

**Stakeholder Consultation for 2018
BAI Review of Ownership and Control Policy**

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1. Introduction

Section 25 of the 2009 Broadcasting Act provides for the BAI to perform a regulatory role with regard to the ownership and control of media institutions in Ireland. In addition to ensuring “the provision of open and pluralistic broadcasting services” in Ireland, the section requires the Authority to “promote diversity in control of the more influential commercial and community broadcasting services”. Part 6 of the 2009 Act also requires that the BAI’s Contract Awards Committee should have regard to the ownership and control of applicants when assessing applications for the award of broadcasting contracts. Given this, the BAI has devised an Ownership and Control Policy which was initially introduced in 2001 and which has subsequently been reviewed on three occasions, most recently in 2012.

The 2014 Competition and Consumer Protection Act expanded the BAI’s role with regard to plurality and introduced a new definition of media plurality which emphasized the need to encourage both Diversity of Content and Diversity of Ownership. The 2014 Act also created new obligations for the BAI relating to Ownership and Control including the provision of advice to the Minister for Communications, Climate Action and Environment on the impact of a proposed media merger on plurality in the State, if requested.

Give the emphasis on promoting diversity and plurality in the BAI’s current Strategy Statement, the BAI’s current work-plan includes the development of a new and separate Plurality Policy and a review of the 2012 iteration of the Authority’s 2012 Ownership and Control Policy.

That review process is broken into five steps. Phase one entailed an operational review. Phase two was constituted by active consultation with relevant stakeholders regarding the current BAI Ownership and Control Policy. Relevant stakeholders included commercial, community and public service broadcasters, broadcasting representative groups and networks, the NUJ, third level colleges, the Competition and Consumer Protection Commission and the Department of Communications, Climate Action and Environment. Based on the first two phases, Phase three will entail the development of a draft revised Ownership and Control Policy followed by the fourth phase - a public consultation on that Revised Policy. The final phase will see the publication of a Revised BAI Ownership and Control Policy.

In February 2018, the BAI sent out a tender document seeking submissions for a survey of stakeholder views on the current BAI Ownership and Control Policy. Dr Roddy Flynn as a member of the Institute of Future Media and Journalism research centre at DCU submitted a proposed work-plan and budget and successfully secured the contract.

The initial tender document asked the researcher to apply a questionnaire, devised by the BAI Executive, to a specified list of stakeholders and liaise with the latter in order to encourage a high response rate. Thereafter, follow-up interviews were to be conducted with selected, identified stakeholders. The submissions/interviews were to be summarised in a detailed review document to be presented the BAI.

2. Methodology

The work commenced in March 2018. The BAI contacted all stakeholders to alert them to the research and to expect an approach from an independent researcher. On March 26th all 41 stakeholders identified by the BAI were directly contacted by the researcher and asked to address the questionnaire examining all aspects of the BAI's current Ownership and Control Policy and to consider some mooted changes to that policy. In the following weeks, the researcher made a series of follow-up contacts with those stakeholders who had not yet responded. Stakeholders who did not respond after three approaches were considered as having tacitly declined to participate. Details of respondents to the questionnaire is provided at Appendix 1.

In total the research received 22 responses from stakeholders. The bulk of these were from BAI licenced radio and television operators but also included interest groups such as the Independent Broadcasters of Ireland, Craol (the national representative body for community radio), and the National Union of Journalists. There were also submissions/interviews from/with the Department of Communications, Climate Action and Environment and with the Commission for Consumer Protection and Competition. The responses represent more than 20 institutions, however, given a degree of institutional overlap in the original stakeholder list. For example, TV3 and Virgin, offered a joint response, while the head of the KCLR radio station is also the current chair of the IBI. Furthermore, when contacted directly, five local stations stated that they considered the IBI as having responded on their behalf.

With regard to the absent responses, some stakeholders did suggest that they might have views on the subject of ownership and control but were unable to address these within the time frame of the research. Others stated that they simply had no particular issues with the policy as it stood or did not consider it relevant to their operations.

Nonetheless, we believe that the responses that were received can be taken as reflecting a broad set of views from the Irish broadcast sector and related institutions. In most cases the written submissions were constituted by detailed, lengthy and considered responses to the questions posed in the questionnaire. Such was the level of detail that, following consultation with the BAI, the decision was taken to limit the use of follow-up interviews for the purposes of clarifying points of ambiguity within responses.

3. Presentation

This document is presented as follows: it opens with a precis of the remarks from the respondents describing the current state of the Irish broadcast media market which contextualise the responses offered to the specific questions which follow. The main body of the report is divided in line with the first eight parts of the current BAI Ownership and Control Policy structure. The last section summarises – without endorsing - suggested changes to the current BAI Ownership and Control Policy emerging from the respondents’ comments.

4. Opening remarks

A number of the respondents preceded their responses to specific questions with substantial introductions contextualising those responses. Though there are differences in their respective emphases, their perspectives can be summarised as follows:

- There is an almost universal assertion that the Irish media landscape as a whole, and radio in particular, is undergoing rapid change.
- Respondents point out that radio is accounting for a declining share of the total Irish advertising market.
- At the same time, they point out that digital/online/social media, often headquartered outside Ireland, are securing an ever larger share of that same market.
- Some respondents argue that some of these online media are producing audio content which constitutes de facto competition for radio stations.
- Given this, the respondents further note that while radio stations are subject to stringent regulation (relating to Ownership and Control but also content, advertising, fairness and impartiality etc.,) their online counterparts operate in a largely deregulated environment. They state that meeting regulatory obligations imposes costs on BAI-licenced stations which are not faced by their online counterparts.
- For many respondents, the effect of this is to create an imbalanced playing field across media undermining the viability of locally-regulated radio (and television) stations, threatening their very existence.
- At the same time, however, a number of respondents argue that the fact that online media are effectively producing radio-like content expands the scale of the audio content market. This has implications for how the BAI and other institutions should define market dominance and opinion-forming power: metrics which consider audience share solely on the basis of the broadcast radio market are excluding much of the relevant market and thus over-emphasize the opinion-forming power of individual outlets.
- Thus some respondents conclude that limits on radio ownership should take into account the online provision of media content when establishing the size of the market as a whole. Furthermore, they assert that the BAI should consider the need to optimise flexibility and commercial opportunities in the radio market.
- (Logically, given that online media are equally capable of mimicking legacy audiovisual content, the same argument should also apply to the status of television stations.)

It is worth noting that the contextualisation above only partially relates directly to questions of ownership and control. The general point is to emphasize the precarious position of legacy broadcast media as a whole and the need to develop the BAI Ownership and Control Policy in such a way as to sustain the viability of the sector as a whole. (Thus the responses should be seen in the light of the conclusions of the Mediatique Report and the ongoing review of the BAI Broadcasting Services Strategy).

In addition to this, the response from the Department of Communications, Climate Action and Environment (DCCA) did not address the specific questions outlined but rather focused on some key principles informing the consultation. The DCCA note that although the two frameworks are not formally aligned there are obvious similarities between the BAI's Ownership and Control Policy and the DCCA's Media Mergers Regime. Both focus on promoting or safeguarding diversity and pluralism in media and on fostering a regulatory environment that will enable media companies to flourish and ensure that a diverse range of views are heard. The DCCA note that the Media Mergers regime does have a wider scope than the Authority's licensing role and necessarily lacks the contractual element built into the BAI's Ownership and Control Policy. (For example the DCCA performs a watchdog function in relation to the potential concentration of media ownership in the State (in respect of the proposed changes in the ownership of media businesses).)

Nonetheless given the overarching scope of the Media Mergers regime and the role of the Authority within the regime, the DCCA argues that the BAI Ownership and Control Policy should be aligned as much as possible with the Media Mergers regime while maintaining its contractual focus.

In its interview the Competition and Consumer Protection Commission made some broadly similar points about the need to ensure that their Media Merger processes and, in particular how they sequenced with the BAI's Ownership and Control mechanisms, meshed. In particular they highlight the need to avoid a situation whereby the BAI okays a merger or acquisition in advance of the CCPC's completing their assessment. However the CCPC, acknowledged that concerns that an earlier licencing approval from the BAI might be used as leverage in negotiations with the CCPC might be addressed by recourse to language emphasizing that approval from either the CCPC or the BAI did not prejudice the decision of the other. More specifically, the CCPC suggest that a BAI decision to grant a licence should be conditioned by the phrase "subject to CCPC approval".

Finally, RTÉ's response also adopted the mode of advancing a set of broad principles which the station felt should inform the BAI's Ownership and Control Policy rather than directly addressed the set questions. In line with submissions from many other stakeholders RTÉ point to the difficulty of considering individual media in isolation for ownership and control purposes. However, RTÉ's take on this issue draws attention to instances of cross-media ownership beyond content producers (i.e. print media, radio and television stations) to include ownership of distribution of broadcast and online distribution platforms.

RTÉ argues that an increasingly converged media landscape makes it impossible to consider issues of media ownership and content creation, in isolation from the issue of ownership of service (e.g. platform, channel, station).

