



ITV plc

PSB prominence and inclusion

Suggestions for legislative drafting

1 General duties of Ofcom

- (1) In carrying out their functions under this Act, it shall be the duty of OFCOM to have regard to the following objectives—
 - (a) fulfilling the purposes of public service television broadcasting in the United Kingdom and supporting the delivery of the obligations of the public service channels;
 - (b) safeguarding funding for programmes made in the United Kingdom for inclusion in PSB content services;
 - (c) ensuring that PSB content services are accessible by means of user interfaces which are used by a significant number of members of the public in the United Kingdom to view programmes;
 - (d) ensuring that PSB content services are easily discoverable and quick to access by users;
 - (e) ensuring that the provider of PSB content services can be clearly identified by users at all times;
 - (f) ensuring that prominence for PSB content services is provided free of charge and not made subject to conditions; and
 - (g) enabling the providers of PSB content services to have a direct relationship with their viewers and users.

2 Significant prominence for PSB content services

- (1) Qualifying providers shall give significant prominence to each PSB content service in each of the user interfaces for which they have editorial responsibility.
- (2) The degree of prominence which is to be considered significant for the purposes of subsection (1) is to be determined by OFCOM and, as a minimum, shall ensure that each PSB content service is no less prominent than the most

prominent service included in the user interface which is not a PSB content service.

- (3) It shall be the duty of OFCOM to secure that subsection (1) is observed.

3 Meaning of PSB content services

- (1) In this Act the reference to PSB content services is a reference to any of the following—

- (a) the public service channels;
- (b) any qualifying on-demand programme service.

- (2) OFCOM may designate a service as a PSB content service for the purposes of this Act where OFCOM is satisfied that the service falls within the scope of subsection (1).

4 Meaning of qualifying provider and editorial responsibility

- (1) In this Act “qualifying provider” means a person who, alone or with any other person, has editorial responsibility for one or more user interfaces which, alone or together, are used by a significant number of members of the public in the United Kingdom to view programmes.

- (2) The number of members of the public in the United Kingdom which is to be considered significant for the purposes of subsection (1) is to be determined by OFCOM.

- (3) For the purposes of this Act a person has editorial responsibility for a user interface if that person has general control over the manner in which programmes or services are offered to users and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the user interface.

- (4) OFCOM may designate a person as a qualifying provider for the purposes of this Act where OFCOM is satisfied that the person falls within the scope of subsection (1).

5 Meaning of user interface

- (1) In this Act “user interface” means a facility—

- (a) whether provided as part of a service or as a service itself for users to find, select or access any of the following—

- (i) television programme services;
- (ii) on-demand programme services;

- (iii) programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services; and
 - (b) which is not itself, nor part of, an electronic programme guide, a television programme service or an on-demand programme service.
- (2) OFCOM may designate a facility as a user interface for the purposes of this Act where OFCOM is satisfied that the facility falls within the scope of subsection (1).

6 Statement of policy for user interfaces

- (1) Every qualifying provider shall draw up, and from time to time to review and revise, a statement of policy [for approval by OFCOM] which sets out—
 - (a) the manner in which programmes and services are included, organised and accessed in each of the user interfaces for it has editorial responsibility; and
 - (b) the practices adopted by the qualifying provider to give significant prominence to PSB content services.
- (2) In drawing up or revising the statement, the qualifying provider shall consult the providers of the public service channels.
- (3) OFCOM shall consult the providers of the public service channels [and anyone else it considers appropriate] before approving a statement or any revision to a statement.
- (4) The statement shall be published by the qualifying provider—
 - (a) as soon as practicable after obtaining OFCOM approval; and
 - (b) in such manner as OFCOM consider appropriate.

7 Code of practice for user interfaces

- (1) It shall be the duty of OFCOM to draw up, and from time to time to review and revise, a code giving guidance as the practices to be followed by qualifying providers in the provision of user interfaces. OFCOM shall review the code as part of any review conducted under section 264 of the Communications Act 2003, unless the code has already been reviewed within the preceding 2 years.
- (2) The code must include the requirements that OFCOM consider appropriate for securing that qualifying providers give significant prominence to PSB content services in accordance with section [2].
- (3) The requirements pursuant to subsection (2) shall include—
 - (a) the degree of prominence to be applied in respect of—

