

Supplementary written evidence submitted by BBC

Letter from Clare Sumner CBE, Director, Policy, BBC, 30 June 2023

Dear Dame Caroline,

I was grateful for the opportunity to appear before the DCMS Select Committee on 20 June. I would also like to thank the Committee for your continued interest, support, and expertise on these issues. We hope that your inquiry will help to refine and improve the Bill over the coming months.

As you know, the BBC believes the Government's draft Media Bill represents a significant intervention to safeguard public service broadcasting into the future.

The need to pass this legislation is urgent. The deficiencies of a 20 year old regulatory framework for the UK's media industry are increasingly apparent. Nowhere more so than on TV prominence. Parliament, Government, Ofcom and industry have been united on this for some time. But it is only now that we are taking action. And the changes in technology and market dynamics also means that the Listed Events regime – conceived in the 1990s – is now also outdated.

The legislative framework needs to be flexible and future proof. But we also need to be bold in addressing the issues that we can see before us – of an increasingly digital media landscape, and one where control and power increasingly rests with a small number of powerful global companies.

That is why we think the draft Bill, whilst extremely welcome, should go further in some key ways.

Specifically, we think the Bill should be amended to do the following:

- The Listed Events regime should be modernised. The Bill should close the streamer loophole – and do it clearly and unambiguously now. Digital clips also need to be brought into the regime too. These can both be addressed in the Bill. Working with the grain of the existing legislation requires some detailed consideration. But we have attached suggestions of how that could be achieved.
- Make clear that the prominence regime for PSB content and services should be 'significant'. A shift to 'significant' rather than 'appropriate' in the prominence regime would better reflect the policy intent of the Bill, and on which there is clear consensus. It gives greater clarity to platforms and the PSBs about the outcomes we should expect. We do not accept that raising that bar should lead to less flexibility for Ofcom to still make sensible and nuanced judgments where necessary.
- Act now to bring remote controls and multi-use devices within scope of the prominence regime. Whilst we think the Bill allows for remote controls and multi- use devices to be in scope of the regime, the explanatory notes make clear that is not the Government's intention. Given remote controls are such a key route for finding content – and with precedent elsewhere in Europe – we should move now to include remote controls within this updated regime. And with increasing viewing on devices other than TV sets, we think a proportionate amendment to ensure that the regime keeps pace with changing technologies and viewing habits is vital too.

We also think there are some important areas of detail where the Bill would benefit from some technical amendment – to ensure it properly meets its objectives.

Specifically the BBC believes the Bill should:

- Apply the principles of the prominence regime in line with the unique funding and regulatory position of the BBC. The BBC's Charter and Agreement – and the incentives and obligations that result - are fundamentally different to that of the commercial PSBs. The Bill gets the 'principles' of the updated prominence regime right. But the practical application needs to vary between the BBC and the commercial PSBs. That does not make the regime any more complex – for the platforms or the regulator. And there is precedent for this sort of approach in the Communications Act. So the Bill must specifically link to the BBC's unique and detailed regulatory framework to ensure the Bill is fit for

purpose for the BBC and its audiences.

- Retain the proportional nature of the quotas for the BBC. This is a technical issue. Nobody is arguing against the principle of the quotas for the PSBs continuing – and they should adapt to reflect on-demand as well as linear delivery. But we don't believe moving to a blanket absolute approach is right. We have suggested some simple amendments to that end.

Thank you again for the opportunity to speak to the Committee and to respond to your questions.

Yours sincerely,

Clare Sumner CBE Director,
Policy

Appendix

This document provides more detail technical suggestions to support our proposed amendments to the Draft Media Bill. It covers Prominence, Listed Events and Quotas.

1. PROMINENCE

We have provided drafting on three issues that I raised in the Committee sessions: must- offer and must-carry requirements as they relate to the BBC, the definition of “appropriate prominence”, and the inclusion of multi-use devices – as well as remote controls – in the regime.

