

Written evidence submitted by the Department for Culture, Media and Sport***Culture, Media and Sport Committee pre-legislative scrutiny of the Draft Media Bill*****Introduction**

In response to a request from the Culture, Media and Sport Select Committee the Department for Culture, Media and Sport has set out responses below to various questions on the delegated powers in the draft Media Bill, particularly those relating to Public Service Television, Prominence on Television Selection Services, On-demand Programme Services, Regulation of Radio Services and Regulation of Radio Selection Services.

Broadly speaking the Committee's specific questions on these Parts of the draft Bill relate to three overarching themes:

- when there is or is not a statutory requirement for OFCOM (or wider stakeholders) to be consulted;
- when there is or is not a requirement for the Secretary of State to ask OFCOM to review or report on certain powers; and
- why the Secretary of State is not required to publish reasons if a recommendation from OFCOM is not accepted.

The Department believes it is important to recognise that the broad industry support for this legislation stems from the sector's request for agile regulation, that can adapt at pace to evolutions in market practices, whilst seeking to protect the ability of viewers and listeners to access high-quality journalism and entertainment.

Throughout the draft legislation, we have sought to balance this clear expectation with the need for parliamentary scrutiny, and are confident that it does so in a manner that reflects established best practice in broadcasting regulation.

Indeed, OFCOM consults regularly and widely in the exercise of its statutory functions, and produces a wide range of reporting in fulfilling those functions. The draft Bill will allow the Government and Parliament to react at pace to the reporting of the regulator, including through delegated legislation.

The Department's responses below go into detail for the specific powers on which the Committee has raised questions.

Delegated legislation questions for draft Media Bill**1. Public Service Television**

Clause 1, inserting new section 264(8B) 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 [in order to contribute to fulfilment of the remit]*

Q: Why is this power exercisable without a report from OFCOM (as in s.271 of the CA 2003 which is noted as a precedent)?

A: The Government considers that consultation with OFCOM is sufficient to allow OFCOM's views in relation to this specific issue (the length of the period for which public service content must be available on-demand in order to contribute to fulfilment of the remit) to be reflected in a proportionate and timely manner. This approach is similar to the Secretary of State's existing power in relation to the independent production quota.

In particular, the Government wants to avoid a situation where OFCOM is required by statute to publish a report simply for the purpose of making a recommendation to the Government on a single issue. It is our view that requiring the publication of a report in such a circumstance could delay or otherwise inhibit regulations being made, to the ultimate detriment of audiences.

By contrast, the delegated power contained in section 271 of the CA 2003 is much broader, allowing the Secretary of State to make amendments to the remit as a whole. It is therefore appropriate and proportionate for it to be associated with a more extensive process.

The Department would like to highlight to the Committee that OFCOM may still choose to report on and/or make recommendations in relation to the operation of these provisions as part of its regular reports under section 264.

Q: Why is this power exercisable without consultation (as in s.271 of the CA 2003 which is noted as a precedent)?

A: Before making regulations under this section, the Secretary of State must consult OFCOM (see new subsection (10A)). The Secretary of State may also consult other persons as they consider appropriate. While section 271 includes an additional requirement to consult certain broadcasters, the Government considers that such a requirement would be disproportionate in the context of this much narrower power. In particular, the Government anticipates a scenario where the views of broadcasters had already been adequately reflected in OFCOM's advice, and so re-consultation could delay at-pace regulation, to the detriment of audiences.

***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*

Q: Why is it necessary for the Secretary of State to be able to exercise this power without a report or recommendation from OFCOM (it is noted that OFCOM must be consulted)?

A: The Government considers that consultation with OFCOM is sufficient to allow OFCOM's views on the level of the independent production quota to be reflected in a proportionate and timely manner. This approach is similar to the Secretary of State's existing power in relation to the independent production quota.

In particular, the Government wants to avoid a situation where OFCOM is required by statute to publish a report simply for the purpose of making a recommendation to the Government on a single issue. It is our view that requiring the publication of a report in such a circumstance could delay or otherwise inhibit an order being made, to the ultimate detriment of audiences.

The Department would like to highlight to the Committee that OFCOM may still choose to report on and/or make recommendations in relation to the operation of these provisions as part of their regular reports under section 264. Any reports of this nature would be considered by the Secretary of State before exercising this power.