RTÉ also argue that ownership and control policies should be informed by consideration of the need to specifically protect and promote Irish voices, perspectives, experiences and culture, in an increasingly globalised media landscape.

RTÉ also draws attention to the likely relevance of the AVMS Directive (once finalised) for issues of media ownership, regulation and concentration within the EU. The station expresses the hope that the developing regulatory framework is developed on the basis of these anticipated additional challenges.

Again, in line with many other stakeholders, RTÉ draws attention to the importance of viability/sustainability as a policy consideration especially with regard to discussions around the licencing of entirely new broadcast services by the BAI. The station argues that diversity of national cultural expression, and audience choice, relies on the existence of a strong and vibrant national media sector. RTÉ further notes that ensuring the financial health of the sector as a whole should be based upon accurate and comprehensive media market intelligence taking into account the role of international media consumption in Ireland and the resulting leakage of commercial income out of the Irish market.

5. Policy Provisions

The following pages summarise the views expressed by the respondents with regard to each section of the existing Ownership and Control Policy. In the case of each section, stakeholders were invited to respond to a single or number of questions about the Policy provisions. The questions are included in the analysis below. The layout of this document follows the order of section 2 of the existing Ownership and Control Policy document. This section is subdivided into two sections on “Policy Objectives” and “Policy Details”. The following pages thus outline respondent views on the current Policy Objectives before moving to consider the more substantial Policy Details section which is itself broken down into eleven subsections. These subsections cover a range of areas including the definition of key terms, how the BAI assesses an “undue” level of media ownership, the role played by programming etc. All of these are covered in sequence barring the last category (Section 2(ii)(k)) referring to “Concrete Indicators of Diversity”. (Given that the BAI is devising a new standalone Plurality Policy, question relating to this section were omitted from the questionnaire sent to the respondents.)

5.1 Policy Objectives

At present, the policy objectives of the BAI’s Ownership and Control policy broadly seek to achieve the following:

- 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.

These objectives are grounded in the obligation and objectives directly and indirectly imposed upon the Authority by sections 25(1)(c), 25(1)(b), 25(2)(c), 39(a)(1) and 66(2)(a) of the 2009 Broadcasting Act.

Question: *Do you think the objectives of the policy are appropriate, given the BAI's statutory obligation and Statement of Strategy 2017-2019?*

The majority of respondents appear to accept that the existing set of policy objectives - advanced as a basis for the finer details of the BAI ownership and Control Policy - are appropriate, though a small number highlight some issues relating to particular elements within specific objectives. These include the suggestion that references to the need for diversity of voices, opinions and sources should be broadened to explicitly reference the need to include both male and female voices. In addition, with regard to the objective of promoting diversity of control of the "more influential" broadcasting services", the question is raised as to how the phrase "more influential" is operationalised and on what basis the BAI distinguishes between more and less influential services. The CCPC also makes the point that the objectives as currently phrased make no direct reference to "diversity of ownership" (or indeed "ownership") and suggest that this be adjusted.

Beyond this, however, there are a cohort of respondents who take issue with the manner in which the objectives treat radio and television in isolation from other media markets. For example the first objective refers to the promotion of "open and pluralistic broadcasting services with *particular reference to radio and television services*". (Italics added.)

From a BAI perspective, the rationale for the treatment of radio and television as distinct from online media may seem obvious given that, under current legislation, the BAI is only empowered to licence and regulate radio and television stations. (Only if specifically invited to express an opinion on non-broadcast media mergers/acquisitions (as is provided for in the 2014 Act), can the BAI have any kind of say over the licencing of print or online media.)

Nonetheless, a number of respondents suggest that the implied focus on radio and television in the first and fourth objectives to the exclusion of the consideration of other media, is simply too narrow given the broader transformation of media markets since the original inception of the BAI Ownership and Control Policy (and even since its last update in 2012). Specifically such respondents point to the role of online media which they suggest form a key (if not dominant) element of the matrix of views and voices encountered by media audiences. E.g. TV3/Virgin's response notes that while the policy objectives are appropriate, "they do not reflect explicitly the influence that Social Media platforms now have in the Media space, both in terms of Audience reach but also in the significant commercial revenues they attract." The response from Clare FM and Tipp FM stresses that media merger legislation must be broadened to encompass ALL media and "not have a narrow ad restrictive view on Radio and TV alone. "

Thus several of the respondents suggest that plurality of ownership should be assessed on a cross-media basis and that medium-specific ownership controls should be removed. This emphasis on the need to reflect the changed nature of the wider media ecology in which broadcasters operate is echoed in responses to subsequent questions.

Question: *Should any additional objective be included?*

Given the emphasis on the precarious state of the broadcast sector as a whole in their introductory remarks, it is not surprising that many respondents emphasize the need to include the viability and sustainability of the indigenous radio sector as objectives for the Ownership and Control policy.

TV3/Virgin suggest adding (or amending an existing objective) thus: “To promote open and pluralistic broadcasting services with particular reference to radio and television services *that are developed and controlled from within the State.*” (Italics added.) In a similar vein Beat 102-103 FM suggest the following: “To appropriately support and encourage existing and new indigenous owners to operate in the broadcasting sector.”

This emphasis on “indigenous” seems intended to invoke the presence in Irish media markets of online media which, though often headquartered outside the state, can easily bypass its borders in the delivery of content.

Having outlined these proposed new objectives – an emphasis on 1) the viability of 2) indigenous media outlets - the respondents work through their implications for BAI regulation. The IBI refers to the need to support independent radio stations in general but place particular emphasis on support for investment into news and current affairs. (This refers to the idea that the BAI might permit the use of the Sound and Vision fund for news and current affairs programming.) In a similar vein, comments from a variety of independent stations suggest that the Broadcast levy is regarded as particularly onerous – not least because it is not levied upon online competition - and thus should be removed in order to sustain the viability of locally-owned broadcasters.

In addition to the above the NUJ suggests adding a third objective: “The maintenance of employment standards within the sector”. Midwest Radio also adds a fourth: the promotion of excellence/punishment of poor performance in the industry by meaningfully recognising the “performance track records of current Incumbents” when renewing licences.

5.2 Policy Details – (A) Interpretation of Terms

The key terms outlined at the beginning of the current BAI Ownership and Control Policy relate to the distinction between a small interest, a substantial interest and a controlling interest in a media outlet.

The BAI currently defines a “controlling interest” as one where an individual or company is in a position proprietarily, financially or in terms of voting rights to **determine** or direct the policy of the media outlet, with regard in particular to programme output, that is, sourcing, production, supply or delivery to the audience.

For the BAI a “substantial interest” is constituted when an individual or company—has sufficient proprietary, financial or voting strength within a media outlet to be able to **influence** directly or indirectly to an appreciable extent the strategic direction or policy (which shall include editorial policy) of the media outlet, with regard in particular to programme output, that is, the sourcing, production, supply or delivery of content to the audience.

A small interest is anything falling below the substantial threshold, which in practice the BAI defines as meaning anything less than 10% of voting capital and or shares in the media outlet.

Although these definitions include control over all aspects of the policy of media outlets, the BAI further emphasizes - in line with its core mission to promote diversity in viewpoint, outlet and source- that it is primarily concerned with how different levels of ownership translate into control/influence over *programme output*.

There is a broad acceptance among the respondents that the definition of the terms “control” and “substantial interest” as presently defined are appropriate and that the 10% shareholding threshold is also an appropriate point above which to describe a holding as substantive. (The few minor dissensions from this outlined below.) The single most substantive response to this set of questions came from Communicorp which though accepting the current definition of a “control” queries how the concept of “substantial interest” is operationalised. (Again, see below.)

Question: *Do you think the interpretation of the term ‘control’ continues to be relevant and appropriate in light of the BAI’s regulatory remit? If not, what other interpretation do you think should be applied or what amendments do you propose?*

Again, the majority agree with the relevance and appropriateness of the current definition of control. Of those who did not, the strongest critique came from the NUJ which describes the definition of control as “manifestly inadequate” citing the need to take account of a substantial shareholder’s ability to exercise influence through, for example, making board appointments.

TV3/Virgin suggest that a distinction should be made between financial/corporate control and/or editorial control. They make the point that although the TV3/Virgin Group is technically owned by Virgin Media UK (and indirectly by Liberty Global) that they are an element of Virgin Media Ireland. At that corporate level, investment decisions relating to Virgin Media Ireland's cable/broadband operation will be made at the same time as decisions regarding investment in the TV3/Virgin group. However, the TV3/Virgin group assert that they are definitively independent at an editorial level from Virgin Media. In other words, control at the level of shareholding may not be identical with editorial control which, as the BAI notes, is their primary concern.

