



ÚDARÁS
CRAOLACHÁIN
NA hÉIREANN

BROADCASTING
AUTHORITY
OF IRELAND

PUBLIC CONSULTATION
DRAFT
BAI OWNERSHIP AND CONTROL POLICY

Introduction

The Broadcasting Authority of Ireland (“BAI”) is an independent statutory organisation responsible for a number of key areas of activity with regard to television and radio services in Ireland. The work of the BAI is principally guided by the Broadcasting Act, 2009 (“2009 Act”). One of the principle objectives of the BAI, as set out in Section 25(1)(c) of the 2009 Act is ‘to provide for open and pluralistic broadcasting services’. The BAI must also ‘promote diversity in control of the more influential commercial and community broadcasting services’. These objectives are also reflected in the BAI’s Strategy Statement (2017-2019) under the strategic theme - ‘**Promoting Plurality and Diversity**’. The BAI has developed its Ownership and Control Policy so as to give practical effect to the achievement of these objectives. The Policy is intended to provide clarity and certainty in respect of the ownership and control of commercial broadcasting, community and multiplex contractors.

In practical terms, the Policy is used by the BAI to assess applications for broadcasting, content provision and multiplex contracts. It is also used to assess requests for variations to the ownership and control structures of these contractors. More broadly, the Policy is designed to facilitate the continued development of a viable and diverse broadcasting sector that is characterised by a plurality of ownership.

The Consultation

The current BAI Ownership and Control Policy was introduced in 2012 and the BAI is now seeking views from the public and stakeholders on a revised and updated Policy. This draft Policy proposes a number of changes to the regulation of the ownership and control of broadcasting services licensed by the BAI. The Policy does not apply to public service broadcasters.

The revision to the Policy involves two key activities. **Firstly**, the BAI undertook a targeted consultation with broadcasters and other key stakeholders. The consultation focused on the content of the current Policy and was undertaken by Dr. Roddy Flynn of the DCU School of Communications. This process was completed in the first half of 2018 and a report on the outcomes of this targeted consultation is now available on the BAI’s website at www.bai.ie/en/consultations/. **Secondly**, the BAI is now conducting a public consultation on a revised Ownership and Control Policy. The draft Policy is included in this document and the updated regulations detailed below have been informed by the Broadcasting Act 2009, by the BAI’s experience of implementing the current Policy and by the outcomes of the targeted consultation completed earlier in 2018.

The purpose of consulting on the draft Policy is to elicit the views of the public and interested stakeholders, including broadcasters and media owners and practitioners, on the proposed changes detailed in the draft Policy. The draft Policy provisions are detailed below. Where relevant, each section includes a brief explanation and/or rationale for the provisions (highlighted in bold text), the draft provisions are then set out and these are followed by a number of consultation questions.

The policy provisions have had regard to the findings of the targeted consultation and a number of updates incorporate suggestions from stakeholders who were involved in that consultation. A range of stakeholder proposals have not been adopted in the draft Policy. In some instances, these were considered to relate to implementation issues and the BAI will give these issues consideration once the Policy is finalised. In other instances, while the proposals were reasonable, they were not considered to be those that would improve on the current Policy either because they would add complexity without any benefits or because they would reduce flexibility in the application of the Policy. A number of other issues were related to broader questions of viability and sectoral sustainability and were considered more appropriate in the context of the BAI's Broadcasting Services Strategy.

Notwithstanding this, the BAI is wholly open to submissions on all of the sections where it has invited responses to specific questions, including those areas which it has left unchanged from the current Policy. The BAI will have regard to all submissions and to the findings of the targeted stakeholder consultation when making decisions as to the contents of the final version of the Policy.

The submissions received in response to this public consultation 2018 will inform the Authority's decisions in respect of the final Policy to be published in the first half of 2019.

How to make a submission

The BAI invites you to make a submission to this consultation. The submission can include a response to any or all of the consultation questions included in this document. Submissions should be made by 30th January 2019. You can e-mail your response to consultations@bai.ie or you can complete a form online at www.bai.ie/en/consultations. Postal responses can be submitted to:-

**BAI Ownership and Control Consultation,
Broadcasting Authority of Ireland,
2 – 5 Warrington Place,
Dublin 2,
D02 XP29.**

If you have any queries in relation to this consultation, please email consultations@bai.ie or phone (01) 6441200.

Publication of Submissions

The BAI will publish the submissions received in this consultation on www.bai.ie after the publication of the final BAI Ownership and Control Policy and subject to consideration of information that may be deemed of a personal nature, sensitive or given in confidence, as provided for by the Freedom of Information Act 2014 and the Data Protection Acts and Regulations.

Freedom of Information

The Broadcasting Authority of Ireland (BAI) undertakes to use its best endeavours to hold confidential any information provided by you in this proposal subject to the BAI's obligations under law, including under the Freedom of Information Act 2014. Should you wish that any of the information supplied by you in your submission should not be disclosed because of its sensitivity, you should, when providing the information, identify the same and specify the reasons for its sensitivity. The BAI will consult with you about this sensitive information before making a decision on any Freedom of Information request received.

Data Protection

The Broadcasting Authority of Ireland shall comply with their obligations under the Data Protection Acts 1988 and 2003 (as amended) and any other applicable data privacy laws and regulations.

