



ÚDARÁS
CRAOLACHÁIN
NA hÉIREANN

BROADCASTING
AUTHORITY
OF IRELAND

**OWNERSHIP AND CONTROL POLICY
(2012)**

INTRODUCTION

In performing its statutory functions, the BAI is charged with endeavouring to ensure the provision of open and pluralistic broadcasting services. More specifically, it is charged with promoting diversity in control of the more influential commercial and community broadcasting services. The BAI endorses the statutory premise that media plurality is vital to the health of Irish democracy and is of the view that rules concerning the ownership and control of broadcasting services make an important contribution to the achievement of plurality in the Irish media.

The BAI believes that it is necessary, in accordance with its statutory remit, to have a policy on the ownership and control of broadcasting and multiplex contractors. The BAI's Strategy Statement 2011-2013, and its Broadcasting Services Strategy (2012), identified the importance and role of this Policy in the Authority's overall regulatory framework. As part of the development of the Broadcasting Services Strategy, the BAI undertook a detailed review of the ownership and control policies in respect of both commercial and community broadcasters. The Ownership and Control Policy (2012) details the approach of the BAI to the application of the statutory provisions relating to the ownership and control of broadcasting services, including the objectives to be achieved, as well as the rules to support the achievement of the activities.

The Act allows the BAI to differentiate in terms of the rules that apply to various types of contracts that it may enter into i.e. broadcasting, content provision and multiplex contracts. The Broadcasting Services Strategy (2012) identifies different licensing and compliance approaches in respect of different contractors and this Policy also makes such distinctions. However unlike previous Ownership and Control policies, this Policy sets out provisions in respect of both commercial and community broadcasting services. The BAI will apply this Policy in assessing the ownership and control elements of applications for these contracts and to assess relevant requests for variations or compliance issues that arise subsequently in respect of such contracts.

The *BAI Ownership and Control Policy (2012)* has been designed to facilitate the continued development of a viable and diverse broadcasting sector that is characterised by a plurality of ownership. The policy is also designed to provide clarity and certainty in respect of the regulatory approach to be adopted and the rules that will apply. The views of stakeholders, expressed through the Broadcasting Services Strategy consultation process have informed the development of this policy. In addition, the Authority's experience in relation to the regulation of ownership and control matters, and relevant legislative and policy developments have been taken into account.

Overall, the Authority believes that this policy balances the needs of a rapidly evolving indigenous broadcasting sector with the statutory requirement to ensure plurality of viewpoint outlet and source in the interests of listeners and viewers.

The BAI's *Ownership and Control Policy (2012)* is divided into two sections as follows:

1. Policy Framework
2. Policy Provisions

1. POLICY FRAMEWORK

The framework, within which the BAI's *Ownership and Control Policy (2012)* was developed and operates, may be divided into three sections as follows:

- (i) The legislative provisions;
- (ii) The BAI Statement of Strategy 2011-2013 and
- (iii) The BAI Broadcasting Services Strategy 2012.

The key components of each of these elements are outlined below.

(i) THE LEGISLATIVE PROVISIONS

The key legislative provisions that provide the framework for the policy are the Broadcasting Act 2009, the Competition Act 2002 and the EU Audio Visual Media Services Directive. Some brief information on each one is provided below and more detailed information is included at Appendix One.

The Broadcasting Act 2009 provides the statutory framework for the licensing and regulation of broadcasting and multiplex services in Ireland. This Act established the BAI to regulate content across all Irish broadcasting services. It sets out a range of general and specific objectives for the BAI including ensuring the provision of open and pluralistic broadcasting services. The Act also identifies the range of contracts that the BAI can enter into and provides the regulatory framework in which these contracts are awarded and operate.

The Competition Act, 2002 contains statutory provisions for the control of media mergers by the Competition Authority and the Minister for Jobs Enterprise and Innovation. The Act also allows the Minister to consider submissions or observations from interested parties, such as the BAI, when making a determination in relation to a proposed media merger. This legislation is due to be revised in 2012 in the context of the recommendations of the Report on the Advisory Group on Media Mergers (2009). Changes to this legislation are likely to require further revisions to this policy.

The EU Audio Visual Media Services Directive¹ ("AVMS Directive") also contains provisions that need to be considered in the context of the ownership and control of broadcasting services in Ireland. *The AVMS Directive provides the framework for national law* applicable to audio visual media services in each of the Member States of the European Union. The Directive provides that 'each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that member state'

(ii) BAI Statement of Strategy 2011-2013

The BAI's Statement of Strategy 2011-2013 identified maintaining plurality of ownership, content and viewpoint as one of the central elements of the Authority's vision on behalf of the public. Ensuring plurality is one of seven key themes in the strategy and this is given effect through a number of strategic objectives which include establishing and implementing policies, codes and procedures that promote and support plurality in terms of viewpoint outlet and

¹ Directive 2010/13/EU of the European Parliament and of the Council 10 March 2010

source. The *BAI Ownership and Control Policy 2012* is a key statement in the realization of this objective.

