

MEDIA BILL

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED INTO THE HOUSE OF COMMONS

1. This Memorandum has been prepared by the Department for Culture, Media and Sport (“the Department”) and addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Media Bill (“the Bill”).
2. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Rt Hon Lucy Frazer KC MP, the Secretary of State for Culture, Media and Sport would propose to make a statement that in her view the provisions in the Bill, as introduced, are compatible with the Convention rights.

Summary of the Bill

3. The Media Bill will reform the legal framework for the regulation of public service broadcasting in the UK.
4. The Bill is structured in 7 Parts and 12 Schedules. The Parts cover:
 - 4.1. **Part 1 - Public Service Television:** amends broadcasting legislation to enable Public Service Broadcasters (PSBs)¹ to contribute to their PSB remit though any audiovisual content on relevant audiovisual services² (including internet programme services³) and to reformulate which content can contribute to the public service remit for television. The Bill will also enable PSBs to meet specific programming quotas (namely, independent, original and regional production quotas) through designated internet programme services (IPS) as well as their “main” public service television service.

¹ These are the BBC, S4C Digital (the Welsh language channel), a Channel 3 service (i.e. ITV1 in England and Wales, STV in parts of Scotland and UTV in Northern Ireland), Channel 4 and Channel 5.

² “Relevant audiovisual services” are defined in new s264(11) Communications Act 2003.

³ “Internet programme service” is, in effect, defined in the Bill to mean either an on-demand programme service or a mix of on-demand programmes and live-stream television programme services e.g. BBC iPlayer, ITVX: see section 362AA(10) in new Part 3A to the CA 2003 as inserted by clause 28 [j3]

- 4.2. The Bill also amends the “listed events” regime⁴, so that qualifying services can only be provided by a PSB. It updates the range of services which fall within scope of the regime with a new definition of “relevant services”, which can include non-UK providers.
- 4.3. **Part 2 - Prominence on television selection services:** introduces a new part 3A to the Communications Act 2003 (CA 2003) so that public service content is given appropriate prominence online, which means it is available and easy to find across a range of new platforms that viewers use to watch TV online (referred to in the Bill as “regulated television selection services”). The existing rules only apply to linear TV and predate the widespread availability of TV programmes online (for example, on smart TVs). The regime is to be enforceable by notices which can require providers of the designated IPS (other than the BBC) and regulated television selection services to take steps to remedy any contravention and/or impose a financial penalty. (Enforcement against the BBC is to be by the Office of Communications (“Ofcom”), under existing provision under the BBC’s Royal Charter and Framework Agreement.) It also provides Ofcom with power to require information from relevant persons and a new dispute resolution function in the event that regulated television selection services and PSBs cannot agree terms in relation to the availability and discoverability of such content.
- 4.4. **Part 3 - Public Service Broadcasters (PSBs)**
- 4.4.1. **Chapter 1: C4C (Channel 4 Corporation):** will require C4C to carry out their activities in a way that they have reasonable grounds to consider would be most likely to enable the Corporation over the long term to maintain or increase the amount of activity that is done in pursuance of their primary functions and securely meet the costs incurred in doing so. The Bill also provides C4C with additional flexibility to discharge this 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 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 is to have powers to enforce the commissioning statement against C4C by way of directions,

⁴ Part 4 of the Broadcasting Act 1996 (BA 1996) gives the Secretary of State the power to draw up a list of sporting events of national interest (commonly known as ‘listed events’). This is aimed at ensuring that key sporting events that have a ‘special national resonance’ are available to be shown on free-to-air.

which can be escalated to imposing licence conditions and ultimately a fine.

