



## Broadcasting Authority of Ireland

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

**March 2021**

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## Executive Summary

The Broadcasting Authority of Ireland (BAI) would like to thank the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht for the opportunity to respond on the General Scheme of the Online Safety and Media Regulation Bill (the General Scheme). In providing feedback on the General Scheme, the BAI welcomes the opportunity to highlight its own interest in this area, as well as its own work and contributions to date – both at national and European levels – to the ongoing debate on the future regulation of broadcasting, on demand and online platforms.

The Irish media landscape has significantly evolved in recent years with the convergence of television and internet, and the emergence of new types of services and user experiences. The requirement for Ireland to transpose the revised [Audiovisual Media Services Directive](#) (AVMSD, the revised Directive) with the consensus on the urgent need to address the issue of harmful online content makes this process both timely and welcome and presents an opportunity to shape and implement a vision for the future regulation of online media as envisaged by the General Scheme.

In recent years, the BAI has been developing its policy response on the future regulation of online content in Ireland in this evolving technological and legislative environment. This policy, informed by years of audiovisual regulatory experience, is set out in its [2019 submission](#) to the public consultation by the (then) Minister for Communications, Climate Action and Environment, on the implementation of the revised Directive and on the future regulation of harmful content on online platforms.

In summary, the BAI proposed the establishment of a single comprehensive regulatory scheme and single regulator which, at its heart, would seek to serve and protect audiences and users in the new media environment – having regard to the wider objectives and content and services that serve citizens – ensuring Diversity and Plurality, promoting Freedom of Expression, sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity.

The BAI notes that the key pillars of its submission to the 2019 public consultation are broadly consistent with the provisions of the General Scheme. As set out in this document, the BAI strongly supports the aims of the Bill and the proposed role and responsibilities of the Media Commission in the regulation of services which will fall in scope. It welcomes the clear set of objectives, functions, and powers of the Media Commission, in particular the proposed compliance and enforcement powers to be given to the new regulator, and the various provisions which give effect to the revised AVMSD.

There are a number of specific Heads which the BAI believes may benefit from further Committee consideration and these are set out in this document. Most notably, the BAI focuses on the issue of online safety and the associated categories and definitions of harmful online content with a view to ensuring their practical implementation. The BAI also provides its observations on some of the potential practical considerations for the new Media Commission, including the compliance and enforcement framework as set out in the General Scheme.

## **1. Introduction**

Established under the Broadcasting Act 2009, the BAI is the independent regulator for radio and television broadcasters in Ireland. Its functions include the regulation of public, commercial and community radio and television services, the making of broadcasting codes and rules, and the provision of funding for programmes and archiving relating to Irish culture, heritage, and experience. The BAI is funded through a levy on all broadcasters licensed in the State.

The BAI, and its predecessors, have been responsible for the regulation of the broadcasting sector in Ireland for over 30 years. In that time, its regulatory focus and activities have evolved in response to the changing media environment brought about by technological developments, increased competition, advertising challenges and, most notably, the changing patterns of media consumption.

Ireland, like other countries at a European and global level, has witnessed considerable growth in the consumption of online content across a range of networks and connected devices, and this trend is only expected to increase. The substitutability of these services for linear broadcasters means the potential for these services to shape and inform views and opinions has increased.

### *Role of the BAI in the implementation of the Audiovisual Media Services Directive and regulation of Harmful Online Content*

In formulating its written response to the Committee, the BAI reflects its own significant experience in the implementation of Audiovisual legislation, including the regulation of harmful content.

At a national level, the BAI is responsible for the regulation of television services pursuant to the current Audiovisual Media Services Directive. Since 2016, the BAI has also been extensively involved in the preparation of the revised AVMS Directive which seeks to balance the responsibilities of linear television broadcasters with key providers of online videos, mainly on-demand audiovisual media services and video-sharing platforms services, many of which will fall to be regulated here in Ireland, pursuant to the Country of Origin (COO) principle.

The BAI is Ireland's designated body to the European Regulators Group for Audiovisual Media Services ([ERGA](#)) which was established by the EU Commission in 2014 and is a recognised advisory group to the Commission under the revised AVMSD. Most recently, the BAI has been engaging with ERGA in discussions at EU level on the implications for content regulation arising out of the revised Directive and other policy areas including the EU Commission's proposed [Digital Services Act](#), its [Digital Markets Act](#), the [Media Action Plan](#) and the [European Democracy Action Plan](#).

The BAI has also been engaged in the regulation of harmful content for many years in the context of its broadcasting and audiovisual regulatory work. This work has included policy development, compliance and enforcement, and complaints activities. Areas covered include harm and offence (including hate speech), protection of minors, harmful advertising content, and fairness and impartiality in the coverage of news and current affairs. Many of these

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activities were underpinned by the [Audiovisual Media Services Directive 2010](#) which addressed issues such as protection of minors, audiovisual commercial communications accompanying or included in children's programme of foods high in fat, salt and sugar, incitement to hatred based on race, sex, religion or nationality.

All such activities involved the requirement to balance freedom of expression considerations with the rights of audiences to be afforded certain protections, especially minors and vulnerable adults.