Contents

1.	Introduction.....	6
2.	Legislative and Policy Background.....	6
3.	Policy Objectives.....	8
4.	Statutory Definitions & Interpretations of Key Terms Used in the Policy.....	9
5.	Policy Provisions.....	12
5.1	Character, Expertise and Experience.....	13
5.2	Financial Resources and the Extent to which the Application Accords with Good Business and Economic Principles.....	17
5.3	Viability and Sectoral Sustainability.....	18
5.4	An undue number of sound broadcasting services.....	19
5.5	An undue number of sound broadcasting services in a specified area.....	22
5.6	An undue amount of communications media in a specified area.....	23
5.7	Programming.....	25
5.8	Non-EU Entities.....	26
	Appendix 1 - Legislative Provisions.....	27
	Appendix 2 - Statutory Definitions.....	31

DRAFT BAI OWNERSHP AND CONTROL POLICY 2018

1. INTRODUCTION

This section of the Policy provides the wider context for the BAI's regulations. The type of broadcasting contracts that are covered by the Policy are detailed and a broad overview of the contents of the Policy is provided. There are no consultation questions in respect of this section. If you have views on this section they can be provided by responding to the final consultation question.

The BAI Ownership and Control Policy (2018) ("the Policy") has been designed to facilitate the continued development of a viable, sustainable and diverse broadcasting sector that is characterised by a plurality of ownership. The Policy is also designed to provide clarity and certainty in respect of the regulatory approach to be adopted and the rules that will apply. Overall, the Authority believes that this Policy balances the needs of a continually evolving indigenous broadcasting sector with the BAI's requirement to ensure plurality. The BAI's commitment to plurality is also set out in the BAI Strategy Statement 2017-2019, where a core part of its mission is identified as promoting a plurality of voices, viewpoints, outlets and sources in Irish media.

This Policy will be used by the BAI to assess the ownership and control element of licence applications and to assess relevant requests for variations to contracts as well as any compliance issues that may arise subsequently in respect of such contracts. In this regard, the Policy will apply to contracts provided further to the following sections of the Broadcasting Act 2009: Section 63 and Section 64 (Sound Broadcasting Contracts); Section 70 (the national Television Programme Service Contract); Section 71 (Content Provision Contracts), and; Section 131 (Multiplex Contracts).

The Policy is divided into a number of sections. Section 2 provides a summary of the legislative and policy background that informs the provisions of the Policy while Section 3 outlines the objectives of the Policy. Section 4 details the key definitions and terms used in the application of the Policy. Finally, Section 5 contains the detailed Policy provisions that the BAI will apply when considering matters pertaining to ownership and control.

2. LEGISLATIVE AND POLICY BACKGROUND

This section of the Policy provides the legislative and policy context for the Policy and makes reference to three key documents – the Broadcasting Act 2009, the Competition and Consumer Protection Act 2014 and the BAI Statement of Strategy (2017-2019). There are no consultation questions in respect of this section. If you have views on this section they can be provided by responding to the final consultation question.

The key legislative provisions that provide the framework for the Policy are the Broadcasting Act 2009, the Competition and Consumer Protection Act 2014, the BAI Strategy Statement 2017-2019 and the BAI Broadcasting Services Strategy (2018).

i. The Broadcasting Act 2009

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

ii. The Competition and Consumer Protection Act 2014

The Competition and Consumer Protection Act 2014 contains statutory provisions for the control of media mergers by the Competition and Consumer Protection Commission and the Minister for Communications, Climate Action and Environment.

The 2014 Act imposes a number of new and additional functions and obligations on the BAI including, amongst other matters, providing advice to the Minister on the impact of a proposed media merger on plurality in the State, if requested; undertaking a retrospective review on the impact of ownership changes on plurality over a 3-year period and providing a report to the Minister on this; and, commissioning of and/or carrying out plurality-related research activities. In addition, in considering a request for a media merger the Minister will have regard to any relevant decisions made under the BAI's Ownership and Control Policy.

The role of the BAI in respect of media mergers is set out in detail in Part 4 of the Competition and Consumer Protection Act 2014.¹

iii. BAI Statement of Strategy 2017-2019

Promoting diversity and plurality is a key theme in the current BAI Strategy Statement and this is given effect through a number of strategic objectives which include establishing and implementing policies, codes and procedures that promote and support plurality in terms of voices, viewpoints, outlets and sources.

The Strategy sets out four objectives in particular and they are as follows:-

- to facilitate a mix of voices, opinions and sources of news and current affairs in audio-visual media which enhances democratic debate and active citizenship in Ireland;
- to increase the production and availability of culturally relevant audio-visual content for Irish audiences;

¹ A copy of the Act is available at: <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/html>. Part 4 of the Act deals with media mergers and the role of the BAI. Additional information is available on the website of the Department of Communications, Climate Action and Environment: <https://www.dccae.gov.ie/en-ie/communications/topics/broadcasting-media/media-mergers/Pages/Media-Mergers.aspx>

- to foster and promote quality programming in the Irish language; and
- to foster a media landscape that is representative of, and accessible to, the diversity of Irish society.

In addition, the BAI's Strategy Statement also emphasises the importance of sectoral sustainability. This is reflected in the strategic objective whereby the BAI commits to working with stakeholders to support the achievement of greater sustainability for the Irish audiovisual sector.

The BAI Ownership and Control Policy 2018 is a key statement in the realisation of these strategic objectives.

iv. **BAI Broadcasting Services Strategy 2018**

The Broadcasting Services Strategy 2018 details the intention of the BAI to facilitate the long-term sustainability of the independent broadcasting sector, to support and foster plurality and diversity of content for Irish audiences including in the Irish language, and to support innovation and development, now and into the future. Alongside these aims, the Strategy is intended to facilitate a mix of voices, opinions and sources of news and current affairs in audio-visual media and to support the BAI's commitment to work with stakeholders to achieve greater sustainability.

This Strategy will guide the BAI's Licensing Plans in the coming number of years and sits alongside the Ownership and Control Policy as a means for achieving diversity and plurality in Irish media.