- 4.4.2. Chapter 2: S4C (Sianel Pedwar Cymru, the Welsh language television service): in response to the independent review of S4C, *Building an S4C for the future* (2018) the government committed to implementing a number of recommendations to support S4C in adapting to rapid technological and market change. The Bill therefore updates S4C's public service remit, and provides greater clarity on its ability to invest and generate commercial revenue.
- 4.5. **Part 4 - On-demand programme services**: contains provisions which give OFCOM new powers to regulate certain on-demand programme services via a Code ("ODPS"), to ensure that audiences are protected from harmful content when they are watching material on-demand (e.g. Netflix). While there is a high standard of rules in place to protect audiences watching broadcast TV, the same is not currently true of ODPS services (with the exception of BBC iPlayer). These provisions will enable larger, TV-like ODPS providers that are not currently regulated in the UK but who target and profit from UK audiences to be regulated by OFCOM. Measures will also be included in respect of ODPS accessibility to ensure ODPS services can be accessed by people with disabilities including in particular persons who are deaf or hard of hearing or persons who are blind or partially-sighted.
- 4.6. **Part 5 - Regulation of Radio Services**: these measures have the primary aim of reducing various regulatory burdens on radio services and OFCOM.
- 4.7. **Part 6 - Radio Selection Services**: this would establish a new regulatory framework to require radio selection services (e.g. voice assistant services usually available via smart speakers such as Alexa and Siri) to provide access to radio services available on the internet and to place further requirements on radio selection services on how radio services are accessed. The enforcement regime will be similar to the regime applying to television prominence (Part 2).
- 4.8. **Part 7 - Miscellaneous and General**: makes general provisions on consequential amendments, extent and commencement etc as well as the following miscellaneous provisions:
 - 4.8.1. Publishers of news-related material: contains provisions which would repeal section 40 of the Crime and Courts Act 2013 (currently uncommenced). Section 40 could, if commenced, require courts to award costs against news publishers in certain

civil claims relating to the publication of news-related material if the news publisher was not a member of the approved regulator.

- 4.8.2. Amendments related to the UK's withdrawal from the EU: addresses failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU.

The Bill and Convention Rights

PART 1: PUBLIC SERVICE TELEVISION

Financial Penalties for failure to comply with a power to require information

Background

5. Clause 18 [j2114] inserts new section 338A and 338B into the CA 2003 to provide OFCOM with a power to serve an information notice on persons requiring them to provide OFCOM with any information they require for the purposes of carrying out their extended functions relating to the regulation of public service broadcasting in the UK. In accordance with new section 338B, a penalty not exceeding £250,000 may be imposed for non-compliance with an information notice. The penalty may include an amount for each day on which the person fails to comply with the information notice up to a maximum of £500 a day. OFCOM must publish and keep up to date a statement of their proposed approach to issuing notices and imposing and recovering penalties under this section: section 392 CA 2003.
6. Equivalent provision is made by clause 24 [jlist104A] to enable OFCOM to require information for the purposes of carrying out their functions relating to the listed events regime with the same maximum penalty for non-compliance as above.

Article 6 (right to a fair trial)

7. Article 6 ECHR provides that everyone is entitled to a fair trial, that is a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
8. The power to fine engages the protections of Article 6(1) as it involves the imposition of an obligation to pay the relevant penalty. Although it is necessarily fact sensitive, the potential severity of the penalties for some persons may mean that they are viewed as criminal in nature. Requirements for a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.
9. Nonetheless, whether the penalties are criminal in nature or not, the process for their imposition meets the requirements of fairness.

10. OFCOM's decision-making process does not, of itself, provide Article 6 guarantees, because it is not a court or tribunal. However, penalty decisions by OFCOM are amenable to challenge by way of an application for judicial review. The existence of this review, where the reviewing court can set aside OFCOM's decision if the Court considers it was wrongly imposed, allow fresh evidence and quash findings of fact if needed, quash any penalty and remit the matter to OFCOM for reconsideration, is sufficient to ensure that the process as a whole is compliant with Article 6. This is particularly so given that the original decision by OFCOM must meet rigorous requirements - OFCOM is required to give reasons for requesting the information and the consequences of not complying (new section 338A(5) CA 2003 and new 104A(6) BA 1996), ensure the penalty is proportionate to the contravention (new section 338B(4) and (6) CA 2003 and new section 104B(4) and (6) BA 1996), and give a reasonable opportunity to the person to make representations about the matters complained of (new section 338B(1)CA 2003 and section 104B(1) BA 1996). OFCOM must also have regard to their published guidelines in determining the amount of the penalty: section 392(1) CA 2003.