Appropriate prominence

As we have set out on several occasions, we believe that PSBs should receive “significant”, rather than “appropriate” prominence. We do not agree that this would override audience choice as others have claimed. Instead, we believe that this will enable choice and is in line with UK audience expectations: around 7 in 10 UK adults want to see UK life and culture represented and portrayed on-screen, while a similar number agree that PSBs make programmes for UK audiences.¹ As we have stated, we also believe that “appropriate” prominence could be ambiguous. For example, Ofcom’s EPG guidance sets out that CBBC and CBeebies could be in the eighth slot in the relevant section of the EPG, even though we believe that many parents would expect to see them much higher.

This change can be most easily done by introducing amendments to section 362AM on the Ofcom Code of Practice.

In the first instance, we suggest adding a new section 362AM(1A) as follows: *"In preparing the code of practice, Ofcom shall take into account that the degree of prominence which is appropriate is that designated internet programme services are among the most prominent internet programme services on the interface"*. High-level guardrails should also be introduced in the Media Bill and provide a list of matters to which Ofcom is required to have regard when issuing its Code of Practice in section 362AM.

For example, if section 362AM were to be amended, a further new subsection could be inserted to state the matters which Ofcom must provide guidance in relation to. This could read as follows:

“(7) In issuing a code of practice for the purposes of this section, OFCOM must include guidance in relation to:

- (a) search, recommendations and personalisation functions offered by regulated television selection services;*
- (b) access to electronic programme guides within regulated television selection services;*
- (c) intended audience targeted by designated internet programme services;*
- (d) areas of regulated television selection services in which appropriate prominence should be given to designated internet programme services and methods of accessing designated internet programme services to secure the requirements in section 362AL;*
- (e) where menus on regulated television selection services facilitate access to individual programmes provided in a designated internet programme service or*

¹ Ofcom PSB Tracker 2019; Ofcom PSM Tracker 2021.

any listed channel, ensuring that the public service broadcaster can select which programme is given prominence.”

Remote controls and multi-use devices

As the BBC set out in our written evidence, and as discussed at the Select Committee session, we believe that it is crucial that remote controls and multi-use devices such as smartphones, tablets, and laptops are included within the scope of the Media Bill.

As we have set out, we don't believe that bringing multi-use devices and remote controls into scope of the Media Bill would require significant changes to the legislation.

Remote controls

Remote controls are a major gateway to content on TV. The large, dedicated buttons that now appear on remotes for non PSB services are also clearly a key way for young audiences and children to find content too. We therefore believe that remote controls should also be brought into the prominence regime.

We think that remote controls are likely to be within the power of the Secretary of State to define as internet television equipment under section 362AD of the Bill. But it is clear the Government does not want to designate remote controls using that power. We believe that the issue is so critical to public service broadcasters and to their audiences that remote controls should be specifically referred to in the legislation (as they have been in France, for example). This would require a relatively simple update to clause 362AD as follows:

“(3A) Regulations made by virtue of subsection (1) shall provide that “internet television equipment” includes remote control systems giving access to regulated television selection services in so far as they include designated internet programme services.”

A further small amendment would then be required to clause 362AE:

“(2A) Regulations made by virtue of subsection (1)(b) shall designate remote control systems giving access to regulated television selection services in so far as they include designated internet programme services.”

Multi use devices

Between 1 January 2022 and 20 February 2023, around 26% of iPlayer content hours were consumed using these multi-use devices. Ofcom research found that, in 2022, eight in ten children also watched TV on a device other than a TV set – with around half using tablets (55%) or mobile phones (47%), and a quarter using games consoles (27%) or computers (24%).²

In including multi-use devices in the scope of the prominence legislation, the BBC hopes that UK audiences will be able to easily access PSB content and services irrespective of the device they are using. The types of interface that the BBC would want to be included in the Media Bill are primarily services that exist on multi-use devices which replicate TV services, such as Google TV on mobiles and Fire TV on smart displays, in addition to addressing self-preferencing of TV apps by mobile operating system providers (for example, iPads are preloaded with Apple TV).