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

Q: Why is it necessary for the Secretary of State to be able to exercise this power without a recommendation from OFCOM (it is noted that OFCOM must be consulted)?

A: The Government anticipates that requiring OFCOM to make a suitable recommendation would limit the effective use of the delegated powers described in this section. In particular, the Government anticipates that there may be occasions when OFCOM, as the independent regulator, is able to collate and present evidence about the availability of audiovisual content, but is not well-placed to make detailed recommendations on what is ultimately a matter of public policy.

The Secretary of State is still constrained in their use of this power. Before making regulations, the Secretary of State must consult OFCOM, the providers of licensed public service channels who are likely to be affected by the regulations, and such other persons providing television programme services or on-demand programme services as the Secretary of State considers appropriate. This will give the Secretary of State the opportunity to hear the views of OFCOM and affected stakeholders whether or not OFCOM has made a recommendation for any such additional quota.

This is similar to the existing precedent contained in section 271 of the CA 2003.

Q: Why is there no obligation on the Secretary of State to publish reasons when rejecting a recommendation from OFCOM under this clause?

A: In the CA 2003, OFCOM is required to report on a wide range of different subjects. An obligation on the Secretary of State to respond publicly to these reports is not standard procedure. For example, under s. 264 OFCOM are required to report on the fulfilment of the public service remit for television, but the Secretary of State has discretion over whether and how to respond to that report. For example, depending on the content of that report, the Secretary of State may choose to respond in the form of a written ministerial statement, draft regulations, a policy paper, or in response to a relevant Parliamentary Question. In this context, a statutory requirement to respond publicly on a recommendation-by-recommendation basis would be contrary to convention, and undermine the objective of the legislation to facilitate agile regulation.

Q: Why is there no obligation on the Secretary of State to publish reasons when acting without a recommendation from OFCOM under this clause?

A: On the question around acting without a recommendation, in the Department's view there is no need for such an obligation. A statutory instrument containing regulations under subsection (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament. This will provide an opportunity for the Secretary of State to set out reasons, and for Parliament to scrutinise these.

In addition, as set out above, before making regulations, the Secretary of State must consult OFCOM, the providers of licensed public service channels who are likely to be affected by the regulations, and such other persons providing television programme services or on-demand programme services as the Secretary of State considers appropriate. This will give them the opportunity to hear from the Secretary of State as to their intentions and to make representations accordingly.

2. Prominence

Clause 23, inserting new section 362AD(2) of the CA 2003: *Power for the Secretary of State to specify “internet television equipment”*

Q: Why is this power not subject to statutory consultation, either with OFCOM or more widely?

A: The Delegated Powers Memorandum for the draft Bill explains that 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” to ensure our approach to regulation is proportionate, targeted and sufficiently future-proofed to be able to respond to new technology or shifts in viewing habits.

Please see response below in relation to the power for the Secretary of State to amend the definition of “internet television equipment” under new section 362AD(7), specifically noting the horizon-scanning function OFCOM has under 362AZ5.

Clause 23, inserting new section 362AD(7) of the CA 2003: *Power for the Secretary of State to amend the definition of a “television selection service” or “internet television equipment”*

Q: Why is this power not subject to statutory consultation, either with OFCOM or more widely?

A: The power under 362AD(7) to amend the definition of “internet television equipment (ITE)” (and “television selection service” (TSS)) is key in ensuring the overall integrity of the new online prominence regime and its adaptability for the future - by ensuring this definition continues to reflect the state of the art, as technology continues to evolve. Additional provisions on statutory consultation are not necessary as OFCOM will have a specific horizon-scanning function under 362AZ5 where the Department expects OFCOM to keep under review advice on which TV platforms/devices should be designated. The Department therefore considers it is not necessary to add any additional legislative obligations onto OFCOM. Any changes to the definition of a TSS and/or ITE would therefore be based on advice from OFCOM, and would be subject to affirmative procedure and would allow for parliamentary scrutiny.

Clause 23, inserting new section 362AE(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”*

Q: Why is OFCOM not required to consult stakeholders before reporting to the Secretary of State on a prospective exercise of this power?