Financial penalties for licensed public service channels

Background

11. In respect of a licensed public service channel (i.e. a Channel 3 service, Channel 4 and Channel 5), the maximum financial penalty which OFCOM can impose for a failure to comply with a condition of the licence is currently 5% of the licence-holder's qualifying revenue for the last complete accounting period (section 41 of the Broadcasting Act 1990). This Bill changes the way "qualifying revenue" is to be calculated so that it is no longer limited to the revenue of the licensed public service television channel in question but is also able to include the revenue in respect of any other designated internet programme service provided by the licence holder or its associate (clause 19(4) [j2108a]).
12. This Bill also makes equivalent amendments to the calculation of "qualifying revenue" in respect of the maximum penalty for a licensed public service channel's failure to begin providing a licensed service after a licence has been granted but before that licence has come into force in section 18 of the Broadcasting Act 1990 (clause 19).

Article 6 (right to a fair trial)

13. For the reasons as set out above, the process for the imposition of a financial penalty meets the requirements of fairness under Article 6 ECHR. Penalty decisions by OFCOM under this provision are amenable to challenge by way of an application for judicial review. The existence of this review, where the reviewing

court can set aside OFCOM's decision if the Court considers it was wrongly imposed, allow fresh evidence and quash findings of fact if needed, quash any penalty and remit the matter to OFCOM for reconsideration, is sufficient to ensure that the process as a whole is compliant with Article 6. This is particularly so given that the original decision by OFCOM must meet rigorous requirements - OFCOM are required to give reasons for imposing the penalty, ensure the penalty is proportionate to the contravention, and give a reasonable opportunity to the person to make representations about the matters complained of (see for example, section 41(3) BA 1990). OFCOM must also have regard to their published guidelines in determining the amount of the penalty: section 392(1) CA 2003.

Changes to broadcasting licence

Background

14. Current legislation only enables contributions to the public service remit to be made by the PSB's public service broadcast television services. Clauses 1 and 2 of the Bill amend sections 264 to 264A of the CA 2003 so that when reporting on the PSB's fulfilment of the general public service remit, OFCOM can also consider content provided by PSBs on any of their relevant audiovisual services. This includes both broadcast material (whether by satellite, cable or radio transmission) and material available online (whether watched live or on-demand). Clause 3 makes equivalent changes to the individual public service remits of the licensed public service channels.
15. Clause 1(2) also simplifies the public service remit so that it is fulfilled when public service broadcasters taken together provide a wide range of audiovisual content which provides comprehensive news; reflects the different communities, cultural interests and traditions in the UK, and; includes an appropriate range and proportion of programmes that are independent productions (with an appropriate amount made outside the M25).
16. A quota is a quantitative obligation placed on a PSB to commission and/or broadcast a minimum amount of a certain type of content per year. This Bill makes amendments (see clauses 8 to 17) so that PSBs can meet their quotas not only through their public service channels as now (e.g. ITV1) but also through an internet programme service (e.g. ITVX) if designated by OFCOM. The revised quotas are to be set on a "hours" (not percentage) basis. This is because the concept of 'percentage of broadcast time' no longer works when applied to on-demand services which may have extensive catalogues. OFCOM will continue to have the discretion to set the respective quotas for each PSB.

17. All of these matters will result in changes to the terms of PSB broadcasting licences, and changed licence conditions.

Article 1, Protocol 1 (protection of property)

18. Article 1, Protocol 1 of the ECHR entitles everyone to the peaceful enjoyment of their possessions. No one is to be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. A PSB channel's broadcasting licence is likely to be a possession for Article 1, Protocol 1 purposes.
19. However, the changes to the licence conditions in those broadcasting licences would not amount to an interference with that possession. If anything, the changes made by the Bill to the meaning of public service content are a relaxation of existing obligations. Moreover, the intention is to enable the PSBs to meet their public service obligations through different audio visual media *if they so choose*. Any decision to deliver their public service obligations through their internet programme service would be their own decision, not one imposed upon them. Accordingly, the proposals will not engage a PSB's right to the protection of property.
20. In any event, any interference would be justified in the public interest as the government considers that these changes will ensure the continued provision of a broad range of public service content, accessible to all types of audiences. Such a decision is within the wide margin of appreciation afforded to the state.