Fujomedia raise a couple of points with regard to this definition. They state that the definition of "Control" seems to assume that it is self-evident as to whether an owner can determine the policy (including editorial policy) of a given media outlet. However, Fujomedia asks whether it would be useful to overtly describe how the BAI makes this determination. For example, is the working definition of "control" a 51% or higher shareholding or does it refer to a corporate structure explicitly empowering a major shareholder/owner broadly to direct editorial policy? Are there other forms of control (as opposed to "influence") which may not require a majority shareholding? Either way, they states that it would seem helpful to clarify for media outlets how control is understood.

Question: *Do you think the interpretation of the term 'substantial interest' is appropriate in light of the BAI's regulatory remit? If not, what other interpretation do you think should be applied or what amendments would you propose?*

Again, the majority of respondents agree that the interpretation of 'substantial interest' is appropriate in light of the BAI's regulatory remit. However, Communicorp suggest that the "tight regulation of Programme Policy Statements (PPS) coupled with balance and fairness requirements" means that the scope for an individual or entity to extend their influence into the editorial realm of a radio station is "negligible". (Logically this would also apply to a controlling share as well as a substantial interest.) Thus Communicorp suggests that the focus on absolute numbers in terms of shares is too crude a basis for asserting a substantial interest/control and should be considered in relation to the actual rights associated with those shares and some discussion of the extent to which regulatory strictures curtail the meaningful exercise of those rights.

TV3/Virgin suggest that there does not seem to be a significant distinction between the terms "control" and "substantial interest". They argue that regardless of the shareholding the key issue for the BAI should be whether an individual or entity can interfere with the editorial independence of any organisation that services news production. They note that although the BAI's default position is that a 10% or higher shareholding automatically constitutes a substantial interest, the Authority's policy also acknowledges that even a sub-10% holding *may* constitute such an interest depending on the overall shareholding structure of the relevant company.

TV3/Virgin thus suggest the BAI should offer greater clarity on what constitutes a substantial interest and this clarity should be based on an objective test.

Ocean FM note that it may be possible for one company to exert de facto influence over the editorial content of other stations, even when the first company has no shareholding at all in those stations. They cite the example of Newstalk's provision of national and international news services to independent radio stations across the country as creating a "significant opportunity to reduce diversity and plurality in broadcasting across the country."

With regard to the suggestion that a substantial interest suggests a capacity to influence editorial policy to an "appreciable extent", Fijomedia asks how this is assessed in practice? Does it require evidence of specific (i.e. "appreciable") incidences where an entity with 10%-plus shareholdings have intervened to shape policy or does it adopt a risk-based approach and assume that 10% ipso facto makes such an intervention a possibility?

Question: *Do you think that the indicative shareholding threshold applied for the determination of a 'substantial interest' remains appropriate? If not, what other thresholds do you think should be applied or what other amendments would you propose?*

There is some suggestion that the 10% threshold is too low to constitute a substantial interest. Classic Hits/4FM/Sunshine 106.8 and WLR FM suggest that the threshold should be raised to a 20% shareholding. Midwest Radio argue that what constitutes substantial should be assessed on a case-by-case basis, given that such influence is contingent on the size of other shareholdings. (For example where three shareholders each hold 25% of the share then, even a 15% shareholding may not constitute a basis for exerting an "appreciable" influence on media outlet policy.)

Finally, in the context of considering ownership and control limits and while not specifically rejecting the 10% threshold, Communicorp argues that a shareholding which falls below outright control should only be considered as a substantial interest if it confers "negative control" power on the shareholder (e.g. conferring the capacity to block strategic decisions but not to impose alternative decisions).

Question: *What other amendments, if any, would you propose to the above section?*

Following on from their last point, Communicorp argues that for the purposes of caps on ownership (e.g. the 25% of the total number of licenced broadcast services) a substantial interest entailing negative control should only be treated as a half ownership.

However Communicorp also strongly argue that the cap on the total number of licences needs to be increased to reflect the changes occurring in the wider media market as a result of the emergence of competition from online media. They envisage a situation closer to the current UK market structure whereby the Irish

radio market would be dominated by three major independent players along with standalone independents and suggest that such a structure would create economies of scale and scope which could sustain a diversity of radio formats. (Note that they specifically cite the Mediatique Report as supporting this assertion.)

The only other substantive comment on the section comes from WLR FM which suggests that the BAI offer more detailed guidelines on the ideal composition of boards, further suggesting that BAI-licenced stations should conduct annual reviews to identify and analyse skills gaps. The intent here is to achieve “better balanced boards with more senior staff in stations attaining director status.”

5.3 Policy Details – (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”. The BAI takes character into account by asking whether the applicant has: been convicted of an offence involving fraud or dishonesty; been restricted or disqualified as a Company Director; been adjudicated a bankrupt or become insolvent; been a director of a company which went into receivership or liquidation; been convicted of an offence counter under Broadcasting and/or the Wireless Group Telegraphy legislation; lost/or had suspended a licence by a broadcasting or any other statutory body; or has any other reason to think they may be regarded as other than a fit and proper person?

It is important to emphasize that affirmative answer to any of these questions does not automatically disbar a potential applicant from holding a licence. They are purely factors to be considered.

Question: *Do you think it is appropriate for the BAI to apply the character tests when considering applications for all types of broadcasting contracts, e.g. commercial radio and television, community radio and television and content provision contracts?*

There is universal agreement that the BAI should continue to apply character tests in this context.

Question: *Do you think the character tests/questions remain relevant and appropriate? Should additional tests/questions be included?*

Although the majority of respondents were happy to leave the current question unchanged, a number of respondents (TV3/Virgin, the IBI, WLR FM, Ocean FM, Classic Hits and 4FM/Sunshine 106.8) questioned whether test (iii) relating to bankruptcy and insolvency remained appropriate in the context of the post-2008 economic Crisis. Given that quite a number of parties (both within and outside Ireland) potentially interested in acquiring a media outlet may have experienced such financial difficulties, the question is raised as to whether these should necessarily be considered an impediment to successful licence operations. Specifically the question is asked: if the individual/entity involved addressed their financial obligations in an orderly and legal manner, what is the rationale for preventing them from re-entering business?

Beat 102-103 FM suggest that an additional test, namely has the applicant ever previously made a licence application and then withdrawn midway through the process as a means of establishing the legitimacy of the application? (Beat 102-103 FM notes that competitive bids increase the application costs for other applicants.)

Finally, the NUJ argues that the character test should be extended to include consideration of any adverse findings by a statutory investigation, such as a Tribunal of Inquiry or an investigation by the Office of the Director of Corporate Enforcement. Furthermore, the NUJ also favours a specific reference to compliance with statutory codes suggesting that the determination of whether an applicant is a fit and proper person should take account of the views of institutions and agencies of the state such as the Pensions Authority, Work Relations Commission etc.

Question: *Do you think the character tests/questions should apply to (i) directors of the contractor; (ii) senior managers (CEO, Financial Controller, Programme Controller and Compliance Officer or equivalents); and (iii) shareholders having a direct or indirect substantial or controlling interest in the contractor?*

Although most respondents agree that shareholders, directors and the CEO should be subject to such character tests, there is widespread disagreement with the idea that they be applied to other members of the senior management team. The responses consider this as potentially constituting micro-management of licensees on the part of the Authority and would potentially place the Authority in the position of being able to determine who did/did not get a job within the relevant media outlet.

Even amongst the independent radio stations – WLR FM, Ocean FM, Midwest Radio, the Radio Kerry Group, KFM and BEAT 102 – who *do* agree with the extension of the tests to senior management there is disagreement as to how far this should be extended. Thus WLR FM and Beat 102-103 FM note that it would be preferable to avoid employing a CEO or Financial Manager with a fraud conviction but, again, can see no rationale for debarring someone from holding a Programme Controller role on the basis of insolvency. In sum then, there is no broad support for the application of all character tests to all senior management personnel.

Question: *Do you think the tests/questions relating to experience and expertise are appropriate? Should any other tests/questions be included?*

There is also near universal agreement that the questions relating to experience of both the Board of Directors and the Management Team are appropriate. It is considered important that, in order to award a licence, the BAI should be confident that the potential licensee has both the personnel and know-how needed to deliver a service in accordance with the agreed contract.

The only additional suggestion in this regard came from Beat 102-103 FM which suggests adding a question considering the diversity and gender make-up of the both Board of Directors and Management Team.

For their part Craol note that the nature of Community Radio is such that a strict adherence to the requirement for such expertise could make it impossible for some community stations to exist in the first place.

Question: *What other amendments, if any, would you propose to the above section?*

Midwest Radio propose adding a question as to whether the applicant has fulfilled all previous contractual commitments to the BAI but there were no suggestions for further amendments here.

5.4 Policy Details – (C) Financial Resources etc.

In considering applications for the award of contracts, the BAI must assess “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”. The respondents generally agree with this requirement, although Craol, the organisation representing community broadcasters, queries how it applies to the not-for-profit status of its members.