### *BAI submission to 2019 public consultation*

The BAI's regulatory experience, as set out above, informed the development of the BAI's comprehensive [submission](#) to the then Department of Communications, Climate Action and Environment's public consultation on the regulation of Harmful Content on Online Platforms and the Implementation of the revised Audiovisual Media Services Directive which forms the basis for this written response.

In its submission, the BAI set out its vision for the future regulation of online media. In summary, the BAI proposed the establishment of a single comprehensive regulatory scheme and single regulator which, at its heart, would seek to serve and protect audiences and users in the new media environment – having regard to the wider objectives and content and services that serve citizens – ensuring Diversity and Plurality, the promotion of Freedom of Expression, sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity.

The submission set out the BAI's rationale for combining the regulation of AV content with the regulation of other forms of harmful content, noting that the fundamental values that have underpinned content regulation in Europe to date (such as freedom of expression and the protection of minors) remain as relevant as ever in the online environment and are equally relevant to the regulation of different forms of Harmful Online Content.

The BAI expressed the view that a regulatory framework for online harms would work best within a wider media regulatory framework, as there is a significant alignment in the objectives of both. It offers the opportunity for a single vision for regulation of the media landscape in Ireland that ensures consistency in the application of regulatory principles, policies, and rules across all areas of content regulation; it offers efficiency for regulated entities in dealing with a single regulator for all forms of content on their platform; and, by offering a coherent and harmonious approach to regulation, it also provides greater clarity for users of the platform.

Finally, the BAI proposed that the new regulator would have responsibility for the development of high-level statutory codes and rules, supported by significant compliance and enforcement powers to give effect to their implementation.

The BAI notes that the key pillars of its submission to the 2019 public consultation are broadly consistent with the provisions of the General Scheme. As set out below, the BAI strongly supports the aims of the Bill and the proposed role and responsibilities of the Media Commission in the regulation of services which will fall in scope.

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Based on the further development of its own position on some of the regulatory issues arising and reflecting feedback from key stakeholders with whom the BAI has been engaged, the BAI identifies issues under a small number of specific Heads which it believes may benefit from further Committee consideration. The BAI's position on these matters is continuing to evolve and it would be very pleased to further engage with the Committee on these or any other elements of its written submission, as appropriate, in this pre-legislative scrutiny phase.

## **2. Head-by-Head Comments**

### **2.1 PART 1 – PRELIMINARY & GENERAL MATTERS (Heads 1-5)**

The BAI supports the proposals set out in **Heads 1-5**. The definitions reflect the requirements of the AVMS Directive and are suitable in the context of the overall and wide-ranging regulatory requirements detailed in the General Scheme.

### **2.2 PART 2 – MEDIA COMMISSION (Heads 6-40)**

The BAI broadly supports the overall provisions set out under this part of the General Scheme. It sets out a clear and appropriate remit for the Commission, a robust compliance framework and best practice measures in terms of the governance and accountability of the Media Commission. We consider that some limited amendments to the provisions should be given consideration by the Committee. These relate to Head 8, Head 9, and Heads 14-18 as well as some comments in respect of Heads 10-13 and 19-44.

#### **2.2.1 Heads 6 and 7:**

The BAI supports these provisions and wishes to make no additional comments.

#### **2.2.2 Head 8 – Independence:**

The BAI welcomes the reference to the fact that the Media Commission will be independent in the performance of its functions. This accords with best practice in a context where the importance of ensuring the independence of national content regulatory authorities is a key concern for the European Commission and is a vital element of national regulation in protecting freedom of expression and in promoting freedom of the media more generally.

The BAI considers that the General Scheme should incorporate the full scope of the provisions of the AVMS Directive. Under Article 30 of the Directive, Member States are required to ensure that their national regulatory authorities: (i) are legally distinct and functionally independent of their respective governments, and (ii) should have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA. We welcome that the General Scheme provides for a Media Commission that is legally distinct and functionally independent and that it will have an appropriate range of enforcement powers to carry out its functions.

Notwithstanding this, Head 23 of the General Scheme provides that the Media Commission, with the consent of the Minister given with the approval of the Minister for Public Expenditure and Reform, appoint such and so many persons to be members of the staff of the Commission as it may from time to time determine.

The regulatory environment in which the Media Commission will operate is highly dynamic and will necessitate the Commission operating in a flexible and responsive

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manner. The Media Commission will have a wide and diverse brief and it will be important that it has the necessary range and number of staff, from the outset, to deliver on the objectives of the legislation. We note that the self-financing funding model proposed for the Commission will ensure that it is able to discharge the financial burdens arising.

### ***2.2.3 Head 9 – Objectives:***

The BAI supports this provision. Reflecting our own objectives under the Broadcasting Act 2009, the BAI considers that plurality in terms of content (ensuring a diverse range of views, perspectives, and opinions) and in terms of ownership (ensuring transparency of ownership and supporting government and regulatory policy objectives in this regard) will be central to the work of the Media Commission. For this reason, we consider that plurality should be referenced specifically as an objective of the Media Commission rather than as a functions (as is the case in the draft General Scheme). The BAI considers the attainment of a healthy, plural media as more than simply a functional process of the Media Commission but rather it will be an essential outcome for the organisation and one which impacts across many of its functional areas.