A: As per standard practice relating to the way OFCOM carries out their general duties, and the legal obligations they have to entities that it regulates, OFCOM will consult stakeholders on their advice to the Secretary of State on which specific television selection services (TSS)

should be designated. This consultation process will provide an opportunity specifically for TSS providers to provide their views on whether it is appropriate to advise the designation of a particular TSS. It is therefore not necessary to add a new duplicative provision.

Q: Why is this power not subject to the affirmative resolution procedure given it amends primary legislation?

A: 362AE does not amend primary legislation, but specifies what television selection services (TSS) will be considered in scope of the new prominence framework (i.e. regulated television selection services (RTSS)). As set out in the Delegated Powers Memorandum, 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 under 362AE until they have received advice from OFCOM (see 362AE(4)) 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 made by the Secretary of State under this new section. The Department has therefore proposed the negative procedure regulations made under this new section 362AE.

Clause 23(3) and Schedule 3, inserting new paragraph 5 of Schedule 15ZA to CA 2003: *Power for the Secretary of State to substitute a different maximum financial penalty*

Q: Why is this power not subject to statutory consultation either with OFCOM or more widely?

A: This provision is necessary to future-proof the legislation if it is later considered that the existing statutory maximum fine is insufficient to incentivise compliance with the new online prominence framework. This power follows the precedent established under section 237(9) CA 2003 which does not require statutory consultation.

As with section 237(10) the Department has also proposed an affirmative procedure for these regulations to ensure that Parliament has full scrutiny of any new sum or percentage being specified. It is our expectation that the Secretary of State would consult with OFCOM (and/or more widely) to inform any decision on substituting a different maximum financial penalty to obtain the necessary information on compliance and enforcement.

3. Video-on-demand

Clause 31, Schedule 7, inserting new section 368HB of the CA 2003: *Power for the Secretary of State to specify Tier 1 services*

Q: The Delegated Powers Memorandum refers to the publication of a list of services prior to the laying of regulations as allowing “for appropriate scrutiny by Parliamentarians in advance of regulations being laid in Parliament”¹, effectively mitigating the disadvantages of using the negative resolution procedure:

- **Is there a precedent for using publication of information before regulations are laid as a form of parliamentary scrutiny?**
- **What is to prevent the Secretary of State from publishing the list of services minutes before the regulations are laid effectively preventing this form of scrutiny?**

¹ [Delegated Powers Memorandum](#), para. 121

- **Why was it decided not to require that the list of services be laid before Parliament?**
- **Why was the negative procedure chosen rather than the affirmative procedure which allows regulations to come into force immediately but not remain in force beyond a certain date ('class iii' procedure on page 19 of [Statutory Instrument Practice](#))?**
- **Why is there no obligation on the Secretary of State to publish reasons for accepting or rejecting the contents of a report by OFCOM?**
- **Why is OFCOM not required to report before subsequent sets of regulations subject to an emergency exception?**
- **How will OFCOM enforce the requirement to provide information on relevant parties outside UK jurisdiction?**

A: The Department has provided a consolidated answer to the questions that relate to Part 4 of the Bill given the interrelationship between the questions.

On publication of information, there is precedent for the Secretary of State by regulations to specify or describe services that will be regulated. Under s.211A of the CA 2003, the Secretary of State can by regulations update the description of a 'regulated electronic programme guide' to include services provided by a person designated by the Secretary of State, or falling within a prescribed description. Under this power the Secretary of State must consult OFCOM, but is not required to publish in advance any detail of which services will come under regulation, or lay these before Parliament. The publication of information before regulations are laid in this instance therefore provides an additional layer of transparency to this comparable process for regulating electronic programme guides.

The published list (which can only be prepared after considering OFCOM's report), by itself, has no legal effect. There is no fixed timetable to publish the list in advance of legislation. Importantly the list must be publically available, and therefore it would not be necessary to lay before Parliament.

The negative procedure is considered appropriate as legislation needs to allow for swift and certain decision making to ensure audiences are protected quickly. Using the negative procedure will balance ensuring that OFCOM are given appropriate regulatory oversight with the ability to act at the earliest opportunity from the moment a risk is identified. Before making regulations the Secretary of State must publish a list of services, or descriptions of a service, that they propose to designate as Tier 1. 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. It would simply be disproportionate to follow the affirmative procedure for each single change made to the list.