3. **POLICY OBJECTIVES**

This section of the Policy remains largely unchanged from the current regulations. However, an important change relates to the inclusion of a policy objective which identifies support for the viability of individual broadcasting services and the sustainability of the broadcasting sector as a whole as an appropriate new objective. The issues of viability and sustainability were identified by broadcasters participating in the targeted consultation as ones that should be given greater emphasis in the Policy. The BAI agreed with this view and has updated the Policy accordingly. This issue is also reflected in the detailed policy provisions set out in Section 5 of the Policy. Separately, the objectives now highlight the importance of promoting diversity of ownership and content. While diversity underpins the current version of the Policy, it was not articulated in the current Policy objectives and the updated draft Policy addresses this matter.

Eight policy objectives have been identified by the BAI as relevant to this Policy. The Policy objectives have been informed by the legislative and policy background set out in section 2. These objectives provide the overall context for the development and implementation of the Policy as well as the assessment of ownership and control proposals. The objectives also provide a framework to assist the BAI in responding to new issues emerging in licensing processes and ownership and control developments in the broadcasting sector.

The Policy objectives are as follows:

- i. To promote open and pluralistic broadcasting services, with particular reference to radio and television services;
- ii. To support both the viability of broadcasting services and the greater sustainability of the broadcasting sector as a whole;
- iii. 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;
- iv. To contribute to the promotion of diversity in control of the more influential commercial and community broadcasting services;
- v. 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;
- vi. To promote diversity in voices, viewpoints, outlets and sources, that is, diversity in the opinions expressed, in programming delivery and content, in ownership and in the sources of information available to the public;
- vii. To contribute to the upholding of the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, and;
- viii. To contribute to the achievement of a regulatory environment that will sustain independent and impartial journalism.

CONSULTATION QUESTIONS

1. Do you consider the objectives of the Policy appropriate, given the organisation's statutory obligations and Statement of Strategy?
2. What are your views on the additional references in the objectives to viability, sectoral sustainability and diversity of ownership?
3. Are there any other objectives which should be included in the Policy?

4. STATUTORY DEFINITIONS & INTERPRETATIONS OF KEY TERMS USED IN THE POLICY

The bulk of statutory definitions included in the current version of the Policy have now been moved to an Appendix with a view to making the document more readable and with a view to providing the appropriate emphasis on definitions and key terms that are important for the operation of the Policy. In this regard, the body of the Policy highlights the statutory definition of 'Communications Media' as it is an important definition in the decision-making process.

Separately, as there are no statutory definitions for ‘control’ and ‘substantial interests’ (terms used in the context of assessing media concentration), it is necessary for the BAI to interpret the meaning of these terms. These terms are interpreted in the current version of the Policy and views were invited as part of the targeted consultation on the BAI’s current interpretation. A range of suggestions were made about how these terms might be amended. A number of these were reasonable but the BAI has decided to retain the current interpretation. The BAI’s decision is informed by the fact that the targeted consultation indicated a good degree of support for the current interpretations, that suggested changes made during the targeted consultation supported the current flexible approach to the interpretation of these terms and because no significant issues have arisen when applying the terms in practice. It is the view of the BAI that issues of control and substantial interests can be complex and context specific and the current approach has demonstrated that it can account in practice for this complexity. Notwithstanding this, the BAI welcomes and will have due regard to any additional views of this matter provided as part of this consultation.

Participants in the targeted consultation also requested the Policy to elaborate on how the definitions and terms are applied in practice. The BAI would note that guidance is already provided on the application of the Policy and that the concerns of respondents can be better addressed via updated guidance rather than via changes to the Policy provisions.

The 2009 Act contains a number of relevant statutory definitions that are used in this Policy. In addition, the Act includes a number of terms that, in order to meet its statutory obligations, the BAI has interpreted. In both cases, the definitions and terms have been used by the BAI in setting the decision-making criteria to give effect to them in practice. The statutory definitions are now set out and the BAI’s interpretation of terms used in the Act but not defined are then provided.

4.1 Statutory Definitions

The 2009 Act includes a number of statutory definitions that are of relevance to this Policy. The statutory definitions for the following are provided at **Appendix 2** :- Broadcast; Broadcaster; Broadcasting Contract; Broadcasting Service; Content Provision Contract; Electronic Communications Network; Multiplex; Multiplex Contractor; Sound Broadcasting Service; Wireless Telegraphy.

The 2009 Act also includes a central statutory definition which describes what constitutes ‘communications media’ for the purposes of assessing ownership and control limits and thresholds and which plays an important role in the BAI’s policy considerations.

In that context, ‘**Communications Media**’ means:-

- (a) The provision of a broadcasting service,
- (b) The provision of a broadcasting services platform, or

- (c) The publication of newspapers or periodicals consisting substantially of news and comment on current affairs.

4.2 Interpretations of Key Terms

Separately, and in order to meet its statutory obligations in respect of ownership and control, the BAI must interpret the relevant terms used in the 2009 Act. In this regard, the manner in which the BAI will interpret references in the legislation to 'Control' and 'Substantial Interest' is now set out.

The interpretations are intended to account for the different factors that can come into play in terms of ownership and control, for example, control of a legal entity can be attained even where the owner does not hold the majority of shares. The interpretations of the terms 'Control' and 'Substantial Interest' also focus primarily on programme output and reflect the BAI's main objectives, in accordance with its statutory remit, which are to regulate content and to promote diversity in voices, viewpoint, outlet and source, thereby providing the public with access to a wide range of quality programmes from a variety of sources.