### ***2.2.4 Heads 10-13:***

Save for the abovementioned comments regarding plurality, the BAI supports these provisions and wishes to make no additional comments.

### ***2.2.5 Heads 14-18 – Investigative Powers of the Commission:***

The BAI supports the extensive powers of investigation proposed for the Media Commission. These are a necessary element in any regulator's suite of compliance and enforcement powers. They will be essential for the Media Commission given the scale and scope of services covered by regulation and the significant harms that may arise from online content. The BAI notes the powers of the authorised officers to seek information from regulated entities and that this information be provided in a 'legible' manner. There is also a requirement for regulated entities to take steps to ensure compliance with this objective.

The BAI supports the incorporation of a single, common set of compliance and enforcement powers in the General Scheme to facilitate the Media Commission's work across all strands of its regulatory functions i.e., broadcasting, on-demand, and video-sharing platforms. In the Authority's view, this offers the most potential for a streamlined compliance framework that provides clarity and certainty to stakeholders and ensures consistent implementation of compliance and enforcement activities across all service types.

The BAI proposes the inclusion of a provision requiring regulated entities to provide all information necessary (in the detail and format specified by the Commission) to the Media Commission to facilitate its regulatory work and the requirement to supply such

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necessary information should not be limited to the functions of authorised officers alone. Rather, it is essential that the Media Commission has adequate powers to seek information, on a confidential basis where necessary and in a manner consistent with Irish law, as may be necessary to fulfil its regulatory obligations.

Separately, the Bill gives the Commission auditing powers as it pertains to the operation by media of their complaints-handling mechanisms (Head 52A). The BAI believes that consideration should be given to widening the auditing powers of the Commission so that it can be applied to other aspects of regulation, for example, the adequacy of the mechanisms in place to protect children from harmful content. This would provide further means by which the Commission can fulfil its statutory and strategic objectives. Naturally, any auditing powers would be subject to appropriate limits and usual governance standards.

### **2.2.6 Heads 19-40:**

The BAI supports these provisions. It recommends that when drafting the specific provisions of the Bill, consideration should be given to the inclusion under Heads 29 and 34 references not just to the functions of the Commission but also to its objectives. Both Heads empower the Commission to cooperate with other bodies.

Separately, in its submission to the Ministerial consultation that informed the General Scheme, the BAI noted the advantages of governance structures for Irish public bodies that consist either of a number of full-time Commissioners or a part-time statutory board (as is the case with the BAI). It further noted that in order to leverage the value provided by a statutory board-led structure, a Commissioner-led governance model may benefit in availing of a structured support mechanism. In that context, therefore, the BAI welcomes and supports the inclusion in the General Scheme of a power for the establishment of advisory committees by the Media Commission (**Head 32**) for the purposes outlined in the Scheme.

## **2.3 PART 3 - TRANSITIONAL PROVISIONS (Heads 41-48)**

### **2.3.1 Heads 41, 42 and 43:**

The BAI welcomes the proposed transition of BAI staff to the Media Commission on the dissolution of the organisation and the certainty provided to staff members in the intervening period.

As set out above, BAI staff have significant experience in both the implementation of the current Directive and in the regulation of harmful content on broadcasting services and would expect that this regulatory experience will prove to be a key support for the Media Commission across all areas of its responsibility.

As set out in its 2019 public consultation response, the BAI sees the value of ensuring as much consistency as possible across the regulation of content on linear, on demand and online platforms, not least at the level of the Media Commission's regulatory and content principles. The definition and treatment of audiovisual media services in the AVMS Directive, naturally lends itself to the application and extension of the current regulatory framework to on demand services which will fall to be regulated by the new Media Commission. Reflecting the 'level playing field' envisaged by the revised Directive, there is likely to be significant overlap and complementarity between the regulatory framework for linear and on-demand services, including the application of content codes and rules, media literacy, the prominence of audiovisual media services of general interest, the promotion of European Works and funding Schemes under Article 13(2) of the revised Directive.

Drawing on its experiences as the Government's nominated body to ERGA and reflecting the focus on Ireland as the country of origin for all the key platforms, the BAI has also been engaged in policy development on the regulation of video-sharing platforms. It is hoped also that this preparatory work will assist the Media Commission in the identification and prioritisation of work activities on its establishment.

In preparation for the establishment of the Media Commission, the BAI will continue its work on the development of policy options for the Media Commission in respect of:

- a) the new linear provisions of the revised Directive,
- b) the on-demand and VSP provisions of the revised Directive, and
- c) the Harmful Online Content-related provisions of the OSMR Bill.

### **2.3.2 Heads 44 – 48:**

The BAI notes these standard administrative measures for the transfer of functions, staff, assets and responsibilities of the BAI to the Media Commission which provide an appropriate level of continuity on the matters in scope.

## **2.4 PART 4 – ONLINE SAFETY (Heads 49a-56)**

### **2.4.1 Head 49 (a)**

#### ***(i) Categories of harmful online content***

The General Scheme sets out the categories of harmful online content as:

- material which it is a criminal offence to disseminate under Irish or Union law,
- material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to which it pertains and which a reasonable person would conclude was the intention of its dissemination,
- material which is likely to encourage or promote eating disorders and which a reasonable person would conclude was the intention of its dissemination, and,
- material which is likely to encourage or promote [self-harm or suicide] or provides instructions on how to do so and which a reasonable person would conclude was:  
(i) the intention of its dissemination and (ii) that the intention of its dissemination was not to form part of philosophical, medical, and political discourse.