(iii) BAI Broadcasting Services Strategy 2012

The BAI Broadcasting Services Strategy 2012 identified the need for, and function of, this Policy in delivering on the Authority's vision for a vibrant Irish broadcasting sector consisting of a mix of public service, commercial and community broadcasters. Plurality of viewpoint, outlet and source is one of six high level objectives listed in this Strategy and the document makes a specific commitment in relation to the development, implementation and review of an Ownership and Control Policy. This Policy will be used by the BAI to assess the ownership and control element of applications and to assess relevant requests for variations and any compliance issues that may arise subsequently in respect of such contracts.

2. POLICY PROVISIONS

(i) *POLICY OBJECTIVES*

The policy objectives are grounded in the Policy Framework set out in Section 1 above. The objectives provide the overall context for the development and implementation of the policy as well as the assessment of ownership and control proposals. The objectives also provide a framework to assist the BAI in responding to new issues emerging in licensing processes and ownership and control developments in the broadcasting sector.

The policy objectives are as follows:

- To promote open and pluralistic broadcasting services, with particular reference to radio and television services;
- To promote diversity in viewpoint, outlet and source, that is, diversity in the opinions expressed, in programming delivery and content, and in the sources of information available to the public;
- To contribute to the upholding of the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression;
- To contribute to the promotion of diversity in control of the more influential commercial and community broadcasting services;
- To contribute to the achievement of a regulatory environment that will sustain independent and impartial journalism;
- To ensure that broadcasting and multiplex contracts are held by persons who are of suitable character, and who have available to them adequate expertise, experience and financial resources; and,
- To ensure that the ethos of a broadcasting service is such that it will best serve the needs of the audience it is licensed to serve.

(ii) *POLICY DETAILS*

The policy details are divided into eleven sections as follows:

- (a) Interpretation of terms
- (b) Character, Expertise and Experience
- (c) Financial Resources
- (d) An undue number of sound broadcasting services
- (e) An undue number of sound broadcasting services in a specified area
- (f) An undue amount of communications media in a specified area
- (g) Assignment of Contracts
- (h) Programming
- (i) Competition Act 2002
- (j) Non-EU Entities
- (k) Concrete Indicators of Diversity

(a) Interpretation of Terms

In order to meet its statutory obligations, the BAI first needs to interpret the relevant terms used and then to adopt decision-making criteria to give effect to them in practice.

The 2009 Act requires the BAI to interpret the following statutory terms: *'control'*; and *'substantial interests'*.² The statutory definition of *'communications media'* is employed. The BAI gives effect to these terms as follows:

"Control" – is in a position proprietarily, financially or in terms of voting rights to determine or direct the policy of the company, with regard in particular to programme output, that is, sourcing, production, supply or delivery to the audience.

"Substantial interests" – has sufficient proprietary, financial or voting strength within a relevant company or companies to be able to influence directly or indirectly to an appreciable extent the strategic direction or policy (which shall include editorial policy) of the company (companies), with regard in particular to programme output, that is, sourcing, production, supply or delivery to the audience.

The above interpretations focus primarily on programme output and reflect the BAI's main objectives, in accordance with its statutory remit, which are to regulate content and to promote diversity in viewpoint, outlet and source, thereby providing the public with access to a wide range of quality programmes from a variety of sources.

With regard to substantial interests, by way of guidance, the BAI is of the view generally that a "small shareholding" does not constitute a substantial interest. A small shareholding is one to which both of the following criteria apply:-

1. The votes which the holder may exercise at a general meeting of the company do not exceed 10% of the total votes which may be cast at that meeting;
2. The nominal value of the shareholding does not exceed 10% of the nominal value of the entire issued share capital of the company.

A shareholding which does not meet the above criteria ("a large shareholding") may be deemed by the BAI to constitute a substantial interest. Determination as to whether a large shareholding is deemed to be a substantial interest will be made by the BAI on a case-by-case basis with reference to the overall shareholding structure of the relevant company. (Where shares are convertible, the tests set out above will be applied on the basis that conversion has not taken place and on the basis of notional conversion).