Control: refers to an individual or legal entity that is in a position proprietarily, financially or in terms of voting rights to determine or direct the policy of the company, with regard in particular to programme output that is, sourcing, production, supply or delivery to the audience.

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

Guidance on Substantial Interest

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

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

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

CONSULTATION QUESTIONS

4. What are your views in respect of the interpretation of the terms 'Control' and 'Substantial Interest' as set out in the Policy? If you believe the interpretation should be changed, please detail how it might be changed and how this change would improve in *practical terms* the application of the Policy, bearing in mind the BAI's rationale for retaining the current interpretation.
5. What other amendments, if any, would you propose to the above section?

5. POLICY PROVISIONS

This section of the Policy details the provisions that will be applied by the BAI in the context of its consideration of matters relating to ownership and control as they arise either in the license application process or where a contractor requests a change to the ownership and/or control of a broadcasting service. Depending on the details of the change requested, a number or all of the provisions may be relevant. The policy provisions include a range of tests that the BAI will apply before making a determination. The tests will be applied on a case-by-case basis and decisions will be made with a view to achieving the policy objectives set out above as well as the wider statutory and strategic obligations and objectives of the BAI as they pertain to media plurality.

The provisions of the draft Policy include one new provision and also remove two provisions in the current Policy.

The draft Policy also includes a new provision dealing with matters of viability and sectoral sustainability. This is discussed in more detail in Section 5.3 below.

The current Policy includes provisions dealing with the 'Assignment of Contracts' and 'Concrete Indicators of Diversity' and it is proposed to remove these provisions. In this regard, the current provision dealing with the 'Assignment of Contracts' places restrictions on changes of ownership in respect of new sound broadcasting contracts and the television service licenced further to section 70 (currently held by Virgin Media). It is the view of the BAI that, given the maturity of the broadcasting sector, having regard also to the property rights of shareholders and taking account of the changes in the wider media market, that these restrictions are no longer necessary. The BAI is also of the view that the other policy provisions, including amended provisions in respect of programming, as well as the terms of broadcasting contracts, are sufficient to ensure that the integrity of the licensing process and the services licenced will be maintained following any assignment of a contract.

Regarding the section on 'Concrete Indicators of Diversity', this was included in the current Policy in anticipation of the introduction of new media mergers legislation (subsequently introduced in 2014). The current Policy states that the BAI will consider the potential for introducing into its Ownership and Control Policy concrete indicators of diversity within media organisations.

It is the view of the BAI that indicators of diversity are now reflected in the licensing process, are addressed in various sections of the Policy, are considered also in the context of performance reviews and are dealt with via other activities, such as the BAI's Gender Action Plan. More generally, the BAI will publish a Media Plurality Policy in 2019 and this will link the BAI's media plurality activities under one policy, a policy centrally concerned with matters relating to diversity of ownership and content.

For these reasons, it is proposed to remove this policy provision. The BAI also notes that this section of the current Policy is explanatory rather than being one that had any practical effect in assessing ownership and control changes. As such, this change will not impact on the application of the Policy.

The Policy details are divided into eight sections as follows: -

- 5.1 - Character, Expertise and Experience;
- 5.2 - Financial Resources;
- 5.3 - Viability and Sectoral Sustainability;
- 5.4 - An undue number of sound broadcasting services;
- 5.5 - An undue number of sound broadcasting services in a specified area;
- 5.6 - An undue amount of communications media in a specified area;
- 5.7 - Programming;
- 5.8 - Non-EU Entities.

These policy provisions will be used by the BAI to assess the ownership and control element of applications and to assess relevant requests for variations and any compliance issues that may arise subsequently in respect of such contracts.

CONSULTATION QUESTION

- 6. What are your views on the removal of the sections of the Policy dealing with the 'Assignment of Contracts' and 'Concrete Indicators of Diversity'?**

5.1 Character, Expertise and Experience

Section 5.1 of the Policy reflects the obligation of the BAI to consider matters relating to the character, expertise and experience of individuals/legal entities whether as applicants for a new licence or as those requesting changes to the ownership and control of a broadcasting service. The draft Policy provisions are broadly similar to the current Policy but a number of changes are proposed.

In this regard, the current Policy applies the character tests to Directors, management positions approved by the BAI and shareholders whose shareholding constitutes a substantial interest, or control, as defined. The draft Policy retains the character tests in respect of shareholders holding control or a substantial interest and Directors but limits the application in terms of management positions to the Chief Executive Officer and the company secretary. If this approach is adopted, the tests would no longer be applied to Programme Directors or Chief Financial Officers, as is currently the case. The BAI is proposing this shorter list of management positions given the maturity of the broadcasting sector and the importance of minimising administrative burden. Nevertheless, the draft Policy gives the BAI the discretion to consider the character of other management positions on a case-by-case basis. This may occur where there is a significant change in ownership and control, for example, where a group of services or a very significant player in the market changes ownership.

Under the specific tests set out at section 5.1.1, the first test dealing with criminal offences has been amended to exclude “spent convictions”. This is changed to take account of the BAI’s experience of applying the Policy and having also had regard to new legislation dealing with spent convictions - the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.

The draft Policy also clarifies that a failure to pass a character test does not automatically disqualify an applicant (in the case of a licence application) nor will it lead to a request for a change of ownership and control being rejected. While this reflects current practice, the targeted consultation highlighted uncertainty on the part of some stakeholders about the impact of failing a character test on a decision of the BAI. This is not to say that a failure won’t be the basis for rejecting a specific request or application, rather, the Policy has been updated to clarify that this will not follow automatically.

