

Broadcasting Authority of Ireland

Submission to the Department of Enterprise, Trade and Employment on the European Commission's Digital Services Act and Digital Markets Act proposals



1. Introduction

The Broadcasting Authority of Ireland (BAI) thanks the Department for the opportunity to respond to the consultation on the European Commission’s proposal for the Digital Services Act and Digital Markets Act. The BAI appreciates 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 online platforms.

2. Context for BAI Response

The BAI is a statutory body, established under the Broadcasting Act 2009, as the regulator for broadcasting services in Ireland. Television services regulated by the BAI operate pursuant to the Audiovisual Media Services Directive (“the AVMS Directive”). The BAI has been extensively involved since 2016 in the preparation of the revised AVMS Directive and more recently has been participating in the preparations for its transposition into Irish law and subsequent implementation. The revised Directive has extended the scope of audiovisual content regulation to include the regulation of video-sharing platform 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. ERGA comprises audiovisual content regulators from the 27 Member States and the BAI Deputy CEO, Celene Craig, was elected to the ERGA Board in December 2020.

Most recently, ERGA has been advising the Commission on the implications for content arising from the proposed Digital Services Act package. As part of its ERGA work in 2020, the BAI co-authored [ERGA’s policy paper](#) on the Digital Services Act, as well as ERGA’s submission to the Commission’s consultation on the DSA. This work is ongoing and the BAI continues to play a leadership role in relation to ERGA contributions on the DSA, the [European Democracy Action Plan](#) (EDAP) and the related [Audio Visual Action Plan to Support Recovery and Transformation](#). These are all part of the Commission’s overall policy package in relation to the reform of the digital environment and the BAI continues to contribute to discussions nationally and at an EU level in relation to all these initiatives.

In May 2020, the BAI published a report, [CodeCheck](#), on the implementation of the [Code of Practice on Disinformation](#) by Google, Facebook, Twitter and Microsoft in Ireland during 2019, and this contributed to an overall ERGA Report on this matter. The BAI is contributing to discussions about a revised version of this Code and the introduction of a more robust monitoring framework. This is expected to be concluded during 2021 and while the focus is on countering disinformation, there is some crossover with issues arising in the DSA, such as the greater accountability of platforms in relation to content, including advertising practices, the provision of data and enhanced regulatory oversight.

Over the past number of years, the BAI has been developing its policy response on the future regulation of online content in Ireland in the evolving technological and legislative environment. This policy is set out in its [2019 submission](#) to the public consultation by the (then) Minister for Communications, Climate Action and Environment, on the future regulation of harmful content on online platforms. The BAI notes that key pillars of its submission are consistent with subsequent legislative proposals, and elements of the submission continue to evolve as the

national and European debates tease out the many complexities of the future regulatory landscape. The DSA proposals are one such development.

The BAI offers its views on the DSA proposals in this submission, based on its experience of regulating content in Ireland and in participating in relevant policy discussions at a national and international level. While views have been developed primarily through the prism of the Audiovisual Media Services Directive, as well as the current Irish legislative proposal for platform regulation in respect of online safety and harmful content, they also reflect broader debates about the future of content regulation in the digital environment. Pursuant to the [General Scheme for the Online Safety and Media Regulation Bill](#), the BAI expects to be absorbed into a new Media Commission which will be established to oversee the regulation of content on broadcasting, on demand and online platforms. The BAI continues to engage with The Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media on this legislative initiative and believes that linked policy initiatives at an EU level should continue to inform this process.

In this context, issues arising from the DSA *from a content regulatory perspective* are identified for consideration below. Given the complexities and far-reaching implications of the draft Digital Services Act Regulation, there has been very little time to consider the issues arising in depth. The purpose of this submission is to note the BAI's significant interest in this area, to set out our preliminary views, and to signal our willingness to engage further with the Department, as the position of the Irish Government evolves and develops. In tandem, and as part of our work in ERGA, we will continue to develop our organisational position further.

3. Digital Services Act Comments

The BAI welcomes the systemic approach to the regulation of online platforms emerging at an EU level and believes that a similar connected approach should be a priority at a national level, especially given the presence of major digital players based here in Ireland. Such an approach accords with the BAI's existing policy and previously expressed views in this regard (as articulated in our submission to Government on the OSMR Bill – see link above). While overall the goals of the draft DSA Regulation have strong merit, many aspects of the procedures and proposed means of implementation are unclear and require further reflection and discussion.

At this point in time, the BAI has identified several high-level issues that we would like to draw to the attention of the Department to ensure an effective and workable regulatory environment going forward. Please note that these constitute a preliminary position on the BAI's part and, as indicated above, we expect our organisational position to evolve and develop over time.

- The form of **legal instrument** proposed – the BAI has no specific issue that it wishes to raise at this time with the form of legal instrument proposed, although we are still considering our formal position on this matter. The BAI notes that some ERGA members have already expressed the view that a Directive would be more appropriate.
- **Scope of Regulation:** The substantive rules set out in the draft Regulation cover a very broad range of subject matter e.g., fundamental rights, digital innovation, and economic/trading activities, consumer rights – the rules are generic in nature to a range of regulatory activity that, historically, have not been a natural or intuitive mix for common rule-setting. The question arises then as to whether the rules are an appropriate fit for all the areas of digital activity that fall within the scope of the Regulation.
- **Overall Approach:** the proposed Regulation might be considered to have adopted a markets/competition model to the regulation of platforms. The BAI, like other content regulators, supports the view that there are very many relevant market/trading/consumer/competition matters that need to be updated at the European legislative level. However, we do not believe that a competition model is the most appropriate approach to addressing the regulation of harmful content.

