

# MEDIA BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the parts and clauses of the Media Bill as introduced in the House of Commons on 8 November 2023 (Bill 8).

- These Explanatory Notes have been prepared by the Department for Culture, Media and Sport in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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# Overview of the Bill

- 1 The Media Bill will reform the legal framework for the regulation of public service broadcasting, make changes to on-demand programme service (“ODPS”) regulation in the UK and make changes to the legal framework for the regulation of radio; including conferring new powers and duties on the Office of Communications (“Ofcom”) and the Secretary of State for Culture, Media and Sport. The draft Bill will also repeal an uncommenced provision of the Crime and Courts Act 2013 related to the regulation of news publishers.
- 2 The draft Bill is divided into 7 parts, as follows:
  - Part 1 contains provisions that update the legislative framework for public service broadcasting (“PSB”), including provision to facilitate the delivery of public service content through digital platforms. This part also amends the “listed events” regime, so that qualifying services can only be provided by a public service broadcaster, and updates the range of services which fall within scope.
  - Part 2 contains provisions that will mean that public service content on designated services is prominent online, which means it will be available and easy to find across a range of television platforms that viewers use to watch TV online (for example, on smart TVs).
  - Part 3 contains provisions to address the sustainability challenges faced by Channel Four Television Corporation (“C4C”), including the introduction of a new sustainability duty and removal of an existing restriction on its involvement in programme-making. This part also implements recommendations of the independent review of S4C, *Building an S4C for the future*, published in 2018. The provisions apply the PSB legislative framework updates from Part 1 to S4C, while retaining the Welsh language content requirement.
  - Part 4 contains provisions which provide Ofcom new regulatory powers to draft and enforce a Video-on-Demand (“VoD”) Code.
  - Part 5 contains provisions to update the regulatory framework for commercial radio.
  - Part 6 contains provisions to protect UK radio’s availability on connected audio devices, including ensuring that stations cannot be charged for the provision of their live service to listeners and that they are findable in response to a listener request.
  - Part 7 contains miscellaneous and general provisions including the repeal of section 40 of the Crime and Courts Act 2013, which could (if commenced) require news publishers to pay the costs of any court judgement if they were not a member of the approved regulator, regardless of the outcome of the court judgement. It also makes amendments to primary broadcasting legislation to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU.

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# Policy background

## Context

- 3 Public service broadcasting generally refers to the provision of television programmes for the public benefit. In order to meet their public service obligations, public service broadcasters (“PSBs”) must provide a range of high-quality and diverse TV programming which meets the needs of audiences across the UK. The current PSBs are the BBC, S4C and the Channel 3, 4 and 5 licence holders.
- 4 Public service content is intended to be socially valuable. Important national and international events are covered by PSBs and they are a trusted source of accurate and impartial news and current affairs. Public service content is also intended to be universal – available to the overwhelming majority of the population without charge.
- 5 Since the concept of PSB first emerged over 80 years ago, the legislative framework has had to evolve in line with changing technology. Most recently, the proliferation of smart TVs, coupled with high-speed fixed and mobile internet connections, has allowed viewers to access TV programmes flexibly from an ever greater range of providers. As a result, audiences are increasingly moving away from watching linear television on a traditional TV set.
- 6 At the same time, while public service content is still highly valued by viewers, changes in viewing habits and constantly developing technology means that PSBs are experiencing new challenges. For example, in the last decade, internet-based media services, and in particular subscription-based VoD services, have become increasingly popular with viewers and now compete with PSBs for content, revenue and audiences. The Government is of the view that the legal framework for PSB needs to change to assist the PSBs in meeting these challenges.
- 7 In November 2020 the Government announced a strategic review of public service broadcasting, and appointed a PSB Advisory Panel to assist in the review. This followed a report by the House of Lords Communications and Digital Committee (*Public Service Broadcasting: As Vital As Ever* (November 2019)), which was itself followed by reports from the DCMS Select Committee (March 2021), and OFCOM (July 2021) about the future of PSB. OFCOM’s report – titled *Small Screen Big Debate: Recommendations to Government on the Future of Public Service Media* – is the latest of their quinquennial reports. The consensus across these reports was that the PSB system needed a refresh to reflect:
  - a. Changing technology: Just as the advent of cable and satellite services revolutionised broadcasting in the 1980s and 1990s, so the increasing adoption of internet-delivered services is revolutionising broadcasting now, creating new delivery methods with their own gatekeepers and business models;
  - b. Changing consumer habits: Today’s viewers now have a huge amount of choice in terms of what they watch and how they watch it – and they are taking advantage of it. In particular, they have continued to move away from linear (“live”) viewing to on-demand viewing. But they are also shifting to different platforms, types of content

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and methods of viewing; and

- c. Increased competition: Changes in technology and consumer habits have set the stage for new global players to emerge (particularly, but not exclusively, subscription-based VoD services).
- 8 The Government is also strongly committed to securing that the public value of radio is maintained and in February 2020 commissioned the Digital Radio and Audio Review, which was undertaken in conjunction with a broad cross-section of industry stakeholders with the objective of assessing likely future trends in listening and to make recommendations on ways of strengthening UK radio and audio.
- 9 The report of the Review was published in October 2021. It found that a growing proportion of radio listening is now online, particularly via voice-activated connected audio devices, and that there was likely to be a shift in bargaining power in favour of voice assistant platforms vis-à-vis radio broadcasters over the coming years. It therefore included recommendations as to potential legislative intervention to secure radio's position in this environment into the future.

## Broadcasting White Paper and Digital Radio and Audio Review

- 10 In June 2021, the Government announced that the conclusions of its strategic review would be set out in a broadcasting white paper. *Up next – the Government's vision for the broadcasting sector* was published on 28 April 2022, on the same day as the Government's response to the Digital Radio and Audio Review. *Up next* set out a range of actions that the Government intends to take to reform the legal framework that governs public service broadcasting among other things, while the Government's response to the Digital Radio and Audio Review acknowledged that the case had been made for new regulation to protect radio's long term position in the context of the rapid growth in usage of smart speakers and other connected devices. The Media Bill includes provision to deliver those reforms.

## Outline of the Bill

### Part 1 - Public service television

- 11 This Part of the Bill updates and simplifies the current public service remit for television. It also seeks to change the legislative framework for PSB to give PSBs greater flexibility in how they contribute to that remit. In particular, it provides that public service content made available on a wide range of audiovisual services, including VoD services, can contribute towards fulfilment of the remit. This Part also amends certain quotas (quantitative obligations placed on a public service broadcaster, generally to commission and/or broadcast at least a certain amount of a certain type of content) to allow PSBs to deliver against these quotas by way of any on-demand services which are, or are part of, a designated "internet programme service" (see Part 2). This Part also repeals sections 218 to 223 of the Communications Act 2003, which relate to the public teletext service. (Provision of the service ceased in 2009.)

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## Part 2 - Prominence on television selection services

- 12 Prominence effectively means giving designated PSB channels and services a privileged (or “prominent”) position on services through which audiences access this content. The existing regulatory framework for ensuring carriage and prominence of PSB channels, set out in the Communications Act 2003, does not extend to the PSBs’ online services, including on-demand and livestreamed programme services, nor services that enable viewers to navigate and select TV programmes beyond the TV guide (electronic programme guide), such as the user interfaces (“UIs”) on smart TVs, set-top boxes and streaming sticks. The Government is seeking through this Bill to give designated PSB services prominence on major TV services.

## Part 3 - Public service broadcasters

- 13 Channel Four Television Corporation (C4C) faces long-term sustainability challenges, in part because the linear advertising revenue on which it substantially relies is in decline. In this context, the Bill gives C4C a new duty which requires that the Corporation carry out their activities in the way that they consider most likely to enable the Corporation to maintain or increase the amount of activity that is done in pursuance of their primary functions, and to securely meet the costs of carrying out its primary functions. The Bill also provides C4C with additional flexibility to meet these sustainability challenges, and discharge their new duty, by removing an existing restriction on C4C’s involvement in programme-making.
- 14 S4C is the UK’s only dedicated Welsh language broadcaster, and as such has a unique cultural and social value, as well as making a vital economic impact. S4C began broadcasting in 1982, and broadcasts sport, drama, music, factual, entertainment and events programmes, across a range of platforms. In response to the independent review of S4C, *Building an S4C for the future*, published in 2018, the Government committed to implementing a number of recommendations to support S4C in adapting to rapid technological and market change. The Bill accordingly updates S4C’s public service remit, and provides greater clarity on its ability to invest and generate commercial revenue. The new unitary board and audit arrangements, recommended by the review and already implemented on an administrative basis, will be given a statutory footing. Finally, this part will also enable S4C and the BBC to agree an alternative arrangement for BBC support to S4C, which in the Government’s view would better suit the evolving broadcasting landscape and the changing way in which people access content.

## Part 4 - On-demand programme services

- 15 VoD services (referred to as On-demand Programme Services in legislation, “ODPS”), such as Netflix and Amazon Prime Video, provide huge value to UK audiences and growing contributions to the UK economy. These services, other than BBC’s iPlayer, are not subject to OFCOM’s Broadcasting Code, which sets out appropriate standards for content including harmful or offensive material, due accuracy in news, fairness and privacy. This Bill will give OFCOM powers to draft and enforce a new Video-on-demand Code, similar to the

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Broadcasting Code, to ensure TV-like content, no matter how audiences choose to watch it, will be subject to similar standards. This new regime will be aimed at the largest, most TV-like VoD services to ensure that major services which engage UK audiences at scale are subject to the same or similar obligations as UK broadcasters. This part also contains provisions to implement requirements on VoD service providers to ensure that on-demand services are accessible to people with disabilities. These will align with existing statutory requirements for access services in place for linear broadcasters.

## Part 5 - Regulation of radio services

- 16 Analogue (AM / FM) commercial radio services in the UK are regulated under a licensing framework which was developed in the 1990s, before the emergence of online listening. This Bill removes a number of regulatory burdens, including requirements on stations to provide specific genres of content, as well as amending OFCOM's duties around localness to focus on a narrow duty to secure the availability to listeners of local news and information. It will also allow for the UK licensing regime to be extended to radio stations based overseas but seeking to provide a service to UK listeners, as well as updating the legislative powers relating to any potential future switch-off of analogue services. It will also expand existing grant-making powers to allow funding for community-related programmes to be made to small commercial stations and producers of audio content.

## Part 6 - Regulation of radio selection services

- 17 With the rapid growth of listening via voice-activated connected audio devices over recent years, UK radio is increasingly operating within an environment which is occupied by larger platforms with competing services and the capability to drive audiences elsewhere. This Bill will ensure that UK radio stations are not charged by these platforms for the provision of their live services to listeners, that platforms cannot overlay content (such as advertising) over the top of those services, and that stations are reliably provided in response to listeners' voice commands. It will also enable station providers to request a default route for their stations to be delivered to listeners.

## Part 7 - Miscellaneous and general

- 18 Part 7 contains miscellaneous and general provisions dealing with consequential provision, extent of the Bill and commencement. It contains three further clauses. First, it inserts common provision about penalties which may be imposed by OFCOM in relation to Part 2 (prominence on television selection services) and Part 6 (regulation of radio selection services). Second, clause 50 will repeal section 40 of the Crime and Courts Act 2013. Further to the recommendations of the Leveson Inquiry in 2012, the Press Recognition Panel was established. Sections 34 to 42 of the Crime and Courts Act 2013 contain the legislative incentives relating to the awards of costs and exemplary damages to join an approved self-regulator. In November 2016, the Government launched a consultation on whether to commence section 40 of the 2013 Act. The Government response was published in March 2018

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with the Government concluding that section 40 was no longer necessary. This Bill seeks to repeal section 40. Third, clause 51 introduces Schedule 12, which makes amendments to primary broadcasting legislation to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the UK.

## Legal background

19 The principal pieces of existing legislation that are relevant to the public service broadcasting provisions in this Bill, and which are amended by provisions in this Bill, are:

- a. Part 1 of the Broadcasting Act 1990 (“BA 1990”), which primarily contains provisions on the licensing of non-BBC TV services;
- b. The Broadcasting Act 1996 (“BA 1996”), which primarily contains provisions on licensing digital terrestrial TV services; and
- c. The Communications Act 2003 (“CA 2003”), which contains further provisions relating to television services in Part 3 of that Act, and provisions relating to on-demand services in Part 4A of that Act.

20 There are different legal and regulatory frameworks for broadcast television and television on-demand.

21 Broadcast television (also known as “linear” or “live” television) means programmes which are transmitted by a signal (whether by airwaves, satellite or an electronic communications network such as the internet) from one point (the broadcaster) to many indeterminate points (the viewers) who watch the same images at the same time as they are transmitted.

22 In terms of the broadcast television services which are licensable (see section 211 of the CA 2003), the legislation provides that such services must be “provided with a view to its availability for reception by members of the public”. The term “reception” is used in the CA 2003, the BA 1990, and the BA 1996 to denote some type of transmission of a signal.

23 The phrase “available for reception by members of the public” is further defined in section 361 CA 2003 to include subscription services (section 361(1)) but not on-demand services (section 361(2)). The viewer has no choice when to watch them; the broadcaster “pushes” out the programmes to the viewer at a given time. Broadcast television encompasses analogue and digital television and streaming over the internet.

24 In contrast, on-demand programme services (also known as “non-linear television”) are not transmitted as described above, but are services generally accessed by means of the internet (whether before or after the user has selected the programmes to view), which enable the viewer to “pull” the programme at a time of the user’s choosing from a catalogue of programmes selected by a media service provider (see section 368A(2) CA 2003; e.g. BBC iPlayer).

25 The Office of Communications (“Ofcom”) is the independent regulator in the UK for *These explanatory notes relate to the Media Bill as introduced to the House of Commons on 8 November 2023 (Bill 8).*



broadcast and on-demand television. OFCOM was established by the Office of Communications Act 2002 but received its full authority from the CA 2003 (see Part 1).

- 26 Under section 368B CA 2003, OFCOM are responsible for the regulation of on-demand television in the UK, although only in certain circumstances for S4C.

## **Territorial extent and application**

- 27 Clause 54 sets out the territorial extent and application of the Media Bill.
- 28 Broadcasting and internet services policy are reserved across the United Kingdom, and “other media” including press regulation is reserved in respect of Wales. As such the Government assesses that the Media Bill is reserved.
- 29 The Media Bill will extend and apply to the whole United Kingdom, with the exception of clause 50 in Part 7 of the Bill, which extends and applies to England and Wales only (see section 61(13)(d) of the Crime and Courts Act 2013).
- 30 In respect of Scotland and Northern Ireland, press regulation is not listed in the reservations in the Scotland Act 1998 or Northern Ireland Act 1998 respectively. Equivalent provision to Section 40 of the Crime and Courts Act 2013, an uncommenced provision which the Media Bill will repeal, was not made by the Scottish Parliament or Northern Ireland Assembly.
- 31 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom.

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# Commentary on provisions of Bill

## Part 1: Public service television

### The public service remit for television

Clause 1: Reports on the fulfilment of the public service remit, and clause 2: OFCOM reports: wider review and reporting obligations

- 32 Section 264 of the CA 2003 establishes the public service remit for television. This comprises the “purposes” of public service television (section 264(4)), which are to be fulfilled in accordance with the “public service objectives” (section 264(6)). At present, the public service remit can only be fulfilled by way of programmes broadcast by the PSBs on relevant television services. These services are: all BBC television services, S4C, the Channel 3 services, Channel 4 and Channel 5 (section 264(11)). It also sets out how OFCOM must report on PSBs’ fulfilment of the remit. Section 264A requires OFCOM to report on the extent to which material included on other television and radio services, on-demand programme services and other internet services contributes towards the public service objectives.
- 33 This clause amends section 264 to update and simplify the current public service remit, and to allow PSBs to contribute towards that remit with programmes made available on a wider range of services (including their on-demand services).
- 34 Subsection (2) of this clause replaces the current PSB “purposes” and “objectives” (set out in subsections (3) to (8) of section 264) with the new public service remit for television:
- a. New subsection (3) replaces the existing subsection (3) of section 264. It sets out the requirement on OFCOM to report periodically on the fulfilment of the remit.
  - b. New subsection (4) replaces the existing subsection (4) of section 264. It provides that the remit is fulfilled when the PSBs together “make available” a wide range of audiovisual content which (and in a manner which) meets the needs and satisfies the interests of as many different audiences as possible. This range of content must include the public service content described in subsection (5) and reflect an appropriate range of genres (subsection (6)). “Make available” is defined in new subsection (13) by reference to a set of relevant audiovisual services which PSBs can use to make contributions towards the fulfilment of the remit (subsections (11) and (14)). This includes, but is broader than, just their public service channel (sometimes referred to in legislation as a television broadcasting service (see section 362 of the CA 2003)).
  - c. New subsection (5) replaces subsections (5) and (6) of section 264. It sets out the principal types of public service content which can form part of a PSB’s contribution to the remit. This includes news and current affairs content; distinctively British content, including content broadcast in a recognised indigenous minority and

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regional language of the UK; original, independent and regional productions; and certain programmes aimed at children and young people. Some of these terms are defined in new subsection (16).

- d. New subsections (7), (8) and (8A) introduce a requirement that, for content to contribute to the remit, the public service broadcaster must have taken steps to ensure that it may be received or accessed by as many of their intended audience as is reasonably practicable in an intelligible form and free of charge. In particular, it must be possible for audience members to receive or access both the particular content in question, and the service that that content appears on, free of charge (but there is no requirement that other content that appears on that same service be available free of charge).
- e. New subsection (8B) includes a specific requirement that where public service content is provided by a PSB's on-demand programme service, then (if it is to contribute to the fulfilment of the PSB remit) it must be available for viewing for a period of at least 30 days. News programmes and programmes containing coverage of sporting events are exempted from this requirement (new subsection (8C)).
- f. New subsection (8D) gives the Secretary of State a power, by way of regulations, to amend the period of time which public service content provided on-demand must be made available for if it is to contribute to the fulfilment of the PSB remit. New subsections (10A) and (10B) set out the appropriate consultation requirements for such regulations and require that the draft affirmative procedure is used.
- g. New subsections (8E) and (8F) replace subsections (7) and (8) of section 264 (matters which OFCOM must consider).

