

MEDIA BILL

Memorandum from the Department for Culture, Media and Sport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Media Bill (“the Bill”). The Bill was published in draft on 29 March 2023. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power is being sought and explains the nature of, and the reason for, the procedure selected.
2. In line with the Committee’s November 2021 *Guidance for Departments on the role and requirements of the Committee*, this memorandum includes discussion of powers conferred on the Office of Communications (“OFCOM”) to issue guidance and codes of practice etc. to provide the Committee a comprehensive overview of the delegated powers in the Bill.

B. PURPOSE AND EFFECT OF THE BILL

3. On 28 April 2022, the Government published [Up next – the Government’s vision for the broadcasting sector](#). This White Paper set out the Government’s vision for the broadcasting sector, and the steps the Government intends to take to further support public service broadcasting (“PSB”) across the UK.
4. In that context, the overall purpose of the Bill is to reform the legal framework for the regulation of PSB and radio in the UK, to enable UK public service broadcasters (“PSBs”) and UK radio to thrive in the long-term. The Bill will mean audiences can more easily access and enjoy quality, British-originated content and it will help to maintain a strong and diverse British broadcasting ecology.
5. The Bill is structured in 7 Parts and 11 Schedules. The Parts are as follows:
 - a. **Part 1 – Public Service Television** contains provisions that update the legislative framework for PSB, including provision to facilitate the delivery of public service content through digital platforms.
 - b. **Part 2 – Prominence on Television Selection Services** contains provisions that will mean that public service content is prominent online, which means it is available and easy to find across a range of television platforms that UK viewers use to watch TV online. The existing rules only apply to linear TV and predate the widespread availability of TV programmes online (for example, on smart TVs).
 - c. **Part 3 – Public Service Broadcasters** including providing the **Channel 4 Television Corporation (C4C)** with 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 at least sustain its current level of activities over the long term and to securely meet those costs incurred in doing so. 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. This Part also contains provisions that implement recommendations of the independent review of **S4C**, *Building an S4C for the future*, published in 2018. The provisions also apply the above

PSB legislative framework updates to S4C, while retaining the Welsh language content requirement.

- d. **Part 4 – On-demand Programme Services etc.** contains provisions which give OFCOM new regulatory powers to draft and enforce a Video-on-Demand (VoD) Code, to ensure that audiences are appropriately protected from harmful content whether they are watching their TV through Netflix or ITV1 (for example). VoD services allow users to access a library of TV and film programmes to browse and watch at a time and place of their choice, whether via a website, app, or smart TV. While there is a high standard of rules in place to protect audiences watching broadcast TV, the same is not currently true of VoD services (with the exception of BBC iPlayer). These provisions will also enable larger, TV-like VoD providers that are not currently regulated in the UK but who target and profit from UK audiences to be brought under OFCOM jurisdiction. 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.
- e. **Part 5 – Regulation of Radio Services** contains provisions to remove 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 duty to secure the availability to listeners of local news and information. It will 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.
- f. **Part 6 – Regulation of Radio Selection Services** 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.
- g. **Part 7 – Miscellaneous and General** contains miscellaneous and general provisions, including the repeal of section 40 of the Crime and Courts Act 2013 which would (if commenced) force 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. This Part will also make amendments to 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.

C. SUMMARY OF DELEGATED POWERS

General commentary on delegated powers in the Bill

- 6. Including powers for OFCOM to issue guidance and codes of practice etc. as set out in paragraph 2 the Bill contains a total of 37 delegated powers. A table is provided in Annex A summarising what powers the Bill confers on whom, for what purpose, and the Parliamentary procedure the Department proposes should be attached to the exercise of the powers. The powers can be thought of in two thematic categories.
- 7. The first are powers to enable the legal framework for regulating PSB and radio to evolve further over time. The broadcasting sector, technology, and viewing and listening habits have shifted considerably since the Communications Act 2003 (“CA 2003”), the last major

piece of broadcasting legislation. It is reasonable to expect that the sector will continue to change and evolve. Without the powers in this category, which will function as “backstop” powers in many cases, a legislative vehicle would need to be found each time a change is needed to be made to reflect changes in the sector. The provision for delegated powers in this category, subject to appropriate scrutiny and safeguards and within the clear framework set out in the Bill, is proposed to enable the Government and OFCOM to react effectively to further changes.

- a. For example, the power in clause 1 would allow the Secretary of State to amend the 30 day period for which public service content must be available on an on-demand service in order to contribute towards the fulfilment of the public service remit. The 30 day period reflects current audience expectations for the period content should be available for. Were industry practice or audience expectations to shift significantly, the Government may wish to propose amending the period.
8. The second category empower the regulator, OFCOM, such that they can operationalise and enforce the new regulatory frameworks that the Bill will establish. In some cases, it would neither be possible nor appropriate for the Government to perform the functions that the Bill proposes are delegated to OFCOM. In the Department’s view, the powers in this category are well precedented, and either directly mirror, broadly reflect or indeed modify existing powers that OFCOM have as the regulator for broadcasting.
 - a. For example, clause 32 empowers OFCOM to prepare and publish a code containing standards for the regulation of services to be included in the new “Tier 1” regulations for VoD. The new Tier 1 regulations will align more closely with the existing Broadcasting Code rules already in place and enforced by OFCOM for the regulation of broadcasting content.

Henry VIII powers in the Bill

9. Eleven of the powers in the Bill are powers to amend primary legislation through secondary legislation, that is to say they are “Henry VIII” powers. Henry VIII powers are clearly marked in the clause by clause analysis and in the table in Annex A. All Henry VIII powers in the Bill are subject to the affirmative procedure when amending primary legislation to ensure Parliament has the opportunity to scrutinise their exercise.
10. The exception is the power conferred on the Secretary of State by clause 40(3), which inserts new section 245(3A) of the Communications Act 2003. In that case, as it set out below, any amendment or modification of Schedule 2 of the Broadcasting Act 1990 (“BA 1990”) enabled by the power would not alter the policy agreed to by Parliament in passing the 1990 Act. As such, even though the power allows for the amendment of primary legislation (Schedule 2, BA 1990), the Department has proposed the negative resolution procedure applies to regulations made under new section 245(3A) as any changes are likely to be technical.

Abbreviations

11. The following are the most frequently used abbreviations throughout this memorandum. Less frequently used abbreviations are defined in the text.

“C4C” means Channel Four Television Corporation

“CA 2003” means the Communications Act 2003

“BA 1990”	means the Broadcasting Act 1990
“BA 1996”	means the Broadcasting Act 1996
“PSB”	means Public Service Broadcasting
“PSBs”	means Public Service Broadcasters. This refers to the BBC, S4C and the Channel 3, 4 and 5 licence holders.
“VoD” (“ODPS”)	means Video-on-Demand. This is a common usage term broadly synonymous with On-demand programme service, “ODPS”, which is used in legislation.

D. CLAUSE BY CLAUSE ANALYSIS OF DELEGATED POWERS IN THE BILL

Powers relating to Part 1 – Public Service Television

Clause 1, inserting new section 264(8B) of the CA 2003: Power for the Secretary of State to amend the length of the period which public service content must be available on-demand

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

12. Currently, a programme only forms part of a PSB’s contribution to the fulfilment of the public service remit if it is broadcast on a “relevant television service”. However clause 1 will expand the ways in which a PSB can contribute to the fulfilment of the remit to include audiovisual content made available by way of a wider range of services, including a PSB’s on-demand programme services (“ODPS”).
13. One of the features of the new public service remit for television being introduced by clause 1 is that public service content, however it is provided, should be universally available. Section 264(8A) of the CA 2003 (as amended by clause 1) will provide that, for a programme included in an ODPS to contribute to the fulfilment of the remit, it must be made available for viewing on the ODPS for a period of not less than thirty days beginning with the day on which that content is first made available for viewing. The purpose of the delegated power set out in proposed new section 264(8B) is to enable the Secretary of State to amend, by way of regulations, the length of the period which public service content must be available for on a PSB’s ODPS in order to contribute to the fulfilment of the remit

Justification for taking the power

14. 30 days was chosen as an appropriate minimum length of time for these purposes as it is consistent with both audience expectations and existing industry practice. For example, ITVX and All4 both have a typical window of 30 days for which programmes are available to access on-demand following broadcast on ITV1 and Channel 4 respectively (though some content is available for longer). However, if either or both of audience expectations and industry practice were to change, it is important that the requirements in legislation can be brought in line with these developments.
15. There is precedent for the Secretary of State to have a power to change the definition of public service content by way of regulations. Section 271 of the CA 2003 enables the Secretary of State to modify, by order, the purposes and objectives of public service broadcasting found in section 264 of the 2003 Act.

Justification for the procedure

16. The question of how long a programme delivered on-demand should be available in order to contribute to the fulfilment of the remit is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

Clause 8, inserting new section 277(1)(b) of the CA 2003, clause 17 and paragraphs 1(2) and 2(2) of Schedule 1: Power for the Secretary of State to specify a number of hours for the purposes of the independent production quota

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary Procedure: Affirmative

Henry VIII power: No

Context and Purpose

17. Under the CA 2003, PSBs are subject to a system of quota obligations. For Channels 3, 4 and 5, these are set out in sections 277 for independent productions, section 278 for original productions, section 279 for news and current affairs, sections 286 to 288 for regional programme-making, section 289A for children's programmes and section 296 for schools programmes on Channel 4 and Schedule 12 to the 2003 Act (for S4C and the BBC). The BBC is also subject to other quotas, but these are non-statutory.
18. In particular, all PSBs are subject to a quota in relation to the inclusion in the service of a range and diversity of independent productions – known as the independent production quota. This is set out in section 277 of the CA 2003 for the licensed PSBs (Channel 3, Channel 4 and Channel 5). Paragraphs 1 and 7 of Schedule 12 to the 2003 Act create a parallel structure for the BBC and S4C respectively. Whereas it is left to OFCOM to determine the level of most PSB quotas, the independent productions quota is unusual in that the Act prescribes that OFCOM must include conditions in the relevant licences it considers appropriate for securing that not less than a given percentage (currently 25%) of the time allocated to “qualifying programmes” included in the channel is allocated to the broadcasting of independent productions. There are existing delegated powers in the 2003 Act for the Secretary of State to i) substitute a different percentage (section 277(3)), and ii)

redefine the quota in terms of expenditure in addition to, or instead of, hours (section 277(4)).

19. As described in more detail below, currently PSBs can only fulfil their quotas by way of content broadcast on their main linear television channel(s) (their ‘public service channels’). However clause 8 makes provision for PSBs to be able to meet certain quotas, including the independent production quota, using an ODPS that is, or forms part of, a designated internet programme service (or an audiovisual service specified under new section 278B(5)(c): see 11 below) in addition to their PSB channels. Allowing these quotas to be delivered across multiple services requires changes to how they are calculated. Consequently clause 8 and Schedule 1 replace the percentage quotas in section 277 and Schedule 12 with a requirement to ensure that no less than a specific number of hours are included in the relevant services of each of the PSBs when taken together. As is currently the case, it may be necessary to revise that number in line with market trends and the Government’s ambition for the sector. As such clauses 8 and Schedule 1 make changes to the existing delegated powers so that the Secretary of State can specify the number of hours (or, as the case may be, amount of expenditure) for each PSB.
20. As now, the Secretary of State is required to consult with OFCOM, the BBC and S4C before exercising this power (section 277(11)).

Justification for taking the power

21. It is necessary for the Secretary of State to be able to set, and subsequently revise, the independent production quota so that they can ensure that the quota continues to be fit for purpose in light of changing economic and market conditions. This reflects the current situation and clause 8 and Schedule 1 merely make consequential amendments to the Secretary of State’s existing delegated powers to reflect more substantive provisions which enable PSBs to meet their independent production quotas through ODPSs that are, or form part of, designated internet programme services.