A concrete example of this in the draft Regulation is the approach adopted to identification of the most significant regulatory targets – i.e., very large online platforms (VLOPs). The BAI (as well as other content regulators) has advocated for a risk-based approach to determining the focus of content regulation e.g., many established platforms may be addressing harmful content through their content moderation activities, given that they have been in existence for longer and have had to respond to public demands for safer services. Whereas, emerging (typically smaller) platforms are more likely to present greater risk to individuals, fundamental rights, and society more generally and, consequently, may merit greater attention from a content regulation perspective.

- **OSMR Bill** – The BAI recognises that the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media first and foremost has responsibility for the preparation of the Online Safety and Media Regulation (OSMR) Bill and we anticipate that the Department will submit its own views on the draft Regulation. While we do not wish to pre-empt any views that the Department may express in relation to the proposal, the BAI considers that many aspects of the draft Regulation need further consideration in the context of the Irish Government's own proposals. While some aspects of the draft Regulation chime with the Bill's proposals, there are other elements that need careful consideration and teasing out in the context of the future regulation of harmful online content. An example in this regard is the approach in the draft Regulation to the definition, scope and treatment of **harmful online content** as opposed to **illegal content**. For example, will "soft" law, (e.g., codes flowing from the statutory provisions on harmful online content), be included in the definition of illegal content, although a breach of such a provision may not constitute a criminal offence?
- **Country of Origin Principle:** ERGA (including the BAI as a member of ERGA) has expressed its ongoing support for the continuation of the Limited Liability Principle (per the

existing Directive on Electronic Commerce 2000/31/EU and the Audiovisual Media Services Directive). However, it might be argued that the proposals in the draft Regulation would see a dilution of the principle, in view of the proposed co-ordination and oversight role of the Commission and the Digital Services Board.

- **Proposed Regulatory Structures:** there is a need to examine in depth the implications for a range of existing/future authorities/regulators in Ireland – including, for example, the Competition and Consumer Protection Commission and the proposed Media Commission. The role of the Digital Services Co-ordinator (“DSC”) – whether as a stand-alone oversight entity (super-regulator?) or as part of an existing regulatory structure or Department – needs consideration to ensure that the regulatory scope of the Regulation is capable of being implemented adequately. Moreover, it seems to the BAI that if the DSC has a role in respect of a range of other relevant regulators, how is the independence and functioning of the relevant regulators/authorities to be clarified and secured? Given the cross-cutting nature of the proposals in the Regulation, including the cross-cutting role of the Digital Services Board, there will be a requirement to clearly delineate the extent of powers of each of the regulatory agencies and to provide clarity on the scope and limits of their respective powers and roles, as may arise from the Regulation’s provisions.
- **Compliance and Enforcement:** there will be many substantive issues to consider in this regard e.g., the division of enforcement competencies as between the regulatory entities but also as between the EC, and the “unified oversight entity”, the Digital Services Board. A further example is that speed in enforcement might well be desirable, but do the timelines set out in the draft Regulation take adequate account of national legal systems (such as Ireland’s) where requirements for due process and natural justice may result in much longer timeframes for implementation of enforcement actions?
- **Media Plurality** – it is widely acknowledged that digital transformation of the media landscape has brought major concentration issues with it. Of particular concern is the application of algorithms which significantly impact the information we receive, and which can also reduce diversity in sources of content and views expressed. In promoting economic development, innovation and competition in the online space, Ireland needs to ensure that this is balanced with the quality and public value of the information received by Irish users.

The Department will be familiar with the BAI’s role in Media Plurality arising from both the Broadcasting Act 2009 and the Competition and Consumer Protection Act 2014. The implications of the proposed Regulation for media plurality need careful consideration to ensure that our national objectives, including the protection of freedom of expression as set out in statute, continue to be met adequately, and that the opportunity is taken to actively promote media pluralism and diversity through EU state aid law.

- **European Democracy Action Plan and Disinformation:** the range of current concerns of European content regulators are set out in the ERGA [Position Paper](#) on the DSA. Among these are recent developments in respect of disinformation which can negatively impact on democratic processes and structures. While some of these issues are being addressed via the European Democracy Action Plan, the BAI, like its European counterparts, considers that such matters are best addressed in a harmonised way via a legislative instrument.

- **Cross-border Enforcement:** there are many practical issues around cross-border enforcement in the draft Regulation that are unclear or impractical and need to be addressed.

4. Conclusion

The BAI understands that Ireland's response to the DSA and DMA proposal will necessarily require taking a whole-of-government position. We note that the proposal has far-reaching implications for a range of regulatory entities in Ireland and the policy approach adopted in Ireland to the supervision of online platforms more generally.

The BAI, together with its regulatory colleagues in the CCPC and ComReg, believes that an input from a regulatory perspective would also greatly benefit the Department's deliberations and ultimate position on the draft Regulation.

The Department's consultation provides an opportunity for a comprehensive, joined-up policy on digital services in Ireland, that weighs up and balances economic and market objectives with the appropriate governance and regulatory considerations, and which ensures a structured and co-ordinated approach across the range of regulatory supervision areas.

We respectfully suggest that the Department considers the process for further engagement with, and input from, key regulators in the digital space, to inform the development of the national response to the Commission's proposals.

22 January 2021