



**Consultation on the Revised BAI Ownership and Control Policy  
Statement of Outcomes**

**Broadcasting Authority of Ireland**

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## 1. Introduction

The Broadcasting Authority of Ireland (“BAI”) has developed its revised Ownership and Control Policy (“the Policy”). This document provides the outcomes from the public consultation undertaken in respect of a draft of this revised policy. The changes made on foot of the consultation are detailed.

Section 2 provides the context for the development of the Policy and the consultation undertaken. Section 3 details the outcomes of the consultation.

## 2. Context

The Ownership and Control Policy has, in various iterations, been in effect since its initial development by the Broadcasting Commission of Ireland in 2001. The Policy was subsequently updated in 2005, 2008 and 2012. The primary objective of the Policy over this period of time has been ensuring the development of a viable, sustainable commercial broadcasting sector characterised by plurality of ownership and diversity of content for the audience, in the context of the wider communications media environment. These issues of plurality, viability, sustainability and diversity of ownership and content have remained a consistent strategic priority for the Broadcasting Authority of Ireland (“the BAI”) since it was established in 2009. This is reflected in the current BAI Strategy Statement 2017-2019 which identifies ‘Promoting Diversity and Plurality’ as one of the key themes in the Strategy.

It is the practice of the BAI to review its policies on a periodic basis. In that context, and in the context of the BAI’s strategic commitment to promote diversity and plurality, the BAI has undertaken a revision of the BAI Ownership and Control Policy. This entailed the following:

- **Operational Review**

This considered how the Policy had operated in practice and the outcomes informed a set of questions that were asked of stakeholders in a targeted consultation.

- **Targeted Stakeholder Consultation**

Dr. Roddy Flynn of Dublin City University was engaged to conduct key informant interviews with stakeholders who have played a central role in the development and subsequent reviews of the Policy. This explored these stakeholders’ perspectives on the current Policy provisions and potential required revisions. These stakeholders included commercial, community and public service broadcasters, broadcasting representative groups, the National Union of Journalists, third level colleges, Department of Communications, Climate Action and Environment, amongst others.



- **Public Consultation on Draft Policy**

Based on the outcomes of the targeted stakeholder consultation and other inputs from the review, the Authority agreed a revised draft revised Ownership and Control Policy. This draft was the subject of a consultation process undertaken between December 2018 and end January 2019 and was promoted via a press briefing, press release and social media engagement. In total, 7 submissions were received representing the full range of broadcasters and other interests. Of these, 2 were from private individuals, 4 were provided by broadcasters and their representatives and one was provided by a firm of solicitors. A list of respondents is provided at Appendix 1 and a copy of the submissions received is available on the BAI's website: - [www.bai.ie](http://www.bai.ie).

### **3. Consultation Outcomes**

This section of the Statement of Outcomes sets out the views and proposals received in respect of each section of the draft revised Policy and the BAI's decisions in relation to them.

In developing the final Policy, the Authority had regard to a number of considerations.

Firstly, the Authority is of the view that the current Policy has operated effectively since 2012 and has permitted a range of contractual variations/changes of ownership without significant problems arising. Both the targeted stakeholder consultation and the public consultation indicated strong support for many of the current Policy provisions. However, while the Policy has worked in practice, the Authority notes that the legislative framework underpinning it has remained largely unchanged since 1988 and does not accommodate significant developments in media content, distribution and streaming. The Authority considers that the framework is now outdated and in need of change to reflect the current and evolving media landscape.

Dissatisfaction with the current legislative provisions was also evident from the responses received to the targeted and public consultations. This was particularly the case regarding the assessment criteria/tests used in the Policy for dealing with market dominance and the upper limits set on commercial radio ownership and related matters. A consistent view expressed by stakeholders was that the BAI should apply these criteria/tests with reference to the total media market, including internet media. In developing the Policy, the BAI's role is bound by the 2009 Act which does not reference internet media. This has limited the BAI's ability to respond to some of the issues highlighted in the consultation and more generally to the significant changes in the media landscape in recent years. For this reason, the BAI is recommending that the legislative provisions should be updated to accommodate the significant changes in the media market and landscape since the introduction of the 2009 Act.



Secondly, a good deal of responses about the current Policy provided in response to the targeted and public consultations focused on matters of viability and sectoral sustainability. A principal mechanism for dealing with these issues is the BAI's Broadcasting Services Strategy and the related licensing process. More broadly, in addition to the strategic objective to promote diversity and plurality, 'Sectoral Sustainability' has been another of the five key strategic themes of the current BAI Strategy Statement. This has been given effect by the Authority via the recent update to the Broadcasting Services Strategy, via engagement with the commercial and community radio and television sectors focusing on sustainability and via ongoing requests for changes to contractual commitments. This responsiveness to the issues of viability and sectoral sustainability has now additionally been given effect in the revised Ownership and Control Policy. This is through the inclusion of a new Policy provision titled 'Viability and Sectoral Sustainability' as well as through the loosening of a number of restrictions in the provisions of the Policy.