Separately, the BAI is seeking views on whether other offences should be included as part of the character test, in addition to fraud or dishonesty and also whether adverse findings of civil/public bodies, but which do not constitute a criminal offence, should also be taken into account.

The BAI is not proposing any changes to the assessment of Expertise and Experience provisions contained in the Policy.

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.”²

² Sections 66(2)(a) and 137(2)(a) of the Act. A specific provision in relation to character, expertise or experience of content provision contract holders is not set out in the Act. However, the BAI, as a matter of Policy, will continue to consider the character of an applicant when considering applications for section 71 and 72 content provision contracts.

5.1.1 Assessments of Character

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

In addition to these character tests being applied at application stage, the BAI shall also apply these to commercial broadcasting services as a matter of policy during compliance reviews and when considering proposals for changes to the ownership and control of contractors. The tests shall apply in general to the following positions approved by the Authority:-

- Directors;
- Chief Executive Officer;
- Secretary;
- Shareholders whose shareholding constitutes a substantial interest, or control

The Authority retains the right to apply character tests to other positions having regard to the particulars of an application or in the context of a change in ownership and/or control.

Tests applied by the BAI in respect of Character

In relation to character, the BAI will apply the following seven tests:-

- i. Has the applicant ever been convicted of an offence involving fraud or dishonesty (but excluding 'spent convictions')?
- ii. Has the applicant ever been restricted or disqualified as a Company Director, or convicted of any offence under the Companies Act 2014 in this jurisdiction or under equivalent legislation in any other jurisdiction?
- iii. Has the applicant ever been adjudicated a bankrupt, become insolvent or entered into a voluntary arrangement with creditors, or had a receiver appointed to any of its assets, in this or any other jurisdiction?
- iv. Has the applicant ever been a director of a company to which a receiver was appointed, which went into compulsory liquidation, creditors' voluntary liquidation, examinership or which made any arrangement with its creditors or class of creditors?
- v. Has the applicant ever been convicted of an offence under any legislation by which Broadcasting and/or Wireless Telegraphy is regulated in this or any other jurisdiction?

- vi. Has the applicant ever had a licence or contract issued by a broadcasting licensing body or any other statutory body suspended or revoked in this or any other jurisdiction?
- vii. Is the applicant aware of any reason why it may not be a fit and proper person to be awarded a contract?

Individuals, contractors and other relevant parties should note that failure to pass any of the tests set out above may not automatically disqualify an applicant or a request for a change of ownership and control. The BAI will have regard to all of the relevant information provided and subsequent clarifications provided, as deemed necessary.

5.1.2 Assessment of Experience and Expertise

In addition to assessing character the BAI will also apply tests in respect of the experience and expertise of applicants. In addition to these tests being applied at application stage, the BAI shall also apply these to commercial/community broadcasting services as a matter of policy during compliance reviews and when considering proposals for changes to the ownership and control of contractors.

Tests applied by the BAI in respect of Experience and Expertise

In relation to experience and expertise, the BAI will apply the following two tests:-

- i. Does the Board of Directors of the applicant include sufficient personnel with the necessary experience, expertise and knowledge having regard to the nature of the contract proposed?
- ii. Is the management structure of the applicant appropriate and does the membership and make-up of the management team have sufficient experience and expertise having regard to the nature of the contract proposed?

In applying these tests the BAI shall examine the proposed arrangement in terms of the relevant individuals within the structure, (e.g. is there an over-reliance on one individual in the corporate and/or management structure) and the overall membership and structure of the Board and management team (e.g. are there any independent directors).

The BAI believes that structures which reflect best practice in terms of corporate governance are key components in ensuring the delivery of quality services for audiences.

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

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

CONSULTATION QUESTIONS

7. What are your views on the seven character tests set out under this section of the draft Policy?
8. Do you think any additional tests should be added? For example, what are your views about whether other criminal offences should be included? Should findings of civil/public bodies, but which do not constitute a criminal offence, also be taken into account. If yes, what types of criminal offences or findings do you consider relevant?
9. In the case of management positions, what are your views on the proposal to limit the character tests, in most instances, to the Chief Executive Officer and the Company Secretary?
10. What other amendments, if any, would you propose to the above section?

5.2 Financial Resources and the Extent to which the Application Accords with Good Business and Economic Principles

This section remains unchanged from the current Policy. Some respondents from the Community Broadcasting sector stated as part of the targeted consultation that this section was not appropriate for their industry, which is not-for-profit. However, it is the view of the BAI that this section provides for a distinction between commercial and community broadcasters. More generally, regardless of the type of service, the Broadcasting Act 2009 and good licensing processes are appropriately focused on ensuring that those granted licences have in place financing and a business model that will ensure the ongoing viability and sustainability of the particular service licenced. For these reasons, the BAI considers the current provisions to be appropriate.

In considering applications for the award of contracts, further to the provisions of Section 66(2) and Section 137(2) of the Act, the BAI is required, inter alia, to have regard to:

“the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles.”

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

5.2.1 Commercial Broadcasting Services (including the contract provided for under Section 70) ³

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

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

5.2.2 Community Broadcasting Services

In the case of community sound broadcasting and community content contracts the BAI shall also have regard to the following:-

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

5.2.3 Broadcasters licensed further to Section 71 of the Act

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

CONSULTATION QUESTIONS

11. In the case of commercial and community broadcasting services, what are your views on the specific tests applied? Should any other tests/questions apply?

12. What other amendments, if any, would you propose to the above section?

5.3 Viability and Sectoral Sustainability

A good deal of responses about the current Policy provided in the context of the targeted consultation focused on matters of viability and sustainability. A principal mechanism used by the BAI for dealing with these issues is the Broadcasting Services Strategy, from which licensing plans emerge. Issues of sustainability and viability have also been a common factor highlighted by broadcasters when requesting changes in ownership and programming.