The BAI agrees that the harms set out in the General Scheme are clearly among the most serious harms that could affect an individual and accordingly warrant inclusion in the categories of harmful content to be included in the legislation. However, the BAI would like to draw attention to two specific elements of the harmful online content framework which it believes may warrant further Committee consideration: namely the definitions of each of the categories of harmful online content and online safety take-down notices.

#### ***Definitions of each of the categories of harmful online content***

In this paragraph, we address the **definitions** of each of the categories of harmful online content, as set out in Head 49A, as they relate to (a) content that is of an intimidating, threatening, humiliating, or persecuting nature; promotion or encouragement of eating disorders; and (c) promotion or encouragement of self-harm/suicide.

Over the past number of years, throughout the BAI's engagement with stakeholders who are active in, and concerned with, harmful online content, there were repeated messages on the need for clear definitions of categories of online content that can be readily applied in practice. For most stakeholders, the clear and central legislative objective in respect of harmful content is the requirement to prevent a person from being harmed or from being caused further harm. This was also the key objective of the BAI's proposals in its Submission to Government in this regard.<sup>1</sup> It should be noted that swift response and redress is central to alleviating harm and distress caused to users affected by online harm. Undue delay can impact the speed and effectiveness

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<sup>1</sup> See page 55 and following of the BAI [submission](#).

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of any actions taken to comply with the statutory provisions. This is particularly the case for children and vulnerable adults impacted by such content.

The BAI strongly agrees with the view that definitions must be clear (also in the interests of freedom of expression), practical, and capable of being applied **at scale** by online platforms and regulators alike.

In this context, the BAI is concerned about the statutory test contained in the definitions and which it is proposed will be applied for establishing whether content constitutes each of the afore-mentioned categories of Harmful Online Content.

While in principle the Authority has no issue with the application of a “reasonable person test”, we are concerned with the element of the definition requiring that “a reasonable person would conclude was the **intention** of its dissemination”. Not only may this be difficult to apply at scale but may, in some circumstances, be very difficult, if not impossible, to conclude in practice. For example, in cases of cyberbullying of a child by another child (or children). Taking another example, a person may, unintentionally, share misinformation concerning eating/diet/nutrition which may cause or be causing harm to a person, although not intending to do so.

In the BAI’s 2019 submission to Government, the Authority proposed a practical and workable approach to addressing instances (very widespread) of harmful online content, including cyberbullying and other categories mentioned above. The approach proposed, which could broadly be described as a rectification or “no fault” approach (i.e., not intended to create consequences for the person placing harmful content of these kinds), would have the effect of rectifying expeditiously the harm being caused, or which may be caused, to a person, without a requirement for proof or conclusion of intention. The emphasis was on the individual being affected by harmful content – not on the person creating/placing the content or on the online platform hosting the content.

In conclusion, the BAI believes that further, more detailed consideration be given to the principles underpinning the statutory objectives in this regard, and which should be reflected in the definitions of harmful content, to be included in the legislation.

### ***(ii) Other Categories of Harmful Online Content***

The BAI also wishes to bring to the Committee’s attention the following potential additional categories of harmful online content which may warrant further consideration.

#### ***Gender-based Harm (including targeting of women and other misogynistic content)***

As noted above, the BAI has been engaging with harmful online content stakeholders in order to learn more about their key areas of concern and to understand their views on the adequacy of the draft legislative proposals in meeting those concerns. These meetings have been supplemented by desk-based inquiries into current research on harmful online content and policies.

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In addition to those categories of harmful online content set out in the General Scheme, the BAI noted stakeholder concerns around the prevalence of online gender-based harm, including, particularly, the negative targeting of women in the online environment across all platforms, especially the harassment and abuse of women who are in the public sphere (most notably women politicians and women journalists). The abuse and harassment of women who may not be active in public life was also noted, e.g., through the non-consensual/illegal sharing of intimate images and sexual abuse images.

The BAI notes from the Explanatory Note accompanying the General Scheme that the second category of material included under harmful online content is intended to encapsulate the notion of cyberbullying and is based on Article 28b(1)(a) and (b) of the revised Directive, while subparagraph (b) is aligned with characteristic grounds specified in the [Charter of Fundamental Rights of the European Union](#) which includes sex and sexual orientation. While the BAI is satisfied that gender-based and other harms would fall in scope of the second category, it may be appropriate for the Media Commission, in the development of its own Online Safety Codes or guidance material to specify the types of harms which may fall to be regulated under this provision of the General Scheme.

In addition, the BAI welcomes the recent publication of the Harassment, Harmful Communications and Other Related Offences Act 2020 (“Coco’s Law”) which now criminalises the non-consensual distribution of intimate images and broadens the scope of the existing offence of harassment to include the publication or sending of threatening or grossly offensive communications about another person with the intent to cause harm.

### *Media Plurality and Disinformation*

Media Plurality has been a central focus of the BAI’s work in recent years and remains a key strategic theme for the organisation under its [Strategy Statement](#) 2021-2023. Key work activities in this area include the funding and publication of the annual [Reuters Digital News Report](#), the funding and development of an [Irish Media Ownership Database](#) and the commissioning of reports on transparency in political advertising.