35 Clause 2 updates section 264A in light of the new public service remit for television.

### Clause 3: Public service remits of licensed providers

36 Section 265 of the CA 2003 sets out the statutory remits for each of the licensed public service channels (i.e. channels 3, 4 and 5: section 362). The remits for channels 3 and 5 are the same (the "provision of a range of high quality and diverse programming"). Channel 4 has an extended remit that specifies the need for their programming to be innovative, creative, experimental and distinctive, for it to take account of cultural diversity and to include educational programmes. There is a separate requirement in section 270 that the licensed PSBs must make an adequate contribution towards the fulfilment of the public service remit for television.

37 This clause amends section 265 to update the public service remits of licensed public service channels to make clear that the high quality and diverse programmes they make available must themselves contribute to the public service remit for television, and together represent an adequate contribution to that remit (subsections (2) and (3)).

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- 38 Subsection (4) allows PSBs to fulfil their channel remits by means of any audiovisual service which PSBs can use to contribute towards the PSB remit (see clause 1).

#### Clause 4: Statements of programme policy, and clause 5: Changes of programme policy

- 39 Section 266 of the CA 2003 mandates OFCOM to require the providers of the licensed public service channels (i.e. channels 3, 4 and 5: section 362) to prepare statements of programme policy which set out how they intend to fulfil their individual channel remits (see clause 3). Currently, these statements must only be prepared in relation to the PSBs' public service channel. Section 267 sets out how PSBs go about making changes to their statements of programme policy, and requires them to consult OFCOM if a change is deemed "significant". A significant change is defined as one that would result in the PSBs' public service channel becoming "materially different in character" from previous years.
- 40 In light of the changes to clause 3, clause 4 amends section 266 CA 2003 so that the licensed PSBs must also set out in their statements of programme policy which audiovisual services they will use to fulfil their channel remit, and, if so, the contributions that each service will make.
- 41 Clause 5 amends section 267 to update the definition of a "significant change" so that it applies if any of the services a licensed public service broadcaster is using to deliver its remit were to become "materially different in character" (rather than just their public service channel).

#### Clause 6: Enforcement of public service remits

- 42 Section 270 of the CA 2003 gives OFCOM specific enforcement powers to use in the event they believe the provider of a licensed public service channel (i.e. channels 3, 4 and 5: section 362) has failed to fulfil its statutory remit, or make an adequate contribution to the public service remit for television. If OFCOM determine that the situation requires the exercise of their powers, they can issue a direction to the licensed public service broadcaster setting out the steps for remedying the failure. If OFCOM remain dissatisfied they can then impose additional licence obligations on the public service broadcaster.
- 43 This clause amends section 270 to make clear that OFCOM can make directions and impose licence conditions in relation to any services which the public service broadcaster has indicated they are using to fulfil their channel remit (inserted subsections (4A) and (7A)).
- 44 In light of the ability of licensed PSBs to use on-demand programme services to deliver their remits (see clause 3), subsection (3) allows OFCOM to consider the record of the provider in relation to Part 4A (which relates to on-demand programme services) when considering enforcement action.
- 45 In addition, subsections (2), (5), and (6) make changes consequential on clause 3.

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## Clause 7: Power to amend public service remit for television in the United Kingdom

- 46 This clause amends section 271 of the CA 2003 (power to amend the public service remit). It makes changes consequential on clause 1.

## Programming quotas for public service television

### Clause 8: Quotas: independent productions

- 47 Section 277 of the CA 2003 sets out a minimum proportion of broadcast hours (“qualifying programmes”) which must be independent productions. This is set at 25% for each of the licensed public service channels (i.e. channels 3, 4 and 5, section 362). The Secretary of State is responsible for defining “independent productions” by order (section 277(2)(b)). They may also amend the level of the quota, or establish a quota established with reference to expenditure in addition to, or instead of, the quota established with reference to broadcast hours.
- 48 This clause amends section 277 to change the way in which the provider of a licensed public service channel may deliver their independent production quota(s).
- 49 Subsection (2) of this clause amends section 277(1) of the CA 2003. It replaces the existing requirement on the provider of a licensed public service channel to allocate time “in the channel” to the broadcasting of a range and diversity of independent productions with a more general requirement to “make available” these productions in the form of “qualifying audiovisual content” (see clause 11).
- 50 Subsection (2) also clarifies that, to count towards the quota, such productions must be commissioned in accordance with the provider’s commissioning code (see subsection (9)(a) of this clause and section 285 of the CA 2003).
- 51 Subsection (2) also replaces references to a “proportion” of hours that the providers of the licensed public service channels must make available with reference to a “number” of hours. The number of hours that each licensed public service channel must include is to be specified by order of the Secretary of State.
- 52 Subsections (3), (4), (6) and (10) make consequential amendments.
- 53 Subsections (5), (7) and (9)(b) make comparable provision in relation to the expenditure quotas which the Secretary of State may establish.

### Clause 9: Quotas: original productions

- 54 Section 278 of the CA 2003 provides that a minimum proportion of broadcasting hours must be allocated to original productions. The proportion for each licensed public service channel (i.e. channels 3, 4 and 5: section 362), as well as the proportion to be determined in peak viewing times) is determined by OFCOM. The Secretary of State is responsible for defining “original productions” by order (section 277(6)). In doing so, they may confer such discretions

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- on OFCOM as they think fit (section 277(7)).
- 55 This clause amends section 277 to change the way in which the provider of a licensed public service channel may deliver their original production quota(s).
- 56 Subsection (2) of this clause amends section 278(1) of the CA 2003. It replaces the existing requirement on the provider of a licensed public service channel to allocate time “in the channel” to the broadcasting of original productions with a more general requirement to “make available” these productions in the form of “qualifying audiovisual content” (see clause 11).
- 57 Subsection (2) also replaces references to a “proportion” of hours which must be made available with references to a “duration (in total)”, which is to be expressed as a number of hours. The number of hours that the provider of each licensed public service channel must include is to be determined by OFCOM. OFCOM may also consider that it is appropriate for some of those hours to be provided in peak viewing times (the “additional peak viewing time objective”). In this case, OFCOM may determine the number of hours to be included in the channel in peak viewing times.
- 58 Subsection (4) inserts a new subsection (7A) into section 278. This new subsection allows the Secretary of State to authorise OFCOM to exclude certain types of content (for example, teleshopping) from counting towards the quota. The Secretary of State is also empowered to require OFCOM to publish guidance in relation to these exclusions, and to authorise OFCOM to require licensed PSBs to have regard to that guidance.
- 59 Subsections (3) and (5) make consequential amendments.

#### Clause 10: Power to create additional quotas for qualifying audiovisual content

- 60 This clause inserts a new section 278A into the Communications Act 2003. This new section establishes a mechanism for the creation of additional quotas for audiovisual content which is not being made available by one or more providers of a licensed public service channel to the extent that is appropriate.
- 61 Subsection (1) of the new section 278A empowers the Secretary of State to (by regulations) specify a description of this audiovisual content. The Secretary of State may only make such regulations following a recommendation from OFCOM under section 229 or 264 of the CA 2003 (subsection (3)). Subsections (5) and (6) set out appropriate consultation requirements and subsection (7) sets out procedural requirements for the regulations, including usage of the draft affirmative procedure.
- 62 Should the Secretary of State make regulations under subsection (1), subsection (4) requires OFCOM to mandate the provider of each licensed public service channel to make available an appropriate number of hours of “qualifying audiovisual content” (see clause 11) meeting the description specified in the regulations.

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## Clause 11: Quotas: meaning of “qualifying audiovisual content” etc

- 63 This clause inserts a new section 278B into the Communications Act 2003. This new section defines what is meant by a public service broadcaster “making available” “qualifying audiovisual content”.
- 64 Subsection (1) of the new section 278B defines “qualifying audiovisual content” as content included in a “qualifying audiovisual service” (see subsection (5)).
- 65 Subsection (2) of the new section provides the definition of “making available” qualifying audiovisual content. It establishes that, for PSBs to have made that content available, they must have provided it by a way of a “qualifying audiovisual service” they, or a person associated with them, provide (see subsection (5)). The content must be “free of charge”, and, where it has been included in an on-demand programme service, it must have been included in that service for at least the period specified in 1 (30 days).
- 66 Subsections (3) and (4) of the new section establish what it means to make something available “free of charge” for the purpose of this section.
- 67 Subsection (5) provides the list of “qualifying audiovisual services”. This includes television broadcasting services (broadly, the public service channels), and on-demand programme services which are, or form part of, designated internet programme services. Having consulted OFCOM, the Secretary of State may add additional audiovisual services to this by way of regulations. Such regulations are subject to the draft affirmative procedure (subsection (8)).

## Clause 12: Quotas: further provision about their fulfilment

- 68 As set out in more detail above, at present PSBs can only meet their quotas by way of programmes broadcast on their main linear television channel(s) (their ‘public service channels’). Programmes which have been broadcast before in substantially the same form (‘repeats’) are able to count towards some but not all of these quotas.
- 69 Clauses 8, 9, 14 and 17 (read with clause 11) make provision for PSBs to be able to fulfil their independent, original and regional productions quotas by making audiovisual content available via any “qualifying audiovisual service” they provide (subject to certain conditions). This raises the potentially complex question of whether making substantially the same audiovisual content available multiple times should count towards these quotas.
- 70 To address this, this clause inserts a new section 278C into the Communications Act 2003. This new section requires the Secretary of State to make provision for the appropriate treatment of material which is made available by a public service broadcaster multiple times, whether on the same service (as with a traditional ‘repeat’) or across multiple services, and whether in the same year or different years.
- 71 Except in relation to the independent productions quota, regulations made by the Secretary of

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State may, rather than making provision directly, instead require OFCOM to make provision (subsection (5)). Before making regulations, the Secretary of State must consult OFCOM (subsection (9)). Regulations made under this power are subject to the affirmative procedure (subsection (10)).

### Clause 13: Quotas: independent productions: commissioning code

- 72 Section 285 of the CA 2003 requires that the provider of each licensed public service channel (i.e. channels 3, 4 and 5: section 362) draw up a code of practice that they will apply when commissioning independent productions for that channel (referred to in legislation as a television broadcasting service). These codes of practice must be consistent with guidance issued by OFCOM.
- 73 In light of the amendments made by clause 8, subsection (1) of this clause extends the scope of those codes to also cover the commissioning of independent productions for other qualifying audiovisual services (see clause 12) which the provider wishes to count towards their independent productions quota (see section 277 of the CA 2003 as amended by clause 8).
- 74 Subsection (3) amends section 285 of the CA 2003 to mandate OFCOM to secure that the public service broadcaster doing the commissioning provides the person who is being commissioned with information about the application of the code.

### Clause 14: Regional programme-making: Channels 3, 4 and 5

- 75 Sections 286 and 288 of the CA 2003 provides that a minimum proportion of programmes made in the United Kingdom for showing on a licensed public service channel (i.e. channels 3, 4 and 5: section 362) are programmes made outside the M25 area (i.e. are regional productions). Comparable provision is made in respect of expenditure. The proportions for each licensed public service channel are determined by OFCOM.
- 76 This clause amends sections 286 and 288 to change the way in which the provider of a licensed public service channel may deliver their regional production quotas.
- 77 Subsection (2) amends the regional production quota for the Channel 3 services. It changes references to programmes “made for viewing” on the relevant licensed public service channel with a more general reference to “qualifying audiovisual content” made available by the provider of that channel (see clause 11). The amount of such content to be made available by the provider of each licensed public service channel is to be determined by OFCOM.
- 78 Subsection (2) also replaces references to a “proportion” of hours which must be made available and “proportion” of expenditure with references to a “duration (in total)” and “amount” of expenditure respectively (also to be determined by OFCOM).
- 79 Subsection (3) makes the comparable change for Channel 5, and subsections (7) and (8) amends section 288 of the CA 2003 to make the comparable change for Channel 4.
- 80 Subsections (4), (5) and (9) make consequential amendments.

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## Clause 15: Networking arrangements for Channel 3

- 81 This clause amends section 290 of the CA 2003, which relates to the existence of a system of networking arrangements which govern the interaction between the providers of the different regional Channel 3 services. Such arrangements must be approved by OFCOM. In considering whether to approve the arrangements proposed by a provider, OFCOM must consider whether the arrangements meet the three networking objectives set out in section 290(4).
- 82 Subsection (2)(a) amends the second networking objective, which relates to the providers of a Channel 3 service making programmes available “for broadcasting in all regional Channel 3 services”. It replaces these words with the words “for inclusion by all the holders of those licences in qualifying audiovisual services provided by them”. (For the definition of “qualifying audiovisual services”, see clause 12.)
- 83 Subsection (2)(b) amends the third networking objective, which relates to the need for the “regional Channel 3 services (taken as a whole) to be... able to compete effectively with other television programme services provided in the United Kingdom”. It reframes the objective in terms of the ability of the providers of those services to be able to compete effectively with both television programme services and on-demand services provided in the United Kingdom.
- 84 Subsection (4) amends the requirement on OFCOM to review annually any networking arrangements as it has previously approved, replacing it with a requirement to review them at least every five years.

## Clause 16: Removal of quotas for school programmes on Channel 4

- 85 In light of the provision made by clause 10, this clause repeals section 296 of the Communications Act 2003.
- 86 Section 296 of the CA 2003 makes provision for a quota in respect of schools programmes on Channel 4. This quota is currently set at 30 minutes per year.

## Clause 17: Quotas: the BBC and S4C, and Schedule 1

- 87 In light of the changes made to the quota obligations imposed on the licensed public service channels by virtue of clauses 8 and 9, this clause introduces Schedule 1, which makes comparable provision for the BBC and S4C.

## Information

### Clause 18: Power to require information

- 88 This clause inserts two new sections into the CA 2003.
- 89 New section 338A gives OFCOM the power to issue information notices in relation to their functions under sections 198B to 198D, sections 263 to 294, Schedule 11, and certain provisions

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in Schedule 12 to the CA 2003. An information notice compels the party receiving the notice to provide OFCOM with the information specified in the notice, including where such information must first be obtained or generated by the party. An information notice may be served on a public service broadcaster other than the BBC or (where necessary) a third party, but only where proportionate. (This power will complement the existing provision in respect of the BBC: section 198 of the CA 2003.) Subsection (8) of new section 338A clarifies that the power to require the provision of information includes the power to require the provision of information held outside of the United Kingdom.

- 90 New section 338B provides that, where OFCOM determine that the recipient of an information notice has contravened section 338A, OFCOM may impose a financial penalty on the person. Such a penalty may include a daily element, but that element must not exceed £500 per day, and the overall penalty must not exceed £250,000.

## **Amount of financial penalties**

### **Clause 19: Amount of financial penalties: qualifying revenue**

- 91 Sections 18 and 41 of the BA 1990, and Schedule 9 to the CA 2003, relate to financial penalties that OFCOM may impose on the provider of a licensed public service channel. In each case, the maximum penalty which OFCOM may impose is set by reference to the “qualifying revenue” of the provider. This is defined in section 19 of the Broadcasting Act 1990 and is limited to the revenue that the provider derives from the public service channel they provide.
- 92 Subsection (3) inserts a new section 18A into the Broadcasting Act 1990. This creates a new definition of the “qualifying revenue” of a provider of a licensed public service channel. The new definition includes revenue both from the licensed public service channel and from certain services included in any designated internet programme service provided by that provider (see new section 362AA CA 2003 Designation of internet programme services inserted by Part 2 of the Bill).
- 93 Subsections (2) and (4) provide that this definition of “qualifying revenue” will apply for the purposes of sections 18 and 41 of the BA 1990, and Schedule 9 to the CA 2003, in preference to the definition in section 19.

## **Sporting and other events of national interest**

### **Clause 20: Categories of relevant service**

- 94 The “listed events” regime works by prohibiting the exclusive live broadcast of an event on the list drawn up by the Secretary of State under section 97 of BA 1996 without prior consent from OFCOM. It aims to ensure that rights to live coverage of listed events are offered to free to air broadcasters who meet certain criteria: currently, broadcast channels which are received by 95% of the population and which are free to air are categorised as ‘qualifying services’. Others are non-qualifying services. As a matter of practice, the only channels that meet this

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criteria are provided by public service broadcasters. Both qualifying and non-qualifying services require OFCOM's consent to show exclusive live coverage of a listed event, unless the rights have also been acquired by a person providing a service of the other kind. OFCOM's code on listed events sets out that OFCOM will wish to be satisfied that broadcasters of both kinds of service have had the opportunity to acquire the rights on fair and reasonable terms.

- 95 Listing does not guarantee that an event will be broadcast live, or on a free to air channel. Rights holders are not required to sell live rights and broadcasters are not obliged to purchase them or to show the events. The legislation sets out to ensure that, where live rights to a listed event are being sold, they must be offered to both a qualifying and non-qualifying service.
- 96 This clause updates the listed events regime to make qualification for the regime a PSB-specific benefit, and amends the regime to ensure that TV-like services providing live content to UK audiences via the internet, as defined in the clause, must comply with the legislation.
- 97 This clause amends section 98 of BA 1996 to define the services that will be within the scope of the regime, referred to as the "relevant services", and amend the qualifying conditions for the regime. The relevant services are split into two categories: a) those television programme services and internet programme services that satisfy certain conditions (referred to as "qualifying conditions" under the current regime), and b) all other relevant services. These are what OFCOM would currently refer to as the "qualifying" and "non-qualifying services". The amendments ensure that qualifying services must be a PSB service, and received free of charge.
- 98 The new definition of "relevant services" ensures that TV-like services not currently captured by the regime but providing live content to UK audiences via the internet, will now be captured. The updated range of services includes television broadcasting services, television licensable content services, digital programme services, and internet programme services. The definition also includes services, or dissociable sections of services, whose principal purpose is the provision of programmes, accessed by the internet, where there is someone who has control of what programmes are included, and when it is made available by that person for use by members of the public in the UK.
- 99 The expanded definition includes TV-like service providers that are not based within the UK, where they intend to show live coverage of listed events to UK audiences. This reflects the fact that UK audiences now have the ability to access live content via TV-like services provided over the internet, and that these services should not be able to purchase exclusive rights to show live coverage of a listed event without having to comply with the conditions or obtain consent from OFCOM.