² Ofcom, ‘Children and parents: media use and attitudes report 2022’. While TV sets are still the most common device for watching films and TV, used by 86% of 3-17 year olds, 81% of children reported watching TV content on a device other than a TV set.

Again, multi-use devices seemingly could be designated by the Secretary of State as “*internet television equipment*” as defined by clause 362AD (1). If designated as internet television equipment, multi-use devices could then be designated as “*regulated television selection services*” under the Media Bill. As it is currently drafted, the draft Bill therefore permits multi-use devices to come into scope of the prominence regime.

However, the Explanatory Notes suggest that it is not the Government’s intention to exercise these powers to include multi-use devices within the prominence regime: “*Subsection (3) allows the Secretary of State to exclude certain devices from the definition where delivery of TV is not necessarily the core function of the device. The intention is to capture devices such as Smart TVs and set-top boxes, which are primarily used to access TSS*” (clause 109).

We understand this reluctance to designate such devices is due to concerns that TV services could receive prominence at the expense of other apps, such as WhatsApp or Gmail. To be clear, the BBC would not agree with such an outcome either.

However, we do not believe that would happen.

1. Firstly, Ofcom’s Code of Practice issued under clause 362AM (6) can include actions recommended in relation to “*particular descriptions*” of regulated television selection services. Ofcom could ensure that non-TV apps are excluded when assessing appropriate prominence on multi use devices.
2. Secondly, this issue will not arise in most cases. It could be that the only aspect of the multi-use device in scope of the prominence regime is the part which presents programmes, and not those parts which involve other services, such as communication services. This is because clause 362AD talks about a “*dissociable section*” of a service which consists of the presence of internet programme services. It’s that dissociable section which will be classed as the regulated television selection service and subject to the prominence requirements. The other sections of the service which do not consist of the presentation of programmes would not be caught by the prominence regime.

Multi-use devices should therefore be included in the regime from the outset, for the reasons we have outlined above.

We have also suggested that the Secretary of State is required to review which internet television equipment is in scope every three years, to ensure that the regime keeps pace with changing technologies and viewing habits. This would require an amendment to section 362AD on the meaning of “*television selection service*”, which includes the provisions that empower the Secretary of State to specify which internet television equipment is in scope. For example, section 362AD could be amended to include a new subsection (9) which reads:

“(9) The Secretary of State shall review the descriptions of apparatus or combinations of apparatus that are specified to be internet television equipment at least every three years to secure that the list reflects technological developments.”

A clear link between the BBC's regulatory framework and the Bill's must-offer and must-carry obligations

We do not agree with comments from other witnesses that there should be one set of prominence rules that cover all PSBs. The BBC plays a unique role in the UK's media landscape. We have distinct must-offer obligations, which already apply to all UK Public Services, including BBC Online (which includes BBC iPlayer). We are required by our Charter and Framework Agreement to publish a Distribution Policy, following consultation with the public and Ofcom, outlining the reasonable conditions under which we will make our output and services available to third parties. These conditions include, for example, securing appropriate prominence, attribution, quality, data and value for money. We are legally required to offer the UK Public Services to third parties without charge, and to act on a FRND basis when doing so.

The draft Media Bill already recognises the BBC's distinctive regulatory framework and is clear that it does not impose additional must-offer obligations on the BBC under new section 362AI (see s.115 of the Explanatory Notes). We welcome this. However, there is no equivalent recognition of the BBC's distinctive regulatory structure in the draft Bill's must-carry provisions, which apply to all designated internet programme services (new section 362AJ).

We welcome the draft Media Bill's inclusion of a must-carry obligation on RTSS providers with respect to the BBC DIPS. Because our existing must-offer requirements for BBC iPlayer are not counterbalanced by a must-carry requirement for platforms, our negotiating position to secure its inclusion on reasonable terms has been significantly weakened in recent years, particularly as regards platforms who might not have an interest in supporting UK PSBs.