Thirdly, the targeted and public consultation included a number of suggested changes which have not been adopted in the final Policy. Decisions in this regard were made having regard to certain considerations. A number of these suggested changes related to operational or implementation issues that can be dealt with via licensing or contract variation documentation and guidelines. Separately, a number of changes were proposed to the decision-making criteria which, in the view of the Authority, would overcomplicate the decision-making process while not providing any clear benefits. The fact that the decision-making criteria have in practice worked effectively to date has informed this view.

Finally, in deciding on Policy changes to be introduced, as well as those proposed and retained without change, the Authority has sought to balance the interests of broadcasters with those of the public, with an overriding focus on the public interest. The BAI's focus in this regard reflects the key media plurality objective that the public should have available to them a mix of voices, opinions and sources of news, current affairs and cultural content.

### **Section 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.

#### ***Authority Decision***

As a factual introductory section, no specific questions were asked in the consultation about the introduction and no observations were made in respect of this section of the Policy. Accordingly, the Authority has agreed to adopt in the final Policy the draft wording as proposed.



## **Section 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).

### ***Authority Decision***

As with the introduction, this section sets out the factual legislative and policy background. As no observations were made in respect of this section of the Policy, the Authority has agreed to adopt in the final Policy the draft wording as proposed.

## **Section 3: Policy Objectives**

This section of the draft revised Policy remained largely unchanged from the current regulations. However, the draft included a new policy element which identified support for the viability of individual broadcasting services and the sustainability of the broadcasting sector as a whole as an objective of the Policy. Separately, the draft revised Policy proposed to highlight in the objectives the importance of promoting diversity of ownership as well as content.

### ***Consultation Feedback***

A range of views were set out by respondents to the consultation in respect of the draft Policy objectives. The objectives, including the additional objective in respect of viability and sectoral sustainability, were broadly supported by broadcasters. In some instances this support was qualified and in another case the objectives as a whole were not supported. One respondent requested that viability and sectoral sustainability should be the driving objective of the Policy. This respondent also argued for the inclusion of a separate objective highlighting the impact of digitalisation and more generally questioned whether the draft revised Policy as proposed could in practice support sustainability without permitting more consolidation of radio services. Another respondent opposed the objectives (and more generally the overall policy approach) on the basis that, in their opinion, the objectives as drafted supported the use of a radio-specific layer of regulation which the respondent considered to be outdated in the current market and contrary to the overall viability and sustainability of the sector. This view also informed this respondent's opposition to including diversity of ownership as a stated objective. One respondent also shared the views of broadcasters and supported the new objective linked to viability and sectoral sustainability but posited that a focus on diversity of content rather than ownership might be a better approach in terms of meeting the intent of the new objective. Two respondents questioned aspects of the proposed viability and sustainability objective. Both queried what they considered to be the priority listing for this objective and one requested that the objective be more citizen centred.



Another respondent set out a detailed submission outlining why the viability and sectoral sustainability objective (and the policy provision dealing with these subjects included later in the draft revised Policy) should not be included. This respondent stated that, contrary to the BAI's view, neither the current business environment nor the Mediatique report support the proposed inclusion of this objective. This respondent stated that while the media business environment is challenging, there are also positive signs for the industry. This respondent also argued that the BAI reference to the Mediatique report as supporting changes in regulation is not evident in the report itself. Further, the respondent also questioned why the BAI, after having undertaken an assessment of the viability of the business plan for a service as part of the licensing process, would then subsequently revisit this issue thereafter in the context of an ownership and control change. This respondent questioned why, if a service is no longer viable, a new licensing process would not commence (implicit in this is that the service with viability challenges would close). The respondent also questioned whether applicants might effectively make a case for a licence with the foreknowledge that it could then make a later case later under the viability and sustainability element of the Ownership and Control Policy and propose weaker contractual provisions. This respondent also noted that the proposed removal of the two-year restriction on assignments of contracts would remove a deterrent in this regard.

#### ***Authority Decision***

Having considered the responses, the Authority is of the view that the basis for including matters relating to viability and sectoral sustainability in the objectives and including a reference to diversity of ownership remain valid. The Authority introduced the policy objective in acknowledgement of the importance of both issues for stakeholders and in the context of its own strategy.

