



## Broadcasting Authority of Ireland

Additional Written submission to the Joint Committee  
on Tourism, Arts, Culture, Sport and Media on the  
General Scheme of the Online Safety and Media  
Regulation Bill

**July 2021**

## Introduction

The Broadcasting Authority of Ireland (BAI) would like to thank the Joint Committee on Tourism, Arts, Culture, Sport and Media for the opportunity to make an additional response on the General Scheme of the Online Safety and Media Regulation Bill (the General Scheme).

As requested by the Joint Committee, this response focuses on: -

- The Additional Heads of Bill relating to the Closure of Aertel, Advertising Minutage and Prominence of Public Service Content.
- The Integration of the Broadcasting (Amendment) Bill, 2019.

In respect of the Additional Heads of Bill, the BAI broadly supports the proposals as set out and includes several observations about the legislative proposals, including a recommendation that rules in respect of advertising limits, provided for under Head 70, would also apply to public service broadcasters.

Regarding the Integration of the Broadcasting (Amendment) Bill, 2019, the BAI's views are limited to the proposals in respect of the levy and the scheme for journalism and do not address proposals in respect of copyright law. We make several observations about the legislative proposals, including the proposal to part-fund the Media Commission via the television licence fee.

## **1. Additional Heads of Bill**

### **2.1 HEAD 1 – CLOSURE OF AERTEL**

This head proposes to amend section 114(1)(b) of the Broadcasting Act 2009 to remove the obligation on RTÉ to provide the Aertel service.

In the BAI's submission to the Future of Media Commission earlier this year, we noted that since the drafting of the 2009 Act, RTÉ (along with TG4) has evolved - largely in response to changes in technology and audience consumption behaviours. As a result of the changing landscape the public objects for RTÉ as set out in section 114 (1) of the 2009 Act are not all now practical or realistic and are not in keeping with changing audience needs and requirements. The BAI recommended to the Future of Media Commission that the public objects should be technology and platform-neutral to the greatest extent possible and should allow for the evolution of services in line with technological developments and audience needs.

In this context, the BAI considers the proposal in Head 1 to remove the statutory requirement for RTÉ to establish and maintain the Aertel teletext service to be appropriate. We agree with the rationale provided. Namely, the change is necessary as part of RTÉ's ongoing series of reforms and because the rationale for a teletext service such as Aertel has since been superseded by more modern communications technology and services. Being mindful that the needs of all audience members should be catered for, information or services made available via the website or via other measures should maximise accessibility.

We believe it is also worth highlighting that in several years, websites could decline in their primacy or their importance in meeting the objective of section 114(1)(b). For this reason, consideration could be given to further amending this public object to future-proof it (insofar as possible) and make it platform-neutral such that a further amendment to remove references to 'websites' is not required in the coming years.

### **2.2 HEAD 2 – ADVERTISING MINUTAGE**

This head proposes to amend section 41(2) of the Broadcasting Act 2009 to remove the hourly limits in respect of advertising minutage on commercial radio services, which is currently set at 10 minutes per hour, while retaining the overall cap of 15% of broadcasting time.

#### **Daily Limits**

As we outlined in our initial submission to the Joint Committee, the BAI believes that regulatory limits on advertising are necessary to balance the commercial needs of broadcasters with the viewing and listening interests and enjoyment of audiences. Accordingly, the BAI supports the inclusion of upper limits in law. In our earlier submission, we noted that specific statutory hourly limits on advertising on sound broadcasting services are unnecessary in the current media environment and that greater discretion should be provided to the regulator in this regard. For these reasons, the BAI supports the daily 15% limit as proposed and welcomes the proposed removal of statutory hourly advertising limits for commercial sound broadcasting services. This proposal, if adopted, would allow the commercial radio sector to maximise potential revenue during popular listening times each day as well as during peak advertising during seasons such as the Christmas period, subject to the application of any regulatory rules developed by the Media Commission further to Head 70 of the OSMR Bill.