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 and misinformation.

From an Irish perspective, this has been evident notably during the recent Covid-19 crisis with the rapid spread of disinformation which resulted in acts of vandalism on 5G masts and the continuing public unrest concerning vaccines, lockdowns, and the wearing of face masks in public areas. The most recent [Reuters Digital News Report](#) highlighted an increasing concern from respondents with what was real and what was fake content on the internet.

The issue of disinformation has been, and continues to be, a very significant concern for European Governments and audiovisual regulators alike. At the European level,

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the BAI chaired an [ERGA sub-group on Media Plurality](#) in 2019-2020 which was charged with assisting the European Commission in assessing the implementation and effectiveness of the self-regulatory [Code of Practice on Disinformation](#) (a Code designed to address the spread of online disinformation and fake news – signatories to the code include online platforms, leading social networks, advertisers and the advertising industry).

Arising from that work, two specific Irish research reports were produced in partnership with the Institute for Future Media and Journalism ([FuJo](#)) at Dublin City University. The first report, [ElectCheck 2019](#), examined how Facebook, Twitter and Google implemented their commitments in relation to transparency of political advertising during the 2019 European Election campaign. This report contributed to a wider interim [ERGA report](#) which addressed the same questions and was published in June 2019. The second report, [CodeCheck](#), was published in April 2020 and looked at how Facebook, Twitter and Google implemented their commitments under the European voluntary Code of Practice on Disinformation. In 2020, the BAI continued to play a lead role in finalising the [ERGA Report on Disinformation](#) which assessed the implementation of the Code of Practice on Disinformation across the European Union.

It is also worth noting that the work undertaken by the BAI and DCU in relation to the assessment of the implementation of the Code was acknowledged in the [Interim Report](#) of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation in 2019 which makes specific reference to the implementation of emerging recommendations.

Through the work of the BAI as set out above, the BAI has built up significant organisational knowledge regarding the regulation of disinformation. With this in mind and acknowledging the significant challenges for regulators in this area, we are of the view that the OSMR Bill should facilitate the Media Commission in continuing this vital aspect of its plurality work by reviewing and tracking developments in Disinformation and by continuing to undertake research (as instructed by the Minister or otherwise) on key areas of concern regarding media plurality.

### ***2.4.2 Head 49 (b) – Provision for further Categories of Harmful Online Content***

The BAI welcomes the inclusion of Head 49 (b) which provides that the Media Commission, with the input of key stakeholders, may propose to include or exclude further categories of material from the definition of harmful online content.

Such a provision will give the Media Commission scope to propose a broadening of the categories, as appropriate, as and when implementation issues arise. It also provides an element of future proofing to the General Scheme which will accommodate changes within the regulatory regime having regard to the nature and prevalence of harmful material available online.

#### ***2.4.3 Head 49 (c) – Definition of age-inappropriate online content***

Noting the specific vulnerabilities of minors, the BAI welcomes the inclusion of this Head. The protection of minors has been a key focus for the BAI throughout its regulatory activities, including its work in developing Codes and Rules, and is a significant focus of the revised AVMS Directive.

The addition of this proposed Head will facilitate the Media Commission in issuing online safety guidance material in relation to content rating, age assurance and age-gating. In this regard, we note the importance of co-operation with other regulatory bodies, such as the Data Protection Commission to ensure consistency and regulatory alignment in respect of the protection of minors.

#### ***2.4.4 Head 50 (a) – Online Safety Codes***

The BAI welcomes the inclusion of this Head. We believe that the most effective way to give effect to legislation for the regulation of online services is through statutory codes and rules. Statutory codes allow regulators to respond flexibly to developments in the industry and to improve regulation over time. The BAI fully supports the views expressed in the Explanatory Memorandum that the Media Commission should have regard to fundamental rights in the creation of online safety codes.

#### ***2.4.5 Head 50 (b) – Compliance Assessments***

The General Scheme sets out specific compliance and enforcement powers for the Media Commission for different kinds of services. In the view of the BAI, a more effective approach may be to establish a single set of compliance and enforcement powers with tailored procedures and/or remedies for different services where necessary (see comments under 2.2.5 - Heads 14-18). Such an approach would support the development of an overarching compliance and enforcement policy and framework by the regulator, provide clarity and certainty for stakeholders, promote operational efficiency within the regulator, and ensure consistency in the implementation of regulation across all service types.

#### ***2.4.6 Head 51 (a) – Online safety guidance materials***

The BAI supports the inclusion of this Head which provides for the Media Commission to issue guidance materials in matters relevant to harmful online content and age-inappropriate online content. The publication of guidance materials reflects current BAI practice where guidance notes are routinely published in order to assist both the public and regulated entities in the interpretation and application of codes and rules. A key advantage of such guidance material is that it allows for a more immediate response to emerging issues without recourse to a formal code revision process.

#### **2.4.7 Head 51 (b) – Advisory Notices**

The BAI is of the view that the power to issue advisory notices would also be of assistance to the Media Commission in undertaking its regulatory activities and so we welcome this Head's inclusion.

