers use to watch TV online. The existing rules only apply to linear TV and predate the widespread availability of TV programmes online (for example, on smart TVs).
  - c. **Part 3 – Public Service Broadcasters** including providing the **Channel 4 Television Corporation (C4C)** with a new duty which requires that the Corporation carry out all their activities in the way that they consider most likely to enable the Corporation to maintain or increase the amount of activity that is done in pursuance of their primary functions over the long term and to securely meet those costs incurred in doing so. C4C's primary functions are: securing the continued provision of the Channel 4 service, the fulfilment of Channel 4's public service remit and C4C's performance of its media content duties (section 199(2) CA 2003). The Bill also provides C4C with additional

flexibility to meet these sustainability challenges, and discharge their new duty, by removing an existing restriction on C4C's involvement in programme-making. To guarantee fair and open access to C4C commissions, C4C is to be placed under a new duty to put in place and adhere to procedures to facilitate fair competition for commissions, prepare and publish a statement of commissioning policy as to their proposals for securing procedures that facilitate fair competition, and to report on their performance in carrying out these proposals. Ofcom are to have powers to enforce the commissioning statement against C4C by way of directions, which can be escalated to imposing licence conditions and ultimately a financial penalty (see clause 30). This Part also contains provisions that implement recommendations of the independent review of **S4C**, *Building an S4C for the future*, published in 2018. The provisions also apply the above PSB legislative framework updates to S4C, while retaining a Welsh language content requirement.

- d. **Part 4 – On-demand Programme Services** contains provisions which give OFCOM new regulatory powers to draft and enforce a Video-on-Demand (VoD) Code, to ensure that audiences are appropriately protected from harmful content whether they are watching their TV through Netflix or ITV1 (for example). VoD services allow users to access a library of TV and film programmes to browse and watch at a time and place of their choice, whether via a website, app, or smart TV. While there is a high standard of rules in place to protect audiences watching broadcast TV, the same is not currently true of VoD services (with the exception of BBC iPlayer). These provisions will also enable larger, TV-like VoD providers that are not currently regulated in the UK but who target and profit from UK audiences to be brought under OFCOM jurisdiction. This Part also contains provisions to implement requirements on VoD service providers to ensure that on-demand services are accessible to people with disabilities. These will align with existing statutory requirements for access services in place for linear broadcasters.
- e. **Part 5 – Regulation of Radio Services** contains provisions to remove a number of regulatory burdens, including requirements on stations to provide specific genres of content, as well as amending OFCOM's duties around localness to focus on a duty to secure the availability to listeners of local news and information. It will allow for the UK licensing regime to be extended to radio stations based overseas but seeking to provide a service to UK listeners, as well as updating the legislative powers relating to any potential future switch-off of analogue services. It will also expand existing grant-making powers to allow funding for community related programmes to be made to small commercial stations and producers of audio content.
- f. **Part 6 – Regulation of Radio Selection Services** contains provisions to protect UK radio's availability on connected audio devices, including ensuring that stations cannot be charged for the provision of their live service to listeners and that they are findable in response to a listener request.
- g. **Part 7 – Miscellaneous and General** contains miscellaneous and general provisions. It inserts common provision about penalties relating to prominence on television and radio selection services (see Parts 2 and 6 of the Bill). It also repeals section 40 of the Crime and Courts Act 2013 which could (if commenced) require news publishers who are not members of an approved regulator to pay costs in the event of a legal claim brought against them, regardless of the outcome. This Part also amends broadcasting legislation to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU.

## C. SUMMARY OF DELEGATED POWERS

### *General commentary on delegated powers in the Bill*

6. Including powers for OFCOM to issue guidance and codes of practice etc. as set out in paragraph 2, and amendments to existing powers, the Bill contains or amends a total of 40 delegated powers. A table is provided in Annex A summarising what powers the Bill confers on whom, for what purpose, and the Parliamentary procedure the Department proposes should be attached to the exercise of the powers. The powers can be thought of in two thematic categories.
7. The first are powers to enable the legal framework for regulating PSB and radio to evolve further over time. The broadcasting sector, technology, and viewing and listening habits have shifted considerably since the Communications Act 2003 (“CA 2003”), the last major piece of broadcasting legislation. It is reasonable to expect that the sector will continue to change and evolve. Without the powers in this category, which will function as “backstop” powers in many cases, a legislative vehicle would need to be found each time a change is needed to be made to reflect changes in the sector. The provision for delegated powers in this category, subject to appropriate scrutiny and safeguards and within the clear framework set out in the Bill, is proposed to enable the Government and OFCOM to react effectively to further changes.
  - a. For example, the power in clause 1(8D), would allow the Secretary of State to amend the 30 day period for which public service content must be available on an on-demand service in order to contribute towards the fulfilment of the public service remit. The 30 day period reflects current audience expectations for the period content should be available for. Were industry practice or audience expectations to shift significantly, the Government may wish to propose amending the period.
8. The second category of powers are powers exercisable by the regulator, OFCOM, and they are about making the new rules work in practice. OFCOM has extensive expertise and experience in regulation and the Government considers it essential that the regulation of content should continue to be conducted by an independent body. In deciding whether to confer a power on OFCOM, the Department has considered whether OFCOM, as the expert regulator, is better placed and thus the practical person to exercise that power. In conferring new powers on OFCOM, the Department has sought to be consistent with the way that powers are now conferred on OFCOM as the regulator for broadcasting. This has happened when the Department has conferred new powers by modifying existing powers. It has also happened when the Department has conferred new powers that mirror or follow existing powers. The intention is to ensure consistency of regulatory approach in the fields where OFCOM is the regulator.
  - a. For example, new s368HB (inserted by Schedule 5 and clause 37) empowers OFCOM to prepare and publish a code containing standards for the regulation of services to be included in the new “Tier 1” regulations for VoD. The new Tier 1 regulations will align more closely with the existing Broadcasting Code rules already in place and enforced by OFCOM for the regulation of broadcasting content.

### *Henry VIII powers in the Bill*

9. Twelve of the powers in the Bill are powers to amend primary legislation through secondary legislation, that is to say they are “Henry VIII” powers. Henry VIII powers are marked in the clause by clause analysis and in the table in Annex A. Eleven Henry VIII powers in the Bill are subject to the affirmative procedure when amending primary legislation to ensure Parliament has the opportunity to scrutinise their exercise.

10. The exception is the power conferred on the Secretary of State by clause 46(3), which inserts new section 245(3A) of the CA 2003. In that case, as is set out below, any amendment or modification of Schedule 2 to the Broadcasting Act 1990 (“BA 1990”) enabled by the power would not alter the policy agreed to by Parliament in passing BA 1990. As such, even though the power allows for the amendment of primary legislation (Schedule 2, BA 1990), the Department has proposed the negative resolution procedure applies to regulations made under new section 245(3A) as any changes are likely to be technical.

#### *Abbreviations*

11. The following are the most frequently used abbreviations throughout this memorandum. Less frequently used abbreviations are defined in the text.

“C4C”	means Channel Four Television Corporation
“CA 2003”	means the Communications Act 2003
“BA 1990”	means the Broadcasting Act 1990
“BA 1996”	means the Broadcasting Act 1996
“PSB”	means Public Service Broadcasting
“PSBs”	means Public Service Broadcasters. This refers to the BBC, S4C and the Channel 3, 4 and 5 licence holders.
“VoD” (“ODPS”)	means Video-on-Demand. This is a common usage term broadly synonymous with On-demand programme service, “ODPS”, which is used in legislation.

### **D. CLAUSE BY CLAUSE ANALYSIS OF DELEGATED POWERS IN THE BILL**

#### **Powers relating to Part 1 – Public Service Television**

#### **Clause 1, inserting new section 264(8D) of the CA 2003: Power for the Secretary of State to amend the length of the period which public service content must be available on-demand**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

#### Context and Purpose

12. Currently, a programme only forms part of a PSBs’ contribution to the fulfilment of the public service remit if it is broadcast on a “relevant television service”. However, clause 1

will expand the ways in which PSBs can contribute to the fulfilment of the remit to include audiovisual content made available by way of a wider range of services, including on-demand programme services (“ODPS”).

13. One of the features of the new public service remit for television being introduced by clause 1 is that public service content, however it is provided, should be universally available. Section 264(8B) of the CA 2003 (as amended by clause 1) will provide that, for a programme included in an ODPS (other than a news programme or coverage of sporting events) to contribute to the fulfilment of the remit, it must be made available for viewing on the ODPS for a period of not less than 30 days beginning with the day on which that content is first made available for viewing. The purpose of the delegated power set out in proposed new section 264(8D) is to enable the Secretary of State to amend, by way of regulations, the length of the period which public service content must be available for on an ODPS in order to contribute to the fulfilment of the remit.

#### Justification for taking the power

14. 30 days was chosen as an appropriate minimum length of time for these purposes as it is consistent with both audience expectations and existing industry practice. For example, ITVX and Channel 4’s VoD service both have a typical window of 30 days for which programmes are available to access on-demand following broadcast on ITV1 and Channel 4 respectively (though some content is available for longer). However, it is important that the Secretary of State has the capability to deal with changes in the way that content is offered or in the way that audiences view content.
15. This may be considered a practical extension of the existing power of the Secretary of State to change the definition of public service content by way of regulations. Section 271 of the CA 2003 enables the Secretary of State to modify, by order, the purposes and objectives of public service broadcasting found in section 264 of the 2003 Act.

#### Justification for the procedure

16. The question of how long a programme delivered on-demand should be available in order to contribute to the fulfilment of the remit is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

### **Clause 8, inserting new section 277(1)(b) of the CA 2003, clause 17 and paragraphs 1(2) and 2(2) of Schedule 1: Power for the Secretary of State to specify a number of hours for the purposes of the independent production quota**

*Power conferred on: Secretary of State*

*Power exercised by: Order*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: No*

#### Context and Purpose

17. Under the CA 2003, PSBs are subject to a system of quota obligations. For Channels 3, 4 and 5, these are set out in sections 277 for independent productions, section 278 for original productions, section 279 for news and current affairs, sections 286 to 288 for regional

productions, section 289A for children's programmes and section 296 for schools programmes on Channel 4 and Schedule 12 to the 2003 Act (for S4C and the BBC). The BBC is also subject to other quotas, but these are non-statutory.

18. In particular, all PSBs are subject to a quota in relation to the inclusion in the service of a range and diversity of independent productions – known as the independent production quota. This is set out in section 277 of the CA 2003 for the licensed PSBs (Channel 3, Channel 4 and Channel 5). Paragraphs 1 and 7 of Schedule 12 to the 2003 Act create a parallel structure for the BBC and S4C respectively. Whereas it is left to OFCOM to determine the level of most PSBs' quotas, the independent production quota is unusual in that the Act prescribes that OFCOM must include conditions in the relevant licences it considers appropriate for securing that not less than a given percentage (currently 25%) of the time allocated to “qualifying programmes” included in the channel is allocated to the broadcasting of independent productions. There are existing delegated powers in the 2003 Act for the Secretary of State to i) substitute a different percentage (section 277(3)), and ii) redefine the quota in terms of expenditure in addition to, or instead of, hours (section 277(4)).
19. As described in more detail below, currently PSBs can only fulfil their quotas by way of content broadcast on their main linear television channel(s) (their ‘public service channels’). However clause 8 makes provision for PSBs to be able to meet certain quotas, including the independent production quota, using an ODPS that is, or forms part of, a designated internet programme service (or an audiovisual service specified under new section 278B(5)(c): see clause 11 below) in addition to their PSB channels. Allowing these quotas to be delivered across multiple services requires changes to how they are calculated. Consequently clause 8 and Schedule 1 replace the percentage quotas in section 277 and Schedule 12 with a requirement to ensure that no less than a specific number of hours are included in the relevant services of each of the PSBs when taken together. As is currently the case, it may be necessary to revise that number in line with market trends and the Government's priorities for the sector. As such clause 8 and Schedule 1 make changes to the existing delegated powers so that the Secretary of State can specify the number of hours (or, as the case may be, amount of expenditure) for each public service broadcaster.
20. As now, the Secretary of State is required to consult with OFCOM, the BBC and S4C before exercising this power (section 277(11)).

#### Justification for taking the power

21. Clause 8 and Schedule 1 make provision that follows from the decision to enable independent production quotas to be met on ODPSs. As now, there will be a need to let the Secretary of State to adjust the quota; and therefore substituted section 277(1)(b) reproduces the effect of section 277(3).

#### Justification for the procedure

22. The level of the independent production quota and how it is expressed is likely to be a matter of particular interest to Parliament, and therefore the Department has proposed to retain the affirmative procedure (section 277(12)).
23. The removal of section 277(10) enables the Secretary of State to treat licence holders differently in respect of setting different levels of quotas and different licence conditions about quotas. Channel 3 services – which are uniquely split between weekend and weekday services – could be described as being in a class of one, but the same cannot be said of other licence holders who may be affected by the provision. This could, theoretically,

attract the procedure for a hybrid Statutory Instrument. Therefore, the Department has proposed to address this by way of the de-hybridisation clause at new section 277(12A).