Question: *Do you think it is appropriate for the BAI to apply this test having regard to the legislative provisions of section 66(2) and section 137(2) of the 2009 Act?*

Again, there is near universal agreement that the BAI should consider whether the applicant is adequately capitalised, and is following a sound business plan which addresses the demands of the specific licence. Communicorp makes the point that the reference to “financial resources” should not be narrowly interpreted as exclusively referring to applicants who are already fully capitalised but that it should include consideration of guaranteed lines of credit and other forms of access to capital (an approach which they suggest already characterises the BAI’s current practice.)

Craol again highlights the specific context of Community Broadcasting noting that the application of business and economic principles may not necessarily be appropriate for community stations. They instead propose taking into account the social impact of Community stations and applying a model of Social Return in Investment (SROI).

Question: *Do you think the test/question is relevant, appropriate and clear? Should any other tests/questions apply?*

For their part Craol argue that, from their perspective at least, there is a question as to whether an applicant for a community licence has adopted/should adopt one-size-fits-all “good business and economic principles”. Thus Craol seeks greater clarity as to how this principle is applied with regard to community broadcasters.

Some concern is expressed as to the role played by advertising and sponsorship with regard to Community Radio stations. There is a sense (expressed by TV3/Virgin) that the ability of community stations to raise up to 50% of their costs from such sources could potentially draw money away from commercial services. Thus it is suggested that the BAI consider other funding options for such stations. In a similar vein, Ocean FM suggest that it is not sufficient to state the ads/sponsorship may account for no more than 50% of operational costs of community stations: these costs should be spelled out in advance in order for that 50% limit to be made meaningful.

Communicorp suggests that the BAI should consider issues such as the cost of credit and the general availability of credit when assessing the financial viability of radio stations.

Question: *What other amendments, if any, would you propose to the above section?*

No further amendments are proposed.

5.5 Policy Details - (D) An undue number of sound broadcasting services

Section 66(2)(g) of the 2009 Broadcasting 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 a bid to offer some guidance as to what constitutes an “undue” number of radio stations, the BAI operates four ownership thresholds, which calculate the number of stations owned by a given radio group as a percentage of the total number of commercial stations licenced by the BAI in Ireland. Ownership of anything up to 15% of all local, regional, multi-city and national franchises in Ireland is considered acceptable. Anything over 25% of all licences (currently 8 stations or more give that there are 34 licenced stations) is considered unacceptable. As the level of ownership moves between 15% - 20% and 20% - 25%, the BAI applies additional, more substantive tests to ensure that increased concentration of ownership will not reduce the diversity and range of voices available to the public via their radio services.

At the outset it should be noted that only two of the respondents – Communicorp and the Wireless Group – currently have holdings which surpass any of the thresholds. Even the lowest threshold (15%) would require a radio group to own 4-5 stations before that threshold was breached. This is not to suggest that submissions from other respondents shouldn’t be considered but somehow less significant but simply to point out that it is a particularly “live” issue for those two groups.

Question: *Is your understanding of the BAI’s application of the criteria set out in this section clear?*

There appears to be widespread agreement that the criteria distinguishing the four thresholds are clear. Communicorp suggest that in cases where a company owns 24.74% or less of the companies licenced by the BAI that this should be rounded down to a 24%. Anything between 24.75 and 24.99 should be treated as 25%. WLR FM do express surprise at the idea that a substantial interest in a smaller local station might be given the same weighting (in terms of limits on ownership) as a controlling share of a national station for the purposes of these thresholds.

Question: *Do you think the percentage thresholds applied by the BAI remain appropriate? What other thresholds could the BAI apply or what other amendments would you propose?*

There is some divergence here amongst the respondents. A number of individual radio stations - iRadio, Beat 102-103 FM, the Radio Kerry Group, KFM, Clare FM and Tipp FM - suggest that the current thresholds are appropriate and do not require changing. WLR FM do not suggest changing the threshold but suggest that the current reliance on the absolute number of stations held by groups as opposed to measuring concentrations by total *audience* share across a group of stations is problematic.

Fujomedia echo this view: it acknowledges the difficulty of tracking a “moving target” like audience share and that such an approach has the potential to punish success (e.g. a radio group which starts with a 20% audience share may, through innovative programming, win new listeners and see that share surpass 25%, at which point the application of an absolute threshold would logically require some divestment.) However, Fujomedia also point out that although Communicorp and the Wireless Group own a similar number of stations, the fact that Communicorp’s stable include both private national radio stations means that their audience share substantially exceeds that the Wireless Group. Yet the two are considered as roughly equivalent in size in terms of calculating their size relative to the thresholds. Thus Fujomedia proposes that, if a threshold system is to be used, that it be related to audience share.

For their part both Midwest Radio and 4FM/Sunshine 106.8 accept the idea of thresholds in principle but argue that they should be made less stringent. Classic Hits 4FM/Sunshine 106.8 advocate raising each of the thresholds by 5% (i.e. bringing the maximum level of station ownership permissible to 30% of all licenced stations). Midwest Radio go further and suggest that the thresholds be doubled (i.e. allowing a single group to own up to 50% of all licenced stations and – logically – potentially reducing the private radio market to two players). Both stations advance these arguments on the grounds that raising the thresholds will permit more consolidation, greater economies of scope and scale and thus greater all-round viability. (Indeed Classic Hits 4FM/Sunshine 106.8 specifically suggests that the application of any threshold should be considered against the likelihood that a given station would otherwise cease operations.) It is suggested that failure to do so will encourage increasing recourse on the part of stations to cheap programming to compete against other (implicitly online) media.

It is also worth recording in this particular regard that the DCCA highlights the manner in which the broader Media Mergers regime applies thresholds: as guidelines for when regulatory intervention may be required rather than as inflexible “*bright lines*” that do not allow for a nuanced case by case approach. In line with the comments from many other respondents, the DCCA considers such an approach to be preferable, particularly in the current rapidly changing media environment.

The Wireless Group, Communicorp and the IBI reference similar logic in calling for the complete removal of the threshold. They suggest that the threshold figures are arbitrary and, in the case of the Wireless Group, that radio specific restrictions should in any case be replaced with a cross-media basis for assessing the plurality of ownership. (Notably the NUJ agrees with this argument suggesting that any ownership thresholds should always be applied on a cross-media basis.) The submission from Wireless stress again that given the threats to the sustainability of the sector and the viability of individual stations, the relaxation of ownership thresholds may be the only way for some stations to remain operational.

All three submissions argue that the BAI must decide whether an emphasis on *diversity of ownership* should take precedence over the risk that stations with marginal viability will close, thus reducing the *diversity of content and services*. The answer offered in these submissions clearly suggests that in this context, diversity of content and services should be the paramount consideration. Thus rather than operating within (and potentially being hamstrung by) arbitrary thresholds, they should be entirely abandoned and changes of control should instead be assessed on a case-by-case basis. The submissions are also clear-eyed on the likely implications of this: greater consolidation in the industry encouraging increased collaboration and sharing of best practice.

Fujomedia's submission appears to anticipate this argument: that private media outlets will argue for the relaxation of thresholds and will advance the economies of scope and scale argument to support greater consolidation. Whilst not necessarily disagreeing with this logic, their submission suggests empirically examining the impact on content diversity of previous consolidations of radio station ownership since 2000. They acknowledge the logic of seeking cost savings achieved through consolidation of back office operations such as sales, marketing, HR, accounts etc., but ask whether past practice has necessarily seen these savings reinvested back into content production.

Question: *Should the BAI differentiate between whether an entity has control or substantial interests in services when making a determination under this section as is currently the case?*

The responses here are nuanced. At one level some doubt is expressed as to how meaningful the distinction between control or substantial interests is in practice. Communicorp notes that the language of the 2012 BAI Ownership and Control Policy clearly suggests that control and substantial interest are to be regarded differently. Given this they argue that it "defies common sense" that they are treated as identical for the purpose of calculating the thresholds (i.e. how many stations a group owns). Thus they strongly agree with the idea that control and substantial interest should be treated differently, reiterate their earlier point that a substantial interest shouldn't be taken into account at all for calculating ownership thresholds (unless that shareholding permits negative control).

Nonetheless, the broad response to this question agrees with sustaining the control/substantial interest distinction. As the IBI notes, there is a substantial difference in the input into radio station operations depending on whether an investor has a substantial interest or owns the station outright. WLR FM, Beat 102-103 FM, iRadio, Classic Hits 4FM/Sunshine 106.8, KFM, the Radio Kerry Group, and Clare FM and Tipp FM all echo this position.

For their part the submission from Ocean FM and the NUJ argue that, in practice, both a "substantial interest" and "control" may have the same outcome, namely that undue influence can be brought to bear on content and thus should be considered distinct.

Midwest Radio also advocates treating them as functionally identical on the grounds that to make a distinction between control and substantial interest further complicates an already complex process.

The Wireless Group adopts an equivocal position suggesting that the significance of a controlling as opposed to substantial interest will vary from case to case. Thus it advocates assessing each case individually (driven by considerations of the need for commercial and operational flexibility).