(b) Character, Expertise and Experience

The 2009 Act requires the BAI, when awarding certain broadcasting contracts or multiplex contracts, to have regard to: *"the character, expertise and experience of an applicant or, if the applicant is a body corporate, the character, expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares"*.³

² Section 66(2)(g) 66(2)(h) and 66(2)(i) of Act

³ Sections 66(2)(a) and 137(2)(a) of the Act

A specific provision in relation to character, expertise or experience of content provision contract holders is not set out in the Act. However, the BAI, as a matter of policy, considers the character of an applicant when considering applications for content provision contracts.

In assessing character, the BAI applies the ordinary meaning of the word and considers, in particular, if the applicant, as set out above, is a fit and proper person to hold a broadcasting, content provision or multiplex contract (as appropriate) with reference to the provisions of sections 66 or 137 of the Act (as appropriate) and in the context of its compliance with other relevant statutory and regulatory provisions.

In relation to character, the BAI applies the following tests:

- (i) Has the applicant ever been convicted of an offence involving fraud or dishonesty?
- (ii) Has the applicant ever been restricted or disqualified as a Company Director, or convicted of any offence under the Companies Acts 1963-2006 (as amended) in this jurisdiction or under equivalent legislation in any other jurisdiction?
- (iii) Has the applicant ever been adjudicated a bankrupt, become insolvent or entered into a voluntary arrangement with creditors, or had a receiver appointed to any of its assets, in this or any other jurisdiction?
- (iv) Has the applicant ever been a director of a company to which a receiver was appointed, which went into compulsory liquidation, creditors' voluntary liquidation, examinership or which made any arrangement with its creditors or class of creditors?
- (v) Has the applicant ever been convicted of an offence under any legislation by which Broadcasting and/or Wireless Telegraphy is regulated in this or any other jurisdiction?
- (vi) Has the applicant ever had a licence or contract issued by a broadcasting licensing body or any other statutory body suspended or revoked in this or any other jurisdiction?
- (vii) Is the applicant aware of any reason why it may not be a fit and proper person to be awarded a contract?

These tests shall be applied at application stage, during compliance reviews and when considering proposals for changes to the ownership and control of contractors. The tests shall apply *inter alia* to Directors, management positions approved by the Authority and shareholders whose shareholding constitutes a substantial interest, or control, as defined in this Policy.

In relation to experience and expertise, the BAI applies the following tests:

- i. Does the Board of Directors of the applicant include sufficient personnel with the necessary experience, expertise and knowledge having regard to the nature of the contract proposed?

- ii. Is the management structure of the applicant appropriate and does the membership and make-up of the management team have sufficient experience and expertise having regard to the nature of the contract proposed?

In applying these tests the BAI shall examine the proposed arrangement in terms of the relevant individuals within the structure, (e.g. is there an over-reliance on one individual in the corporate and/or management structure) and the overall membership and structure of the Board and management team (e.g. are there any independent directors). The BAI believes that structures which reflect best practice in terms of corporate governance are key components in ensuring the delivery of quality services for audiences.

In assessing these matters the BAI shall also take into account the specific nature of the service involved, e.g. local, community, multiplex etc. In the case of community services the BAI requires that the ownership and management structures facilitate and support active participation by the community served at all levels within the service

In relation to the composition and structure of an entity, the BAI does not differentiate between either a natural person or persons or the corporate status of the applicant i.e. type of legal entity.

(c) Financial Resources and the Extent to which the Application Accords with Good Business and Economic Principles

In considering applications for the award of contracts, further to the provisions of Section 66(2) and Section 137(2) of the Act, the Authority is required, *inter alia*, to have regard to “*the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles*”.

In the case of Community Sound Broadcasting Contracts and Community Content provision contracts the Authority also needs to be satisfied that the contractor has the sole objective of achieving monetary reward of no greater amount than is reasonably necessary to defray the expense that is incurred in providing the service.

This section does not apply to contracts awarded under Section 71 of the Act.

In implementing the above provisions, the BAI shall have regard, *inter alia*, to the following:

- Does the applicant have available to it adequate financial resources and does its approach accord with good business and economic principles, having regard to the nature of the service proposed?

In the case of community sound broadcasting and community content contracts the BAI shall also have regard to the extent to which the service is being operated on a not-for-profit basis and is maintaining its independence by attracting funding from a variety of sources. In this context, community services are required to ensure that advertising and sponsorship together do not account for more than 50% of all income annually.

(d) “An undue number of sound broadcasting services”

Section 66(2)(g) of the Act requires the BAI to have regard to: “*the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Part*”.