## Clause 21: Contracts relating to coverage of listed events

- 100 Section 99 of BA 1996 applies to contracts for exclusive rights to show live coverage of listed events to UK audiences. It means that, where a person attempts to enter into a contract under which they will obtain exclusive rights to show live coverage of a listed event to UK

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audiences on a relevant service, that contract will be void. Subsections (1) to (3) amend the scope of section 99's application from "television programme providers" to providers of relevant services. The amendments also make it clear that clause 99 only applies to Group A listed events.

101 Section 100 of BA 1996 is also amended to take account of the new definition of relevant services.

## Clause 22: Restrictions on showing live coverage of listed events

102 Section 101 of BA 1996 is replaced with a new section that sets out the restrictions on showing live coverage of listed events, including for Group B events.

103 Live coverage of a Group A event may be shown without consent from OFCOM where a provider of a service in the other category has also acquired rights to show full live coverage or, in the case of a multi-sport event such as the Olympics, rights to show "adequate live coverage". The aim is to ensure that partnership arrangements between qualifying and non-qualifying broadcasters may continue as they do now, acknowledging that the regime will now cover a wider range of services. If non-exclusive rights deals do not provide adequate live coverage to a provider in another category, consent from OFCOM can still be sought. Live coverage of a listed event is also permitted where consent has been granted by OFCOM.

104 Live coverage of a Group B event is authorised and therefore does not require OFCOM consent if "adequate alternative coverage" is provided by a relevant service provider in a different category. Regulations can be made by OFCOM under section 104ZA to define what constitutes "adequate alternative coverage" of a Group B event and the requirements that must be satisfied by persons who have acquired rights to provide adequate alternative coverage. This reflects existing practice followed in relation to Group B events as set out in the current OFCOM Code on Sports and Other Listed and Designated Events.

## Clause 23: Regulations about coverage of listed events

105 Section 104ZA is amended so that OFCOM can define, in Regulations, what is to be considered to be "live coverage" and what is to be taken to represent the provision of "adequate live coverage" of a multi-sport Group A event.

## Clause 24: Provision of information

106 This clause amends section 104A to create a new power for OFCOM to require providers of relevant services and, in limited circumstances, certain other persons to supply them with any information that they require in order to be able to carry out their functions in relation to listed events. It also creates a new section 104B that sets out the penalties that may be applied for failure to provide information. These new provisions are necessary to enable OFCOM to enforce the listed events regime against service providers that are not licensed by OFCOM.

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## Clause 25: Sections 20 to 23: saving provision

107 This ensures that contracts that have already been agreed before the introduction of the new provisions will not be affected. Any contract entered into prior to the commencement of the new provisions will be governed by the old listed events regime.

## Public teletext service

### Clause 26: Public teletext service

108 Sections 218 to 223 of the CA 2003 establish a public teletext service. The service is to be provided by a licensed public teletext provider. The most recent public teletext provider ceased to provide the public teletext service in 2009, and its licence was revoked by OFCOM in 2010. There is no current public teletext provider.

109 The clause therefore repeals provisions of the CA 2003 relating to the public teletext provider.

## Further amendments

### Clause 27: Further amendments relating to public service television, and Schedule 2

110 This clause introduces Schedule 2, which makes amendments to broadcasting legislation to maintain operability of that legislation in light of the changes set out in Part 1 of this Bill.

## Part 2: Prominence on television selection services

### Clause 28: Prominence on television selection services

111 This clause amends the Communications Act 2003 by inserting a new Part 3A into that Act. The new Part contains provisions which set out the framework for the new online prominence regime and provisions on a number of procedural issues relating to the administration and enforcement of the new regime by OFCOM. The clause introduces Schedule 3, which contains further amendments to the Communications Act 2003 that are required as a consequence of the provisions in this clause. To note, clause 49 is also relevant to this Part in that it introduces Schedules 10 and 11 which insert new Schedules 16A and 16B to the Communications Act 2003 to provide provisions for the imposition of financial penalties and joint liability of entities. These provisions apply for the purposes of both this Part (prominence on television selection services) and Part 6 (regulation of radio selection services).

#### New Part 3A - Prominence on television selection services

112 This new Part 3A is inserted into the Communications Act 2003 by clause 28. This new Part establishes a prominence framework for designated public service broadcasting services (referred to as internet programme services) on regulated television selection services.

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## Designated internet programme services

### Section 362AA Designation of internet programme services

113 This new section gives OFCOM the power to designate an internet programme service (IPS) which will then benefit from prominence and availability requirements.

114 A designated IPS includes an IPS provided by the BBC and, where OFCOM consider appropriate, an IPS provided by another public service broadcaster (or a person associated with that public service broadcaster) which meets the conditions set out in subsections (3) to (5). The eligibility conditions are designed to ensure that services which are designated, and therefore benefit from prominence, make, or if designated would be capable of making, a significant contribution to the remit of a public service broadcaster (or at least one of the remits of a licensed public service broadcaster - if they are the provider, or associated with the provider of more than one licensed public service broadcaster). A designated IPS is also required to ensure the public service remit content is readily discoverable and promoted within the service. Subsections (7) and (8) set out the particular factors that OFCOM must take into account when determining whether it is appropriate to designate an eligible IPS. Subsection (9) requires OFCOM to consult the provider of the IPS and such other persons as they consider appropriate before designating an IPS.

115 For an IPS provided by persons associated with the BBC, subsection (5) sets out the designation criteria which it must fulfil in order to be designated by OFCOM. This includes making a significant contribution to the promotion of BBC's public purposes, and that such content is readily discoverable and promoted within the IPS.

116 Subsections (10) and (11) provide a general definition of an IPS as a service with the principal purpose of providing programmes delivered by the internet. This includes services which are entirely on-demand (whether one or more on-demand service) or only partially on-demand and contain other dissociable services such as livestreamed television programme services. For example, ITVX and BBC iPlayer provide access to a mix of both on-demand and livestream programming. It need not be the case that the provider of the IPS provides all the services included in it: an IPS can also 'host' third-party programme services, including paid-for content (notwithstanding that such content is not public service remit content).

117 Subsection (12) provides definitions for "public service remit" and "public service remit content" in relation to this new section.

### Section 362AB Revocation of designation

118 This new section gives OFCOM the ability to revoke a designation of an IPS made under the preceding section if they have reasonable grounds to believe that the service is failing to meet the conditions for designation set out in section 362AA. Subsections (2) to (4) set out what OFCOM must do to notify their intention to revoke a designation, and then the steps they must take to revoke a designation. OFCOM must revoke a designation of an IPS if requested to do so by the provider (see subsection (7)) or if the provider ceases to be associated with its

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relevant public service broadcaster: see subsection (1).

#### Section 362AC Statement relating to designation functions

119 This new section requires OFCOM to develop and publish a statement setting out the methods and principles they propose to follow in carrying out their designation and revocation functions under new sections 362AA(3) to (5) and 362AB(2).

#### Section 362AD Notifications in relation to designated internet programme services

120 This new section requires a provider of a designated internet programme service (IPS) to notify OFCOM if they are no longer a person associated with the public service broadcaster (as defined under new section 362AZ12(6)). Subsection (2) provides that the process for notification to OFCOM and information required by them may be set by OFCOM.

### Regulated television selection services

#### Section 362AE Meaning of “television selection service”

121 This new section defines “television selection service” (TSS) for this Part. Subsection (1) sets out the definition of a TSS in terms of what such a service consists of and enables a user to do. In summary, a TSS presents programme services or programmes provided by those services to a user, and allows them to select between those services and programmes and to access them. For example, a user can select between on-demand apps, or between programmes provided by those apps on a user interface on a smart TV.

122 A TSS must be provided by means of the internet and in connection with “internet television equipment”. Subsection (2) is the power for the Secretary of State to define “internet television equipment” in regulations. This power will be used to define the apparatus (including software) attached to those TSSs which may be in scope of the new 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 TSSs.

#### Section 362AF Meaning of “regulated television selection service”

123 This new section sets out how a “regulated television selection service” (RTSS) is to be designated as in scope of regulation by the Secretary of State, following recommendations from OFCOM.

124 This section sets out that designation should capture RTSSs that are used by a significant number of viewers in the UK to access TV content online. The Secretary of State may designate a specific television selection service or a description of a television selection service (i.e. a category) via regulations. The Government expects this to include the user interfaces on popular Smart TVs, as well as connected TV devices such as streaming sticks and set top boxes.

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125 Subsection (3) sets out factors which may also be used to frame the regulations which designate descriptions of TSSs, including number of users, manner of use, date on which the TSS was first made available and its functionality.

#### Section 362AG Advice from OFCOM

126 This new section sets out the process by which OFCOM will provide advice to the Secretary of State to inform a decision on which TSS to designate by regulations under section 362AE.

127 Subsections (4) and (5) set out what factors OFCOM must include in their advice to inform the designation of RTSSs under new section 362AE.

## Notification by providers of television selection services

#### Section 362AH Notification by providers of television selection services

128 This new section requires a TSS to notify OFCOM when they fall, or are about to fall, within any definition set out by the Secretary of State in regulations (i.e. become an RTSS) or cease to be a service of such description.

## Lists of services

#### Section 362AI Lists of Services

129 This new section requires OFCOM to publish on their website and keep up to date lists of designated IPSs and RTSSs and their providers.

## Must-offer and must-carry obligations

#### Section 362AJ Must-offer obligations in the case of designated internet programme services

130 The provider of a designated IPS (other than the BBC) will be subject to the “must-offer” objectives set out in subsections (1) to (3). Broadly, these objectives set out how, subject to agreeing terms, the provider of a designated IPS must make their designated service (for example, My5) available to a RTSS (for example, a smart TV) and do their best to secure arrangements are kept in force which ensure their designated IPS continues to be included in the RTSS. Arrangements between providers of a designated IPS and a RTSS must also be consistent with “agreement objectives” set out under section 362AM. The BBC’s equivalent obligations are to be set out under their Royal Charter and Framework.

#### Section 362AK Must-carry obligations

131 This new section sets out the “must carry” obligations for RTSS providers (subsection (1)). These are the corollary of the “must offer” obligations in the previous section. The provider of a RTSS must include all designated IPSs in its service. Together, these two sets of obligations are designed to incentivise the agreement of appropriate terms between providers of designated IPSs and RTSSs that meet those obligations, and are consistent with the “agreement objectives” set out under new section 362AM. Where a “listed” livestream

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channel or particular public service remit content is not contained within a designated IPS, the RTSS would not be required to carry or give appropriate prominence to that listed PSBs' channel or content (see new section 362AM(2)).

#### Section 362AL Guidance as regards agreement objectives

132 This new section requires OFCOM to prepare and publish guidance about how providers of a designated IPSs and providers of RTSSs may act consistently with the agreement objectives set out under new section 362AM. Subsection (2) stipulates that OFCOM guidance under this section will apply in reference to the BBC's comparable duty to act consistently with the agreement objectives under the BBC Charter and Framework Agreement. Subsection (3) includes consultation requirements on OFCOM before preparing any such guidance.

#### Section 362AM Meaning of "the agreement objectives"

133 Subsection (1) sets out "the agreement objectives" which the providers of RTSSs and designated IPSs must act consistently with during commercial negotiations (362AJ(3) and 362AK(2)). In respect of the BBC, equivalent "agreement objectives" which they must act consistently with will apply through their Framework Agreement. This is to encourage healthy and effective negotiations where both parties are able to reach reach an appropriate arrangement for the availability and prominence of the designated IPS on the relevant RTSS which secures that:

- a. the designated IPS is given appropriate prominence within the RTSS. This includes giving appropriate prominence to any public service remit content and "listed channel" included in that designated IPS: see subsection (2). The "listed channels" are set out under subsection (3);
- b. the arrangements do not adversely affect the continued provision of public service content to audiences.
- c. the arrangements prevent disproportionate impacts on a RTSS' ability to innovate its service.

134 Under the Communications Act 2003 S4C and licensed public service channels must be offered to 'appropriate networks' for carriage (subject to the need to agree terms) and conversely the providers of those 'appropriate networks' must carry them if required to do so by OFCOM. (The BBC has equivalent "must offer" obligations under the Royal Charter and Framework Agreement.) This is underpinned by a mutual recognition that the respective value of carriage fees and payments for content should level each other out (referred to as a zero net fee arrangement).

135 The agreement objective at 362AM(1)(b)) would be compatible with such an arrangement, i.e. there is no requirement for payments or transfers of value to pass between the provider of a designated IPS or RTSS (in either direction) for the supply and carriage of a designated IPS. However there may be instances where payments or transfers of value are deemed an appropriate arrangement between parties – for example, to cover costs reasonably incurred

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by the provider of the designated IPS to accommodate bespoke technical requirements of the provider of the relevant RTSS. Arrangements may also (subject to commercial negotiation) address issues outside the scope of the agreement objectives, i.e. that do not relate to the inclusion of the IPS in the RTSS.

136 Further detail as to what terms would be considered consistent with these agreement objectives are to be set out in guidance produced by OFCOM which OFCOM are required to consult on (see section 362AL). The Department expects OFCOM's guidance will look to provide clarity to both providers of designated IPSs and RTSSs across a range of negotiating factors, including (but not limited to): terms governing the ability to generate advertising revenue; access to audience data; technical functionality; and brand attribution.

## **Duties related to a designated internet programme service**

### **Section 362AN Duties relating to a designated internet programme service**

137 This new section sets out duties on the providers of designated IPSs to ensure that the service complies, and continues to comply, with the requirements set out under 362AA(3) to (5). The BBC's equivalent obligations are to be set out under their Royal Charter and Framework.

## **Duties related to a regulated television selection service**

### **Section 362AO Duties relating to a regulated television selection service**

138 This new section sets out the duties to be placed on providers of RTSSs under the new prominence regime. Under subsection (1) a provider of a RTSS is required to give an appropriate degree of prominence to any designated IPSs within its service. Subsection (2) allows for regional variation between the degree of prominence provided.

139 Subsection (3) clarifies that – where a designated IPS contains “listed channels” and public service remit content (or content which fulfils the public purposes of the BBC under their Royal Charter and Framework) – the obligation to provide appropriate prominence extends to that content or any listed channel in an IPS.

140 Subsection (4) also requires RTSS providers to ensure their user interfaces are accessible for those with disabilities, particularly those affecting sight or hearing, and that people are informed of what assistance is available and included in the RTSS.

### **Section 362AP Code of practice**

141 This section places a requirement on OFCOM to issue a code of practice, setting out the steps they recommend RTSS providers take in order to comply with the duties set out in section 362AO.

### **Section 362AQ Effects of the code of practice**

142 This new section sets out how a provider of a RTSS can demonstrate compliance with the duties to present a designated IPS with an appropriate degree of prominence and incorporate

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accessibility features as set out under new section 362AO(1) and (4).

143 If the provider takes the steps set out in a code of practice issued by OFCOM, they are to be treated as in compliance: subsection (1). Not following the steps does not automatically mean the provider is in breach of the obligations (subsection (2)).

144 In the event of any legal proceedings, subsection (3) requires the court or tribunal to take into account a provision of the code of practice that was in force at the time relating to the question and appears to the court to be relevant.

145 Subsection (4) puts an equivalent requirement on OFCOM to take into account provisions of the code of practice when they determine a question which arises in connection with their exercise of their dispute resolution or enforcement functions (subsection (5)).

#### Section 362AR Issuing a code of practice

146 This new section sets out the consultative steps OFCOM must take before issuing a code of practice under section 362AP (subsection (1)), but which do not apply for revisions to the code if the Secretary of State agrees the steps are not necessary (subsection (2)).

### Power to require information

#### Section 362AS Power to require information

147 This new section empowers OFCOM to issue information notices to require the persons listed in subsection (4) to provide OFCOM with information that they require for the purposes of carrying out their functions under this new prominence regime. Subsection (5) sets out a non-exhaustive list of the functions which OFCOM may require such information for, and subsections (6) and (7) set out what an information notice must contain.

### References of disputes to OFCOM

#### Section 362AT References of disputes to OFCOM

148 This new section sets out the process by which disputes between the provider of a designated IPS and the provider of a RTSS may be referred to OFCOM, or by which OFCOM may invite one or more of those parties to refer such disputes.

149 Subsections (1) and (2) sets out what disputes dealt with in this new section may relate to. Subsection (3) requires that disputes may only be referred to OFCOM if there is no realistic prospect of resolving the dispute without doing so.

150 Subsections (5) and (6) enable OFCOM to set out further requirements on the manner in which references of disputes are made, and require OFCOM to publish any such requirements, including drawing them to the attention of those likely to be affected (i.e. providers of designated IPSs and RTSSs).

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### Section 362AU Action by OFCOM on reference of a dispute

151 This new section sets out what OFCOM must or may do when a dispute is referred to them under the preceding section, providing certain conditions are met.

152 Subsection (2) requires OFCOM to decide whether or not it is appropriate to handle the dispute. Where the dispute relates to the arrangements that should be made for the purposes of the prominence duties and OFCOM consider it is highly likely that a designated IPS will not be carried by a RTSS or given an appropriate degree of prominence within the service unless the dispute is resolved, then OFCOM will take the dispute forward unless they consider one of the criteria in subsection (4) are met. These are that there are alternative means available (e.g. private arbitration or mediation) which would resolve the dispute promptly and satisfactorily and likely result in an outcome that is consistent with the agreement objectives in section 362AM.

