The Draft Media Bill

April 2023

Introduction

Welcome to our 7-part series on the draft Media Bill, which was published by the UK Government on 29th March 2023. In this series, we provide a concise overview of each of the draft Bill's seven parts, sharing insights on the provisions that caught our eye and assessing their potential impact on the industry.

As we explore, the draft Bill introduces the most extensive changes to UK media regulation in 20 years, and should it come into force, the draft Bill will impact the direction of travel for the UK's media sector in the decades ahead.

There will now be some time pressure for the draft Bill to obtain Royal Assent before the next general election. Given the impact that it will have on an industry that is part of the UK public's daily lives, we expect both the House of Commons and the House of Lords to closely debate and scrutinise the draft Bill.

We will continue to monitor the draft Bill as it evolves, and have created a Media Bill Tracker (linked below) which we will be updating regularly to note any amendments to the draft Bill as it progresses, along with other changes of note in the UK media sector.

Be sure to bookmark the Media Bill page to stay updated.

Part 1 of our 7-part series on the draft Media Bill – updates to the public service remit for television

In the article, we explore Part 1 of the draft Media Bill, which aims to futureproof public service obligations and make it easier for the UK's public service broadcasters to meet them in an age where linear channels are becoming gradually less relevant.

Background

The current public service broadcasters (we will, with apologies, refer to them as public service media owners, or "**PSMOs**") include the statutory corporations of the BBC and S4C, and the providers of the licensed public service channels ("**LPSCs**") that provide nationwide Channel 3 services, Channel 4 (also a statutory corporation, but regulated in a different manner to S4C) and Channel 5.

The current public service remit is set out in the Communications Act 2003 (the "**Act**") as a set of programming purposes and objectives for PSMOs. The Act requires PSMOs to provide a wide range of socially valuable programming that is high-quality, balanced, educational and representative, and meets the needs of the wider public. Public service content should also be accessible to most of the population on a free-to-air basis.

To encourage diversity of content and suppliers and to help promote television production in the regions, the Act also requires that PSMOs fulfil certain quotas to ensure that a suitable proportion of their network programmes consist of independent, original and regional productions.

Currently, the only content that can be credited towards the fulfilment of each PSMO's remit and quotas is content shown on their respective main linear television channels.

However, almost 20 years after the Act came into force, the television landscape has changed significantly. Changes in technology and consumer viewing habits mean that the days of majority content viewership through linear channels are quickly fading. The British viewing public is increasingly sourcing content across multiple formats (e.g. OTT, VoD, IPTV, Connected TV) and from multiple providers, with global players such as Netflix, Disney+ and Apple TV growing their market share year-on-year.

Following Ofcom's strategic review of public service broadcasting, the Government concluded that the legal framework for PSMOs needed a refresh to address the challenges of the evolving landscape.

What changes are proposed by the Media Bill?

The government's aim in this part of the draft Bill is to ease the statutory burden on PSMOs and to ensure that they continue to thrive despite the increasing pluralisation of the UK's media landscape.

Part 1 simplifies and updates the public service remit and is intended to give PSMOs greater freedom and flexibility on how they meet their public service obligations. An unashamedly functional part of the draft Bill, Part 1 achieves this through a series of amendments to the Act and other existing broadcasting legislation. We look at some of the key changes below.

i) Remit

The draft Bill allows PSMOs to fulfil their public service remit by making available audiovisual content through "relevant audiovisual services". Rather than having to rely on the provision of television services through their primary linear channels to fulfil their remit obligations, PSMOs can now use licensed TV content, digital programming, internet programming and other editorialised internet content, as well as TV broadcasting, to do so. In practice, this means the BBC iPlayer and its commercial counterparts will likely be deployed as the primary means of propagating some public service content.

The draft Bill replaces the existing fourteen programming purposes and objectives with a streamlined remit and sets out the types of public service content which count towards a PSMO's contribution to the remit, requiring that PSMOs must provide: "comprehensive and authoritative" coverage of news and current affairs that facilitates "fair and well-informed" debate; distinctively British content (in other words, content that "reflects the lives and concerns of different communities and cultural interests and traditions" within the UK), including content in recognised regional or minority languages of the UK (such as Welsh or Cornish); programming aimed at children and young people in the UK; and original, independent and regional productions.

Content will not contribute to the remit unless the PSMO has taken steps to ensure that the content can be received or accessed by as much of its intended audience as is reasonably practicable, in an intelligible form and free of charge. Where content is provided by an on-demand service, it will not contribute to the remit unless it is available for viewing for at least 30 days.

Where Ofcom believes that an LPSC has failed to fulfil its remit, its enforcement powers under the Act now extend to any audiovisual services which the LPSC has indicated (in its statement of programme policy) it is using to fulfil its remit.

ii) Quotas

In a similar vein to the updated remit, LPSCs have been granted greater flexibility in how they meet their production "quotas", with the requirement to allocate time "in the channel" to the broadcasting of independent, original and regional productions replaced with a more general requirement to make available content, including independent, original and regional productions, through "qualifying audiovisual services". "Qualifying audiovisual services" include TV broadcasting services, on-demand services and other "relevant audiovisual services". Services such as iPlayer, ITVX, or All4 (including when distributed by another provider, such as on Sky, Virgin or connected TV platforms) and wider internet content will now be able to contribute to the quotas.

Content will not count towards the "independent production" quota unless it has been commissioned in accordance with the LPSC's commissioning code of practice, which importantly means that the "Terms of Trade" will apply to public service content for whatever platform it is commissioned by a PSMO). The Secretary of State may also authorise Ofcom to exclude certain types of content from counting towards the "original production" quota. Where it is deemed that a particular type of programming has not been made available to audiences, the Secretary of State can give Ofcom the power to require PSMOs to provide more of that type of programming.