We believe the Media Bill should also set out a distinctive must-carry requirement for platforms with regard to the BBC, which does not refer to the Bill's agreement objectives but instead to our obligations under the Framework Agreement. That would be an entirely consistent approach and would be more workable for the BBC.

If the must-carry provisions are to achieve the Government's policy aims around securing prominence for public service BBC content, it should require that the arrangements with the RTSS must conform to the conditions of our Distribution Policy, which are in effect the minimum commercial terms that the BBC is required to agree to when distributing our services. This will ensure that the BBC can enter commercial negotiations with global platforms on a more level playing field.

Our proposed amendments to the Bill are as follows:

"362AJ Must-carry obligations

(1) The provider of a regulated television selection service must—

(a) in respect of each designated internet programme service, enter into arrangements with the provider of the designated internet programme service for the regulated television selection service to include that designated internet programme service, and

(b) keep them in force.

(2) The provider of a regulated television selection service must act consistently with the agreement objectives when entering into arrangements in pursuance of subsection (1) and while they are in force.

(3) Subsections (1) and (2) do not apply in respect of any designated internet programme service provided by the BBC.

(4) In respect of each designated internet programme service provided by the BBC, the provider of a regulated television selection service must –

(a) in respect of each designated internet programme service provided by the BBC, enter into arrangements with the BBC for the regulated television selection service to include that designated internet programme service, and

(b) keep them in force.

(5) The provider of a regulated television selection service must act consistently with the strategy and policy developed by the BBC, pursuant to clause 62 of the BBC Agreement and in accordance with the BBC's obligations in clause 61 of the BBC Agreement (and equivalent provisions in future BBC Agreements), when entering into arrangements in pursuance of subsection (4) and while they are in force.

(6) For provision applying where there is a dispute about the arrangements that should be made or their operation, see sections 362AQ to 362AV.”

2. LISTED EVENTS

Background

The Listed Events regime has meant that key national sporting events and moments have been broadcast by the PSBs free-to-air for the past 25+ years. The benefits of this are well documented: they have united the UK and its constituent nations and regions in ways very few other things can manage. They have created national pride. They have played a vital role in promoting the nation's well-being, the UK economy and the UK's standing overseas.

The draft Media Bill in the market context

We welcome the Government's ongoing recognition of the importance of Listed Events and the draft Bill's approach to amend the s.98 BA 1996 qualifying criteria such that services provided by a PSB will be qualifying ("Category A") services.

However, the ways in which audiences access and consume content has changed substantially in recent years. The rights market is very different too.

While OTT subscription services' spend on sport has lagged behind other areas that is now changing and we are seeing major interventions in the UK and western markets more broadly from dedicated sports services like Dazn and Viaplay – and now from general streamers such as Amazon, Apple TV and Youtube – alongside a decline in spend from traditional broadcasters. Sport is a uniquely valuable property for subscription services as it can attract new subscribers and prevent churn.

We are of the view that a situation in which a streamer tries to acquire exclusively a Listed Event (either in part or full) is increasing in probability all the time. But the current legislative framework does not protect against that, and there is a clear risk some Listed Events disappear behind a paywall.

Given the significance of the live element to Listed Events (and to sport in general) it would be remarkable to leave such a situation as wholly unregulated. We note that in the next 12 months or so rights to listed events including the men's Football World Cup, the women's Football Euros and men's Cricket Test matches are expected to be tendered.

As the BBC and other PSBs have outlined to the Committee, the draft Media Bill misses the opportunity to safeguard the regime against the threat of live-streamers and to complement the existing linear protections with protections for digital, on-demand coverage.

The Media Bill is the opportunity to address these issues. Primary legislation in this area is infrequent and if this window is missed it is very unlikely another one will open before the Listed Events landscape changes irrevocably.

The streamer loophole

The existing Listed Events regime only applies to "television programme providers" – i.e. holders of Ofcom broadcast licences (plus BBC and S4C).