Listed Events: restriction on showing live coverage

Background

21. Currently, the "listed events" regime works by prohibiting the exclusive live broadcast of an event on the list drawn up by the Secretary of State without prior consent from OFCOM unless the broadcasting rights have been acquired by both a person providing a "qualifying service" (i.e. a free to air broadcast channel received by 95% of the population⁵) and a non-qualifying service (i.e. any other broadcaster). As a result, an event operator who wants to get coverage of its event might have to secure that it sells rights to at least one person providing a "qualifying service" and at least one person providing a "non-qualifying service". An event operator might establish its own television programme service for reception in the UK, or part of the UK, on which it would be able to show its own event live. In that case, it would be prevented by section 101(1) of the Broadcasting Act 1996 from showing the event live unless either it had allowed a provider of a television programme service in the other category to acquire rights

⁵ As a matter of practice, the only services which meet the criteria for "qualifying services" are provided by PSBs.

to live coverage of the event or it had secured OFCOM's consent. Where a broadcaster wants to show exclusive live coverage of one of the listed events, it must first apply for OFCOM's consent who will consider the application taking into account matters set out in their Code.⁶

22. The changes to be made by the Media Bill are firstly to require that a qualifying service must be provided by a PSB (so long as it is free to air) and secondly, to extend the types of programme services within scope of the listed events regime to include a broad range of internet and digital services including non-UK providers defined as "relevant services". This means that an event operator would then not be able to retain exclusive rights to show a listed event live on any relevant programme service provided by itself unless it has also either sold the coverage rights to the provider of a "relevant service" in another category to its own (e.g. a PSB), or OFCOM consent. A person wishing to show exclusive live coverage of one of the listed events will still be able to apply for OFCOM's consent, as now.

Article 1, Protocol 1 (protection of property)

23. In requiring either consent or a minimum of two persons to have the rights to show a listed event and requiring one of those persons to be a PSB providing a free to air service, the listed events regime affects the use to be made of the coverage rights to that event by the owner. This potentially engages the protections conferred by Article 1, Protocol 1 against deprivation or control use of possessions, save in the public interest and subject to the conditions provided for by law.
24. The measures will not amount to a deprivation of property but a restriction of its use or enjoyment. In any event, this restriction can be justified as part of the measures necessary to enforce laws in the public interest. It is prescribed in legislation and advances a legitimate aim to ensure that key events of sporting or other national importance are made available to all viewers, particularly those who cannot afford the extra cost of subscription programme services. Further, there is the flexibility for a provider to apply to OFCOM for consent to show exclusive live coverage of a listed event.

PART 2: PROMINENCE ON TELEVISION SELECTION SERVICES

Financial penalties for infringement of the new online prominence framework

Background

25. New enforcement powers will be conferred on OFCOM, enabling them to tackle infringements of prominence duties by regulated television selection services,

⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0029/35948/ofcom_code_on_sport.pdf

providers of designated IPS (other than the BBC)⁷ or persons who do not comply with an information notice issued under new section 362AS. New section 362AZ enables OFCOM to issue a provisional notice of enforcement action where they consider there are reasonable grounds for believing that the regulated television selection service has failed or is failing in respect of a prominence obligation or a person has not complied with an information notice. The provisional enforcement notice must specify a period during which the recipient can make representations, after which OFCOM may then issue a confirmation decision (see new section 362AZ1) if they consider, following the representations, that the person is failing or has failed to comply with the notified requirement or information request. This notice will either set out steps the provider must take to comply, or impose a penalty, or both. The maximum penalty amount that can be imposed on regulated television selection service or a provider of an IPS (other than the BBC or S4C) is £250,000 or 5% of qualifying worldwide revenue, whichever is greater. This reflects the existing maximum in respect of on-demand programme service providers: see section 368J CA 2003. The maximum penalty in respect of the BBC and S4C or another person who fails to comply with a duty to provide information is £250,000. This reflects the current maximum in respect of third parties (i.e. those who are not providers) in section 368Z10(8) CA 2003 and in respect of the BBC and S4C in section 198(5) and section 341(3) CA 2003 respectively.