Question: *Do you think the consideration of a Compliance Audit in respect of a threshold ranging from 15% to 20% is relevant and appropriate?*

At present, if a radio group moves from holding less than 15% of all licenced radio services to a holding of between 15% and 20%, the BAI requires the group to submit a Compliance Audit covering a two-year period beginning 12 months in advance of the period at which the proposal to acquire a new station or stations was submitted.

There are a variety of perspectives at work here. There is broad support for the idea that an owner's previous compliance history should inform the BAI's assessment of an acquisition which brings a radio group's holdings over a threshold. Communicorp, Clare FM and Tipp FM, BEAT 102, WLR FM, OCEAN, the Radio Kerry Group, and KFM straightforwardly state that an audit should be considered in these circumstances.

Others, however, express doubt regarding the current level of the thresholds in some submissions. Thus both Midwest Radio and Classic Hits 4FM/Sunshine 106.8 support consideration of a compliance threshold but only if the threshold breached is 20% (Classic Hits 4FM/Sunshine 106.8) or 30% (Midwest Radio). For their part the IBI reiterate their view that the use of fixed thresholds is inherently problematic. Thus, by extension, it would be equally problematic to automatically trigger consideration of an audit once a 15% threshold was passed. (That said, the IBI does suggest that Compliance Audits might be used as a mitigating factor were the BAI considering blocking the completion of a media outlet purchase on the grounds that it breached a threshold.)

Classic Hits 4FM/Sunshine 106.8 also query whether there is a need for an entirely new full-scale Compliance Audit in the case where the new owner already has an established compliance history. Similarly, with regard to cases where existing owners are acquiring a new radio station, the Wireless Group makes the point that the very fact that they already hold (and have retained) a licence suggests that they have broadly remained in compliance with the various codes.

Question: *In respect of a threshold between 15% and 20%, in your view, should other factors be taken into account by the Authority? For example, should the Authority weight the services by size, audiences share etc.*

Question: *In respect of a threshold between 20% and 25%, in your view, are each of the additional five factors taken into account by the Authority relevant and appropriate? Should other factors be taken into account?*

At present, a group which accounts for between 15% and 20% of all radio licences is not assessed by anything more than the previously discussed Compliance Audit. However, if the holding goes over 20% (but still less than 25%), a further set of factors come into play in addition to a Compliance Audit. These are:

1. The number of radio stations where the radio groups control rather than a substantial interest.
2. The extent to which the radio stations operate in the same or distinct franchise areas.
3. The total combined share of local, regional and national of radio audience that would be enjoyed by the radio group if the proposed acquisition proceeded.
4. The extent to which the radio stations within the group post-acquisition would have common target audiences.
5. The extent to which combined radio stations owned would result in concentration of the supply of news and information taking into account *all* communications media (i.e. radio, television and print media).

These questions have generally been treated together in respondent submissions. iRadio, the Radio Kerry Group, KFM, Midwest Radio all express the view that the existing factors are sufficient and do not need to be changed (although, again, in the case of Midwest Radio, this is subject to the caveat that the thresholds at which these factors come into play should be doubled),

Other responses rehearse positions expressed in response to earlier questions. The IBI response does not directly address the existing factors referred to in the question. Instead it again emphasizes the need to consider whether a proposed sale is vital to the survival of a station or not as an additional factor. The basic argument that it's better to have a radio station characterised by local voices and content, addressing specific communities regardless of ownership than to have no radio station is echoed by Clare FM and Tipp FM and 4FM/Sunshine 106.8. The Wireless Group also broadly accepts the existing factors but re-emphasizes the need for the BAI to retain as much flexibility as possible in considering individual cases, (i.e. to have the scope to set the existing factors aside) rather than being hamstrung by quantitative measures such as market share.

Communicorp raises some questions about the evidence base informing these factors. It suggests that the reference to size and audience share as considerations for groups accounting for between 20% and 25% of the market implies that the BAI may treat these factors as proxies for opinion-forming power and that decisions as

to whether an acquisition might proceed might be assessed on that basis. However, they stress that there is no evidence base for the opinion-forming power of different media in Ireland. Thus Communicorp argues that such factors should only be considered after conducting some robust research to address this lacuna.

Beat 102-103 FM makes perhaps the most interesting proposal suggesting that the BAI should consider the extent to which a given radio group employs the same individuals to work across separate stations once it goes over the 20% threshold. Although Beat 102-103 FM acknowledge that financial, administrative, IT and engineering type work can operate effectively as shared services, they also stress that this should not extend to managers, sales and – presumably most importantly – content producers (including on-air personnel) in order to preserve diversity, a plurality of services and competition.

***Question:** One of the factors relates to the type of programming provided by the relevant services owned or to be acquired by an entity, specifically ‘news and information’. Should this be expanded, in your view, to include other genres of programming including for example, current affairs, cultural content etc.?*

There is some division here. Though the bulk of respondents would prefer to leave matters as they stand there is a significant minority who believe that the genres should be expanded to include current affairs. The IBI disagree with any expansion to additional genres of content, stating that the ability to influence opinion-forming power is not a central focus on programmes other than news and current affairs. They are supported in this by iRadio, Midwest Radio, the Radio Kerry Group, Ocean FM, Classic Hits 4FM/Sunshine 106.8, and the Wireless Group.

Communicorp also disagree with a significant expansion in the range of genres taken into account (noting, for example, the difficulty of determining what might fall under the heading of “cultural content”) but, they note in passing that a concentration in the supply of news and information might already include current affairs, which suggests that they are potentially open to a slight broadening of relevant programming genres. Similarly Clare FM and Tipp FM reject an expansion but their use of the phrase “beyond news and current affairs” suggests that they also consider current affairs to be relevant in this regard. Beyond this the NUJ and KFM overtly state that the relevant genres should be expanded to include a broadly defined category of current affairs while WLR FM adopt a much more expansionist stance suggesting that it should be expanded to include not just current affairs but also drama, art, sport and documentaries. Beat 102-103 FM espouses the broadest approach of any respondent, agreeing that all the genres referred to in the question should be included.

Question: *What other amendments, if any, would you propose to the above section?*

Effectively none are proposed though WLR FM does suggest that the Board of whichever company provides news services to independent radio stations (currently provided by Newstalk) should be composed of representatives of the stations served.

5.6 Policy Details - (E) An undue number of sound broadcasting services in a specified area

Though at a glance very similar to Section 66(2)(g) of the 2009 Broadcasting Act, the subsequent section - Section 66(2)(h) - 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” within *a specified geographical area*. Thus it addresses the possibility that although a radio group may only hold 2 or 3 stations, these may be concentrated in a particular region, thus affording that group potential opinion-forming power in that area. (For example the Wireless Group Group owns both 96FM and C103 in the Cork area.)

In determining what constitutes an “undue number” the BAI again attempts to calculate what would exceed a reasonable share of a given geographic market. Though acknowledging the difficulty of arriving at a universally-applicable and acceptable definition of what constitutes a “reasonable share” of communications media within a given area, the BAI takes into account the total number of licenced radio services within the relevant area and the share of the total radio audience in that area that would be held by the radio group in question post-acquisition.

Further, the BAI borrows two concepts from competition legislation to assess whether the applicant has (or, as a result of acquiring a new broadcast licence, would have) an unreasonable share of the totality of radio stations in the area: substitutability and dominance. Substitutability assesses the extent to which one radio station may be deemed to be a substitute for (i.e. broadly offers the same content and addressed the same audiences as) another.

Dominance describes the capacity of a licence applicant to influence opinion-forming power based on their ownership of radio stations within a given geographical area (which may be defined at local, regional or national level depending on the nature of the licence). In effect then, the test, applies audience market share as a proxy for opinion-forming power.

Given that the questions relating to ownership within a specified geographic area parallel those relating to overall radio station ownership (i.e. Section D), most respondents either rehearsed the positions set out previously or addressed the six questions set out immediately below *en masse*. (The CCPC in passing suggest that the head of this section should reflect the language of the 2009 Broadcasting Act and clarify that the term “area” refers to a “geographical area” (as opposed to a thematic area).

Questions:

- *Do you think the BAI’s interpretation of the term ‘undue number’ is appropriate and clear?*

- *In your view, is the approach taken by the BAI to ascertain a ‘reasonable share’ appropriate and clear?*
- *In your view, are the factors taken into account by the BAI, namely the number of services and their audience share, appropriate? Should any other factors be considered?*
- *In your view, are the tests of substitutability and dominance appropriate and clear? Should any other tests be applied?*
- *When applying the tests of substitutability and dominance, are the factors to which the BAI has regard appropriate and clear? Should any other factors be considered?*
- *What other amendments, if any, would you propose to the above section?*

Only two respondents – KFM and iRadio - describe the current practice for determining what constitutes an undue number of radio stations in any given area as straightforwardly acceptable. At the other extreme only the NUJ argues that the basis for calculating a reasonable share is neither clear nor appropriate. Most respondents agree that the core definitions – “undue number” and “reasonable share” are well understood but they raise doubts about how appropriate they are. Indeed the responses to this section often take the form of discussions of what philosophical principles should underlie the BAI Ownership and Control Policy rather than individually addressing the questions as laid out in the questionnaire. Thus IBI generally consider the definitions to be clear, and the factors appropriate but insist again on the need to augment those factors with some consideration of the impact of an acquisition on the take viability and sustainability of the radio station to be acquired. This is echoed by the Radio Kerry Group, Clare FM and Tipp FM and Classic Hits 4FM/Sunshine 106.8: all agree with the working definition and with the approach taken by the BAI to ascertain a reasonable share. However, all three also argue that the financial viability of stations involved in a merger or acquisition should also be taken into account when considering relevant factors and questions of substitutability and dominance tests.