To help LPSCs manage quotas across these diverse services, fulfilment will now be assessed by reference to content duration (i.e. number of hours), rather than proportion (such as a percentage of channel time). The Secretary of State has been tasked with setting the level of the quota for independent productions. Ofcom is responsible for setting the level of the quota for original and regional productions and assessing whether it would be appropriate to require that some of those hours of original productions are provided at peak viewing times.

Where the same or substantially the same content is made available across multiple services, the draft Bill does not make clear the extent to which 'repeats' of the content can count towards the quotas. Instead, the draft Bill leaves it to the Secretary of State to provide for this and, in turn, the Secretary of State may require Ofcom to determine the answer to this (other than in relation to the "independent production" quota).

Comparable provisions on quota obligations are set out for the BBC and S4C in Schedule 1 of the draft Bill, reflecting the somewhat different way in which these services are regulated, compared with the LPSCs.

iii) Statements of programme policy and commissioning code

LPSCs will need to update their statements of programme policy, which set out how they intend to fulfil their remit, to identify which relevant audiovisual services they will use to fulfil their remit and the proposed contribution by each of those services.

Similarly, LPSCs will need to update their codes of practice for commissioning independent productions to cover the commissioning of independent productions for other qualifying audiovisual services where the LPSC wishes to count these towards the "independent production" quota.

iv) Ofcom powers

The draft Bill grants Ofcom new powers to issue information notices, requiring PSMOs (other than the BBC, which is covered by an existing provision in the Act) to provide information needed for carrying out Ofcom's updated functions, and to impose financial penalties for contravention of a notice up to a maximum of £500 per day or £250,000 overall.

v) Teletext

Part 1 also repeals provisions relating to the public teletext provider, saying an official goodbye to the service 14 years after it was last active.

CMS View – Surprise Score 1/10

The need to modernise the framework governing PSMOs has long been acknowledged by the government and industry stakeholders and was a key facet of the Government's White Paper published last year and the preceding Ofcom PSMO review. In the light of that White Paper, the contents of Part 1 of the draft Bill are largely as expected. The changes proposed in Part 1 will allow PSMOs to deliver on their remit and quota obligations using the diversity of services that they operate. Whether these changes are sufficient to ensure their survival in the UK's audiovisual future remains to be seen. As mentioned above, further clarity is still required as to the complex but key question of how content made available multiple times across multiple services should be treated.

While we were not surprised by the approach for PSMOs, our surprise score comes from the repeal of the public teletext provisions which, despite prompting a trip down memory lane to the days of Ceefax, was not mentioned in last year's White Paper.

Part 2 of our 7-part series on the draft Media Bill – a revised prominence regime

In this article we explore Part 2 of the draft Media Bill ("Prominence on Television Selection Services").

The current regulatory framework

The current so-called "prominence" framework (as set out in the Communications Act and Ofcom's code of practice on EPGs) guarantees specified public service media owner ("**PSMO**") linear channels prime positioning in EPGs. In particular, the current framework guarantees that the first five channels the public find when they switch on (or, at least, navigate to the linear section of the TV guide on) their TVs are operated by PSMOs.

This framework does not, however, extend beyond linear to PSMOs' other services, such as on-demand services nor to non-linear areas of the TV user interface or UI.

As outlined in the White Paper, in response to increased competition, the increasing difficulties that PSMOs face in securing prominence on global platforms, and the general trend for content to be increasingly consumed online and via different means, the UK Government is seeking to introduce a new prominence regime.

Who does it apply to?

The new prominence framework set out in the draft Media Bill applies to "**designated internet programme services**" being made available on "**regulated television selection services**".

The draft defines:

"**internet programme services**" as services with the principal purpose of providing programmes delivered by the internet. This includes services which are entirely on-demand or only partially on-demand and contain other services (for example live-streamed television programme services); and

"**designated internet programme services**" ("**DIPS**") are any internet programme services provided by the BBC or any other PSMO (or person associated with a PSMO) that Ofcom designates. This would, therefore, capture BBC iPlayer for instance and, subject to Ofcom designation, other PSMO on-demand services such as All4, My5 and ITVX. Ofcom can only designate an internet programme service where it meets certain criteria; essentially that the service makes or would, if designated, be capable of making a significant contribution to the fulfilment of the PSMO's public service remit (as defined by the Communications Act 2003).

The other key definition on which the framework relies is "**regulated television selection services**". The draft defines:

"**television selection services**" as services, provided via the "*internet and in connection with internet television equipment*" (the term "internet television equipment" will be defined by the Secretary of State, but perhaps indicates the Government's intention not to regulate mobile phone interfaces, at least initially), that present internet programme services to users and allows users to select between and access those services and/or programmes within them; and

"**regulated television selection services**" ("**RTSS**") are television selection services as designated by the Secretary of State. It is not, therefore, known exactly what services will fall within the scope of this definition as we await such regulations. However, the draft Media Bill does provide that designations should only capture services that the Secretary of State considers are used by a "significant number" of members of the public and the explanatory notes clarify that the Government "*expects this to include popular Smart TVs and pay TV operators, as well as connected TV devices such as streaming sticks and set top boxes*".

How will this all work?

DIPS will be obliged to offer ("**must offer**") their services to RTSS providers and providers of RTSS are in turn required to carry ("**must carry**") DIPS. If this all sounds rather familiar, it is, and piggy backs off the existing framework that applies to PSMO linear services.