**Clause 9(4), inserting new section 278(7A) of the CA 2003 and clause 17 and paragraph 3(5) of Schedule 1 inserting new paragraph 8(7A) of Schedule 12 to CA 2003: Amendments clarifying that the Secretary of State’s existing power to specify descriptions of programmes that are original productions includes the power to authorise OFCOM not to count a description of programmes towards the original productions quota and to require OFCOM to publish guidance about the determination of whether an original production falls within a description.**

*Powers conferred on: Secretary of State*

*Powers exercised by: Order*

*Parliamentary Procedure: Affirmative*

*Henry VIII powers: No*

### Context and Purpose

24. Section 278(1) of the CA 2003 requires OFCOM to include such licence conditions as they consider appropriate to secure that a minimum proportion of broadcasting hours on each licensed public service channel must be allocated to original productions. The proportion for each channel, as well as the proportion to be broadcast in peak viewing times, is determined by OFCOM. The equivalent provisions for S4C are contained in paragraph 8 of Schedule 12 to CA 2003. Section 278(3) provides that OFCOM may include licence conditions which exclude a specified description of programmes from counting towards a proportion of the original productions quota. The equivalent provision for S4C is at paragraph 8(4) of Schedule 12. “An original production” is a programme of such description as specified by the Secretary of State in an order: section 278(6) and paragraph 8(6) of Schedule 12.
25. Clause 9 amends section 278 of the CA 2003 to take account of the changes that the Bill makes to how the original production quota may be delivered. In particular, references to “proportions” of broadcast hours (or programme expenditure) are replaced with references to the duration (in total) of programmes made available. Clause 17 introduces Schedule 1, which, among other things, makes a comparable change in respect of S4C’s original production quota in paragraph 8 of Schedule 12 to CA 2003.
26. The existence of a power for the Secretary of State to specify the description of programmes which count towards the original productions quota is unaffected by this Bill (see section 278(6) of, and paragraph 8(6) of Schedule 12 to, the CA 2003). This includes the power to exclude from that definition particular types of content.
27. Similarly, OFCOM is to continue to have the power to exclude a specified description of programmes from counting towards the original production quota. In light of the broader changes being made to the original productions quotas, new section 278(7A) and paragraph 8(7A) of Schedule 12 respectively replace section 278(3) in respect of licensed public service channels and paragraph 8(4) of Schedule 12 in respect of S4C. It also restates the power for the Secretary of State to require OFCOM to issue guidance in relation to those descriptions to which the relevant PSB must have regard: see section 278(3)(b) and (7) in respect of licensed public service channels and paragraph 8(5) and (7) of Schedule 12 in respect of S4C. However, OFCOM’s power to exclude certain programmes will be

dependent on the making of an order by the Secretary of State to specify the description of programmes that are to be original productions.

#### Justification for taking the power

28. The Bill does not substantively change the powers for the Secretary of State to specify the description of programmes which count towards the original productions quota or the power of the Secretary of State to confer such discretions on OFCOM as the Secretary of State thinks fit (both of which are essential to ensuring that the scope of the quota can evolve over time as viewing habits change). The Department mentions the amendments made here simply for the sake of completeness.
29. In particular, it was necessary to replace the delegated powers in light of the amendments made to the original productions quota by clauses 9 and 11 which enable the relevant PSBs to meet their quotas through a range of audiovisual services. As detailed above, this includes requiring quotas to be expressed in terms of the absolute number of hours to be made available rather than as proportion of content broadcast on a provider's licensed public service channel or S4C Digital as the case may be. In making changes from percentages to hours, the Government has taken the opportunity to make adjustments to the powers in section 278(6) and paragraph 8(6) of Schedule 12.

#### Justification for the procedure

30. The Secretary of State's power to specify the description of programmes which count towards the original productions quota and confer on OFCOM such discretions as the Secretary of State thinks fit continues to remain subject to the affirmative Parliamentary procedure: see section 278(9) of, and paragraph 8(9) of Schedule 12 to, CA 2003.

#### **Clause 10, inserting new section 278A(1) of the CA 2003: Power for the Secretary of State to specify a category of audiovisual content for the purpose of creating additional quotas for audiovisual content**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: No*

#### Context and Purpose

31. A key plank of the Department's intention in Part 1 of the Bill is to simplify and consolidate the existing public service remit for television. Presently, the "purposes" of public service broadcasting in the UK are listed in section 264(4) of CA 2003, and the "objectives" for PSB services are listed in section 264(6) of CA 2003. Clause 1 provides a new, more consolidated, public service remit for television. This process of consolidation and simplification provides an opportunity to move away from the numerous and often overlapping requirements contained in the present PSB "objectives", and instead pursue an evidence-led approach to which types of content are being under-served (if any).



32. The power in new section 278A(1) will therefore allow the Secretary of State to specify a category of content which, in their view, is not being made available to the extent that the Secretary of State considers appropriate (i.e. is under-served). This is intended to potentially capture both genres (for example religious programmes), as well as broader concepts (for example, programming with relevance for older children). The effect of specification would be to require OFCOM to include the conditions that OFCOM considers appropriate to ensure the content in question is made available by the providers of the licensed public service broadcasters. That is in line with OFCOM's existing, general role in setting quotas for public service broadcasters (with the exception of the independent production quota, which is discussed in paragraph 18 of this memorandum).

#### Justification for taking the power

33. The policy objective of this power is to act as a "backstop", to be exercised reactively in the event that (following a report by OFCOM) the Secretary of State considers that a category of content is under-served. Consequently, it will be necessary to allow the new PSB framework to bed in before (as part of their regular reporting cycles) OFCOM are in a position to assess what categories of content (if any) require specific provision.
34. Similarly to the Secretary of State's existing power to amend public service remits in section 271 of the CA 2003, the requirement in subsection (1)(b) of new section 278A (requirement that subsection (3) applies) constrains the exercise of this power. Subsection (3) means that the Secretary of State can only make regulations under this power where OFCOM have made a recommendation for the making of such regulations in their most recent report under section 229 (report in anticipation of new licensing round) or 264 (report on the fulfilment of the public service remit) of the CA 2003. Subsection (6) also imposes requirements on the Secretary of State to consult the listed persons before making regulations. Similarly, OFCOM must consult with the persons listed in subsection (5) before recommending that the Secretary of State make such regulations.

#### Justification for the procedure

35. The potential creation of additional quotas for audiovisual content is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure.

**Clause 11, inserting new section 278B(5)(c)(ii) of the CA 2003: Power for the Secretary of State to specify additional "qualifying audiovisual services" which can be used by public service broadcasters to fulfil their independent, original and regional productions quotas and any additional quota under clause 10**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: No*

#### Context and Purpose

36. Currently, PSBs can only meet their quotas by way of content broadcast on their main linear television channel(s) (their ‘public service channels’). However, the independent communications regulator OFCOM has found that the current quota system is restrictive for PSBs and recommended in their most recent review of public service broadcasting, *Small Screen: Big Debate*, that the framework for PSB should be made more ‘service neutral’ to better reflect modern viewing habits. In line with this recommendation, clauses 8, 9, 14 and Schedule 1 (read with clause 11) make provision for public service broadcasters to be able to fulfil their statutory independent, original and regional productions quotas using any “qualifying audiovisual service” they, or a person associated with them, provides. This term is defined in new section 278B (see clause 11) as including both their television broadcasting services (i.e. their public service channels) and ODPSs that are, or form part of, internet programme services that have been designated to receive prominence (see clause 28).
37. In this context, the purpose of the new delegated power (subsection (5)(c)(ii) of new section 278B) is to enable the Secretary of State to make additions to the list of services that PSBs can use to fulfil their independent, original and regional production quotas (or any additional quota made under new section 278A) as viewing habits change and technology continues to develop.

Justification for taking the power

38. It is the Department’s view that the arrangements described above should provide PSBs with sufficient flexibility for meeting their quotas in line with the ways audiences currently view content. However if, as is likely, viewing habits continue to evolve in the coming years, it may be necessary to add additional services to the list of services which PSBs can use to fulfil their quotas in order to ensure that public service content remains easily accessible by audiences, and that PSBs are able to innovate in the way that they make that content available.
39. There are limits on what services can be prescribed. The Secretary of State will only be able to specify relevant audiovisual services (within the meaning of section 264 as amended) and must consult with OFCOM before making any regulations (subsection (7) of new clause 278B). OFCOM, in their capacity as the independent regulator, will be able to advise based on their understanding of audiences’ viewing habits and technological changes. The draft affirmative procedure will apply (subsection (10)).

Justification for the procedure

40. The question of which services PSBs should be able to use to fulfil their quota obligations is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

**Clause 12, inserting new section 278C(2) of the CA 2003: Power for the Secretary of State to make provision for repeats, etc**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: No*

## Context and Purpose

41. As set out in more detail above, at present PSBs can only meet their quotas by way of content broadcast on their main linear television channel(s) (their ‘public service channels’). However, clauses 8, 9, 14 and Schedule 1 (read with clause 11) make provision for PSBs to be able to fulfil their independent, original and regional productions quotas by making audiovisual content available via any “qualifying audiovisual service” they, or a person associated with them, provides.
42. The new power at section 278C(2) requires the Secretary of State to make provision for the appropriate treatment of material which is made available by PSBs multiple times, whether on the same service (as with a traditional ‘repeat’) or across multiple services, and whether in the same year or different years.
43. The Secretary of State must exercise this power to make regulations. However, except in the case of a quota condition relating to independent productions, such regulations may, rather than making provision directly, instead require OFCOM to determine the matter by way of licence condition or direction to S4C (subsection (5)). Before making regulations, the Secretary of State must consult OFCOM (subsection (9)). Regulations made under this power are subject to the affirmative procedure (subsection (10)).

## Justification for taking the power

44. There are currently powers at section 277(2)(a), paragraph 1(2)(a) and 7(2)(a) of Schedule 12 in respect of independent productions and at 278(6) and paragraph 8(6) of Schedule 12 in respect of original productions for the Secretary of State to specify the descriptions of programmes that are to be regarded as independent or original productions for the purposes of those quotas. These can be used to exclude repeats. Nevertheless, it would clearly be sensible to have provision about the treatment of repeat programmes in relation to all quotas, including regional programme quotas and any additional quotas, not just the independent and original productions quotas.
45. Indeed, given the level of detail that is likely to be needed when considering repeats across all television channels and ODPS as well as between programmes that fall in one or other (or more than one category) of production quotas, it is the Department’s view that there is stronger justification for taking a power to specify which programmes are to count towards a particular quota and those which are not than existed when CA 2003 was originally enacted.

## Justification for the procedure

46. The question of whether repeats (or, equivalently, content made available on multiple services) should count towards a PSB’s quota obligations is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

## **Clause 23: Amendment to power for OFCOM to define “adequate alternative coverage” for the purposes of section 101(2)(a)(ii) of the Broadcasting Act 1996**

*Power conferred on: OFCOM*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary Procedure: None*

*Henry VIII power: No*

Context and Purpose

47. 104ZA of the Broadcasting Act 1996 gives Ofcom powers to make regulations about coverage of listed events. Clause 23 amends these powers to ensure operability following the change to the services in scope of the regime.

Justification for taking the power

48. Under 104ZA of the Broadcasting Act 1996 OFCOM has powers to make regulations to determine what listed events are to be treated as live, and in relation to “adequate alternative coverage”. The amendments to these regulation making powers update the existing powers so that they operate correctly following changes in scope, and to provide guidance and direction for OFCOM regarding what may be covered in the regulations and the matters they must have regard to when determining what is to be taken to be “adequate live coverage”. The regulation making powers ensure that partnership arrangements between qualifying and non-qualifying broadcasters may continue as they do now, acknowledging that the regime will now cover a wider range of services. If non-exclusive rights deals do not provide adequate live coverage to a provider in another category, consent from OFCOM can still be sought. Live coverage of a listed event is also permitted where consent has been granted by OFCOM.

Justification for the procedure

49. The amendments to the regulation making power are technical changes, and therefore in the Department’s view, no changes to the existing arrangements are required.

**Powers relating to Part 2 – Prominence on television selection services**

**Clause 28, inserting new section 362AA of the CA 2003: Power for OFCOM to designate internet programme services**

*Power conferred on: OFCOM*

*Power exercised by: Decision*

*Parliamentary Procedure: None*

*Henry VIII power: No*

Context and Purpose

50. Under the existing prominence regime in the linear space there is a list of PSB channels set out in section 310(4) of the CA 2003 (e.g. BBC One, BBC Two, ITV1, Channel 4, Channel 5, S4C and STV) which must be afforded prominence within a regulated electronic programme guide.
51. The purpose of section 362AA is to enable OFCOM to designate what “internet programme services” (IPSs) are to be in scope of the new prominence regime and so given the benefits of carriage and prominence on a regulated television selection service. It also ensures that

only services which meet eligibility criteria and which OFCOM consider appropriate are designated.

52. A designated IPS includes an IPS provided by the BBC and, where OFCOM consider appropriate, an IPS provided by PSBs (other than the BBC) or persons associated with that public service broadcaster which meets the conditions set out in subsections (3) to (5). These conditions are that the IPS makes a significant contribution to the relevant PSBs' remit and has the public service remit content included in it readily discoverable and promoted. Subsections (7) and (8) set out the particular factors that OFCOM must take into account when determining whether it is appropriate to designate an eligible IPS. Subsection (9) requires OFCOM to consult the provider of the IPS and such other persons as they consider appropriate before designating an IPS. Under new section 362AC OFCOM is also required to prepare and publish a statement setting out their methodology and principles they will look to consider in deciding whether or not to designate an IPS or to revoke the designation of an IPS under sections 362AA and 362AB respectively.
53. Section 362AN requires providers of a designated IPS to continue to operate their designated services in accordance with the eligibility criteria under 362AA (3), (4) and (5). Equivalent provision is to be made in respect of the BBC under the BBC's Royal Charter and Framework Agreement.
54. The definition of an IPS in section 362AA(10) and (11) is intended to catch services which consist of a single ODPS (whether based in the UK or not) as well as services that offer a combination of an ODPS (whether based in the UK or not) and other services, whether ODPSs or services with livestream programming.
55. As set out in 362AZ12(6), a provider of an IPS is associated with a public service broadcaster if: (a) the provider of the IPS is controlled by the public service broadcaster or (b) (in the case of a Channel 3 and Channel 5 service) where the public service broadcaster and the provider of the IPS are controlled by the same person (with "controlled" having the same meaning as in Part 1 of Schedule 2 to BA 1990).