More broadly, the Mediatique report produced by the BAI in the context of the review of the Broadcasting Services Strategy highlighted issues of viability and sustainability and recommended that the BAI have regard to these issues in the context of its Ownership and Control Policy.

³ This contract is currently held by Virgin Media Television Limited.

In addition, the BAI's Strategy Statement 2017-2019, the Broadcasting Services Strategy and the licensing process undertaken in the context of the 2009 Act highlight the importance of ensuring that broadcasting services are viable and remain so and, more broadly, that the sustainability of the broadcasting sector is supported.

In view of this, the draft Policy includes a number of proposed changes. As already noted above, these concerns are reflected in the draft Policy objectives set out in Section 3. In addition, it is proposed to address these issues via the inclusion of a new policy provision that focuses on viability and sectoral sustainability. The draft Policy provision set out in Section 5.3 states that where a change of ownership and control is proposed, the BAI shall have regard to the extent to which the proposal will support the viability of a contractor and/or sectoral sustainability. In addition, the suitability of the change in the context of the Broadcasting Services Strategy shall also be considered.

In the context of proposed changes to the ownership and control of broadcasting services, the BAI shall have regard to the following:-

- The extent to which any proposal to vary the ownership or control of the contract will support the viability of the Contractor?
- The extent to which any proposal to vary the ownership or control of the contract will support the sustainability of the Broadcasting Sector as a whole?
- The suitability of any proposal in the context of the objectives and provisions of the BAI Broadcasting Services Strategy.

CONSULTATION QUESTION

13. Do you think the inclusion of this additional policy provision is appropriate in the context of the stated objectives of the Policy? What are your views on the tests that are proposed in respect of viability and sectoral sustainability and are there any additional tests that the BAI should apply in this context?

5.4 An undue number of sound broadcasting services

Sections 5.4, 5.5 and 5.6 of the draft Policy give effect to Sections 66 (2)(g)(h) and (i) of the Broadcasting Act 2009. These statutory provisions require the BAI, when assessing applications for new contracts, to consider the desirability of allowing any individual or group of persons to have control of, or substantial interests in an undue number of the total number of broadcasting services in the State, as a whole (Section 5.4), or in a specified geographical area (Section 5.5).

In addition, the BAI must consider the desirability of allowing any individual or group of persons to have control of, or substantial interests in, an undue amount of communications media (Section 5.6). Communications media include broadcasting services and platforms and newspapers and periodicals consisting substantially of news and comment on current affairs but do not include digital media.

These sections of the Policy are those which provide a key mechanism for managing plurality and diversity in terms of ownership and they are applied not only at the licensing stage but also in the context of consideration of requests for changes in ownership and control. A number of those participating in the targeted stakeholder consultation, and who represent broadcasting services, set out a view that the tests used by the BAI when considering market dominance, substitutability, and plurality under each of these Sections of the Policy were either wholly unnecessary or in need of either clarification or updating to account for online media. These positions were centrally informed by the view that the media market has radically changed in recent years and the Policy and the BAI should be updated to take account of the role of digital media when making decisions about ownership and control.

It is the view of the BAI that the current Policy, while operating effectively in practice, is based on a legislative framework that has remained largely unchanged since 1988. It does not accommodate significant developments in media content, distribution and streaming. Nevertheless, the BAI must operate within this legislative framework and it is of the view that in respect of Sections 5.4, 5.5 and 5.6 of the Policy, its scope for updating the Policy is limited.

The provisions of the 2009 Act which are given effect by the Policy deal solely with sound broadcasting services and communications media and do not include reference to digital media. In practice, this limits the BAI's assessment of a changes of ownership as they pertain to a consideration of the desirability of an individual/legal entity owning an undue number of communications media (section 5.6).

Regarding Section 5.4 and 5.5 which deal with Sound Broadcasting Services only, maintaining healthy pluralism in this sector is a key strategic concern for the BAI. For this reason, the BAI is proposing to retain the current upper threshold of 25% of the total number of sound broadcasting services that any one individual or legal entity may own. The BAI's decision is informed by the fact that the radio sector in Ireland remains viable and sustainable and the loosening of the 25% maximum level is therefore not desirable since it would raise the potential of a reduction in media pluralism without any basis.

Having said that, the BAI does not consider the number of thresholds and the current tests applied in respect of ownership of the total number of services remain warranted. For this reason, the number of thresholds to be applied is being reduced from four to three and the extent of the tests that are applied in the case of higher percentages of ownership are reduced. In this regard, a person or legal entity will be permitted to own up to 20% of the total number of services without any tests being applied.

In the case of ownership between 20-25% of the total number of sound broadcasting services, individuals or legal entities seeking ownership to this level will be required to successfully pass a compliance audit but the five additional tests currently applied at this level of ownership are not retained.

Section 66(2)(g) of the Act requires the BAI to have regard to:

“the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Part”.

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

5.4.1 Thresholds applied by the BAI in respect of an “Undue Number”

The BAI shall operate three thresholds in respect of what it considers an “undue number”. They are as follows:-

- i. **A number equivalent to 20% or less** of the total number of commercial sound broadcasting services licensed under the Act is considered an acceptable level for any one entity.

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

- ii. **A number equivalent to between 20-25%** of the total number of commercial sound broadcasting services licensed under the Act requires additional consideration by the BAI as to whether it is an acceptable level for any one entity.