Though not necessarily disagreeing with this stress on viability, WLR FM suggests that post-acquisition facility sharing between stations including sharing of on-air content should only be permitted on viability grounds and that the practice of sharing should be closely monitored post-merger (Indeed WLR FM go so far as to recommend that the BAI should have the right to appoint an independent director to the boards of those stations. WLR FM also suggest that in assessing “reasonable share”, that the number of communications media outlets and audience share - should be augmented by a consideration of the specific audience demographic targeted by a station (as opposed to simply the cruder audience share metric) i.e., not just how much of the total franchise area audience is accounted for by a given radio station but how much of the, for example, 15-44 year-old demographic does a station account for? In a somewhat similar vein, Beat 102-103 FM supports current

practice as it relates to the applicability of the substitutability and dominance tests, namely: does a given merger/acquisition leave the audience with alternative (substitute) sources of content or are they now all dominated by a single radio group? However, it also emphasizes the need to assess the extent to which stations belonging to the same group are capable of maintaining editorial independence from one another.

The Wireless Group re-states the view that radio ownership-specific regulations should be abandoned and ownership assessments made on a cross-media basis. This is echoed by Ocean FM who, while agreeing that the interpretation of and factors considered in arriving at an “undue” number of stations are clearly defined, disagrees as to whether they are appropriate because their application is limited to the radio market. Instead they argue that such should consider the cross-media (especially online and social media) market as a whole.

Communicorp offers the most detailed response here. This again emphasizes that the current ownership caps are outdated and do not take account of the difficulties currently faced by the sector as a whole. Thus they should be revised upwards. With regard to the question of what constitutes a “reasonable share”, they question the basis on which any regulator might assume that ownership of a given percentage of radio stations automatically translates into parallel dominance of opinion-forming power. Again, they suggest that the BAI commission Ireland-specific research testing the relationship between the ownership of individual media outlets and the capacity to influence public opinion.

5.7 Policy Details - (F) An undue number of communications media in a specified area

Sections 66(2)(i) and 137(2)(i) of the 2009 Broadcasting 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. These sections thus extend the BAI’s remit beyond radio to include an assessment of cross-media concentration of ownership. Under the 2009 act, “communications media” are defined as including broadcasting services (i.e. radio and television stations), broadcasting services platforms (e.g. satellite or cable distributors like Sky and Virgin Media) and newspapers or periodicals consisting substantially of news and comment on current affairs. Notably, however, given the increased prominence of online content consumption since the publication of the 2009 Act and the 2012 Ownership and Control policy, “communications media” does not take into account ownership of online media.

As in Section E, an undue amount is understood to mean more than a reasonable share of all communications media in a given area. The current BAI Ownership and Control Policy seeks to operationalise this by delineating the totality of communications media (defined as print and broadcast media outlets plus broadcast platforms) in that area and calculating the combined readership, listenership, viewership and subscriber share of the applicant for a broadcast licence.

Further, the BAI again borrows two concepts from competition legislation to assess whether the applicant has (or, as a result of acquiring a new broadcast licence, would have) an unreasonable share of the totality of communications media: substitutability and dominance. In this case substitutability assesses the extent to which one communications medium may be deemed to be a substitute for (i.e. broadly offers the same content and addressed the same audiences as) another (e.g. to what extent can a print outlet be considered to address the same audience and with similar content as a radio station or television service). Dominance describes the capacity of a licence applicant to influence opinion-forming power based on their combined ownership of cross-media outlets within a given geographical area (which may be defined at local, regional or national level depending on the nature of the licence) and their overall share of the audience for communications media in that territory.

Given the similarity of the questions in Section F with those of Section E, it is not surprising that many of the respondents again essentially reiterate their previously stated positions. The response of Communicorp for example, again boils down to the view that the current caps are unnecessarily conservative and they again question the empirical basis on which any regulator might assume that ownership of a given percentage of radio stations automatically translates into parallel dominance of opinion-forming power.

Question: *In your view, is it appropriate that the BAI apply the communications media tests to all types of BAI broadcasting contracts?*

Section 71 of the 2009 Broadcasting Act (which deals with television contracts) makes no reference to media concentration. Thus it could be argued that Ownership and Control issues should not be considered relevant when the BAI are considering an application for television Content Provision licence. Nonetheless BAI practice since 2001 has been to take such considerations into account when assessing ALL broadcast (i.e. radio and television) licence applications. Most of the respondents straightforwardly agree with this practice (IBI, Midwest Radio, NUJ, iRadio, the Radio Kerry Group, Classic Hits 4FM/Sunshine 106.8, Clare FM and Tipp FM, Beat 102-103 FM, KFM, WLR FM, Craol). For their part, given their earlier advocacy of the idea that all media ownership should be assessed on a cross-media basis, the Wireless Group emphasize that a cross-media approach is the only logical means of assessing the award of sound broadcasting contracts (and – by logical extension – contracts for television), tacitly arguing that Section (d) and (e) of the current O&C policy are redundant.

Only Ocean FM and TV3/Virgin suggest that the application of communications media tests to all BAI contracts are inappropriate. Even here, Ocean FM support the principal of cross-media checks but disagree with the manner in which this is currently operationalised because it excludes online platforms. Given that TV3/Virgin are the only respondent from a television background it is perhaps unsurprising that they also disagree that their contracts should be assessed in this manner. TV3/Virgin rehearse the point that since Section 71 of the 2009 Broadcasting Act makes no reference to media concentration with regard to television licensees, that the BAI should not apply such considerations when considering a licence award.

Question: *In your view, is the approach taken by the BAI to ascertain a ‘reasonable share’ appropriate and clear?*

Eight respondents - the IBI, Craol, WLR FM, KFM, Beat 102-103 FM, Clare FM and Tipp FM, Classic Hits 4FM/Sunshine 106.8 and iRadio – straightforwardly answer this question in the affirmative. The Radio Kerry Group also agree that the approach is clear but suggest that the specific financial conditions of particular franchise areas should be taken into account in arriving at determinations of what constitutes “reasonable”. (In other words, some franchise areas may be sufficiently lucrative as to permit licensees to achieve viability on the basis of a 30% audience share but this may not be the case in other, less lucrative markets).

Four – Ocean FM, the NUJ, the Wireless Group and Midwest Radio- argue that the term “reasonable” is subjective and open to interpretation. (Midwest Radio suggest that even the term “area” is ambiguous: does it refer to a geographic area, media type or audience segment)? TV3/Virgin suggest seeking a more concrete definition of what constitutes reasonable, and suggest employing international (European) benchmarks as a basis for doing so.

As with their earlier responses, Communicorp question the empirical basis on which any regulator might assume that ownership of a given percentage of media outlets automatically translates into parallel dominance of opinion-forming power. They do not suggest that media ownership cannot potentially constitute opinion-forming power but rather that at present there is no objective basis for determining the point at which such power is “unreasonably” concentrated in a single entity.

In a similar vein the Wireless Group suggest that the BAI’s assessments of reasonable share of the market should take account of the presence of digital and social media in the wider media market thus avoiding defining communications media more narrowly than would be appropriate.

Question: *In your view, are the factors taken into account by the BAI, namely the number and types of communications media and their audience share, appropriate? Should any other factors be considered?*

Several stations – the IBI, Craol, KFM, Clare FM and Tipp FM, Classic Hits 4FM/Sunshine 106.8, iRadio, and Midwest Radio – agree that the number of media outlets and their audience share are appropriate factors to consider in this regard. Beat 102-103 FM and the Radio Kerry Group also broadly agree but suggest additional factors. Beat 102-103 FM propose taking into account the extent to which media outlets owners are directly involved in day to day editorial, programming and sales decisions while the Radio Kerry Group argue that audience share should be augmented with the media outlet’s share of market revenues. WLR FM echo this invocation of the question of viability. Though suggesting that the extent to which media outlets competing in a given area are editorially independent of one another should be one additional factor (in sum, “Do they give choice to the listener?”), WLR FM also suggest taking into consideration whether media outlets under ownership and control scrutiny can be regarded as capable of surviving financially as standalone operations? (The implication here is that insistence on editorial independence could be relaxed if it threatened the viability of one of the stations. In other words, it is better to have two stations with the same editorial line than see one go out of business.)