#### Justification for taking the power

56. Under this new prominence regime there will not necessarily be a static list of services which should be given prominence, as is the case in the linear space. Therefore it is important that the regime allows for a more flexible approach for determining what services should be designated. The process of designation will need to be agile, given the rate of change as to which IPSs are in scope of the regime. The Bill therefore sets out a clear framework of criteria that an IPS must satisfy in order to be designated, and particular matters which must be taken into account when deciding to designate an IPS, but delegates the decision on designation to OFCOM.
57. It is necessary to have a selection process for which IPS should be designated and so afforded the benefits of carriage and prominence on regulated television selection services. In particular, PSBs are to be able to decide on which programme services to place their public service remit content and PSBs may seek to have more than one IPS designated. Also, licensed PSBs will be able to provide a designated IPS in respect of two or more licensed PSBs if associated with them. For example, ITVX may be a designated IPS on behalf of a number of Channel 3 services. Further, a PSB might choose to update the way they operate their service or choose to deliver a new service. Against this background determinations have to be made to ensure that only those IPSs which satisfy all the eligibility criteria above, and are considered by OFCOM to be appropriate, are designated.

58. In the Department's view, OFCOM are best placed to make this determination because they are responsible for monitoring and enforcing the extent to which the PSBs contribute to the fulfilment of the general and individual public service remit across all the PSBs relevant audiovisual services (including their IPS). For that reason, OFCOM as the regulator are best placed to assess whether an IPS satisfies the criteria in subsections (3), (4) and (5) and whether it would be appropriate, having reference to the matters set out in subsections (7) and (8), for a particular IPS to be offered, made available and displayed prominently. The approach taken in the Bill will also enable OFCOM to respond more promptly to changes in the way PSBs, or their associates, deliver their IPSs to ensure the service meets, and continues to meet, the conditions for designation.

#### Justification for the procedure

59. The Department's view is that once Parliament has agreed in principle, by way of the Bill, to enable a PSB to: (i) contribute to the fulfilment of their PSB remit across all their relevant audiovisual services (including their designated IPS); and (ii) has agreed to the high level criteria for designation, it would be appropriate for OFCOM to designate which specific services satisfy those criteria without further Parliamentary procedure. OFCOM will be required to publish information about the methods they apply in determining designation: see section 362AC. Further, it is important that OFCOM have the ability to respond promptly to the way IPSs are delivered to ensure only those IPSs which contribute significantly to the fulfilment of the relevant PSBs' public service remit are designated. If not, the Department considers that OFCOM must have the power to take appropriate enforcement action, including as a matter of last resort, the power to remove the designation of the IPS (see below for analysis of the power to revoke designation). For these reasons, the Department considers it would be both impracticable and disproportionate to have designation subject to any extra Parliamentary procedure.

#### **Clause 28, inserting new section 362AB of the CA 2003: Power for OFCOM to revoke designation of internet programme services**

*Power conferred on: OFCOM*

*Power exercised by: Decision*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

60. Prominence is provided in exchange for the fulfilment of certain obligations by the PSBs, including original programming and local news provision. This exchange of obligations and benefits is known as the 'PSB compact'. In a scenario where a designated IPS is no longer making a significant contribution to the relevant PSBs' remit or if the IPS does not make public service content easy to find within the service, then it is important OFCOM has the necessary enforcement tools to remedy this, and in worst case scenarios revoke the designation, and thus access to the benefits of prominence and availability.

61. In a situation where a designated IPS is no longer satisfying the eligibility conditions under new section 362AA(3), (4) and (5), this new section gives OFCOM the power to revoke its designation for prominence and availability. Subsection (1) also states that the designation of the IPS is revoked where the provider ceases to be associated with a public service broadcaster (as defined under new section 362AZ12(6)).

62. OFCOM must consider that there are reasonable grounds for believing a designated IPS has failed or is failing to comply with any of these designation requirements. If so, OFCOM may give a notice under this section to the provider of the designated IPS giving reasons for this opinion and any reasons for proposing to remove their designation. A provider of a designated IPS has an opportunity to make representations to OFCOM within a specified period (as determined by OFCOM in their notice), after which OFCOM will make the final decision as to whether or not to revoke the designation of the IPS.
63. Subsection (7) also requires OFCOM to revoke the designation of an IPS at the request of the provider of the service. This could, for example, be because the service itself no longer exists or has been superseded by a newer IPS.

#### Justification for taking the power

64. As stated above, the Department is of the view that it is appropriate for OFCOM to determine whether or not to designate or remove the designation of an IPS as they will be monitoring the extent to which the PSBs contribute to the fulfilment of the general and individual public service remit and quota requirements across all their relevant audiovisual programme services, as well as the level of prominence given to public service remit content within the designated IPS. If OFCOM have the power to designate an IPS then it would need the converse power to revoke that designation.

#### Justification for the procedure

65. The Department's view is that decisions under this new section will be a regulatory matter for OFCOM within the parameters set by Parliament through the Bill, and therefore no extra procedure that is Parliamentary in nature needs to be attached to decisions made under this new section. The ability to revoke the designation of an IPS will be an important enforcement tool for the regulator to ensure that the benefit of prominence is only given to those designated IPSs which can demonstrate how the service is used to fulfil the provider's PSB obligations. OFCOM need to have the necessary enforcement tools in relation to providers of the designated IPSs, including the power to ensure that the particular IPS continues to meet the designation criteria (362AN).

### **Clause 28, inserting new section 362AE(2) of the CA 2003: Power for the Secretary of State to specify "internet television equipment"**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: No*

#### Context and Purpose

66. This section establishes the definition of a "television selection service" (TSS), which is used in connection with an "internet television equipment". The definition of a TSS has two strands. First, a TSS must present the IPSs included in its service (for example, the on-demand player of a public service broadcaster). Second, a TSS must allow a user to choose between IPSs or programmes provided by those IPSs and access the IPSs and/or

programmes so chosen. So, for example the user interface of a smart TV that enables users to choose between IPS, or to select and access programmes provided by those IPS – whether on-demand or live-streamed – could constitute a TSS.

67. The definition of a TSS then flows through to new section 362AF (meaning of “regulated television selection service”) which creates the category of TSS which are to be regulated.
68. This definition bears some similarity to the definition of an “electronic programme guide” in section 310(8) of the 2003 Act. However, it has been necessary to make certain changes to reflect the state of technology and how television is delivered and accessed by viewers over the internet – in particular that the TSS is delivered via an apparatus which for the purposes of this legislation is referred to as an “internet television equipment”.
69. Subsection (2) of this new section 362AE empowers the Secretary of State to specify in regulations the “internet television equipment” with which a television selection service is to be used in connection with before it can be considered to fall within the scope of regulation under new section 363AF (see below). In these regulations the Secretary of State will set out the descriptions of apparatus or ‘categories’ of apparatus (including software) that are to be considered “internet television equipment”. For example, the Department would expect this to cover smart TVs and set-top boxes which are primarily used to access a TSS.
70. The purpose of seeking this power is to enable the Secretary of State to set out further technical detail in regulations on the definition of an “internet television equipment”.

#### Justification for taking the power

71. In the Department’s view, there are two reasons why specifying an “internet television equipment” in regulations is appropriate. First, the Department’s intention is to avoid capturing all devices capable of carrying on-demand and livestream services. In the Department’s view that would not be proportionate. Instead, the Department’s intention is for the new prominence regime to only capture devices whose main function is the delivery of television.
72. Designating what is and is not considered to be “internet television equipment” is likely to be an intensive and technically complex process. Setting out technical detail in regulations gives further opportunity to get this provision right in capturing those apparatus that are predominantly used for watching television and avoids any unintended consequences posed by listing specific apparatus or categories of apparatus on the face of the Bill.
73. Technological change may lead to further shifts in viewing habits, which means that it is necessary to amend the specified list of “internet television equipment”. This power would provide the Government with appropriate flexibility to respond more rapidly to technological change. It is important that the specified “internet television equipment” – which is used to access a “television selection service” – is sufficiently future-proofed. However, the Department also wishes to ensure that regulation remains proportionate.

#### Justification for the procedure

74. In the Department’s view the parameters of what an “internet television equipment” means is set out clearly on the face of the Bill under sections 362AE(2) to (4) in the light of section 362AE(1). As such the Department is of the view that the negative procedure is appropriate and affords Parliament sufficient scrutiny as to the precise descriptions and categories of specific apparatus which a TSS is accessible from. The Department also notes that this approach is precedented, insofar as the power in section 368 of the CA 2003 –



which sets out the meanings of a “television receiver” for the purposes of the TV licence fee – is also subject to the negative procedure.

**Clause 28, inserting new section 362AE(7) of the CA 2003: Power for the Secretary of State to amend the definition of a “television selection service” or “internet television equipment”**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

Context and Purpose

75. As stated above, the rate of change in how viewers are watching television online and the new types of TV services and technology emerging means it is important that the definition of a “television selection service” (TSS) and “internet television equipment” remains relevant and is able to capture both current and future technology. Therefore, a power is taken at subsection (7) to amend both these definitions. This power includes the power to make consequential amendments to the 2003 Act or any other Act.

Justification for taking the power

76. This power will allow the definition of a TSS and/or “internet television equipment” to be updated if necessary in line with technological developments.
77. For the integrity of the new online prominence regime, it is important that these definitions continue to reflect the state of the art, even as technology evolves at considerable speed. In particular, it is important that the definition continues to capture a wider range of user interfaces used by viewers to find and access online television services.
78. In addition, were the definition to be more rigidly set in primary legislation, the Government is concerned that there may even be cases where an existing TSS or equipment was altered by their providers (whether accidentally or deliberately) so as to take those services outside the existing definition. This could have significant negative implications for the viewer experience and for designated IPS providers.

Justification for the procedure

79. The Department recognises that the definition of a TSS and/or “internet television equipment” will have a considerable impact on the nature and scope of the online prominence regime. As such, any regulations made under this section are likely to be of considerable interest to Parliament. For this reason, the draft affirmative procedure is proposed.

**Clause 28, inserting new section 362AF(1) of the CA 2003: Power for the Secretary of State to designate “regulated television selection services” or specify a description of “regulated television selection services”**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: No*

### Context and Purpose

80. As set out above, new section 362AE establishes the definition of a television selection service (TSS). This definition then flows through into this new section which creates a category of “regulated” television selection services (RTSSs). A number of obligations are then placed on providers of RTSSs by other provisions in the Bill, including the duty to carry designated IPSs and to display these designated IPSs with appropriate prominence within their user interface (UI). A RTSS provider will also be required to ensure its UI is accessible to those viewers with hearing and visual impairments.
81. A RTSS is defined as one designated by the Secretary of State by regulations (subsection (1(a))); or one being of a description (or category) designated by the Secretary of State by regulations (subsection (1)(b)). A RTSS may only be designated if it meets the requirement in subsection (2). Principally, this requires that it is used by a significant number of members of the public in the United Kingdom. In the case of a designating a description of RTSS under subsection (1)(b), subsection (3) sets out particular factors that may be used to frame these “descriptions”, including number of users, manner of use, date in which the TSS was first made available and functionality.
82. Before making regulations, the Secretary of State must have received a report under new section 362AG, setting out OFCOM’s assessment of the number of users, the manner in which the TSS is used, functionality, and any other matters OFCOM consider likely to affect whether to designate (or conversely to revoke the designation of) a TSS. Under new section 362AG(9) OFCOM is required to publish a statement setting out the principles and methods it will propose to follow in preparing their advice. OFCOM’s report may be provided proactively by OFCOM, or on request from the Secretary of State. OFCOM must publish all reports given to the Secretary of State in relation to these provisions. Should the Secretary of State materially depart from OFCOM’s recommendations, the Secretary of State must set out their reasons for doing so.

### Justification for taking the power

83. For the new online prominence regime to be effective, it is important that it captures the most popular TSSs (together comprising a significant proportion of the market). Capturing the most popular TSSs will ensure that designated IPSs are available and easy to find for the overwhelming majority of UK viewers.
84. Regulations which specify particular TSSs or particular descriptions of TSSs (such as provision about the maximum number of users of a service) will create clarity about which services have to comply with the new regime.
85. Given the propensity of providers to launch (or withdraw) TSS and the inevitable rise and/or fall in the popularity of different services, ensuring that the most popular services are captured within regulations, without accidentally capturing less popular services, could require updates to the regulations. This also applies to services associated with devices which may no longer be sold or supported. This approach will allow for these updates to

be made which would not be straightforward if these services were listed on the face of the Bill.

86. As also stated above, to ensure regulation is proportionate and targeted, it is not our policy aim to capture all platforms capable of carrying on-demand and livestream services, but only the major or most popular TV platforms – i.e. those services that are used by a “significant number of UK users” to access TV online and which have the technical functionality to operate as a regulated television selection service.

#### Justification for the procedure

87. In the Department’s view, the Bill contains sufficient detail to indicate the types of TSS and categories of TSS which would fall within the scope of regulation. Furthermore, the Secretary of State cannot make any designations until they have received advice from OFCOM, who will be carrying out the necessary research to assess if certain TSS or categories meet conditions in accordance with new section 362AE. This will ensure proportionate regulation and will provide the necessary evidence required to inform any designations (or revocation of designations) made by the Secretary of State under this new section. The Department has therefore proposed the negative procedure regulations made under this new section.