The arrangements regarding how DIPS will be made available on RTSS will be negotiated between the relevant PSMO and RTSS provider and the draft Media Bill provides that RTSS providers shall provide DIPS with an "appropriate" degree of prominence within the RTSS. The draft Media Bill does not specify where such apps shall be placed (e.g. which rows apps will be placed on or the order of such apps) however, as is the case for linear television, this may be a point that Ofcom would seek to address in the form of a code of practice.

Further, any arrangements made between PSMOs and RTSS providers should not disproportionately restrict how the provider of a RTSS may make innovations in the ways that users may select and access DIPS. This appears to be a nod to the fact that the UI on RTSS tend to differ and are constantly developing, unlike the constant of a linear EPG. In the absence of further regulation (or a code of practice as noted above) it is easy to see how PSMOs and RTSS providers may come to a different determination as to where app tiles should be placed to ensure prominence.

On the other hand, the arrangements must be "consistent with" the PSMO being able to meet the costs of meeting its public service remit: does this mean that RTSS are expected to subsidise PSMOs, or simply that RTSS may not impose disproportionate charges that might erode PSMO programming budgets? Without further guidance (in the legislation or from Ofcom), this provision remains obscure.

Importantly, where DIPS contain "listed channels" (i.e. any BBC channel, channels 3, 4, 5 or S4C) or "public service remit content" (i.e. content from the PSMOs and contributing to fulfilment of such remit) such channel or content shall also be afforded prominence and shall be made readily discoverable by RTSS providers. This introduces a new concept of "content prominence" and is not only surprising (as the Government has not previously indicated its intention to extend prominence to content) but is also likely to be the most controversial aspect of the prominence regime as further discussed below.

What is the role of Ofcom?

Ofcom will be responsible for administering and enforcing the new prominence framework. As well as designating those internet programme services that fall in scope as DIPS, Ofcom also has the right to revoke a designation where appropriate, for example, if it considers that an internet programme service no longer meets the relevant criteria.

Ofcom has a number of additional duties, including that it must: (a) maintain a published list of DIPS and RTSS and their providers; (b) publish guidance in respect of how PSMOs and RTSS providers are to act; and (c) provide a code of practice setting out recommended steps for the "must carry" obligations. The draft Media Bill also sets out a process by a PSMO and provider of a RTSS may refer disputes to Ofcom and the steps Ofcom must take in this regard (including deciding whether it should handle the dispute or not). Ofcom will also be given powers to levy annual fees on RTSS providers and PSMOs as a contribution to cover Ofcom's costs of administering its functions. The amount of such levy will be determined by Ofcom.

In addition, Ofcom will be granted the power to enforce non-compliance (including by levying potentially substantial fines).

CMS View – Surprise Score 5/10

In general, the contents of this Part of the draft Media Bill is aligned with our expectations based on the Government's White Paper. Further clarity is still required as to the exact scope of the new framework, for example, with the specifics of what will be considered a regulated television selection service being a large omission in the draft Media Bill and placing significant power in the hands of the government of the day.

The other big open question, as noted above, is precisely what level of financial constraint is meant by arrangements needing to be "consistent with" the PSMO being able to meet the costs of meeting its public service remit.

What will come as a shock to many in the sector, again as noted above, is that the prominence framework applies not only to services but, in some instances, to content where such content on DIPS is considered "public service remit content". The exact scope of this obligation is not yet clear, with the draft Media Bill being very light on detail. Nevertheless, without significantly greater granularity, either in the draft Media Bill or future Ofcom Codes (contrast the recent Irish legislation which provides a number of guardrails around content prominence), this provision may have far reaching impact and engender many disputes.


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Part 3 of our 7-part series on the draft Media Bill – the future of Channel 4

In this article, we will focus on what was the most controversial part of the Government's White Paper on its vision for the broadcasting sector, the future of Channel 4.

Channel 4 to remain publicly owned

Harold Wilson once famously said "*a week is a long time in politics*" and, although the Government's U-turn on the privatisation of Channel 4 may have taken a little longer than a week, the proposal was short lived and appeared doomed from the start, with 96% of respondents to the Government's consultation "on a potential change of ownership of Channel 4" against the proposal. But how did we get here?

The latest plan to sell Channel 4, which is owned by the state but entirely self-funded through its own commercial activities, was announced in the Government's Broadcasting White Paper in April 2022 as part of an apparent wider effort to modernise the sector. This followed a period of consultation in 2021 which the then Secretary of State for the DCMS, Oliver Dowden, said was needed because the broadcasting landscape had "*changed beyond recognition*" with increased global competition, changing viewership habits and a decline in linear advertising revenue.

However, as in 2017 when the Government previously announced a plan to sell Channel 4, the proposal was met by huge opposition from the industry including, notably, from Channel 4 itself as well as from within the Government, a key concern being the potential dilution of Channel 4's public service remit together with the impact on the UK's independent production sector.

Channel 4's unique model (more on this below) means that it commissions hundreds of independent producers from around the UK each year to produce its programming. Privatisation, it was feared, could shift production away from independent producers (as its multi-million pound annual budget for commissions would likely be a key cost-saving measure for any new private owner) which could have a knock-on impact on the wider creative industry, at a time when the independent production sector is already under immense pressure.

With this backdrop, it was perhaps not entirely surprising when, in January, the Government published its Channel 4 Press Release and confirmed that, after reviewing the business case for Channel 4's sale, the decision to privatise Channel 4 was not the right one. However, the Government did indicate that reforms would be needed in the draft Media Bill to give Channel 4 more commercial flexibility and provide a sustainable future for the broadcaster.

