



# **Code of Practice for the Placement of Television Services on the Saorview Platform**

## **Outcomes of Consultation**

## 1. Introduction

Following a series of discussions in the first half of 2014, the Department of Communications, Energy and Natural Resources (“DCENR”) wrote in early September and formally requested the BAI to proceed with the development of a code of practice for the placement of additional channels on the Saorview platform as envisaged in 2012. It has been agreed with DCENR that the code will be applied in respect of all channels which are either currently carried on the platform or which may be carried at a future date.

The development of this code of practice by the BAI was undertaken at the request of the Minister, pursuant to his powers under Section 139 of the Act. However, it is the understanding of the BAI that the implementation of the code is likely to be placed on a more specific statutory footing by the Minister at a future point in time.

The BAI has developed a Code of Practice which consists of five sections as follows:

- **Introduction** – This sets out the purpose and basis of the code;
- **Scope** – This section identifies the types of channels which it is envisaged might be carried on the Saorview platform;
- **Appropriate Prominence** – This section introduces the concept of appropriate prominence and proposes the services which should be granted this status;
- **Fair, Reasonable and Non-discriminatory Treatment** – This section sets out the principles which must be followed by RTÉ (which operates the Saorview platform) to ensure that fair, reasonable and non-discriminatory treatment is applied to the placement of services which are to be carried on the platform;
- **Other Matters** – This section sets out the mechanism for a right of appeal and proposals for a review of the code at appropriate intervals.

A consultation on the draft code of practice for the placement of television services on the Saorview platform was undertaken by the BAI in October 2014

The remainder of this document is set out as follows: **Section 2** provides a summary of the key points emerging from the responses to the consultation: **Section 3** sets out the proposed changes to the draft code and provides the BAI rationale for these changes.

The list of organisations consulted in the development of the code and the list of consultation questions are attached in the **Appendix** to this document.

## 2. Responses to Consultation

At the closing date of 28<sup>th</sup> October, 2014 the BAI had received a total of 12 responses from the following organisations:

RTÉ (responses received from RTÉ Mux Management, 2rn and RTÉ Television)  
TV3  
TG4  
ComReg  
Houses of the Oireachtas  
Irish Film Board  
UTV  
Irish TV  
Eircom  
DCTV

The consultation asked 4 questions on the draft code regarding; appropriate prominence; fair, reasonable and non-discriminatory treatment of channels; right of appeal and code review; and other views. This section summarises the responses to these questions. Some of the consultation responses addressed matters concerning the scope of the code and the statutory basis for its implementation. These are also addressed hereunder.

### 2.1 Responses to Question 1

Question 1 was as follows:

*The Draft Code of Practice identifies a range of channels which are either specified as being those of public service broadcasters or which have specific public service obligations. These presently consist of RTÉ One and RTÉ Two; TG4; TV3 and 3e. The principles of the Code acknowledge that "appropriate prominence" permits a measure of discrimination in favour of these PSB channels.*

- **What are your views on the principles regarding appropriate prominence as outlined?**
- **Are there other channels, or categories of channels, which you believe should be considered for an appropriate level of prominence? Please set out the channel or categories of channels that you consider should be given such designation and the reasons for your proposals?**

#### Summary of Responses

A wide variety of views were given and these are summarised as follows:

RTÉ Mux Management considered that appropriate prominence should be given to all channels designated under Section 130 of the Act with the exception of those that might be carried under Section 130(1)(e). Channels should then be sorted by genre. The concept of giving all public service channels prominence and grouping them by genre was supported by 2rn, while RTÉ Television felt that PSB channels which had been given Ministerial approval under Section 103 of the Act should get the same prominence as Section 130(1)(a) channels.

TV3 agreed with the principles of appropriate prominence being granted to PSB channels and those with specific public service obligations under Section 70 of the Act. They considered that Section 71 contractors should be excluded from the platform (this is addressed further under 'Scope' at Section 2.4 beneath).

UTV was of the view that Section 3 of the code should make more explicit reference to channels with a public service nature. Both UTV and Irish TV gave various reasons as to why they considered that they were public service in nature.

The Houses of the Oireachtas felt that public service should be better defined and that community and public service television should be categorised as wholly public and non commercial and should be defined as a separate category.

