



**Submission to the Joint Oireachtas
Committee on the Online Safety and Media
Regulation Bill**

8 March 2021

1. Executive Summary

1.1. Media Regulation

The aspirations of the Revised Audio Visual Media Services Directive (AVMSD) include bringing greater parity and user protection to online media services as to linear broadcasting. This is an ambitious goal; as media consumption becomes more converged, and the lines of distinction become ever more porous, this is an important piece of legislation with wide ranging impacts. RTÉ greatly welcomes the detailed considerations that are ongoing as to the transposition of this Directive, and the beginning of the process to appointment a Media Commissioner.

However, in attempting to bring national media legislation and regulation in line with the realities of the modern age, RTÉ would suggest that proper consideration is also given to updating Ireland's broadcasting legislation. Work first began on the Broadcasting Act 2009, as far back as 2003. Current legislation predates the existence of many digital devices, including the smartphone and tablet. There is therefore a risk that while one element of media legislation is updated, other elements are left to become ever more meaningless and out of touch. We would therefore urge that attempts are made to look at media legislation and regulation cohesively, and that the Broadcasting Act 2009 is updated accordingly.

As a secondary point we note within the draft legislation the intention that the regulatory costs of the Media Commission, are to be achieved by a levy to be imposed on the range of digital services and broadcast services to be included within its remit. The scope of work envisaged for the Media Commission is indeed extensive; the challenges of regulating such a range of online services should not be underestimated. It is clear that significant resources, both financial and in terms of personnel, will be required, all of which comes at a cost. Given that in the interim period before the legislation to enact these levies is in place, the costs of establishing the Commission are to be financed from the Exchequer, we would ask that this legislation is treated with due urgency. Given the scope of work and responsibilities of the incoming Media Commission, it is also essential that it is given commensurate levels of agility to act, and powers of enforcement (see Section 3.2 and 3.3).

Apart from the issue of direct costs, there are also other opportunity costs which potentially impact on the position of national broadcasters, such as the regulation of Prominence (see Section 6.2) and the potential introduction of a content levy, which could provide much needed stimulus within the creative sector at a time of great need (see Section 6.4).

1.2. Online Harm

The real time consequences of online behaviour have never been more apparent. From the increasing evidence of misuse of online data in electoral process, to online bullying and hate speech which is causing professional and personal harm (see Section 4), to the rise of misinformation which impacts on critical issues such as medical information and climate understanding.

Online harm is no longer an abstract issue and it is a material risk to the wellbeing of citizens, societies and nations. Whilst the ambition to create greater surveillance and enforcement around online harm by the Media Commission is to be welcomed, RTÉ would also urge that due attention is given to the risk of misinformation and integrity of reporting.

Ireland has been largely well served by legislation and regulatory standards which support high standards of reporting that is both impartial, fair and accurate. Indeed many would argue that our defamation legislation can tend to inhibit some reporting. As Ireland's legislation and regulatory structure looks to achieve greater parity between online and linear services (such as print and broadcasting), we would suggest that some of the standards that have sustained our media services to date, should also be reflected in online regulation. For the most part these standards have been upheld in part from the fact that Ireland's broadcasters and publishers have accepted that they must take responsibility for what they place within the public domain. As a provider of an on demand service, RTÉ already on a voluntary basis, broadly complies with the standards and requirements applicable to linear broadcasting in its on demand offering. There is no such equivalent acceptance of responsibility by many online entities (such as Facebook and Twitter) and yet the impacts of these platforms can create at least equivalent impacts. RTÉ would therefore suggest that there should be greater alignment of editorial standards in online services, with linear services (Section 3.4).

Harmful and often misleading commercial (paid for) communications have also been a key feature of the internet for many years and given that online video ads are now sharing the same screens as broadcast ads, the current regulatory deficiency stands to undermine the objectives of existing codes and restrictions in broadcast and print media advertising codes and standards.

Our understanding of the world, and of each other, is shaped by the information we engage with, and what we are exposed to. When public confidence in information providers becomes significantly eroded, the consequences can be serious. At the far end of this spectrum, it can give rise to forms of extremism and the breakdown of social order. RTÉ would therefore stress the importance of a comprehensive assessment of the full range of potential online harm, and that the regulator needs to take a risk-based and proportionate approach across a broad range of business types.