#### **Clause 28, inserting new section 362AL of the CA 2003: requirement for OFCOM to issue guidance on “agreement objectives”**

*Power conferred on: OFCOM*

*Power exercised by: Guidance*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

88. The Government’s intention is to allow providers of designated IPSs and RTSSs to continue negotiating independently and to encourage processes where parties have the flexibility to negotiate a deal that is mutually beneficial. This will be achieved by the following: (1) requiring providers of designated IPSs and RTSSs to act consistently with the statutory “agreement objectives” under new sections 362AJ(3) and 362AK(2) when agreeing terms as to their respective “must offer” and “must carry” obligations; and (2) requiring OFCOM to publish, review and revise (where appropriate) guidance as to how IPS and RTSS providers could promote these statutory objectives. Ultimately, if no agreement can be reached between the provider of the designated IPS or RTSS, any party can refer the dispute to OFCOM for resolution: see sections 362AT to 362AY.
89. These “agreement objectives” are set out on the face of the Bill under new section 362AM(1).

#### Justification for taking the power

90. OFCOM’s guidance will seek to support commercial negotiations by providing clarity to both parties around what they would consider “appropriate terms” and how both parties can act consistently with the “agreement objectives” during negotiations – as required by

the legislation. The aim is to help parties avoid long and protracted negotiations and disputes as opposed to dictating what should be negotiated.

91. In the Department's view, it would be neither appropriate nor effective to go further on the face of the Bill than the "agreement objectives" in new section 362AM(1) because the detail proposed to be in guidance procured by OFCOM will relate to independent commercial negotiations between IPS and RTSS providers.

#### Justification for the procedure

92. It is the Department's view that OFCOM is best placed to issue guidance on the "agreement objectives" as they will have the necessary expertise gained through their experience as the independent regulator responsible for enforcing the new prominence regime. Furthermore, such guidance is to be devised by OFCOM after consultation, so interested parties will be able to input on what sorts of arrangements are appropriate and practicable. In addition, the guidance is expected to require updates to reflect changes in the market, technical innovations and new service enhancements on the part of IPSs and TSSs. As such, the Department considers that it would be impracticable and unduly onerous for Parliament to review this sort of guidance.

#### **Clause 28, inserting new sections 362AP to 362AR of the CA 2003: requirement for OFCOM to issue a Code of practice relating to prominence**

*Power conferred on: OFCOM*

*Power exercised by: Code of practice*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

93. By virtue of new section 362AO(1) and (4) (duties relating to a RTSS) providers of RTSSs are required to include and give an appropriate degree of prominence to a designated IPS and to incorporate features in the service which enable persons with disabilities to use their service.
94. Subsections (1) to (3) of new section 362AP require OFCOM to issue, and publish, a code of practice describing actions that OFCOM recommends for compliance with the duties set out under 362AO. Failure to do so does not by itself make the provider liable to legal proceedings, but a court, tribunal or OFCOM must take into account the contents of a code when determining a question where the provision in the code is relevant (see new section 362AQ(3)).
95. Relevant consultation requirements are set out in new section 362AR which requires OFCOM to consult the Secretary of State, PSBs, RTSSs and other appropriate persons before issuing a code of practice.

#### Justification for taking the power

96. The duties referred to in new section 362AO are substantive obligations on providers of RTSSs. As discussed above, there is no single model for a RTSS nor a "one-size fits all"

approach to delivering prominence or accessibility requirements, given different platforms will have different features (i.e. rails, tiles, tabs and sections) included within their service. Consequently, it is impossible to provide on the face of the Bill a single yardstick for what constitutes an “appropriate” degree of prominence: giving providers flexibility in this regard is both inevitable and important in ensuring that these provisions do not restrict innovation, impact customer choice or inadvertently lead to a situation where a RTSS cannot comply due to insufficient technological capability. Nevertheless, in the context of this flexibility the Government is keen to ensure that providers of RTSSs have access to guidance which, if followed, provides clear recommendations and assurance that they are meeting their statutory obligations under this regime.

97. The Department considers a code of practice to be the appropriate means for securing that the manner in which a RTSS presents designated IPSs to its users complies with its duties under section 362AO. Compared to primary legislation, a code of practice can be more easily updated from time to time to ensure that the recommended steps are future-proofed. OFCOM have power to revise the Code and are required to do so when requested by the Secretary of State. In addition, a code of practice might include various recommendations (and potentially useful examples) which are geared towards different types of TSSs. It is going to be necessary for the code to take into account how audiences interact with different TSSs and how that might change over time, as well as technological innovation and the emergence of new ways of delivering prominence on a TSS. The Department considers that OFCOM, as the regulator, has the necessary expertise and is best placed to recommend actions in each case, taking account of both audience viewing habits and types of technology and devices on the market.

#### Justification for the procedure

98. In the Department’s view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. The creation of a code of practice, in accordance with the procedure and constraints set out, is a function that may appropriately be conferred upon OFCOM. OFCOM is already experienced in independently producing and enforcing regulatory codes. For example, OFCOM already administer the Code of Practice for electronic programme guides in relation to the linear prominence regime under section 310 CA 2003.
99. Once Parliament has agreed in principle that RTSS providers should be under a duty to display designated IPSs prominently on their service, the question of how that service should be displayed is appropriately determined by OFCOM (following consultation with PSBs, RTSS providers, the Secretary of State and any other appropriate persons).
100. Further, the Department considers that the range of recommended steps required to cater for different categories of RTSSs and the likely adjustments needed to reflect technical innovations and service enhancements over time would render it impracticable and unduly onerous for Parliament to review. For these reasons, the Department does not consider that any parliamentary procedure is necessary.

#### **Clause 28, inserting new section 362AZ5 of the CA 2003: requirement for OFCOM to issue guidance on enforcement**

*Power conferred on: OFCOM*

*Power exercised by: Guidance*

*Parliamentary Procedure: None*

*Henry VIII power: No*

### Context and Purpose

101. As is the case under the existing prominence regime under section 310 of the CA 2003, OFCOM will be enforcing this new online prominence regime. Therefore a range of enforcement powers will be conferred on OFCOM for the purposes of tackling any contraventions in a proportionate and effective manner.
102. OFCOM will be required to produce, publish and maintain guidance about how it proposes to exercise its enforcement powers. The guidance must, in particular, give information about the factors that OFCOM would have regard to when taking, or considering taking, enforcement action. Before producing such guidance, OFCOM must consult with the Secretary of State and any other person OFCOM considers appropriate. OFCOM will have the power to amend or revise the guidance. OFCOM requires new powers to be able to enforce the new prominence obligations against providers of designated IPSs and RTSSs in scope of the regime or third parties who have failed to respond to a request for information. This enforcement provision will enable OFCOM to issue a provisional notice of contravention in respect of a failure to comply with a number of listed duties. These include:
- a. for designated IPS providers: the notification duties in new section 362AD, the “must offer” obligations at 362AJ and the requirements set out at new section 362AN; and
  - b. for RTSS providers: the notification duties in new section 362AH, the “must carry” obligations at new section 362AK, and requirements set out at new section 362AO.
103. In order to issue such a notice, OFCOM must consider that there are reasonable grounds for believing that the provider has failed or is failing to comply with a relevant duty or requirement. This notice can then be followed by a confirmation decision requiring the provider to take remedial action as well as imposing a financial penalty for continued failure to comply with the duties or requirements. In respect of RTSS providers and providers of a designated IPS (other than the BBC or S4C), OFCOM can impose a maximum penalty of the greater of £250,000 and 5% of the person’s qualifying worldwide revenue. In the case of the BBC, S4C and a third party (who fails to comply with an information notice under new section 362AS) the maximum penalty is £250,000.
104. In terms of enforcement against the BBC, this will continue to be by OFCOM under comparable duties to be imposed on the BBC by way of the BBC’s Royal Charter and Framework Agreement.

### Justification for taking the power

105. Since this guidance will be informing providers of designated IPSs and RTSSs (and other persons in receipt of an information notice) how OFCOM propose to exercise their enforcement powers under the Bill, it is appropriate for OFCOM to be responsible for such guidance, after consulting the Secretary of State and other persons who OFCOM considers appropriate.
106. This guidance is intended to assist affected persons by providing them with transparency as to how OFCOM intends to use their enforcement powers. Furthermore, the power to revise the guidance provides OFCOM with the ability to modify the details as required in light of emerging technologies and changes in the activities of RTSSs and IPSs. It would not be appropriate to put this on the face of the Bill. Rather, it is more appropriate for

OFCOM, who are enforcing this regime, to set out their enforcement processes and procedures as OFCOM already does for the sectors it currently regulates.

#### Justification for the procedure

107. Since the guidance will be concerned with how OFCOM as the regulator intends to use their enforcement powers, it is the Department's view that issuing such guidance is a function that may appropriately be conferred upon them. OFCOM are required to consult the Secretary of State and other persons they consider appropriate when preparing guidance. Therefore, the Department does not consider that any parliamentary procedure is necessary.

#### **Clause 28, inserting new section 362AZ6(2) of the CA 2003: requirement on OFCOM to publish a Fees Statement**

*Power conferred on: OFCOM*

*Power exercised by: Published Statement*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

108. In order to enforce this new prominence regime OFCOM will be funded by fees from providers of designated IPSs and RTSSs. For the BBC and S4C OFCOM will rely on its existing fees provision under section 198(4)(a) and section 207(6) of the CA 2003 respectively. OFCOM will be required to publish a Statement of Principles ("the Statement") which OFCOM will adhere to when setting out the fees payable by providers with in-scope services.

109. The principles within the Statement must secure that the annual aggregate amount of fees charged by OFCOM will meet, but not exceed, the costs of carrying out their functions under the new prominence regime for that financial year (financial year meaning a period of 12 months ending on 31 March) less the amount payable by the BBC and S4C. OFCOM's statement must also ensure there is transparency in relation to the costs incurred in the exercise of their functions and the amount of fees charged and that any fee required is proportionate and justifiable having regard to the circumstances of the service provider required to pay it.

#### Justification for taking the power

110. Under the CA 2003, OFCOM is required to set licence fees in the broadcasting section and administrative charges in the electronic communications in accordance with charging principles that they have published. There are similar provisions in the Postal Services Act 2011 in relation to the setting of charges for the postal services sector and in the Online Safety Act 2023 in relation to fees required from providers of in-scope services (which are not exempt) under that Act. In line with their legislative duties, OFCOM currently publish a Statement of Principles which outlines that charges and fees must be set so as to meet, but not to exceed, OFCOM's annual costs of regulating the relevant sector.

111. The duty on OFCOM to provide a statement of principles together with the requirement to publish statements of accounts is crucial to ensure consistency with OFCOM's other

regimes. It is also appropriate for OFCOM to publish the Statement and their statement of accounts to allow for transparency in the funding regime for online prominence and clarify for those who are liable to pay as to how the amount of the fee is to be calculated. It is intended to reassure providers that the amount they will be required to be paid is calculated proportionately and is justified. It is expected that OFCOM will consult with providers of IPSs and TSSs in preparation of the Statement.

#### Justification for the procedure

112. The Statement determines how OFCOM will calculate the fee to be charged from regulated providers to fund administration of the online prominence regime. OFCOM must consult such persons they consider appropriate ahead of making or revising the statement. OFCOM must also publish the Statement and any revisions. This approach and duty to publish is consistent with OFCOM's other regimes set out above which likewise attach no parliamentary procedure to the statement of charging principles — and will ensure the principles are transparent to industry, parliamentarians, and other interested parties.

113. As the document setting out the independent regulator's fee regime in full, it is appropriate that this Statement is published by OFCOM themselves, rather than subject to parliamentary procedure.

#### **Clause 49 and Schedule 10, inserting new paragraph 5 of Schedule 16A to CA 2003: Power for the Secretary of State to substitute a different maximum financial penalty**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

#### Context and Purpose

114. Clause 49 introduces Schedule 10 which inserts new Schedule 16A to CA 2003. Schedule 16A provides provision in relation to financial penalties that may be imposed by OFCOM under Part 2 (prominence on television selection services) and Part 6 (regulation of radio selection services).

115. Paragraph 5 of Schedule 16A to the CA 2003 confers a power for the Secretary of State to substitute a different sum for the maximum amount of penalties that can be imposed on providers of designated IPSs, RTSSs and designated radio selection services and/or persons who fail to comply with an information notice.

#### Justification for taking the power

116. This is necessary to future proof the legislation if it is later considered that the existing statutory maximum is insufficient to incentivise compliance with the online prominence framework. This is especially relevant given the size of some of the services which could be captured. Section 237(9) of the CA 2003 provides a precedent for such a power.

#### Justification for the procedure



117. The Department proposes that the affirmative procedure applies here to ensure that Parliament has full scrutiny of any new sum or percentage being specified.

**Clause 49 and Schedule 10, inserting new paragraph 7 of schedule 16A to CA 2003: requirement for OFCOM to make a statement about “qualifying worldwide revenue”**

*Power conferred on: OFCOM*

*Power exercised by: Published Statement*

*Parliamentary Procedure: None*

*Henry VIII power: No*

Context and Purpose

118. Clause 49 introduces Schedule 10, which inserts new Schedule 16A to the CA 2003. Schedule 16A includes provision in relation to financial penalties that may be imposed by OFCOM under Part 2 (prominence on television selection services) and Part 6 (regulation of radio selection services).

119. In cases other than those relating to the BBC, S4C or a person who fails to comply with an information notice, the maximum penalty that OFCOM can impose against providers of a designated IPS, RTSS or designated radio selection service is the greater of £250,000 and 5% of qualifying worldwide revenue. The concept of “qualifying worldwide revenue” is necessary here because some of the providers in question will operate, or be based, outside the UK. Given that there will be a question as to what revenue is to count towards the calculation of the amount of a penalty, paragraph 7 of Schedule 16A requires OFCOM to produce a statement giving information about the amounts which it does or does not regard as comprising a person’s “qualifying worldwide revenue.” The statement must also include provision about the application of “qualifying worldwide revenue” to groups of entities where they are held to be jointly and severally liable. Before producing any such statement, OFCOM must consult with the Secretary of State, the Treasury and such other persons as OFCOM consider appropriate. OFCOM must also keep the statement under review.