A new look Channel 4

Unlike other public service media owners ("**PSMOs**"), Channel 4 does not and currently cannot produce any of its content in-house – it is a "publisher-broadcaster" which means it must commission or acquire all of its content from third parties. One of the main arguments in favour of privatisation was that Channel 4 being publicly owned severely limited its ability to borrow money and to raise private sector capital to invest in new platforms and products, as well as to produce and sell its own content. This also constrained its ability to compete with global SVOD services.

Sustainability duty on Channel 4

The draft Media Bill provides that a new legal duty will be imposed on the Channel 4 board to carry out their activities in a way that they reasonably consider most likely to enable them to "at least sustain the level of their activities" over the long term and to "be securely in a position to meet costs incurred in carrying on their activities." Channel 4's annual report (to be laid before Parliament) must include a report on Channel 4's sustainability duty. The explanatory notes clarify that this intentionally follows the similar duties placed on company directors in the Companies Act 2006 and 'activities' include activities that Channel 4 considers appropriate for carrying on its primary functions, which are the fulfilment of Channel 4's public service remit (a nod to industry concerns in this regard) as well as the performance of its media content duties.

Whilst enshrining this duty in statute undoubtedly sends a message, it remains to be seen what effect this legal duty may have on the broadcaster given its generality, the fact it is unlikely to go beyond the obligations and aims of the board anyway, and, crucially, what measures, if any, the Government may take to support this.

Ability for Channel 4 to create its own content

The draft Media Bill also removes the restriction on Channel 4's involvement in the making of programmes to be broadcast on Channel 4. This was originally proposed in the Broadcasting White Paper as part of privatisation plans, and then again confirmed in January despite the decision for Channel 4 to remain publicly owned, so is not a surprise – the existing model makes Channel 4 more reliant on advertising revenue than other broadcasters so the removal of the "publisher-broadcaster" restriction is intended to give Channel 4 a greater ability to produce and monetise its own content and grow its commercial income.

Whilst the decision not to privatise Channel 4 has been met with relief by most, this element of the draft Media Bill is causing concern for many, particularly the independent production sector, who query the long-term effect if effective protections are not put in place.

The Government said in its Channel 4 Press Release that it will work closely with the independent production sector to consider necessary steps to ensure that Channel 4's important role in driving investment into the sector is safeguarded and any changes to Channel 4's commissioning model would need to be introduced gradually, with appropriate checks and balances. One such protection being discussed between the Government and producers is the increase of Channel 4's "indie quota" from its current level of 25 percent of programmes. While the draft Media Bill empowers the Secretary of State to define the level of the indie quota, it does not set any specific level, in the absence of any immediate consensus on the issue (we understand that discussions are ongoing).

Greater access to capital

Another measure to "ensure the future for Channel 4" referenced in the Government's Channel 4 Press Release but not set out in the draft Media Bill is to afford Channel 4 greater access to capital. The Press Release provided that the DCMS will make it easier and simpler for Channel 4 to draw down on its £75 million credit facility and provide Channel 4 greater access to private capital for ambitious investments to promote its long-term sustainability.

CMS View – Surprise Score 0/10

Last year the decision not to move ahead with the privatisation of Channel 4 would have been a surprise. However, as discussed above, the draft Media Bill reflects the position adopted in the Government's Channel 4 Press Release in January this year, including the removal of the "publisher-broadcaster" restriction. It remains to be seen what protections the Government will put in place in this regard, and accordingly how the removal of this restriction will affect the industry, particularly the independent production sector. One particular group concerned about the impact is the so-called non-qualifying independent producers (or NQIs). This comprises companies that operate as independent producers, but do not meet the statutory requirements to be treated as a qualifying indie (often because they have a broadcaster shareholder). The NQIs currently supply many programmes to Channel 4 and fear a squeeze between a higher quota for qualifying indies and Channel 4 commencing its own production activities. What we might well see (but is not in the current draft Media Bill) is some commitment to keep Channel 4's production activities separate from its commissioning and to ensure that NQIs, indies and Channel 4 production all have the same ability to pitch for shows beyond the indie quota.

Channel 4 has said it welcomes the Government's commitment to engage closely with the independent production sector about the impact and seems keen to emphasise its commitment to investment in the UK production sector generally. However, what is clear is that it will have to balance this against its new legal duty brought about in the draft Media Bill to sustain a secure financial future for the Corporation.

Part 4 of our 7-part series on the draft Media Bill – levelling the regulatory playing field between video-on-demand and traditional broadcast linear services

In this article we explore Part 4 of the draft Media Bill, "On-Demand Programme Services".

Enhanced regulation for large video-on-demand services

Ever since VOD services burst onto UK (and EU) screens over ten years ago the topic of VOD regulation has been something that regulators and industry personnel have been grappling with. The AVMS Directive 2010 introduced minimum obligations on VOD services (that were supplemented under the revised AVMS Directive 2018) against a backdrop where the EU noted in the 2010 AVMS Directive that:

"*On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services*"

Fast-forward to today and very few would argue that the impact that VOD services have on society is less than traditional broadcast linear services. In fact, according to Ofcom's Media Nations Report 2022, penetration of SVOD services in the UK is in excess of 65%. It is therefore of little surprise that the draft Media Bill seeks to increase regulation on VOD services.

Who does it apply to?

The draft Media Bill introduces increased regulation on large streaming services watched in the UK, regardless of where such services are based. This is in light of the fact that many large SVOD services are headquartered outside of the UK and Ofcom has no current remit to ensure such platforms comply with the current "ODPS rules". Moreover, since Brexit, the UK has not been able to depend on such rules being regulated in their "country of origin" (other than in limited situations where the European Convention on Transfrontier Television applies). In fact, Ofcom has a whole page on its website dedicated to the fact that it does not regulate Netflix.

