



## **Response from the Broadcasting Authority of Ireland**

### **Consultation on the Transparency of Online Political Advertising**

#### **Introduction**

The Broadcasting Authority of Ireland (the “BAI”) thanks the Interdepartmental Group for providing it with an opportunity to contribute to the discussion about, and consultation on, the matter of online political advertising.

The BAI is the independent regulator for broadcasting in Ireland established further to the Broadcasting Act 2009 (the “2009 Act”). Further to the 2009 Act, the BAI has responsibility for a broad range of activities, including the licensing, regulation and support of independent and public service radio and television broadcasters in Ireland. In broad terms, the objectives of the BAI are to ensure the provision of open and pluralistic broadcasting services that meet the needs of the people of Ireland and which support and uphold democratic values.

A key role of the BAI is the regulation of standards in respect of commercial communications, including advertising, sponsorship and product placement. This has included applying the statutory prohibition on advertising ‘directed towards a political end’ provided for further to Section 41(3) of the 2009 Act.

As members of the Interdepartmental Group will be aware, this statutory prohibition has been a consistent part of broadcasting legislation for over 50 years. Over the last 30 years of independent broadcasting regulation, the BAI and its predecessors (the BCI and the IRTC) have applied this prohibition. As a result, the BAI has significant experience in respect of the challenges of regulating political advertising, the impact of the statutory prohibition and the vital need to balance the interests of citizens, their right to free speech and the requirement to protect democratic discourse. The BAI’s response to the current consultation draws on this extensive experience of regulating political advertising. Our response has a focus on the general issues arising but also on how these issues relate to audiovisual media services (linear and non-linear) and to video-sharing platforms.

The BAI’s response is divided into four sections as follows:-

- Section 1 – Definition of Political Advertising;
- Section 2 – Transparency;
- Section 3 – Technology and Capability;
- Section 4 – Legal Framework and Governance.

The BAI supports the prioritisation by the Interdepartmental Group of the issue of online political advertising. The risks highlighted in the first report of the Group arising from the absence of regulation are clear and present. The BAI is happy to elaborate further on its submission at the request of the Interdepartmental Group and would like to state its willingness to participate in the Open Policy Forum to be established.



## 1. Definition of Political Advertising

The current legislative framework for broadcasting does not provide a definition for advertising directed towards 'a political end.' In the absence of this definition, the BAI and its predecessors have drawn on the definition as set out in the High Court judgement - *Colgan v IRTC* (1998). This describes an advertisement directed towards a 'political end' as one being directed towards:-

- furthering the interests of a particular political party, or;
- procuring changes in the laws of this country, or countering suggested changes in those laws, or;
- procuring changes in the laws of a foreign country or countering suggested changes in those laws, or;
- procuring a reversal of government policy or of particular decisions of governmental authorities in this country or countering suggested reversals thereof, or;
- procuring a reversal of governmental policy or of particular decisions of governmental authorities in a foreign country or countering suggested reversals thereof.

As such, the legislation is not restricted solely to advertisements which further the interests of a political party nor is it restricted to political matters relating to the jurisdiction of the Republic of Ireland.

In determining whether an advertisement is to be considered as one directed towards 'a political end', the BAI has advised broadcasters to take into account the following three factors:-

- i. The content of the advertisement;
- ii. The context in which the advertisement is broadcast;
- iii. The aims and objectives of the advertiser and of the advertising campaign.

It has been the BAI's experience to date that one or more of the three factors may play a determining role in deciding whether an advertisement is towards 'a political end'.

In certain circumstances, the current political context may have a strong bearing, for example in the run-up to an election or a referendum. In other circumstances, the text of the advertisement may be fundamentally problematic even if the advertiser is not political or exclusively political in nature. This may be because it is clearly advocating political action. Furthermore, the advertisement may be part of a campaign with clear political objectives, such as to lobby government to change Irish law or governmental policy. Naturally, advertisements that advance the interests of organisations whose sole or predominant purpose is of a political nature have a higher potential to fall foul of the prohibition e.g. political parties, special interest lobby groups etc.<sup>1</sup>

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<sup>1</sup> The BAI would emphasise that in applying the definition, it has never considered the merits of the organisation seeking to run the advertising campaign nor the merits of the objectives of the campaign in question. Rather, its role has been restricted to considering whether the advertisement falls to be considered as one directed towards 'a political end' as defined above, and are subject to restrictions on-air.