In order to provide guidance and a degree of certainty for entities, the BAI will continue to provide minimum and maximum thresholds in respect of what it considers an “undue number”. These are designed to ensure that a reasonable range and number of different voices are available to the public.

The BAI shall operate four thresholds:

1. A number equivalent to 15% or less of the total number of commercial sound broadcasting services licensed under the Act is considered an acceptable level for any one entity. In applying this threshold, the BAI shall **not** differentiate between whether an entity has ‘*control*’ or ‘*substantial interests*’ in a service when making a determination with regard to the number of sound broadcasting services held by that entity
2. A number equivalent to between 15% and 20% of the total number of commercial sound broadcasting services licensed under the Act requires additional consideration by the BAI. The BAI shall take such consideration with reference *inter alia* to a Compliance Audit, submitted by the entity, in respect of all of its sound broadcasting services over a two-year period. This period shall commence twelve months in advance of the date on which the application is received. The Compliance Audit shall set out the relevant contractor’s compliance with regard to all of the statutory, policy and contractual provisions. Guidelines for the submission of a Compliance Audit are available from the BAI.

In applying this threshold, the BAI shall **not** differentiate between whether an entity has ‘*control*’ or ‘*substantial interests*’ in a service when making a determination with regard to the number of sound broadcasting services held by that entity

3. A number equivalent to between 20% and 25% of the total number of commercial sound broadcasting services licensed under the Act requires further additional consideration by the BAI. The BAI shall give such consideration with reference *inter alia* to a Compliance Audit, submitted by the entity, in respect of all of its sound broadcasting services over a two-year period, as set out in 2 above. In addition the BAI shall have regard to the following five factors:-
 - I. The number of services where an entity has control rather than a substantial interest;
 - II. The extent to which the relevant services are operating in common or separate franchise areas;
 - III. The relative audience shares of the relevant services when compared with all sound broadcasting services licensed under the 2009 Act;
 - IV. The extent to which the relevant services have a common target audience focus;

V. The extent to which the relevant services represent a concentration of the supply of news and information taking into account all communications media.

4. A number equivalent to over 25% of the total number of commercial sound broadcasting services licensed under the Act would be unacceptable; regardless of whether an entity has control of, or substantial interests in, the relevant services.

(e) An undue number of sound broadcasting services in a specified area

Section 66(2)(h) of the Act requires the BAI to have regard to: “the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services” in a specified area.

In applying its Ownership and Control Policy under the Act, as set out above, the BAI gives effect to the term “**undue number**” as meaning “more than a reasonable number of the range of sound broadcasting services available in the specified area”.

The BAI takes the view that there is no obvious practical matrix for determining what constitutes a “reasonable share” of the sound broadcasting services in all cases. The BAI considers, therefore, the context in which each application is made, on a case-by-case basis, examining:-

- a) the total number of the sound broadcasting services in the relevant area;
- b) the share of the total audience⁴ of the various sound broadcasting services in the relevant area (the “audience share” model).

The BAI shall apply two tests in order to determine if an individual or entity has more than a reasonable share of the sound broadcasting services:-

- I. A test of **substitutability** i.e. in assessing the extent to which one sound broadcasting service may be deemed to be a substitute for another;
- II. Regarding an applicant’s ability to influence opinion-forming power, a test of **dominance**, applying the applicant’s audience share of the sound broadcasting services (in which it holds a substantial or controlling interest) in the relevant area.

In applying these tests, the BAI shall differentiate between whether an entity has “control of” or “substantial interests in” a sound broadcasting service. It shall also have regard to the different characteristics of the sound broadcasting service in question e.g. format and content; delivery mechanism/platform; the nature of the service (national, local, regional) and the target audience.

(f) An undue amount of communications media in a specified area

Sections 66(2)(i) and 137(2)(i) of the Act require the BAI to have regard to: “the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in” a specified area.

Section 71 of the Act does not include a specific provision in relation to media concentration in respect of applicants for other content contracts under that Section. However, the BAI, as a

⁴ In the case of radio, “audience” refers to listeners; in the case of television, “audience” refers to viewers; in the case of print media, “audience” refers to readers; in the case of broadcasting services platforms, “audience” refers to subscribers.

matter of policy, applies this test when considering applications for all Content Provision Contracts.

In applying its Ownership and Control Policy under the Act, as set out above, the BAI gives effect to the term “**undue amount**” as meaning “more than a reasonable share of the range of communications media available in the area covered by the relevant contract”.