The BAI shall make such a consideration with reference to a Compliance Audit, submitted by the entity, in respect of all of its sound broadcasting services over a two-year period. This period shall commence twelve months in advance of the date on which the application is received. The Compliance Audit shall set out the relevant contractor’s compliance with regard to all of the statutory, policy and contractual provisions. Guidelines for the submission of a Compliance Audit are available from the BAI.

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

- iii. **A number equivalent to over 25%** of the total number of commercial sound broadcasting services licensed under the 2009 Act would be unacceptable; regardless of whether an entity has control of, or substantial interests in, the relevant services.

CONSULTATION QUESTIONS

14. **What are your views on the proposed modifications to the thresholds which would:-**

- Increase the first threshold from 15%-20%
- Apply a Compliance Audit from 20%-25%
- Maintain the 25% threshold in respect of ownership of the total number of sound broadcasting services?

15. **What other amendments, if any, would you propose to the above section?**

5.5 An undue number of sound broadcasting services in a specified area

Section 66(2)(h) of the 2009 Act requires the BAI to have regard to:

“the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services” [in a specified area].

In applying its Ownership and Control Policy under the 2009 Act, as set out above, the BAI gives effect to the term “**undue number**” as meaning “more than a reasonable share of the range of sound broadcasting services available in the specified area”. The BAI will assess this requirement with respect to geographic areas.

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

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

⁴ In the case of radio, “audience” refers to listeners.

5.5.1 Tests applied by the BAI in respect of ‘a reasonable number’ of Sound Broadcasting Services in a Specified Area

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

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

In applying these tests, the BAI shall differentiate between whether an entity has “control of” or “substantial interests in” a sound broadcasting service.⁵ It shall also have regard to the different characteristics of the sound broadcasting service in question e.g. format and content; delivery mechanism/platform; the nature of the service (national, local, regional) and the target audience.

CONSULTATION QUESTION

16. What are your views in respect of this section of the Policy? What other amendments, if any, would you propose to the above section?

5.6 An undue amount of communications media in a specified area

Sections 66(2)(i) and 137(2)(i) of the 2009 Act require the BAI to have regard to:

“the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media” [in a specified area].

Section 71 of the 2009 Act does not include a specific provision in relation to media concentration in respect of applicants for other content contracts under that Section. However, the BAI, as a matter of policy, applies this test when considering applications for all Content Provision Contracts.

⁵ **Control:** refers to an individual or legal entity that is in a position proprietarily, financially or in terms of voting rights to determine or direct the policy of the company, with regard in particular to programme output that is, sourcing, production, supply or delivery to the audience. **Substantial Interest:** refers to an individual or legal entity that has sufficient proprietary, financial or voting strength within a relevant company or companies to be able to influence directly or indirectly to an appreciable extent the strategic direction or policy (which shall include editorial policy) of the company (companies), with regard in particular to programme output, that is, sourcing, production, supply or delivery to the audience.

In applying its Ownership and Control Policy under the 2009 Act, as set out above, the BAI gives effect to the term “**undue amount**” as meaning “more than a reasonable share of the range of communications media, as defined in the 2009 Act, available in the geographical area covered by the relevant contract”. The BAI takes the view that there is no obvious practical matrix for determining what constitutes a “reasonable share” of the communications media in all cases.

Therefore, the BAI will consider the context in which each licence application or an application for a contract variation is made, on a case-by-case basis, examining:-

- i. the totality of the communications media in the relevant geographical area;
- ii. the share of the total audience⁶ of the various communications media in the relevant geographical area (the “audience share” model).

5.6.1 Tests applied by the BAI in respect of ‘a reasonable share’ of Communications Media

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

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

In applying these tests, the BAI shall differentiate between whether an entity has “control of” or “substantial interests in” a communications media.⁷ It will also have regard to the different characteristics of the communications media in question e.g. type, cost to the user, size and nature of the target audience. An applicant shall be required to justify its proposals in the context of the above.

CONSULTATION QUESTION

17. What are your views in respect of this section of the Policy? What other amendments, if any, would you propose to the above section?

⁶ In the case of radio, “audience” refers to listeners; in the case of television, “audience” refers to viewers; in the case of print media, “audience” refers to readers; in the case of broadcasting services platforms, “audience” refers to subscribers.

⁷ **Control:** refers to an individual or legal entity that is in a position proprietarily, financially or in terms of voting rights to determine or direct the policy of the company, with regard in particular to programme output that is, sourcing, production, supply or delivery to the audience. **Substantial Interest:** refers to an individual or legal entity that has sufficient proprietary, financial or voting strength within a relevant company or companies to be able to influence directly or indirectly to an appreciable extent the strategic direction or policy (which shall include editorial policy) of the company (companies), with regard in particular to programme output, that is, sourcing, production, supply or delivery to the audience.

5.7 Programming

Section 5.7 of the draft Policy highlights the requirement on the BAI (further to the 2009 Act) to consider the quality and/or type of programming proposed by applicants for new contracts. As a matter of Policy, the BAI also has regard to these considerations when assessing proposals to change ownership at the level of 'substantial interest' and 'control'. In this circumstance, the contractor must set out its proposals in relation to the programming remit of the service.

Under the current Policy, these proposals are assessed with reference to a number of criteria. The draft Policy retains the current criteria and adds a further criteria as follows:-

"Whether, in the context of news and current affairs programming proposals and/or practices, the proposals reflect a sufficient and demonstrable commitment to achieving and sustaining impartial, credible and independent journalism."

This additional criteria is intended to ensure that changes of ownership secure a mix of voices, opinions, outlets and views in respect of news and current affairs and reflects the BAI's commitments regarding plurality. In addition, it also allows the BAI to consider whether the news and current affairs practices of the applicant for a change of ownership will support impartial, credible and independent journalism.