153 Subsection (5) sets out what OFCOM must do once OFCOM have decided whether to handle the dispute. Subsection (6) sets out the circumstances in which a dispute may be subsequently referred back to OFCOM after OFCOM have decided it is not appropriate for them to handle the dispute.

### Section 362AV Interim measures

154 This new section empowers OFCOM to make interim measures where OFCOM decide whether or not it is appropriate for them to handle a dispute, or where a dispute is referred back to OFCOM. Such measures may include an interim declaration setting out the rights and obligations of the parties, an interim direction fixing the terms or conditions of transactions between the parties of a dispute or imposing an obligation on the parties to enter into a transaction between themselves on the terms and conditions fixed by OFCOM: subsection (2). Such interim measures cannot be imposed until OFCOM have given the parties an opportunity to make representations and considered any such representations received about the imposition of interim measures: subsection (4). Such interim measures bind the parties of the dispute unless they are withdrawn by OFCOM or cease to have effect as a result of legal proceedings staying or sisting OFCOM's handling of the dispute: subsection (9).

### Section 362AW Procedure for resolving disputes

155 This new section provides that where OFCOM decide it is appropriate for them to handle a dispute under section 362AU(2), or where the dispute is referred back to OFCOM under new section 362AU(6), then the procedure for considering and determining the dispute is to be the procedure which OFCOM consider appropriate. Save for exceptional circumstances, OFCOM must make their determination within four months of the date OFCOM decide it is appropriate for them to handle the dispute or the date the dispute has been referred back to them.

### Section 362AX Resolution of referred disputes

156 This new section applies where OFCOM make a determination for resolving a dispute (see new section 362AW(2)).

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157 Subsection (2) set out the powers available to OFCOM in order to resolve a dispute, which they must exercise in a way they consider most appropriate for meeting the agreement objectives (new section 362AM). Subsection (4) enables OFCOM to take account of the decisions made by others to resolve a dispute by alternative means when exercising their powers, where the dispute in question has subsequently been referred back to OFCOM. This may include ratifying those decisions already taken by others.

158 Subsections (5), (6) and (7) enable OFCOM to require one party to pay the costs incurred by the other party during the dispute, or to pay OFCOM in respect of the dispute costs incurred on them. OFCOM cannot require a party to make payments to another party or to OFCOM under subsection (5) unless they have considered the conduct of the party before and after the dispute was referred and whether or not OFCOM's determination (either as a whole or in part) is in favour of that party.

159 Subsection (8) provides that determinations made by OFCOM to resolve disputes are binding on the parties to those disputes.

#### Section 362AY Effect of referrals on legal proceedings

160 This new section provides that referring a dispute to OFCOM under new section 362AT or referring a dispute back to OFCOM under new section 362AU(6) (subsection (1)) does not prevent any person from bringing or continuing any legal proceedings related to any matters under dispute (subsection (2)).

161 Subsection (3) sets out further steps which OFCOM are not prevented from taking by the reference or reference back of a dispute. Subsection (4) sets out what is to happen where a court orders the handling of the dispute by OFCOM to be stayed or (in Scotland) sisted.

## Enforcement

#### Section 362AZ Provisional notices of contravention

162 This new section enables OFCOM to give a notice to the provider of a designated IPS or a provider of a RTSS if they have reasonable grounds to believe that the person has failed or is failing to comply with their obligations under:

- a. new sections 362AD, 362AJ or 362AN (duties of providers of designated internet programme services under this Part), or
- b. new section 362AH, 362AK or 362AO (duties of providers of regulated television selection services under this Part).

163 Subsection (2) also enables OFCOM to give a notice to any person if they have reasonable grounds to believe that the person has failed or is failing to comply with their duty under section 362AS(9) to comply with an information notice.

164 Subsections (3) to (10) set out what provisional notices of contravention must or may do in the circumstances listed in each subsection, where applicable. The provisional notice must set out OFCOM's provisional decision as to which duty the person has breached and its reasons.

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OFCOM may also detail any proposed steps that the person must take to comply with the duty or remedy the contravention and/or any financial penalties OFCOM intend to impose in respect of the alleged contravention. The provisional notice must also invite the person to make representations to OFCOM about the alleged contravention with any supporting evidence within a specified time period.

#### Section 362AZ1 Confirmation decisions: general

165 This new section applies where OFCOM have given a person a provisional notice of contravention in relation to a failure to comply with a duty or duties listed above in paragraph 162 and 163, and the period for representations has expired.

166 Subsection (2) requires OFCOM to decide whether, after considering any representations made and supporting evidence, to provide the person with a “confirmation decision” under this new section. If OFCOM decide not to give a confirmation decision, they must tell the person that (subsection (5)).

167 Subsection (6) requires that a confirmation decision state that OFCOM are satisfied that the person has failed or been failing to comply with one or more notified duties, and gives their reasoning. Subsection (7) enables OFCOM to specify in the “confirmation decision” steps that OFCOM consider appropriate for the person to take to comply and remedy any failures.

168 Subsection (8) provides for penalties which OFCOM may specify in a confirmation decision, where the provisional notice of contravention proposes imposing penalties. The penalty specified in OFCOM’s confirmation decision can be greater than the amount proposed in the provisional notice (subsection (9)).

169 Subsection (10) states that OFCOM may give a confirmation decision under this Part to a person who was, but is no longer a provider of a RTSS or a designated IPS, if the person was providing the service at the time of the failure set out in the confirmation decision.

#### Section 362AZ2 Confirmation decisions: steps

170 This new section applies if a confirmation decision by OFCOM requires the person to take specific steps. Subsection (2) sets out what a notice in relation to a confirmation decision must do in that circumstance.

171 Subsection (3) imposes a duty on a person to whom a confirmation decision is given to comply with the steps that may be set out in that decision. Subsection (4) specifies how a duty under subsection (3) is enforceable by OFCOM in civil proceedings.

#### Section 362AZ3 Confirmation decisions: penalties

172 This new section applies where a confirmation decision imposes one or more penalties. Subsections (2) and (3) set out certain details which must be included in a confirmation decision which imposes a penalty. This includes OFCOM’s reasons for imposing a penalty, the breaches that have attracted the penalty, a deadline for payment and the consequences of non-payment. Subsection (4) sign-posts new Schedule 16A to the Communications Act 2003, which is inserted by clause 49 and Schedule 10 and itself contains further provision about the

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imposition of a penalty by way of a confirmation decision.

#### Section 362AZ4 Penalty for failure to comply with confirmation decisions

173 This new section enables OFCOM to give a person a penalty notice (subsection (2)), provided OFCOM are satisfied that the person has failed to comply with the steps set out in a confirmation decision from OFCOM (subsection (1)).

174 Subsection (4) sets out what OFCOM must do before giving the person a penalty notice, and subsection (5) then sets out what a penalty notice must do and/or contain including OFCOM's reasons for imposing a penalty, the breaches that have attracted the penalty, a deadline for payment and the consequences of non-payment.

#### Section 362AZ5 Enforcement: Guidance

175 This new section allows OFCOM to issue guidance about how they intend to use their enforcement powers under new sections 362AZ to 362AZ4 or new Schedule 16B, which itself is inserted by clause 49 and Schedule 11.

### Supplemental provisions of Part 3A

#### Section 362AZ6 Fees

176 This new section allows OFCOM to require a provider of a designated IPS (other than the BBC and S4C) and a RTSS to pay an annual fee to OFCOM. (For the BBC and S4C OFCOM will be able to seek payment under section 198(4) and section 207(6) of the Communications Act 2003 respectively.) The amount of the fee to be paid is as determined by OFCOM in accordance with a statement of principles to be prepared by OFCOM: subsection (2). OFCOM must consult such persons as they consider appropriate before publishing such a statement of principles; subsection (9).

177 Subsection (3) requires that the fee must be justifiable, proportionate, and represent the appropriate contribution of the provider towards meeting the likely costs of OFCOM carrying out their functions under this Part.

178 Where a person ceases to be a provider of a designated IPS or a RTSS during the period to which the fee relates, OFCOM may repay a person some or all of the fee they have paid (subsection (6)).

179 Subsection (7) clarifies that OFCOM's costs of carrying out their functions under this Part during a financial year includes any costs incurred when preparing to carry out those functions in that year.

#### 362AZ7 Non-payment of fee

180 This new section enables OFCOM to give a notice to the provider of a designated IPS or a RTSS in the event either party fails to pay a fee under section 362AZ6. Within this notice OFCOM may specify the outstanding amount of the fee they consider the provider is due to pay and the period within which the provider must pay it (subsection 2). Under subsection (4)

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the provider can make representations to OFCOM in relation to the notice. If, after the period allowed for representations has expired and OFCOM are still satisfied that an amount is still owed to them in respect of unpaid fees, OFCOM may give the provider a penalty notice, under subsection (6), requiring the provider to pay to OFCOM a penalty of an amount determined by OFCOM. The payment of penalties can be enforced by proceedings brought in the civil courts (see paragraph 6 of new Schedule 16A referenced below).

#### 362AZ8 Information to be included in a notice under section 362AZ7

181 This new section sets out what information must be included in notices issued under 362AZ7 including the reasons why OFCOM propose to impose the penalty and the amount of the proposed penalty.

#### Section 362AZ9 Monitoring role for OFCOM

182 This new section sets out OFCOM's monitoring role under the new online prominence regime, which includes obtaining, compiling and keeping under review information relating to the matters listed.

#### Section 362AZ10 Notices

183 This section provides for the means of service (subsection (2) and (9)) and the persons upon whom notices given by OFCOM can be served (subsections (3) to (8)) under any provision of this Part. A notice served by email is deemed to have been served 48 hours after it was sent unless the contrary is proven: subsection (10).

#### Section 362AZ11 Extra-territorial application

184 This section provides for the extra-territorial application of this Part in certain cases. In particular, this Part applies to television selection services and internet programme services provided from outside the United Kingdom. Subsection (1) stipulates a duty imposed on a provider of a television selection service under this Part applies in relation to that service only so far as it is made available for use by members of the public in the United Kingdom.

185 Subsection (4) clarifies that the power to require the provision of information includes the power to require the provision of information held outside of the United Kingdom.

186 Subsection (5) states that new section 362AZ2(4) (requirements enforceable in civil proceedings against a person) applies whether or not the person is in the United Kingdom.

#### Section 362AZ12 Interpretation of Part 3A

187 This section defines terms used in this Part. In particular, subsection (2) to (5) clarifies that it is only the person who has general control over an IPS who is to be treated for the purposes of this Part. Subsection (6) also provides the definition of a person associated with a public service broadcaster.

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## Schedule 3: Part 2: Further amendments

188 This Schedule contains further amendments to the Communications Act 2003 that are required as a consequence of the new provisions inserted by clause 28

## Schedule 10: Schedule to be inserted by clause 49 as Schedule 16A of the 2003 Act

189 Clause 49 introduces Schedules 10 and 11, which insert new Schedules 16A and 16B to the Communications Act 2003 to provide provisions for the imposition of financial penalties and joint liability of entities. These provisions apply for the purposes of both this Part (television prominence) and Part 6 (radio prominence).

### Amount of penalties: principles

190 Paragraph 2 of Schedule 16A sets out the principles that OFCOM must apply when determining the amount of the penalty to impose. This includes taking into account any representations made by the person upon whom the penalty is imposed, the effect of the failure and any steps taken by the person to comply or remedy the failure.

### Maximum amount of penalties

191 Paragraph 3 of Schedule 16A sets out the maximum amount of penalties that may be imposed by OFCOM. Sub-paragraph (2) says that the maximum penalty that OFCOM can impose on the provider of a designated IPS (other than the BBC or S4C) or a RTSS with an accounting period is the greater of £250,000 and 5% of the person's "qualifying worldwide revenue" for the person's most recent complete accounting period. Sub-paragraph (3) states that in any other case, the maximum penalty which can be imposed is £250,000. This includes the BBC and S4C and other persons (who are not designated IPS or RTSS providers) who have failed to comply with an information notice or designated IPS or RTSS providers who do not have an accounting period.

### Maximum amount of penalties: group of entities

192 Paragraph 4 of Schedule 16A sets out the circumstances when OFCOM may hold two or more entities jointly liable for a penalty imposed by OFCOM (see also Schedule 16B). This may occur where OFCOM deem a parent company jointly liable for the penalty of their subsidiary, or where OFCOM deem a subsidiary company to be jointly liable for the penalty of their fellow subsidiary or parent company. If one of the entities is the BBC or S4C, the maximum penalty which can be imposed is £250,000. In all other cases, it is the greater of £250,000 and 5% of the person's "qualifying worldwide revenue" for the person's most recent complete accounting period.

### Power to amend paragraphs 3 and 4

193 Paragraph 5 gives the Secretary of State the power to make regulations which change the maximum amount of the financial penalties currently specified in this Schedule. The affirmative procedure is to apply to regulations made under this paragraph.

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## Recovery of penalties

194 Paragraph 6 sets out how payment of penalties can be recovered and enforced in England and Wales, in Scotland and in Northern Ireland.

## Qualifying worldwide revenue

195 Paragraph 7 requires OFCOM to publish and keep under review a statement defining what OFCOM regard as comprising a person's "qualifying worldwide revenue". OFCOM must consult the Secretary of State, the Treasury and such other persons as OFCOM consider appropriate before producing such a statement.

## Schedule 4: Schedule to be inserted as Schedule 16B of the 2003 Act

### Joint provisional notices of contravention

196 Paragraph 2 of Schedule 16B provides for instances where OFCOM may give a provisional notice of contravention jointly to a provider of a designated IPS, RTSS or designated radio selection service (see Part 6 below) (which is or was in operation at the time) and its parent company (or controlling individual(s)), its subsidiary company or a fellow subsidiary.

### Liability of parent entities for failures by subsidiary entities

197 Paragraph 3 of Schedule 16B applies where OFCOM intend to give a confirmation decision or penalty decision to either a provider of a designated IPS, RTSS or designated radio selection service and/or a subsidiary entity (which is or was in operation at the time) alone, or jointly to the entity and its parent company.

### Liability of subsidiary entities for failures by parent entities

198 Paragraph 4 of Schedule 16B applies where a provider of a designated IPS, RTSS or designated radio selection service and/or a parent entity (which is or was in operation at the time) that OFCOM provide a confirmation decision or penalty notice to has a subsidiary, which OFCOM are satisfied has contributed to the failure.

### Liability of fellow subsidiary entities for failures by subsidiary entities

199 Paragraph 5 of Schedule 16B applies where a provider of a designated IPS, RTSS or designated radio selection service and/or a subsidiary entity (which is or was in operation at the time) that OFCOM provide a confirmation decision or penalty notice to has a fellow subsidiary beyond one dealt with in paragraph 4, which OFCOM are satisfied has contributed to the failure dealt with by the decision or penalty notice.

### Liability of controlling individuals for failures by subsidiary entities

200 Paragraph 6 of Schedule 16B applies where an individual(s) controls a provider of a designated IPS, RTSS or designated radio selection service and/or a subsidiary entity (which is or was in operation at the time) that OFCOM provide a confirmation decision or penalty notice to. Sub-paragraph (2) allows OFCOM to give a confirmation decision or penalty notice

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to either the entity alone, or jointly to the entity and controlling individual(s).

## General

201 Paragraph 7 clarifies how paragraph 4 of Schedule 7 to the Companies Act 2006 is to be read for the purposes of this Schedule and paragraph 8 sets out how sections 1161(5) and 1162 of, and Schedule 7 to, the Companies Act 2006 apply to entities for the purpose of this Schedule, including entities formed outside of the United Kingdom.

## Part 3: Public service broadcasters

### Chapter 1: C4C

#### Clause 29: Sustainability duty of C4C

202 This clause amends the Broadcasting Act 1990 to insert a new section 23A after section 23 (which provides for the establishment of C4C). New section 23A places a duty on C4C (which consists of a chair, a deputy chair and other members (section 23(2) of the Broadcasting Act 1990), to carry out all of C4C's activities in the way that they consider most likely to enable it to maintain or increase the amount of activity that is done in pursuance of their primary functions, and to securely meet the costs of carrying out its primary functions. This is designed to ensure C4C meets its costs on an on-going basis, and manages the costs well so that it can at least sustain, and aim to grow, the amount of activity done in pursuance of its primary functions. The amount of such activity is an aggregate amount i.e. activity may decrease in one area, so long as it increases in another so that the overall amount is either maintained or increased. C4C's 'activities' are activities that C4C consider to be appropriate for carrying on its primary functions, or are connected, otherwise than merely in financial terms, with activities undertaken by them for the carrying out of those functions (section 199(1) of the Communications Act 2003). C4C's primary functions are: securing the continued provision of the Channel 4 service, the fulfilment of Channel 4's public service remit and C4C's performance of its media content duties (section 199(2) of the Communications Act 2003).

203 The duty is conceived from the directors' duty in section 172 of the Companies Act 2006, which places a duty on company directors to (amongst other things) 'promote the success of the company....and in doing so have regard (amongst other matters) to the likely consequences of any decision in the long term'. The changes in wording reflect C4C's status as a statutory corporation, as opposed to a Companies Act limited company.

204 Subsection (3) amends Schedule 3, paragraph 13 of the Broadcasting Act 1990, which addresses C4C's annual reports. Subsection (3) details that the annual report must include a report on C4C's discharge of the sustainability duty under this clause. The annual report is to be laid before Parliament by the Secretary of State.

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## Clause 30: C4C's duties in relation to commissioning programmes

205 This clause places C4C under a duty to put in place and adhere to procedures to facilitate fair competition for their commissions for their broadcast and on-demand services, which should include, among other things, procedures for referring disputes between producers and C4C to mediation. Alongside their statement of media content policy C4C must also 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.