To give effect to both "enhanced regulation" and "cross-territorial reach" the draft Media Bill introduces a new category of service titled "*Tier 1 services*".

Tier 1 services, which will be subject to enhanced regulation, include:

- VOD services operated by public service broadcasters, other than BBC iPlayer, which is already regulated under the Broadcasting Code, and will remain so; and
- any VOD services specified by the Secretary of State either explicitly by name or by reference to falling within parameters as mandated by the Secretary of State from time to time. This may include both UK on-demand programme services and non-UK on-demand programme services (i.e. services that are not headquartered in the UK, and/or do not make editorial decisions in the UK but are made available to members of the public in the UK).

As noted in other articles in this series, available here, the ability for the Secretary of State to "designate" services appears throughout other sections of the draft Media Bill and affords the Government with the ability to react quickly in the face of changes to the media environment (including, for example, new large VOD services being made available in the UK) without the need to enact new legislation.

Prior to the Secretary of State's designations, Ofcom will be required to provide a report on the UK VOD market with such report to include details of audience figures and catalogue sizes. Although no VOD services are referenced explicitly by name in the draft Media Bill, the Government's Press Release on the draft Media Bill specifically references "*Netflix, Amazon Prime Video, Disney+*" as coming within the scope of new regulation and therefore should we see the draft Media Bill become law it would be safe to assume that the services referenced above will fall within the Secretary of State's first designations.

How will this all work?

Ofcom will be tasked with developing and enforcing a new code for the regulation of Tier 1 services, which will be binding on each such service 6 months after it becomes a Tier 1 service or after the code is first published (whichever is later). No reference is specifically made to "non-Tier 1 services" and we therefore assume that the current ODPS rules will continue to apply to them, or (in the case of non-UK services) that they will remain unregulated.

The new code must achieve a number of objectives as set out in the draft Media Bill and should "*level the playing field*" with the rules that currently apply to traditional linear broadcasters (i.e. the Ofcom Broadcasting Code).

The draft Media Bill notes that the new code should achieve the "standards objectives" most of which readers will be familiar with (for example, the protection of minors and the protection of the public from offensive content), however, the draft Media Bill also provides that the topical issue of "impartiality" must be addressed in the code.

The special impartiality rules appear to generally reflect those in the Broadcasting Code that currently apply to traditional linear broadcast services, with the exception of the requirement for due impartiality in relation to matters of "*major political or industrial controversy and major matters relating to current public policy*". The Government explained that this omission reflects the fact that VOD services are less likely to include programmes that are reactive to live and rapidly developing events. Nevertheless, Tier 1 services will not be able to reflect in their programmes the service provider's views or opinions on any matters of political or industrial controversy, or current public policy.

Accessibility requirements

A welcome addition in the draft Media Bill is the requirement to increase access services for on-demand services. Ofcom will draft a code which requires Tier 1 services to ensure that their services are "accessible". Such rules will apply from two years after which a service becomes a Tier 1 service; or when the code is published, whichever is later.

In-scope services will be required to meet targets for the percentage of catalogue hours that are subtitled, audio described and signed. For each of the first two years, at least 40% of catalogue hours must be subtitled, 5% must be audio described and 2.5% must be signed. Following this interim period, the yearly targets will double to 80%, 10% and 5% respectively. The Secretary of State has the power to modify by regulations the percentages set out above, however, any amendments must be in consultation with Ofcom and will need to be approved through an affirmative statutory instrument. Aligning with the current access requirements that apply to regulated linear services, Ofcom will have the power to provide exemptions for these targets, taking into account factors such as the cost of compliance, technical difficulty and the extent of audience benefit.

Prior to the draft Media Bill being published, there were concerns that tough accessibility targets (which were expected in some form) may be imposed on all VOD services, thereby discouraging new entrants into the market. However, the targets appear to currently only apply to Tier 1 services and, even then, Ofcom will have the power to make exceptions in certain cases. Importantly for non-UK on-demand services, the accessibility requirements will only apply to services so far as they are made available to audiences in the UK.

Review of audience protection measures

Ofcom will also be tasked with assessing whether on-demand services' audience protection measures adequately protect audiences from harm. This will, for example, include consideration of age ratings, content warnings and parental controls. There is no explicit references in the draft Media Bill as to the consequences where Ofcom determines "audience protection measures" are not suitable. We assume, however, that this will be a point that is addressed in the new draft code.

What is the role of Ofcom?

Unlike other sections of the draft Media Bill there is minimal reference in Part 4 "On-Demand Programme Services" regarding the scope of Ofcom's enforcement powers, this is because Ofcom is already afforded such enforcement powers under the Communications Act and already regulates, and enforces compliance with the current rules by, registered on-demand programme services. The draft Media Bill does however provide that Ofcom will put in place procedures for handling complaints with regards to Tier 1 services that fail to observe the new code.

In addition, the draft Media Bill does provide that Ofcom has the power to request certain information from on-demand programme services, including what audience protection measures they have in place and also information to assist Ofcom in compiling its reports on the on-demand service market for the purpose of assisting the Secretary of State with its designations of Tier 1 services. Where services fail to comply with certain information requests, Ofcom will be permitted to sanction services including by imposing financial penalties (of up to £250,000) and by suspending or restricting access services.