### **Advertising Limits and Application of Head 70 Rules**

Separately, we note that Head 70 of the OSMR Bill includes an obligation on the Media Commission to develop rules in respect of advertising. Head 70 states: -

*1) The Commission shall, subject to the requirements of [Head 69 – Advertising] and, in accordance with subsection (4), prepare, and from time to time as occasion requires, revise rules (“media rules”) with respect to—*

*(a) the total daily times that shall be allowed for the transmission of advertisements and teleshopping material on a broadcasting service, in respect of a contract under [Part 6 of the Broadcasting Act, 2009],*

*(b) the maximum period that shall be allowed within the period of 6.00 and 18:00 and the period of 18.00 and 24:00 for the transmission of advertisements and teleshopping material (within the meaning of [Head on Media Codes]) on such a broadcasting service, and the Commission may make different such rules with respect to different classes of broadcasting service.*

The BAI believes that the development of rules by the Media Commission to give effect to Head 70 are important where there is a statutory daily upper limit of 15% proposed. These rules will be an important mechanism for balancing the commercial interests of broadcasters with the interests of audiences and thereby ensuring that programming schedules across a given day are not overly saturated with advertising content in any hour or daypart. We expect that broadcasters will take a sensible approach to the amount of advertising carried on-air since, to do otherwise, would likely alienate audiences. Notwithstanding this, having in place rules to set limits ensures clarity for both the public and broadcasters in respect of advertising permissible during the broadcast day and further ensures accountability.

In addition to the above points, we would also like to make three further observations relating to the way the new Head of Bill will be given practical effect via the Head 70 advertising requirements.

### **Removal of Daily Advertising Limits for Public Service Broadcasters**

Firstly, consideration should be given to removing the hourly limits on advertising for public service broadcasters while retaining an upper daily limit. In this scenario, the Minister would retain responsibility for setting the overall daily limit. If adopted, this would require an amendment to section 106 of the Broadcasting Act 2009. Such an approach would maintain the current differences in advertising inventory that public service and other broadcasters can avail of and would recognise that the factors informing the change proposed by Head 2 also impact on public service broadcasters. Accordingly, some additional flexibility should also be provided to public service broadcasters via the removal of hourly limits and the retention of a daily limit set by the Minister.

### **Application of Head 70 Rules on Advertising Limits to Public Service Broadcasters**

Secondly, at present, public service broadcasters are required to comply with all BAI codes and rules other than those relating to daily and hourly limits on advertising. Given this, bringing the regulation for advertising limits for public service broadcasters under the same framework applying to all other broadcasters is considered desirable by the BAI. This would ensure that consistent regulation would apply to all broadcasters as it relates to advertising limits. This would require an update to Head 70 such that the rules proposed would not be limited only to services awarded contracts under Part 6 of the Broadcasting Act 2009.

The role of the Minister in setting the overall daily advertising limits for public service broadcasters would need to be reflected in the revised head and the role of the Media Commission would be concerned with regulations that would set the maximum period that all broadcasters would be allowed for the transmission of advertisements during off-peak and peak hours (as provided for in Head 70). This would ensure that there would be a statutory basis for the Media Commission to assess compliance with advertising limits on public service broadcasters and to operate the same range of compliance actions for both commercial, community and public service channels, where non-compliance is evident.

### **Peak and Off-Peak Advertising Limits**

Thirdly, and finally, 6am-6pm and 6pm to midnight are appropriate time periods for television services in terms of off-peak and peak viewing and are determined by the AVMS Directive. In the case of radio, the peak and off-peak times are 7am-7pm and 7pm-1am. For this reason, we would suggest that the wording of the Head would identify specific time periods for television only and would reference but not specify peak and off-peak periods of the day in the case of radio services, thus allowing also for changes in listening trends as they might evolve in the future.

## **2.3 HEAD 3 – PROMINENCE OF PUBLIC SERVICE CONTENT**

Head 3 introduces detailed provisions intended to secure the prominence of Public Service Content. Such content is defined not only with reference to the public service broadcasters but to other channels providing public service content as described in subsection 1 of Head 3. The Head proposes that the Media Commission would put in place regulations to ensure prominence for Public Service Content on the user interfaces of various platforms.

It is the BAI's view that Public Service Content requires due prominence across platforms and services to facilitate universal access for all audiences. This is particularly vital in an increasingly platform-agnostic and saturated market, underpinned by subscription-based and personalised services. Irish Public Service Content needs to be made available to audiences via traditional platforms, but also needs to reach audiences who consume content outside of an EPG and on a personalised subscription basis. Therefore, we support Head 3 and the legal framework proposed for facilitating prominence. We also welcome the widening of the definition of Public Service Content to include content on services other than traditional public service channels and the inclusion within the scope of regulation of user interfaces, including those on Smart TVs, satellite/cable/OTT set-top boxes and streaming sticks.