Justification for the procedure

22. The level of the independent production quota and how it is expressed is likely to be a matter of particular interest to Parliament, and therefore the Department has proposed to retain the affirmative procedure (section 277(12)).

Clauses 9(4), inserting new section 278(7A) of the CA 2003 and clause 17 and paragraph 3(5) of Schedule 2 1 inserting new paragraph 8(7A) of Schedule 12 to CA 2003: Power to clarify that the Secretary of State’s existing power to specify descriptions of programmes that are original productions includes the power to authorise OFCOM not to count a description of programmes towards the original productions quota and to require OFCOM to publish guidance about the determination of whether an original production falls within a description.

Powers conferred on: Secretary of State

Powers exercised by: Order

Parliamentary Procedure: Affirmative

Henry VIII powers: No

Context and Purpose

23. Section 278 of the CA 2003 provides that a minimum proportion of broadcasting hours on each licensed public service channel must be allocated to original productions. The proportion for each channel, as well as the proportion to be broadcast in peak viewing times, is determined by OFCOM. Comparable provision is made in respect of expenditure. The equivalent provisions for S4C are contained in paragraph 8 of Schedule 12 to CA 2003.
24. Clause 9 amends OFCOM's existing power in sections 278 of the CA 2003 to take account of the changes that the Bill makes to how the original production quota may be delivered. In particular, references to "proportions" of broadcast hours (or programme expenditure) are replaced with references to the duration (in total) of programmes made available. Clause 17 introduces Schedule 1, which, among other things, makes a comparable change in respect of S4C's original production quota in paragraph 8 of Schedule 12 to the CA 2003.
25. The existence of a power for the Secretary of State to specify the description of programmes which count towards the original productions quota is unaffected by this Bill: see section 278(6) of, and paragraph 8(6) of Schedule 12 to, the CA 2003. This includes the power to exclude from that definition particular types of content. This is a parallel to the similar power delegated to OFCOM at section 278(3) in respect of licensed public service channels and paragraph 8(4) of Schedule 12 in respect of S4C.
26. In light of the broader changes being made to section 278, new section 278(7A) and paragraph 8(7A) of Schedule 12 restate the existing power of the Secretary of State to authorise OFCOM to require that original productions of a description specified in the licence may not be counted towards meeting the condition. It also restates the power for the Secretary of State to require OFCOM to issue guidance in relation to those descriptions to which the relevant PSB must have regard: see section 278(3)(b) and (7) in respect of licensed public service channels and paragraph 8(5) and (7) of Schedule 12 in respect of S4C.

Justification for taking the power

27. The Bill does not substantively change the powers for the Secretary of State to specify the description of programmes which count towards the original productions quota or the power of the Secretary of State to confer such discretions on OFCOM as the Secretary of State thinks fit (both of which are essential to ensuring that the scope of the quota can evolve over time as viewing habits change). We mention here simply for the sake of completeness.
28. In particular, it was necessary to restate the delegated power in light of the amendments made to the original production quota by clauses 9 and 11 which enable the relevant PSB to meet their quotas through a range of audiovisual services. As detailed above, this includes requiring quotas to be expressed in terms of the absolute number of hours to be made available rather than as proportion of content broadcast on a provider's licensed public service channel or S4C Digital as the case may be. Making these amendments to section 278 has resulted in a slight restructuring of the relevant provisions and the Government has taken this opportunity to restate the existing delegated power more clearly.

Justification for the procedure

29. The Secretary of State's power to specify the description of programmes which count towards the original productions quota and confer on OFCOM such discretions as the Secretary of State thinks fit continues to remain subject to the affirmative Parliamentary procedure: see section 278(9) of, and paragraph 8(9) of Schedule 12 to, CA 2003.

Clause 10, inserting new section 278A(1) of the CA 2003: Power for the Secretary of State to specify a category of audiovisual content for the purpose of creating additional quotas for audiovisual content

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Henry VIII power: No

Context and Purpose

30. A key plank of the Department's intention in Part 1 of the Bill is to simplify and consolidate the existing public service remit for television. Presently, the "purposes" of public service broadcasting in the UK are listed in section 264(4) of CA 2003, and the "objectives" for PSB services are listed in section 264(6) of CA 2003. Clause clause 1 provides a new, more consolidated, public service remit for television. This process of consolidation and simplification provides an opportunity to move away from many of the rigid and outdated genre requirements contained in the present PSB "objectives", and instead pursue an evidence-led approach to which types of content are being under-served (if any).
31. The power in new section 278A(1) will therefore allow the Secretary of State to specify a category of content which, in their view, is not being made available to the extent that the Secretary of State considers appropriate (i.e. is under-served). This is intended to potentially capture both genres (for example religious programmes), as well as broader concepts (for example, programming with relevance for older children). The effect of specification would be to require OFCOM to include the conditions that OFCOM consider appropriate to ensure the content in question is made available by the providers of the licensed public service broadcasters. That is in line with OFCOM's existing, general role in setting quotas for public service broadcasters (with the exception of the independent production quota, which is discussed in paragraph 24 of this memorandum).

Justification for taking the power

32. The policy objective of this power is to act as a "backstop", to be exercised reactively in the event that (following a report by OFCOM) the Secretary of State considers that a category of content is under-served. Consequently, it will be necessary to allow the new PSB framework to bed in before (as part of their regular reporting cycles) OFCOM is in a position to assess what categories of content (if any) require specific provision.
33. Similarly to the Secretary of State's existing power to amend public service remits in section 271 of the CA 2003, the requirement in subsection (1)(b) of new section 278A (requirement that either subsection (2) or (3) apply) constrains the exercise of this power. Subsection (2) means that the Secretary of State can make regulations under this power

where OFCOM have made a recommendation for the making of such regulations in their most recent report under section 229 (report in anticipation of new licensing round) or 264 (report on the fulfilment of the public service remit) of the CA 2003. Subsection (3) provides for the exercise of this power in situations where OFCOM has reported under section 229 or 264, but not made a specific recommendation. Subsection (6) also imposes requirements on the Secretary of State to consult the listed persons before making regulations. Similarly, OFCOM must consult with the persons listed in subsection (5) before recommending that the Secretary of State make such regulations.

Justification for the procedure

34. The potential creation of additional quotas for audiovisual content is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure.

Clause 11, inserting new section 278B(5)(c)(ii) of the CA 2003: Power for the Secretary of State to specify additional “qualifying audiovisual services” which can be used by public service broadcasters to fulfil their independent, original and regional productions quotas and any additional quota under clause 10

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: No

Context and Purpose

35. Currently, PSBs can only meet their quotas by way of content broadcast on their main linear television channel(s) (their ‘public service channels’). However, the independent communications regulator OFCOM has found that the current quota system is restrictive for PSBs and recommended in their most recent review of public service broadcasting, *Small Screen: Big Debate*, that the framework for PSB should be made more ‘service neutral’ to better reflect modern viewing habits. In line with this recommendation, clauses 8, 9, 14 and Schedule 1 (read with clause 11) make provision for public service broadcasters to be able to fulfil their statutory independent, original and regional productions quotas using any “qualifying audiovisual service” they provide. This term is defined in new section 278B (see clause 11) as including both their television broadcasting services (i.e. their public service channels) and ODPSs that are, or form part of, internet programme services that have been designated to receive prominence (see clause 23).
36. In this context, the purpose of the new delegated power (subsection (5)(c)(ii) of new section 278B) is to enable the Secretary of State to make additions to the list of services that PSBs can use to fulfil their independent, original and regional production quotas or any additional quota made under new section 278A as viewing habits change and technology continues to develop.

Justification for taking the power

37. It is the Department’s view that the arrangements described above should provide PSBs with sufficient flexibility for meeting their quotas in line with the ways audiences currently

view content. However if, as is likely, viewing habits continue to evolve in the coming years, it may be necessary to add additional services to the list of services which PSBs can use to fulfil their quotas in order to ensure that public service content remains easily accessible by audiences, and that PSBs are able to innovate in the way that they make that content available.

38. There are limits on what services can be prescribed. The Secretary of State will only be able to specify relevant audiovisual services (within the meaning of s264 as amended) and must consult with OFCOM before making any regulations (subsection (7) of new clause 278B). OFCOM, in their capacity as the independent regulator, will be able to advise based on their understanding of audiences' viewing habits and technological changes. The draft affirmative procedure will apply (subsection (9)).

Justification for the procedure

39. The question of which services PSBs should be able to use to fulfil their quota obligations is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

Clause 12, inserting new section 278C(2) of the CA 2003: Power for the Secretary of State to make provision for repeats, etc

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Henry VIII power: No

Context and Purpose

40. As set out in more detail above, at present PSBs can only meet their quotas by way of content broadcast on their main linear television channel(s) (their 'public service channels'). However, clauses 8, 9, 14 and Schedule 1 (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.
41. The new power at section 278C(2) requires the Secretary of State to make provision for the appropriate treatment of material which is made available by a PSB 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.
42. The Secretary of State must exercise this power to make regulations. However, except in the case of a quota condition relating to independent productions, such regulations 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)).

Justification for taking the power

43. The efficient and effective operation of the modernised independent, original and regional production quotas will require clear rules on the appropriate treatment of this material, since that treatment will have a significant bearing on the appropriate level of each quota. This is an issue with the existing system of quotas, and the existing delegated power (at section 277(2)(a)) has previously been used to exclude repeats from the independent production quota. However, the Government considers that this is an apt moment to restate this power more clearly, and to update it to apply across the three sets of quotas or any additional quota made under new section 278A which will now be deliverable across a wider range of services.

Justification for the procedure

44. The question of whether repeats (or, equivalently, content made available on multiple services) should count towards a PSB's quota obligations is likely to be a question of particular interest to Parliament, and therefore the Department has proposed the affirmative procedure.

Powers relating to Part 2 – Prominence on television selection services

Clause 23, inserting new section 362AA of the CA 2003: Power for OFCOM to designate internet programme services

Power conferred on: OFCOM

Power exercised by: Decision

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

45. Under the existing prominence regime in the linear space there is a list of PSB channels set out in section 310(4) of the Communications Act 2003 (e.g. BBC One, BBC Two, ITV1, Channel 4, Channel 5, S4C and STV) which must be afforded prominence within a regulated Electronic Programme Guide (EPG). The list of PSB linear channels are static and we would not expect there to be considerable changes in how they operate/appear (in most cases via an EPG) on TVs and platforms.
46. The purpose of new section 362AA is to enable OFCOM to designate what 'internet programme services (IPS)' are to be in scope of the new prominence regime. It also ensures that only services which make a significant contribution to the fulfilment of the relevant PSBs' public service remit and which make public service content easy to find within the service, are afforded prominence. Subsection 1 sets out that an IPS must be provided by the BBC, a PSB or a "person associated with" the PSB. Meanwhile, subsection (3), (4) and (5) sets out specific eligibility criteria a service must satisfy to be designated by OFCOM, and subsection (6) details additional matters which OFCOM must have particular regard to when deciding whether it is appropriate to designate a particular service. Meanwhile, subsection (9) allows OFCOM to impose licence conditions to ensure designated IPS provided by a licensed public service channel continue to meet the designation criteria after the service has been designated. Equivalent change is made in respect of S4C in new

paragraph 5A of Schedule 12 to CA 2003, to be inserted by paragraph 8 of Schedule 5 to this Bill. The BBC's online services are already regulated by OFCOM under the BBC's Framework Agreement.

47. As set out in subsection (10), a service is considered an IPS if “— (a) its principal purpose is the provision of programmes (as described in section 368ZA); (b) the programmes viewed by the user are received by the user by means of the internet; and (c) the programmes it provides to a user of the service are either—(i) contained in a single on-demand programme service (ODPS), or (ii) contained in an ODPS and one or more other services which are either ODPS or other services that consist of, or have as their principal purpose the provision of, programmes.” The purpose of this definition is to allow services which offer a purely on-demand service and/or a mix of on-demand and livestream programming to be potentially designated under the new regime.
48. As set out in 362AZ8 (6) , a provider of an IPS is considered to be associated with a PSB if: (a) the provider of the IPS is a wholly-owned subsidiary of the PSB; (b) the PSB is a wholly-owned subsidiary of the provider of the IPS; (c) the provider of the IPS and the PSB are wholly-owned subsidiaries of another body corporate.