The Irish Film Board felt that the Irish Film Channel should be specifically referred to along with RTÉ, TV3, etc., while Eircom took the view that channels with a significant viewing share or those investing in Irish programming should have prominence on the EPG.

TG4 and ComReg agreed with the consultation proposals under this heading although TG4 also made the point that channels that prioritise Irish content are the most important and should be prioritised accordingly.

## **2.2 Responses to Question 2**

Question 2 was as follows:

*The Draft Code of Practice lists a series of provisions regarding Fair, Reasonable and Non-Discriminatory Treatment of channels that are carried or may be carried on the Saorview platform.*

- **What are your views on these provisions?**
- **Are there any other provisions which you consider should be included in this regard? Please set these out in your response.**

### **Summary of Responses**

There was general agreement with the list of provisions regarding fair, reasonable and non-discriminatory treatment of channels that are carried or may be carried on Saorview. Some additional views were given as follows:

RTÉ Mux Management and 2rn proposed a genre based method of allocating channel numbers to aid viewer navigation of content. Neither organisation felt that audience share was a good way of assigning positions on Saorview for several reasons which included the LCN position could contribute to audience share; channels established to meet a public service obligation, but with a limited audience potential would be disadvantaged and LCN positions would have to change with changing audience shares.

RTÉ Mux Management and 2rn did not agree with section 4(d) of the draft code which gave priority to new or additional channels over +1 channels. They only felt that this should be the case within a genre, i.e. a new News & Information channel should get priority over +1 channels in this genre, but not over +1 channels in a genre higher up the EPG listing. RTÉ Television also felt that the code should not be so specific as to mention +1 channels. In contrast, DCTV questioned whether space should be allocated to +1 channels in the current new media environment.

2rn felt that the first come first served basis could result in a non-logical sequence of channels which could damage the attractiveness of the platform.

UTV welcomed the general thrust of the approach taken in the draft code, but felt that the BAI needs to mandate what exactly is FRND and should consult with the industry in the drawing up of an “objectively justifiable method of allocating positions”.

### **2.3 Responses to Question 3**

Question 3 was as follows:

*The Draft Code of Practice proposes that there should be a right of appeal to the BAI and that the Code should be reviewed after two years and at appropriate intervals thereafter.*

- **What are your views on these provisions?**

#### **Summary of Responses**

There was general agreement with both of these proposals, although RTÉ Mux Management asked that the right to appeal system be clearly set out with specific timeframes for decision making. They also considered that a review of the code after 2 years was too short a period of time suggesting that five years would be more appropriate

### **2.4 Other matters raised**

Question 4 was as follows:

*Other views:*

- **Do you have any other views that you wish to be taken into consideration in advance of the finalisation of the Code?**

Several issues were raised under this section. The main issues were the statutory basis for this consultation and the scope of the consultation.

#### **2.4.1 Statutory Basis for Consultation**

A number of respondents queried the statutory basis for the BAI's role in undertaking the consultation and preparation of the code under Section 139 of the Act as they considered that this section was specifically related to analogue switch off only and that this had been completed in 2012. TV3 also queried the rationale for the undertaking of the consultation at this time.

#### **2.4.2 Scope**

TV3 took the view that channels licensed under Section 71 of the Act should not be carried on Saorview and that the remaining space on the multiplex should be reserved for licencees with specific public service obligations and channel upgrades planned by the Section 70 licensee (TV3 and 3e). DCTV noted that Section 72 contractors were not included in the scope and that this was a missed opportunity

#### **2.4.3 Other Issues**

Other views were raised around the framework to be adopted by the Minister in determining applications under Section 130 (1) (a) (iv) of the Act, the tariff model for carriage on Saorview and Sound & Vision funding, but these are not deemed relevant to the consultation.

### **3. Revised Code of practice for the Placement of Television services on the Saorview Platform**

The BAI has given careful consideration to all of the responses to the consultation. In broad terms, we have not proposed any major changes to the draft as the code was generally deemed to be acceptable by all respondents and it also follows best practice in other jurisdictions such as the UK. However, we have made a number of changes to reflect some of the concerns held by respondents. These are outlined hereunder and are presented in the section order within the code.