CMS View – Surprise Score 2/10

The closing of the regulatory gap between linear and VOD services has been a hot topic for some time and it is therefore of little surprise that the Government has taken this opportunity to "*level the playing field*". It is also not a surprise that large VOD services based outside of the UK, but which target citizens within the UK, will be subject to regulation. The draft Media Bill does not however do anything to close the gap between (on the one hand) linear and VOD services and, on the other, video-sharing platforms' audio-visual content, despite such platforms increasingly becoming destinations where users consume such content.


ON AI

Part 5 of our 7-part series on the draft Media Bill – the de-regulation of analogue commercial radio

In this article we explore the changes in regulation of commercial radio found in Part 5 of the draft Media Bill.

Background

In February 2017, the Government initiated a consultation into proposals to deregulate commercial radio and to reform the legislation regulating commercial radio, which was largely developed in the late 1990s. Part 5 of the new draft Media Bill aims to deliver on the findings from the Government's consultation by including significant changes to the regulatory landscape of the commercial radio sector and allowing for much greater flexibility in how stations deliver their services.

Changes to both national and local analogue radio services

Ofcom will no longer have to ensure there is a diversity of national analogue (i.e. FM and AM) stations or a range and diversity of local analogue services. This will lift restrictions imposed on Ofcom in terms of to whom they may grant analogue radio licences, allowing for much greater freedom for Ofcom to exercise its own discretion and to decide, for example, whether or not to re-license an analogue frequency at all, in light of a general shift towards national and local services being available via digital means. In this context, it is interesting to contrast the current law, where Ofcom has recently terminated Absolute Radio's AM national licence after Bauer, Absolute Radio's owner, ceased transmissions. Ofcom is currently evaluating what financial penalty to impose in this case (Ofcom having an obligation to impose some financial penalty in this situation).

Further, the draft Media Bill helpfully addresses the issue of analogue radio licences potentially ending before a licence holder is set for a digital switch-over. Now, Ofcom will be able to extend the licence holder's existing analogue radio licence up until the date for the digital switch-over, thereby preventing the need for further legislation.

Scaling back of licence application requirements for local services

The draft Media Bill has either removed, or largely stripped back, the prescriptive requirements in applying for a licence for local analogue services. This means that application requirements for a local analogue licence are now largely left to the discretion of Ofcom.

In addition to the relaxation of application requirements, local analogue radio licences can now also be more easily renewed if Ofcom is satisfied that a licence holder is already providing a local digital radio service, or, where they are intending to do so in the near future. Where a licence holder is already providing a local digital radio service, they will only be required to satisfy Ofcom of this fact. In the event that the licence holder is not yet providing a local digital radio service, but it intends to in the future, it will be required to provide the following for the renewal to be considered:

- a statement of explanation to Ofcom explaining why it is not possible to broadcast a digital service;
- an assurance that they are intending to do so, as soon as such a digital service becomes possible; and
- a nomination of a suitable multiplex service as soon as the licence holder has secured one (noting that this will likely be a condition of any renewed licence that is granted in this circumstance).

Amendments to the character and coverage requirements for local services

Interestingly, the draft Media Bill has reflected a slight shift in attitude towards what listeners want to hear on the radio and the purpose for which radio is used. Currently, local radio stations must commit and adhere to various conditions in their licences that relate to ensuring they broadcast specific genres of content, for example spoken material or specific genres of music, as well as ensuring they target particular age groups. The draft Media Bill seeks to remove these requirements and instead imposes a requirement that programmes consisting of or including local news and information, such as traffic, weather or local events, must be included in local radio services on a regular basis and must consist of locally gathered news. To assist with this, the draft Media Bill also further removes the requirement to provide a certain amount of programmes from a studio within a station's coverage area. Relevantly, the draft Media Bill does not require stations to employ journalists directly, but rather permits a station to enter into relationships with newspapers and media agencies in order to build more news and local information into their service offering.

Again, this largely reflects the reality of today's stations, sanctioned by Ofcom, where (with limited exceptions around breakfast and drivetime) many local radio stations have been merged into national brands, with limited presence in many local radio station service areas beyond news-gathering.

The draft Media Bill does not currently impose the same universal requirements on local digital services. Instead, it empowers the Secretary of State to be able to impose regulations in the future that could require Ofcom to ensure that at least one local digital radio service in a local multiplex area carries local news and information, or to ensure there is space reserved in a local multiplex for a local radio service that carries local news or information.

Scaling back of licence application requirements for radio multiplex licences:

The draft Media Bill has also stripped back requirements when applying for a radio multiplex licence. An applicant no longer needs to include detailed proposals about the number and characteristics of all digital radio services that will be broadcast on the multiplex or the capacity of the services proposed to appeal to a variety of tastes and interests. Rather the applicant must satisfy Ofcom only of the other remaining requirements included in sections 46, 47, 50 and 51 of the Broadcasting Act 1996, such as specifying areas which would be within the coverage area of the service, the ability of the applicant to maintain these coverage areas and to comply with the general requirement to act in a manner calculated to ensure fair and effective competition.

Non-UK digital sound programmes may now fall to be regulated by Ofcom:

The draft Media Bill also sets a framework for Ofcom to license overseas radio stations, by indicating which non-UK digital sound programmes will now fall to be regulated by Ofcom. These will be a digital sound programme that:

- is from a "qualifying country" with the list of qualifying countries being determined by the Secretary of State; and
- are or intended to be broadcast by means of a local radio multiplex service, or small-scale radio multiplex service.

According to the Government's explanatory notes to the draft Media Bill, the Secretary of State intends to specify Ireland as a qualifying country. This would mean that Irish community and commercial radio station operators could apply for digital licences for their radio services, thereby allowing for those services to be broadcast in the UK. This mirrors the benefits afforded to certain Irish TV channels pursuant to the Good Friday Agreement (and already incorporated, by means of amendments, into the Communications Act 2003).