1.3. Key Opportunities provided by the Directive

Beyond objectives of creating greater safety within the online world, the AVMS Directive also aims to create a level playing pitch in terms of investment by online services in cultural content, the protection of the value chain, and transparencies in consumer choice. The sheer scale, reach and power of some of these platforms has had other impacts which warrant attention at this time.

Globalisation has undoubtedly increased consumer choice across many products and services which is a very positive outcome. But it has also increased the vulnerability of national services, goods and economies. In the context of media services, this translates to the available level of choice of culturally resonant work (articulated further in Section 6.1), and in due levels of prominence (Section 6.2).

Prominence is the means through which Irish services such as RTÉ and TG4 are readily perceived as being available, and in part that perception is formed by their visibility and discoverability. Existing legislation in the broadcasting sphere acknowledges this risk in terms of placing within formal arrangements for Electronic Programme Guides (EPGs). As media interfaces (such as smart TV screen displays) are increasingly accommodating a converged media world, there is a real risk that the prominence, or discoverability of these services becomes diminished. Without appropriate regulatory supports, smaller media services such as indigenous public service media services will never match the bargaining power that global players have, to secure prominence. Therefore, in recognition of this disparity, prominence for domestic content and services should be reflected in amended legislation (for more on this issue see Section 6.2).

RTÉ would also note that the Directive tries to address some of the risk associated with the dilution of the value chain for content creators. Due enforcement and enhancement of copyright legislation is one element of that, but so too is the provision within Article 13 which creates the potential for national legislators to impose obligations on media service providers who are earning significant revenues from the Irish market, to make a more fair contribution to the Irish creative sector, who otherwise risk being greatly diminished. RTÉ notes that the Media Commission will have the regulatory authority to ensure compliance by ODPS (coming within its jurisdiction) with the obligation to ensure that 30% of their content is European in origin and given due prominence. This needs to be monitored effectively to ensure that this guidance is meaningful in terms of consumer choice. Consumer access to specifically Irish stories, could be enhanced by the creation of a National Content Creation Fund, which could be funded by levy options accommodated within Article 13. This is outlined in more detail in Section 6.

2. RTÉ Comments on General Scheme for Online Safety and Media Regulation (OSMR) Bill

RTÉ has provided comments below on the General Scheme for the OSMR Bill. For ease of reference, our comments are referenced in the context of the different parts of the Scheme.

2.1. General Comments on Media Regulation

By way of introductory comment, and as noted previously by RTÉ, there are many provisions of the existing Broadcasting Act, 2009 which seem set to be simply transposed into the OSMR Bill (and eventually the OSMR Act when enacted) without the opportunity being taken to conduct a more fundamental review of broadcasting. Broadcasting laws have not been significantly updated since 2009. This was before analogue switch off, with the focus on linear broadcasting and DTT as a predominant distribution platform. Given the changes in distribution and technology that have occurred over the past ten years, a swathe of provisions which are now redundant look set to be imported into the eventual OSMR Act. In this regard, for example, the provisions on licensing of DTT commercial television and DTT sound broadcasting services will be transposed into the OSMR Bill as part of the Media Commission's responsibilities despite the fact that there has been no commercial DTT in ten years.

Television has witnessed an acceleration of structural changes across the industry. If the intent of the eventual OSMR Act is to level the regulatory playing pitch as between broadcasters and on-demand and subscription media service providers then, Ireland as a Member State should as a matter of urgency ensure that broadcasting laws are overhauled, so that the quickening shift to online habits does not leave public service media content unfindable. For everything that Ireland gains in terms of regulation of a digital environment, it stands to lose in terms of the indigenous Irish content that public service media and Irish licensed broadcasters invest in, if there are no revised prominence obligations in respect of new platform interfaces. The OSMR Act looks set to simply replicate already outdated provisions. This point is expanded further below at Part 6 along with RTÉ's suggestions for legislative change and related regulatory reform.

2.2. Addressing the 'Value Gap'.

In similar vein, opportunities which are presented by the AVMS Directive which might seek to ensure that those media service providers earning significant revenues from Irish subscribers and viewers have an attendant obligation to also invest in the Irish creative sector need to be grasped.

Ireland also needs to ensure that opportunities such as those provided by EU Directive 2019/790 on copyright and related rights in the digital single market (DSM Copyright Directive) due for implementation by Ireland by June of this year are transposed to ensure that the “value gap” as between content aggregators and publishers for example is addressed.