Article 6 (right to a fair trial)

26. Article 6 ECHR provides that everyone is entitled to a fair trial, that is a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
27. The power to fine engages the protections of Article 6(1) as it involves the imposition of an obligation to pay the relevant penalty. Given the potential severity of the penalties, it is possible that a court would find that the penalties are criminal in nature and so impose stricter requirements in order to comply with Article 6.
28. Nonetheless, whether the penalties are criminal in nature or not, the process for the imposition of them will be fair as there are safeguards built into the Bill. These include an explicit statutory requirement for OFCOM to give reasons for issuing a penalty, see new sections 362AZ3(2)(a) and 362AZ4(5)(a); a right for regulated service providers to make representations and provide evidence to the regulator (see new section 362AZ4(4)(b)) which OFCOM must take account of in making any determination on penalties (paragraph 2(1) and (2) of new Schedule 16A as inserted by Schedule 10) and a requirement on OFCOM for the penalty to be proportionate and appropriate with regard to the nature and extent of the alleged

⁷ Existing provisions under the BBC's Charter and Framework Agreement are to be used to enforce duties imposed on the BBC.

contravention (paragraph 2(4) of Schedule 16A). OFCOM must also have regard to their published statement setting out guidelines they propose to follow in determining the amount of penalties they impose (see section 392 CA 2003).

29. Further, penalty decisions by OFCOM are amenable to challenge by way of application for judicial review. Thus, if such a substantial fine is imposed that it may be considered criminal in nature for Article 6 purposes, the provisions of the Bill are nonetheless compatible with Article 6.

Prominence on television selection services: “must carry” obligations

Background

30. The providers of a designated IPS will be required to ensure that their service is offered to regulated television selection services, subject to the need to agree terms (see new section 362AJ as inserted by clause 28). Conversely, each regulated television selection service will be under a duty to make the “offered” designated IPS available on their service: see new section 362AK. These provisions seek to replicate the “must offer” and “must carry” obligations in the linear space: sections 272, 273 and section 64 of the CA 2003 respectively.

Article 1, Protocol 1 (protection of property), Article 10 (freedom of expression)

31. By requiring the owners of regulated television selection services to carry designated IPS which are not of their choosing, the “must carry” obligation in new section 362AK (to be inserted by clause 28) affects the use to be made of the owners’ property. This potentially engages the protections conferred by Article 1, Protocol 1 against deprivation or control of use of possessions, save in the public interest and subject to the conditions provided for by law and by the general principles of international law.
32. Also, the “must carry” duty potentially engages their right to impart information under Article 10 ECHR, since this right is affected when one requires someone to promulgate messages which are not their own.

Justification for interference with Article 1, Protocol 1

33. The measures will not amount to deprivation of property but a restriction of its use or enjoyment. This restriction can be justified as part of the measures necessary to enforce laws in the general interest. The requirement to carry particular PSB programme services would advance a legitimate aim in the general interest, namely the enhancement of public access to public service content when accessed online. This is equivalent to how electronic communications networks

are required to carry PSB content now in respect of broadcast television (section 64 CA 2003).

34. Any cost on the regulated television service would be the subject of commercial negotiation with the PSBs when agreeing terms for offer and carriage and in the event of any dispute, a party would be able to refer the dispute to OFCOM for resolution, or, as now, seek arbitration or mediation or instigate legal proceedings. This ensures that the “must carry” duty would not become excessively burdensome for the regulated television service: see also the PSB’s obligation to offer (new sections 362AJ).