The BAI notes the concerns set out in the Discussion Paper around the impact of any definition of political advertising chosen and the risks of unintended consequences, particularly on organisations whose objectives are primarily civic rather than political. Notwithstanding this, the BAI believes that if the objective of introducing controls is to protect the democratic fabric then consideration should be given to defining political advertising in a broad manner and applying controls that focus firstly on the intended aim of the advertising campaign and, secondly, on the nature of the organisation (where relevant). The context into which the advertisement would be placed could also be considered, where appropriate. This would mean that a wide range of stakeholders would be impacted by a broad definition of political advertising.<sup>2</sup> In terms of when such controls might apply, it is the view of the BAI that it may not be sufficient to apply controls on political advertising online only during time periods in advance of an election or a referendum. In view of this, consideration should be given to applying controls on an ongoing basis.

These opinions in respect of the desirability of applying a broad definition and applying it on an ongoing basis are also informed by the following considerations:-

- Firstly, it has been the BAI's experience that a wide range of stakeholders do and will continue to communicate political messages via advertising. In a broadcasting context, this has included political parties and politicians. It has also included organisations who have a social or civic remit but who wish to inform audiences about their views on matters that are clearly political. That there is a wide range of stakeholders, other than political parties, seeking to pay for political advertising is also evident from the recent referendum campaigns on marriage and on the 8<sup>th</sup> Amendment. Therefore, a narrow definition of political advertising may not be practical in terms of capturing actual practice in this area.
- Secondly, the application of controls only in the run-up to an election or referendum is not likely to be wholly sufficient to protect citizens from the risks arising from online political advertising. This will be the case in particular where there is a short timeframe between the formal announcement of an election/referendum and the date of the ballot or where debate may be ongoing for a considerable period but where a date has not been set e.g. the debate in respect of the 8<sup>th</sup> Amendment. Furthermore, domestic or foreign actors seeking to intentionally influence debate, either in a benign manner or with a view to spreading disinformation, may operate on longer timeframes and this should be considered when deciding when controls would apply. It would still remain possible to introduce specific/additional controls in the weeks prior to an election or referendum so as to provide further protection for citizens, even where permanent controls were also in effect.
- Finally, it would appear that the regulatory approach to online political advertising set out in the Discussion Paper is focused on transparency rather than prohibition. In that context, the application of a broad definition of 'political advertising' would arguably not prohibit any social and civic stakeholders from advertising and could instead introduce greater transparency in respect of their advertising.

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<sup>2</sup> The BAI would emphasise that it is not proposing the adoption of the definition set down in the High Court judgement.



In addition, concerns about unintended consequences articulated in the Discussion Paper could be addressed, for example, via transparency mechanisms that might apply differently in the case of lobbying advertising vs advertising clearly addressing an election or referendum.

In terms of wider issues in respect of the definition, the BAI believes that the current work by the Interdepartmental Group provides an opportunity to put a cross-media definition of political advertising on a statutory footing. A common statutory definition could bring certainty and could encourage a consistent approach where a political advertisement may be sold across a variety of media simultaneously.

The BAI also suggests that the introduction of a definition and related controls on political advertising take account of the potential for Irish-based online political advertising to target other jurisdictions, in both positive and not-so-positive ways. A broad definition of political advertising covering politics in other territories (such as reflected in the definition above) could consequently be considered appropriate. It would also take account of the fact that issues around extraterritoriality highlighted in the Discussion Paper go in both directions and may be matters of concern for governments and regulatory authorities in other jurisdictions. Given the prevalence of online platforms in Ireland that make audiovisual content available and ongoing regulatory responses to disinformation and political advertising at an EU-wide level, requests for intervention in respect of political advertising that targets other European states may become more prevalent (as seen previously in the case of data protection). A broad definition could provide a strong basis for clarifying for EU governments and regulators Ireland's understanding of the type of advertisements to be controlled.