#### **3.1 Introduction**

A number of respondents queried the statutory basis for the development of the code. The draft code had indicated that the BAI had developed the code at the request of the Minister pursuant to his powers under Section 139 of the Act. Under this section the Minister had established in September 2010 a Digital Switchover Steering group to oversee the implementation of analogue switch off. The steering group established a number of working groups including one which was tasked with addressing content related matters. This group concluded its work in May 2012 and included among its recommendations a commitment that the BAI would draw up a draft code of practice on number allocation for the Saorview platform which would give priority to certain channels and ensure that FRND (Fair, Reasonable and non-discriminatory treatment) principles would be applied in respect of all channels. The drawing up of the code at this time is giving effect to this recommendation.

In these circumstances, the BAI is satisfied that the undertaking of this consultation is a legitimate exercise under Section 139 of the Act. The Introduction to the code recognises that a further statutory provision may be required to underpin the implementation of the code. However, this is a matter for the Minister and, accordingly, it is not intended to make any changes to this section of the code.

### **3.2 Scope**

Two queries were raised under this section. One suggested that Section 71 contractors should be excluded from the scope while the other proposed that contractors licensed under Section 72 (community television services) should be added.

The BAI accepts that Section 71 contractors have no rights per se to be included on the Saorview platform. The same would apply in respect of Section 72 contractors. However, both types of contractors may be carried if they are either designated by the Minister by order under Section 130 (1) (a) (iv) of the Act or if RTÉ receives the consent of the Minister under the provisions of Section 130 (1) (e). The same could apply in respect of services licensed elsewhere in the European Union which may also be carried under either of these sections.

Accordingly, the BAI has modified Section 2 of the code to reflect the above. We have removed the specific heading "Channels licensed under Section 71 of the Act" and inserted an additional line under both the Sections 130 (1) (a) (iv) and 130 (1) (e) bullets as follows: "This may include channels licensed pursuant to Sections 71 or 72 of the Act, or channels licensed elsewhere in the European Union".

### **3.3 Appropriate Prominence**

There were a number of calls within the consultation to extend the number of channels to which appropriate prominence should be granted. These included additional RTÉ services, the Oireachtas and Film Board channels and – in one case – all services which received designation under Section 130 (1) (a) (iv) of the Act. There was also a query as to why the RTÉ News Now service was not now included as it had been referenced by the content working group in 2012.

The principle of "appropriate prominence" recognises that there should be a measure of discrimination in favour of certain specified public service channels. All other channels are required to be given channel number allocations using FRND principles, thereby avoiding any potential discrimination for one channel over another. The Code also has an appeals process in the event that a channel provider considers that the placement of its channel is not being operated in accordance with FRND principles.

The BAI notes that the services currently proposed to be granted 'appropriate prominence' have been given a degree of status within various parts of the Broadcasting Act 2009, particularly through the imposition of a range of specific statutory obligations on these services. The level and type of obligations imposed on these services by statute do not apply to the same extent to other services which may be carried on the platform. It would therefore appear reasonable to the BAI to give preferred appropriate prominence status to these services over other services. Furthermore, at a practical level, the Saorview platform currently consists of two multiplexes with a resulting limited number of placements. For these reasons, we consider that there is a reasonable basis for only granting appropriate prominence status to the five services as outlined in the draft code.

Section 4 beneath references the potential for a genre based approach to the FRND treatment of channels and the BAI considers that the niche RTÉ News Now channel may be more appropriately catered for under that provision.

Accordingly, it is not proposed to make any changes to this section from the current draft of the code.

### **3.4 Fair, Reasonable and Non-Discriminatory Treatment**

No issues arose in the consultation in respect of sub-sections (a), (c) or (e) of this section, although we have made a minor change to (c) which now reads “...listing or display of a channel to which RTÉ is connected...”. There was also general agreement with the content of the other sub sections although a number of points were raised covering audience share; grouping by genre; the principle of “first come first served” and the location of +1 channels. These are now addressed hereunder.

The proposal in subsection 4(b) of allocating by audience share was not supported by a number of respondents as it had the potential to discriminate against niche channels or those with significant public service obligations but with a limited audience share at the point in time at which they are placed. The BAI accepts the arguments made by these respondents and has decided to remove this method from the code.