The statutory framework of the 2009 Act requires the BAI to have regard to the quality and/or the range and type of programming proposed by applicants. The BAI believes that it is important, when considering applications for licences, and proposals that involve changes at the level of "substantial interests" or "control", to ask the applicant to set out its proposals in relation to the programming remit of the service.

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

- i. Is the general quality and/or range, type and schedule of programming to be provided appropriate with regard to the audience to be served?
- ii. In the context of services licensed under Sections 63 and 70, does the Programme Policy Statement of the service reflect sufficient commitment to:-
 - Serving audiences in the relevant franchise area?
 - The creation of new opportunities for Irish talent in music, drama and entertainment?
 - Programmes relating to Irish language and culture?
- iii. Whether, in the context of news and current affairs programming proposals and/or practices, there is sufficient and demonstrable commitment to achieving and sustaining impartial, credible and independent journalism.

- iv. In the context of community services licensed, does the Programme Policy Statement of the service:-
 - Has the sole objective of specifically addressing the interest of and seeking to provide a social benefit to, the community concerned?
 - Facilitate and support active participation in all aspects of programming by the community concerned?

CONSULTATION QUESTIONS

- 18. What are your views of the proposed additional test in respect of news and current affairs programming and practices?**
- 19. What other amendments, if any, would you propose?**

5.8 Non-EU Entities

Section 5.8, this reflects the current Policy position. While the BAI is cognisant that issues arising from Brexit may need to be reflected in this heading, it is not proposed to make this change in advance of any outcomes to current negotiations with the EU.

In considering ownership and/or control proposals, the BAI requires that non-EU entities shall have established a registered office within the EU. The BAI shall also have regard to the extent to which reciprocal arrangements for investment and licensing are in place with the relevant non-EU state. Relevant provisions of the Audio-Visual Media Services Directive will be applied as required.

CONSULTATION QUESTION

- 20. Are there any other policy provisions that should be included in the document? If yes, what should these be and what reasons are there for adding the policy provision/s in the context of the Broadcasting Act and the BAI's role?**
- 21. Do you have any other views in respect of the draft BAI Ownership and Control Policy?**

APPENDIX 1 – LEGISLATIVE PROVISIONS

The Broadcasting Act 2009 provides the statutory framework for the licensing and regulation of broadcasting and multiplex services in Ireland.

Broadcasting Act 2009⁸

(i) Introduction

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

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

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

- 25(2)(c) Promote diversity in control of the more influential commercial and community broadcasting services;
- 25(2)(d) Provide a regulatory environment that will sustain independent and impartial journalism; and,
- 25(2)(g) Provide a regulatory environment that will facilitate the development of a broadcasting sector in Ireland that is responsive to audience needs and in particular is accessible to people with disabilities.

(ii) Overview of the range of Contracts provided for in the 2009 Act and covered by the Policy

Sound Broadcasting Contracts (Section 63)

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

⁸ Available at: <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

Community Sound Broadcasting Contracts (Section 64)

The Authority, on the recommendation of the Contract Awards Committee, shall enter into a community sound broadcasting contract with 2 or more members of a local community or community of interest if it is satisfied that these people are representative of the community concerned. The Contract Awards Committee must also be satisfied that the broadcasting service will specifically address the interest of the relevant community and seek to provide a social benefit. Finally, the Committee must be satisfied that the service will be viable and will be run on a not-for-profit basis. Sections 65, 66 and 67 deal with the application and decision making processes for sound broadcasting contracts.

The Television Programme Service Contract (Section 70)

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

Content Provision Contracts (Section 71)

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

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

Community Content Provision Contracts (Section 72)

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

Multiplex Contracts (Section 131)

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

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

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

- (a) the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character, expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares;
- (b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles;
- (g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under Part 6 of the Act⁹;
- (h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in the area specified in the notice;
- (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in a notice.
- (k) any other matters which the Contract Awards Committee considers to be necessary to secure the orderly development of broadcasting services.

(iv) Section 137(2) Criteria to be applied by the Contract Awards Committee in considering applications for multiplex contracts.

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

- (a) the character, expertise and experience of the applicant or, if the applicant is a body corporate, the character, expertise and experience of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares;
- (b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles;
- (h) any other matters which the Contract Awards Committee considers to be necessary to secure the orderly establishment, maintenance and operation of multiplexes;

⁹ Sections 63, 64, 68, 71

(i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in a notice under Section 136(3).

(v) Section 66 (3)

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

(vi) Section 66(4)

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

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

In this context, the Contract Awards Committee shall examine what it describes as “the track record” of the applicant or, if the applicant is a body corporate, the track record of its directors, manager, secretary or other similar officers and its members and the persons entitled to the beneficial ownership of shares, with reference to the criteria in Section 66(2) of the Act. Section 66(5) requires the Contract Awards Committee to give reasons for its decision, to an applicant, where it decides to refuse to award a broadcasting contract.

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

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

APPENDIX 2 – STATUTORY DEFINITIONS

Broadcast: means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

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

Broadcasting Contract: means a Contract entered into under section 63, 64, 68 or 70 of the Act;

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

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

Communications Media' means:-

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

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

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

Electronic Communications Network: means transmission systems including, where applicable –

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

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

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

Irrespective of the type of information conveyed.

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

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

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

Wireless Telegraphy: has the same meaning as in the Wireless Telegraphy Act of 1926 which is: “wireless telegraphy means and includes any system of communicating messages, spoken words, music, images, pictures, prints, or other communications, sounds, signs, or signals by means of radiated electro-magnetic waves originating in an apparatus or device constructed for the purpose of originating such communications, sounds, signs, or signals.