Naturally, whichever definitional approach is taken, it will need to take account of any court decisions reached in Ireland and Europe so as to ensure that the balance of rights, properly highlighted in the Discussion Paper as an essential concern, are treated appropriately.

## **2. Transparency**

The BAI does not have any recommendations regarding specific transparency requirements that might apply. The BAI notes the examples included in the Discussion Paper detailing possible approaches and there are long established transparency requirements in place for political advertising in both Ireland, Europe and internationally that can be readily drawn upon.

What will be important is to ensure that the transparency requirements applied allow for tailoring for the different media types and formats where online political advertising may be placed. Experience has shown that applying disclosure requirements without regard to the media on which they will be consumed can minimise their effectiveness. This is evident in the case of financial regulatory disclosure information where lengthy text can be easily viewed in a newspaper or television advertisement but which is less effective appended to the end of a radio advertisement. Similarly, many online political advertisements may be seen on mobile devices, laptops or on a smart television and transparency requirements should account for the different means by which citizens consume information. Input from stakeholders selling and placing political advertising will be important in order to apply appropriate transparency requirements and the Open Policy Forum provides an opportunity to examine issues such as this one.



Separately, while the focus of the consultation is on transparency measures, the BAI considers it equally important that any controls introduced also include standards about what is acceptable/not acceptable in terms of the content of such advertisements. For example, standards applying to accuracy, truth etc., would seem to be necessary as part of the control framework and so as to provide certainty to stakeholders selling, buying or displaying political advertising.

In addition, while the first report of the Interdepartmental Group noted that the risks from political advertising in terms of traditional, linear radio and television broadcasting services are low, the BAI would caution against an approach that focuses solely on the existing media environment. Irish television content is also available online via live streams and on social media platforms such as Twitter and Facebook. Content is also available via on-demand services, for example, on the RTÉ and TV3 online players. Moreover, with the prevalence of smart televisions, audiences can watch linear and non-linear audiovisual content on the same device and are less likely to distinguish in practice between traditional and new television formats.

As such, the overlap between traditional and new methods of distributing and consuming television-like content will only increase in the coming decade. This is relevant in the context of the Interdepartmental Group's concern about future-proofing regulation. For this reason, the BAI recommends that the overall policy approach taken to political advertising, in terms of either the transparency requirements or content standards applied, should be consistent across both linear and online environments while also having regard to any need to tailor the controls for each individual medium. It should take account not only of the technical feasibility of regulating online political advertising but also emerging and developing business models impacting on all audiovisual services and the need to regulate with their development (and associated risks) in mind. Not to do so runs, in the BAI's opinion, the risk of content which presents a potential harm to citizens being regulated differently on different media platforms without a sufficient rationale.

In terms of the impact on stakeholders; as noted above, the application of a broad definition of political advertising will impact on any stakeholder choosing to pay for political advertising and the range of stakeholders referenced in the Discussion Paper will be impacted. In addition, other stakeholders potentially impacted will be the European Parliament and Commission and also linear broadcasters who may be disproportionately impacted if a different regulatory approach is taken in linear vs online media.

### **3. Technology and Capability**

As would appear to be evident from recent controversies regarding social media, information asymmetry is a key challenge for politicians, governments and regulators in their attempts to protect the public interest. Information about the means by which online media, including social media organisations, are using technology to deal with disinformation is often limited to that provided by the organisation. This information may consist of a general articulation of what they will do/are doing and the question of their total capacity remains unknown. However, based on current knowledge arising from recent controversies, including decisions by social media organisations to restrict advertising during the referendum campaign on the 8<sup>th</sup> Amendment, it seems evident that online providers have significant capabilities to deal with political advertising.



