

Written evidence submitted by Netflix

Response from Netflix to the Culture, Media and Sport Select
Committee's pre-legislative scrutiny of the Draft Media Bill

May 2023

Overview

1. Netflix is a streaming subscription video on demand (SVoD) service that allows customers to watch a wide variety of TV shows, films, documentaries, and more over the internet. We do not offer user-generated content, live programming, sports, or news. Our content is available on-demand and not scheduled as it is on linear channels. We are a global service, with over 230 million subscribers in 190 countries, with the UK being one of our most important markets.
2. Netflix has been in the UK for over 10 years and makes a significant contribution to the UK's screen sector. This world-leading industry is a major contributor to the British economy, generating hundreds of thousands of jobs and billions in investment. The UK is Netflix's second biggest production hub globally and in recent years we have invested nearly \$1.5 billion annually in UK-made shows like *Sex Education*, *Bridgerton*, *The Witcher*, *Top Boy* and *The Crown* with filming taking place across the country, including in the nations and regions, creating over 10,000 jobs a year and generating opportunities throughout the UK.
3. We have consistently supported the introduction of the Media Bill, and proposals to bring our service under Ofcom's jurisdiction in the UK. While we're supportive of the Bill's broader policy objectives, there are a number of areas where we would welcome greater clarity.

Designation of Tier 1 services

4. We recognise policymakers' desire to further harmonise the regulation of linear and video on demand. However, Netflix has concerns regarding the proposed tiered approach to the regulatory framework depending on the 'size' of each service, in particular the absence of any defined criteria on the face of the Bill that might be used to determine that.
5. Neither the Bill nor the explanatory notes gives any indication as to potential thresholds under which a service might be considered to be Tier 1. It is therefore unclear what number or proportion of services are intended to be in scope; without this clarity, there is no way of ascertaining whether the approach may ultimately be discriminatory, or whether Tier 1 standards will prove proportionate for the services to which they will be applied. It is also impossible to ascertain whether this approach will be future-proof as the number and variety of on-demand services

continues to evolve in the coming years. At present the draft legislation also gives considerable discretion to the Secretary of State to make ad hoc determinations about which services should qualify as Tier 1. We believe any criteria for Tier 1 should be objective, proportionate, non-discriminatory and future proof, and this should be clarified in the primary legislation.

6. Given the Government's own stated intent for greater harmonisation with the regulation of linear channels, all of which are subject to the Broadcast Code regardless of their size, it's unclear how a differentiated, tiered approach for VoD can be justified in the interests of parity. It also risks confusion for audiences who will likely not be aware of when they are shifting between Tier 1, regulated services and other services which would be regulated to a lesser standard. The outcome of a consistent regulatory approach was a clear policy objective for the legislation when it was originally devised.

Standards code for Tier 1 services

7. The Bill will legislate to give Ofcom powers to draft and enforce a new Video-on-Demand Code, similar to the existing Broadcasting Code. While we recognise the desire to ensure that all TV-like content is subject to similar standards, it is important that the Bill and subsequent Code reflect the many differences between how on-demand and linear content is both distributed and consumed, to ensure any new measures are proportionate to the medium, and in the best interests of audiences.
8. Despite growing convergence in the consumption habits of audiences watching both linear and on-demand television, on-demand programme services are and will continue to remain fundamentally different from traditional television, and it therefore remains appropriate to maintain a distinct regulatory framework for each. This fundamental distinction has been highlighted by Ofcom's own IPSOS Mori research in 2020, which noted that *"attitudes towards different platforms were influenced by the extent to which participants felt in control of their viewing and listening"*.
9. The historical concern with regulation of standards on linear television was driven by the risk of viewers coming across unsuitable content by accident. The risk is both inherent and specific to linear TV, and it remains the case today. By contrast on Netflix, every decision to view a title is an active and deliberate choice as our members make a conscious selection about what they want to see. Netflix seeks to provide as much context and control as possible to ensure that our members can make informed choices about what is right for them and their families to watch. We've been leading the way on self-regulation as the first streaming service to voluntarily carry British Board of Film Classification (BBFC) age ratings and advisories on all our content, and we also offer a granular level of PIN controls.

Tier 1 standards code - impartiality requirements

10. In transposing content standards for broadcasting onto VoD services, we are particularly concerned about the potential impact of Government's proposals for due impartiality provisions in non-news content outlined in the Bill. We believe there should be careful scrutiny of whether due impartiality

for any streaming service is proportionate or even applicable in a VoD environment, especially given the absence of any evidence of harm to audiences under the existing regulatory framework.