Justification for taking the power

49. Given that there will not be a relatively static list of services which should be given prominence under the new regime, as is the case in the linear space, it is important that the regime allows for a more flexible approach for determining what services should be in scope. The process of designating will also need to be agile, given the rate of change as to which IPS are in scope of the regime will likely be higher than in the linear space. The Bill therefore sets out a clear framework of criteria that an IPS must satisfy in order to be designated, and particular matters which must be taken into account when deciding to designate an IPS, but delegates the decision on designation to decisions of OFCOM.
50. In the Department's view, OFCOM are best placed to determine whether or not an IPS is to be designated because they are responsible for monitoring and enforcing the extent to which the PSBs contribute to the fulfilment of the general and individual PSB remit across all their relevant audiovisual services (including their IPS). For that reason, OFCOM as the independent regulator is best placed to assess whether an IPS satisfies the criteria in subsection (3),(4) and (5) and whether it would be appropriate, having reference to the matters set out in subsection (6), for a particular IPS to be offered, made available and displayed prominently. The approach taken in the Bill will also enable OFCOM to respond more quickly to changes in the market and/or the introduction of new services which PSBs might use to deliver their PSB remit in the future. Setting out a list of IPS services on the face of the Bill would not allow that degree of flexibility.

Justification for the procedure

51. The Department's view is that once Parliament has agreed in principle, via the Bill, to enable a PSB to: (i) contribute to the fulfilment of their PSB remit across all their relevant audiovisual services (including their designated IPS); and (ii) has agreed to the high level criteria for designation, it would be appropriate for OFCOM to designate which specific services satisfy those criteria without further Parliamentary procedure. For the reasons set out above, the ability for OFCOM to respond quickly to changes in the market will be important, and for both those reasons the Department considers that no further Parliamentary procedure should be attached to OFCOM decisions under this new section. Were a designated service to stop contributing adequately to fulfilment of their public service remit, OFCOM can take appropriate enforcement action, including as a matter of

last resort, the power to remove the designation of the IPS (see paragraphs 55 to 60 below for analysis of the power to revoke designation).

Clause 23, inserting new section 362AB of the CA 2003: Power for OFCOM to revoke designation of internet programme services

Power conferred on: OFCOM

Power exercised by: Decision

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

52. Prominence is provided in exchange for the fulfilment of certain obligations by the PSBs, including original programming and local news provision. This exchange of obligations and benefits is known as the ‘PSB compact’. In a scenario where a designated IPS is no longer making a significant contribution to its provider’s public service remit or if the IPS does not make public service content easy to find within the service, then it is important OFCOM has the necessary enforcement tool to remedy this, and in worst case scenarios remove the designation, and thus access to the benefits of prominence and availability.
53. In a situation where a designated IPS is no longer satisfying the eligibility conditions under new section 362AA(3), (4) and (5), i.e. it is no longer: (a) making a significant contribution to the fulfilment of the public service remit of the PSB; or (b) the public service remit content included in the service is not readily discoverable or is not promoted by the service, this new section gives OFCOM the power to revoke their designation for prominence and availability. Subsection (1) also gives Ofcom the power to remove a designation if the IPS is no longer provided by a person considered to be associated with the PSB under 362AZ8.
54. OFCOM must consider that there are reasonable grounds for believing a designated IPS has failed or is failing to comply with any of these designation requirements. If so, OFCOM may give a notice under this section to the PSB giving reasons for this opinion and any reasons for proposing to remove their designation. A PSB has an opportunity to make representations to OFCOM within a specified period (as determined by OFCOM in their notice), after which OFCOM will make the final decision as to whether or not to revoke the designation of the IPS.
55. Subsection (6) also gives OFCOM the ability to remove the designation of an IPS at the request of a public service broadcaster. This could be because the service itself no longer exists or the PSB wishes to designate a new IPS.

Justification for taking the power

56. As stated above, the Department is of the view that it is appropriate for OFCOM to determine whether or not to designate or remove the designation of an IPS as they will be monitoring the extent to which the PSBs contribute to the fulfilment of the general and individual PSB remit and quota requirements across all their relevant audiovisual programme services (including the PSB’ IPS), as well as the level of prominence given to PSB content within the designated IPS. If OFCOM has the power to designate an IPS then it would need the converse power to remove that designation.

Justification for the procedure

57. The Department's view is that decisions under this new section will be a regulatory matter for OFCOM within the parameters set by Parliament through the Bill, and therefore no further Parliamentary procedure should be attached to decisions made under this new section. The ability to revoke the designation of an IPS will be an important enforcement tool for the regulator to ensure that the benefit of prominence is only given to those designated IPS which can demonstrate how the service is used to fulfil the provider's PSB obligations. OFCOM already has enforcement tools in relation to PSBs. In respect of licenced public service channels, this includes the power to ensure that the particular IPS continues to contribute adequately to fulfilling PSB obligations.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: No

Context and Purpose

58. This section establishes the definition of a "television selection service (TSS)", which is used in connection with an "internet television equipment". The definition of a TSS has two strands. First, a TSS must present the IPSs included in its service (for example, the on-demand player of a public service broadcaster). Second, a TSS must allow a user to choose between selection services or programmes and access IPSs and/or programmes provided by those IPSs. So, for example a smart TV that enables users to choose between IPS, or to select and access programmes provided by those IPS whether on-demand or live-streamed.
59. The definition of a TSS then flows through to new section 362AE (meaning of "regulated television selection service") which creates a category of "regulated" TSS which will be those providers which have to comply with the new prominence framework set out in the Bill.
60. This definition bears some similarity to the definition of an "electronic programme guide" in section 310(8) of the 2003 Act. However, it has been necessary to make certain changes to reflect the state of technology and how television is delivered and accessed by viewers over the internet – in particular that the TSS is delivered via an apparatus which for the purposes of this legislation is referred to as an "internet television equipment".
61. Subsection (2) of this new section 362AD empowers the Secretary of State to specify "internet television equipment" in regulations. In these regulations the Secretary of State will set out the descriptions of apparatus or 'categories' of apparatus that are to be considered "internet television equipment". For example, the Department would expect this to cover Smart TVs and set-top boxes, which are primarily used to access a TSS.
62. The purpose of seeking this power is to enable the Secretary of State to set out further technical detail in regulations on the definition of an "internet television equipment".

Justification for taking the power

63. In the Department's view, there are two reasons why specifying an "internet television equipment" in regulations is appropriate. First, the Department's intention is to avoid capturing all devices capable of carrying on-demand and livestream services. In the Department's view that would not be proportionate. Instead, the Department's intention is for the new prominence regime to only capture devices whose main function is the delivery of television.
64. Setting out specific apparatus or categories of apparatus on the face of the Bill would risk unintended consequences and multi-use devices whose primary function is not the delivery of television to be brought into scope. Setting out technical detail in regulations avoids creating a definition on the face of the Bill which would inadvertently capture devices which we are not proposing to capture, and does not preclude the designation of TV devices we potentially would want to capture.
65. Technological change may lead to further shifts in viewing habits, which means that it is necessary to amend the specified list of "internet television equipment". This power would provide the Government with appropriate flexibility to respond more rapidly to technological change. It is important that the specified "internet television equipment" – which is used to access a "television selection service" – is sufficiently future-proofed. However, the Department also wishes to ensure that regulation remains proportionate.

Justification for the procedure

66. In the Department's view the parameters of what an "internet television equipment" means is set out clearly on the face of the Bill in section 362AD(1). As such the Department is of the view that the negative procedure is appropriate and affords Parliament sufficient scrutiny as to the precise descriptions and categories of specific apparatus which a regulated TSS is to be accessed. The Department also notes that this approach is precedented, insofar as the power in section 368 of the Communications Act 2003 – which sets out the meanings of a "television receiver" for the purposes of the TV licence fee – is also subject to the negative procedure.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

67. As stated above, the rate of change in how viewers are watching television online and the new types of TV services and technology emerging means it is important that the definition of a "television selection service (TSS)" and "internet television equipment" remains relevant and is able to capture both current and future technology. Therefore, a power is taken at subsection (7) to amend both these definitions. This power includes the power to make consequential amendments to the 2003 Act or any other Act.

Justification for taking the power

68. This power will allow the definition of a TSS and/or “internet television equipment” to be updated if necessary in line with technological developments.
69. For the integrity of the new online prominence regime, it is important that these definitions continue to reflect the state of the art, even as technology evolves at considerable speed. In particular, it is important that the definition continues to capture a wider range of user interfaces used by viewers to find and access online television services.
70. In addition, were the definition to be affixed on a more permanent basis, the Government is concerned that, *in extremis*, changes could be made to existing TSS or equipment by their providers (whether accidentally or deliberately) so as to take those services outside the existing definition. This could have significant negative implications for the viewer experience and for designated internet programme service (IPS) providers.

Justification for the procedure

71. The Department recognises that the definition of a TSS and “internet television equipment”, has a considerable impact on the nature and scope of the online prominence regime. As such, any regulations made under this section are likely to be of considerable interest to Parliament. For this reason, the draft affirmative procedure is proposed.

Clause 23, inserting new section 362AE(1) of the CA 2003: Power for the Secretary of State to designate “regulated television selection services” or specify a description of “regulated television selection services”

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: No

Context and Purpose

72. As set out above, new section 362AE establishes the definition of a television selection service (TSS). This definition then flows through into this new section which creates a category of “regulated” television selection services (RTSS). A number of obligations are then placed on RTSS by other provisions in the Bill, including the duty to carry designated internet programme services (IPS) and to display these designated IPS with appropriate prominence within their user interface (UI). A RTSS will also be required to ensure its UI is accessible to those viewers with hearing and visual impairments.
73. A RTSS is defined as one designated by the Secretary of State by regulations; or one being of a description (or category) designated by the Secretary of State by regulations (subsection (1)). An RTSS or a category of RTSS may only be designated if they meet the requirements in subsections (2) and (3). Principally, this requires that they are used by a significant number of members of the public in the United Kingdom as a means to select and access designated IPS and/or programmes within an IPS.

74. Before making regulations, the Secretary of State must have received a report under new section 362AF, setting out OFCOM’s assessment of the number of users, the manner in which the TSS is used and any other matters OFCOM consider likely to affect whether to designate a TSS. Such a report may be provided proactively by OFCOM, or on request from the Secretary of State. OFCOM must publish all reports given to the Secretary of State in relation to these provisions. Should the Secretary of State materially depart from OFCOM’s recommendations, the Secretary of State must set out their reasons for doing so.

Justification for taking the power

75. For the new online prominence regime to be effective, it is important that it captures the most popular TSS (together comprising a significant proportion of the market). Capturing the most popular TSS will ensure that designated IPS are available and easy to find for the overwhelming majority of UK viewers.
76. By prescribing which TSS or categories of TSS are in scope of regulations (including thresholds where applicable) it will ensure regulatory clarity as to which services have to comply with the new regime.
77. Given the propensity of providers to launch (or withdraw) TSS and the inevitable rise and/or fall in the popularity of different services, ensuring that the most popular services are captured within regulations, without accidentally capturing less popular services, could require updates to the regulations. This approach will allow for these updates to be made which would not be straightforward if these services were listed on the face of the Bill.
78. As also stated above, to ensure regulation is proportionate and targeted, it is not our policy aim to capture all platforms capable of carrying on-demand and livestream services, but only the major or most popular TV platforms – ie. those services that are used by a “significant number of UK users” to access TV online.