3. The Media Commission – Core Functions (Part Two)

3.1. Regulatory standards

The AVMS Directive is clear and unambiguous in its requirement that Member States put in place an independent and adequately resourced regulatory authority to ensure compliance with the AVMS Directive and RTÉ strongly supports this position. The General Scheme makes some considerable inroads into achieving an overarching independent regulatory framework.

RTÉ notes that one of the key objectives at Head 9 of the Media Commission is to *“provide a regulatory framework that takes account of the rapidly changing technological environment and that provides for rules to be applied in a proportionate, consistent and fair manner across all services regulated... “*. This is an ambitious and worthy objective.

To that end, and given the pace with which technology is developing, it is imperative that the Media Commission is enabled to work fully and liaise closely with relevant interest groups including those from industry as well as building on the work of the Internet Safety Committee in the Department of Justice and Equality, as well as the office of Ombudsman for Children, and other relevant Government Departments particularly in drafting and reviewing acceptable national standards for digital safety in Ireland.

Effective cooperation will reduce the risk of enforcement gaps, and possible inconsistencies between the measures undertaken by regulatory agencies. Given the proposed remit of the Media Commission, there will be some regulatory overlap and RTÉ would comment that given this, there needs to be consistency in terms of standards.

3.2. Supporting national media literacy objectives

The Media Commission should also play a key role in a media literacy strategy and improved education and guidance in relation to online and digital communications within schools in liaison with the Department of Education and Skills. We note that sub section (xiii) of Head 9 mandates the Media Commission with the promotion of media literacy and to promote educational activities and initiatives with regard to online safety. This is an

imperative given that research by CyberSafeKids¹ shows ‘82% of 8-12 year olds are now signed up to social media and messaging accounts and 92% own a smart device. Worryingly, 28% of children can go online ‘whenever I want’ and 15% say there are “no rules”.

3.3. Future-proofing regulation

RTÉ notes that Head 10 which deals with Functions of the Media Commission includes a provision for co-operation with authorities which have responsibility for enforcement of laws relation to harmful online content and the protection of children. In addition it is noted that Head 10(2)(a)(i) also provides that the Minister can equip the Commission with “additional functions” relating to the implementation of any directive or regulation of the EU concerning online safety , digital services and the protection of minors.

RTÉ suggests that these provisions will need to be utilised to ensure that the regulatory model in Ireland remains up to date given that the boundaries between broadcasting and the online world need to be fundamentally redrawn. In the context of a rapidly changing environment, the Media Commission needs to be equipped to react quickly to changes in the online and technological environment.

3.4. The need for greater alignment of broadcast standards and online standards

The regime for the regulation of broadcasting is designed to ensure maximum audience protection (whilst safeguarding freedom of expression). In traditional linear broadcasting there is a comprehensive regulation of standards. Compliance with broadcast standards is given a statutory basis in the Broadcasting Act, 2009 whereby a broadcaster is obliged to comply or be found in breach of the relevant statutory code following a detailed and transparent complaints procedure which is clearly set out and accessible to members of the public. These codes ensure that the public can maintain trust in their content.

RTÉ welcomes the provisions of Head 11 dealing with the Core Powers of the Commission which includes the power to “devise, implement, monitor and review codes” as well as the power to require compliance updates from relevant designated online services. RTÉ notes that the powers also include “the power to issue notices and warnings”. As submitted above, given the pace of changes in technology, it is important that codes are revised and reviewed on a regular basis to ensure that they are fit for purpose and responsive to changes in technology. In that context, in order for any system of oversight to be effective, it must not only be given a statutory basis, it also needs to provide for efficient and swift/immediate take down procedures by reference to national digital safety standards.

¹ <https://www.cybersafekids.ie/wp-content/uploads/2021/02/CyberSafeKids-Press-Release-SID-8.2.21.pdf>

3.5. Online Harm and Disinformation

RTÉ notes that the functions of the Media Commission also includes at xv(iii)(head 10) the provision of a regulatory environment that will sustain independent and impartial journalism. RTÉ address this point further below in the context of online harm. RTÉ wishes to highlight here that, in this regard, Ofcom in its paper entitled “Addressing Harmful Content Online (A perspective from Broadcasting and On-Demand Standards Regulation)”² correctly identifies that amongst the priorities for online standards setting, standards in news is a particularly complex area and one where there is a growing public concern about misleading content, including disinformation and “fake news” which has consequences for public trust and democratic processes and is therefore “harmful” in this way. Accuracy in news is an extremely important area of protection regardless of how content is delivered. There are areas where accuracy is critical online, for example where inaccuracy is deliberately designed to mislead large numbers of user and sometimes to influence key events such as elections or referendums. This is an area which RTÉ believes needs to be specifically addressed in the context of regulating harmful content. Misinformation has the potential to harm. The world has witnessed an obvious example of this recently in the context of US political developments in January.