The draft Media Bill extends the regime to include "Internet Programme Services". But this has technical and jurisdictional limitations. In short, that expansion will fail to capture

services which are purely live streams or services which are not headquartered in the UK or whose editorial decision-making is outside the UK.³

This means that pure streaming services (i.e. services which do already, or may in future, provide access to live coverage over the internet, with no on-demand aspect) will remain free to serve UK audiences entirely outside of the Listed Events regime.

One possible solution would be to amend the definition of “internet programme service” to include live-streamers for listed events purposes. However, given the reliance of other substantive parts of the Bill on the definition of internet programme service, we have sought to avoid unintended consequences by not pursuing this option.

Another possible solution, which we understand is the Government’s preferred approach, is for the Government to use an existing power in the Communications Act 2003, whereby the Secretary of State to designate further EPGs as “Regulated EPGs”. This could extend Ofcom’s jurisdiction and bring services which live-stream (with no-on demand element) within scope of the Listed Events regime, as “Television Programme Services”.

However, this approach will be ineffective. It relies on a live-streamer appearing on an EPG, which would be straightforward to get around. It also relies on being able to show that a streamer’s principal purpose is providing programmes to be seen on television. This could be ambiguous at best. Finally it will result in significant ongoing work and oversight by the Secretary of State in order to keep adding regulation to capture fast developing and ever changing technological advances.

This approach would create uncertainty in the market, reducing any leverage the PSBs have, and probably significantly increasing the price of these rights. If there isn’t complete clarity over the rules they will be exploited and leveraged by rights sellers.

Our suggestion is that the better option is merely an extension of the current proposals, so that the Bill will recognise a third category of service and include them in scope, alongside television programme services and internet programme services. The umbrella concept would be “relevant audiovisual services” and providers of them would become subject to key provisions of the regime.

This could be done without affecting other provisions of the Media Bill and in particular works with existing s.98 proposals in the Media Bill.

Digital on-demand rights

As previously discussed, digital on-demand rights are now central to audience expectations. At Tokyo 2021 we sometimes saw digital on demand clips and highlights reaching 10 times more people than our live coverage (particularly where an event had a British success and was overnight).

In our view the simplest intervention to achieve the aims outlined above would be to extend the regime to on-demand rights under the familiar model that currently protects live and highlights coverage. The new protection would be similar to the current formulation which

³ See limbs (e) and (f) in definition of ODPS in s.368A Comms Act 2003

applies to live coverage of Group B events, i.e. via a requirement for “adequate alternative coverage” on-demand.

This can be achieved by inserting, via the Media Bill, one new substantive provision into Part 4 of BA 1996 (after the current s.101 provisions), and some minor consequential amendments.

The precise scope of the on-demand rights (i.e. what rights are captured, the amount of content the PSB could provide on demand, what a reasonable time delay/holdback may be) can all be effectively set out in the Ofcom Code. This follows the existing model whereby the legislation outlines the framework to protect coverage of the listed event and the details and flexibility to take account of the circumstances of the event in question, are provided by Ofcom in the Code. The necessary changes to the Code could be consulted on in detail with relevant stakeholders, ensuring that the wider market had the opportunity to input into the proposed changes at the appropriate stage.

In respect of the drafting proposals outlined above (the streamer loophole solution and digital rights), we would be happy to provide DCMS or this Committee with a full drafting schedule outlining the necessary revisions.

3. INDEPENDENT PRODUCTION QUOTAS

The BBC supports the principle that the Government has set out, that public service delivery should count across a range of platforms, on-demand as well as linear. However, we share the concerns raised by Channel 4 that absolute quotas may not be sufficiently flexible.