The BAI takes the view that there is no obvious practical matrix for determining what constitutes a “reasonable share” of the communications media in all cases. The BAI considers, therefore, the context in which each application is made, on a case-by-case basis, examining:-

- (a) the totality of the communications media in the relevant area;
- (b) the share of the total audience⁵ of the various communications media in the relevant area (the “audience share” model).

The BAI shall apply two tests in order to determine if an individual or entity has more than a reasonable share of the communications media:-

- I. A test of **substitutability** i.e. in assessing the extent to which one sound broadcasting service may be deemed to be a substitute for another;
- II. Regarding an applicant’s ability to influence opinion-forming power, a test of **dominance**, applying the applicant’s audience share of the sound broadcasting services (in which it holds a substantial or controlling interest) in the relevant area.

In applying these tests, the BAI shall differentiate between whether an entity has “control of” or “substantial interests in” a communications media. It will also have regard to the different characteristics of the communications media in question e.g. type, cost to the user, size and nature of the target audience.

An applicant shall be required to justify its proposals in the context of the above.

(g) Assignment of Contracts Section 69 and Section 138

Sections 69 and 138 provide that the BAI may prohibit the assignment of, or any material change in, the ownership of an applicant, either by specifying a condition in the contract itself, or by making the assignment subject to the previous consent in writing of the BAI, in which case the BAI shall have regard to the ownership and control provisions set out in section 66(2) and 66(4) or 137(2) of the Act as appropriate.

In the case of broadcasting contracts entered into under Sections 63 and 70 of the Act, the BAI generally looks unfavorably upon proposed changes in ownership structures within a **two-year period** after the award of a contract.

This policy provision takes account of the competitive nature of the licensing process for these contracts and the resources dedicated to the preparation of applications by each applicant group. The BAI believes this approach is desirable because a change in ownership within a

⁵ In the case of radio, “audience” refers to listeners; in the case of television, “audience” refers to viewers; in the case of print media, “audience” refers to readers; in the case of broadcasting services platforms, “audience” refers to subscribers.

two-year period would be likely to undermine the integrity of the licensing process itself and be unfair to unsuccessful applicants.

The BAI operates a level of flexibility where an application for such change is from an applicant whose contract has been renewed. An application in such case should satisfy the following criteria:

- There were no other applicants for the contract;
- The shareholders who are disposing of their interest were also shareholders of the applicant over the period of the first contract; and
- The proposed new shareholders have undertaken to comply with all of the contractual obligations arising from the contract concluded between the BAI and the original applicant.

The BAI shall not apply any specific moratorium on changes in the ownership and/or control of multiplex contractors appointed under section 137 of the Act. Contractors shall, however, be subject to statutory and contractual provisions in relation to any changes proposed.

(h) Programming

The statutory framework of the Act requires the BAI to have regard to the quality and/or the range and type of programming proposed by applicants.

The BAI believes that it is important, when considering applications for contracts, and proposals that involve changes at the level of “substantial interests” or “control”, to ask the applicant to set out its proposals in relation to the programming remit of the service.

The BAI shall consider these proposals with reference to the following:

- Is the general quality and/or range, type and schedule of programming to be provided appropriate with regard to the audience to be served?
- In the context of services licensed under Sections 63 and 70, does the Programme Policy Statement of the service reflect sufficient commitment to:
 - Serving audiences in the relevant franchise area?
 - The creation of new opportunities for Irish talent in music, drama and entertainment?
 - Programmes relating to Irish language and culture?
- In the context of community services licensed, does the Programme Policy Statement of the service
 - Have the sole objective of specifically addressing the interest of and seeking to provide a social benefit to, the community concerned?
 - Facilitate and support active participation in all aspects of programming by the community concerned?

(i) Competition Act 2002

Section 23 of the Competition Act 2002 ("the 2002 Act") sets out the respective statutory roles of the Competition Authority ("the Authority") and the Minister for Jobs Enterprise and Innovation ("the Minister") in respect of media mergers. The definition of a media business includes, *inter alia*, services licensed by the BAI.

Pursuant to this provision, the Minister retains a public interest role in the control of media mergers and, in certain circumstances, may order that a media merger may or may not be put into effect or may be put into effect subject to specified conditions. In reaching a decision, the Minister is required to have regard to a set of "relevant criteria."⁶ Consideration by the Minister of such mergers may overlap with consideration by the BAI pursuant to the statutory provisions and the provisions of the *BAI Ownership and Control Policy (2012)*. In addition, the BAI may, pursuant to Section 23(6) of the 2002 Act, make its views known to the Minister regarding any proposed change.

In assessing applications for changes in the ownership and control of an entity, and in making its determination in this regard, the BAI will have regard to the statutory, contractual and policy framework set out in section 1 of this Policy and the role and powers of the Competition Authority and of the Minister pursuant to the provisions of the 2002 Act.