206 OFCOM are required to review C4C's performance of its duties in relation to commissioning media content, alongside their review of C4C's media content duties, and to prepare a report on their findings. As with C4C's statement of media content duties, OFCOM are to have powers to enforce the commissioning statement against C4C by way of directions.

## Clause 31: Involvement of C4C in programm-making

207 This clause repeals section 295 of the Communications Act 2003, which restricts C4C's involvement in programme-making.

208 It also requires OFCOM to consider whether, and to what extent, the making of programmes by C4C, or a body corporate controlled by C4C, has affected the fulfilment of the public service remit for television in the United Kingdom, as part of one their reviews under section 264 of the Communications Act 2003. The requirement will only be triggered if C4C, or a body corporate controlled by C4C engages in the making of programmes with a view to them being broadcast on the Channel 4 service.

## Chapter 2: S4C

### Clause 32: S4C's powers and public service remit

209 This clause amends the CA 2003 to update S4C's public service remit and powers. The clause removes the current geographical restriction on S4C's powers, therefore ensuring S4C is able to provide services outside Wales, and confirms that S4C is allowed to provide a digital or online service, as recommended by the independent review published in 2018. In addition, it simplifies the framework of S4C's functions, public service duties and public service remits currently set out in the CA 2003, reflecting the new public service remit introduced for all PSBs in Part 1, and adjusts the approval arrangements for S4C's commercial activities.

210 Subsection (2) replaces current sections 204 to 206 of the CA 2003, which set out the functions and powers of the Welsh Authority (i.e. the body corporate) to be delivered through the analogue and digital channels of S4C and S4C Digital, and also set out other activities the Welsh Authority is permitted to undertake with the associated approval requirements.

211 New section 204A provides S4C in subsection (1) with the power to provide any audiovisual content i.e. it may provide content that does not fulfil the public service remit alongside

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content that does. Subsection (2) sets out S4C's public service remit and (3) states that S4C must use subsection (1) to fulfil that remit (generally, the Bill refers to the body corporate as "S4C", rather than as the "Welsh Authority" – see notes below on Chapter 2 of Part 3: minor and consequential amendments). The new remit aligns with the changes introduced in Part 1 above for all PSBs, requiring S4C to make available a broad range of audiovisual content which contributes to the public service remit for television and (collectively) represents an adequate contribution to that remit. To contribute to the public service remit for television, and therefore S4C's public service remit, content must (for example) be available free of charge. In addition subsection (2) retains the requirement that a substantial proportion of S4C's public service remit content must be in Welsh.

212 Subsection (4) confirms that the phrase "audiovisual content" has the same meaning as in section 264 as amended above, i.e. audiovisual programmes other than advertisements, included in a relevant audiovisual service. Subsection (5) confirms that the same interpretation of "made available" as set out in subsection (13) of section 264 also applies. This confirms that S4C may provide audiovisual content itself or under arrangements with another person. Paragraph 1(2) and (3) of Schedule 6 to the BA 1990, which allows S4C to do anything incidental or conducive to the delivery of its functions (primarily its power and public service remit in new 204A), still apply.

213 New section 204B sets out a number of additional restrictions on S4C's powers in section 204A. Subsection (1) states that S4C must obtain the Secretary of State's approval in writing before providing any television programme service, or doing anything for a charge or with a view to making a profit i.e. commercial activity. Subsection (2) applies the latter requirement to a commercial activity carried out by an S4C company. These subsections also replace the previous requirement for approval to be provided by way of an Order in secondary legislation to allow S4C greater flexibility in responding to market developments.

214 Subsection (3) allows the Secretary of State to approve a range of activities by way of a general approval, or to approve a particular activity in a specific approval.

215 Subsection (4) confirms that S4C Digital, the current television channel, is to be treated as approved at the point of commencement. No further approval is required. It also confirms that any other activities already being carried out by S4C are to be treated as approved at the point of commencement, whether or not they were previously approved, given it would be impractical to pause them purely for the purposes of obtaining approval after commencement.

216 Subsection (5) confirms that S4C still cannot provide a licensable radio service under section 245 of the CA 2003.

217 New section 204C subsections (1) to (3) confirm that the Secretary of State must publish any approval of a new television service or a specific new commercial activity, but any commercially sensitive material must be redacted. No approval for the activities described in new section 204B(3) is required to be published.

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218 Subsections (3) and (4) of clause 26 respectively amend section 207 of the CA 2003 (S4C's finances) and paragraph 1 of Schedule 6 to the BA 1990 (S4C: supplementary provisions) to reflect the restructuring of S4C's powers detailed above. This includes that its power to do anything incidental and conducive to its functions can be done through or with other persons. It also reiterates that its power to charge or make a profit does not apply to the provision of content where that content is specifically being used to meet S4C's public service remit. This does not preclude S4C from subsequently charging or making a profit in respect of public service content after S4C have relied upon it to fulfil a contribution to its public service remit.

### Clause 33: The S4C Board

219 This clause formally replaces S4C's current governance arrangements with a new unitary board that is composed of both executive and non-executive members, as recommended by the independent review published in 2018.

220 Subsection (1) confirms that the BA 1990 will therefore be amended to implement the changes in statute. They have already been implemented through standalone agreements between S4C, the Comptroller and Auditor General and the Secretary of State on audit arrangements, and through the creation of a shadow unitary board which already undertakes governance responsibilities, with provision in S4C's Standing Orders (available on S4C's website) for specific situations where the differences between the previous model and the unitary board model have required a bespoke approach.

221 Subsection (2) amends section 56 of the BA 1990 (Welsh authority to continue in existence as S4C) to confirm that S4C members must only act through the Board - no other board structure may exist.

222 Subsection (3) creates a new provision in the BA 1990, section 56A, which establishes S4C's new unitary board ("the S4C Board") in subsections (1) and (2). Consequential amendments to section 56 in the BA 1990 are made in Schedule 6.

223 Subsection (3) of the new section 56 confirms that the S4C Board has overall responsibility for S4C's activity in pursuit of its duties, including to fulfil the public service remit, and powers. Further duties of the Board are set out in S4C's Standing Orders, available on S4C's website.

224 Subsection (4) of clause 30 of this Bill inserts new Schedule 6A in the BA 1990.

225 Paragraph 1 of new Schedule 6A confirms the membership of the Board must consist of non-executive and executive members, that there must be five to eight non-executives including the chair, and the Secretary of State has responsibility to appoint the non-executive members and decide how many non-executive members there must be (in accordance with sub-paragraph (2)(b)). The paragraph also sets out that there must be two or three executive members on the Board, including the Chief Executive of S4C (whether permanent or acting), that it is the responsibility of the non-executive members to decide the number of executive members on the Board (in accordance with sub-paragraph (4)(b)) and appoint individuals to those roles, and that any appointments must take into account the range of skills and

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experience needed for the effective running of S4C.

226 Paragraph 2 (sub-paragraphs (1) and (2)) prevents a member or employee of the BBC or OFCOM from being a member of the S4C Board, and, in sub-paragraph (3), requires the Secretary of State to satisfy themselves both before appointment and at intervals throughout their tenure of office that non-executives do not have any financial or other interest likely to conflict with their ability to conduct their duties as S4C Board members.

227 Paragraph 3 sets out the details of Board members' tenure of office, including confirmation that compliance with the members' terms of appointment is required (sub-paragraph (1)), the restrictions on the tenure of non-executive members (sub-paragraphs (2) and (3)), and the circumstances in which a non-executive member ceases to be a member of the S4C Board (sub-paragraph (4)). The circumstances in which an executive member ceases to be a member of the S4C Board are also set out (sub-paragraphs (5) and (6)).

228 Paragraph 4 sets out the arrangements for the payment of remuneration and pensions of members. The Secretary of State is responsible for determining the remuneration and allowances of non-executives, including pensions, allowances of gratuities, and responsibility for payment lies with S4C (sub-paragraphs (1) and (2)). The Secretary of State is also responsible for determining any compensation to be paid to non-executives in the event they cease to be a member of the S4C Board before the end of their term of office, and the Secretary of State determines that there are special circumstances which warrant compensation (sub-paragraphs (3) and (4)).

229 Paragraph 5 to 8 set out the arrangements for Board proceedings. Paragraph 5 sub-paragraph (1) allows the S4C Board to determine its own procedures, and sub-paragraph (2) allows the S4C Board to delegate one or more functions to either a committee or one or more individuals who are either a member of the S4C Board or an employee of S4C.

230 Paragraph 6 requires the S4C Board to comply with principles of good corporate governance where it is reasonable to regard them as applicable to S4C.

231 Paragraph 7 requires members to raise any interests that they may have in any matters to be discussed by the S4C Board at the meeting at which the relevant matter is to be discussed (sub-paragraph (1)). Such a disclosure must be recorded in the minutes of the meeting and the member must not take part in any deliberation or decisions relating to that matter (sub-paragraph (2)). This does not apply if all other members agree that the member's interest can be disregarded for the purposes of sub-paragraph (2) (sub-paragraph (3)). A general notification of an interest in any matter involving a specified company or firm, and a disclosure made by notice which is considered at the meeting in question rather than the member attending in person, are both permitted (sub-paragraph (4)(a) and (b)). These provisions include meetings of any of the S4C Board's committees (sub-paragraph 5).

232 Paragraph 8 states that any proceedings of S4C or the S4C Board are not affected by any S4C Board vacancies, any defect in the appointment of a member of the S4C Board, or a failure to comply with the requirements of paragraph 7.

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233 Subsection (5) of clause 33 of this Bill introduces a transitional arrangement which means that existing members of the current board continue to be members of the S4C Board once this section comes into force, for the remainder of their current tenure and in accordance with their existing terms of appointment (sub-section (2)).

#### Clause 34: Accounts and audit

234 This clause changes the current legislation setting out S4C's financial audit arrangements so that the Comptroller and Auditor General is formally appointed in legislation as S4C's external auditor rather than S4C being able to choose its own auditor with confirmation by the Secretary of State. This was one of the recommendations of the independent review published in 2018, and although the Comptroller and Auditor General has since taken over the auditing of S4C's accounts, this clause puts the arrangement on a statutory footing.

235 Subsection (2) inserts new paragraphs (2A) to (2F) into Schedule 6 to the BA1990 (S4C: supplementary provisions). Paragraph (2A) requires S4C to send a copy of its financial accounts to the Comptroller and Auditor General as soon as possible after the end of the relevant financial year.

236 Paragraph (2B) sets out the role of the Comptroller and Auditor General. This includes ensuring the Secretary of State receives a copy of the Comptroller and Auditor General's report on each statement of accounts of S4C, and the associated certified statement.

237 Paragraph (2C) states that it is the responsibility of the Secretary of State to lay the report and certified statement before Parliament.

238 Paragraph (2D) states that S4C must arrange for the report and certified statement to be laid before Senedd Cymru, the Welsh Parliament, as soon as possible after the Secretary of State has fulfilled their responsibilities in paragraph (2C).

239 Paragraph (2E) states that each S4C subsidiary must appoint the Comptroller and Auditor General as auditor unless the Comptroller and Auditor General agrees that the S4C subsidiary may appoint a different auditor. Paragraph (2F) confirms that the Comptroller and Auditor General may inspect the accounts of any S4C subsidiary regardless of the identity of the subsidiary's auditor.

240 Subsection (3) requires S4C to give the Secretary of State access to the accounts and related documents of an S4C subsidiary.

241 Subsection (4) is a consequential amendment repealing paragraph 13(2) of Schedule 6 to the BA 1990 (accounts and audit report to be attached to annual report).

#### Clause 35: Amendment of BBC's obligation to provide Welsh programmes

242 This clause allows the BBC and S4C to come to an alternative agreement on ways for the BBC to support S4C in delivery of its public service remit, rather than the previously fixed approach of requiring the BBC to provide at least 10 hours of programmes in Welsh to S4C

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per week.

243 Subsection (2) amends the current subsection (1) and (1A) of section 58 of the BA 1990 (sources of programmes for S4C) to allow the BBC and S4C to agree an alternative arrangement in writing to the BBC's existing responsibility to provide S4C with at least 10 hours of Welsh language programmes per week. When no alternative agreement is in place, the BBC's existing responsibility to provide 10 hours of content in Welsh continues. Under new (1B), the BBC must publish the terms of an alternative agreement as soon as reasonably practicable. New (1C) allows the BBC to exclude from publication any information which it or S4C considers to be commercially sensitive unless they consider there is an overriding public interest in publishing the information.

244 Subsection (3) removes references to S4C's analogue television service and the requirement for Channel 4 to provide S4C with programme schedules and programmes to deliver that service. This reflects the fact that S4C's analogue television service, which showed English programmes from the Channel 4 service alongside Welsh language programmes when Channel 4 was not available in all parts of Wales, no longer exists.

245 Subsection (4) makes changes to replace references to the Welsh Authority with references to S4C, to reflect the move away from the previous governance structure to the unitary board and the subsequent use of the term "S4C" to refer to the organisation as a whole rather than the analogue television channel which, following the digital switchover, no longer exists.

### Clause 36: Chapter 2 of Part 3: minor and consequential amendments

246 This clause introduces Schedule 6, which contains further amendments to the BA 1990, the BA 1996, and the CA 2003 that are required as a consequence of the provisions in this part. These include reflecting the fact that S4C as an analogue television channel no longer exists, and so replaces references to the "Welsh Authority" with "S4C" as the body corporate rather than the analogue television channel, with references to S4C Digital remaining as S4C's current television channel. The changes also reflect S4C's new public service remit.

## Part 4: On-demand programme services

### Clause 37: Tier 1 services

247 This clause amends the CA 2003 to restructure Part 4A, and introduce a new category of non-UK on-demand programme services. Subsection (2) inserts a new chapter heading, "Chapter 1: Introductory provisions", into Part 4A.

248 Subsection (3) inserts new sections 368AA and 368AB into the CA 2003.

### Section 368AA Meaning of non-UK on-demand programme service

249 368AA defines non-UK on-demand programme services as on-demand programme services that are not headquartered in the UK, and/or do not make editorial decisions in the UK, but are made available to members of the public in the UK.

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## Section 368AB Overview of Part 4A

- 250 368AB provides an overview of the new structure of Part 4A of the CA 2003. Chapter 1 is definitional, Chapter 2 is the regulation of on-demand programme services, Chapter 3 is the regulation of 'Tier 1' services (as to which, see further at 368HA below), Chapter 4 is enforcement, Chapter 5 is supplementary.
- 251 Subsection (4) updates the definition of 'the appropriate regulatory authority' in the CA 2003 to clarify that OFCOM are the appropriate regulatory authority for ensuring compliance with new Tier 1 standards, (as to which see 368HF below). It also updates the language of this section on the appropriate regulatory authority to include non-UK on-demand programme services, as defined above.
- 252 Subsection (5) inserts a new chapter heading to section 368B of the CA 2003: "Chapter 2: Regulation of on-demand programme services".
- 253 Sections (6) to (8) explain Schedules 7, 8 and 9, described below, which contain amendments to Part 4A of the CA 2003 and other legislation.
- 254 The 'Tier 1 services', to which the title of this clause references, comprise a new sub-category of on-demand programme services and non-UK on-demand programme services specified in regulations. Tier 1 services will be subject to enhanced regulation. This will include some non-UK services, which were previously not under the regulation of Part 4A of the CA 2003. These services are now brought within scope of Part 4A of the CA 2003 on on-demand programme services, and the enhanced regime being introduced for Tier 1 services. The definition of Tier 1 services, and the detail of the regulation applicable to them is set out in Schedule 7.

## Clause 38: Audience protection reviews

- 255 This clause amends Part 4A of the CA 2003. It inserts a new section, section 368OB, on audience protection reviews.
- 256 Subsection (1) states that OFCOM must review the audience protection measures (for example the age ratings, content warnings, parental controls - see the non-exhaustive list in subsection (4)) of both on-demand programme services and Tier 1 non-UK on-demand programme service providers.
- 257 The scope of this review is defined in subsection (2) to include consideration of whether the services' audience protection measures are adequate to comply with the obligations to protect audiences from harm set out elsewhere in Part 4A of the CA 2003.
- 258 Under subsection (3), OFCOM can carry out subsequent audience protection reviews at such times as appear appropriate.
- 259 Subsection (5) states that OFCOM can request that on-demand service providers give information on their audience protection measures, for the purposes of a review of audience protection measures. Under subsection (6), if OFCOM have concerns about the sufficiency of audience protection measures used by a provider - whether as a result of this review or

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anything else done in the exercise of their functions - they may request further information from the provider. Subsection (7) outlines that OFCOM can specify a time period for delivery of this information as well as the format it is presented in.

260 Subsection (8) also sets out that requests for information on audience protection measures can be required more regularly from on-demand service providers, at intervals defined by OFCOM.

261 Subsections (9) and (10) state that the on-demand service provider has to comply with OFCOM's requests for such information, and that any information provided under this section can be published by OFCOM.

### Clause 39: S4C: on-demand programme services

262 This clause makes amendments to the CA 2003 to update the regulation of S4C's video-on-demand services, and bring it in line with other on-demand programme services.

263 Subsection (2) removes an existing section of the CA 2003, which makes special provision for the application of Part 4A to the regulation of on-demand programme services in relation to S4C. It is this section that created the anomaly for the regulation of S4C, and as such, removing this will serve to bring its regulation in line with other video-on-demand providers.

264 Subsection (3) removes two provisions of section 341 of the CA 2003, which covers the ability for OFCOM to impose penalties on S4C for the contravention of requirements. As the regulation of S4C is brought in line with other video-on-demand services, S4C will now be included under OFCOM's existing powers for enforcement in Part 4A of the Act, including their power to impose penalties in relation to on-demand programme services.