3.6. Adequate Powers of Enforcement

RTÉ notes that the core powers of the Media Commission are enumerated at Head 11 of the General Scheme. Given that the Media Commission is to have competence across a number of regulatory areas, the Scheme provides that it is to be provided with robust enforcement powers comparable to those of the Data Protection Commission and to ComReg. Even though the Media Commission will not be a market-facing regulator, RTÉ is of the view that these enforcement powers are necessary, given the range of services which will come within its regulatory remit.

RTÉ further notes the extended powers provided to the Media Commission in relation to the conduct of investigations. It appears that these powers have been extended to almost parallel those available to (market-facing) regulatory agencies such as ComReg and the CCPC in the context of compelling individuals to produce documents and to give evidence. The investigatory powers available to the Media Commission will need to be fairly and proportionately applied across a range of media service providers, video sharing platforms, and proposed designated online platforms.

RTÉ would point out that from a regulatory perspective, it has long since been regulated in terms of investigatory measures that can be taken by the BAI as set out in Section 50 of the Broadcasting Act, 2009. A regulatory investigation took place in 2012 and the

² https://www.ofcom.org.uk/_data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf

powers available to the BAI were found to be entirely adequate to deal with this. In that regard, there is no requirement for the regulatory powers to be extended in the context of investigations into broadcasters such as RTÉ and broadcast contractors, both of whom have an existing range of statutory and licensing obligations. RTÉ would make the same comment in relation to the proposed (extended) financial sanctions.

Other potential enforcement options for consideration

By way of general comment, as we are all aware, regulatory powers do not exist in a vacuum and are linked to other non-core powers. There are other and arguably more immediate powers which in the context of the Commission's regulation of designated online services should be considered, such as a power of the Media Commission to obtain a court order to block access, as well as the power to issue detailed take down notices. Content is disseminated at an uncontrollable pace within the online/social media environment, and time will frequently be of the essence in terms of its removal. The Media Commission needs to have immediate sanctions available to it in this regard which will secure speedy redress.

This is all the more so as under the current liability regime which is derived from the EU's e Commerce Directive, platforms are protected from legal liability for any illegal content that they host (rather than create) until they have actual knowledge of it or are aware of facts or circumstances from which it would have been apparent that it was unlawful, and have failed to act "expeditiously" to remove or disable access to it. That is to say that they are not liable for a piece of user generated content until they have received a notification of its existence. The EU Commission has already acknowledged in its Communication on Online Platforms and the Digital Single Market that further guidance and greater clarity is required in relation to these liability provisions if online services are to take more responsibility in terms of effective take down procedures etc. RTÉ submits that there has already been a significant review of this approach in the context of the DSM Copyright Directive 2019/790 EC which has now been accepted by the EU Parliament and which in certain instances places a more active monitoring responsibility on qualifying host providers with regard to liability for copyright infringement. There is no reason why the liability regime cannot be reviewed and extended in similar vein in relation to harmful online content.

Transitional Provisions (Part 3).

RTÉ notes that the successful transitioning of BAI staff and augmentation of resources will be time-critical to its establishment. In terms of the proposed transitioning, it is RTÉ's understanding that the Media Commission will be regarded as a public service body. The key requirement of regulatory independence as provided for in the AVMS Directive would deem it necessary for the Commission to be regarded as such. That being so, then public service restrictions should not impede retaining the correct resources to staff the Media Commission.

3.7. Urgency of establishing the Media Commission

The provisions in this part appear to reflect standard provisions for the orderly transfer of functions as between state bodies. Ireland is already late in its implementation of the AVMS Directive. RTÉ can only emphasize that urgency is needed in terms of the establishment of the Commission and the commencement of its work.

Given also that the funding of the Commission will be reliant on the imposition of a levy on designated services, any delay can only result in the cost being borne by the public purse and "lost" levies. RTÉ and other broadcasters such as TG4 and Virgin already contribute to this levy, and there can be no expectation that they would make up any shortfall.