(j) Non-EU Entities

In considering ownership and/or control proposals, the BAI requires that non-EU entities shall have established a registered office within the EU. The BAI shall also have regard to the extent to which reciprocal arrangements for investment and licensing are in place with the relevant non-EU state.

(k) Concrete indicators of Diversity

In the draft Broadcasting Services Strategy the Authority stated that it would consider the potential for introducing into its Policy the concept of concrete indicators of diversity within media organisations e.g. the extent to which both the policies and practices of the media organisation model inclusiveness (including employment and staff policies) and reflect a full range of audience interests, the range of sources of news, information and viewpoints available to the broadcaster, the track record of the broadcaster with regard to fairness, impartiality and objectivity in news and current affairs provision, the commitments included in a broadcaster's Programme Policy Statement, and its track record in relation to compliance with these.

The Authority notes that the new Consumer and Competition Bill also plans to address this area. While appreciating the importance and potential of this approach, the Authority has decided that it will consider this issue further once the new Consumer and Competition Act has come into effect.

⁶ See Section 1 (Policy Framework) for the provisions of the 2002 Act.

APPENDIX ONE – LEGISLATIVE PROVISIONS

(i) THE LEGISLATIVE PROVISIONS

The Broadcasting Act 2009 provides the statutory framework for the licensing and regulation of broadcasting and multiplex services in Ireland. *The Competition Act, 2002* and the *EU Audio Visual Media Services Directive*⁷ ("AVMS Directive") also contain provisions that need to be considered in the context of the ownership and control of private commercial broadcasting services in Ireland. All of the above provide the legislative framework for the *BAI Ownership and Control Policy (2012)* and the relevant provisions are set out at Appendix One.

- (a) Broadcasting Act 2009
- (b) Competition Act 2002
- (c) The AVMS Directive

(a) Broadcasting Act 2009

Available at: <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

(i) Introduction

Section 25(1) of the *Broadcasting Act 2009* provides that the Authority and the statutory committees, in performing their functions, shall endeavour to ensure-

- (a) That the number and categories of broadcasting services made available in the State by virtue of this Act best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity;
- (b) That the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld, and
- (c) The provision of open and pluralistic broadcasting services.

Section 25(2) provides further that the Authority and the statutory committees shall *inter alia*:

25(2)(c) Promote diversity in control of the more influential commercial and community broadcasting services;

25(2)(d) Provide a regulatory environment that will sustain independent and impartial journalism; and,

25(2)(g) Provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities.

(ii) Statutory Definitions

The following statutory definitions are particularly relevant for the purposes of this Policy

"Broadcast" means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals,

⁷ Directive 2010/13/EU of the European Parliament and of the Council 10 March 2010

intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

“Broadcaster” means a person who supplies a compilation of programme material for the purpose of its being transmitted, relayed or distributed as a broadcasting service (whether that person transmits, relays or distributes that material as such a service or not);

“Broadcasting Contract” Means a Contract entered into under section 63, 64, 68 or 70 of the Act;

“Broadcasting Service” means a service which comprises of a compilation of programme material of any description and which is transmitted, relayed or distributed by means of an electronic communications network, directly or indirectly for simultaneous or near-simultaneous reception by the general public, whether that material is actually received or not, and where the programmes are provided in a pre-scheduled and linear order, but does not include:

- (a) A service provided in a non-linear manner where each user of the service chooses a programme from a catalogue of programmes, or
- (b) Other audio and audiovisual services provided by way of the Internet.

“Communications Media” means –

- (a) The provision of a broadcasting service,
- (b) The provision of a broadcasting services platform, or
- (c) The publication of newspapers or periodicals consisting substantially of news and comment on current affairs.

“Content Provision Contract” means a contract between the Authority and a person whereby that person may supply a compilation of programme material for the purposes of its:

- (a) Inclusion as part of a multiplex;
- (b) The purpose of its being transmitted as a broadcasting service in the State, part of the State or elsewhere by means of an electronic communications network including a satellite network, a MMD system, a fixed or mobile terrestrial network, a cable television network, an internet protocol television network or any other form of electronic communications network.

“Electronic Communications Network” means transmission systems including, where applicable –

- (a) Switching equipment,
- (b) Routing equipment, or
- (c) Other resources.