On the issue of prominence, the use of smart speakers and other similar devices to access audio and audiovisual content has become more prevalent and has been raised as a concern by broadcasters. In that context, consideration should be given to how the OSMR Bill might provide the Minister with relevant statutory powers (and the Media Commission with appropriate regulatory or statutory powers) to designate, for the purpose of prominence, devices where they are used as a means of finding and accessing Public Service Content. We note that this will require detailed consideration about the need for such regulation or the provisions that would give this regulation effect, but the OSMR Bill is a timely opportunity for government to consider whether it should be addressed in some manner via the provisions of the Bill.

We noted in our prior submission that a significant issue that the BAI has become acutely aware of, both at a national level and through the BAI's European work with ERGA, is the societal harm caused by disinformation. Since our submission in March to the Joint Committee, the BAI has published the 2021 [Reuters Digital News Report](#).

This report highlighted again the trust that the Irish public puts in news produced by high quality broadcasting services and role of such services in countering disinformation. In this context, we agree that in addition to ensuring findability of content of cultural relevance to Irish audiences, the prominence provisions of Head 3 would support the findability of accurate, trustworthy, and reliable information sources as a bulwark against disinformation and in support of plurality for Irish audiences.

There are two additional observations we wish to make.

Firstly, Head 3 (1) (b) describes what constitutes Public Service Content. One quality is that it: -

*“Provides the public access to high quality, impartial, independent journalism, reporting on matters of local, regional, national, European and international importance in a balanced way and which contributes to democratic discourse.”*

As members of the Joint Committee will recall, during public debate on constitutional changes in respect of marriage and the right to life, there was much discussion about the perceived need for ‘balance’ in broadcasting coverage. The BAI clarified in its public statements and via updates to its guidelines that there is no statutory obligation for balance in the Broadcasting Act 2009. The BAI highlighted that driving coverage of news and current affairs issues on the basis that each topic or debate must be ‘balanced’ by both perspectives can lead to false equivalence whereby one view is given an artificial emphasis that is not merited. This is not to say that balance is not an important tool in covering a news and current affairs topic, but it should be used selectively. In view of this, we would propose that in Head 3(1)(b) the words ‘*in a fair, objective and impartial way*’ are used in the draft of the Bill rather than ‘*balanced way*’. This would ensure consistency in references to the standards expected of journalism (and referenced elsewhere in the OSMR Bill and in the Broadcasting Act 2009).

Secondly, Head 3 (6)(g) states that the Media Commission, in setting rules for prominence, should have regard to any contractual arrangements in place between a Public Service Content provider and a service provider with prominence obligations. It will be important that the Media Commission has sight of any contractual arrangements that are in place such that it can make any determination under this Head where existing contractual arrangements are a relevant factor. The BAI considers that the OSMR Bill should ensure that the Media Commission has appropriate powers in this respect.

## 2. Integration of the Broadcasting (Amendment) Bill, 2019

The Broadcasting (Amendment) Bill, 2019 ('the 2019 Amendment Bill') proposed several amendments relating to the funding of the BAI. It also proposed to update the levy obligations on broadcasters, including the granting of exemptions, deferrals or reductions in the levy and providing certainty on levy obligations and legislative requirements for any broadcasters wishing to become established and regulated in Ireland. In addition, the 2019 Amendment Bill proposed a scheme of grants for the promotion of professional journalistic practices in certain sound broadcasters. Our response deals with those aspects of the Bill dealing with the levy and those relating to the scheme for journalistic practices.

### 2.1 Levy Aspects

We note that it is proposed to integrate the provisions of the 2019 Amendment Bill into the OSMR Bill on the grounds that the 2019 Amendment Bill has been superseded by the development of the OSMR Bill. The BAI considers this appropriate in a context where the OSMR Bill provides for the dissolution of the BAI and the introduction in the OSMR Bill of a new levy scheme which will cover all regulated entities and not just broadcasting providers (the focus of the 2019 Amendment Bill).

Given the technical nature of the 2019 Amendment Bill as it relates to the Levy scheme, it is difficult to comment in detail in the absence of the specific legislative provisions that will become available once the OSMR Bill is published. Notwithstanding this, we wish to make the following observations.