In the case of video-sharing platforms and online providers more generally, it is a reality that, given the centrality of algorithms to their business models, they will naturally be reluctant to share proprietary information. Given this, it would seem necessary to engage in open and good faith dialogue with these providers so as to ascertain the scope of their capability to manage political advertising. The extent to which online providers engage or are obliged to engage and disclose information will naturally be influenced by the terms set for their engagement and the type of regulation applied e.g. co/self/statutory regulation.

It should be noted that, whatever approach is taken, the video-sharing platforms may not themselves have full oversight of commercial arrangements that may be included in content carried on their platforms or services since they operate not only as sellers of advertising but also as intermediaries for content (which may include commercial content agreed independently of the online provider). More generally, due to programmatic advertising, algorithms rather than individuals often determine the placement of advertisements. For these reasons, a regulatory approach that mixes both proactive and reactive actions would seem necessary. This market dynamic is recognised in the approach taken in the E-commerce Directive and also in the updated Audiovisual Media Services Directive which places responsibilities on video-sharing platforms such as YouTube and Facebook that include both proactive and reactive elements.

#### **4. Legal Framework and Governance**

As highlighted above, the BAI suggests that the issue of political advertising online be regulated on an ongoing basis, as the risk is ever present rather than being one that arises only in the immediate run-up to an election or referendum.

Furthermore, consideration should be given to putting in place a legal framework that clearly sets out the objectives to be achieved and the principles that will apply rather than being overly prescriptive. In order to future-proof the controls and allow for flexibility and responsiveness to changes in media behaviours, content and technology, the details of the controls in terms of transparency or content requirements should be dealt with via a mechanism which, while having its basis in statute, is not itself detailed in legislation.

It is the view of the BAI that the controls should be media neutral except where, for example, transparency mechanisms need to be tailored for a particular medium. Moreover, if political advertising online is to continue to be permitted, consideration should be also be given to permitting it on linear radio and television broadcasting services. To do otherwise would seem problematic in circumstances where linear broadcasting services would be the only media singled-out for a prohibition despite online political advertising arguably having a higher impact on account of the ability to micro-target.

In terms of the body that might have oversight for monitoring and enforcing any controls on political advertising online, the BAI is of the view that a permanent body is necessary in order to adequately address the risks associated with online political advertising. The BAI is also of the view that the nature, functions, operational and policy remit of this body requires further detailed consideration given the complexity entailed in regulating political advertising. If a single body, such as a standing Electoral Commission, is responsible for the governance and monitoring of any new controls, it will also be important that it develops strong formal relationships with the key stakeholders who may have a statutory role in respect of each media type.



In the case of managing controls on political advertising placed on video-sharing platforms, a formal relationship between the designated body for the regulation of political advertising and the National Regulatory Authority (NRA) established in order to implement the updated Audiovisual Media Services Directive might be particularly helpful.<sup>3</sup> The formal relationship could be given effect via statute or via a memorandum of agreement with a statutory footing.

The NRA will be responsible for implementing the new requirements on video-sharing platforms such as YouTube and Facebook. The Directive will require video-sharing platforms to take appropriate measures, including steps which will: protect the physical, mental and moral development of minors; protect the general public from audiovisual content that contains incitement to violence and hatred; protect the general public from content the dissemination of which constitutes criminal and terrorist offences; and, ensure that audiovisual advertisements marketed, sold or arranged on their services do not breach advertising rules set out in the Directive. The NRA in question will accordingly be dealing with video-sharing platforms on an ongoing basis and will also co-operate with EU audiovisual media service regulators with responsibility in this area. In this context, the formal relationship envisaged between the designated body for the control of political advertising and the NRA may provide a valuable link for implementing any controls on political advertising applying to video-sharing platforms.

On the issue of how enforcement and monitoring will work, the BAI believes that it is too early to propose mechanisms in this regard and this should be discussed at the Open Policy Forum and in co-operation with other EU member states and their regulators.

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<sup>3</sup> No organisation has been designated in this regard as the Directive has only recently been finalised and European states have 21 months to transpose the Directive into domestic law.