We agree that advisory notices will provide the Media Commission with additional regulatory flexibility in dealing with certain distinct or new issues as they may arise.

#### **2.4.8 Head 52 (a) – Auditing Complaints Handling**

Ensuring that the complaints handling systems of online services are appropriately audited will be a key responsibility of the Media Commission. The BAI considers that the Media Commission's auditing powers should be broadened to encompass all relevant matters that fall within the scope of the regulatory regime pursuant to the Media Commission's statutory functions. We are also of the view that the Media Commission should have the discretion to request that a regulated entity undertakes an independent audit as part of its suite of compliance powers.

#### **2.4.9 Head 52 (b) – Systemic Complaints Scheme**

The BAI welcomes the proposed establishment of a systemic complaints scheme. Such a proposal is aligned with BAI's 2019 public consultation response which proposed the introduction of a "designated priority complainants' scheme" requiring regulated entities to dedicate additional resources to dealing with and resolving complaints from certain bodies designated as "priority complainants".

Such an approach reflects the trajectory in thinking at a European level where the focus has shifted to developing solutions for regulating online platforms that can manage the scale of content available online. It has become broadly recognised within ERGA, for example, that regulators will be required to apply their limited resources to target issues with the greatest risk of harm for users, thereby providing the greatest benefit to the public. Through its participation at ERGA, the BAI drafted a Memorandum of Understanding (MOU) which creates a framework for cooperation between EU media regulators. This MOU recognises that this type of co-operation is central to the overall approach to the regulation of online platforms.

#### **2.4.10 Head 52 (c) – Obligation to consider Mediation**

The BAI welcomes the overall intent of this Head and support a non-adversarial approach to dispute resolution between platforms and users. We note, however, that this Head would need to be very carefully drafted so as to not necessitate the Media Commission's involvement in every dispute between a user, or group of users, and a designated online service. The approach taken to encouraging mediation on online services must be reconcilable with the scale of content online, and the need for the regulator to be able to prioritise its limited resources towards addressing the most important issues. The BAI considers that the contents of this head might be condensed

and inserted as one of the objectives or principles of the Media Commission's Online Safety Codes or within the broader Compliance framework of the Media Commission. This would allow it to implement a more tailored, responsive, and proportionate approach to mediation.

#### **2.4.11 Head 53 – Compliance and Warning Notices**

While the BAI welcomes the proposed addition of compliance and warning notices as part of the suite of the Media Commission's compliance and enforcement powers, it is of the view that the General Scheme should provide for a single compliance and enforcement framework which could be tailored to individual service types as deemed appropriate by the regulator (see BAI comments under 2.2.5 - Heads 14-18 above).

##### *Online Safety Take-down Notices*

In its original proposals for the General Scheme of the Online Safety and Media Regulation Bill, the Minister's proposals discussed options for a system of removal of harmful content on online platforms, including the potential for a regulatory notice-and-take-down system. The requirement for an accompanying statutory test was also discussed and proposals for such a test were invited.

In its response to the Minister's consultation, the BAI proposed a three-pronged holistic regulatory approach to harmful online content, broadly encompassing three primary objectives:

- (i) **Rectifying** or avoiding harm to an individual – via removal notices on behalf of Irish users directly affected by that content.
- (ii) **Minimising** online harmful content through the development and enforcement of a regulatory code and accompanying regulatory guidance.
- (iii) **Preventing** harm, through media literacy activities

The BAI notes the decision not to include a scheme for the removal of content, as set out in the 2019 proposals of the Minister.

Through its engagement with a wide range of stakeholders active in the field of harmful online content, it was evident to the BAI that there was a strong expectation that the legislation would make provision for the issuing of content removal notices. A consistent message received by the BAI was that the inclusion of a system facilitating the swift removal of content was vital to the achievement of the overall policy objectives in respect of harmful online content, and the protection of online users, most especially children and vulnerable adults.

As set out earlier in this submission, the BAI wishes to record its deep appreciation of the recent enactment of the *Harassment, Harmful Communications and Other Related Offences Act 2020*. While very much welcoming the Act, the BAI, however, does not believe that the creation of criminal offences alone is likely to fully address the potential

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for harm caused by harmful online content. Rather, the Authority considers that the creation of criminal offences *combined with* a complementary regulatory system for harmful online content offers a more comprehensive approach to addressing the harm impacting Irish citizens in this regard.

The BAI proposes that the principle of including such a system would merit reconsideration. In the Authority's view, there must be the potential for the Media Commission ultimately to order the timely, fair, and proportionate removal of content, subject to any necessary regulatory safeguards that would be desirable to accompany such interventions.

In tandem with this approach, the BAI also believes it would be valuable to explore further other fair and proportionate regulatory means (or a combination of means) by which the same objectives could be achieved e.g., via the ability of online platforms to "suspend" content while it is being reviewed; regulatory rules and/or guidance for platforms on the removal of content, etc.

### ***2.4.12 Head 54 (a) – Sanctions***

As set out above, the BAI welcomes the inclusion of a range of compliance and enforcement powers for the Media Commission but is of the view that these could be part of a single compliance and enforcement framework which provides consistency and certainty for all stakeholders.

