



ÚDARÁS  
CRAOLACHÁIN  
NA hÉIREANN

BROADCASTING  
AUTHORITY  
OF IRELAND

**BAI OWNERSHIP AND CONTROL POLICY  
2019**

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### 1. INTRODUCTION

The BAI Ownership and Control Policy (2019) (“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

The key legislative and policy 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.<sup>1</sup>

### 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;
- 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 2019 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.

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<sup>1</sup> 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>

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

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 ensure that the ethos of a broadcasting service is such that it will best serve the needs of the audience it is licensed to serve;
- ii. To contribute to the upholding of the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression;
- iii. To promote open and pluralistic broadcasting services, with particular reference to radio and television services;
- iv. To contribute to the achievement of a regulatory environment that will sustain independent and impartial journalism;
- v. 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;
- vi. To support both the viability of broadcasting services and the greater sustainability of the broadcasting sector as a whole;
- vii. To contribute to the promotion of diversity in control of the more influential commercial and community broadcasting services;
- viii. 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.

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

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).

## **5. POLICY PROVISIONS**

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.

### 5.1 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.”<sup>2</sup>

#### 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 eight tests:-

- i. Has the applicant ever been convicted of an offence (excluding ‘spent convictions’) relating to any of the following:- fraud or dishonesty; membership of a criminal organisation; corruption; terrorist offences; money laundering; terrorist financing; child labour; human trafficking?

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<sup>2</sup> 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.

- 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. Has the applicant ever been the subject of any of the following:- adverse findings by a tax authority; adverse findings by a regulatory body in relation to gross professional misconduct; adverse findings by a competition authority in relation to anti-competitive conduct?
- viii. 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 or 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.

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

In considering applications for the award of contracts, further to the provisions of Section 66(2) and Section 137(2) of the Act, the 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) <sup>3</sup>**

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?

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<sup>3</sup> This contract is currently held by Virgin Media Television Limited.

### 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.

## 5.3 Viability and Sectoral Sustainability

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.

## 5.4 An undue number of sound broadcasting services

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

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

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

### 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.

### 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 audience<sup>4</sup> of the various sound broadcasting services in the relevant geographical area (the “audience share” model).

### 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.<sup>5</sup> 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.

### 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].

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<sup>4</sup> In the case of radio, “audience” refers to listeners.

<sup>5</sup> **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.

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.

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 audience<sup>6</sup> 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.<sup>7</sup> 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.

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<sup>6</sup> 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.

<sup>7</sup> **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

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:-
  - Have the sole objective of specifically addressing the interests 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?

### 5.8 Non-EU Entities

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

### **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 2009<sup>8</sup>**

##### **(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.

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

(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.

**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 Act<sup>9</sup>;
- (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;

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<sup>9</sup> Sections 63, 64, 68, 71

- (b) the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles;
- (h) any other matters which the Contract Awards Committee considers to be necessary to secure the orderly establishment, maintenance and operation of multiplexes;
- (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in a notice under Section 136(3).

**(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.