Justification for taking the power

120. “Qualifying worldwide revenue” is a key factor in determining the applicable penalties, which is central to OFCOM’s enforcement regime. For example, the statement will determine what is to count or not count towards the calculation of “qualifying worldwide revenue” and how “qualifying worldwide revenue” is to be determined in respect of groups of entities which are held to be jointly and severally liable. Setting this information out in a statement will allow OFCOM as the regulator to draw on its own financial and regulatory expertise, and consult with affected companies, in order to inform how “qualifying worldwide revenue” is to be appropriately determined. It will also allow OFCOM to vary the information more readily in future to ensure that the calculation of “qualifying worldwide revenue” remains relevant and up to date. This may be necessary, if, for example there are changes in accounting practices in different countries to consider or the “qualifying worldwide revenue” depends in part on what revenues derived from a certain activity which is itself affected by technological changes affecting how that activity is undertaken.

Justification for the procedure

121. Additional parliamentary scrutiny would be disproportionate given that the decision on what constitutes “qualifying worldwide revenue” is a technical one. Before making a statement, OFCOM must consult with the Secretary of State, HM Treasury and any other persons OFCOM considers appropriate. This will ensure that the Government and key stakeholders can input views as to how the “qualifying worldwide revenue” should be calculated. Further, to ensure transparency for industry, parliamentarians and other interested parties, the statement (including any revised statement) will be published and laid before Parliament by the Secretary of State.

### **Powers relating to Part 3 – Public Service Broadcasters**

#### **Clause 32(2), inserting new section 204B of the CA 2003 : Secretary of State’s approval of S4C’s new activities**

*Power conferred on: Secretary of State*

*Power exercised by: Written approval by Secretary of State*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

122. Under paragraph 1(2) of Schedule 6 to the BA 1990, as inserted by section 206(6) of CA 2003, S4C as a public body already has the power to carry out its public service functions and to do anything which appears to S4C to be ‘incidental or conducive’ to the carrying out of those functions. In addition, S4C has the power under that Act to undertake activities which are ‘connected’ to its public service activities and which are considered ‘appropriate’ for S4C to enter into. However, for S4C to exercise this latter power, it requires the approval of the Secretary of State in the form of an Order, following the process for a negative resolution order. This is a Statutory Instrument that has to be laid before both Houses of Parliament for 40 sitting days.

123. In practice, the timescale for seizing on commercial opportunities, especially those involving disruptive technologies or first-mover advantage, together with the confidential nature of discussions on commercial transactions, are normally incompatible with the process of making an Order.

124. The S4C Independent Review was published on 29 March 2018 along with the Government’s response to the review. The four recommendations which required changes through primary legislation included amending current approval requirements to give S4C greater flexibility in their ability to invest and generate commercial revenue. The Department is therefore updating the regulatory framework to provide S4C with that greater flexibility and also clarity as to how it can raise commercial income, to support an S4C for the future that is able to grow its commercial revenues without being constrained by a reliance on public funding, as public service broadcasters are encouraged to do. As part of this, the Department is removing the requirement for Secretary of State approval by order, and replacing it with Secretary of State approval in writing: see new section 204B as inserted by clause 32(2). The same will apply to the creation of a new linear television service. Therefore, S4C must ensure that it and its companies obtain the Secretary of State’s approval in writing before doing anything for a charge or with a view to making a profit.

### Justification for taking the power

125. Introducing a power for the Secretary of State to approve commercial activities of S4C and S4C companies in writing rather than by order would implement the recommendation in the Review, to give S4C greater flexibility and sustainability, most effectively. It would be difficult to create an exhaustive list on the face of the Bill of approved activity for payment or intended to make a profit that S4C could undertake, because it is not possible to predict precisely what future commercial activity might constitute. The proposed power will allow the Department to determine which activities can be covered by a general approval, and which would need specific approval, for example on the basis of a financial threshold of investment size. This allows for flexibility but will also allow the Secretary of State to ensure that more significant commercial activity being undertaken is appropriate. The approval of a new linear television service will also be done in writing rather than by order, again to allow S4C greater flexibility in responding to developing audience needs, and the associated approval will be published unless it contains commercially sensitive information.

### Justification for the procedure

126. Once Parliament has approved in principle that SoS need only approve S4C undertaking new commercial activities or a new linear television service, then it is appropriate for the Secretary of State and S4C to determine when and how S4C should seek approval on these matters.

### **Clause 35: Power for S4C and British Broadcasting Corporation (BBC) to agree on provision of support by BBC**

*Power conferred on: S4C and BBC*

*Power exercised by: Written agreement between S4C and BBC*

*Parliamentary Procedure: None*

*Henry VIII power: No*

### Context and Purpose

127. Section 58 of the BA 1990 requires the BBC to provide S4C, free of charge, with no less than ten hours of television programmes in Welsh per week, to support S4C in fulfilling its public service remit as set out in Schedule 12 to the CA 2003. Both S4C and the BBC have agreed that such a specific requirement is now out of date – the BBC may be able to provide other types of support to S4C that are more relevant to S4C's functions and remit in a modern digital broadcasting age. For example, that support might include use of spectrum, specific services, rights, funding or content. As such, the purpose of the new delegated power in proposed new s.58(1A) of the BA 1990 is to allow for the BBC and S4C to have the flexibility to agree mutually beneficial alternative arrangements. These alternative arrangements will be agreed by the BBC and S4C in a written agreement. If the parties are unable to reach an agreement on alternative arrangements, the current requirement for the BBC to provide S4C with 10 hours of television programming in Welsh will remain as a backstop.

### Justification for taking the power

128. All parties agree the current arrangement (10 hours of television programming in Welsh) is out of date and does not reflect the evolving broadcasting landscape where different BBC support may be more relevant to help S4C meet its public service remit. Crucially, the nature of that support may need to change frequently and rapidly depending on S4C's priorities at any given time, as well as developments in viewing habits and technology. Waiting for primary or secondary legislation changes would not provide the parties with the flexibility to respond to developments in the wider broadcasting landscape, or indeed in S4C's own strategy, in a timely manner.

### Justification for the procedure

129. This will be an agreement between two independent broadcasters based on their respective business strategies, with no Government involvement. It would therefore not be appropriate or relevant to require Parliamentary scrutiny of any agreement.

## **Powers relating to Part 4 – On-demand programme services**

### **Clause 37 and Schedule 7, inserting new section 368HB of the CA 2003: Power for the Secretary of State to specify Tier 1 services**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: No*

### Context and Purpose

130. This clause enables the Secretary of State to determine which video-on-demand ("VoD") services, including services that are currently outside UK jurisdiction, fall within the new enhanced Tier 1 regulation. This is in addition to VoD services that are being used by PSBs (other than the BBC) to contribute to the fulfilment of its public service remit, which will automatically fall into Tier 1 by operation of new section 368HA(1).

131. Under current legislation, VoD services are regulated less robustly than traditional broadcast television, and in some cases are not regulated in the UK at all. The new Tier 1 requirements are designed to give audiences similar protections to existing legislation already in place for the regulation of broadcast content. Tier 1 is intended to capture larger, TV-like services and those that have the greatest potential for audience harm. Smaller, lower risk on-demand services in the UK will continue under existing law (which is found in Chapter 2 of Part 4A CA 2003).

132. While responses to the Government's consultation on *Audiences Protection Standards on Video-on-demand Services* suggested metrics that could be used to assess the risk of audience harm from different services, the responses did not provide evidence of where that level should be set. In addition, data is currently limited to support an evidence-based decision at this time; for example, there is no comprehensive industry standard measurement for on-demand audiences.

### Justification for taking the power

133. In the Government's view, it would not be practical to set out which specific services come under Tier 1 on the face of the Bill, aside from those being used by public service broadcasters (other than the BBC) to contribute to the fulfilment of their public service remit. Due to the rapidly changing landscape of the VoD market, it would be inefficient to narrowly define the scope of this regulation, with new entrants to the market and rapid growth in services likely requiring updates to the included regulated services in future. It is important that the framework can evolve to reflect these changes.
134. Fixed parameters or metrics for inclusion could result in services coming in and out of regulation scope as metrics such as turnover or audience size fluctuate. Outlining specific metrics to capture larger, TV-like services would also not allow for the inclusion of smaller services in Tier 1, even though these might pose a high risk of harm (e.g. in the case of pseudo medical advice or harmful extremism). These will need to be considered in light of the level of harm or potential for harm, which cannot be measured numerically or by proxy and must be considered on an individual basis.
135. The existing information gathering powers in place for VoD services are limited, meaning that the information required to set exact parameters and determine which services should come under Tier 1 is not yet available. The legislation therefore gives OFCOM information-gathering powers and provides that the Secretary of State will request that OFCOM prepare a report on the operation of the market in the UK for VoD services before the initial determination of which services fall within Tier 1. The Secretary of State is required to have regard to the contents of this report when determining which services will come under Tier 1. In the Department's view, this acts as an appropriate constraint on the exercise of the power.

### Justification for the procedure

136. The use of regulations will ensure Parliamentary oversight of the Secretary of State's decisions. The negative procedure is considered appropriate as legislation needs to allow for swift decision making to ensure audiences are protected quickly. Using the negative procedure will, in the Department's view, balance ensuring that OFCOM is given appropriate regulatory oversight with the ability to act at the earliest opportunity from the moment a risk is identified. The clause does provide that before making regulations the Secretary of State must lay before Parliament and publish online a list of services, or descriptions of a service, that they propose to designate as Tier 1. This must be done no fewer than 5 sitting days before the regulations are made. This will ensure maximum transparency for providers who might fall within Tier 1, and allow for appropriate scrutiny by Parliamentarians in advance of regulations being laid in Parliament.
137. Legislation also requires that the Secretary of State has regard to an independent report conducted by OFCOM before making the first regulations to determine services for inclusion in Tier 1. This will enable decisions to be evidenced by OFCOM's expertise but ensure OFCOM's essential role as an impartial, independent regulator is not unduly affected.
138. The scope of the report must deal with any matters specified by the Secretary of State in their request, and any other matters considered appropriate by OFCOM. It is expected that this report will include information such as: turnover, size and nature of audience, accessibility to potential viewers, content of programmes, and matters to which OFCOM give prominence. The information in this report will be used by the Secretary of State to

inform their decisions on which video-on-demand services should be included in Tier 1, whether due to their large, TV-like nature, or potential to cause harm.

**Schedule 7, inserting new section 368HF of the CA 2003: Power for OFCOM to prepare and publish a Code of standards for Tier 1 services**

*Power conferred on: OFCOM*

*Power exercised by: Standards Code*

*Parliamentary Procedure: None*

*Henry VIII power: No*

Context and Purpose

139. This clause requires OFCOM to prepare and publish a Code containing standards set by them for the regulation of Tier 1 VoD services. The standards of this Code must be set by OFCOM so as to secure the objectives set out in this provision. This Code will be primarily aimed at larger, TV-like VoD services, but could also address smaller services that have the potential to cause harm to audiences due to the nature of their content.

140. The objectives for the Tier 1 VoD Code laid out here provide OFCOM with clear guidance on the aims of Tier 1 regulation. The objectives of the new Code align closely with the objectives set out in legislation for OFCOM's existing Broadcasting Code for the regulation of OFCOM licensed broadcast content. This includes objectives such as protecting under-eighteens, that material likely to incite crime or lead to disorder is not included, that news is reported with due accuracy and due impartiality, that audiences are protected from the inclusion of offensive and harmful material, and that responsibility is exercised in relation to religious programming.

141. In regulating these services, OFCOM must also have regard to the matters set out in 368HH(2) such as the likely expectation of potential audiences to the nature of the content and the degree of harm or offence likely to be caused. It is also required that OFCOM must consult on the content of the Code, including those who provide Tier 1 services, those who represent the interests of potential audiences of Tier 1 services, and any others who have an interest in the content of the Code.

Justification for taking the power

142. OFCOM is the UK's independent regulator and already regulates VoD services based in the UK. This regulation will remain in place but will be supplemented with the regulation of Tier 1 services. The delegated power given to OFCOM to prepare and publish the new Code will therefore be built on existing powers to regulate VoD services in the UK.

143. OFCOM has extensive expertise and experience in regulation and the Government considers it essential that the regulation of content should continue to be conducted by an independent body. The use of a delegated authority to produce a Code has already been demonstrated to be effective through the Broadcasting Code, which OFCOM devised, keeps updated, and enforces for broadcast content. As the new VoD Code will have similar objectives to the Broadcasting Code there is precedent for OFCOM being delegated these powers for Tier 1 services. The obligations for providers of Tier 1 services will also fall on businesses rather than individuals.

144. The delegation of powers to draft, implement, review and update a standards Code is also consistent with the aim of the Government to effectively future-proof content regulation in the face of the constantly changing landscape of VoD services. This clause sets out that OFCOM must keep the code under review and may from time to time revise the code as it sees fit. This is more practical than laying out the specific rules in legislation as it allows for OFCOM to ensure content regulation is kept in line with audience needs and changes to what is considered harmful. The Department recognises the Committee's general concern on binding guidance and Codes, but the reasons set out here show why, in the Department's view, the approach proposed is appropriate, has precedent and is practical.