### ***2.4.13 Head 54 (b) – Senior Management Liability***

As previously stated, the BAI believes that a wide and appropriate range of compliance and enforcement powers (including sanctions) should be available to support the objectives of the legislation. In that context, legislative provisions in respect of senior management liability are in keeping with the regulatory principles of accountability and transparency on the part of regulated entities. We note that the proposal is broadly aligned with proposed accountability measures in other jurisdictions. We will review further the proposed detailed wording of the legislative provisions when they are published.

### ***2.4.14 Head 55 – Voluntary Arrangements***

The BAI welcomes the proposed power for the Media Commission enabling the Commission to enter into voluntary arrangements with any relevant online service not established in the State and hopes that this may provide additional protections for users. As evidenced by the recently published European Commission's [Digital Services Act proposals](#), such an approach is aligned with a broader European move to broaden the scope of regulation in certain instances to all intermediary services provided in the EU, irrespective of their place of establishment.

**2.4.15 Head 56 – Designation of Relevant Online Services**

The BAI supports the designation powers granted to the Media Commission under Head 56. It emphasises the need for flexibility in determining the kinds of services that should fall within the scope of Online Safety codes and considers that the solution of “designation” proposed is proportionate and effective.

The Media Commission will also need to distinguish which services (or elements of a service) fall to be regulated under the Online Safety elements of the General Scheme (i.e., national application) and those which fall to be regulated under the revised Directive (i.e., Europe-wide application).

In designating services, the Media Commission will need to have adequate powers to compel services to provide relevant information to assist it in making such determinations.

On the above basis, the BAI will carefully consider the detailed proposals of the draft Bill when published.

## **2.5 PART 5 – ON-DEMAND AUDIOVISUAL MEDIA SERVICES (Heads 57-60)**

The BAI supports the provisions in respect of on-demand media service providers set out in **Heads 57-60**. A process for registration of on-demand services (a requirement of the AVMS Directive) is proposed and there is a clear mechanism for enforcing the registration requirements where it is necessary to do so in order to protect citizens from harmful content.

As noted in the explanatory notes under this part of the General Scheme, there are potentially thousands of on-demand services established in the state and a proportionate approach, such as that set out, is appropriate. The BAI notes in this context that a key element of the objectives of the Media Commission will be to provide a regulatory framework to be applied in a proportionate manner having regard to the differing nature of those services (Head 9). The approach underpinning this part of the Bill will assist the Media Commission in meeting that objective.

This section of the General Scheme also details the compliance, enforcement, and sanctions measures for on-demand audiovisual media service providers (Head 59 and 60). The BAI supports the provisions as they will ensure that the Media Commission has the appropriate powers to implement the regulatory framework. We noted earlier in this submission that we would anticipate that the compliance, enforcement, and sanctions measures detailed across the Bill, for broadcasters, on-demand and video-sharing platforms would be streamlined in the final draft of the Bill. As stated above, this will ensure that the legislation has a consistent approach across all media.

## **2.6 Part 6 – MISCELLANEOUS AVMSD PROVISIONS (Heads 61-77)**

### ***2.6.1 Heads 61 and 62 – Complaints and Media Codes***

As noted in the explanatory notes of the General Scheme, it is recognised that the scale of services that might constitute on-demand services is significant. It is the intent of the legislation that the Media Commission will be enabled to take a proportionate approach to the application of its regulation, having regard to this scope. It is our understanding, therefore, that the obligations on a broadcaster or on an on-demand provider of significant scale may be different to those placed e.g., on an on-demand provider who might only operate a very small service accessible via a social network. At the same time, the General Scheme should not be understood as applying lesser regulation simply based on size of the service being provided, since a small service may contain content that would infringe codes and rules and create harms or risk of harms that the regulation is trying to address.

A risk-based approach to regulation is therefore provided for in the General Scheme. In practical terms, this may mean that certain provisions set out under this Part of the Scheme would be applied differently depending on different factors such as the nature of the service, the content provided, the risk to the public interest etc., but in doing so the Media Commission must take an approach that is fair, equitable, proportionate, and consistent.

The BAI supports this overall approach to the regulation of on-demand services, but we are also of the view that this Part of the General Scheme should include a specific legislative provision which clearly enables the Media Commission to apply its regulation differently depending on the nature of media services that fall within the scope of this part of the General Scheme. This will ensure that the focus of the Media Commission's regulation under this Part is firstly on large services as well as those services which have the potential to cause public harm (regardless of their size). It would also assist in avoiding undue and unnecessary regulatory burdens on smaller services and unnecessary administrative burden on the Commission.

### ***2.6.2 Heads 63-66 – European Works and Reporting***

The BAI supports these provisions. They reflect the requirements of the AVMS Directive in respect of quotas for European Works on linear and on-demand services and the obligation on the Media Commission to provide reports to the Minister as required. Prominence of European Works (in particular, Irish content) is of great importance as a mechanism for ensuring audiences have access to culturally relevant and trustworthy content. The obligations in respect of prominence set out here are also welcomed and supported by the BAI.

### ***2.6.3 Head 67 – Duties of Media Service Providers***

The BAI supports these provisions. We reiterate the importance of the Media Commission being specifically empowered to tailor these duties depending on the nature and size of the service provided and it will be important to ensure that the draft

wording of the Bill addresses this concern and avoids unintended consequences whereby smaller on-demand services have disproportionate regulatory obligations.