4 Online Safety/ Protection from Harm and Defining Harmful Online Content (Part 4)

One of the functions of regulation is to respond to the need to protect people from harm. Given the level of public concern regarding online harms, not just in Ireland but worldwide, the new regulatory framework needs to improve safety online. The internet has revolutionised how people communicate and access news, entertainment and other media creating an increasingly converged communications market. As we have pointed out before, over five years have passed since the Internet Content Governance Advisory Group (“ICGAG”) was put in place. The ICGAG was asked to consider the emerging issues arising from pervasive access to online content, its impact on society as a whole and in particular to take account of issues of online safety arising from children and young people’s use of the internet. It was tasked with considering whether the existing national regulatory and legislative frameworks around electronic communications, internet governance and the sharing and accessing of content online remain relevant. It made a number of significant recommendations. Of note, their report identified a fragmented range of regulators from the BAI, the Internet Safety Advisory Committee (ISAC), various Government Departments, Office of the Data Protection Commissioner, ComReg, the ODAS Group. Their report identified what was lacking which was an overarching strategic and policy framework to inform and co-ordinate a response to governance arrangements concerning online content over seen by an independent regulator. The proposed structure in the General Scheme and OSMR Bill goes some way towards addressing that deficiency.

In the context of protection against harmful content, RTÉ supports a broad definition of harmful content. At a minimum the categories of content outlined should be included within any definition of “harmful content”. By way of general comment, there are clear priorities for online standards setting in the context of legislation/regulation.

1. The protection of minors is a serious concern in relation to content. Access by children to the content referred to above and specifically provided for in the AVMS Directive in terms of setting minimum standards across Member States of the EU is a clear priority for a regulator.
2. People want to be protected from illegal content, in that people should be able to expect that they are protected from hate speech and other illegal material as they are through content and standards regulation such as exists for traditional broadcast services licensed in Ireland and throughout the EU.

RTÉ notes that it is not proposed to define harmful online content as a singular concept, rather the approach of the General Scheme is to enumerate definitions of categories of material considered to be harmful online content. RTÉ notes the four listed categories

which include violent content, content that promotes incitement to crime/terrorism. RTÉ has previously submitted that categories of harmful content should also include misinformation and “fake news”.

In RTÉ’s view, the Bill should include forceful provisions relating to 'hate speech'. In this regard, the Garda Commissioner’s working definition of 'hate crime' is notable³. It is important that citizens feel there are relevant safeguards in place – provided for by a supportive media regulatory regime - for all of the people of Ireland, and in this context, particularly those from minority groups. This will help to ensure any harmful and prejudicial language is not allowed or legitimised through use in media. This is an area that could be legislated for and elaborated on via the Media Commission’s codes.

4.1 Information integrity in an era of misinformation

At law, impartiality requirements do not apply to online news. The regulatory framework for impartiality was created specifically for broadcast content. Whilst the broadcasting rules would be technically impossible to transpose to an online environment, regulation in this area needs to be mindful that people should be able to know who has created the content they see, and what choices online platforms make in how they prioritise, present or exclude different content, particularly where content is sensitive or influential.

4.2 Due protection for democracy

In this regard, we would highlight a recent law in France passed in November, 2018 which allows judges to order the immediate removal of online articles that they decide should constitute disinformation during election campaigns. The law states that users must be provided with “information that is fair clear and transparent” on how their personal data is being used, and sites have to disclose money that they have been given to promote information. RTÉ submits that the approach to “harmful” content must also take on board threats to the integrity of elections and referenda which are vital aspects of a democratic society.

At present we have a regulatory system where a linear broadcasting is regulated in the context of election coverage however online is subject to no regulation in this area. A Report in the UK by DCMS in February 2019 entitled “Disinformation and Fake News”⁴ includes a reference to a detailed report completed by the ICO in the UK last year into use of the data analytics in political campaigns. The Report points to the fact that “non-broadcast political advertising remains unregulated and the ability of social media companies to target content to individuals is a new phenomenon which creates issues in relation regulation of elections”. Most people do not realise that their social networks affect what news they see or that much of the content that they see draws on data about their online history.