The remaining methods identified in the draft code – “first-come first-served”, listings by genre or the use of non sequential allocation to allow for future channels – received broad support from the respondents. In view of this, the BAI is satisfied to accept one or a combination of all three methods of allocating positions within this section of the code. The BAI will have regard to commonly held industry standards in its assessment of RTÉ’s proposals for the development of an objectively justifiable method of allocating positions.

One of the respondents suggested that the BAI should consult with third parties before an objectively justifiable method of allocating positions is agreed on. Section 4(b) already requires RTÉ to consult with the BAI in respect of this matter and we consider that this provision is sufficient as it currently stands.

A number of respondents did not support the proposal in Section 4(d) to give priority to new or additional channels over +1 channels. Other respondents questioned the value of allocating space to such channels in the context of technological developments.

The BAI considers that it is reasonable that new or additional channels would get greater priority over +1 channels in the interest of audiences. Furthermore, it may be noted that this was also the view of the content working group. However, in the event that a genre based approach is adopted by RTÉ, it is reasonable that the positioning of +1 channels could be implemented within the appropriate genre as suggested by one of the respondents.

Accordingly, we have made no change to this Section 4 (d).

### **3.5 Other Matters**

There was general support for the proposals for a Right of Appeal and a code review.

One of the respondents requested that there should be clarity on the mechanisms and timeframe to be used for an appeal. The BAI would agree with this but is satisfied that the current wording of this section is sufficient. The BAI will make a separate provision concerning this proposal.

Another respondent suggested that the proposal to hold a review of the code after two years was unnecessary and suggested that the first review should not take place for five years. However, the BAI considers that, given that this is the first code of its kind, a two year period would seem reasonable and appropriate and it may be that a longer timeframe would apply thereafter.

### **Summary of Key Changes**

There are no changes proposed to Section 1 ("Introduction"); Section 3 ("Appropriate Prominence") or Section 5 ("Other Matters").

Section 2 ("Scope") –

- The bullet point "Channels licensed under Section 71 of the Act" has been removed;
- A line has been added to the bullet points covering channels to be carried under Sections 130 (1) (a) (iv) and 130 (1) (e) which reads "This may include channels licensed pursuant to Sections 71 or 72 of the Act, or channels licensed elsewhere in the European Union".

Section 4 ("Fair, Reasonable and Non Discriminatory Treatment") has been modified as follows:

- The reference to "listing based on audience share" in 4(b) has been removed.
- The line "one or a combination of the following methods" has been added to 4(b).
- The line "the BAI will have regard to commonly held industry standards in its assessment of RTÉ's proposals for the development of an objectively justifiable method of allocating positions" has been added to 4 (b).

## Appendix

### Organisations Consulted

The following is a list of the organisations whose views were sought in this consultation process:

- RTÉ
- TV3
- TG4
- ComReg
- 2rn
- Houses of the Oireachtas
- Irish Film Board
- UTV Ireland
- Setanta Ireland
- Irish TV
- UPC
- Eircom
- Dublin Community Television Society Limited (DCTV)
- Cork Community Television Limited (CCTV)
- Community Television Association

## Consultation Questions

The following is a list of questions on the Draft Code of Practice that the BAI would like your views on.

1. The Draft Code of Practice identifies a range of channels which are either specified as being those of public service broadcasters or which have specific public service obligations. These presently consist of RTÉ One and RTÉ Two; TG4; TV3 and 3e. The principles of the Code acknowledge that "appropriate prominence" permits a measure of discrimination in favour of these PSB channels.
  - **What are your views on the principles regarding appropriate prominence as outlined?**
  - **Are there other channels, or categories of channels, which you believe should be considered for an appropriate level of prominence? Please set out the channel or categories of channels that you consider should be given such designation and the reasons for your proposals?**
2. The Draft Code of Practice lists a series of provisions regarding Fair, Reasonable and Non-Discriminatory Treatment of channels that are carried or may be carried on the Saorview platform.
  - **What are your views on these provisions?**
  - **Are there any other provisions which you consider should be included in this regard? Please set these out in your response?**
3. The Draft Code of Practice proposes that there should be a right of appeal to the BAI and that the Code should be reviewed after two years and at appropriate intervals thereafter.
  - **What are your views on these proposals?**
4. Other views:
  - **Do you have any other views that you wish to be taken into consideration in advance of the finalisation of the Code?**