Justification for the procedure

79. In the Department’s view, the Bill contains sufficient detail to indicate the types of TSS and categories of TSS which would fall within the scope of regulation. Furthermore, the Secretary of State cannot make any designations until it has received advice from OFCOM who will be carrying out the necessary research to assess if certain TSS or categories meet conditions in accordance with new section 362AE. This will ensure proportionate regulation and will provide the necessary evidence required to inform any designations made by the Secretary of State under this new section. The Department has therefore proposed the negative procedure regulations made under this new section.

Clause 23, inserting new section 362AK of the CA 2003: requirement for OFCOM to issue guidance on “agreement objectives”

Power conferred on: OFCOM

Power exercised by: Guidance

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

80. The Government’s intention is to allow PSBs and regulated television selection services (RTSS) to continue negotiating independently and to encourage processes where parties have the flexibility to negotiate a deal that is mutually beneficial.. This will be achieved by the following: (1) requiring PSBs and RTSS providers to act consistently with the statutory “agreement objectives” under new section 362AI(4) and 362AJ(2) when agreeing terms as to their respective “must offer” and “must carry” obligations; and (2) requiring OFCOM to publish, review and revise (where appropriate), guidance as to how PSBs and RTSS could promote these statutory objectives.
81. These “agreement objectives” are set out on the face of the Bill under new section 362AI(5).

Justification for taking the power

82. In the Department’s view, it would be neither appropriate nor effective to go further on the face of the Bill than the “agreement objectives” in new section 362AI(5) because the detail proposed to be in guidance procured by OFCOM will relate to independent commercial negotiations between PSBs and RTSS providers. OFCOM’s guidance will not attempt to determine the financial value of factors negotiated between PSBs and platforms, as this is not the primary objective of the regime. Instead OFCOM’s guidance will simply seek to support commercial negotiations by providing clarity to both parties around what it would consider “appropriate terms” and how both parties can act consistently with the “agreement objectives” during negotiations – as required by the legislation. The aim is to help parties avoid long and protracted negotiations and disputes as opposed to dictating what should be negotiated.

Justification for the procedure

83. Given as above, it is the Department’s view that OFCOM should issue guidance on the “agreement objectives”, no parliamentary procedure is proposed. The issuing of guidance is an essentially administrative step for OFCOM as the independent regulator who will enforce the new prominence regime.

Clause 23, inserting new sections 362AM to 362AO of the CA 2003: requirement for OFCOM to issue a Code of practice relating to prominence

Power conferred on: OFCOM

Power exercised by: Code of practice

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

84. By virtue of new section 362AL(1) and (4) (duties relating to a regulated television selection service) providers of regulated television selection services (RTSS) are required to include and give an appropriate degree of prominence to a designated internet programme service (IPS) and to incorporate features in the service which enable persons with disabilities to use their service.

85. Subsections (1) to (3) of new section 362AMN require OFCOM to issue, and publish, a code of practice describing actions that OFCOM recommends for compliance with the duties set out under 362AL. Failure to do so does not by itself make the provider liable to legal proceedings, but a court, tribunal or OFCOM must take into account the contents of a code when determining a question where the provision in the Code is relevant (see new section 362AN(3)).
86. Relevant consultation requirements are set out in new section 362AO which requires OFCOM to consult the Secretary of State, public service broadcasters, RTSS and other appropriate persons before issuing a code of practice.

Justification for taking the power

87. The duties referred to in new section 362AL are substantive obligations on RTSS. As discussed above, there is no single model for a RTSS nor a “one-size fits all” approach to delivering prominence or accessibility requirements, given different platforms will have different features (i.e. rails, tiles, tabs and sections) included within their service. Consequently, it is impossible to provide on the face of the Bill a single yardstick for what constitutes an “appropriate” degree of prominence: giving providers flexibility in this regard is both inevitable and important in ensuring that these provisions do not restrict innovation, impact customer choice or inadvertently lead to a situation where a RTSS cannot comply due to insufficient technological capability. Nevertheless, in the context of this flexibility the Government is keen to ensure that RTSS have access to guidance which, if followed, provides clear recommendations and assurance that they are meeting their statutory obligations under this regime.
88. These provisions rely on the use of a code of practice which – compared to primary legislation – can be more easily updated from time to time (should new approaches to prominence materialise). In addition, it can simplify the process to amend the code to include new recommendations or case studies for different cases, to account for the number of different types of RTSS. OFCOM, as the independent regulator, is best placed to recommend actions in each case, taking account of both audience viewing habits and types of technology and devices on the market.

Justification for the procedure

89. In the Department’s view, this provision relates to an administrative matter for OFCOM. Once Parliament has agreed in principle that RTSS providers should be under a duty to display designated IPS prominently on their service, the question of how that service should be displayed is appropriately determined by OFCOM (following consultation with PSBs, RTSS providers, the Secretary of State and any other appropriate persons). The code of practice will also assist RTSS providers to know how they can demonstrate their compliance with the duties listed under new section 367M. Therefore, the Department does not consider that any parliamentary procedure is necessary.

Clause 23, inserting new section 362AZ3 of the CA 2003: requirement for OFCOM to issue guidance on enforcement

Power conferred on: OFCOM

Power exercised by: Guidance

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

90. As is the case under the existing prominence regime under section 310 of the Communications Act 2003, OFCOM will be enforcing this new online prominence regime. Therefore a range of enforcement powers will be conferred on OFCOM for the purposes of tackling any contraventions in a proportionate and effective manner.
91. OFCOM will be required to produce, publish and maintain guidance about how it proposes to exercise its enforcement powers. The guidance must, in particular, give information about the factors that OFCOM would consider it appropriate to take into account when taking, or considering taking, enforcement action. Before producing such guidance, OFCOM must consult with the Secretary of State and any other person OFCOM considers appropriate. OFCOM will have the power to amend or revise the guidance.
92. For PSBs OFCOM will use existing powers in relation to the enforcement of updated PSB licence conditions. These powers are to be used to enforce PSB obligations where they are fulfilled by services other than their licensed public service channel in respect of Channel 3, 4 and 5 or by S4C's public television services, which includes their designated IPS. In terms of enforcement in relation to the BBC and S4C the Bill creates a function for OFCOM to regulate the BBC and S4C under this new Part by amending section 198 and section 341 of the Communications Act 2003 respectively – further amendments will also be required in the BBC Framework Agreement.
93. OFCOM requires new powers to be able to enforce the new prominence obligations against providers who are not PSBs, such as a regulated television selection service (RTSS) in scope of the regime or third parties who have failed to respond to a request for information. This enforcement provision will enable OFCOM to issue a provisional notice of contravention in respect of a failure to comply with a number of listed duties. These are the notification duties in new section 362AG, the requirements set out at new section 362AL and “must carry” obligations at new section 362AJ. In order to issue such a notice, OFCOM must consider that there are reasonable grounds for believing that the provider has failed or is failing to comply with a relevant duty or requirement. This notice can then be followed by a confirmation decision requiring the provider to take remedial action as well as imposing a penalty for continued failure to comply with the duties or requirements. OFCOM can impose a maximum penalty of the greater of £250,000 or 5% of the person's qualifying worldwide revenue (in the case of a third party the maximum penalty is £250,000).

Justification for taking the power

94. Since this guidance will be informing PSBs and RTSS providers how OFCOM proposes to exercise its enforcement powers under the Bill, it is appropriate for the regulator to be responsible for such guidance, after consulting the Secretary of State and other persons who OFCOM considers appropriate.
95. This guidance is intended to assist regulated services by providing them with transparency as to how OFCOM intends to use its enforcement powers. Furthermore, the power to revise the guidance provides OFCOM with the ability to modify the details if they are required in light of emerging technologies and changes in the activities of regulated services. It would not be appropriate to put this on the face of the Bill. Rather, it is more appropriate for the independent regulator – OFCOM – who is enforcing this regime to set out their

enforcement processes and procedures as they already do for the sectors they currently regulate.

Justification for the procedure

96. Since the guidance will be concerned with how the regulator intends to use its enforcement powers, it will be administrative in nature. Therefore, the Department does not consider that any parliamentary procedure is necessary.

Clause 23, inserting new section 362AZ4 of the CA 2003: requirement on OFCOM to publish a Fees Statement

Power conferred on: OFCOM

Power exercised by: Published Statement

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

97. In order to enforce this new prominence regime OFCOM will be funded via fees from providers with in-scope services (both PSBs and regulated television selection service (RTSS) providers). OFCOM will be required to publish a Statement of Principles (“the Statement”) which OFCOM will adhere to when setting out the fees payable by providers with in-scope services for their costs in relation to the exercise of their new prominence functions.
98. The principles within the Statement must outline how the fees charged by OFCOM will meet, but not exceed, the costs of carrying out their functions under the new prominence regime for that financial year (financial year meaning a period of 12 months ending on 31 March). OFCOM’s statement will also be required to set out principles underpinning the result that the fees to be charged are proportionate and justifiable and has regard to the circumstances of the service provider, as well as to ensure there is transparency in relation to the costs incurred in the exercise of functions and fees charged.

Justification for taking the power

99. This duty to publish the Statement is consistent with OFCOM’s approach for other regimes. There is precedent: see section 347 of the Communications Act 2003 in relation to the statement of charging principles in respect of broadcasting licence fees. It is appropriate for the regulator to publish the Statement to allow for transparency around how the new online prominence is funded and to ensure clarity for PSBs and RTSS providers who will have to pay the fee set by OFCOM.

Justification for the procedure

100. In the Department’s view, no parliamentary procedure is necessary, in line with the existing fees procedures for OFCOM’s other regimes. OFCOM must publish the Statement and any revisions to aid broader transparency.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

101.Paragraph (5) of proposed new Schedule 15ZA to the Communications Act 2003 (introduced by Schedule 3 to this Bill) confers a power for the Secretary of State to substitute a different sum for the £250,000 sum specified as the maximum amount for penalties to be imposed for regulated television selection services (RTSS) and/or person who fails to comply with an information notice (see section 367Q), as well as the power to substitute a different percentage for the 5% of qualifying world revenue imposed on RTSS.

Justification for taking the power

102.This is necessary to future proof the legislation if it is later considered that the existing statutory maximum is insufficient to incentivise compliance with the online prominence framework. This is especially relevant given the size of some of the services which could be captured. Section 237(9) Communications Act 2003 provides a precedent for such a power.

Justification for the procedure

103.The Department proposes that the affirmative procedure applies here to ensure that Parliament has full scrutiny of any new sum or percentage being specified.

**Clause 23(3) and Schedule 3, inserting new paragraph 7 of schedule 15ZA to CA 2003:
requirement for OFCOM to make a statement about “qualifying worldwide revenue”**

Power conferred on: OFCOM

Power exercised by: Published Statement

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

104.OFCOM will have the power to impose a financial penalty against regulated television selection service (RTSS) providers, where in some cases they might deliver their service worldwide and/or are based outside of the UK. Under new schedule 15ZA CA 2003, OFCOM will be able to impose a maximum penalty of £250,000 or 5% of the person’s qualifying worldwide revenue, whichever is greater. The definition of “qualifying worldwide revenue” for purposes of calculating maximum amount of penalties for RTSS

(where relevant) is to be set out in a statement by OFCOM (see paragraph 7 of new schedule 15ZA).

Justification for taking the power

105. “Qualifying worldwide revenue” is a key factor in determining the applicable penalties, which is central to OFCOM’s enforcement regime. Defining it in a statement will allow OFCOM as the regulator to draw on their own financial and regulatory expertise, and consult extensively with affected companies, in order to determine the appropriate definition(s) of “qualifying worldwide revenue”. Defining the terms in a statement will also allow for the definitions to be amended in the future. This will be required to ensure that the terms “qualifying worldwide revenue” remain relevant.

Justification for the procedure

106. Additional parliamentary scrutiny would be disproportionate given that the decision on what constitutes “qualifying worldwide revenue” is essentially a technical one. Before making a statement, OFCOM must also consult with the Secretary of State, HM Treasury and any other persons OFCOM considers appropriate. This will ensure that the Government and key stakeholders can input views as to how the “qualifying worldwide revenue” should be calculated.