³ <https://www.garda.ie/en/Crime/Hate-crime/>

⁴ <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>

4.3 Online harm and advertising

In this context, it is instructive to examine the concept of “harm” in the context of linear broadcasting. There are for example both clearly defined and prohibited commercial communications for broadcasters that were deemed to be harmful. Underpinned by primary legislation (Section 42 of the Broadcasting Act 2009) the BAI’s ‘*General Commercial Communications Code*’ sets out very clear objectives:

- To ensure that the public can be confident that commercial communications are legal, honest, truthful, decent and protect the interests of the audience.
- To ensure that commercial communications do not impinge on the editorial integrity of broadcasts.
- To provide guidance to the general public on the standards they can expect from commercial communications on broadcasting services.
- To provide clear guidance to broadcasters as to the standards to which commercial communications shall adhere.
- To provide broadcasters with a simple, flexible and comprehensive code that does not impede in an unwarranted manner their right to communicate commercial messages.

These objectives are relevant and appropriate in the context of the regulation of harmful online content. Harmful and often misleading commercial (paid for) communications has been a key feature of the internet for many years and given that online video ads are now sharing the same screens as broadcast ads, the current regulatory deficiency stands to undermine the objectives of the current *General Commercial Communications Code* for broadcasting.

We would point out that of particular concern is the dramatic rise in the use of paid for video advertising and content, distributed largely through social media and video sharing applications, directed towards political ends. Ireland (and the UK) currently has a very clear regulation relating to prohibited commercial communications for broadcasters, which includes advertising directed towards a political end. The BAI code states that: ‘*Commercial communications that are directed towards a political end or that have any relation to an industrial dispute are prohibited.*’ This is underpinned by Section 41(3) of the Broadcasting Act, 2009 which is a statutory prohibition on broadcasting of advertisements with a political end.

In the UK, the DCMS Committee in its workings on internet regulation has proposed that the standards objectives in broadcasting regulation could be used by the UK Government as “a basis for setting standards for online content”. Whilst it would have been overly simplistic to simply transport the linear broadcast regulatory system to online, RTÉ submits that the regulatory system for online needs and protection from harmful content needs to consider as a matter of urgency, the inclusion of misinformation and fake news, with a view to ensuring responsible standards in the interests of users.

4.4 Online extremism

RTÉ further submits that the threat of “online extremism” needs to be kept under review in terms of the addition of a specific category. RTÉ notes that in drafting the proposed OMSR legislation regard was had to the UK’s Online Harms White Paper. RTÉ agrees that enumeration is overall a better approach rather than specific definitions. RTÉ wishes to highlight that as recently as February 2021 there have reported failures in UK law to deal with threats of online extremism and they are now proposing amendments. This is indicative of the need for the Media Commission to be able to regularly review how and what categories of harm are to be regulated.

4.5 Copyright abuse and protection of the value chain

RTÉ also submits that it might also be appropriate to include a category of content which infringes copyright law, given the fact that there is a marked disequilibrium between value deriving to creators of content work and online services which include it in their services. This is something that the proposed DSM Copyright Directive intends to address. RTÉ notes that the Commission has the power to include additional categories in the future, and RTÉ submits that this should be kept under regular review and/or consultation.

The Online Safety Codes (Part 4)

RTÉ is of the view that it is appropriate and necessary to have Codes in place in respect of harmful content which must be applicable to designated online services and which include video sharing platforms (VSPs). The same range of regulatory powers ought to extend to VSPS to ensure a consistent systemic regulatory oversight.

Designation of Relevant Online Services (Part 4)

RTÉ understands that on foot of the Scheme, the Department is envisaging extending the scope of regulation to social media/online platforms such as Facebook, Instagram, Snapchat, and Whatsapp for example. As a general point, RTÉ submits that whilst taking in a broad range of services, the regulator needs to take a risk-based and proportionate approach across a broad range of business types. That is to say, the regulator’s initial focus should be on those service providers which pose the biggest and clearest risk of harm to users as a result of the scale of the platform.

4.6 Video Sharing Platforms

RTÉ notes the definition of “video sharing service” in the AVMS Directive which refers to services where an “essential functionality” of the service or “principal purpose” of the service is devoted to providing programmes, user generated videos or both ...for which the [VSP] provider does not have editorial responsibility..” RTÉ notes that the definition furthermore requires that the “organisation of [content] is determined by the [VSP] provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.” The Recitals to the Directive provide some indication on their interpretation and Recital 5 in particular. This provides that the Commission should where necessary issue guidelines after consultation with the Contact Committee on the practical application of the essential functionality criterion of the definition of a “video-sharing platform”.