#### Justification for the procedure

145. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is already precedent for OFCOM to independently produce and enforce a regulatory standards Code, with OFCOM already administering the Broadcasting Code, which this VoD Code is expected to broadly mirror. In addition, OFCOM already oversees the regulation of VoD services in the UK through the On Demand Programme Service Rules and accompanying guidance. This VoD Code will be an extension of its existing regulatory position in this area.

#### **Schedule 7, inserting new section 368HH(4) of the CA 2003: Power for the Secretary of State to amend the list of matters OFCOM must have regard to in setting the standards code for Tier 1**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

#### Context and Purpose

146. New section 368HH sets out the matters to be taken into account by OFCOM when drafting or revising the standards code for Tier 1 services. The new Tier 1 requirements introduced in this legislation are designed to align more closely with existing legislation already in place for the regulation of broadcast content. The legislation provides OFCOM with clear guidance on the aims of Tier 1 regulation.

147. The provision specifies that in setting out the standards for enhanced regulation, OFCOM must have regard for matters such as: the likely expectation of potential audiences as to the nature of content; the degree of harm or offence likely to be caused by content; whether and how information about the nature of content can be given to audiences; the length of time for which programmes will be included on a service; and the desirability of maintaining independence of editorial control. These factors must be taken into account by OFCOM when drafting or revising the code of standards that they set for Tier 1 services.

148. Section 366HH(4) gives the Secretary of State the power to amend this list of matters that OFCOM must take into account in drafting or revising the Tier 1 standards code.

### Justification for taking the power

149. This delegation of powers to update the matters to be taken into account in setting the Tier 1 standard code is consistent with the aim of the Government to effectively future-proof content regulation in the face of the constantly changing landscape of VoD services and evolving technology. It is important that the framework can evolve to reflect these changes. This schedule allows for amendments to the list of matters for consideration and will therefore ensure that content regulation is kept in line with audience needs, changes in technology and market trends, and changes to what is considered harmful to audiences.
150. This power is aligned with the existing legislation around regulation for broadcasting, which similarly gives the Secretary of State the power to amend matters to be taken into account in the development of the Broadcasting Code. The power is also appropriately constrained by the requirement that the Secretary of State must consult OFCOM before making the regulations.

### Justification for the procedure

151. The power in new section 368HH(4) will enable the Secretary of State to amend existing primary legislation and will directly affect the scope of the regulatory framework. The Department also recognises that any amendments to the list of matters which OFCOM must have regard to when drafting or revising the standards code for Tier 1 services is likely to be of particular interest to Parliament. The Department has therefore proposed the affirmative procedure.

### **Schedule 7, inserting new section 368HL(1) of the CA 2003: Power for OFCOM to prepare and publish a Code on accessibility for Tier 1 services**

*Power conferred on: OFCOM*

*Power exercised by: Accessibility code*

*Parliamentary Procedure: None*

*Henry VIII power: No*

### Context and Purpose

152. This clause requires OFCOM to prepare and publish a code imposing requirements on Tier 1 services to ensure that their services are accessible to those with hearing and/or sight loss. Broadcast television channels are currently obliged by law to provide subtitling, audio description, and signing (access services) on a certain proportion of their programmes. These are essential services to help the estimated 12 million people with hearing impairments and 350,000 with visual impairments in the UK to access and enjoy television programming.
153. However, there are currently no statutory requirements for access services on video-on-demand services and the provision of access services lags behind that of broadcast television. The introduction of similar accessibility requirements on video-on-demand services is considered to be necessary to ensure that services can be enjoyed by the widest possible audience, regardless of disability. This is also in line with Government policy to



bring video-on-demand regulation in line with broadcasting in a proportionate way, where appropriate.

154. Section 368HL introduces accessibility requirements similar to those in place for linear broadcasting for the large, TV-like Tier 1 video-on-demand services, and gives OFCOM the power to create an accessibility code to set out how these requirements should be met.

155. The legislation sets out the level of provision that must be met by on-demand service providers. This is set so that after four years of being a Tier 1 provider, 80% of the total catalogue of hours must be subtitled, 10% audio described, and 5% signed. OFCOM's code will set out that Tier 1 services must report annually on their accessibility and steps taken to ensure the quality and usability of their access services. Significantly, OFCOM's Code is required to set out possible exemptions to the access service targets based on factors such as audience benefit, technical difficulty with compliance, and the cost to providers. This is important in ensuring the proportionality of the requirements, it gives OFCOM the flexibility to consider services' circumstances on a case-by-case basis, and where appropriate, to act to reduce the proportion of a service's catalogue which must be subtitled, audio described and signed.

#### Justification for taking the power

156. OFCOM is the UK's independent regulator and already regulates broadcasters' compliance with similar accessibility requirements for linear television. The delegated power given to OFCOM to prepare and publish the new accessibility code will therefore be built on existing powers to regulate the accessibility of linear television services in the UK. This is in line with the Government's policy position to bring video-on-demand regulation in line with broadcasting regulation where appropriate.

157. OFCOM has extensive expertise and experience in regulation, and the Government considers it essential that the regulation of video-on-demand services should be conducted by an independent body, as is the case for broadcasting. The use of a delegated authority to produce an accessibility code has already been demonstrated to be effective through the existing broadcasting code on television access services, which OFCOM devised, keeps updated, and enforces for broadcast content. As the new accessibility code for video-on-demand has similar targets and objectives to the broadcasting accessibility code, there is precedent for OFCOM being delegated these powers for Tier 1 video-on-demand services. The obligations for providers of Tier 1 services will also fall on businesses rather than individuals.

158. The delegation of powers to draft, implement, review and update an accessibility code is also consistent with the aim of the Government to effectively ensure VoD regulation can respond to the constantly changing landscape of VoD services. This clause sets out that OFCOM must keep the code under review and may revise the code as it sees fit. OFCOM's oversight of the code and ability to assess exemptions to the fulfilment of targets will ensure that there is sufficient flexibility in how these targets are met and achieved, which is particularly important given the constant technological changes which may alter the feasibility or cost of providing access services over time. This is more practical than laying out the specific rules in legislation as it allows for OFCOM to ensure the regulation of accessibility is kept in line with external changes to the market, and is proportionate. The Department recognises the Committee's general concern on binding guidance and Codes, but the reasons set out here reflect why, in the Department's view, the approach proposed is appropriate, has precedent and is practical.

### Justification for the procedure

159. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is precedent for OFCOM to independently produce and enforce an accessibility code, with OFCOM already administering the broadcasting code on television access services, which this video-on-demand accessibility code is expected to broadly mirror. In addition OFCOM will be required under new section 368HP to publish a draft of its Code and consult on it. It must consult those that represent the interests of those with disabilities, and those that provide the services that the code will apply to before drawing it up, and when it is reviewed or revised.

### **Schedule 7, inserting new section 368HN of the CA 2003: Power for Secretary of State to modify the access service requirements in 368HL(4) and (5)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

### Context and Purpose

160. This clause gives the Secretary of State the power to by regulations modify the targets that are set in legislation for the provision of access services by Tier 1 video-on-demand providers.

161. The required level of subtitles, audio description, and signing, and the timeframes for the delivery of these requirements, are informed by recommendations by OFCOM resulting from a review of the video-on-demand access service landscape. However, ongoing flexibility is necessary to reflect that the video-on-demand landscape is constantly changing, with developments in technology and viewing habits. The power to modify accessibility requirements and timeframes is also set out in legislation for broadcasting.

162. Therefore, while OFCOM will have powers to exempt services from legislative requirements, it is important that these regulations contain provisions to ensure that requirements can be updated if needed to ensure continued relevance and/or proportionality.

### Justification for taking the power

163. This delegation of powers to update the access service requirements for Tier 1 services is consistent with the aim of the Government to effectively ensure video-on-demand regulation can respond to the constantly changing landscape and evolving technology. It is important that the framework can evolve to reflect these changes. This schedule will ensure that access service requirements are kept in line with audience needs, and changes in technology and market trends.

164. This power is also aligned with the existing legislation around accessibility for broadcasting, which similarly gives the Secretary of State the power to amend the targets and timeframes set out directly in primary legislation. The power is also appropriately

constrained by the requirement that the Secretary of State must consult OFCOM before making the regulations.

#### Justification for the procedure

165. The power in new section 368HO will enable the Secretary of State to amend existing primary legislation and will directly affect the scope of the regulatory framework. The Department recognises that any amendments to the accessibility requirements for Tier 1 services is likely to be of interest to Parliament. The Department has ensured parliamentary oversight and input from the expert regulator by making the power subject to the affirmative procedure and making it a requirement for the Secretary of State to first consult OFCOM before any regulations are made. This follows the relevant procedures in section 306 of the CA 2003 for regulations to be brought forward to amend requirements for linear broadcast services.

#### **Schedule 7, amendment to section 107 of the BA 1996: Power for OFCOM to draw up and review a Fairness Code for Tier 1 services**

*Power conferred on: OFCOM*

*Power exercised by: Standards Code*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

166. Section 107 of the BA 1996 sets out the requirement for OFCOM to prepare a Code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy. This Fairness Code relates to the treatment of individuals involved in programming and broadcasting, rather than regulation of the content being broadcast. For simplicity, OFCOM includes this Code within its Broadcasting Code

167. The new Tier 1 provisions are designed to align regulation of VoD services more closely with existing legislation already in place for the regulation of broadcast content. This schedule therefore amends section 107 of the BA 1996 to require OFCOM to also draw up and review a Code specifically relating to the avoidance of unjust or unfair treatment in any programmes included in Tier 1 services. OFCOM will be able to include this in its wider VoD Code if they consider appropriate.

#### Justification for taking the power

168. This power is aligned with the existing legislation around regulation for broadcasting, which also gives OFCOM the power to prepare a code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy.

169. This delegation of powers to draft, implement, and review a Fairness Code is therefore consistent with the aim of the Government to bring VoD regulation in line with broadcasting regulation where appropriate. It will simply serve to extend OFCOM's existing powers to include the newly defined enhanced Tier 1 service providers.

#### Justification for the procedure

170. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is already precedent under section 107 of the BA 1996 for OFCOM to draw up and enforce a Code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy.

### **Powers relating to Part 5 – Regulation of Radio Services**

#### **Clause 44(6), inserting new section 315A of the CA 2003: Power to make provision enabling OFCOM to ensure at least one digital radio service in a local multiplex area includes local news and information**

*Powers conferred on: Secretary of State*

*Powers exercised by: Regulations*

*Parliamentary Procedure: Affirmative (where amending primary legislation)*

*Henry VIII powers: Yes*

#### Context and Purpose

171. Section 314 of the CA 2003 makes provision for the local content and character of local analogue radio services. Clause 44 subsections (4) to (8) amend section 314 to reframe these requirements so that each radio service on which localness requirements are imposed as a condition of their OFCOM broadcasting licence now only needs to provide local news and information (rather than other local material) and that some local news must be locally-gathered. Local digital radio services do not have any localness requirements. However, digital versions of local analogue services (known as 'simulcasts') will provide local news and information.

172. As the proportion of people listening to digital radio increases and analogue radio decreases, the Department expects the number of local analogue services to reduce over time and eventually, in the event of the completion of a full analogue-to-digital switchover, to disappear. In the event that there are no analogue services in a local area, then there would be no radio services being required to provide local news and information. Clause 44(9) therefore inserts new section 315A giving the Secretary of State the power to make provision for enabling OFCOM to ensure that there is at least one local digital radio service providing local news and information in each local multiplex area.

#### Justification for taking the power

173. The number of digital-only radio stations (i.e. services for which there is no scope for OFCOM to impose localness requirements) is currently relatively small. It is too early to assess the likely shape of a radio market in which these stations predominate (and which would therefore require the extension of localness requirements into digital radio). It is not yet, therefore, appropriate to put in place a regime stipulating how these requirements should apply to digital-only stations.

174. There are a number of ways in which this policy could be implemented when the time comes, and it is likely that new options will arise as technology develops. For example, the power could be used to impose on OFCOM duties similar to those in section 314 requiring OFCOM to secure that at least one radio service in a local area includes local news and

information. It could be required to impose conditions in local radio multiplex licences requiring the multiplex operator to broadcast at least one digital radio service containing local news or information. Or, it could be required to reserve capacity for local digital services that provide local news and information. The Secretary of State would only exercise these powers following consultation with OFCOM, multiplex operators and digital radio providers.

#### Justification for the procedure

175. The potential creation of requirements for local news and information on digital radio services is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure.

#### **Clause 46(3), inserting new section 245(3C) of the CA 2003: Power for the Secretary of State to specify a qualifying country for the purpose of conferring functions on OFCOM to regulate digital radio services provided from that country**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: No*

#### Context and Purpose

176. Section 245 of the CA 2003 specifies the radio services which fall to be regulated by OFCOM. OFCOM may only regulate services that are provided from the UK or by a person whose principal place of business is in the UK. Clause 46 amends section 245 to provide that a digital radio service from a qualifying country and broadcast by means of a local or small-scale radio multiplex service also falls to be regulated by OFCOM. A qualifying country is a country or territory that is specified in regulations by the Secretary of State. The Secretary of State intends to specify Ireland as a qualifying country with the effect that Raidió Teilifís Éireann (the Irish national broadcaster) and other Irish commercial and community radio station operators can apply for licences in the UK.

#### Justification for taking the power

177. The approach taken in the Bill gives the Secretary of State the flexibility to respond to requests to allow digital radio services from outside the UK to be licensed by OFCOM. Setting out specific countries on the face of the Bill would not allow for that degree of flexibility.

#### Justification for the procedure

178. The clause sets out the policy of allowing services from other countries to be granted digital radio licences and the exercise of the power would be to specify which specific country. This extension of the regulatory scheme for digital radio is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure.