Powers relating to Part 3 – Public Service Broadcasters

Clause 26(2), inserting new section 204B of the CA 2003 : Secretary of State’s approval of S4C’s new activities

Power conferred on: Secretary of State

Power exercised by: Written approval by Secretary of State

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

107. Under paragraph 1(2) of Schedule 6 to the Broadcasting Act 1990, as inserted by section 206(6) of the Communications Act 2003, S4C as a public body already has the power to carry out its public service functions and to do anything which appears to S4C to be ‘incidental or conducive’ to the carrying out of those functions. In addition, S4C has the power under that Act to undertake activities which are ‘connected’ to its public service activities and which are considered ‘appropriate’ for S4C to enter into. However, for S4C to exercise this latter power, it requires the approval of the Secretary of State in the form of an Order, following the process for a negative resolution order. This is a Statutory Instrument that has to be laid before both Houses of Parliament for 40 sitting days.

108. In practice, the timescale for seizing on commercial opportunities, especially those involving disruptive technologies or first-mover advantage, together with the confidential nature of discussions on commercial transactions, are normally incompatible with the process of making an Order.

109. The S4C Independent Review was published on 29 March 2018 along with the Government's response to the review. The four recommendations which required changes through primary legislation included amending current approval requirements to give S4C greater flexibility in their ability to invest and generate commercial revenue. The Department is therefore updating the regulatory framework to provide S4C with that greater flexibility and also clarity as to how it can raise commercial income, to support an S4C for the future that is able to grow its commercial revenues without being constrained by a reliance on public funding, as public service broadcasters are encouraged to do. As part of this, the Department is removing the requirement for Secretary of State approval by order, and replacing it with Secretary of State approval in writing: see new section 204B as inserted by clause 26(2). The same will apply to the creation of a new linear television service. Therefore, S4C must ensure that it and its companies obtain the Secretary of State's approval in writing before doing anything for a charge or with a view to making a profit.

Justification for taking the power

110. Introducing a power for the Secretary of State to approve commercial activities of S4C and S4C companies in writing rather than by order would implement the recommendation in the Review, to give S4C greater flexibility and sustainability, most effectively. It would be difficult to create an exhaustive list on the face of the Bill of approved activity for payment or intended to make a profit that S4C could undertake, because it is not possible to predict precisely what future commercial activity might constitute. The proposed power will allow the Department to determine which activities can be covered by a general approval, and which would need specific approval, for example on the basis of a financial threshold of investment size. This allows for flexibility but will also allow the Secretary of State to ensure that more significant commercial activity being undertaken is appropriate. The approval of a new linear television service will also be done in writing rather than by order, again to allow S4C greater flexibility in responding to developing audience needs, and the associated approval will be published unless it contains commercially sensitive information.

Justification for the procedure

111. Once Parliament has approved in principle that SoS need only approve S4C undertaking new commercial activities or a new linear television service, then it is appropriate for the Secretary of State and S4C to determine when and how S4C should seek approval on these matters. This is essentially an administrative matter which in the Department's view would not require further scrutiny from Parliament.

Clause 29: Power for S4C and British Broadcasting Corporation (BBC) to agree on provision of support by BBC

Power conferred on: S4C and BBC

Power exercised by: Written agreement between S4C and BBC

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

112. Section 58 of the Broadcasting Act 1990 requires the BBC to provide S4C, free of charge, with no less than ten hours of television programmes in Welsh per week, to support S4C in fulfilling its public service remit as set out in Schedule 12 to the Communications Act 2003. Both S4C and the BBC have agreed that such a specific requirement is now out of date – the BBC may be able to provide other types of support to S4C that are more relevant to S4C’s functions and remit in a modern digital broadcasting age. For example, that support might include use of spectrum, specific services, rights, funding or content. As such, the purpose of the new delegated power in proposed new s.58(1A) of the Broadcasting Act 1990 is to allow for the BBC and S4C to have the flexibility to agree mutually beneficial alternative arrangements. These alternative arrangements will be agreed by the BBC and S4C in a written agreement. If the parties are unable to reach an agreement on alternative arrangements, the current requirement for the BBC to provide S4C with 10 hours of television programming in Welsh will remain as a backstop.

Justification for taking the power

113. All parties agree the current arrangement (10 hours of television programming in Welsh) is out of date and does not reflect the evolving broadcasting landscape where different BBC support may be more relevant to help S4C meet its public service remit. Crucially, the nature of that support may need to change frequently and rapidly depending on S4C’s priorities at any given time, as well as developments in viewing habits and technology. Waiting for primary or secondary legislation changes would not provide the parties with the flexibility to respond to developments in the wider broadcasting landscape, or indeed in S4C’s own strategy, in a timely manner.

Justification for the procedure

114. This will be an agreement between two independent broadcasters based on their respective business strategies, with no Government involvement. It would therefore not be appropriate or relevant to require Parliamentary scrutiny of any agreement.

Powers relating to Part 4 – On-demand programme services

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: No

Context and Purpose

115. This clause enables the Secretary of State to determine which video-on-demand (“VoD”) services, including services that are currently outside UK jurisdiction, fall within the new enhanced Tier 1 regulation. This is in addition to VoD services that are being used by a PSB (other than the BBC) to contribute to the fulfilment of its public service remit, which will automatically fall into Tier 1 by operation of 368HA(1).

116. Under current legislation, VoD services are regulated less robustly than traditional broadcast television, and in some cases are not regulated in the UK at all. The new Tier 1 requirements are designed to give audiences similar protections to existing legislation already in place for the regulation of broadcast content. Tier 1 is intended to capture larger, TV-like services and those that have the greatest potential for audience harm. Smaller, lower risk on-demand services in the UK will continue under existing law (which is found in Chapter 2 of Part 4A CA 2003).
117. While responses to the Government's consultation on *Audiences Protection Standards on Video-on-demand Services* suggested metrics that could be used to assess the risk of audience harm from different services, the responses did not provide evidence of where that level should be set. In addition, data is currently limited to support an evidence-based decision at this time; for example, there is no comprehensive industry standard measurement for on-demand audiences.

Justification for taking the power

118. In the Government's view, it would not be practical to set out which specific services come under Tier 1 on the face of the Bill, aside from those being used by public service broadcasters (other than the BBC) to contribute to the fulfilment of their public service remit. Due to the rapidly changing landscape of the VoD market, it would be inefficient to narrowly define the scope of this regulation, with new entrants to the market and rapid growth in services likely requiring updates to the included regulated services in future. It is important that the framework can evolve to reflect these changes.
119. Fixed parameters or metrics for inclusion could result in services coming in and out of regulation scope as metrics such as turnover or audience size fluctuate. Outlining specific metrics to capture larger, TV-like services would also not allow for the inclusion of smaller services in Tier 1, even though these might pose a high risk of harm (e.g. in the case of pseudo medical advice or harmful extremism). These will need to be considered in light of the level of harm or potential for harm, which cannot be measured numerically or by proxy and must be considered on an individual basis.
120. The existing information gathering powers in place for VoD services are limited, meaning that the information required to set exact parameters and determine which services should come under Tier 1 is not yet available. The legislation therefore gives OFCOM information-gathering powers and provides that the Secretary of State will request that OFCOM prepare a report on the operation of the market in the UK for VoD services before the initial determination of which services fall within Tier 1. The Secretary of State is required to have regard to the contents of this report when determining which services will come under Tier 1. In the Department's view, this acts as an appropriate constraint on the exercise of the power.

Justification for the procedure

121. The use of regulations will ensure Parliamentary oversight of the Secretary of State's decisions. The negative procedure is considered appropriate as legislation needs to allow for swift decision making to ensure audiences are protected quickly. Using the negative procedure will, in the Department's view, balance ensuring that OFCOM are given appropriate regulatory oversight with the ability to act at the earliest opportunity from the moment a risk is identified. The clause does provide that before making regulations the Secretary of State must publish a list of services, or descriptions of a service, that they

propose to designate as Tier 1. This will ensure maximum transparency for providers who might fall within Tier 1, and allow for appropriate scrutiny by Parliamentarians in advance of regulations being laid in Parliament.

122. Legislation also requires that the Secretary of State has regard to an independent report conducted by OFCOM before making the first regulations to determine services for inclusion in Tier 1. This will enable decisions to be evidenced by OFCOM's expertise but ensure OFCOM's essential role as an impartial, independent regulator is not unduly affected.

123. The scope of the report must deal with any matters specified by the Secretary of State in their request, and any other matters considered appropriate by OFCOM. It is expected that this report will include information such as: turnover, size and nature of audience, accessibility to potential viewers, content of programmes, and matters to which OFCOM give prominence. The information in this report will be used by the Secretary of State to inform their decisions on which video-on-demand services should be included in Tier 1, whether due to their large, TV-like nature, or potential to cause harm.

Schedule 7, inserting new section 368HF of the CA 2003: Power for OFCOM to prepare and publish a Code of standards for Tier 1 services

Power conferred on: OFCOM

Power exercised by: Standards Code

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

124. This clause requires OFCOM to prepare and publish a Code containing standards set by them for the regulation of Tier 1 VoD services. It is defined here that the standards of this Code must be set by OFCOM so as to secure the objectives set out in this provision. This Code will be primarily aimed at larger, TV-like VoD services, but could also address smaller services that have the potential to cause harm to audiences due to the nature of their content.

125. The objectives for the Tier 1 VoD Code laid out here provide OFCOM with clear guidance on the aims of Tier 1 regulation. The objectives of the new Code align closely with the objectives set out in legislation for OFCOM's existing Broadcasting Code for the regulation of OFCOM licensed broadcast content. This includes objectives such as protecting under-eighteens, that material likely to incite crime or lead to disorder is not included, that news is reported with due accuracy and due impartiality, that audiences are protected from the inclusion of offensive and harmful material, and that responsibility is exercised in relation to religious programming.

126. In regulating these services, OFCOM must also have regard to the matters set out in 368HH(2) such as the likely expectation of potential audiences to the nature of the content and the degree of harm or offence likely to be caused. It is also required that OFCOM must consult on the content of the Code, including those who provide Tier 1 services, those who represent the interests of potential audiences of Tier 1 services, and any others who have an interest in the content of the Code.

Justification for taking the power

127. OFCOM is the UK's independent regulator and already regulates VoD services based in the UK. This regulation will remain in place but will be supplemented with the regulation of Tier 1 services. The delegated power given to OFCOM to prepare and publish the new Code will therefore be built on existing powers to regulate VoD services in the UK.
128. Ofcom has extensive expertise and experience in regulation and the Government considers it essential that the regulation of content should continue to be conducted by an independent body. The use of a delegated authority to produce a Code has already been demonstrated to be effective through the Broadcasting Code, which OFCOM devised, keeps updated, and enforces for broadcast content. As the new VoD Code will have similar objectives to the Broadcasting Code there is precedent for OFCOM being delegated these powers for Tier 1 services. The obligations for providers of Tier 1 services will also fall on businesses rather than individuals.
129. The delegation of powers to draft, implement, review and update a standards Code is also consistent with the aim of the Government to effectively future-proof content regulation in the face of the constantly changing landscape of VoD services. This clause sets out that OFCOM must keep the code under review and may from time to time revise the code as it sees fit. This is more practical than laying out the specific rules in legislation as it allows for OFCOM to ensure content regulation is kept in line with audience needs and changes to what is considered harmful. The Department recognises the Committee's general concern on binding guidance and Codes, but the reasons set out here show why, in the Department's view, the approach proposed is appropriate, has precedent and is practical.

Justification for the procedure

130. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is already precedent for OFCOM to independently produce and enforce a regulatory standards Code, with OFCOM already administering the Broadcasting Code, which this VoD Code is expected to broadly mirror. In addition, OFCOM already oversees the regulation of VoD services in the UK through the On Demand Programme Service Rules and accompanying guidance. This VoD Code will be an extension of their existing regulatory position in this area.