Justification for interference with Article 10

35. The interference is prescribed by law, as the duty is formulated in such a way as to provide those affected with sufficient certainty and foreseeability about their obligations. Further, as set out in paragraph 33 above, there are safeguards included to prevent the duty becoming excessively burdensome.
36. The interference also pursues the legitimate aims of the protection of the rights of others as the “must carry” duty substantially enhances the ability of the public to enjoy their right under Article 10 to receive information and ideas regardless of frontiers, particularly in relation to news and current affairs.
37. The interference is also necessary in a democratic society. The government considers that the public’s ability to receive information, particularly with regard to keeping up to date with the news and current affairs, is of the utmost democratic importance.

Dispute resolution procedure

Background

38. OFCOM are to be given a new dispute resolution function to resolve matters when the provider of a designated internet programme service and regulated television selection service providers cannot agree commercial terms for the offer and carriage of designated internet programme services and/or the level of discoverability/prominence: see new sections 362AT to 362AY CA 2003 (as inserted by clause 28). One or more parties to the dispute may refer a dispute to OFCOM for resolution and where OFCOM consider it is highly likely that the parties will not agree arrangements for the carriage of the PSB’s designated internet programme service, OFCOM will be required to handle the dispute unless they consider that there is no alternative means available which is likely to provide a prompt and satisfactory resolution of the dispute. OFCOM also have power to impose interim measures pending the determination of that dispute. Both an

interim measure and final determination by OFCOM are binding on the parties: see sections 362AV(9) and 362AX(8).

Article 6 (right to a fair trial)

39. Article 6 ECHR provides that in the determination of their civil rights, everyone is entitled to a fair trial, that is a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
40. There is a question as to whether the dispute resolution procedure concerns the determination of a civil right. For the purposes of Article 6, there must be a dispute regarding a right which can, at least, on arguable grounds, be recognised under domestic law (Boulois v Luxembourg, application 37575/04).
41. The “must offer” obligation on providers of a designated IPS in new section 362AJ requires OFCOM to impose conditions in the broadcasting licence for licensed public service channels to offer designated programme services as available (subject to the need to agree terms). In effect, this is an invitation to treat, which, under common law, is not an enforceable contract. As and when an enforceable contractual offer is actually made (i.e. a specific and complete promise by one party to enter into a contract on certain terms made with the intention of being bound by the acceptance) will depend on the individual circumstances surrounding the negotiations.
42. Nonetheless, to the extent that any determination under OFCOM’s new dispute resolution procedure is a determination of a person’s civil rights for Article 6 purposes, the process meets the requirements of fairness for Article 6.
43. OFCOM’s decision-making process does not, of itself, provide Article 6 guarantees, because the body is not a court or tribunal and not an independent decision-maker for the purposes of Article 6. However, decisions by OFCOM are amenable to challenge by way of an application for judicial review. The existence of this review, where the reviewing court can set aside OFCOM’s decision if the Court considers it was wrongly imposed, allow fresh evidence and quash findings of fact if needed, quash any penalty and remit the matter to OFCOM for reconsideration, is sufficient to ensure that the process as a whole is compliant with Article 6. See for instance Telefonica v OFCOM [2008] EWCA Civ 1373 where Lord Justice Jacob’s judgement makes clear that the courts applying judicial review principles can consider the merits of a case where the circumstances require it (paragraphs 20 to 29). OFCOM’s decision can be set aside if the appellant can show that OFCOM’s decision was “wrong”: see for instance EE Ltd v Competition Commission [2013] EWCA Civ 154.