#### **2.6.4 Head 68 – Retention of Programme Material**

The BAI supports this provision and notes that it is tailored to the manner in which on-demand services operate in practice.

#### **2.6.5 Head 69 – Advertising**

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. For this reason, the BAI supports the inclusion of limits in law. However, in the current media environment, we consider the carry-over of specific limits on advertising on sound broadcasting services to be unnecessary and that greater discretion should be provided to the regulator in this regard.

It will be a matter for the Houses of the Oireachtas to decide how the balance between broadcaster and audience needs can be met. In that context, we highlight several options that might be considered. Specific advertising limits could be set by the Media Commission when developing rules under Head 70 (Media Rules) but which would operate within an overall upper legal limit, such as the 15 per cent proposed in the General Scheme. Any such rules would be subject to the statutory review process of new codes and rules already proposed in the Bill. Another option would be to align maximum hourly advertising limits on sound broadcasting services with those for television (i.e., 12 minutes). At a minimum, the Bill should include a provision whereby sound broadcasters are permitted to average advertising over several hours while staying within a total limit each day.

Separately, the BAI notes that the General Scheme retains the outright prohibition on advertising directed towards a 'political end'. The General Scheme is undergoing pre-legislative scrutiny at the same time as the Electoral Reform Bill. The Bill provides, for the first time, for the regulation of online political advertising. In its submission to the consultation on the transparency of online advertising conducted by the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation, the BAI set out its view that political advertising on television and radio should be permitted if permitted online. We reiterate that view and when the proposals in the Electoral Reform Bill are considered, we recommend that the OSMR Bill should include provisions permitting political advertising during election periods (from the date that an election is formally called until the commencement of the broadcast moratorium) subject to any regulatory rules or guidance.

The Electoral Reform Bill proposes strong measures ensuring the transparency of such advertising and important limits which the BAI consider could be adopted in the case of broadcast advertising. Such an approach would ensure a fair regulatory playing field and would also recognise the fact that broadcasting is a trusted media for Irish audiences where such advertising can be responsibly aired.

#### **2.6.6 Head 70-72- Media Rules, Inspection of draft codes and rules & presentation to Minister**

The BAI supports these provisions. They reflect current practice and will ensure appropriate input from all stakeholders and oversight by the Minister and the Houses of the Oireachtas.

#### **2.6.7 Head 73 - Cooperation with other parties**

This provision empowers the Media Commission to cooperate with other parties in the development and operation of self-regulatory systems. The BAI welcomes and supports this provision. The provision complements Heads 29 and 34 which facilitate cooperation by the Media Commission with other national and extra-national bodies (such as ERGA). Some of these cooperation measures will likely include co-regulatory mechanisms. For this reason, the BAI recommends that Head 73 be amended to permit the Media Commission to cooperate in the development, operation, and oversight of co-regulatory mechanisms/systems, in addition to the development, operation and oversight of self-regulatory mechanisms/systems provided for in the draft General Scheme under this Head and in pursuit of the objectives of the statute.

#### **2.6.8 Head 74 - Code of Practice for Complaints Handling**

The BAI supports these provisions. As noted above, it will be important for the Media Commission to be able to tailor the code of practice for different providers having regard to the size and nature of their operations, the risk(s) presented, and having regard to the number of services potentially coming in scope of the regulatory structure.

#### **2.6.9 Head 75 - Right of Reply**

This provision reflects the current sections of the Broadcasting Act 2009, updated to incorporate the proposed structure of the Media Commission. The BAI notes that the Right of Reply Scheme currently in place has never been used. Notwithstanding this, the BAI considers it appropriate to retain this provision as it gives effect to the requirement for a right of reply as set out in the AVMS Directive and because it is an avenue of redress for members of the public who believe that their honour or reputation has been impugned.

#### **2.6.10 Head 76 – Content Levy**

The BAI considers it appropriate to provide in the legislation for a content levy in the context of the provisions of Article 13 (2) of the AVMS Directive on foot of an assessment of viability by the Media Commission. The BAI notes that a significant amount of work will be required in the design and development of such a scheme.

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**2.6.11 Head 77 – Content Levy Scheme**

The BAI supports the provisions set out herein and considers that it will be vital to ensure the continuity of the BAI's Broadcasting Funding Scheme. Given emerging issues in respect of disinformation and the increasing importance of, and funding for, credible news and current affairs content, the BAI believes consideration should be given to permitting funding for this kind of programme content under one or more schemes provided for in the proposed legislation.

### **3. Conclusion**

The BAI welcomes and supports the aims of the General Scheme in providing for the future regulation of traditional and online services in this new converged media environment. The establishment of the Media Commission as the single regulator under the comprehensive framework allows for a consistent approach to the regulation of services in scope which should serve and protect audiences while also promoting and upholding fundamental European values such as freedom of expression, cultural diversity, and human dignity.

The BAI has identified specific issues under a number of Heads which it believes may warrant further Committee consideration and these are set out in this document. We would be very pleased to elaborate on any or all these matters if it may be of assistance.

The BAI would again like to thank the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht for the opportunity to respond on the General Scheme and would be happy to further clarify or discuss any elements of this written submission.