Schedule 7, inserting new section 368HH(4) of the CA 2003: Power for the Secretary of State to amend the list of matters OFCOM must have regard to in setting the standards code for Tier 1

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

131. New section 368HH sets out the matters to be taken into account by OFCOM when drafting or revising the standards code for Tier 1 services. The new Tier 1 requirements introduced

in this legislation are designed to align more closely with existing legislation already in place for the regulation of broadcast content. The legislation provides OFCOM with clear guidance on the aims of Tier 1 regulation.

132. The provision specifies that in setting out the standards for enhanced regulation, OFCOM must have regard for matters such as: the likely expectation of potential audiences as to the nature of content; the degree of harm or offence likely to be caused by content; whether and how information about the nature of content can be given to audiences; the length of time for which programmes will be included on a service; and the desirability of maintaining independence of editorial control. These factors must be taken into account by OFCOM when drafting or revising the code of standards that they set for Tier 1 services.
133. Section 366HH(4) gives the Secretary of State the power to amend this list of matters that OFCOM must take into account in drafting or revising the Tier 1 standards code.

Justification for taking the power

134. This delegation of powers to update the matters to be taken into account in setting the Tier 1 standard code is consistent with the aim of the Government to effectively future-proof content regulation in the face of the constantly changing landscape of VoD services and evolving technology. It is important that the framework can evolve to reflect these changes. This schedule allows for amendments to the list of matters for consideration and will therefore ensure that content regulation is kept in line with audience needs, changes in technology and market trends, and changes to what is considered harmful to audiences.
135. This power is aligned with the existing legislation around regulation for broadcasting, which similarly gives the Secretary of State the power to amend matters to be taken into account in the development of the Broadcasting Code. The power is also appropriately constrained by the requirement that the Secretary of State must consult OFCOM before making the regulations.

Justification for the procedure

136. The power in new section 368HH(4) will enable the Secretary of State to amend existing primary legislation and will directly affect the scope of the regulatory framework. The Department also recognises that any amendments to the list of matters which OFCOM must have regard to when drafting or revising the standards code for Tier 1 services is likely to be of particular interest to Parliament. The Department has therefore proposed the affirmative procedure.

Schedule 7, inserting new section 368HL(1) of the CA 2003: Power for OFCOM to prepare and publish a Code on accessibility for Tier 1 services

Power conferred on: OFCOM

Power exercised by: Accessibility code

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

137. This clause requires OFCOM to prepare and publish a code imposing requirements on Tier 1 services to ensure that their services are accessible to those with hearing and/or sight loss. Broadcast television channels are currently obliged by law to provide subtitling, audio description, and signing (access services) on a certain proportion of their programmes. These are essential services to help the [estimated 12 million people with hearing impairments and 350,000 with visual impairments] in the UK to access and enjoy television programming.
138. However, there are currently no statutory requirements for access services on video-on-demand services and the provision of access services lags behind that of broadcast television. The introduction of similar accessibility requirements on video-on-demand services is considered to be necessary to ensure that services can be enjoyed by the widest possible audience, regardless of disability. This is also in line with Government policy to bring video-on-demand regulation in line with broadcasting in a proportionate way, where appropriate.
139. Section 368HL introduces accessibility requirements similar to those in place for linear broadcasting for the large, TV-like Tier 1 video-on-demand services, and gives OFCOM the power to create an accessibility code to set out how these requirements should be met.
140. The legislation sets out the level of provision that must be met by on-demand service providers. This is set so that after four years of being a Tier 1 provider, 80% of the total catalogue of hours must be subtitled, 10% audio described, and 5% signed. OFCOM's code will set out that Tier 1 services must report annually on their accessibility and steps taken to ensure the quality and usability of their access services. Significantly, OFCOM's Code is required to set out possible exemptions to the access service targets based on factors such as audience benefit, technical difficulty with compliance, and the cost to providers. This is important in ensuring the proportionality of the requirements, it gives OFCOM the flexibility to consider services' circumstances on a case-by-case basis, and where appropriate, to act to reduce the proportion of a service's catalogue which must be subtitled, audio described and signed .

Justification for taking the power

141. OFCOM is the UK's independent regulator and already regulates broadcasters' compliance with similar accessibility requirements for linear television. The delegated power given to OFCOM to prepare and publish the new accessibility code will therefore be built on existing powers to regulate the accessibility of linear television services in the UK. This is in line with the Government's policy position to bring video-on-demand regulation in line with broadcasting regulation where appropriate.
142. Ofcom has extensive expertise and experience in regulation, and the Government considers it essential that the regulation of video-on-demand services should be conducted by an independent body, as is the case for broadcasting. The use of a delegated authority to produce an accessibility code has already been demonstrated to be effective through the existing broadcasting code on television access services, which OFCOM devised, keeps updated, and enforces for broadcast content. As the new accessibility code for video-on-demand has similar targets and objectives to the broadcasting accessibility code, there is precedent for OFCOM being delegated these powers for Tier 1 video-on-demand services. The obligations for providers of Tier 1 services will also fall on businesses rather than individuals.

143. The delegation of powers to draft, implement, review and update an accessibility code is also consistent with the aim of the Government to effectively ensure VoD regulation can respond to the constantly changing landscape of VoD services. This clause sets out that OFCOM must keep the code under review and may revise the code as it sees fit. OFCOM's oversight of the code and ability to assess exemptions to the fulfilment of targets will ensure that there is sufficient flexibility in how these targets are met and achieved, which is particularly important given the constant technological changes which may alter the feasibility or cost of providing access services over time. This is more practical than laying out the specific rules in legislation as it allows for OFCOM to ensure the regulation of accessibility is kept in line with external changes to the market, and is proportionate. The Department recognises the Committee's general concern on binding guidance and Codes, but the reasons set out here reflect why, in the Department's view, the approach proposed is appropriate, has precedent and is practical.

Justification for the procedure

144. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is precedent for OFCOM to independently produce and enforce an accessibility code, with OFCOM already administering the broadcasting code on television access services, which this video-on-demand accessibility code is expected to broadly mirror. In addition Ofcom will be required under clause 368HP to publish a draft of their Code and consult on it. They must consult those that represent the interests of those with disabilities, and those that provide the services that the code will apply to before drawing it up, and when it is reviewed or revised.

Schedule 7, inserting new section 368HN of the CA 2003: Power for Secretary of State to modify the access service requirements in 368HL(4) and (5)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

145. This clause gives the Secretary of State the power to by regulations modify the targets that are set in legislation for the provision of access services by Tier 1 video-on-demand providers.

146. The required level of subtitles, audio description, and signing, and the timeframes for the delivery of these requirements, are informed by recommendations by OFCOM resulting from a review of the video-on-demand access service landscape. However, ongoing flexibility is necessary to reflect that the video-on-demand landscape is constantly changing, with developments in technology and viewing habits. The power to modify accessibility requirements and timeframes is also set out in legislation for broadcasting.

147. As such, while Ofcom will have powers to exempt services from legislative requirements, it is important that these regulations contain provisions to ensure that requirements can be

updated if needed to ensure continued relevance and/or proportionality as Parliament seeks to best deliver for audiences.

Justification for taking the power

148. This delegation of powers to update the access service requirements for Tier 1 services is consistent with the aim of the Government to effectively ensure video-on-demand regulation can respond to the constantly changing landscape and evolving technology. It is important that the framework can evolve to reflect these changes. This schedule will ensure that access service requirements are kept in line with audience needs, and changes in technology and market trends.

149. This power is also aligned with the existing legislation around accessibility for broadcasting, which similarly gives the Secretary of State the power to amend the targets and timeframes set out directly in primary legislation. The power is also appropriately constrained by the requirement that the Secretary of State must consult OFCOM before making the regulations.

Justification for the procedure

150. The power in new section 368HO will enable the Secretary of State to amend existing primary legislation and will directly affect the scope of the regulatory framework. The Department recognises that any amendments to the accessibility requirements for Tier 1 services is likely to be of interest to Parliament. The Department has ensured parliamentary and regulatory oversight by making the power subject to the affirmative procedure and making it a requirement for the Secretary of State to first consult Ofcom before any regulations are made. This follows the relevant procedures in Section 306 of the Communications Act 2003 for regulations to be brought forward to amend requirements for linear broadcast services.

Schedule 9, amendment to section 107 of the BA 1996: Power for OFCOM to draw up and review a Fairness Code for Tier 1 services

Power conferred on: OFCOM

Power exercised by: Standards Code

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

151. Section 107 of the BA 1996 sets out the requirement for OFCOM to prepare a Code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy. This Fairness Code relates to the treatment of individuals involved in programming and broadcasting, rather than regulation of the content being broadcast. For simplicity, OFCOM includes this Code within their Broadcasting Code

152. The new Tier 1 provisions are designed to align regulation of VoD services more closely with existing legislation already in place for the regulation of broadcast content. This schedule therefore amends section 107 of the BA 1996 to require OFCOM to also draw up and review a Code specifically relating to the avoidance of unjust or unfair treatment in

any programmes included in Tier 1 services. OFCOM will be able to include this in their wider VoD Code if they consider appropriate.

Justification for taking the power

153. This power is aligned with the existing legislation around regulation for broadcasting, which also gives OFCOM the power to prepare a code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy.

154. This delegation of powers to draft, implement, and review a Fairness Code is therefore consistent with the aim of the Government to bring VoD regulation in line with broadcasting regulation where appropriate. It will simply serve to extend OFCOM's existing powers to include the newly defined enhanced Tier 1 service providers.

Justification for the procedure

155. In the Department's view no Parliamentary procedure, beyond Parliament's existing oversight of OFCOM, is necessary for these provisions. There is already precedent, under section 107 of the BA 1996, for OFCOM to draw up and enforce a Code relating to the avoidance of unjust or unfair treatment or unwarranted infringement of privacy.

Powers relating to Part 5 – Regulation of Radio Services

Clause 38(6), inserting new section 315A of the CA 2003: Power to make provision enabling OFCOM to ensure at least one digital radio service in a local multiplex area includes local news and information

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Affirmative (where amending primary legislation)

Henry VIII powers: Yes

Context and Purpose

156. Section 314 of the CA 2003 makes provision for the local content and character of local analogue radio services. Clause 38(3) and (4) amends section 314 to reframe these requirements so that each radio service on which localness requirements are imposed as a condition of their OFCOM broadcasting licence now only needs to provide local news and information (rather than other local material) and that some local news must be locally-gathered. Local digital radio services do not have any localness requirements. However, digital versions of local analogue services (known as 'simulcasts') will provide local news and information.

157. As the proportion of people listening to digital radio increases and analogue radio decreases, the Department expects the number of local analogue services to reduce significantly and potentially eventually, in the event of a full analogue-to-digital switchover, to disappear. In the event that there are no analogue services in a local area, then there would be no radio services being required to provide local news and information. Clause 38(5) therefore inserts new section 315A giving the Secretary of State the power to

make provision for enabling OFCOM to ensure that there is at least one local digital radio service providing local news and information in each local multiplex area.

Justification for taking the power

158. The number of digital-only radio stations (i.e. services for which there is no scope for OFCOM to impose localness requirements) is currently relatively small. It is too early to assess the likely shape of a radio market in which these stations predominate (and which would therefore require the extension of localness requirements into digital radio). It is not yet, therefore, appropriate to put in place a regime stipulating how these requirements should apply to digital-only stations.
159. There are a number of ways in which this policy could be implemented when the time comes, and it is likely that new options will arise as technology develops. For example, the power could be used to impose on OFCOM duties similar to those in section 314 requiring OFCOM to secure that at least one radio service in a local area includes local news and information. They could be required to impose conditions in local radio multiplex licences requiring the multiplex operator to broadcast at least one digital radio service containing local news or information. Or they could be required to reserve capacity for local digital services that provide local news and information. The Secretary of State would only exercise these powers following consultation with OFCOM, multiplex operators and digital radio providers.