The Wireless Group also agree that the number of media outlets and their audience share are appropriate factors in this regard but, along with Ocean FM, this is subject to the proviso that the market for communications media should be defined appropriately (i.e. to include online/social media). Ocean FM asserts that if digital media are not considered part of the overall market then, by definition, not all relevant factors are being taken into consideration. TV3/Virgin also agree with the factors identified but stress that a metric audience share should not be used in an overly crude fashion. Instead the BAI should consider the specific demographics addressed by a given service. Thus a channel targeting a mainstream 15-44 year old audience should be assessed in terms of its share of that particular market.

Communicorp express doubt about the appropriateness of these factors, again stressing that market share is not a proxy for opinion-forming power and the need to quantify opinion-forming power in this regard.

Question: *In your view, are the tests of substitutability and dominance appropriate and clear? Should any other tests be applied?*

Question: *When applying the tests of substitutability and dominance, are the factors to which the BAI has regard appropriate and clear? Should any other factors be considered?*

The IBI, Craol, WLR FM, KFM, Beat 102-103 FM, Clare FM and Tipp FM, 4FM/Sunshine 106.8, iRadio and Midwest all agree that the tests and factors referred to are appropriate. However, the IBI, WLR FM and 4FM/Sunshine 106.8 also emphasize that regardless of ownership, independent radio is inherently competitive and even stations with the same owner will fight against one another for market share. This appears to downplay the significance of the substitutability test. All three also appear to suggest that the factors should include some consideration of the likelihood that a given acquisition will keep locally-owned stations organically connected to their franchise area viable and thus operational.

Given their consistent advocacy of the idea that the ownership of individual radio stations should be assessed in relation to the universe of available media the Wireless Group strongly endorse the idea that the starting premise for policy makers should be to acknowledge the potential for substitutability *across* different forms of media. Similarly dominance should be assessed with reference to radio's role in commenting upon, informing and interacting with other platforms including print, television and digital outlets rather than in isolation. Though this may read as unproblematic support for the tests and factors as currently applied, the Wireless Group's reference to "digital outlets" is significant, given that they are not amongst the communications media considered. (In a similar vein, Ocean FM regard the tests are flawed because they fail to encompass the entire communications media market.)

Other respondents are also less enthusiastic about the tests and factors. Communicorp – again – emphasize the need to properly explore the "usual assumptions made about the opinion forming power of radio" (and by extension, other media).

TV3/Virgin argues the manner in which the BAI operationalises the tests of substitutability and dominance are unclear: what, for example, would be considered a positive outcome (i.e. one more likely to dispose the BAI towards approving a given acquisition) of a substitutability test? The station also argues that it is unclear what the BAI considers to be in the interests of the Broadcasting sector in this regard. (They further suggest that Competition law clearly defines these concepts and that they should be applied by the BAI in line with those definitions.)

Question: *What other amendments, if any, would you propose to the above section?*

No further amendments are proposed.

5.8 Policy Details – (G) Assignment of Contracts

Sections 69 and 138 of the 2009 Broadcasting Act permit the BAI to block the transfer of an existing broadcasting licence to a new owner, either by specifying a condition in the initial contract or by making the transfer subject to BAI's written consent. (Obviously this is essential if the BAI is to be able to exercise meaningful control over concentration of media ownership on an ongoing basis and not just at the point when licences are up for renewal.) Though not an absolute rule, the BAI generally looks unfavourably upon changes in ownership which occur within a two-year period after the award of a contract.

The BAI will, however, adopt a flexible approach in the case where the proposed seller of a radio or television station has previously held the licence for a full term and has had it recently renewed (i.e. less than two years previously). Factors disposing the BAI towards approving an early transfer of ownership include: that there were no other applicants for the contract; that the sellers were also shareholders of the station over the period of the first contract (typically a decade) and; that the proposed buyers have agreed to comply with all of the contractual obligations arising from the contract originally concluded between the BAI and the seller.

Question: *Do you think it is appropriate that the BAI applies a moratorium to changes in the ownership and control of an entity within two years after the award of contract?*

Several of the respondents - Beat 102-103 FM, KFM, Ocean FM, Midwest, the Radio Kerry Group, WLR FM, Craol – straightforwardly agree with the maintenance of the moratorium. A smaller number - IBI, Clare FM and Tipp FM and 4FM/Sunshine 106.8 – agree with the idea of a moratorium but argue that it should be flexibly applied. Thus they agree that the winner of the licence should be required to bring it to air before selling it but, if the viability of the station is threatened, the BAI should consider relaxing the two-year requirement. iRadio also agrees that no ownership change should occur until after the new service is up and running but, noting that moratoriums on O&C create barriers to risk capital and thus to accessing new capital investment into sector, also advocate retaining some flexibility regarding early transfers of ownership. Communicorp is broadly similar suggesting that it agrees with the principles underlying the two-year moratorium but acknowledging the need for the BAI to retain the discretion to set this aside in exceptional circumstances.

TV3/Virgin also accepts the need for a moratorium but suggests that the default period for it should be reduced to 12 months after the award of contract. For their part the Wireless Group does not accept that there is a rationale for any moratorium. They argue that if a prospective new owner meets qualifying conditions

and is prepared to meet programming commitments made in applying for the contract – in effect if there is no distinction in the service promised – that a sale should be permitted to proceed.

Question: *If not, do you think another time period would be appropriate? Please specify the suggested time period.*

Most of the respondents do not directly address this question so are presumably happy to see the two year moratorium remain as a default. Beat 102-103 FM expressly state that they are happy with the current duration. As noted above TV3/Virgin and Communicorp both suggest that the moratorium be reduced to 12 months, while the Wireless Group again suggest that there should be no time limit at all. The IBI, Clare FM and Tipp FM, 4FM/Sunshine 106.8 and WLR FM agree that no time limit is *necessary if the broadcaster has previously held a 10-year licence* (i.e. that they are contemplating a sale within a short period after a licence renewal). iRadio do not refer to a specific moratorium period but suggest that a resale should not occur until after the original licence holder has actually begun broadcasting.

Question: *In your view is it appropriate that the BAI operates a level of flexibility in circumstances where there was only one applicant for the contract?*

Unsurprisingly given the response to earlier questions most of the respondents agree with the BAI's flexible approach in this context. Communicorp makes the point that in the case where there only been one applicant, there is no prospect of a disappointed applicant arguing that initial contract award was flawed. Ocean FM is the only respondent to argue against the operation of a more flexible approach in this context.

Question: *Do you think that the criteria that the BAI applies when considering an application for a change within a two year period are appropriate and clear? Should additional factors be included?*

Again, there is a general agreement that the criteria are appropriate and clear - Communicorp, TV3/Virgin, KFM, Clare FM and Tipp FM, iRadio, and Craol all straightforwardly state as much. For their part the IBI, Beat 102-103 FM, Midwest (implicitly), WLR FM, 4FM/Sunshine 106.8, Clare FM and Tipp FM also agree they are appropriate and clear but strongly endorse the idea of adding a new criterion of "viability" - i.e. if the sustainability of the station is under threat for financial reasons, this should be considered a supporting factor in approving an early (pre two-year) ownership change.

For their part the Radio Kerry Group suggest that the BAI's flexibility should be extended to contract amendments (by agreement with the new shareholders) once the two-year moratorium is over. Implicitly pointing to the long duration of the standard contract, they emphasize that such flexibility would permit the BAI to respond to changing market conditions brought about by the arrival of new media

players exploiting technological distribution capacities either entirely unknown or not widely used at the point the initial contract was signed.

Question: *What other amendments, if any, would you propose to the above section?*

No further amendments are proposed here.

5.9 Policy Details – (H) Programming

Given that the 2009 Broadcasting Act requires the BAI to take account of the quality and/or the range and type of programming proposed by applicants for licences, the Authority believes that these factors should also be considered when assessing proposals that involve ownership changes. Thus, the BAI currently includes the following questions when assessing a change of ownership:

- Is the general quality and/or range, type and schedule of programming to be provided appropriate with regard to the audience to be served?
- Does the Programme Policy Statement of the service: serve audiences in the relevant franchise area; create opportunities for Irish talent in music, drama and entertainment and; commit to the provision of content relating to Irish language and culture?

With regard to community broadcasting services, the BAI also asks whether the Programme Policy Statement specifically addresses the interests of and seeks to provide a social benefit to, the community in question. It also asks whether the PPS encourages active participation in all aspects of programming by the community concerned.

Question: *Do you think the application of this criterion in relation to programming is appropriate when considering proposals for changes to the ownership and control of a contractor?*

For the most part there is widespread acceptance of the idea that programming quality commitments should be taken into account by the BAI in considering ownership change. The IBI, Communicorp, the Wireless Group, WLR FM, the Radio Kerry Group, Midwest, iRadio, KFM, Beat 102-103 FM, Clare FM and Tipp FM, 4FM/Sunshine 106.8, and Craol all agree with this without reservation.

Both Ocean FM and TV3/Virgin disagree with the application of content quality criteria. Ocean FM effectively argue that such assessments should be left to the market. The audience will judge/punish those stations which fail to provide quality content (however defined) by switching channels and thus the station will eventually go out of business). For their part TV3/Virgin argue that “quality” is a subjective term and therefore difficult, if not impossible, to objectively measure.