#### **Clause 46(3), inserting new section 245(3A) of the CA 2003: Power for the Secretary of State to amend, or otherwise modify, Schedule 2 to the BA 1990 (restrictions on the holding of licences)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: Yes*

#### Context and Purpose

179. Schedule 2 to the BA 1990 makes provision about persons who are disqualified from holding a Broadcasting Act licence including licences to provide digital radio services. For example, paragraph 1 of Part 2 disqualifies a local authority from holding such a licence. In the event that the Secretary of State specifies a country as a qualifying country (see above) for the purposes of section 245 of the CA 2003 enabling OFCOM to license digital radio services from that country, it may be necessary to make consequential amendments to Schedule 2 to reflect the different circumstances in that country. For example, to provide that a local authority from that country is disqualified from holding a licence. Clause 46(3) inserts new subsection (3A) into section 245 of the CA 2003 to give the Secretary of State to make such amendments by regulations.

#### Justification for taking the power

180. The nature of the disqualification to apply in relation to digital radio services provided from outside the UK will vary and depend on the specific circumstances of each individual country. It is therefore appropriate to take a power to amend or otherwise modify the restrictions on the holding of licences in Schedule 2.

#### Justification for the procedure

181. Any amendment or modification of Schedule 2 would reflect the existing disqualifications, which means that such amendments or modifications would not alter the policy agreed to by Parliament in passing BA 1990. As such, even though the power allows for the amendment of primary legislation (Schedule 2), the Department has proposed the negative resolution procedure applies to regulations made under new section 245(3A).

### **Powers relating to Part 6 – Regulation of Radio Selection Services**

#### **Clause 48, inserting new section 362BA of the CA 2003: Power for the Secretary of State to amend the definition of a “radio selection service”**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

#### Context and Purpose

182. The rate of change in how listeners are accessing radio online and the new types of audio services and technology emerging mean it is important that the definition of a “radio selection service” (RSS) remains relevant and is able to capture both current and future technology. Therefore, a power is taken at subsection (2) of inserted section 362BA to amend this definition. This power includes the power to make consequential amendments to the CA 2003 Act or any other Act.

#### Justification for taking the power

183. This power will allow the definition of a RSS to be updated if necessary in line with technological developments.

184. For the integrity of the new regime for radio selection, it is important that this definition continues to reflect the state of the art, even as technology evolves at considerable speed. In particular, it is important that the definition continues to capture a wider range of services used by listeners to access internet radio services. This power will also allow the definition to be updated in line with changes in listening habits.

185. In addition, were the definition to be more rigidly set in primary legislation, the Government is concerned that there may even be cases where an existing RSS was altered by its provider (whether accidentally or deliberately) so as to take that service outside the existing definition. This could have significant negative implications for the listener experience and for internet radio service providers.

#### Justification for the procedure

186. The Department recognises that the definition of a RSS has a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

### **Clause 48, inserting new 362BB(1) of the CA 2003: Power for the Secretary of State to designate “designated radio selection services”**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: No*

#### Context and Purpose

187. New section 362BA establishes the definition of a radio selection service (RSS). This definition then flows through into this new section which creates a category of “designated” radio selection services (DRSS). A number of obligations are then placed on DRSS by inserted section 362BI (the duty to provide access to relevant internet radio services).

188. A DRSS is defined as one designated by the Secretary of State by regulations (subsection (1)). A DRSS may only be designated if it meets the requirement in subsection (2) that it is used by a significant number of members of the public in the United Kingdom to access internet radio services.

189. Before making regulations, the Secretary of State must have received a report under inserted section 362BC, setting out OFCOM's assessment of the number of users, the manner in which the RSS is used, whether the level of use of the service is significant and any other matters OFCOM considers likely to affect whether to designate a RSS. Such a report may be provided proactively by OFCOM, or on request from the Secretary of State. OFCOM must publish all reports given to the Secretary of State in relation to these provisions. Should the Secretary of State materially depart from OFCOM's recommendations, the Secretary of State must set out their reasons for doing so.

#### Justification for taking the power

190. For the new regime for regulating radio selection to be effective, it is important that it captures the RSSs that comprise a significant proportion of the market. Capturing the RSSs that cover a significant proportion of the market in this way will ensure that UK listeners are able to continue to select and listen to internet radio services as the RSSs' share of the audio market grows.

191. By prescribing which RSSs are in scope of regulations (including thresholds where applicable) it will ensure regulatory clarity as to which services have to comply with the new regime.

192. A number of voice-controlled services have been launched in recent years, including vehicle-based services. Internet services are becoming more widely spread (for example, they are being bundled with domestic appliances). The government considers that the field of voice-controlled internet services, including voice-controlled access to radio services, is likely to change significantly in coming years. The government also expects there to be changes in the numbers using RSSs and as regards which services are more popular.

193. As also stated above, to ensure regulation is proportionate and targeted, it is not the Government's policy aim to capture all platforms but only the major or most popular platforms – i.e. those services that are used by a "significant" number of UK users to access internet radio services.

#### Justification for the procedure

194. In the Department's view, the Bill contains sufficient detail to indicate the types of RSS which would fall within the scope of regulation. Furthermore, the Secretary of State cannot make any designations until it has received advice from OFCOM, which will be carrying out the necessary research to assess if a given RSS meets conditions in accordance with new section 362BC. This will ensure proportionate regulation and will provide the necessary evidence required to inform any designations made by the Secretary of State under this new section. The Department has therefore proposed the negative procedure for regulations made under this new section.

### **Clause 48, inserting new 362BB(5) of the CA 2003: Power for the Secretary of State to amend section 362BB to alter the conditions that must be satisfied before a radio selection service can be designated**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*



*Henry VIII power: Yes*

Context and Purpose

195. The Secretary of State may only designate a radio selection service under new section 362BB if they consider the service is used by a significant number of users in the United Kingdom. Subsection (6) allows the conditions for designation to be amended in response to developments in the market. In particular, the Department requires the flexibility to amend the conditions so that services operating in environments where members of the public would expect to be able to receive radio (but which might not pass the significant number threshold) can be designated.

Justification for taking the power

196. As explained above, for the new regime for regulating radio selection to be effective, it is important that it captures the main platforms used to access internet radio services. There are a number of different environments in which radio selection services operate which may need to be subject to different conditions in order to be designated. This is particularly so given the likelihood that new types of services will launch over the next few years. This power (which is subject to a requirement for the Secretary of State to consult) will enable updates to be made to reflect these changes which would not be possible if the conditions for designation were fixed on the face of the Bill. The overall aim is to ensure that where a RSS acts as a gatekeeper in an environment where a user would expect to be able to access internet radio services, it should be subject to the regulatory scheme.

Justification for the procedure

197. The Department recognises the exercise of this power would have a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this inserted section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

198. Relevant consultation requirements are set out in sections 362BB(4) and (5)-(5A). The Secretary of State is required to consult the following persons on setting designation requirements or modifying them in any way: (a) persons who appear to represent the providers of RSSs; (b) persons who appear to the Secretary of State to represent providers of internet radio services; and (c) such other persons as the Secretary of State considers appropriate.

**Clause 48, inserting new 362BD(1) of the CA 2003: Power for the Secretary of State to revoke the designation of a designated radio selection service**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

*Henry VIII power: No*

Context and Purpose

199. Where the Secretary of State has designated a radio selection service under new section 362BB but that service is no longer used by a significant number of users in the United Kingdom, subsection (1) of new section 362BD allows for this designation to be revoked (which may be in response to a request from the designated radio selection service). The designation must be revoked if the Secretary of State considers that the level of use of the service in the United Kingdom to listen to relevant internet radio services is not significant, and the Secretary of State may request OFCOM to prepare a report making recommendations about the exercise of this power.

Justification for taking the power

200. As covered above in relation to the designation of radio selection services, it is likely that, as the market evolves, particular services will become less popular. Enabling the Secretary of State to revoke the designation of a radio selection service where that service is no longer one of the main platforms through which UK listeners access radio is important to ensure that the regime for regulating radio selection remains proportionate.

Justification for the procedure

201. In the Department's view, the Bill contains sufficient detail to indicate the types of RSS which would fall within the scope of regulation. Furthermore, the Secretary of State must have received advice from OFCOM as to whether a given designated RSS is used by a significant number of people in the UK. This will provide the evidence required to inform any revocation of designation. The Department has therefore proposed the negative procedure for regulations made under this new section.

**Clause 48, inserting new 362BH(1) of the CA 2003: Power for the Secretary of State to amend sections 362BF and 362BG so as to alter the definition of "internet radio service" and "relevant internet radio service"**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

Context and Purpose

202. To be eligible for the protections which this Bill puts in place, an internet radio service must satisfy certain requirements set out in new sections 362BF and 362BG, namely that the programmes included on that internet radio service (disregarding advertisements) are broadcast on an OFCOM-licensed or BBC radio service at the same time as they are provided on that internet radio service and that the provider of the internet radio service has given notice to OFCOM requesting inclusion in (and has not subsequently requested removal from) the list which OFCOM will maintain of such services.

203. As listening habits evolve, and/or in response to any potential moves on the part of IRSs to unfairly leverage their position by seeking charges from DRSSs for allowing the IRS to be played, it may be necessary to amend the definition of a "relevant internet radio service" so as to ensure that the services falling within scope keep pace with that evolution, and to prevent such charges.

### Justification for taking the power

204. While, at this point, the Government has concluded that the core public value of radio is reflected in the conditions set out in new sections 362BF and 362BG, the significant growth in on-demand TV viewing over recent years provides an illustration of how media consumption habits can change. It may therefore be necessary in the future to amend sections 362BF and 362BG to reflect new ways in which that public value is delivered within the radio market.

### Justification for the procedure

205. The Department recognises the exercise of this power would have a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this inserted section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

### **Clause 48, inserting new section 362BK of the CA 2003: requirement for OFCOM to issue a Code of practice relating to radio selection**

*Power conferred on: OFCOM*

*Power exercised by: Code of practice*

*Parliamentary Procedure: None*

*Henry VIII power: No*

### Context and Purpose

206. By virtue of new section 362BI providers of designated radio selection services (DRSSs) are required to provide access to a relevant internet radio service and to secure that the DRSS operates in particular ways relating to findability and not charging.

207. Subsections (1) to (3) of new section 362BK require OFCOM to issue, and publish, a code of practice describing actions that OFCOM recommends for compliance with the duties set out under section 362BI. Failure to do so does not by itself make the provider liable to legal proceedings, but a court, tribunal or OFCOM must take into account the contents of a code when determining a question where the provision in the Code is relevant (see new section 362BL).

208. Relevant consultation requirements are set out in new section 362BM which requires OFCOM to consult the Secretary of State, providers of DRSSs, providers of internet radio services and other appropriate persons before issuing a code of practice.

### Justification for taking the power

209. The duties referred to in new section 362BI are substantive obligations on DRSSs. However, there is no single model for a DRSS to deliver those substantive obligations. Consequently, it is impossible to provide on the face of the Bill a single method in which these obligations can be delivered. Giving providers flexibility in this regard is both inevitable and important in ensuring that these provisions do not restrict innovation, impact customer choice or inadvertently lead to a situation where a DRSS cannot comply due to insufficient technological capability. Nevertheless, in the context of this flexibility the Government is keen to ensure that DRSSs have access to guidance which, if followed,

provides clear recommendations and assurance that they are meeting their statutory obligations under this regime.

210. These provisions rely on the use of a code of practice which can be more simply updated from time to time (should new approaches materialise). In addition, it can simplify the process to amend the code to include new recommendations or case studies for different cases. OFCOM, as the independent regulator, is best placed to recommend actions in each case, taking account of both audience listening habits and the types of RSS on the market.

#### Justification for the procedure

211. Once Parliament has agreed in principle that DRSS providers should be under substantive duties, the question of how that service should be operated is appropriately determined by OFCOM (following consultation with internet radio service providers, RSS providers, the Secretary of State and any other appropriate persons). The code of practice will also assist DRSS providers to know how they can demonstrate their compliance with the duties listed under new section 362BI. Therefore, the Department does not consider that any parliamentary procedure is necessary.

### **Clause 48, inserting new section 362BP of the CA 2003: Power for Secretary of State to modify regulation relating to radio selection services**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative*

*Henry VIII power: Yes*

#### Context and Purpose

212. The new regulatory regime for radio selection created by the Bill imposes a number of substantive obligations on the providers of designated radio selection services. The aim of these provisions is to establish ground rules between the providers of DRSS and providers of radio services. However, the particular areas where protections are necessary are likely to evolve as listening via connected audio devices continues to grow, the technology develops (with, for example, voice assistants becoming more sophisticated in their responses to commands) and listening habits (such as the balance between live and on-demand listening) change. Inserted section 362BP gives the Secretary of State the power to amend inserted Part 3B of the 2003 Act to alter, add or remove requirements or prohibitions on providers of DRSS. Subsection (2) sets out examples of what changes might be made.

#### Justification for taking the power

213. In order to ensure that the new regime for radio selection remains relevant to the needs of the listening public, it is important that these rules can change to reflect the development of technology in this area and changes in listening habits, both of which may change at considerable speed. This power will allow the Secretary of State to ensure the regulatory scheme remains fit for purpose.

214. There are two key procedural safeguards that attach to the exercise of this power, in addition to the affirmative procedure proposed. First, before making any changes, the

Secretary of State must have received a report of a review undertaken by OFCOM under inserted section 362BQ. Such a review must consider the adequacy of the regulation of DRSS and the report must be published.

215. Secondly, before making any changes, the Secretary of State must consult with the providers of DRSS, providers of internet radio services and any such other persons as the Secretary of State considers appropriate.