265 Subsection (4) makes amendments to Schedule 12 to the CA 2003, which covers the obligations of the Welsh Authority. This Schedule gives OFCOM the power to issue a correction or statement of findings if S4C breaches the requirements set out in paragraph 15 and 23A. As this power will now be covered by the existing broader regime for video-on-demand services under 368I and 368IA, which cover enforcement, all references to on-demand programme services are removed from these paragraphs. This retains OFCOM's powers in relation to S4C's other services, but places enforcement powers for S4C's video-on-demand services within Part 4A of the CA 2003, as is the case for other video-on-demand services.

### Clause 40: Other amendments of Part 4A of the 2003 Act

266 This clause explains the contents of Schedule 10. This includes amendments to Part 4A of the CA 2003 to update enforcement definitions to include Tier 1 non-UK services, and to update certain requirements for OFCOM and service providers.

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## Schedule 5: Tier 1 services: Chapter to be inserted as Chapter 3 of Part 4A of the 2003 Act

267 This Schedule includes detail on the enhanced regulation of the new Tier 1 on-demand programme services, to be added to Part 4A of the CA 2003 as “Chapter 3: Regulation of Tier 1 Services”.

### Section 368HA Meaning of Tier 1 service

268 Section 368HA defines Tier 1 services. These will be on-demand programme services used by public service broadcasters, other than the BBC, to contribute to fulfilling their public service requirements, and any other on-demand services or non-UK on-demand services specified in regulation made by the Secretary of State under s.368HB.

269 On-demand programme services provided by the BBC are excluded from the specification at subsection (2) including public service broadcasters fulfilling their public service remits within Tier 1. This means that regulation of the BBC’s on-demand programme services will remain consistent with the existing system whereby regulatory obligations are set out in the Charter and Framework Agreement rather than directly in legislation.

### Section 368HB Power to specify Tier 1 services etc

270 368HB gives the Secretary of State the power to specify which on-demand programme services, including non-UK on-demand programme services, fall under enhanced Tier 1 regulation. The regulations may specify a service by name, or set out a description of parameters to define which services fall within Tier 1 (for example, all services with audience figures over a certain level will come under Tier 1).

271 Subsection (3) sets out that before doing so, the Secretary of State must publish a list of the services proposed for inclusion as Tier 1 services, and make this publicly accessible. Subsection (4) requires that this list of services proposed for inclusion as Tier 1 must be published at least five sitting days before regulations are made. These provisions will ensure that public and Parliamentary scrutiny can take place in advance of the proposed regulations being laid before Parliament.

272 The Secretary of State must also request a report from OFCOM on the operation of the video-on-demand market in the UK before making the first set of regulations. This will include details such as audience figures, turnover, and size of catalogue for both on-demand programme services and non-UK on-demand programme services, along with any matters the Secretary of State specifically asks to be included. The Secretary of State must take this report into consideration when determining which services should come under the enhanced Tier 1 regulations.

273 Subsection (5) provides that if the Secretary of State chooses to update the regulations determining which services fall within Tier 1, they may request another report from OFCOM on the on-demand programme service market in the UK. If such a report is produced, the

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Secretary of State must consider its content in deciding whether to update the regulations on which services fall within Tier 1 regulations.

274 In preparing these reports, subsection (7) sets out that OFCOM can request information from on-demand programme services and non-UK on-demand programme services relating to their service. Subsection (9) details that OFCOM can then share the information provided in response to this request with the Secretary of State, but that this information cannot be shared more widely.

275 Under subsection (10), these requests by OFCOM can specify a time period for on-demand services to provide this information as well as how the information is to be provided.

276 Subsection (11) specifies that where information is requested by OFCOM for the purposes of preparing this report on the operation of the on-demand market in the UK, the on-demand programme service must comply.

#### Section 368HC Notification to OFCOM

277 Under section 368HC, services must notify OFCOM if they are a provider of a Tier 1 service, using the format and providing the information specified by OFCOM for this purpose. OFCOM must also tell any non-UK on-demand programme services which are specified in or fall within the description in regulations made under 368HB, of that fact. This is intended to help service providers to comply with the above 368HC(1) requirement to notify OFCOM of Tier 1 status.

278 Subsection (4) specifies that if a service stops providing a Tier 1 service, they must notify OFCOM of this fact.

#### Section 368HD Lists of Tier 1 providers

279 Section 368HD requires that OFCOM must create and maintain an up-to-date and publicly accessible list of all notified Tier 1 service providers. This should include those that have notified that they are providing a Tier 1 service and have not further notified that they are no longer providing a Tier 1 service.

#### Section 368HE Application etc of Chapter 2 to certain Tier 1 services

280 Subsections (1) and (2) clarify that several provisions outlined in Chapter 2 of the CA 2003 apply to all Tier 1 services, including non-UK on-demand programme services defined as Tier 1 by the Secretary of State. It requires that any reference to an on-demand service in this chapter is treated as if it includes a reference to Tier 1 services. This chapter covers the duties of the appropriate authority, the duties of service providers, provisions on harmful material, advertising, the advertising of less healthy food and drink, sponsorship, and product placement.

281 Subsections (3), (4) and (5) apply a 12 month grace period before the application of these provisions in Chapter 2 to Tier 1 non-UK on-demand programme services. This grace period is designed to ensure proportionality by giving a reasonable period of time before Tier 1 non-UK on-demand programme services must comply with new requirements.

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282 Subsection (6) states that the requirement of on-demand programme services to retain a copy of every programme included in a service should be 90 days for on-demand services used by public service broadcasters to contribute to the fulfilment of its public service remit, rather than the 60 days required for other on-demand services. This aligns the video-on-demand requirements with the current requirements in place in linear broadcasting for public service broadcasters.

#### Section 368HF Standards code for Tier 1 services

283 Section 368HF requires that OFCOM must develop a new standards code for the regulation of Tier 1 services, and gives the detail of what should be included.

284 Subsections (2) and (3) provide OFCOM with the objectives of the Code, and requires that OFCOM design the Code to best meet these. The objectives set out here for the Video-on-demand Code align with the objectives set out in legislation for OFCOM's Broadcasting Code, save that they do not include the advertising and product placement provisions. Advertising on video-on-demand services will be considered through the Online Advertising Programme, which the Government published a [consultation](#) on in March 2021.

285 Subsection (4) outlines that OFCOM can publish the Code in whatever ways it considers likely to bring the Code to the attention of those that will be affected by it. It must keep the Code under review. OFCOM are permitted to update the Code and when they do, they must publish the revised version and include a statement on when the new version comes into force.

#### Section 368HG Tier 1 standards code: special impartiality requirements

286 Section 368HG provides further detail on the due impartiality objective included in 368HF above. Subsection (1) defines the special impartiality requirements. This mirrors the current provision in place for broadcasters, including impartiality requirements on matters of political or industrial controversy and matters relating to public policy. However, section 368HG is slightly different from the existing provisions for broadcasters to ensure better functionality in an on-demand environment. 368HG therefore does not include the existing provision for broadcasters that OFCOM must take into account the need to ensure due impartiality in relation to matters of 'major' political or industrial controversy and 'major' matters relating to current public policy.

287 OFCOM define these 'major' matters in more detail in the Broadcasting Code, which states that such matters will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area. This additional regulatory layer is of particular importance in the linear broadcasting context where broadcasters will often provide live coverage of rapidly developing, often unexpected major events. The highly temporal nature of the major matters concept means that it is likely to have little relevance in the video-on-demand context, which is not generally reactive to live and rapidly developing events.

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288 Subsection (2) clarifies that the due impartiality provision under 368HG(1) does not exclude the expression of views or opinions by Tier 1 services relating to the provision of on-demand services or non-UK on demand services themselves.

289 Subsection (3) outlines that OFCOM's Video-on-demand Code must consider the requirement to preserve due impartiality, and that this should include guidance on the ways in which this can be met by service providers. The wording of this section also differs slightly from the existing legislation for broadcast television. Under broadcasting legislation, the corresponding requirement sets out that the preservation of due impartiality may be satisfied in relation to a series of programmes taken as a whole. The concept of 'a series of programmes taken as a whole' is defined within the Broadcasting Code, and includes for example, that a series of programmes must be scheduled 'within an appropriate period'.

290 These aspects do not translate well to the video-on-demand context where these scheduling and temporal considerations do not exist. The language of subsection (3) excludes reference to 'a series of programmes taken as a whole' to provide scope for OFCOM guidance to set out how the due impartiality requirements may be achieved beyond an individual programme, in ways better suited to the nature of their services.

#### Section 368HH Tier 1 standards code: matters to be taken into account

291 Section 368HH outlines further detail on the requirements for OFCOM's Code, and sets out some specific matters that should be taken into account in preparing or revising the Code. The matters to be taken into account are intended to ensure that OFCOM are able to design and enforce the Code in a way that is suitable for an on-demand environment, and that requirements placed on Tier 1 services are proportional and not unduly onerous for providers. For example, the age of the content and the likely effect of consideration being required in order to view a particular Tier 1 service are new matters, not replicated from existing broadcasting legislation, as these factors were considered to be particularly important in an on-demand environment, such as with regard to special impartiality requirements.

292 Subsections(4) and (5) outline that the Secretary of State can amend the matters for consideration laid out above, but must first consult OFCOM. Subsection (6) provides that any amendments to these matters must be approved through an affirmative statutory instrument, where both Houses of Parliament must approve the regulations. This will ensure appropriate scrutiny of any proposed amendments to the scope of the Tier 1 standards Code.

#### Section 368HI Tier 1 standards code: procedural requirements

293 Section 368HI sets out the procedural requirements that OFCOM must fulfil before publishing their standards Code. This includes requirements to consult those that represent the interest of audiences of Tier 1 services, those providing on-demand programme services and non-UK on-demand programme services that OFCOM think fit to consult, and any other stakeholders that have an interest in the Code. This also applies to any subsequent revisions.

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## Section 368HJ Duties of Tier 1 providers to comply with Tier 1 standards code

294 Section 368HJ relates to the duties of Tier 1 services to comply with OFCOM's Code.

Subsection (1) states that services specified as Tier 1 must comply with the new Tier 1 standards Code prepared and published by OFCOM.

295 Subsections (2) and (3) clarify that the requirement to comply with the Code only comes into force after a grace period given to the providers of Tier 1 on-demand programme services.

The grace period is defined as a period of 12 months, beginning either when the service becomes a Tier 1 service or when the Code is first published, whichever comes later.

296 Subsection (4) details that where the Secretary of State specifies an on-demand provider to be a Tier 1 service, these regulations can remove the grace period given to services before the Code comes into force. The Secretary of State can also choose to reduce the grace period given to a period less than 12 months. This section allows for potentially harmful services to be brought more quickly under the requirements of the Code.

297 As outlined below in Schedule 9 paragraph 2(2) amends section 107 of the Broadcasting Act 1996 so that Tier 1 services will also be required to observe a fairness code. This is a code prepared by OFCOM relating to the avoidance of unjust or unfair treatment or unwarranted interference with privacy.

## Section 368HK Complaints etc relating to Tier 1 standards code

298 Section 368HK sets out requirements for complaints processes in relation to compliance with the standards Code. Both OFCOM and Tier 1 providers must put in place procedures for handling and resolving complaints that a Tier 1 service failed to observe the standards Code.

299 Subsection (3) states that OFCOM can report to the Secretary of State on issues they have identified in carrying out their regulatory responsibilities in relation to Tier 1 services which appear to raise questions of general policy about the regulation of those services.

## Section 368HL Accessibility code for Tier 1 services

300 Section 368HL sets out the requirements for OFCOM to develop a new accessibility code for Tier 1 services, to ensure that these on-demand services are accessible to those with disabilities. This section details what should be covered by this code and also includes reporting requirements for Tier 1 services to report annually to OFCOM on their accessibility.

301 Section 368HL sets targets for Tier 1 services to reach in terms of their provision of access services, setting a certain percentage of a service's total catalogue hours to be subtitled, audio described, and signed, within a four-year period. It also sets interim requirements at half this total level to be met after a two-year period.

302 This section provides that OFCOM can assess and set exemptions to these requirements, based on the description of the types of programme, the platform a service is being delivered on, or adjusting requirements for a service as a whole. In determining these exemptions, OFCOM must have regard for the list of factors set out in legislation, such as the extent of

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audience benefit, the technical difficulty that providers may experience in complying, and the cost of compliance.

303 The accessibility requirements set out in this section and in OFCOM's code will only apply to services so far as they are made available to audiences in the UK.

304 OFCOM are required under this section to keep their accessibility code under review and may revise it. The code and any revisions must be published with regard to the need to make this accessible to people with disabilities.

#### Section 368HM Meaning of "relevant date" in section 368HL

305 Section 368HM sets out the date from which a service must comply with the accessibility requirements set out in 368HL.

306 This is defined as the point at which a service becomes a Tier 1 service, either under the definition at 368HA or as specified by the Secretary of State under 368HB, or the day that the new video-on-demand accessibility code is published by OFCOM, whichever is later.

307 For the purposes of calculating the relevant date, OFCOM can determine that a service is a continuation of a service previously provided by the same person.

#### Section 368HN Power to modify requirements in section 368HL

308 Section 368HN gives the Secretary of State the power to modify by regulations the percentage requirements for subtitles, audio description, and signing set out in 368HL.

309 This section requires that before making any modifications to the requirements, the Secretary of State must consult OFCOM.

310 This section provides that any amendments to these matters must be approved through an affirmative statutory instrument, where both Houses of Parliament must approve the regulations. This will ensure appropriate scrutiny of any proposed amendments to the levels of access services required on on-demand services.

#### Section 368HO Tier 1 accessibility code: procedural requirements

311 Section 368HO sets out the procedural requirements that OFCOM must fulfil before publishing their video-on-demand accessibility code. This includes requirements to consult those representing the interests of people with disabilities, those providing on-demand programme services and non-UK on-demand programme services that OFCOM think fit to consult, and others that OFCOM believe to have an interest in the accessibility code.

312 OFCOM are required to publish a draft of the code as part of their consultation process, and must ensure that all drafts and versions of the code are made accessible to those with disabilities.

#### Section 368HP Duty to comply with Tier 1 accessibility code

313 Section 368HP sets out that Tier 1 services must comply with the requirements of the code prepared and published by OFCOM under 368HL.

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## Section 368HQ Reports to Secretary of State

314 Section 368HQ sets out that OFCOM may report to the Secretary of State on any issues that arise in carrying out their functions relating to Tier 1 services, including on any issues that raise questions about the general policy of regulating these services.

## Section 368HR Application of Chapter 3

315 Section 368HL highlights that the duties of Tier 1 services laid out in this schedule only apply so far as the services are made available for use by members of the public in the United Kingdom. A non-UK based Tier 1 service is therefore only required to fulfil these requirements for the parts of their service that are available to UK audiences.

## Schedule 6: Tier 1: further amendments of Part 4A of the 2003 Act

316 This Schedule amends OFCOM's existing enforcement, fees and information-gathering powers in Part 4A CA 2003 to meet the needs of the new Tier 1 regime.

317 Paragraph 3 does this in respect of section 368I (enforcement of 368CB and 368D), paragraph 4 in respect of section 368IA (enforcement of 368E(4)), paragraph 5 in respect of section 368K (suspension or restriction of service for contraventions or failures), paragraph 6 in respect of section 368L (suspension or restriction of a service for inciting crime or disorder), paragraph 7 in respect of section 368M (supplementary provisions about directions), paragraph 8 in respect of section 368N (enforcement of directions under 368K or 368L), paragraph 10 in respect of section 368NA (fees) and paragraph 12 in respect of section 368R (interpretation of Part 4A).

318 Paragraph 11 replaces Section 368O of the CA 2003, which is OFCOM's power to demand information. It also inserts a new provision 368OZA (information powers: supplementary).

## Section 368O Power to require information

319 New section 368O allows OFCOM to obtain information from on-demand programme services, non-UK on-demand programme services, persons who were providers of on-demand programme services or non-UK on-demand programme services, or anyone else who appears to be able to obtain or generate required information. The information may be required for the purposes of OFCOM's functions under Part 4A, or functions under part 5 of the Broadcasting Act 1996 that sets out the broadcasting standards commission. Under subsection (3) OFCOM can require services to obtain or generate this information.

320 A non-exhaustive list of purposes for which information may be required is set out in new section 368O(6). Subsections (7) and (8) set out the parameters of an information requirement by OFCOM under this section. OFCOM must describe what information is required of the provider and why, detail how this information should be provided, and explain what would happen if the request is not complied with. The notice must also specify when the information is required by, and can do so by providing a specific date or period. Subsection (10) sets out that providers must comply with the requirements included in a notice from OFCOM.

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321 Subsection (12) gives a non-exhaustive list of examples of the types of information that could be requested under the term 'information' used in this section.

#### Section 368OZA Information powers: supplementary

322 New section 368OZA applies the existing enforcement provisions in Part 4A to OFCOM's expanded information-gathering powers. This means that OFCOM will have the ability to impose enforcement notices, impose financial penalties and suspend or restrict services for failures to comply with requests for information under new subsection (10) of 368HB, new subsection (8) of 368O and new subsection (9) of 368OB.

323 Subsection (5) amends the maximum financial penalty that could be applied in this situation to remove a reference to '5% of the applicable qualifying revenue'. This accounts for the fact that this provision relates to information requests to third parties that are not on-demand programme service providers or Tier 1 non-UK providers. They therefore may not have 'qualifying revenue' in relation to the provision of on-demand programme services.

324 Subsection (1) specifies that the powers to require information under new 368HB, new 368O, or new 368OB includes the power to require the provision of information held outside of the UK.

#### Schedule 7: Tier 1 services: amendments of other legislation

325 This Schedule includes amendments to the Representation of the People Act 1983 (paragraph 1), Broadcasting Act 1996 (paragraph 2), the CA 2003 (paragraph 3), and the Wireless Telegraphy Act 2006 (paragraph 4) to add references to Tier 1 services.