CMS View – Surprise Score 3/10

Considering the consultation launched by the Government in 2017, as well as the release of the White Paper, we were not surprised by the draft Media Bill incorporating changes to the content and framework requirements of commercial radio (even though this apparently remained unresolved until quite late in the day). The team was, however, surprised by the extent of these changes, being more than a mere relaxation of licence requirements and instead better characterised as a total liberalisation of the regulatory framework. These changes are not only a reflection of a need to update some elements of applicable legislation, but also reflect the Government's clear desire to further support and enable the commercial radio industry by providing stations with greater flexibility in the delivery of services without needing consent from Ofcom.
The industry seems to have succeeded in driving home the message that commercial radio remains valuable and provides stronger support to UK culture than online-only streaming music services.

Part 6 of our 7-part series on the draft Media Bill – smart speakers to fall within the scope of media regulation

In this article, we explore the section of the draft Media Bill that has attracted the most press attention so far and that is "Part 6 – Regulation of Radio Selection Services".

Certain smart speaker platforms to be required to carry UK licensed radio stations

The draft Media Bill provides that simulcasts of UK licensed radio stations shall be made available on certain designated voice-activated connected audio devices at no cost to the radio station provider itself. Such devices have seen rapid growth of audio listening in recent years, and the UK Government is of the view that the "must-carry" obligation is required to ensure that UK licensed radio stations are available to audiences as listening habits migrate from FM/AM/DAB to over the internet. In addition, designated voice-activated connected audio devices will not be permitted to interrupt radio station transmissions (i.e. designated voice-activated connected audio devices-initiated pre-roll or interstitial advertising is prohibited).

Who does it apply to?

The relevant provisions in the draft Media Bill apply to so-called *regulated radio selection services* that will be obliged to carry so-called *relevant internet radio services*.

(1) Regulated radio selection services

The draft Media Bill provides two relevant definitions:

a. "**radio selection services**", which is broadly defined as an internet-based service which allows for internet radio to be played by spoken commands. The definition would therefore capture not just smart speakers but also other "smart" devices including connected car media systems; and

b. "**regulated radio selection services**", which are those radio selection services that are designated as such by the Secretary of State either explicitly or as a result of falling within a definition of "regulated radio selection services" as mandated by the Secretary of State from time to time. This flexibility seems to be an approach the current Government is in favour of to ensure it can react quickly to changes in technology and changes to the media environment. For example, a similar "designation" approach currently applies with respect to those services designated by the Secretary of State as "regulated EPGs". The only constraint is that the Secretary of State has to be satisfied that the service is used by a significant number of members of the public in the United Kingdom.

The "must carry" obligation applies to *regulated radio selection services only*. Therefore, it is currently less clear which "services" will have to comply with the "must carry" obligations as no designations have been made and we would not expect them to be until after the draft Media Bill becomes law. However, the Government's Press Release on the draft Media Bill provides us with an insight into the types of platforms that the Government may have in mind will be designated. In fact, the Government calls out two such services specifically, "Google and Amazon".

(2) Relevant internet radio services

The simplest way to think of a "relevant internet radio service" is a UK licensed commercial radio station (AM or FM or DAB) or BBC radio station a simulcast of which is also made available over the internet. For simplicity, we will refer to these services herein as "radio stations". The draft Media Bill suggests that it should also largely carry the same ads (thus limiting the ability for radio stations to monetise their internet audiences through targeted advertising).

How will this all work?

A regulated radio selection service (e.g. an Alexa or a Google Nest) will either be designated explicitly or will be required to notify Ofcom that it qualifies as such where it fulfils the Secretary of State criteria. Whereas a radio station will be required to notify Ofcom if it wishes to be included in the list of stations that will be subject to the "must carry" obligation.

From there, it is not clear on the face of the draft Media Bill how the parties will be expected to proceed and negotiate. Although given that radio stations will not be charged for carriage and regulated radio selection services will not be able to interrupt transmissions, it is hard to envisage that negotiations between them will be too difficult unless negotiations centre around prominence and access requirements.

The draft Media Bill also gives significant discretion to the radio stations to determine how such radio stations are played (for example, the BBC could request that BBC Radio 1 is played through BBC Sounds). This is likely to be a highly controversial topic with regulated radio selection services as it may lead to additional cost and development time.

What is the role of Ofcom?

Unsurprisingly, Ofcom will administer the two lists of *relevant internet radio services* and *radio stations* and will be given powers to levy annual fees on such persons as a contribution to cover Ofcom's costs of administering its function. The amount of such levy will be determined by Ofcom.

Ofcom will also be required to publish a code of practice on the topic and will provide input and make recommendations to the Secretary of State as to the designation of *regulated radio selection services*.

In addition, Ofcom will be granted the power to deal with complaints related to the regime, investigate potential breaches, and enforce its compliance (including by levying fines).

CMS View – Surprise Score 8/10

As previously noted, we were somewhat surprised to see this covered in the draft Media Bill. Although access to radio has been on the UK Government's agenda, the only previously published commitment was about radio listings on TV EPGs, so it is somewhat surprising that the UK Government appears to have taken such a broad approach.

It is safe to say that the changes suggested are likely to be very popular with UK radio, and decidedly less popular with smart-speaker type providers. As such, we would expect that this topic will continue to dominate the press and will be a topic which both the House of Commons and the House of Lords spend some time debating. Given the attention this section of the draft Media Bill will inevitably attract, this is likely to increase the difficulty of getting the draft Media Bill into law before the next election.