#### Justification for the procedure

216. The Department recognises the exercise of this power would have a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this inserted section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

#### **Clause 48, inserting new section 362BX of the CA 2003: requirement on OFCOM to issue guidance on enforcement**

*Power conferred on: OFCOM*

*Power exercised by: Guidance*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

217. OFCOM will be enforcing this new regulatory regime for radio selection services. Therefore a range of enforcement powers will be conferred on OFCOM for the purposes of tackling any contraventions in a proportionate and effective manner.

218. OFCOM will be required to produce, publish and maintain guidance about how it proposes to exercise its enforcement powers. The guidance must, in particular, give information about the factors that OFCOM would consider it appropriate to take into account when taking, or considering taking, enforcement action. Before producing such guidance, OFCOM must consult with the Secretary of State and any other person OFCOM consider appropriate. OFCOM will have the power to amend or revise the guidance.

219. OFCOM require new powers to be able to enforce the new obligations against providers of DRSS or third parties who have failed to respond to a request for information. This enforcement provision will enable OFCOM to issue a provisional notice of contravention in respect of a failure to comply with a number of listed duties or requirements set out at new section 362BI. In order to issue such a notice, OFCOM must consider that there are reasonable grounds for believing that the provider has failed or is failing to comply with a relevant duty or requirement. This notice can then be followed by a confirmation decision requiring the provider to take remedial action as well as imposing a penalty for continued failure to comply with the duties or requirements. OFCOM can impose a maximum penalty of the greater of £250,000 or 5% of the person's qualifying worldwide revenue (in the case of a third party the maximum penalty is £250,000).

#### Justification for taking the power

220. This guidance is intended to assist providers of regulated services by providing them with transparency as to how OFCOM intend to use their enforcement powers. Furthermore, the

power to revise the guidance provides OFCOM with the ability to modify the details if they are required in light of emerging technologies and changes in the activities of regulated services.

221. It is most appropriately a matter for the regulator, OFCOM, who are enforcing this regime, to set out their enforcement processes and procedures as they already do for the sectors they currently regulate. Since this guidance will be informing DRSS providers how OFCOM proposes to exercise their enforcement powers under the Bill, it is appropriate for the regulator to be responsible for such guidance.

#### Justification for the procedure

222. OFCOM is required to consult the Secretary of State and other persons who OFCOM consider appropriate, before preparing guidance. In the Department's view that is an appropriate level of procedure for guidance on the exercise of OFCOM's enforcement powers.

#### **Clause 48, inserting new section 362BY of the CA 2003: requirement on OFCOM to publish a Fees Statement**

*Power conferred on: OFCOM*

*Power exercised by: Published Statement*

*Parliamentary Procedure: None*

*Henry VIII power: No*

#### Context and Purpose

223. In order to enforce this new radio selection regime OFCOM will be funded by fees from providers with in-scope services (both relevant internet radio services and designated radio selection service providers). OFCOM will be required to publish a Statement of Principles ("the Statement") which OFCOM will adhere to when setting out the fees payable by providers with in-scope services for their costs in relation to the exercise of their new functions.

224. The principles within the Statement must secure that the annual aggregate amount of fees charged by OFCOM will meet, but not exceed, the costs of carrying out their functions under the new regime for that financial year (financial year meaning a period of 12 months ending on 31 March). OFCOM's statement must also ensure there is transparency in relation to the costs incurred in the exercise of their functions and the amount of fees charged, and that any fee required is proportionate and justifiable having regard to the circumstances of the service provider required to pay it.

#### Justification for taking the power

225. Under the CA 2003, OFCOM is required to set licence fees in the broadcasting section and administrative charges in the electronic communications in accordance with charging principles that they have published. There are similar provisions in the Postal Services Act 2011 in relation to the setting of charges for the postal services sector and in the Online Safety Act 2023 in relation to fees required from providers of in-scope services (which are not exempt) under that Act. In line with their legislative duties, OFCOM currently publish

a Statement of Principles which outlines that charges and fees must be set so as to meet, but not to exceed, OFCOM's annual costs of regulating the relevant sector.

226. The duty on OFCOM to provide a statement of principles together with the requirement to publish statements of accounts is crucial to ensure consistency with OFCOM's other regimes. It is also appropriate for OFCOM to publish the Statement and their statement of accounts to allow for transparency in the funding regime for radio selection services and to clarify for those who are liable to pay as to how the amount of the fee is to be calculated. It is intended to reassure providers that the amount they will be required to be paid is calculated proportionately and is justified. It is expected that OFCOM will consult with providers of relevant internet radio service providers and DRSSs in preparation of the Statement.

#### Justification for the procedure

227. The Statement determines how OFCOM will calculate the fee to be charged from regulated providers to fund the radio selection regime. OFCOM must consult such persons they consider appropriate ahead of making or revising the statement. OFCOM must also publish the Statement and any revisions. This approach and duty to publish is consistent with OFCOM's other regimes set out above which likewise attach no parliamentary procedure to the statement of charging principles – and will ensure the principles are transparent to industry, parliamentarians and other interested parties.

228. As the document setting out the independent regulator's fee regime in full, it is appropriate that this Statement is published by OFCOM themselves, rather than subject to parliamentary procedure.

#### **Powers relating to Part 7 – Miscellaneous and General**

**Clause 49 and Schedule 10: inserting paragraph 5 of Schedule 16A to CA 2003: Power for the Secretary of State to substitute a different maximum financial penalty; and paragraph 7 of schedule 16A to CA 2003: requirement for OFCOM to make a statement about “qualifying worldwide revenue”**

229. These powers apply in respect of Part 2 (prominence on television selection services) and Part 6 (regulation of radio selection services) and are discussed above under the powers relating to Part 2.

#### **Clause 52: Power for the Secretary of State to make consequential provision**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Draft affirmative when amending primary legislation. Negative in all other cases.*

*Henry VIII power: Yes*

#### Context and Purpose

230. This clause provides the Secretary of State with a power to make provision that is consequential on this Bill or on regulations made under this Bill. Regulations made under this power may modify primary legislation, and in consequence this is a Henry VIII power.

Justification for taking the power

231. The exercise of this power is constrained insofar as it can only be exercised in connection with a provision of this Bill or regulations under this Bill.

232. This Bill makes numerous and significant amendments to the CA 2003, and it is possible that further consequential amendments to that Act may be needed to ensure the combined legal framework operates as intended.

233. The Department has made every effort to identify and include on the face of the Bill all consequential provisions that are required. In the event that some provisions have not been identified, or other legislation making its passage through Parliament at the same time as this Bill creates the need to make further consequential provision, this power is needed to provide legal certainty and avoid any legal lacunas after the Bill receives Royal Assent, and then comes into force as an Act.

Justification for the procedure

234. The Department considers that the affirmative resolution procedure should apply where this power is exercised as a Henry VIII power, that is to modify primary legislation. The Department considers that the negative resolution procedure is appropriate in all other cases.

**Clause 55: Power for the Secretary of State to commence provisions, and make transitional or saving provision**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations or Order made by Statutory Instrument*

*Parliamentary Procedure: None*

*Henry VIII: No*

Context and Purpose

235. This clause deals with the commencement of the provisions of the Bill. The provisions in the Bill will be commenced in three categories.

236. First, the provisions listed in subsection (1) will come into force when the Bill receives Royal Assent and becomes an Act, and those in subsection (2) will come into force two months after the Act is passed.

237. Second, subsection (3) enables the Secretary of State to bring the remaining provisions in the Bill into force on a day set out in regulations or by order made by statutory instrument. These can be different days for different provisions.



238. Subsection (5) is a standard power for the Secretary of State to, by regulations, make transitional or saving provisions in connection with the coming into force of any provision of the Bill.

Justification for taking the power

239. It may be sensible for parts of the Bill to commence at different times. This power enables that.

240. The power to make transitional or saving provision is often needed when bringing legislative provisions into force, for example in transitioning between two legislative regimes.

Justification for the procedure

241. Consistent with common practice, commencement regulations under this clause are not subject to any parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by regulation enables the provisions to be brought into force at the appropriate time. The procedure for the transitional or saving power is consistent with that for commencement regulations.

**Department for Culture, Media and Sport**

31 January 2024

## ANNEX A – SUMMARY OF DELEGATED POWERS

Clause/Schedule	Power conferred on and purpose	Henry VIII?	Parliamentary procedure
<b>PART 1 – PUBLIC SERVICE TELEVISION</b>			
Clause 1, 264(8D), CA 2003	Secretary of State to amend the length of the period which public service content must be available on-demand	Yes	Affirmative
Clauses 7 and 8, and Schedule 1	Secretary of State to specify a number of hours for the purposes of the independent productions quota	No	Affirmative
Clauses 9 and 17, and Schedule 1	Clarify that the Secretary of State’s existing power to specify description of programmes that are original productions includes the power to authorise OFCOM not to count a description of programmes towards the original productions quota, and to require OFCOM to publish guidance about the determination of whether an original production falls within a description	No	Affirmative
Clause 10	Secretary of State to specify a category of audiovisual content for the purpose of creating additional quotas for audiovisual content	No	Affirmative
Clause 11	Secretary of State to specify “qualifying audiovisual services” which can be used by public service broadcasters to fulfil their independent, original and regional productions quotas and any additional quota under clause 10	No	Affirmative
Clause 12	Secretary of State to make provision for repeats, etc	No	Affirmative

Clause 23	Amendment to power for OFCOM to define “adequate alternative coverage” for the purposes of section 101(2)(a)(ii) of the Broadcasting Act 1996	No	None
<b>PART 2 – PROMINENCE ON TELEVISION SELECTION SERVICES</b>			
Clause 28, 362AA	OFCOM to designate internet programme services	No	None
Clause 28,362AB	OFCOM to revoke designation of internet programme services	No	None
Clause 28, 362AE(2)	Secretary of State to specify “internet television equipment”	No	Negative
Clause 28, 362AE(7)	Secretary of State to amend the definition of a “television selection service” or “internet television equipment”	Yes	Affirmative
Clause 28, 362AF(1)	Secretary of State to designate “regulated television selection services” or specify a description of “regulated television selection services”	No	Negative
Clause 28, 362AL	OFCOM to issue guidance on “agreement objectives”	No	None
Clause 28, 362AP to 362AR	OFCOM to issue a Code of practice relating to prominence	No	None
Clause 28, 362AZ5	OFCOM to issue guidance on enforcement	No	None
Clause 28, 362AZ6	OFCOM to publish a Fees Statement	No	None
<b>PART 3 – PUBLIC SERVICE BROADCASTERS - CHANNEL 4 AND S4C</b>			
Clause 32(2), 204B	Secretary of State’s approval of S4C’s new activities	No	None
Clause 35	S4C and BBC to agree on provision of support by BBC	No	None

<b>PART 4 – ON-DEMAND PROGRAMME SERVICES</b>			
Clause 37 , Schedule 7, 368HB CA 2003	Secretary of State to designate Tier 1 Services	No	Negative
Schedule 7, 368HF	OFCOM to prepare and publish a Code of standards for Tier 1	No	None
Schedule 7, 368HH(4)	Secretary of State to amend the list of matters OFCOM must have regard to in setting the standards code for Tier 1	Yes	Affirmative
Schedule 7, 368HL(1)	OFCOM to prepare and publish a Code on accessibility for Tier 1 services	No	None
Schedule 7, 368HN	Secretary of State to modify the access service requirements	Yes	Affirmative
Schedule 9, amends s.107 BA 1996	OFCOM to draw up and review a Fairness Code for Tier 1	No	None
<b>PART 5 - REGULATION OF RADIO SERVICES</b>			
Clause 44(6), 315A, CA 2003	Secretary of State to make provision enabling OFCOM to ensure at least one digital radio service in a local multiplex area includes local news and information.	Yes	Affirmative (where amending primary legislation)
Clause 46(3), 245(3C)	Secretary of State to specify a qualifying country for the purpose of conferring functions on OFCOM to regulate digital radio services provided from that country.	No	Affirmative
Clause 46(3), 245(3A)	Secretary of State to amend, or otherwise modify, Schedule 2 to the BA 1990 (restrictions on the holding of licences).	Yes	Negative
<b>PART 6 - REGULATION OF RADIO SELECTION SERVICES</b>			

Clause 48, 362BA, CA 2003	Secretary of State to amend the definition of a “radio selection service”.	Yes	Affirmative
Clause 48, 362BB(1)	Secretary of State to designate “designated radio selection services”	No	Negative
Clause 48, 362BB(6)	Secretary of State to amend section 362BB to alter the conditions that must be satisfied before a radio selection service can be designated.	Yes	Affirmative
Clause 48, 362BD(A1)	Secretary of State to revoke the designation of a designated radio selection service.	No	Negative
Clause 48, 362BH(1)	Secretary of State to amend sections 362BF and 362BG so as to alter the definition of “relevant internet radio service”.	Yes	Affirmative
Clause 48, 362BK	OFCOM to issue a Code of Practice relating to radio selection.	No	None
Clause 48, 362BP	Secretary of State to modify regulation in relating to radio selection services.	Yes	Affirmative
Clause 48, 362Y	OFCOM to issue guidance on enforcement.	No	None
Clause 48, 362Z	OFCOM to publish a Fees Statement.	No	None
<b>PART 7 – MISCELLANEOUS AND GENERAL</b>			
Clause 49 and Schedule 10, Schedule 16A, paragraph 5	Secretary of State to substitute a different maximum financial penalty (see Part 2)	Yes	Affirmative
Clause 49 and Schedule 10,	OFCOM to make a statement about “qualifying worldwide revenue” (see Part 2)	No	None

Schedule 16A, paragraph 7			
Clause 52	Secretary of State to make consequential provision	Yes	Draft affirmative when amending primary legislation. Negative in all other cases.
Clause 55	Secretary of State to commence provisions, and make transitional or saving provision	No	None