326 The amendments to the Broadcasting Act 1996 add a requirement that OFCOM create a new code of guidance on the avoidance of unjust or unfair treatment and unwarranted infringement of privacy in respect of programmes on Tier 1 services. It clarifies that this will only apply in relation to Tier 1 services where made available to members of the public in the UK. It also amends existing language, to allow complaints to OFCOM in relation to the new fairness and privacy Code in a Tier 1 service.

327 Paragraph 2(4) inserts new provisions (4A), (4B) and (4C) to section 111 of the Broadcasting Act 1996. These new subsections together align the enforcement of the Tier 1 fairness and privacy Code with the enforcement of the Tier 1 standards Code. This gives services a 12 month grace period before a fairness and privacy complaint can be considered by OFCOM. The grace period is defined in the same way, as a period of 12 months, beginning either when the service becomes a Tier 1 service or when the Code was first published, whichever comes last. The Secretary of State can also choose to reduce the grace period given to a period less than 12 months.

328 Amendments are also made to section 119 on publication of OFCOM's findings. This section brings the requirements around publishing details on fairness and privacy complaints for Tier 1 service cases in line with broadcasting cases. It inserts a new subsection to clarify that where a contravention is found, OFCOM have the power to impose a financial penalty and suspend

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or restrict a service. The definition of those covered in this provision is updated to ‘relevant person’ and to include providers of Tier 1 services.

- 329 Paragraph 2(7) amends section 120 on reports on action taken voluntarily in response to findings on complaints. This section updates the wording to include that if a direction to publish details of a fairness or privacy complaint is given to a Tier 1 provider, they must provide OFCOM with a report on the matter, as is the case for broadcasters.
- 330 Finally, paragraph 2(8) covers section 130, which covers the interpretation of this part of the Broadcasting Act 1996, under which the above sections all fall. This adjustment includes reference to a Tier 1 service in accordance with the definition given above in this legislation.
- 331 Paragraph 3 updates sections 361, 368Z14, 405, and Schedule 11A of the CA 2003. It inserts references to non-UK on-demand programme services that are Tier 1, to bring these in line with existing provisions on on-demand programme services.
- 332 Paragraph 4 similarly updates the Wireless Telegraphy Act 2006 so that OFCOM can give notice to satellite uplinkers in relation to non-UK on-demand programme services that are Tier 1.
- 333 Paragraph 5 updates section 80 of the Online Safety Act 2023 to exclude Tier 1 non-UK on-demand programme services from the scope of duties about regulated providers of pornographic content. Under the original section 80 of the Online Safety Act, on-demand programme services, as defined at section 368A of the CA 2003, were excluded from these duties. This updated exclusion to include Tier 1 non-UK on-demand programme services avoids duplication of regulation on protections for children from pornographic content.

### Schedule 8: Other amendments of Part 4A of the 2003 Act

- 334 This Schedule makes amendments to Part 4A of the CA 2003, including to update enforcement definitions to include Tier 1 non-UK services, and to update certain requirements for OFCOM and service providers.
- 335 Paragraph 2 updates section 368BZA of the CA 2003 on the requirement for OFCOM to maintain a list of on-demand programme service providers. Wording here is updated to clarify that OFCOM are required to keep a list of those that have notified them of their intention to provide such a service and have not notified OFCOM that they intend to cease provision of their service.
- 336 Paragraphs 3, 9 and 10 amend enforcement provisions in Part 4A of the CA 2003 to ensure that they apply whether or not the provider is in the UK.
- 337 Paragraphs 4, 5, 6 and 7 remove or amend existing provisions on accessibility that are no longer necessary after the addition of new accessibility requirements in Schedule 7. This includes removing section 368BC on accessibility for people with disabilities and section 368BD on the enforcement of 368BC.

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338 Paragraph 8 amends section 368D of the CA 2003 on the duties of service providers. This increases the requirement to keep a copy of every programme included on the service after first being available from at least forty-two to at least sixty days, in line with linear broadcasting requirements.<sup>8</sup> amend existing provisions on accessibility that are no longer needed after the addition of new accessibility requirements in Schedule 7.

339 Paragraphs 11, 12 and 13 remove references to 368BC and 368BD from sections on financial penalties, suspension or restriction of services, and the power to demand information. This is because these sections on accessibility have been omitted (see above).

340 Paragraph 14 inserts a new section 368QA to the CA 2003. This provision allows OFCOM to serve providers with notices electronically, and covers any notice included in this Part.

## **Part 5: Regulation of radio services**

### **Clause 41: Licensing of analogue radio services**

341 This clause amends Chapters 1 and 2 of Part 3 of the BA 1990 on the licensing of analogue radio services.

342 Subsection (2) amends section 85 of the BA 1990 so as to remove the duty on OFCOM to provide for a diversity of national analogue (i.e. AM / FM) services and a range and diversity of local analogue services, given the range of national and local services that are now available via digital means. This change will also give OFCOM more flexibility to decide whether or not to relicence any analogue frequency which may be vacated over the coming years as radio broadcasters focus on DAB digital radio and online distribution.

343 Subsection (3) amends section 97B of the BA 1990 to enable OFCOM, in the event that a date for digital switchover is set in accordance with section 97A of that Act, to extend existing analogue radio licences until that date. This will provide OFCOM with a way to extend licences for a relatively short period of time and avoid the need for further legislation in the event that a switchover date is set which post-dates the licence period of any remaining analogue licences.

### **Clause 42: Licensing and local services**

344 This clause amends Chapter 2 of Part 3 of the BA 1990 on the licensing of local analogue radio services.

345 Subsection (2) substitutes section 104 of the BA 1990 to give OFCOM the discretion to decide how applications for a licence must be made and thereby removes the previous prescriptive requirements (including the publication of a notice) on how such application was to be made. This reflects that, over the coming years, there are likely to be very few occasions where OFCOM will need to hold a competition for an analogue local commercial radio licence, given that nearly all licences will be eligible for renewal under section 104AA of the BA 1990 on the basis that they provide a local digital service.

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346 Subsection (3) inserts new subsections (4ZA), (4ZB) and (4ZC) into section 104AA of the BA 1990. Section 104AA (read together with section 104A) allows for the renewal of a local analogue radio licence where OFCOM are satisfied that the licence holder is also providing a local digital radio service. The new subsection (4ZB) allows OFCOM to renew a licence if an alternative condition is met - the applicant makes a statement of explanation that it is not possible to broadcast a digital service and a statement of intent to broadcast a digital service after it becomes reasonably possible to do so. This reflects that there may be circumstances where a radio station intends to broadcast on digital, but is not in a position to do so because a suitable digital multiplex service is not available in its broadcast area. The new subsection (4ZC) requires OFCOM to impose a licence condition on that radio station requiring it to nominate a suitable multiplex service as soon as it is reasonably possible to do so.

### Clause 43: Character of local services

347 This clause amends Chapter 2 of Part 3 of the BA 1990 in relation to the character and coverage of national and local radio services. Subsection (2) amends section 106 of the BA 1990 to remove the requirement for local radio licences to include conditions for securing the character of the licensed service. This means that local radio stations will no longer have to commit, and then adhere, to conditions in their licences requiring them to broadcast specific genres of content, or target a particular age group (the 'format'). These requirements are replaced by the amendments made by clause 44 which will set the requirements for local news and information.

348 Subsection (3) makes a consequential amendment by repealing section 106ZA of the BA 1990 which relates to the requirements to be followed before OFCOM could consent to a departure from the character of local licensed service.

349 This clause also amends Chapter 5 of Part 3 of the CA 2003. Subsection (4) repeals sections 355 and 356 of that Act, which require OFCOM to carry out a review where there has been a change of control over a local radio licence holder. The review considers matters including the character of the service and localness requirements. This requirement is no longer proportionate following the changes made to character requirements by the rest of this clause and the changes to the localness requirements made by clause 44.

### Clause 44: Local news and information

350 This clause amends section 314 of the CA 2003 in relation to the local content and character of local analogue radio services.

351 Subsections (3) to (8) amend section 314 to reframe the localness requirements on local commercial radio services. Unless OFCOM consider that it would be appropriate not to do so in a particular case, licences for such services must include conditions that OFCOM consider appropriate to ensure the services include, and regularly broadcast, programmes consisting of or including local news and information (e.g. traffic / travel / weather / what's on / local

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events), and to require that local news to include locally-gathered news.

352 OFCOM will no longer be required to secure that stations provide non-news local material (e.g. spoken material or music). This reflects the fundamental importance of news and information to listeners, as well as the part which radio plays in ensuring plurality within the local news sector. OFCOM will also no longer be required to impose requirements to secure that stations provide a certain amount of programming from a studio within their coverage area. These changes will provide stations with increased flexibility in terms of where to produce their content.

353 The provisions do not require stations to directly employ journalists to gather this local news, but allow for the possibility of, for example, a station entering into a relationship with a newspaper, agency or freelance journalist who gathers news in the local area.

354 This clause also inserts new section 315A into the CA 2003 giving the Secretary of State the power to make provisions, by regulations, to enable OFCOM to ensure that at least one local digital radio service in a local multiplex area carries local news and information. Currently, there are no localness requirements applying to local digital services though, in practice, many existing digital radio services will be simulcast versions of analogue stations carrying local news and information. As the market evolves, it is likely that increasing numbers of stations will decide to cease transmitting over analogue and provide a broadcast service solely over digital. In the event this results in a lack of local news and information, new section 315A allows the Secretary of State to extend localness requirements to digital radio. For example, OFCOM could be required to impose conditions in local radio multiplex licences requiring the multiplex operator to carry at least one digital radio service carrying local news and information, or to reserve capacity on the multiplex for a radio service carrying local news or information.

#### Clause 45: Financial assistance for radio

355 This clause amends Chapter 6 of Part 3 of the CA 2003 to insert a new section, section 359A, on financial assistance for radio and sound services.

356 This new section confers on the Secretary of State the power to give financial assistance for or in connection with the provision of analogue and digital community radio services, local analogue and digital commercial radio services, and for the production of sound programmes (whether intended for broadcast or to be accessed on demand).

#### Clause 46: Licensing of non-UK digital sound programme services

357 This clause amends section 245 of the CA 2003, which specifies the radio services which fall to be regulated by OFCOM.

358 Subsection (2) amends section 245 to provide that a digital radio service provided from a qualifying country (as specified by the Secretary of State by regulations) and broadcast by

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means of a local or small-scale radio multiplex service also falls to be regulated by OFCOM. The Secretary of State intends to specify Ireland as a qualifying country with the effect that Raidió Teilifís Éireann (the Irish national broadcaster) and other Irish commercial and community radio station operators can apply for digital licences for their radio services and ultimately for those services to be broadcast in the United Kingdom.

359 Subsection (3) amends section 245 to confer on the Secretary of State the power to amend, by regulations, the provisions dealing with restrictions on who may hold a broadcasting licence (Schedule 2 to the BA 1990). Such changes may be needed to update the existing restrictions to reflect the fact that the service is based outside the UK.

### Clause 47: Radio multiplex licences

360 This clause amends Part 2 of the BA 1996 in relation to the application process for radio multiplex licences, and the conditions attached to these licences.

361 An application for a licence will no longer be required to include proposals about the number and characteristics of digital radio services to broadcast on the multiplex. The effect of this clause is to remove OFCOM's function of overseeing the 'line-ups' of national and local radio multiplexes. This will mean that applicants for a national or local radio multiplex licence are required to satisfy OFCOM that they are able to deliver a service with sufficient geographical coverage and which is likely to be sustainable, and that they will act in a manner calculated to ensure fair and effective competition (as required by the remaining provisions of sections 46, 47, 50 and 51 of the BA 1996), but are otherwise free to decide the number and nature of radio stations which they carry. This change, which reflects the maturity of the digital radio market and the availability of a wide range of radio stations across the UK, will allow for simpler arrangements between multiplex operators and OFCOM.

## Part 6: Radio selection services

### Clause 48: Regulation of radio selection services

362 This clause amends the CA 2003 to insert a new Part 3B, and introduce a new category of designated radio selection services. These services are voice assistant services which enable listeners to select and listen to internet radio services by using voice-activated connected audio devices. They account for a growing proportion of radio listening in the UK.

#### Section 362BA Meaning of 'radio selection service'

363 Subsection (1) of 362BA defines a 'radio selection service' as a service which enables listeners to select an internet radio service (see below) and cause the radio service to play by giving spoken commands to a device connected to the internet. Subsections (2) to (5) allow for this definition to be amended (following consultation) enabling the Secretary of State to respond to developments in technology and changes in the market (for instance, in relation to new methods by which listeners could select radio stations).

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364 In recognition of the fact that any such amendments to the definition of radio selection services should be subject to Parliamentary scrutiny, subsection (6) provides that the affirmative resolution procedure applies to regulations making the amendments.

#### Section 362BB Meaning of ‘designated radio selection service’

365 This new section sets out how a “designated radio selection service” (DRSS) is to be designated as in scope of the provisions in this Act.

366 Subsections (2) to (4) provide that the Secretary of State may designate a service only if the level of its use to listen to internet radio services is significant, having received a report from OFCOM under new section 362BC, and following consultation. This recognises the fact that only those services which are used by a significant number of people have the capacity to meaningfully affect UK radio stations’ ability to reach their audiences. Subsection (2) also makes clear that a significant level of use of a service may be different in certain circumstances - in particular, in vehicles, or in some geographical areas of the UK, where listeners are particularly reliant on a service to access radio.

367 Subsection (5) allows the Secretary of State to amend this section to alter the conditions that must be satisfied before a radio selection service can be designated. This enables the Secretary of State to respond to developments in technology and changes in the market.

#### Section 362BC Advice from OFCOM

368 Section 362BC gives OFCOM the function of preparing reports making recommendations about the designation of radio selection services.

369 OFCOM must, in any such report, set out their assessment in relation to the factors set out in subsection (4); and if a designation is made that differs from OFCOM’s recommendations, the Secretary of State must publish a statement setting out the reasons for such a departure.

#### Section 362BD Revocation of designation of radio selection services

370 This section sets out the mechanism by which the designation of a radio selection service may be revoked. Section 362BD(3) requires the Secretary of State to revoke a designation if the level of use of the radio selection service to listen to internet radio services is no longer significant (as informed by a report from OFCOM, in accordance with subsections (4) and (5)).

#### Section 362BE List of designated radio selection services etc

371 This new section provides that a list of designated radio selection services and their providers must be established, maintained and published by OFCOM. Subsections (2) and (3) set out notification requirements in the event that a provider of a designated radio selection service ceases to provide that service.

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## Relevant internet radio services

### Section 362BF Meaning of “internet radio service”

372 This new section sets out a definition of “internet radio service” - as a service, or a dissociable section of a service, consisting of sound programmes (together with any ancillary services) which is made available for reception by members of the public over the internet.

### Section 362BG List of relevant internet radio services

373 This new section requires OFCOM to establish, maintain and publish a list of relevant internet radio services, with “relevant” services being those which have notified OFCOM (in accordance with subsection (5)) that they wish to be included in that list (and therefore to receive the benefits as set out in this Part), and which have in place (as set out in subsection (3)) an effective system or process for securing that the internet service corresponds to a BBC radio service, a licensed community or commercial radio service, or a licensed restricted service with a duration of at least 12 months. The internet radio service will correspond with such a broadcast service if all its programmes are provided at the same time as the broadcast service (disregarding advertisements).

### Section 362BH Sections 362BF and 362BG: power to amend

374 This section enables the Secretary of State, following consultation, to amend the definition of an “internet radio service” or a “relevant internet radio service” in response to changes in the listening market. Subsection (4) provides that those amendments could include prohibitions or restrictions on radio stations levying charges on a radio selection service in relation to the provision of their streams.

375 Subsection (6) requires the Secretary of State to consult before exercising the powers under this section, and subsection (7) says that any such exercise of these powers should be subject to Parliamentary scrutiny under the affirmative procedure.

## Regulation of radio selection services

### Section 362BI Access to relevant internet radio services

376 Subsection (1) imposes a duty on the provider of a DRSS to take all reasonable steps to secure that listeners are able to use that service to select and listen to relevant internet radio services. In other words, providers of DRSS are required to ensure that BBC stations and UK commercial and community radio stations (as well as restricted services with a duration of at least 12 months) licensed by OFCOM that are provided over the internet, and have been included in the list maintained by OFCOM in accordance with section 362BG, can be found and listened to on request.

377 The provider of a DRSS is required to take all reasonable steps to provide access to an IRS.

For example, where a listener has made a request for an IRS that is not understood by the *These explanatory notes relate to the Media Bill as introduced to the House of Commons on 8 November 2023 (Bill 8)*.

DRSS, the service should ask the listener to repeat or clarify the request or take other reasonable steps to enable it to comply with the request. However, a provider of a DRSS is not required to provide access where the listener has failed to take action (as might be required by an IRS) to enable access to the service (such as install a skill or app in the DRSS).

378 The provider of a DRSS must cause the selected IRS to play. Subsection (2) provides that, before a requested radio station is played, the DRSS may play a brief identification of that station (and / or the service through which the station is being provided), as well as one or more advertisements (subject to the station's agreement). Subsection (2) also provides that the selected service cannot be interrupted (for example, by inserting advertising into the internet service being played). See also subsection (5) below.

379 Subsections (3) and (4) impose a duty on the provider of a DRSS to take all reasonable steps to secure that the service employs a particular method which supports the preference of the internet radio service. Where the internet radio service has expressed a preferred route through which their service should be delivered to listeners (which might be, for example, Global Player for stations operated by Global, or BBC Sounds for stations operated by the BBC; or, in the case of smaller stations, a third party aggregator such as TuneIn), the provider of the DRSS should ensure that this preference is complied with unless it would be unduly burdensome to do so.