Justification for the procedure

160. The potential creation of requirements for local news and information on digital radio services is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure.

Clause 40(3), inserting new section 245(3C) of the CA 2003: Power for the Secretary of State to specify a qualifying country for the purpose of conferring functions on OFCOM to regulate digital radio services provided from that country

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: No

Context and Purpose

161. Section 245 of the CA 2003 specifies the radio services which fall to be regulated by OFCOM. OFCOM may only regulate services that are provided from the UK or by a person whose principal place of business is in the UK. Clause 40 amends section 245 to provide that a digital radio service from a qualifying country and broadcast by means of a local or small-scale radio multiplex service also falls to be regulated by OFCOM. A qualifying country is a country or territory that is specified in regulations by the Secretary of State. 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 licences in the UK.

Justification for taking the power

162. The approach taken in the Bill gives the Secretary of State the flexibility to respond to requests to allow digital radio services from outside the UK to be licensed by OFCOM. Setting out specific countries on the face of the Bill would not allow for that degree of flexibility.

Justification for the procedure

163. The clause sets out the policy of allowing services from other countries to be granted digital radio licences and the exercise of the power would be to specify which specific country. This extension of the regulatory scheme for digital radio is likely to be of particular interest to Parliament and therefore the Department has proposed the affirmative procedure. The Bill does not currently include provision applying the affirmative procedure but this will be corrected in due course.

Clause 40(3), inserting new section 245(3A) of the CA 2003: Power for the Secretary of State to amend, or otherwise modify, Schedule 2 to the Broadcasting Act 1990 (restrictions on the holding of licences)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: Yes

Context and Purpose

164. Schedule 2 to the Broadcasting Act 1990 makes provision about persons who are disqualified from holding a Broadcasting Act licence including licences to provide digital radio services. For example, paragraph 1 of Part 2 disqualifies a local authority from holding such a licence. In the event that the Secretary of State specifies a country as a qualifying country (see above) for the purposes of section 245 of the CA 2003 enabling OFCOM to license digital radio services from that country, it may be necessary to make consequential amendments to Schedule 2 to reflect the different circumstances in that country. For example, to provide that a local authority from that country is disqualified from holding a licence. Clause 40(3) inserts new subsection (3A) into section 245 of the CA 2003 to give the Secretary of State to make such amendments by regulations.

Justification for taking the power

165. The nature of the disqualification to apply in relation to digital radio services provided from outside the UK will vary and depend on the specific circumstances of each individual country. It is therefore appropriate to take a power to amend or otherwise modify the restrictions on the holding of licences in Schedule 2.

Justification for the procedure

166. Any amendment or modification of Schedule 2 would reflect the existing disqualifications, which means that such amendments or modifications would not alter the policy agreed to by Parliament in passing the 1990 Act. As such, even though the power allows for the

amendment of primary legislation (Schedule 2), the Department has proposed the negative resolution procedure applies to regulations made under new section 245(3A).

Powers relating to Part 6 – Regulation of Radio Selection Services

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

167. The rate of change in how listeners are accessing radio online and the new types of audio services and technology emerging means it is important that the definition of a “radio selection service (RSS)” remains relevant and is able to capture both current and future technology. Therefore, a power is taken at subsection (2) of inserted section 362BA to amend this definition. This power includes the power to make consequential amendments to the 2003 Act or any other Act.

Justification for taking the power

168. This power will allow the definition of a RSS to be updated if necessary in line with technological developments.

169. For the integrity of the new regime for radio selection, it is important that this definition continues to reflect the state of the art, even as technology evolves at considerable speed. In particular, it is important that the definition continues to capture a wider range of services used by listeners to access internet radio services. This power will also allow the definition to be updated in line with changes in listening habits.

170. In addition, were the definition to be affixed on a more permanent basis, the Government is concerned that, *in extremis*, changes could be made to existing RSS by their providers (whether accidentally or deliberately) so as to take those services outside the existing definition. This could have significant negative implications for the listener experience and for internet radio service providers.

Justification for the procedure

171. The Department recognises that the definition of a RSS has a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Henry VIII power: No

Context and Purpose

172. New section 362BA establishes the definition of a radio selection service (RSS). This definition then flows through into this new section which creates a category of “regulated” radio selection services (RRSS). A number of obligations are then placed on RRSS by inserted section 362BH (the duty to provide access to relevant internet radio services) and section 362BI (further requirements as regards relevant internet radio services).

173. A RRSS is defined as one designated by the Secretary of State by regulations; or one being of a description (or category) designated by the Secretary of State by regulations (subsection (1)). An RRSS or a category of RRSS may only be designated if they meet the requirement in subsection (2) that they are used by a significant number of members of the public in the United Kingdom.

174. Before making regulations, the Secretary of State must have received a report under inserted section 362BC, setting out OFCOM’s assessment of the number of users, the manner in which the RSS is used and any other matters OFCOM consider likely to affect whether to designate a RSS. Such a report may be provided proactively by OFCOM, or on request from the Secretary of State. OFCOM must publish all reports given to the Secretary of State in relation to these provisions. Should the Secretary of State materially depart from OFCOM’s recommendations, the Secretary of State must set out their reasons for doing so.

Justification for taking the power

175. For the new regime for regulating radio selection to be effective, it is important that it captures the most popular RSSs (together comprising a significant proportion of the market). Capturing the most popular RSSs will ensure that UK listeners are able to continue to select and listen to internet radio services as the RSSs’ share of the audio market grows.

176. By prescribing which RSS or categories of RSS are in scope of regulations (including thresholds where applicable) it will ensure regulatory clarity as to which services have to comply with the new regime.

177. Given the propensity of providers to launch (or withdraw) RSS and the inevitable rise and/or fall in the popularity of different services, ensuring that the most popular services are captured within regulations, without accidentally capturing services which are having less of an impact on the market (regulation of which would be disproportionate), could require updates to the regulations. This approach will allow for these updates to be made, which would not be straightforward if these services were listed on the face of the Bill.

178. As also stated above, to ensure regulation is proportionate and targeted, it is not our policy aim to capture all platforms but only the major or most popular platforms – i.e. those

services that are used by a “significant number of UK users” to access internet radio services.

Justification for the procedure

179. In the Department’s view, the Bill contains sufficient detail to indicate the types of RSS and categories of RSS which would fall within the scope of regulation. Furthermore, the Secretary of State cannot make any designations until it has received advice from OFCOM who will be carrying out the necessary research to assess if certain RSS or categories meet conditions in accordance with new section 362BC. This will ensure proportionate regulation and will provide the necessary evidence required to inform any designations made by the Secretary of State under this new section. The Department has therefore proposed the negative procedure for regulations made under this new section.

Clause 42, inserting new 362BB(6) of the CA 2003: Power for the Secretary of State to amend section 362BB to alter the conditions that must be satisfied before a radio selection service can be designated

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

180. The Secretary of State may only designate a radio selection service under new section 362BB if they consider the service is used by a significant number of users in the United Kingdom. Subsection (6) allows the conditions for designation to be amended in response to developments in the market (which could be, for instance, in relation to the environments in which these platforms may be found, such as in the car). In particular, we want the flexibility to amend the conditions so that services operating in environments where members of the public would expect to be able to receive radio (but which might not pass the significant number threshold) can be designated as a regulated radio selection service.

Justification for taking the power

181. As explained above, for the new regime for regulating radio selection to be effective, it is important that it captures the main platforms used to access internet radio services. There are a number of different environments in which radio selection services operate (for example, in cars) which may need to be subject to different conditions in order to be designated. This is particularly so given the likelihood that new types of services will launch over the next few years. This power will enable updates to be made to reflect these changes which would not be possible if the conditions for designation were fixed on the face of the Bill. The overall aim is to ensure that where a RSS acts as a gatekeeper in an environment where a user would expect to be able to access internet radio services, it should be subject to the regulatory scheme.

Justification for the procedure

182. The Department recognises the exercise of this power would have a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this inserted section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

Clause 42, inserting new sections 362BJ of the CA 2003: requirement for OFCOM to issue a Code of practice relating to radio selection

Power conferred on: OFCOM

Power exercised by: Code of practice

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

183. By virtue of new section 362BH and section 363BI providers of regulated radio selection services (RRSS) are required to provide access to a relevant internet radio service and to secure that the RRSS operates in particular ways relating to findability and not charging.

184. Subsections (1) to (3) of new section 362BJ require OFCOM to issue, and publish, a code of practice describing actions that OFCOM recommends for compliance with the duties set out under sections 362BH and 363BI. Failure to do so does not by itself make the provider liable to legal proceedings, but a court, tribunal or OFCOM must take into account the contents of a code when determining a question where the provision in the Code is relevant (see new section 363BK).

185. Relevant consultation requirements are set out in new section 362BL which requires OFCOM to consult the Secretary of State, providers of RRSS, providers of internet radio services and other appropriate persons before issuing a code of practice.

Justification for taking the power

186. The duties referred to in new sections 362BH and 362BI are substantive obligations on RRSS. However, there is no single model for a RRSS to deliver the substantive obligations in the above sections. Consequently, it is impossible to provide on the face of the Bill a single method in which these obligations can be delivered. Giving providers flexibility in this regard is both inevitable and important in ensuring that these provisions do not restrict innovation, impact customer choice or inadvertently lead to a situation where a RRSS cannot comply due to insufficient technological capability. Nevertheless, in the context of this flexibility the Government is keen to ensure that RRSS have access to guidance which, if followed, provides clear recommendations and assurance that they are meeting their statutory obligations under this regime.

187. These provisions rely on the use of a code of practice which – compared to primary legislation – can be more easily updated from time to time (should new approaches materialise). In addition, it can simplify the process to amend the code to include new recommendations or case studies for different cases. OFCOM, as the independent regulator, is best placed to recommend actions in each case, taking account of both audience viewing habits and types of technology and devices on the market.

Justification for the procedure

188. In the Department's view, this provision relates to an administrative matter for OFCOM. Once Parliament has agreed in principle that RRSS providers should be under substantive duties, the question of how that service should be operated is appropriately determined by OFCOM (following consultation with internet radio service providers, RRSS providers, the Secretary of State and any other appropriate persons). The code of practice will also assist RRSS providers to know how they can demonstrate their compliance with the duties listed under new sections 362BJ and 362BK. Therefore, the Department does not consider that any parliamentary procedure is necessary.

Clause 42, inserting new section 362BN of the CA 2003: Power for Secretary of State to modify regulation relating to radio selection services

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Henry VIII power: Yes

Context and Purpose

189. The new regulatory regime for radio selection created by the Bill imposes a number of substantive obligations on the providers of regulated radio selection services. The aim of these provisions is to establish ground rules between the providers of RRSS and providers of radio services. However, the particular areas where protections are necessary is likely to evolve as listening on smart speakers continues to grow, the technology develops (with, for example, voice assistants becoming more sophisticated in their responses to commands) and listening habits (such as the balance between live and on-demand listening) change. Inserted section 362BN gives the Secretary of State to amend inserted Part 3B of the 2003 Act to alter, add or remove requirements or prohibitions on providers of RRSS. Subsection (2) sets out examples of what such changes could be made.

Justification for taking the power

190. For the integrity of the new regime for radio selection, it is important that these rules are able to change to reflect the development of technology in this area and changes in listening habits, both of which may change at considerable speed. This power will allow the Secretary of State to ensure the regulatory scheme remains fit for purpose.

191. There are two key procedural safeguards that attach to the exercise of this power, in addition to the affirmative procedure proposed. First, before making any changes, the Secretary of State must have received a report of a review undertaken by OFCOM under inserted section 362BO. Such a review must consider the adequacy of the regulation of RRSS and the report must be published.

192. Secondly, before making any changes, the Secretary of State must consult with the providers of RRSS, providers of internet radio services and any such other persons as the Secretary of State considers appropriate.

Justification for the procedure

193. The Department recognises the exercise of this power would have a considerable impact on the nature and scope of the regulatory regime. As such, any regulations made under this inserted section are likely to be of considerable interest to Parliament. For this reason, the affirmative procedure is proposed.