- (i) search, recommendations and personalisation functions offered by user interfaces;
 - (ii) the positioning of electronic programmes guides within user interfaces; and
 - (iii) specific audiences or regions targeted by PSB content services;
 - (b) where individual PSB programmes can be accessed through a user interface, an obligation on the qualifying provider to allow the provider of those programmes to select which programmes should be given prominence;
 - (c) in exceptional circumstances, and excluding those arising due to decisions taken by the qualifying provider of a user interface, where OFCOM consider it is not possible for prominence to be given, such as where programmes are displayed based on factual or statistical criteria only, an obligation on the qualifying provider to treat providers of PSB content services in a manner which is fair, reasonable and non-discriminatory; and
 - (d) the areas of a user interface where prominence should be given, which shall include—
 - (i) the areas positioned as central to the user experience, such as a home page or landing page, as determined by OFCOM; and
 - (ii) any other areas used by a significant number of users to access programmes as determined by OFCOM.
- (4) The code shall include guidance as to—
- (a) the preparation, review, revision and publication of the statements drawn up by qualifying providers pursuant to section [6]; and
 - (b) the matters to be included in such statements.
- (5) The code shall include guidance as to—
- (a) the type of services to be considered PSB content services;
 - (b) the type of persons to be considered qualifying providers;
 - (c) the type of facilities to be considered user interfaces; and
 - (d) the procedures to be adopted by OFCOM for requiring the provision of information from qualifying providers and for enforcing this Act.
- (6) It shall be the duty of qualifying providers to comply with the code.

8 Regulated Offer obligations affecting PSB content services

- (1) The provider of every licensed public service channel shall at all times offer its PSB content services—
 - (a) as available to every qualifying provider for inclusion in each of the user interfaces for which that qualifying provider has editorial responsibility; and
 - (b) on terms to be agreed between the provider of the licensed public service channel and the qualifying provider or,
 - (c) where such terms cannot be agreed, on the terms as set out in the regulated offer of the provider of the licensed public service channel; or
 - (d) where OFCOM is satisfied that the terms of the regulated offer do not reflect the principles set out in this section, on such reasonable terms as OFCOM consider appropriate having regard to its general duties as set out in section 1 and the principles set out in this section.
- (2) It shall be the duty of OFCOM to secure that subsection (1) is observed.
- (3) OFCOM may publish guidance as to the terms that should be included in a regulated offer by the provider of a licensed public service channel, having regard to the principles set out in this section, and the manner in which a regulated offer should be published.
- (4) The first principle is that PSB content services may be made available in standard definition or high definition, as the provider of the PSB content service may in its discretion decide.
- (5) The second principle is that PSB content services should be available free of charge to users, unless OFCOM consider it appropriate for the provider of the service to charge users directly having regard to the nature of the service.
- (6) The third principle is that the terms should not involve any net financial payments from the provider of the public service channel to the qualifying provider.
- (7) The fourth principle is that the terms should not afford users or the qualifying provider the ability to modify, record, copy, disaggregate, remove content from, extract, capture or replicate data from or otherwise interfere with any PSB content service (or any part of it, including advertising) without the consent of the provider of that service.
- (8) The fifth principle is that the terms should enable the provider of the public service channel to maintain a direct relationship with users, including obtaining data from users in accordance with applicable laws.

- (9) The sixth principle is that the terms should not require the provider of the PSB content services to make technical or other changes to their services (and underlying operational processes) and the cost of any technical or other changes required to user interfaces should be borne by the provider of the user interface.
- (10) The seventh principle is that, in relation to qualifying on demand programme services, the terms of the regulated offer should relate only to the provision of content recently first broadcast on public service channels.

9 Inclusion requirements affecting qualifying providers

- (1) Every qualifying provider shall at all times offer to include in each of the user interfaces for which it has editorial responsibility every PSB content service—
 - (a) on terms to be agreed between the qualifying provider and the provider of the service; or
 - (b) where such terms cannot be agreed in the case of the provider of a licensed public service channel, on the terms as set out in the regulated offer of that provider; or
 - (c) where OFCOM is satisfied that the terms of the regulated offer do not reflect the principles set out in section [8] or where terms cannot be agreed in the case of a provider of a public service channel which is not a licensed public service channel, on such reasonable terms as OFCOM consider appropriate having regard to the principles set out in that section.
- (2) The terms of inclusion shall include the provision of such form of broadcast or other transmission by the qualifying provider as is necessary to enable users to view the PSB content services at a quality which is at least equivalent to the majority of viewing to other services included in the same user interface [unless otherwise agreed with the provider of the PSB content service].
- (3) It shall be the duty of OFCOM to secure that this section is observed.