380 Subsection (5) recognises that a listener may have, for example, requested the DRSS to provide them with notifications (such as alarms or calls delivered by a connected audio device) that may interrupt the playing of the selected IRS, or may have a preference between alternative routes through which a station is capable of being delivered. Subsection (5) provides that the requirements set out in this section should not be taken to override the preferences as the way in which the DRSS operates.

381 Subsection (6) sets out that a provider of a DRSS cannot impose a charge on a provider of a relevant internet radio service in complying with its duties to provide access to that service as set out in this section.

#### Section 362BJ Further provision about access to relevant internet radio services

382 This new section requires a provider of a DRSS to draft, publish and maintain a statement about how it intends to comply with the duties in new section 362BI.

#### Section 362BK Code of practice

383 This section places a requirement on OFCOM to issue a code of practice, setting out the steps that they recommend providers of DRSS take in order to comply with the duties and prohibition set out in section 362BI.

#### Section 362BL Effects of the code of practice

384 This new section sets out how a provider of a DRSS can demonstrate compliance with its

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duties with regard to radio services.

385 If the provider takes the steps set out in a code of practice issued by OFCOM, they are to be treated as in compliance: subsection (1). Not following the steps does not automatically mean the provider is in breach of the obligations: subsection (2).

386 In the event of any legal proceedings, subsection (3) requires the court or tribunal to take into account a provision of the code of practice that was in force at the time relating to the question and appears to the court to be relevant.

387 Subsection (4) puts an equivalent requirement on OFCOM to take into account provisions of the code of practice when they determine a question which arises in connection with their exercise of their dispute resolution or enforcement functions (subsection 5).

#### Section 362BM Issuing a code of practice

388 This new section sets out the consultative steps OFCOM must take before issuing a code of practice under section 362BJ, but which do not apply for revisions to the code if the Secretary of State agrees the steps are not necessary (subsection (2)).

#### Section 362BN Complaints procedures

389 This new section requires providers of DRSS to have in place procedures for handling and resolving any complaints made by relevant internet radio services in relation to the duties or prohibitions set out in section 362BI.

### **Modification of regulation of radio selection services**

#### Section 362BP Power to modify regulation

390 This section enables the Secretary of State to make regulations to amend the regulatory framework in relation to providers of DRSS (subsection (1)), and sets out the areas in which such amendment may be needed as technology and the market evolves (subsection (2)).

391 Subsections (4) and (5) make provision for procedural safeguards: before making regulations to amend the regulatory framework the Secretary of State must have received a report from OFCOM under section 362BQ and must consult the providers of relevant internet radio services, DRSS and any other persons that the Secretary of State considers appropriate. The regulations must also be scrutinised by Parliament by way of the affirmative procedure (subsection (6)).

#### Section 362BQ Review by OFCOM

392 This section provides that OFCOM may (and where requested by the Secretary of State in accordance with section 362BP, must) prepare reports that review the adequacy of the regulation of DRSS under this new Part.

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## Section 362BR Power to require information

393 This new section empowers OFCOM to issue information notices to require the persons listed in subsection (4) to provide OFCOM with information that they require for the purposes of carrying out their functions under this regime. Subsection (5) sets out a non-exhaustive list of the functions which OFCOM may require such information for, and subsections (6) and (7) set out what an information notice must contain.

## Enforcement

### Section 362BS Provisional notices of contravention

394 This new section enables OFCOM to give a notice to a provider of a DRSS if they have reasonable grounds to believe that the person has failed or is failing to comply with their obligations under new sections 362BE, 362BG, 362BI, 362BJ or 362BN, or to any person if they have reasonable grounds to believe that the person has failed or is failing to comply with their duty under section 362BR(9) to comply with an information notice.

395 Subsections (3) to (10) set out what provisional notices of contravention must or may do in the circumstances listed in each subsection, where applicable. The provisional notice must set out OFCOM's provisional decision as to which duty the person has breached and its reasons. OFCOM may also detail any proposed steps that the person must take to comply with the duty or remedy the contravention and/or any financial penalties OFCOM intend to impose in respect of the alleged contravention. The provisional notice must also invite the person to make representations to OFCOM about the alleged contravention with any supporting evidence within a specified time period.

### Section 362BT Confirmation decisions: general

396 This new section applies where OFCOM have given a person a provisional notice of contravention in relation to a failure to comply with a duty or duties, and the period for representations has expired.

397 Subsection (2) requires OFCOM to decide whether, after considering any representations made and supporting evidence, to provide the person with a "confirmation decision" under this new section. If OFCOM decide not to give a confirmation decision, they must tell the person that (subsection (5)).

398 Subsection (6) requires that a confirmation decision state that OFCOM are satisfied that the person has failed or been failing to comply with one or more notified duties, and gives their reasoning. Subsection (7) enables OFCOM to specify in the confirmation decision steps that OFCOM consider appropriate for the person to take to comply and remedy any failures.

399 Subsection (8) provides for penalties which OFCOM may specify in a confirmation decision, where the provisional notice of contravention proposes imposing penalties. The penalty specified in OFCOM's confirmation decision can be greater than the amount proposed in the

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provisional notice (subsection (9)).

400 Subsection (10) states that OFCOM may give a confirmation decision under this Part to a person who was, but is no longer a provider of a DRSS, if the person was providing the service at the time of the failure set out in the confirmation decision.

#### Section 362BU Confirmation decisions: steps

401 This new section applies if a confirmation decision by OFCOM requires the person to take specific steps. Subsection (2) sets out what a notice in relation to a confirmation decision must do in that circumstance.

402 Subsection (3) imposes a duty on a person to whom a confirmation decision is given to comply with the steps that may be set out in that decision. Subsection (4) specifies how a duty under subsection (3) is enforceable by OFCOM in civil proceedings.

#### Section 362BV Confirmation decisions: penalties

403 This new section applies where a confirmation decision imposes one or more penalties. Subsections (2) and (3) set out certain details which must be included in a confirmation decision which imposes a penalty. This includes OFCOM's reasons for imposing a penalty, the breaches that have attracted the penalty, a deadline for payment and the consequences of non-payment. Subsection (4) refers to Schedule 16A, which contains further provision about the imposition of a penalty by way of a confirmation decision (see above).

#### Section 362BW Penalty for failure to comply with confirmation decision

404 This new section enables OFCOM to give a person a penalty notice (subsection 2), provided OFCOM are satisfied that the person has failed to comply with the steps set out in a confirmation decision from OFCOM (subsection 1).

405 Subsection (4) sets out what OFCOM must do before giving the person a penalty notice, and subsection (5) then sets out what a penalty notice must do and/or contain including OFCOM's reasons for imposing a penalty, the breaches that have attracted the penalty, a deadline for payment and the consequences of non-payment.

#### Section 362BX Enforcement: Guidance

406 This new section allows OFCOM to issue guidance about how they intend to use their enforcement powers under new sections 362BS to 362BW and Schedule 16B (see above).

## Supplemental provisions of Part 3B

#### Section 362BY Fees

407 This new section allows OFCOM to require providers of relevant internet radio services and / or providers of DRSS to pay an annual fee to OFCOM. The amount of the fee to be paid is as *These explanatory notes relate to the Media Bill as introduced to the House of Commons on 8 November 2023 (Bill 8).*

determined by OFCOM in accordance with a statement of principles to be prepared by OFCOM (subsection (2)). OFCOM must consult such persons as they consider appropriate before publishing such a statement of principles (subsection (8)).

408 Subsection (3) requires that the fee must be justifiable, proportionate, and represent the appropriate contribution of the provider towards meeting the likely costs of OFCOM carrying out their functions under this Part.

409 Where a person ceases to be a DRSS provider during the period to which the fee relates, OFCOM may repay a person some or all of the fee they have paid (subsection (6)).

410 Subsection (7) clarifies that OFCOM's costs of carrying out their functions under this part during a financial year includes any costs incurred when preparing to carry out those functions in that year.

#### Section 362BZ1 Non-payment of fee

411 This new section enables OFCOM to give a notice to the provider of a relevant IRS or DRSS in the event either party fails to pay a fee under section 362BY. Within this notice OFCOM may specify the outstanding amount of the fee they consider the provider is due to pay and the period within which the provider must pay it (subsection 2). Under subsection (4) the provider can make representations to OFCOM in relation to the notice. OFCOM may also give the provider a penalty notice, under subsection (6), requiring the provider to pay to OFCOM a penalty of an amount determined by OFCOM.

#### Section 362BZ2 Information to be included in a notice under section 362BZ1

412 This new section sets out what information must be included in notices issued under 362BZ1.

#### Section 362BZ3 Monitoring role for OFCOM

413 This new section sets out OFCOM's monitoring role in relation to radio selection services, which includes obtaining, compiling and keeping under review information relating the designation (or revocation of designation) of radio selection services and enforcement action under this Part.

#### Section 362BZ4 Notices

414 This section provides for the means of service (subsection (2) and (9)) and persons upon whom notices given by OFCOM can be served (subsections (3) to (8)) under any provision of this Part. A notice served by email is deemed to have been served 48 hours after it was sent unless the contrary is proven (subsection (10)).

#### Section 362BZ5 Application of Part 3B

415 This section provides for the extra-territorial application of this Part in certain cases. In particular, this Part applies to radio selection services provided from outside the United

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Kingdom (subsection (2)), although the duties imposed on DRSS apply only insofar as those services are made available to members of the public in the UK (subsection (1)).

416 Subsection (3) clarifies that the power to require the provision of information includes the power to require the provision of information held outside of the United Kingdom.

417 Subsection (4) states that new section 367BU(4) (requirements enforceable in civil proceedings against a person) applies whether or not the person is in the United Kingdom.

#### Section 362BZ6 Interpretation of Part 3B

418 This section defines terms used in this Part.

## Part 7: Miscellaneous and general

### Amount of Penalties etc

#### Clause 49: Penalties under Parts 3A and 3B of the Communications Act 2003

419 Clause 49 introduces Schedule 16A and 16B to provide further provision about financial penalties and liability of joint entities in relation to prominence on television and radio selection services: see Parts 2 and 6 respectively.

### Publishers of news-related material

#### Clause 50: Awards of costs

420 This clause repeals a section of the Crime and Courts Act 2013.

421 Subsection (2) repeals section 40 (award of costs) of the Crime and Courts Act 2013. If enacted, section 40 could require publishers who are not members of an approved regulator to pay costs in the event of a legal claim brought against them, regardless of the outcome.

422 Subsection (3) makes a consequential amendment to subsection 41(1) of the Crime and Courts Act 2013. Section 41 sets out the meaning of “relevant publisher” for the purposes of sections 34 to 40 of the Act. “40” is substituted for “39”.

### Amendments related to the UK’s withdrawal from the EU

#### Clause 51: Amendments of broadcasting legislation: UK’s withdrawal from EU

423 This clause explains the contents of Schedule 12. This includes amendments to existing broadcasting legislation to address issues of retained EU law.

#### Schedule 12: Amendments related to the UK’s withdrawal from the EU

424 This Schedule includes amendments to the Broadcasting Act 1990, the Broadcasting Act 1996, and Part 4A of the Communications Act 2003 to address areas of retained EU law.

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## Part 1 - Amendments of the Broadcasting Acts

425 Part 1 of this Schedule removes references to the Audiovisual Media Services Directive from the Broadcasting Act 1990 and the Broadcasting Act 1996.

## Part 2 - Amendments of the Communications Act 2003

426 Part 2 of Schedule 12 amends Part 4A of the Communications Act 2003 related to the UK's withdrawal from the EU. This is to remove references to the European Commission, obligations under the Audiovisual Media Services Directive, and other EU legislation.

427 This Part also replaces section 368OA (Cooperation with Member States and the European Commission). The updated section permits OFCOM to cooperate with EEA States that are subject to the Audiovisual Media Services Directive and with the national regulatory authorities for these states in certain circumstances. This includes to facilitate the carrying out of OFCOM's functions under this part, or the functions of the EEA state's national regulatory authorities.

## General

### Clause 52: Power to make consequential provision

428 Clause 52 gives the Secretary of State a regulation-making power to make amendments to other legislation which are consequential to provisions in this Bill. Any regulations proposed under this power which amend or repeal primary legislation are subject to the affirmative procedure. Any other regulations are subject to the negative procedure.

### Clause 53: Financial provisions

429 Clause 53 authorises expenditure arising from the Bill, further information about which can be under 'Parliamentary approval for financial costs or for charges imposed' below.

### Clause 54: Extent

430 This clause sets out the territorial extent of the Bill. The Bill will extend and apply to the United Kingdom except for the repeal of section 40 of the Crime and Courts Act 2013 in clause 50 which will extend and apply to England and Wales only.

431 See the table in Annex A for a summary of the position regarding territorial extent and application in the UK.

### Clause 55: Commencement

432 This clause provides for the commencement of the provisions in this Bill. The majority of the provisions in this Bill will be brought into force by regulations made by the Secretary of State.

433 Subsection (1) lists the provisions that come into force on the day on which this Act is passed.

434 Subsection (2) lists the provisions that come into force two months after the Bill receives Royal

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Assent.

435 Subsection (3) enables the Secretary of State to bring any provisions in the Bill not covered by subsections (1) and (2) into force by regulations, and subsections (4) to (7) set out further provision on how regulations under subsection (3) may be used.

436 Subsection (8) sets out that regulations under this section must be made by statutory instrument.

### Clause 56: Short title

437 This clause establishes the short title of this legislation, when enacted, as the Media Act 2023.

## Financial implications of the Bill

438 The Bill includes powers to allow OFCOM to charge fees to industry in order to allow them to become cost neutral to the exchequer. Operating costs incurred by OFCOM in carrying out their functions under the Bill will be met by proportionate fees charged to industry. Further details of the costs and benefits of provisions are set out in the impact assessments published alongside the Bill.

## Parliamentary approval for financial costs or for charges imposed

439 The Bill will require a money resolution because it might give rise to charges on the public revenue (that is, broadly speaking, new public expenditure). The money resolution will cover the possibility that increased spending by OFCOM might require the payment of grant under paragraph 9 of the Schedule to the Office of Communications Act 2002 or the possibility of the Secretary of State making a grant to S4C under section 61 of the BA 1990.

440 The Bill will require a ways and means resolution because it authorises new charges on the people (that is, broadly speaking, new taxation or other similar charges) and because various provisions of the Bill require payment of money into the Consolidated Fund. The new charges covered by the ways and means resolution are the charging of fees under Parts 2, 4 and 6 for the purpose of meeting the expenses of OFCOM as regards the prominence regime, the regulation of non-UK on-demand programme services that are Tier 1 services, and the regulation of radio selection services.

## Compatibility with the European Convention on Human Rights

441 The Government considers that the Bill is compatible with the European Convention on Human Rights.

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## Public Sector Equalities Statement

442 In relation to the policy which is given effect by the Bill, the Secretary of State, the Rt Hon Lucy Frazer KC MP has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

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## No statement under the Environment Act 2021

443 The Secretary of State, the Rt Hon Lucy Frazer KC MP, is of the view that the draft Bill as published does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021.

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## Related documents

444 The following documents are relevant to the Bill and can be read at the linked locations:

- [Up Next - the Government's vision for the broadcasting sector](#), April 2022.
- [Government response to the Digital Radio and Audio Review](#), April 2022
- [Consultation on audience protection standards on video-on-demand services](#), August 2021; and the [Government response to the consultation](#), April 2022.
- [Digital Radio and Audio Review](#), October 2021
- OFCOM review, [Small Screen: Big Debate - the debate on the future of public service broadcasting and media in the UK](#), July 2021.
- House of Commons Digital, Culture, Media and Sport Committee, [The future of public service broadcasting](#), Sixth Report of Session 2019–21, March 2021.
- [Building an S4C for the future: An independent review by Euryyn Ogwen Williams](#); and the [Government response to the review](#), 2018.
- OFCOM, [Review of prominence for public service broadcasting](#), 2018.
- [Commercial radio deregulation consultation](#), February 2017; and the [Government response to the consultation](#), December 2017.
- [Government response to the consultation on the Leveson Inquiry and its implementation](#), March 2018.

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## Annex A - Territorial extent and application in the United Kingdom

Clause 46 sets out the territorial extent of the clauses in the Bill. The extent of a Bill is the legal jurisdiction where it forms part of the law. The extent of a Bill can be different from its application. Application refers to where it has practical effect.

All of the provisions in the Media Bill extend and apply to the whole of the United Kingdom, with the exception of clause 43, which extends and applies to England and Wales.<sup>1</sup>

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the Senedd Cymru?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Part 1 - Public Service Television	Yes	Yes	Yes	Yes	No	No	No	No
Part 2 - Prominence	Yes	Yes	Yes	Yes	No	No	No	No
Part 3 - Public service broadcasters	Yes	Yes	Yes	Yes	No	No	No	No
Part 4 - On-demand programme services	Yes	Yes	Yes	Yes	No	No	No	No
Part 5 - Regulation of radio services	Yes	Yes	Yes	Yes	No	No	No	No
Part 6 - Regulation of radio	Yes	Yes	Yes	Yes	No	No	No	No

<sup>1</sup> References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the Senedd Cymru or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

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selection services								
Part 7 - Miscellaneous and General, clause 43, Awards of costs	Yes	Yes	No	No	No	Yes	Yes	No
Part 7 - Miscellaneous and General, clause 44, Amendments to broadcasting legislation: UK's withdrawal from EU	Yes	Yes	Yes	Yes	No	No	No	No
Part 7 - Miscellaneous and General - clauses 45 to 48	Yes	Yes	Yes	Yes	No	No	No	No

## Subject matter and legislative competence of devolved legislatures

The majority of the provisions in the Bill extend to the whole of the United Kingdom and are reserved under the broadcasting and internet services reservations. Clause 50 in Part 7 of the Bill extends to England and Wales only and is reserved in respect of Wales as relating to “other media”.

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# MEDIA BILL

## EXPLANATORY NOTES

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