PART 6 - RADIO SELECTION SERVICES

Background

44. This Part creates a new statutory framework to regulate the provision of online services which allow a user to request, using a voice command addressed to a device such as a 'smart speaker', a radio service to be played.
45. This framework is to be inserted as a new Part 3B to the CA 2003 and is to work as follows:
 - 45.1. Radio selection services (RSS): are defined as online services which enable a person to select an internet radio service and cause it to play. The Secretary of State may only designate such a service as a "designated radio selection service" if it considers, having received advice from OFCOM, that the use of service to listen to internet radio is significant. By way of example, it is envisaged that Amazon's Alexa will be designated. The definition of "radio selection service" may be amended by affirmative regulations.
 - 45.2. Internet radio services: are defined as sound services distributed to the public via the internet. A relevant internet radio service is a service which has the same content (except for advertising), and is distributed at the same time, as a licensed radio or BBC radio service.
 - 45.3. Duty to provide access to internet radio services: a regulated RSS is required to take all reasonable steps to provide access to a relevant internet radio service where requested to do by the radio service. This is sometimes inaccurately referred to as a "must carry" obligation; this is a "must provide access" obligation.
 - 45.4. Other duties: in doing so, a regulated RSS must ensure that: it provides access to the radio service via the method (possibly including aggregator services) requested by the radio service; it only provides access to the service requested (and not additional advertising); it does not charge the radio service for access; and publishes a statement about how it intends to comply with these duties.
 - 45.5. Enforcement powers and fees: these mirror the enforcement provisions for television prominence (see above). However, there is no provision for a dispute resolution function, as the new statutory framework does not require providers of regulated radio selection services and internet radio services to enter into arrangements with each other.

Financial penalties for infringement of the new radio selection framework

Article 6 (right to fair trial)

46. The new enforcement powers to be conferred on OFCOM mirror those for the new prominence framework for television selection services (see paragraphs 20

above). The same analysis applies. For the same reasons as set out at paragraphs 24 and 25, we consider these provisions to be compatible with Article 6 ECHR.

Radio selection services: “must provide access” obligations

Article 10 (freedom of expression)

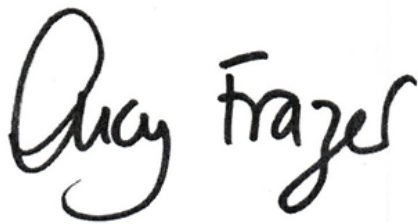
47. By requiring the providers of regulated radio selection services to provide access to internet radio services which are not of their choosing, the “must provide access” obligation in inserted section 362BI (to be inserted by clause 48[rss01]) potentially engages their right to impart information under Article 10 ECHR, since this right is affected when one requires someone to promulgate messages which are not their own.
48. The interference is prescribed by law, as the duty is formulated in such a way as to provide those affected with sufficient certainty and foreseeability about their obligations. The providers that are likely to be designated as regulated radio selection services already provide access to internet radio services at no cost so it is very unlikely that the “must provide access” duty would become excessively burdensome for their providers.
49. The interference also pursues the legitimate aims of the protection of the rights of others as the “must provide access” duty substantially enhances the ability of the public to enjoy their right under Article 10 to receive information and ideas regardless of frontiers, particularly in relation to news and current affairs.
50. The interference is also necessary in a democratic society - the government considers that the public’s ability to receive information, particularly with regard to keeping up to date with the news and current affairs, is of the utmost democratic importance.

Radio selection services: “must provide access” obligations

Article 1, Protocol 1 (protection of property)

51. By requiring the providers of regulated radio selection services to provide access to internet radio services which are not of their choosing, the “must provide access” obligation in new section 362BI (to be inserted by clause 48 [rss01]) affects the use to be made of the providers’ property. This potentially engages the protections conferred by Article 1, Protocol 1 against deprivation or control of use of possessions, save in the public interest and subject to the conditions provided for by law and by the general principles of international law.

52. The measures will not amount to deprivation of property but a restriction of its use or enjoyment. This restriction can be justified as part of the measures necessary to enforce laws in the general interest. The requirement to carry particular radio services (which are public service in nature) would advance a legitimate aim in the general interest, namely the enhancement of public access to public service content when accessed online. This is equivalent to how electronic communications networks are required to carry PSB content now in respect of broadcast television (section 64 CA 2003) and the prominence provisions in this Bill.
53. Any cost on the regulated radio selection service for providing access would be negligible and, in any case, compensated by the fact that internet radio service would be providing valuable content to be included in the radio selection service encouraging more individuals to use the service and purchase connected audio services provided by the service. It is very unlikely that the “must provide access” duty would become excessively burdensome.

A handwritten signature in black ink that reads "Lucy Frazer". The signature is written in a cursive, flowing style.

Department for Culture, Media and Sport
8th November 2023