10 Ofcom power to impose arrangements

- (1) Where—
 - (a) OFCOM has exercised its powers under either or both of section 8(1)(d) and section 9(1)(c);
 - (b) OFCOM are satisfied that the provider of the PSB content service and the qualifying provider have failed to agree arrangements for the inclusion by the qualifying provider of the PSB content service in the user interface for which the qualifying provider has editorial responsibility;

- (c) OFCOM have allowed each of the providers an opportunity to make representations about that failure and proposals to remedy it; and
- (d) having regard to any such representations and proposals, it is reasonable and proportionate to do so;

OFCOM may impose on those providers the arrangements that OFCOM consider appropriate.

- (2) Arrangements imposed under this section come into force on the date determined by OFCOM.
- (3) The persons subject to arrangements imposed under this section shall comply with the provisions of those arrangements.
- (4) Where:
 - (a) arrangements are imposed under this section;
 - (b) other arrangements are entered into between the persons bound by the imposed arrangements; and
 - (c) the other arrangements entered into are approved by OFCOM;

the imposed arrangements shall cease to have effect on the coming into force of the other arrangements.

11 Notification to OFCOM by qualifying providers

- (1) A qualifying provider must not provide any user interface unless that provider has given a notification to OFCOM.
- (2) A qualifying provider must give a notification to OFCOM where it ceases to be a qualifying provider.
- (3) A notification for the purposes of this section must—
 - (a) be sent to OFCOM in such manner as OFCOM may require; and
 - (b) contain all such information as OFCOM may require.

12 Fee to be paid by qualifying providers

- (1) OFCOM may require a qualifying provider to pay them a fee.
- (2) OFCOM must be satisfied that the amount of any fee required under subsection (1)—
 - (a) represents the appropriate contribution of the provider towards meeting the likely costs described in subsection (4)(a), and
 - (b) is justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed.

- (3) A different fee may be required in relation to different cases or circumstances.
- (4) OFCOM must for each financial year—
 - (a) prepare such estimate as it is practicable for them to make of the likely costs of carrying out their functions under this Act during that year;
 - (b) ensure that the aggregate amount of the fees that are required to be paid to them under subsection (1) during that year is sufficient to enable them to meet, but not exceed, the costs estimated under paragraph (a);
 - (c) consult in such manner as they consider appropriate the providers likely to be required to pay them a fee under subsection (1) during that year; and
 - (d) publish in such manner as they consider appropriate the amount of the fees they will require providers to pay to them under subsection (1) during that year.
- (5) As soon as reasonably practicable after the end of the financial year, OFCOM must publish a statement setting out, for that year—
 - (a) the aggregate amount received by them during that year in respect of fees required to be paid under subsection (1);
 - (b) the aggregate amount outstanding and likely to be paid or recovered in respect of fees that were required to be so paid under subsection (1); and
 - (c) the costs to them of carrying out their functions under this Act during that year.
- (6) Any deficit or surplus shown (after applying this subsection for all previous years) by a statement under subsection (5) is to be—
 - (a) carried forward; and
 - (b) taken into account in determining what is required to satisfy the requirement imposed by virtue of subsection (4)(b) in relation to the following year.
- (7) OFCOM may repay to a person some or all of a fee paid to them by a person under subsection (1) if—
 - (a) that person has ceased to be a qualifying provider at some time during the period to which the fee relates; and
 - (b) that person has given OFCOM a notification under section [11](2).
- (8) For the purposes of this section—

- (a) OFCOM's costs of carrying out their functions during a financial year include their costs of preparing to carry out the relevant functions incurred during that year; and
 - (b) OFCOM's costs of preparing to carry out their functions incurred after [] but before the financial year in which those functions were first carried out by them are to be treated as if they were incurred during that year.
- (9) In this section "financial year" means a period of 12 months ending with [31 March].

13 Power to demand information

- (1) OFCOM may require a person who appears to them to be, to potentially be, or to have been a qualifying provider and to have information that they require for a purpose within subsection (2) to provide them with all such information as they consider necessary for that purpose.
- (2) The following are within this subsection—
 - (a) the purposes of an investigation which OFCOM are carrying out in order for it to be determined whether a contravention of this Act has occurred or is occurring, where—
 - (i) the investigation relates to a matter about which they have received a complaint, or
 - (ii) they otherwise have reason to suspect that there has been a contravention;
 - (b) the purpose of ascertaining or calculating applicable qualifying revenue under section [15].
- (3) OFCOM may not require the provision of information under this section unless they have given the person from whom it is required an opportunity of making representations to them about the matters appearing to them to provide grounds for making the request.
- (4) OFCOM must not require the provision of information under this section except by a demand for the information contained in a notice served on the person from whom the information is required that describes the required information and sets out OFCOM's reasons for requiring it.
- (5) A person who is required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM in the demand for information.