The BBC commissions TV content from across the breadth and diversity of the UK's production sector. We are the broadcaster with the strongest creative and economic footprint across the UK, commissioning over £1.4bn of original TV content in 2021/22 and working with 334 independent producers – 61% of whom were based in the Nations and English regions.⁴ We regularly exceed our 25% independent productions quota, with 31% of BBC productions made by qualifying independent companies in 2021,⁵ and in 2021/22, we met all of our regional and original production quotas.⁶ We remain committed to supporting the range and diversity of our supplier base: for example, our Small Indie Fund ringfences £1m a year to back independent producers with a turnover of less than £10m per year, who in most instances count towards our independent productions quota when commissioned.

In order to effectively deliver on the BBC's Public Purposes, it is essential to adapt our commissioning strategy on a rolling basis, taking into account a range of constantly changing factors – such as audience performance, changes to producer locations, volumes, and qualifications, levels of third-party investment, inflationary pressures, and fluctuations in spend and hours driven by sport and other events (for example, 2022 was a particularly high sports year, increasing the total number of broadcast hours). Because absolute hours-based quotas are inherently inflexible, we will have to make trade-offs in order to meet absolute quotas that we don't have to make under the current, proportional framework, to the detriment of audiences.

For example, budgetary constraints mean that the BBC is currently making choices about where to invest in our TV content. Going forward, we are investing in fewer, higher-value hours. With respect to the hours that are relevant for the independent productions quota, there will be a forecast reduction of around 500 hours in 2024/25 compared to our current hours. An overall reduction in hours means that an absolute figure, set in stone and based on historic averages where the BBC's total hours were higher, will be proportionally higher.

We note that the Government has raised concerns that applying proportional quotas across a PSB's entire linear and on-demand output would represent a significant expansion of the present quota system, which is one of the key reasons for changing the way that quotas are set from a proportional to an absolute basis. However, a better solution may be to introduce a proportional quota that applies only to public service remit content, whether that is delivered via broadcast or on-demand.

Even if absolute hours are introduced for the other PSBs, we believe that there is a relatively simple solution for the BBC: that the Government takes advantage of our distinctive regulatory framework to retain our proportional quotas. The BBC's independent, regional, and original productions quotas already apply across all our linear broadcast channels. We do not therefore think that applying them to our on-demand services would represent the same expansion of regulation for the BBC as it would for the other PSBs. Importantly, maintaining proportional quotas for the BBC will preserve the Government's policy

⁴ BBC, Commissioning Supply Report 2021/22.

⁵ Ibid.

⁶ BBC, Annual Report and Accounts 2021/22.

intent – and retain this important regulatory intervention that has benefitted both audiences and the production industry.

The following drafting sets out changes to the draft Media Bill that would allow the BBC to deliver its independent productions quota in a service-neutral way, but continue to be set on a percentage basis.

Changes to the independent productions quota for the BBC are set out in Schedule 1, Part 1 of the draft Media Bill (*“Quotas: the BBC”*). This can be amended as follows:

- Paragraphs 1(1), 1(3), 1(6), and 1(10) to remain without amendment.
- Paragraphs 1(4), 1(7), and 1(8) to be omitted.
- Paragraph 1(2) to be replaced with the following:

“For sub-paragraph (1) substitute—

“It shall be the duty of the BBC to secure that, in each year-

(a) it makes available qualifying audiovisual content that includes a range and diversity of independent productions commissioned in accordance with any relevant code drawn up by the BBC under the BBC Charter and Agreement, and

(b) those independent productions represent not less than 25 per cent of the total duration of qualifying audiovisual content made available by the BBC.”

- Paragraph 1(5) to be replaced with the following:

“In sub-paragraph (5), for the words from “, in each year” to the end of the sub- paragraph substitute

“- (a) in each year, it makes available qualifying audiovisual content that includes a range and diversity of independent productions commissioned in accordance with any relevant code drawn up by the BBC under the BBC Charter and Agreement, and

(b) the cost of the acquisition of those independent productions is not less than the percentage specified in the order of its programming budget.”

- Paragraph 1(9) to be replaced with the following:

“In sub-paragraph (14), in the definition of programming budget, for “qualifying programmes” substitute “qualifying audiovisual content”.