Which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, and such conveyance includes the use of –

- (i) Satellite networks
- (ii) Electricity cable systems, to the extent that they are used for the purposes of transmitting signals
- (iii) Fixed terrestrial networks (both circuit-switched and packet-switched, including the Internet)
- (iv) Mobile terrestrial networks
- (v) Networks used for either or both sound and television broadcasting, and
- (vi) Cable television and internet protocol television networks

Irrespective of the type of information conveyed.

“Multiplex” means an electronic system which combines programme material and related and other data in a digital form and the transmission of that material and data so combined by means of wireless telegraphy directly or indirectly for reception by the general public.

“Multiplex Contractor” means the holder of a contract entered into under section 131.

“Sound broadcasting service” means a broadcasting service which transmits, relays or distributes, by wireless telegraphy, communications, sounds, signs or signals intended for direct reception by the general public whether such communications, sounds, signs or signals are actually received or not.

“Wireless Telegraphy” has the same meaning as in the Wireless Telegraphy Act of 1926 which is:

“wireless telegraphy means and includes any system of communicating messages, spoken words, music, images, pictures, prints, or other communications, sounds, signs, or signals by means of radiated electro-magnetic waves originating in an apparatus or device constructed for the purpose of originating such communications, sounds, signs, or signals.

(iii) Overview of the range of Contracts covered by the Policy

Sound Broadcasting Contracts (Section 63)

The Authority, on the recommendation of the Contract Awards Committee, shall enter into sound broadcasting contracts with persons to provide sound broadcasting services in areas specified by the Authority. Sections 65, 66 and 67 deal with the application and decision making processes for sound broadcasting contracts.

Community Sound Broadcasting Contracts (Section 64)

The Authority, on the recommendation of the Contract Awards Committee, shall enter into a community sound broadcasting contract with 2 or more members of a local community or community of interest if it is satisfied that these people are representative of the community concerned. The Contract Awards Committee must also be satisfied that the broadcasting service will specifically address the interest of the relevant community and seek to provide a social benefit. Finally the Committee must be satisfied that the service will be viable and will be run on a not-for-profit basis. Sections 65, 66

and 67 deal with the application and decision making processes for sound broadcasting contracts.

The Television Programme Service Contract (Section 70)

The Authority, on the recommendation of the Contract Awards Committee, shall enter into a television programme service contract with a person or persons to provide a television programme service as a free-to-air service. This is currently held by TV3. Section 66 deals with the decision making processes for this contract.

Content Provision Contracts (Section 71)

The Authority, on the recommendation of the Contract Awards Committee, may enter into a content provision contract with a person whereby that person may supply a compilation of programme material for the purposes of its inclusion as part of a multiplex; or, its being transmitted in the State, part of the State or elsewhere by means of an electronic communications network.

An electronic communications network could be a satellite network; an MMD system; a fixed or mobile terrestrial network; a cable television network; or, an internet protocol television network.

Community Content Provision Contracts (Section 72)

The Authority shall enter into a community content provision contract with 2 or more members of a local community or community of interest if it is satisfied that these people are representative of the community concerned. The Authority must also be satisfied that the broadcasting service will specifically address the interest of the relevant community and seek to provide a social benefit. Finally the Authority must be satisfied that the service will be viable and will be run on a not-for-profit basis.

Multiplex Contracts (Section 131)

Further to the provisions of Section 131 and 136 of the 2009 Act, it is the function of the Authority to arrange for the establishment, maintenance and operation of television and sound multiplexes, including national multiplexes, in addition to any multiplexes established, maintained and operated by RTÉ. Sections 134, 135, 136 and 67 deal with the application and decision making processes for multiplex contracts.

(iv) Section 66(2) - Criteria to be applied by the Contract Awards Committee in considering applications for sound broadcasting contracts or for a television programme service contract;

Section 66(2) requires the BAI, in determining the most suitable applicant for the award of a contract, to have regard, *inter alia*, to:

- (a) the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character, expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares;

- (b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles;
 - (g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under Part 6 of the Act⁸;
 - (h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in the area specified in the notice;
 - (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in a notice.
 - (k) any other matters which the Contract Awards Committee considers to be necessary to secure the orderly development of broadcasting services.
- (v) **Section 137(2) Criteria to be applied by the Contract Awards Committee in considering applications for multiplex contracts.**

Section 137(2) requires the BAI, in determining the most suitable applicant for the award of a contract, to have regard, *inter alia*, to:

- (a) the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character, expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares;
- (b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles;
- (h) any other matters which the Contract Awards Committee considers to be necessary to secure the orderly establishment, maintenance and operation of multiplexes;
- (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in a notice under *Section 136(3)*.