A few questions also remain, some of which are listed above (e.g. amounts of levies and Secretary of State designation) however a key issue to be considered will be the extent to which a device can interrupt the radio stream. The draft Media Bill states that, where triggered, "*the service [must] cause only the relevant internet radio service to play*" but this would suggest that transmission cannot be interrupted to provide the user with helpful notifications, such as deliveries, emergency notifications, messages from friends or a doorbell ringing.

Part 7 of our 7-part series – listed events regime revisions and a blow for Leveson

In this article, as part seven of our seven-part series, we will cover:

1. changes to the listed events regime, which are set out in Part 1 of the draft Media Bill; and
2. Part 7 of the draft Media Bill, which: (i) repeals Section 40 of the Crime and Courts Act 2013; (ii) makes several amendments related to the UK's withdrawal from the EU; and (iii) sets out the general provisions of the draft Media Bill.

Listed events regime revisions

The current regulatory framework (as set out in the Broadcasting Act 1996) gives the Secretary of State the power to draw up a list of sporting events of "national interest" (e.g., the FA Cup Final). The broadcast rights to these events must be offered to "qualifying" services in the first instance. To be a qualifying service, the service must be provided to end-users without any fee or other consideration for reception of the service and it must be received by at least 95 per cent of the population of the United Kingdom, the aim being that certain events are accessible and made available to the British public for free.

Although the current listed events regime in reality applies only to public service media owners ("**PSMOs**"), given that only PSMOs currently satisfy the thresholds required to make content available to a large enough audience (a list of qualifying services can be found here), with the increased availability of broadband and connected devices, it was foreseeable that in the not-too-distant future a non-PSMO service could achieve the required thresholds to compete for listed events.

The draft Media Bill amends the "qualifying conditions" for the listed events regime set out in the Broadcasting Act 1996, so that a qualifying service must be provided by a PSMO. In short, this means that the listed events regime applying to qualifying services will now be a benefit available exclusively to PSMOs.

In line with other measures in the draft Media Bill, the range of services that fall within the scope of the listed events regime has been updated to capture a "designated internet programme service". The draft Media Bill defines:

- an "internet programme service" as a service with the principal purpose of providing programmes delivered by the internet. This includes services which are entirely on-demand or only partially on-demand and contain other services (for example, live-streamed television programme services); and
- a "designated internet programme service" as any internet programme service provided by the BBC or any other PSMO (or person associated with a PSMO) that Ofcom designates. This would, therefore, capture BBC iPlayer for instance and, subject to Ofcom designation, other PSMO on-demand services such as All4, My5 and ITVX. Ofcom can only designate an internet programme service where it meets certain criteria; essentially that the service makes or would, if designated, be capable of making a significant contribution to the fulfilment of the PSMO's public service remit (as defined by the Communications Act 2003).

The draft Media Bill does not yet address the issue of whether digital rights should be included in the listed events regime, which was the subject of a Government review in November last year (which we highlighted in our previous Law-Now available here).

Part 7 of the draft Media Bill "Miscellaneous and general"

A repeal of section 40

The draft Media Bill repeals the hugely controversial Section 40 of the Crime and Courts Act 2013. Section 40 (which is not currently in force) was introduced to incentivise news publishers to sign up to an approved regulator (i.e., one which complies with the recommendations of the Leveson Inquiry) and enable access to individuals against the press. If brought into force, Section 40 would make any publisher which has not signed up to an approved regulator liable to pay both sides' legal costs if they are sued, even if the publisher wins the case. Many national newspaper groups objected to Section 40, arguing it was not fit for purpose and would hurt investigative journalism. Should the draft Media Bill come into force in its current form then the likely consequence is an end to the Government-backed press regulatory system.

Amendments related to the UK's withdrawal from the EU and general provisions

The draft Media Bill makes several other amendments, including:

— to existing legislation to address deficiencies with retained EU law. These amendments are, in effect, housekeeping, as opposed to notable amendments: for example, removing references to the European Commission, the Audiovisual Media Services Directive, and other EU legislation;

— permitting Ofcom to cooperate with EEA states that are subject to the Audiovisual Media Services Directive, and with the national regulatory authorities of such states, in certain circumstances; and

— giving the Secretary of State a regulation-making power to make amendments to other legislation which are consequential to the provisions in the draft Media Bill.

CMS View – Surprise Score 2/10

The changes to the listed events regime are unsurprising, given the acknowledgment to such changes in the White Paper. This will come as a disappointment to sports rights holders, some of whom would have hoped that, in the future, the emergence of new services being deemed "qualifying" (e.g., super-platforms) would drive up value in their rights. There may be further changes following the conclusion of the Government's review on whether digital rights should be included in the listed events regime. However, as we mentioned in our Law-Now, in practice, PSMOs already commonly acquire digital rights when they acquire rights to listed events, so whether intervention on the point is really needed is questionable.

The extension of qualifying services to pure internet-delivered content is more surprising. In future, it might mean that a linear channel only available through a PSMO digital service (for example, the BBC iPlayer) might be the only place for live coverage of a listed event (though that would be a brave step for the PSMO concerned).

Whilst the repeal of Section 40 was not in the White Paper, the Government has long said it would do so (for example, back in March 2018, in response to a consultation). Nonetheless, the actual repeal of Section 40 will be welcome news (no pun intended) for several publishers, one of whom described leaving it on the statute books as a legislative sword hanging over the newspaper industry. This could be the final nail in the coffin for a state-backed regulation system in the UK. It is also indicative of a broader swing in political and public opinion in favour of the media in the decade since the low point for the media of the Leveson Inquiry.

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