11. The importance of due impartiality in a broadcast environment, and its role in providing counterbalancing viewpoints in the context of a linear schedule targeted at a domestic audience is well recognised. Much of the detail in any future VoD Code will be a matter for Ofcom, but Government itself acknowledges the challenges in transposing due impartiality for VoD services in the explanatory notes for the Bill, stating that Ofcom needs flexibility to determine how due impartiality requirements may be fulfilled in an on-demand context. In contrast to a linear channel, Netflix and other streaming services have extensive and growing libraries of content which are sourced from around the world, intended for an equally broad audience, with many titles remaining indefinitely on the service.
12. However, notwithstanding granting Ofcom greater latitude in applying these rules, the inclusion in the legislation of this broad and nebulous concept will prove extremely challenging to apply successfully and in a manner which is proportionate and in the best interests of the viewer. The reference in the legislation to 'current public policy' and 'political or industrial controversy' - concepts which are by definition highly time sensitive - raise the possibility that Netflix would need to keep its library of content under continual review, purging titles on a regular basis, to ensure alignment with any controversy or policy deemed current, regardless of the context at the time at which the title was first made available on service. This would be further complicated during times of elections and referendums.
13. The difficulty of compliance is potentially increased by amendments the Government has made in transposing the impartiality rules for broadcasters. The removal of an existing provision for broadcasters that Ofcom must take into account the need to ensure due impartiality in relation to matters of 'major' political or industrial controversy and 'major' matters relating to current public policy appears only to lower the threshold for streaming services where due impartiality is required, to encompass more trivial matters of political or industrial controversy or current public policy, and it is unclear how this better facilitates transposition, or best serves the interests of VoD audiences.
14. In addition the decision to remove the criterion applicable to broadcasters that due impartiality may be satisfied in relation to 'a series of programmes taken as a whole', on the basis that this does not translate well to the video-on-demand context where these 'scheduling and temporal considerations do not exist', is untrue. Like other streaming services, Netflix presents programmes together on service in formats which would be typically considered as series. Permitting impartiality over a series is a useful editorial tool and it is unclear why Government has removed this from the legislation for VoD.
15. The question of the intended audience is an added complexity for any international streaming service, with global catalogues of licensed and commissioned content that may be available in the UK, but not specifically targeted at a UK audience. The range and variety of Netflix's content,

generally considered a strength of our offering in terms of maximising choice for British viewers, could equally become a potential source of risk from a compliance perspective if it fell within Ofcom's remit. Without considerably greater clarity around the scope and application of these provisions, it would inevitably be easier to remove content pre-emptively from our UK catalogue than risk an onerous compliance burden and potential liability.

16. The challenges of an overly broad application of 'due impartiality' is well illustrated by an Ofcom adjudication concerning *An Inconvenient Truth*, an Al Gore documentary on global warming broadcast on Channel 4. In its ruling, Ofcom distinguished that the calls to action in the final section of the film were addressed specifically to citizens of the United States while, in this instance, the film was not broadcast to a US audience. This highlights an important nuance that would be far more commonly encountered on a global service and raises further questions about how these provisions might effectively apply to programmes created in many different jurisdictions and aimed at viewers outside the UK.
17. In reaching its decision on that adjudication, Ofcom highlighted the potential threat to freedom of expression from over-zealous application of this challenging concept: *"It seemed to the Committee that public policy may be formed on almost any conceivable subject and that therefore the test of whether a programme's subject matter was one that "related to current public policy" had necessarily to be a high one in order for Ofcom to be able to regulate in such a way that protects freedom of expression. The Committee felt strongly that a very wide application of Section Five to cover not only discussions of a specific policy but also all issues that might in some way have a relationship to public policy (i.e. effectively any subject on which a factual documentary programme could be made) would have a chilling effect on broadcaster's ability to explore important subject matter."*
18. In conclusion and given these concerns, it is clear that due impartiality is one area which does not readily translate from a linear to a VoD environment and we are not yet reassured that Government has given sufficient thought to this in their drafting of the Bill. We would strongly urge the Committee to consider carefully whether there is any compelling justification for the inclusion of due impartiality in a VoD standards Code, and whether legislating for such a standard is both necessary and proportionate for on-demand services. This is a particularly important consideration given the absence of any clear harms to audiences that Government has been able to identify under the status quo, and the very real concomitant risk of a pre-emptive chilling effect on streamers' appetite to make available their libraries of documentaries for UK viewers.

Fairness and privacy code for Tier 1 services

19. We also note that there is a separate requirement in the draft legislation for Tier 1 services to observe a fairness and privacy Code, to be drawn up by Ofcom, relating to the avoidance of unjust or unfair treatment of individuals or organisations in programmes or unwarranted interference with privacy.

20. Whereas this is in principle - unlike impartiality - a reasonable obligation for content that is available as a library, transposing these obligations from domestic broadcasters to global streaming services creates a heightened risk of 'complaint tourism' from other jurisdictions, whereby a person from outside the UK but featured in a programme that is available on the UK service can legitimately complain to Ofcom. As international complainants have been previously known to use the UK regulator to try and have material removed, we would welcome clarification from Government on what steps can be taken to mitigate this risk, for the same purpose measures were introduced historically to tackle the widely recognised problem of libel tourism through updated UK defamation laws.

Accessibility requirements for Video on Demand

21. The Bill will give Ofcom the power to require VoD services to provide subtitles on 80% of their programmes; 10% audio description; while 5% of programmes should provide signed interpretation.

22. Netflix is a market leader in making content accessible to members with vision and hearing impairments with audio descriptions, subtitles and/or captions. We currently have English language subtitles for 100% of our UK catalogue, and audio description on all our English language branded content in the UK.

23. Under the existing framework for linear television, with which these provisions are seeking harmonisation, under certain criteria broadcasters are able to make a financial contribution (for example, to the British Sign Language Broadcasting Trust) in lieu of the requirements for signed content, in order to facilitate the creation of more programming for audiences with those specific needs. Our expectation is that similar arrangements will be put in place for on-demand services. As with requirements for access services on linear, there is no reference to this on the face of the Bill, but we would welcome clear reassurances from Government and Ofcom that this would be the ultimate intention.