In the CA 2003, the Secretary of State is required to consider information from OFCOM on other matters before making regulations. An obligation on the Secretary of State to respond publicly to these consultations or reports is not standard procedure. For example, under s. 264 OFCOM are required to report on the fulfilment of the public service remit for television, but the Secretary of State has discretion over whether and how to respond to that report. In making any additional regulations, it will be up to the Secretary of State to determine whether a further report on the operation of the UK on-demand market by OFCOM is required. Importantly further information may not be needed, or the Secretary of State may be required to make regulations more quickly, in the case of an unregulated service which may be considered to have a high risk of harm.

Ultimately it will be for OFCOM to enforce the requirement to provide information on relevant parties outside UK jurisdiction. It is not expected that larger non-UK VoD services that target UK audiences will not comply with requests for information, though a refusal to comply could be taken into account by the Secretary of State when determining which services to designate for Tier 1 regulation.

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

Q: Why is exercise of this power not triggered by a review or report by OFCOM (either ordered by the Secretary of State or of OFCOM's own initiative)?

A: This replicates existing powers in section 323 of the CA 2003, where by order, the Secretary of State may modify the list of matters in section 319(4) to which OFCOM must have regard to when setting or revising standards in the Broadcasting Code. We do not think there is a reason to deviate from the existing precedent. Before making the regulations under this power, the Secretary of State is required to consult OFCOM. Therefore the effect of a new requirement for OFCOM to report, would largely duplicate the existing requirement to consult OFCOM, introducing administrative challenges that could needlessly delay changes being introduced.

This power does not restrict the Secretary of State requesting an OFCOM report, or OFCOM independently advising the Secretary of State on these matters, if it considers appropriate.

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)

Q: Why is exercise of this power not triggered by a review or report by OFCOM (either ordered by the Secretary of State or of OFCOM's own initiative)?

A: It is for the Government to set out in legislation appropriate access requirements to be placed on designated video-on-demand services. This replicates existing powers in section 303 of the CA 2003 for the Secretary of State to set out the access service requirements for broadcasters and at section 306 to modify these if necessary. Before modifying the access service requirements for VoD services, the Secretary of State is required to consult OFCOM.

4. Regulation of radio services

Clause 38(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

Q: Why is the exercise of this power not subject to statutory consultation with OFCOM and other appropriate stakeholders?

A: This provision enables an extension of the existing regulatory regime for analogue radio to holders of digital radio licences in specific circumstances as prescribed by the new section 315A. The provision has similarities to the powers s244 and s262 of the CA 2003 which allows for modified arrangements to be created by Order for the licensing of local television and community radio by Ofcom. These provisions do not include an express provision to consult either Ofcom or stakeholders before using the powers to modify legislation.

Q: Why is it necessary for this power to be able to amend any Act of Parliament?

A: In the event the Government decides to make new requirements for local news and information on digital radio services, one option would be to insert the new requirements into the CA 2003 after those provisions dealing with localness on analogue radio, or into an appropriate point within the Broadcasting Act 1990 or the Broadcasting Act 1996. This would ensure that all provisions dealing with localness, both on analogue and digital services, are located together which would provide assistance to the readers of the legislation.

Q: Why is the affirmative procedure not required for all regulations made under this clause? Why does this approach not appear on the face of the Bill?

A: 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 considers the affirmative procedure to be appropriate. The Bill only includes provisions applying the affirmative procedure in the event the regulations amend primary legislation. The Department's intention is for all regulations made under this clause to be subject to the affirmative procedure. We thank the Committee for drawing this to the Department's attention, this omission will be corrected in due course.

***Clause 40(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*

Q: Why is exercise of this power not triggered by a review or report by OFCOM (either ordered by the Secretary of State or of OFCOM's own initiative)?

A: It is for the Government to set out in legislation the framework for licensing radio services in the UK, and the scope of this framework. In particular, any decisions on the potential licensing of overseas services for broadcast in the UK should be a matter for the Secretary of State to determine. Any extension of the regime for licensing digital radio services, as a matter of practice, would involve engagement with OFCOM and other relevant stakeholders, and would be subject to parliamentary scrutiny. Therefore, the effect of a new requirement for OFCOM to report would largely duplicate existing requirements already established. The power does not restrict the Secretary of State requesting an OFCOM report, or OFCOM advising the Secretary of State on these matters, if it considers appropriate.