Clause 42, inserting new section 362BW of the CA 2003: requirement on OFCOM to issue guidance on enforcement

Power conferred on: OFCOM

Power exercised by: Guidance

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

194. OFCOM will be enforcing this new regulatory regime for radio selection services. Therefore a range of enforcement powers will be conferred on OFCOM for the purposes of tackling any contraventions in a proportionate and effective manner.

195. OFCOM will be required to produce, publish and maintain guidance about how it proposes to exercise its enforcement powers. The guidance must, in particular, give information about the factors that OFCOM would consider it appropriate to take into account when taking, or considering taking, enforcement action. Before producing such guidance, OFCOM must consult with the Secretary of State and any other person OFCOM considers appropriate. OFCOM will have the power to amend or revise the guidance.

196. OFCOM requires new powers to be able to enforce the new obligations against providers of RRSS or third parties who have failed to respond to a request for information. This enforcement provision will enable OFCOM to issue a provisional notice of contravention in respect of a failure to comply with a number of listed duties or requirements set out at new sections 362BH and 362BI. In order to issue such a notice, OFCOM must consider that there are reasonable grounds for believing that the provider has failed or is failing to comply with a relevant duty or requirement. This notice can then be followed by a confirmation decision requiring the provider to take remedial action as well as imposing a penalty for continued failure to comply with the duties or requirements. OFCOM can impose a maximum penalty of the greater of £250,000 or 5% of the person's qualifying worldwide revenue (in the case of a third party the maximum penalty is £250,000).

Justification for taking the power

197. Since this guidance will be informing RRSS providers how OFCOM proposes to exercise its enforcement powers under the Bill, it is appropriate for the regulator to be responsible for such guidance, after consulting the Secretary of State and other persons who OFCOM considers appropriate.

198. This guidance is intended to assist regulated services by providing them with transparency as to how OFCOM intends to use its enforcement powers. Furthermore, the power to revise the guidance provides OFCOM with the ability to modify the details if they are required in light of emerging technologies and changes in the activities of regulated services. It would

not be appropriate to put this on the face of the Bill. Rather, it is more appropriate for the independent regulator – OFCOM – who is enforcing this regime to set out their enforcement processes and procedures as they already do for the sectors they currently regulate.

Justification for the procedure

199. Since the guidance will be concerned with how the regulator intends to use its enforcement powers, it will be administrative in nature. Therefore, the Department does not consider that any Parliamentary procedure is necessary.

Clause 42, inserting new section 362BX of the CA 2003: requirement on OFCOM to publish a Fees Statement

Power conferred on: OFCOM

Power exercised by: Published Statement

Parliamentary Procedure: None

Henry VIII power: No

Context and Purpose

200. In order to enforce this new radio selection regime OFCOM will be funded via fees from providers with in-scope services (both relevant internet radio services and regulated television selection service providers). OFCOM will be required to publish a Statement of Principles (“the Statement”) which OFCOM will adhere to when setting out the fees payable by providers with in-scope services for their costs in relation to the exercise of their new functions.

201. The principles within the Statement must outline how the fees charged by OFCOM will meet, but not exceed, the costs of carrying out their functions under the new regime for that financial year (financial year meaning a period of 12 months ending on 31 March). OFCOM’s statement will also be required to set out principles underpinning the result that the fees to be charged are proportionate and justifiable and has regard to the circumstances of the service provider, as well as to ensure there is transparency in relation to the costs incurred in the exercise of functions and fees charged.

Justification for taking the power

202. This duty to publish the Statement is consistent with OFCOM’s approach for other regimes. There is precedent: see section 347 of the Communications Act 2003 in relation to the statement of charging principles in respect of broadcasting licence fees. It is appropriate for the regulator to publish the Statement to allow for transparency around how the new regime is funded and to ensure clarity for RRSS and relevant internet radio service providers who will have to pay the fee set by OFCOM.

Justification for the procedure

203. In the Department’s view, no parliamentary procedure is necessary, in line with the existing fees procedures for OFCOM’s other regimes. OFCOM must publish the Statement and any revisions to aid broader transparency.

Powers relating to Part 7 – Miscellaneous and General

Clause 45: Power for the Secretary of State to make consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Draft affirmative when amending primary legislation. Negative in all other cases.

Henry VIII power: Yes

Context and Purpose

204. This clause provides the Secretary of State with a power to make provision that is consequential on this Bill or on regulations made under this Bill. Regulations made under this power may modify primary legislation, and in consequence this is a Henry VIII power.

Justification for taking the power

205. The exercise of this power is constrained insofar as it can only be exercised in connection with a provision of this Bill or regulations under this Bill.

206. This Bill makes numerous and significant amendments to the Communications Act 2003, and it is possible that further consequential amendments to that Act may be needed to ensure the combined legal framework operates as intended.

207. The Department has made every effort to identify and include on the face of the Bill all consequential provisions that are required. In the event that some provisions have not been identified, or other legislation making its passage through Parliament at the same time as this Bill creates the need to make further consequential provision, this power is needed to provide legal certainty and avoid any legal lacunas after the Bill receives Royal Assent, and then comes into force as an Act.

Justification for the procedure

208. The Department considers that the affirmative resolution procedure should apply where this power is exercised as a Henry VIII power, that is to modify primary legislation. The Department considers that the negative resolution procedure is appropriate in all other cases.

Clause 47: Power for the Secretary of State to commence provisions, and make transitional or saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations or Order made by Statutory Instrument

Parliamentary Procedure: None

Henry VIII: No

Context and Purpose

209. This clause deals with the commencement of the provisions of the Bill. The provisions in the Bill will be commenced in three categories.

210. First, the provisions listed in subsection (1) will come into force when the Bill receives Royal Assent and becomes an Act, and those in subsection (2) will come into force two months after the Act is passed.

211. Second, subsection (3) enables the Secretary of State to bring the remaining provisions in the Bill into force on a day set out in regulations or by order made by statutory instrument. These can be different days for different provisions.

212. Third, subsection (5) details some provisions in Part 4 of the Bill, which will come into force when the triggers listed in the subsection are met.

213. Subsection (7) is a standard power for the Secretary of State to, by regulations, make transitional or saving provisions in connection with the coming into force of any provision of the Bill.

Justification for taking the power

214. It may be sensible for parts of the Bill to commence at different times. This power enables that.

215. The power to make transitional or saving provision is often needed when bringing legislative provisions into force, for example in transitioning between two legislative regimes.

Justification for the procedure

216. Consistent with common practice, commencement regulations under this clause are not subject to any parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by regulation enables the provisions to be brought into force at the appropriate time. The procedure for the transitional or saving power is consistent with that for commencement regulations.

Department for Culture, Media and Sport

29 March 2023

ANNEX A – SUMMARY OF DELEGATED POWERS

Clause/Schedule	Power conferred on and purpose	Henry VIII?	Parliamentary procedure
PART 1 – PUBLIC SERVICE TELEVISION			
Clause 1, 264(8B), CA 2003	Secretary of State to amend the length of the period which public service content must be available on-demand	Yes	Affirmative
Clauses 8 and 17, and Schedule 1	Secretary of State to specify a number of hours for the purposes of the independent production quota	No	Affirmative
Clause 9 and 17 and Schedule 1	Clarify that the Secretary of State’s existing power to specify description of programmes that are original productions includes the power to authorise OFCOM not to count a description of programmes towards the original productions quota, and to require OFCOM to publish guidance about the determination of whether an original production falls within a description	No	Affirmative
Clause 10	Secretary of State to specify a category of audiovisual content for the purpose of creating additional quotas for audiovisual content	No	Affirmative
Clause 11	Secretary of State to specify “qualifying audiovisual services” which can be used by public service broadcasters to fulfil their independent, original and regional productions quotas and any additional quota under 10	No	Affirmative
Clause 12	Secretary of State to make provision for repeats, etc	No	Affirmative

PART 2 – PROMINENCE ON TELEVISION SELECTION SERVICES			
Clause 23, 362AA CA 2003	OFCOM to designate internet programme services	No	None
Clause 23, 362AB	OFCOM to revoke designation of internet programme services	No	None
Clause 23, 362AD(2)	Secretary of State to specify “internet television equipment”	No	Negative
Clause 23, 362AD(7)	Secretary of State to amend the definition of a “television selection service” or “internet television equipment”	Yes	Affirmative
Clause 23, 362AE(1)	Secretary of State to designate “regulated television selection services” or specify a description of “regulated television selection services”	No	Negative
Clause 23, 362AK	OFCOM to issue guidance on “agreement objectives”	No	None
Clause 23, 362AM to 362AO	OFCOM to issue a Code of practice relating to prominence	No	None
Clause 23, 362AZ3	OFCOM to issue guidance on enforcement	No	None
Clause 23, 362AZ4	OFCOM to publish a Fees Statement	No	None
Clause 23 and Schedule 3, Schedule 15ZA	Secretary of State to substitute a different maximum financial penalty	Yes	Affirmative
Clause 23 and Schedule 3, Schedule 15ZA	OFCOM to make a statement about “qualifying worldwide revenue”	No	None

PART 3 – PUBLIC SERVICE BROADCASTERS - CHANNEL 4 AND S4C			
Clause 26(2), 204B	Secretary of State’s approval of S4C’s new activities	No	None
Clause 29	S4C and BBC to agree on provision of support by BBC	No	None
PART 4 – ON-DEMAND PROGRAMME SERVICES			
Clause 31, Schedule 7, 368HB CA 2003	Secretary of State to designate Tier 1 Services	No	Negative
Schedule 7, 368HF	OFCOM to prepare and publish a Code of standards for Tier 1	No	None
Schedule 7, 368HH(4)	Secretary of State to amend the list of matters OFCOM must have regard to in setting the standards code for Tier 1	Yes	Affirmative
Schedule 7, 368HL(1)	OFCOM to prepare and publish a Code on accessibility for Tier 1 services	No	None
Schedule 7, 368HN	Secretary of State to modify the access service requirements	Yes	Affirmative
Schedule 9, amends s.107 BA 1996	OFCOM to draw up and review a Fairness Code for Tier 1	No	None

PART 5 - REGULATION OF RADIO SERVICES			
Clause 38(6), 315A, CA 2003	Secretary of State to make provision enabling OFCOM to ensure at least one digital radio service in a local multiplex area includes local news and information	Yes	Affirmative (where amending primary legislation)
Clause 40(3), 245(3C)	Secretary of State to specify a qualifying country for the purpose of conferring functions on OFCOM to regulate digital radio services provided from that country.	No	Negative
Clause 40(3), 245(3A)	Secretary of State to amend, or otherwise modify, Schedule 2 to the Broadcasting Act 1990 (restrictions on the holding of licences).	Yes	Negative
PART 6 - REGULATION OF RADIO SELECTION SERVICES			
Clause 42, 362BA, CA 2003	Secretary of State to amend the definition of a “radio selection service”.	Yes	Affirmative
Clause 42, 362BB(1)	Secretary of State to designate “regulated radio selection services” or specify a description of “regulated radio selection services”	No	Negative
Clause 42, 362BB(6)	Secretary of State to amend section 362BB to alter the conditions that must be satisfied before a radio selection service can be designated	Yes	Affirmative
Clause 42, 362BJ	OFCOM to issue a Code of Practice relating to radio selection	No	None
Clause 42, 362BN	Secretary of State to modify regulation in relating to radio selection services	Yes	Affirmative
Clause 42, 362W	OFCOM to issue guidance on enforcement	No	None
Clause 42, 362X	OFCOM to publish a Fees Statement	No	None

PART 7 – MISCELLANEOUS AND GENERAL

Clause 45	Secretary of State to make consequential provision	Yes	Draft affirmative when amending primary legislation. Negative in all other cases.
Clause 47	Secretary of State to commence provisions, and make transitional or saving provision	No	None