Recital 6 further provides that where a “*dissociable*” element of a service constitutes a VSP, only that section should be covered by the Directive. Video clips embedded in the editorial content of electronic newspapers and magazines would not be covered. RTÉ does not take issue with this in that the inclusion of a video clip or audiovisual material may be ancillary or secondary to the overall function of the service. Without prejudice to guidelines that may be issued by the Commission, RTÉ submits that the definition of VSPs should be interpreted in a manner which in addition to the obvious examples of Facebook and YouTube also includes social media platforms such as Twitter, Instagram, Whatsapp etc., and particularly platforms which are used by younger people. RTÉ acknowledges and agrees that there is little clear guidance provided in the Directive. On the face of it, it may be necessary for the Commission to assess VSPs on a case by case basis given that technology is expanding the concept of “sharing” with ability to review or revise the list of regulated VSPs in Ireland.

The provisions of Article 4 of the Directive permits Member States to require media service providers (under their jurisdiction) to comply with more detailed or stricter rules in the fields coordinated by the Directive. This provides an opportunity for Ireland as a Member State to ensure that national safety standards regarding online content are consistently applied.

4.7 Transparency and accountability obligations

Article 28b(5) of the AVMS Directive places an obligation on each Member State to establish the necessary mechanisms to assess the appropriateness of the specific measures outlined in the Directive. RTÉ notes that the Scheme proposes that those VSPs which come under the jurisdiction of the regulator in Ireland will also need to comply with the same regulatory principles such as obligations to remove content, and compliance with take down procedures.

RTÉ submits that VSPs which are the subject of regulation must ensure that its users are given transparent and accurate information concerning its service. In similar vein their terms of use should be made available to the regulator for approval and/or for confirmation of compliance. Similarly other measures which VSPs are obliged to put in place such as the provision of age verification and parental control systems to users should be made available to the regulator for prior approval.

Thereafter, RTÉ submits that the Media Commission should be in a position to seek regular compliance reports from VSPs, proof of age verification measures in place and other proactive technological tools to enable identification, flagging or blocking, removal of illegal and harmful content and behavior, as well as sight of user terms and conditions for approval. In addition annual reports on compliance, timelines for responding to complaints should be made available to the regulator. The Media Commission should have the power to publish those reports to ensure transparency and accountability and so users can make informed decisions about online use.

4.8 Defining online relevant services

It is proposed that the Media Commission will have the power to designate online services in terms of their regulation and compliance with safety codes etc. As a general point RTÉ would comment that the approach to same should, to the extent possible, be technologically neutral and agnostic as to the business model.

Part 5 – On Demand Audiovisual Media Services

RTÉ is aware that its on-demand service will be regulated by the Commission and as RTÉ understands it, a non-contractual registration system is intended. As a provider of an on demand service, RTÉ already broadly complies with the standards and requirements applicable to linear broadcasting in its on demand offering on a voluntary basis.

Part 6

6.1 Heads 63,64,65 and the Definition of European Works

RTÉ notes that the Media Commission will have the regulatory authority to ensure compliance by ODPS (coming within its jurisdiction) with the obligation to ensure that 30% of their content is European in origin and given due prominence. As RTÉ understands it the 30% quota is intended to foster European diversity. RTÉ would favour an interpretation of transmission hours to place a necessary emphasis on the volume of content, and that would also have regards to the quality of cultural and relevant European Works. This is to avoid a potential risk around increasing titles, regardless of quality or duration, purely to meet this quota. RTÉ sets out its views in relation to the potential for a levy under A.9 and would advocate that a mechanism to enable investment in the creation of European Works is necessary to ensure that the 30% quota remains meaningful in this context.

6.2 RTÉ's position on prominence

RTÉ notes that the issue of prominence arises in the context of on-demand services. However this issue is one which merits close consideration in the context of any regulatory reform. The AVMS Directive also recognises the need for due prominence of local content on audio visual services and on-demand platforms. It provides that Member States may impose prominence requirements.

National cultural expression and audience choice will ultimately be best supported if there is a sufficiently strong and vibrant national media sector. A healthy, diverse and pluralist media sector requires national policy objectives and activities to foster and support enhanced sectoral sustainability and to ensure prominence of culturally relevant content. The value of such content is however only fully realised when audiences are enabled to access it, and select it.

Without appropriate prominence requirements, PSM content can become difficult to find, or can be several clicks away, and this reduces the chances of being watched. This puts public value-for-money of Irish PSM at risk and runs contrary to the principle that PSM content should be universally available and accessible to all. Ireland's PSMs face increasing challenges in securing prominence for their content and services. This content will be of little value if audiences cannot find it.