**Section 3 of 2019 Amendment Bill – Amendment of s33 of the 2009 Act:** The BAI supports the proposal that holders of section 71 contracts (pursuant to the 2009 Act, contracts which will transfer to the Media Commission) would be required to pay a levy as a regulated entity. We note that the section 71 contracting process was established in the 2009 Act as a means of encouraging new market entrants, and particularly new forms of audiovisual media that might have a smaller audience appeal. Since that time, the broadcasting landscape has changed, including the fact that following Brexit, larger broadcasting services have been availing of section 71 contracts. The BAI also supports the flexible approach whereby the regulator will still be able to allow a derogation from payment of the levy in the case of services with a smaller audience appeal. The overall approach proposed will ensure that services which are larger, and which may incur a higher regulatory burden are required to fund the cost of regulation whereas growth in the market is encouraged by allowing the derogation in certain instances and as deemed appropriate by the regulator and confirmed by the Minister via the appropriate legislative instrument.

This section of the 2019 Amendment Bill also proposed to **part-fund the BAI from the television licence fee**. We note that the original rationale for this proposal was to reduce the levy on the independent radio sector. To achieve this, and in a context where the BAI operations are currently entirely funded from the levy, it was proposed in the 2019 Amendment Bill that the revenue lost to the BAI from a reduced levy on this sector would be covered by licence fee funding (subject to an upper limit).

As we understand it, in the context of the OSMR Bill, it is now proposed to allow the “broadcasting functions of the new Media Commission to be part-funded from television licence money”.<sup>1</sup> The BAI does not support this proposal for several reasons.

In financial terms, the Media Commission will be funded by a wider range of regulated entities, and it should therefore be possible to reduce the levy on the independent radio sector without the need for licence fee funding.

We also note that, currently, 7% of the licence fee collected is allocated to the Broadcasting Funding Schemes which fund the BAI Sound and Vision and Archiving Schemes. The balance is used to fund RTÉ and expenses relating to the collection costs of licence fee by An Post. As has been recognised, there are significant difficulties with the current licence fee model, and this has led to declining funds available. For this reason, reappportioning part of these funds to part-finance the Media Commission would reduce funds available for RTÉ to discharge its public service remit. We would also note the need to ensure and maintain the adequate funding of public service broadcasters (as previously articulated by the BAI in its reports to the Minister on funding). Were this proposal to proceed, its success in achieving its objectives would likely be dependent on higher licence fee compliance or a restructuring of the way it is collected, for example via a public service broadcasting charge.

This section also proposed to update the levy to ensure that levy payments cover both **working capital** and ‘expenses properly incurred’ by the BAI. Only the latter are covered by the current 2009 Act. The BAI is of the view that any levy scheme that will fund the Media Commission should cover both working capital and current and capital expenditure of the Media Commission and we support any provision in the OSMR Bill that would ensure this outcome.

**Section 4 of the 2019 Amendment Bill – Amendment of s71 of the 2009 Act:** The BAI supports the proposal to require that any *additional* services operated by the section 70 contractor must have a section 71 contract.

#### **Section 5 of the 2019 Amendment Bill - Amendment of section 123 of Act of 2009**

For the reasons set out above in respect of section 3, the BAI would not in principle support the funding of the broadcasting activities of the Media Commission from the television licence fee. If it were to proceed, it is assumed that a new levy order would be developed by the Media Commission rather than the BAI, and we would emphasise the need for it to be implemented in a context of higher licence fee income.

The BAI notes that the OSMR Bill will exclude certain categories of broadcasters from levy payment, including community services. The BAI supports this proposal and would also propose that it be applied in the case of institutional sound broadcasting services provided for under the 2009 Act.

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<sup>1</sup> <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/#integration-of-the-broadcasting-amendment-bill-2019>

## 2.2 Grant Scheme for Journalistic Practices

### **Section 6 and 7 of the 2019 Amendment Bill – Scheme for professional journalistic practices in certain sound broadcasters**

The BAI welcomes the proposed scheme as an important support for journalism. During the tenure of the BAI and in the case of its predecessor organisation, the BCI, funding supports for the broadcasting sector have successfully facilitated the development of the sector over many years. This includes the wide range of initiatives supported by the BAI's sectoral development funding programme as well as ancillary schemes arising from the Broadcasting Funding Scheme.

### **Sections 8 and 9 of the 2019 Amendment Bill – Amendment of sections 157 and 159 of 2009 Act.**

These provisions are technical amendments to take account of the new funding scheme as set out in Section 7, and the BAI has no issues with the proposed amendments.