14 Enforcement

- (1) Where OFCOM determine that a person has contravened any part of this Act they may do one or both of the following—

- (a) give the person an enforcement notification under this section;
 - (b) impose a penalty on the person in accordance with section [15].
- (2) OFCOM must not make a determination as mentioned in subsection (1) unless there are reasonable grounds for believing that a contravention has occurred and they have allowed the person an opportunity to make representations about that apparent contravention.
- (3) An enforcement notification under this section is a notification which specifies the determination made as mentioned in subsection (1) and imposes a requirement on the person to take all such steps for remedying the contravention as may be specified in the notification.
- (4) An enforcement notification must—
- (a) include reasons for OFCOM's decision to give the enforcement notification; and
 - (b) fix a reasonable period for taking the steps required by the notification.
- (5) It is the duty of a person to whom an enforcement notification has been given to comply with it.
- (6) That duty is enforceable in civil proceedings by OFCOM—
- (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.

15 **Financial penalties**

- (1) The amount of a penalty imposed on a person under section [14] is to be such amount not exceeding 5 per cent. of the person's applicable qualifying revenue or £250,000 whichever is the greater amount, as OFCOM determine to be—
- (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.
- (2) The "applicable qualifying revenue", in relation to a person, means—
- (a) the qualifying revenue for the person's last complete accounting period falling within the period to which the contravention relates; or
 - (b) in relation to a person whose first complete accounting period falling within that period has not ended when the penalty is imposed, the amount that OFCOM estimate to be the qualifying revenue for that period.

- (3) For the purposes of subsection (2) the “qualifying revenue” for an accounting period consists of the aggregate of all the amounts received or to be received by the person to whom the contravention relates or by any connected person in the accounting period from the sale of products and the provision of services after deduction of sales rebates, value added taxes and other taxes directly related to turnover.
- (4) For the purposes of subsection (3), “connected” has the same meaning as it has in the Broadcasting Act 1990 by virtue of section 202 of that Act.
- (5) A financial penalty imposed under this section—
 - (a) must be paid into the Consolidated Fund; and
 - (b) if not paid within the period fixed by OFCOM, is to be recoverable by OFCOM as a debt due to them from the person obliged to pay it.
- (6) For the purposes of subsections (2) and (5)—
 - (a) the amount of a person’s qualifying revenue for an accounting period; or
 - (b) the amount of any payment to be made into the Consolidated Fund by any person in respect of any such revenue,is, in the event of a disagreement between OFCOM and that person, the amount determined by OFCOM.

16 General interpretation

- (1) In this Act, except in so far as the context otherwise requires—

“editorial responsibility” means control over the design, layout and content of user interfaces regardless of the mechanism by which this is achieved (e.g. including manual or algorithmic / machine learning methods) or whether aspects of this are delegated to third parties (e.g. where content service providers are able to determine which content is promoted in certain areas of a user interface)

“electronic programme guide” has the same meaning as in section 310 of the Communications Act 2003;

“licensed public service channel” has the same meaning as in section 362 of the Communications Act 2003.

“on-demand programme service” has the same meaning as in section 368A of the Communications Act 2003;

“qualifying on-demand programme service” means an on-demand programme service (or parts of such a service) made available by a provider of a public service channel which delivers programmes which were recently first broadcast on a public service channel. Qualifying on-demand programme services should be available to users free of charge but can form part of a broader offer

(including but not limited to additional content and/or functionality) for which charges may apply.

“PSB programme” means a programme which has been included or will be included in a public service channel;

“public service channel” has the same meaning as in section 310 of the Communications Act 2003;

“purposes of public service television broadcasting in the United Kingdom” has the same meaning as in section 405 of the Communications Act 2003;

“regulated offer” means a published standard set of terms offered by the provider of a licensed public service channel for the inclusion in a user interface of:

- (a) its licensed public service channel; and
- (b) a qualifying on-demand programme service;

“television programme service” has the same meaning as in section 362 of the Communications Act 2003.

- (2) In this Act the person who is to be treated as the provider of a service is the person with general control over which programmes and other services and facilities are comprised in the service (whether or not that person has control of the content of individual programmes or of the broadcasting or distribution of the service).
- (3) In this Act reference to a provider shall include two or more such providers acting together.

17 **Amendment**

The Secretary of State may amend any part of this Act by order.