With regard to the factors specific cited by the BAI as potential factors TV3/Virgin note that not all services for which licences are applied for can serve, to a meaningful level, Irish language or cultural requirements. (Instead responsibility for such content should be left to publicly funded stations such as RTÉ and TG4 which have specific remits to provide Irish language and cultural needs.)

Question: *The factors taken into account by the Authority under this criterion reflect the legislative provision in section 66(2) in the 2009 Act. What other factors, if any, should be considered?*

Few of the respondents propose any additional factors for considerations. Those that do include:

Beat 102-103 FM which suggests that content quality measures should also include commitments to the in-house production of local news, sport and current affairs. Beat 102-103 FM also asserts that the BAI should take account of the level of diversity (gender, ethnic, age etc.) among presenters while also taking into account the importance of hiring a certain percentage of local personnel. They stress that this is of particular relevance on local and regional stations. They are not suggesting that all employees should be from the franchise area but that there should be some recognition of the importance of being fully immersed in the community and understanding the 'localness' of the station). Finally, Beat points to the importance of considering the presence or absence of policies on gender balance, including not just an equitable presence of male and females voices but also gender pay parity.

Both iRadio and WLR FM emphasize that the programming should be reflect the specific needs and interests of the audience in a specific broadcasting service area. Indeed WLR FM suggest that opt-out programming (i.e. "rip and read" news services) should be entirely prohibited between the hours of 7am and 7pm.

Midwest suggest taking into account the sustainability of the proposed programming and in particular emphasize the need for audit measures to ensure that the applicant's programme delivery actually fulfils the commitment made in the station's Programme Policy Statement.

Question: *What other amendments, if any, would you propose to the above section?*

Again, there are very few specific additional suggestions in this regard. Ocean FM, however, do propose creating listener panels to discuss media content and provision of programming, the findings of which should be related to audience share with a view to devising a funding mechanism which can address gaps in sought-for programming.

5.10 Policy Details – (I) Competition Act 2002 and (J) Non-EU entities

In considering ownership and/or control proposals, the BAI requires that owners or potential owners who are headquartered outside the European Union should have a registered office within the EU. The BAI also take account of the extent to which reciprocal arrangements are in place governing investment in and licensing of broadcasting with the relevant non-EU state.

Question: *Do you think that the requirement for non-EU entities to have established a registered office within the EU is appropriate?*

There is more or less universal agreement that such entities should have a registered office within the EU.

Question: *What additional requirements, if any, should apply?*

Both the the Radio Kerry Group Group and Communicorp suggest that special consideration may need to be given to the eventual position of UK-based entities in the light of Brexit.

Question: *What other amendments, if any, would you propose to the above section?*

No further amendments are proposed here.

6. Summary of responses/proposals

For the sake of clarity we have sought to distill the material above into a series of options for the BAI's consideration. Note that this is purely a summary of responses: the current research was not asked to make recommendations based on the stakeholder responses and it neither endorses nor critiques any of the proposals summarised below. Nor does it consider their regulatory or legislation implications.

Summary of points:

Policy Provisions

- Augment the policy provisions by adding “sustainability” and “viability” of indigenously-owned broadcast outlets as new elements in the overall policy objectives.
- The narrow focus on radio and television when considering dominance of media markets should be expanded to include a wider set of media markets including print and online. Medium-specific ownership controls are no longer considered appropriate.
- The policy objectives should be expanded to make an explicit reference to “diversity of ownership”.
- Maintenance of employment standards within the media sector should also be added to the policy objectives.

Interpretation of Terms

- It would be helpful to offer greater clarity on how the distinction between a “controlling” versus “substantial” ownership/shareholder interest is operationalised in practice. The use of fictitious case studies may aid in this respect. It would also be helpful to clarify the significance of these specific factors: shareholdings which constitute a de facto blocking minorities; the capacity to appoint individuals to the Board of Directors and the extent to which a given shareholding entitles a shareholder to commercially sensitive information.
- The BAI may wish to consider limiting the application of “substantial interest” to those contexts where a shareholding confers negative power on the shareholder.

Character, Expertise and Experience

- The BAI may wish to consider relaxing/removing those character tests relating to bankruptcy and insolvency.

- The Authority may also wish to consider extending the character test to include adverse findings regarding an applicant by a statutory investigation or other institutions and agencies of the state.
- Character tests should only be applied to shareholders, directors and Chief Executive Officers.

Financial Resources

- The BAI may wish to consider creating a framework to clearly define what constitute “good business and economic principles”. At present, stakeholders feel that applicants are effectively required to arrive at their own - subjective - definitions.
- The BAI may wish to consider adapting the emphasis on “good business and economic principles” to reflect the not-for-profit nature of community broadcasters.
- The BAI should consider creating a better definition of the costs faced by community broadcasters and identify non-commercial sources of funding to support these rather than placing such broadcasters in competition with commercial advertisers for advertising revenues.

An undue number of sound broadcasting services

- The BAI should consider moving to audience-share based ownership thresholds rather than using the number of stations owned as a basis for calculating levels of media ownership.
- The BAI should in any case increase the number of stations which may be owned by a single entity or remove the ownership thresholds entirely.
- In cases where a merger or acquisition leads to a 15% market holding or higher, the BAI should consider using existing compliance records as part of their assessment rather than instituting a new full-scale Compliance Audit.
- The BAI should consider supporting research to establish an empirical basis upon which the opinion-forming power of individual media outlets can be assessed rather than using audience share as a proxy for such influence.
- The BAI should consider assessing the impact of post-merger/acquisition rationalisation on personnel. However, the BAI should also distinguish between the impacts upon back office functions (financial, administrative, IT and engineering type work) the impact upon content production personnel. (The former arguably has little impact on content diversity.)

- The BAI should consider redefining “news and information” to overtly include current affairs.

An undue number of sound broadcasting services in a specified area

- The BAI should augment the factors currently influencing what constitutes a reasonable share of a geographic market with considerations of the impact of an acquisition on the *viability* of the radio station to be acquired.
- The BAI should limit cross-station sharing of on-air content to contexts where the viability of the services is otherwise shown to be subject to threat.
- When using audience share metrics in assessing levels of market dominance, the BAI should not use total audience figures but rather focus on a given outlet’s share of their specific target demographic.
- Again BAI considerations of what constitutes an “undue” number of stations should consider dominance across media markets (especially online and social media) rather than within specific media.

An undue number of communications media in a specified area

- In determining what constitutes “reasonable” number of media outlets owned the BAI should take account of the prevailing financial health of the relevant media market.
- The BAI should consider developing more concrete definitions of what constitutes a “reasonable” share of a given media market.
- The BAI’s assessments of reasonable share of the market should take account of the presence of digital and social media in the wider media market.
- The BAI’s assessments of substitutability should perhaps consider the extent to which, in practice, even stations belonging to the same media group, will actively compete against one another for market share by means of offering distinct editorial voices.

Assignment of Contracts

- The BAI should consider relaxing/adopting a more flexible attitude towards current time limits on the re-sale of recently awarded/renewed licences. However such limits should not be removed entirely.

Programming

- The BAI should maintain the current emphasis on programming quality commitments when considering ownership change.

Appendix 1

<u>List of Respondents to the Targeted Consultation</u>	
Stakeholder	Submitted Response?
4FM	Yes
Beat 102-103 FM	Yes
Clare FM and Tipp FM	Yes
East Coast FM	No
Galway Bay FM	Not directly but endorsed IBI submission.
Highland Radio	Not directly but endorsed IBI submission.
iRadio North East & Midlands; iRadio North West	Yes
KCLR 96FM	Not directly but endorsed IBI submission.
KFM	Yes
Midlands 103	No
Ocean FM	Yes
Radio Kerry	Yes
Radio Nova	Not directly but endorsed IBI submission.
RedFM	Not directly but endorsed IBI submission.
Shannonside FM / Northern Sound	Yes
South East Radio	Not directly but endorsed IBI submission.
Spirit Radio	No
Sunshine106.8	Yes
WLR FM FM FM	Yes
The Wireless Group Group	Yes
Eir Sport	No
UCB Ireland	No
Eurasian Broadcasting Enterprises Ltd	No
TV3/Virgin / 3e / be3	Yes
QYOUTV	No
RTÉ	Yes
Communicorp Group Ltd.	Yes
Independent Broadcasters of Ireland (IBI)	Yes
National Union of Journalists - Ireland (NUJ)	Yes
Community Television Association (CTA)	No
CRAOL	Yes
Irish Times	No
MSK Media Limited	No
Independent News and Media	No
Celtic News and Media	No
Dept. of Communications, Climate Action and the Environment	Yes
Virgin Media Ireland Limited	Yes
CSI Sports Networks PTE Limited	No

FuJo (Inst. For Future Media & Journalism)	Yes
The Competition & Consumer Protection Commission	Yes