Q: Why is the exercise of this power not subject to statutory consultation with OFCOM and other appropriate stakeholders?

A: As set out above, it is for the Government to set out in legislation the scope of the framework for licensing radio services in the UK, and any decisions on the potential licensing of overseas services for broadcast in this country should be a matter for the Secretary of State. Any exercise of this power would involve engagement with OFCOM and other appropriate stakeholders, and would be subject to parliamentary scrutiny. As set out in the Delegated Powers Memorandum, the Bill as currently drafted applies the negative procedure, but will be corrected to apply the affirmative resolution procedure in due course.

Q: There is some confusion in the Delegated Power Memorandum as to the parliamentary procedure that applies to exercise of this power. Can you confirm your position and how it will be reflected in the final Bill?

A: This extension of the regulatory scheme for digital radio is likely to be of particular interest to Parliament, and therefore the department considers the affirmative procedure to be appropriate. The Bill does not currently include a provision that applies the affirmative procedure, but this will be corrected in due course.

Clause 40(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 Broadcasting Act 1990 (restrictions on the holding of licences)

Q: Why is exercise of this power not subject to consultation with OFCOM or other restriction to ensure the broad power to amend or modify is only used to reflect existing disqualifications?

A: The power is technical in nature as any amendment or modification of Schedule 2 of the Broadcasting Act 1990 enabled by the power would not alter the policy agreed to by Parliament in passing the 1990 Act. As such, the Government considers that its exercise by way of regulations subject to the negative procedure is appropriate and proportionate.

5. Regulation of radio selection services

Clause 42, inserting new section 362BA of the CA 2003: Power for the Secretary of State to amend the definition of a “radio selection service”

Q: Why is this power not subject to statutory consultation either with OFCOM or more widely?

A: OFCOM will have a specific horizon-scanning function under new section 362BY where the Government would expect OFCOM to keep under review advice on which platforms should be designated. In the Department’s view, it would therefore be duplicative to add a specific statutory consultation requirement to the exercise of the power in new section 362BA(2). The power under 362BA(2) to amend the definition of a “radio selection service” (RSS) is key in ensuring the overall integrity of the new regime and its adaptability for the future - by ensuring this definition continues to reflect the state of the art, as technology continues to evolve. Any changes to the definition of an RSS would be subject to the affirmative procedure and would allow for parliamentary scrutiny.

Clause 42, inserting new 362BB(1) of the CA 2003: Power for the Secretary of State to designate “regulated radio selection services” or specify a description of “regulated radio selection services”

Q: The Delegated Powers Memorandum justifies the use of the negative resolution procedure in the exercise of this power on the grounds that “the Bill contains sufficient detail to indicate the types of RSS and categories 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 who will be carrying out the necessary research...”² Why has the view been adopted that this approach is a substitute for parliamentary scrutiny?

A: It is not the Department’s intention for the approach, as outlined in the Delegated Powers Memorandum, to be a substitute for parliamentary scrutiny. The Department believes that this approach allows OFCOM to carry out its function to assess the market and make

² [Delegated Powers Memorandum](#), para. 179

recommendations on designation based on that assessment (and in particular, whether an RSS has a significant number of users); those recommendations will provide the basis and the necessary evidence required to inform any designation made by the Secretary of State - a decision which is akin to a regulatory decision and subject to the rules on quasi judicial decisions. As such, the Department considers that the negative resolution procedure is appropriate.

Clause 42, inserting new 362BB(6) 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*

Q: Why is exercise of this power not triggered by a review or report by OFCOM (either ordered by the Secretary of State or of OFCOM's own initiative)?

Q: Why is the exercise of this power not subject to statutory consultation with OFCOM and other appropriate stakeholders?

A: It is for the Government to set out in legislation the framework for designation of radio selection services. Any alteration of the regime such as to alter the conditions that must be satisfied before an RSS can be designated would involve engagement with OFCOM and other relevant stakeholders, and would be subject to parliamentary scrutiny. OFCOM will have a specific horizon-scanning function under new section 362BY where the Government would expect OFCOM to keep under review advice on which platforms should be designated so therefore there is no need to have an additional requirement to trigger a specific review or report or to require a consultation.

Department for Culture, Media and Sport

June 2023