(vi) **Section 66 (3)**

In considering the suitability of any applicant for the award of a sound broadcasting contract to provide a sound broadcasting service in respect of an area which includes a Gaeltacht area, the Contract Awards Committee shall have particular regard to the continuance and advancement as a spoken language of the Irish language.

(vii) **Section 66(4)**

In considering the suitability of an applicant for the award of a broadcasting contract, the Contract Awards Committee shall have regard to-

⁸ Sections 63, 64, 68, 71

- (a) The overall quality of the performance of the applicant with respect to the provision by him or her of a broadcasting service under any broadcasting contract held by him or her at, or before, the date of the making of the application, and
- (b) Reports of the Compliance Committee.

In this context, the Contract Awards Committee shall examine what it describes as “the track record” of the applicant or, if the applicant is a body corporate, the track record of its directors, manager, secretary or other similar officers and its members and the persons entitled to the beneficial ownership of shares, with reference to the criteria in Section 66(2) of the Act.

Section 66(5) requires the Contract Awards Committee to give reasons for its decision, to an applicant, where it decides to refuse to award a broadcasting contract.

(viii) Section 69 and Section 138 – Assignment or change of ownership

Sections 69 and 138 concern the terms and conditions of broadcasting and multiplex contracts respectively, including the assignment of a contract or any interest therein. In essence, it empowers the Authority to prohibit the assignment of a contract or any material change in the ownership of a company, either by specifying a condition in the contract itself, or by making the assignment subject to the previous consent in writing of the Authority. In the latter case the Authority shall have regard to the criteria set out in Section 66(2) and, where applicable, Section 66(4) in the case of broadcasting contracts; and Section 137(2) in the case of multiplex contracts.

(b) Competition Act 2002

Available at: <http://www.irishstatutebook.ie/2002/en/act/pub/0014/index.html>

Section 23 of the Competition Act, 2002 contains statutory provisions for the control of “media mergers” by the Competition Authority and the Minister for Enterprise, Trade and Employment. “Media Merger” is defined as meaning a merger or acquisition in which one or more of the undertakings involved carry on a media business in the State. The definition of “Media Business” includes ‘a business of providing a broadcasting service or a business of providing a broadcasting services platform’.⁹

In accordance with Section 23(4), the Minister may, within 30 days of a decision by the Competition Authority to allow a media merger, determine that the media merger may or may not be put into effect or may be put into effect subject to specified conditions. In making a determination, the Minister must have regard to the following “relevant criteria” under Section 23(10):

- (a) the strength and competitiveness of the media business indigenous to the State;
- (b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings;
- (c) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State; and
- (d) the share in the market in the State of one or more of the types of business activity falling within the definition of ‘media business’ that is held by any of the undertakings

⁹ Section 23(10) of the Competition Act, 2002

involved in the media merger concerned, or by any individual or other undertaking who or which has an interest in such an undertaking.

Section 23(6) of the Competition Act 2002 allows the Minister to consider submissions or observations from interested parties, such as the BAI, when making a determination in relation to a proposed media merger.

(c) *The Audiovisual Media Services Directive Available at:*

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

The *AVMS Directive provides the framework for national law* applicable to audio visual media services in each of the Member States of the European Union.

Article 2.1 of the AVMS Directive provides that 'each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that member state'.

Article 2.3-2.6 set out a number of interlinked criteria to be applied in determining if a media service provider shall be deemed to be established in a Member State. These include: where the media service provider's head office is located; where editorial decisions are made; where a significant proportion of the work force is located and where the media service provider first commenced operation . Further (subsidiary) criteria include the location of the workforce and any satellite uplink, and the use of a country's satellite capacity. In addition, the Directive allows, satellite capacity use and satellite up-link location to be applied in certain circumstances. A key objective of these provisions is to avoid cases of double jurisdiction or absence of jurisdiction by ensuring that each media service provider comes under the jurisdiction of one and only one EU country for the purposes of the Directive.

The system also ensures that broadcasters who have an impact on EU audiences are covered by the directive even when they are not established in the EU. EU authorities can exercise power via up-links located on their territory or the use of satellite capacity.

Article 4 (2) – (5) provides a new mechanism to deal with concerns raised previously about services operating under the jurisdiction of a particular member state but mostly targeting audiences in another member state. The Directive provides that if a country objects to the content in a foreign television broadcast, which is wholly or mostly directed to it, it can use a consultation procedure (cooperation procedure) to address the country of origin. The latter shall then issue a non-binding request for the broadcaster to comply with the stricter rules of the targeted country. If the broadcaster circumvents these national rules, the objecting country can also - with the Commission's prior approval – take binding measures (circumvention procedure).