RTÉ's own research demonstrates that Irish audiences expect public service content and channels to be easily findable and discoverable, and furthermore believe this is important that they are. The transposition of the revised AVMS Directive can ensure prominence for public service media providers, and presents the opportunity to modernise the legal and

regulatory framework to give efficacy to culturally relevant content: that it is not only produced, but available, findable and discoverable. RTÉ would urge that nationally a more pro-active role is taken in this area, now and over this transposition period.

The Broadcasting Act 2009 provides for PSM prominence on linear EPGs (and only on those limited platforms regulated in Ireland). The prominence regulatory regime needs to be urgently reviewed and extended to non-linear/on-demand platforms to ensure prominence of PSM content on all major viewing platforms. RTÉ would therefore suggest that in terms of a greater realignment between the regulatory framework for both linear and online content providers, that due consideration is given to the matter of prominence. In this regard, RTÉ shares the BAI's view that the provisions of Sections 74 and 75 of the Broadcasting Act 2009 are outdated.

In RTÉ's view the Online Safety and Media Regulation Bill should set-out a role for the new Media Commission to regulate prominence. This legislation should require the new Media Commission to develop enforceable prominence codes (within a specified time-frame). Given the pace of change in content distribution, the Media Commission should have powers to review and update their prominence codes. Importantly, the new Bill should close out on existing jurisdictional anomalies so that the new Media Commission fully regulate and enforce prominence requirements among those distributing content and services within Ireland.

There are European developments to draw on. In the UK for example, Ofcom have proposed revisions to the EPG Code and is considering extending the prominence regime to VOD discovery and the rules around navigation to PSB content. Germany have transposed this aspect of the Revised AVMSD and developments are afoot in other parts of Europe. This is an area that both the European Broadcasting Union (EBU) and the European Regulators Group for Audiovisual Media Services (ERGA) urge merits attention.

In November 2020, RTÉ and TG4 submitted a joint paper 'Safeguarding Prominence for Irish Public Service Media in a Global Media Landscape' to the Minister TCAGSM. The points made above echo those set out in the joint paper, which could be shared with the Committee should you wish to consider this matter further.

6.3 Heads 69 and 70 Advertising Flexibility

RTÉ wishes to see the option for flexibility in its use of advertising minutage incorporated into this new Bill. The Revised AVMSD provides for more flexibility so that broadcasters are able to decide when to place advertising in order to maximise advertisers' demand and viewers' flow (Recital 41 of the AVMS Directive). The Directive is mindful of ensuring that viewers are not exposed to excessive advertising. To that end, RTÉ is not suggesting a legislative change to increase to its minutage, rather for more flexibility in its allocation of its permitted advertising. At present, under section 106 of the Broadcasting Act, 2009 the Minister has the power to fix the RTÉ's advertising time.

Over the past decade changes in the television advertising market in Ireland, as well as changes in technology and audience behaviour have severely impacted Irish licensed broadcasters and RTÉ. These factors have resulted in a decline in spend on television advertising, notably as revenues shift to digital global giants. Flexibility will not mitigate this, however would provide some benefit for RTÉ's commercial performance. It will also contribute to an enhanced audience experience of its television channels, avoiding inappropriate interruption of programmes such as sports events, state occasions, live current affairs programming, and films.

6.4 Content Levy Establishment/Content Levy Scheme

Article 13 of the AVMSD allows members states the opportunity to create provisions of additional levies or investment obligations to be placed on audio visual services within operation within that jurisdiction. The intention of this section of the Directive is to promote the production of European works.

The AVMS Directive provides a real opportunity for the imposition of a levy on service providers (such as subscription providers and video on demand services) which target audiences in Member States. Resultant income or funds derived from a levy could provide an invaluable resource to sustain domestic content production at national level, while also supporting an overall EU audiovisual policy. At present the only media service with any national investment obligations is RTÉ who has an obligation to spend a minimum of €40 million per year with the independent sector. By comparison, the level of investment by international audiovisual services would amount to a very small fraction of this, and is in no way commensurate with the level of revenue being generated within this market.

The creation of a content levy would therefore go some way to address the current imbalance of revenue vs investment, in which large levels of expenditure are leaving the country, with very little expenditure on content made within Ireland. RTÉ has been a member of the Joint Creative Audiovisual Sectoral Group who have made a more substantial submission on this specific issue, informed by independent research conducted by Indecon. RTÉ would therefore suggest that this opportunity is given full consideration and timely enactment.