Regarding the views of one respondent about the necessity of the objective and the BAI's arguments for including it, the Authority did not agree with this respondent's analysis. The Authority noted that Mediatique cited the good health of the industry but also indicated future challenges and recommended a regulatory response from the BAI, in terms of licence terms and ownership regulations. In that context, the Authority considers that sectoral sustainability in the short to medium term is a reasonable concern that should be incorporated in the Policy and is one that reflects its own experience of dealing with requests from the broadcasting sector for contractual variations. As such, the Authority is satisfied that the objective reflects the reality of operating in the business market.

Regarding the inclusion of the objective highlighting diversity of ownership as well as content; given the underlying plurality focus of the Policy, the Authority considers it appropriate to adopt this updated objective highlighting diversity of ownership.

Finally, while no objective was intended to have priority, in the interests of readability the Authority has grouped the objectives together under similar themes.



#### **Section 4: Statutory Definitions & Interpretations of Key Terms Used in the Policy**

The draft revised Policy proposed to include the bulk of statutory definitions (set out in the body of the current version of the Policy) in an Appendix. This was done 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 draft revised Policy highlighted 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.

##### ***Consultation Feedback***

There was broad but qualified support for this section of the draft revised Policy with key broadcaster representatives and broadcasting contractors supporting the interpretations. One respondent requested that the BAI apply a wider definition of 'Communications Media' rather than the one included in the draft revised Policy (which excludes internet media). This was so that the BAI's definition would align with that of a 'Media Business' contained in the Competition and Consumer Protection Act (which includes certain internet media). Another respondent requested the BAI apply an operational distinction between 'control' and 'substantial interests' when assessing ownership and control issues. They stated that in practice these concepts are different and should not be treated as equivalent (which they contend the BAI does at this time). One respondent stated that the BAI's interpretations of 'Control' and 'Substantial Interest' were outdated and needed to reflect current best practice (for example, the practice of the OECD). Finally, one respondent argued that the ability to control or influence should be the predominant consideration rather than matters relating solely to control and substantial interests.

##### ***Authority Decision***

Regarding the definition of 'Communications Media'; as this is a statutory definition the BAI has no discretion regarding the scope of media services that the definition encompasses or excludes. As this definition does not include internet media, the BAI does not believe that it can legally have regard to this form of media when making an assessment as to the desirability of allowing any person or group of persons to have control of, or substantial interests in, an undue amount of communications media (as per the Broadcasting Act).

Regarding the BAI's interpretation of the terms 'Control' and 'Substantial Interest', as the 2009 Act specifically requires the BAI to have regard to ownership which is either a controlling or substantial interest, it does not have discretion to consider only a controlling interest (as proposed by some respondents to the consultation).



The Authority does not agree that these terms are treated in an equivalent manner in the Policy. In practice, the current and draft revised Policy distinguishes between 'control' and 'substantial interests', for example, when applying the tests relating to an 'undue number of sound broadcasting services in a specified area' and 'an undue amount of communications media'. More generally, both are relevant in an assessment of plurality since they concern how a media service may be influenced.

While noting the views of views of participants in the BAI's targeted consultation and responses from the public consultation, the Authority has decided to retain the current interpretations of 'Control' and 'Substantial Interest'. It has done so because there was a good degree of support for the current interpretations, because they provide for a flexible and responsive approach to changes to contracts and because no significant issues have arisen when applying the terms in practice. The BAI was also of the view that arguments made in the consultation did not provide grounds for overriding the current approach.

### **Section 5: Policy Provisions**

This section of the draft revised Policy set out the provisions that would 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 proposed a range of tests that the BAI would apply before making a determination. The tests would be applied on a case-by-case basis and decisions would 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 draft Policy provision largely mirror those of the current Policy.

The draft revised Policy included a new provision dealing with matters of viability and sectoral sustainability. This is discussed in more detail below. The draft revised Policy also proposed to remove the provisions contained in the current Policy dealing with the 'Assignment of Contracts' and 'Concrete Indicators of Diversity'. The proposed removals are dealt with later in this document. The other Policy provisions and the consultation outcomes in respect of these are now addressed.

#### **Section 5.1: Character, Expertise and Experience**

This section of draft revised Policy reflects the practice of the BAI to consider matters relating to the character, expertise and experience of persons or groups of persons (including 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 revised Policy proposed to reduce the office holders and other relevant parties to which the character tests of the Policy would apply while also retaining discretion for the BAI to consider the character of other management positions on a case-by-case basis. Under the specific character tests set out in the Policy, the first test dealing with criminal offences was amended to exclude “spent convictions”. The draft revised Policy also clarified that a failure to pass a character test would not automatically disqualify an applicant (in the case of a licence application) nor will it automatically lead to a request for a change of ownership and control being rejected. Separately, the BAI sought 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 provisions in respect of ‘Experience’ and ‘Expertise’ remained materially unchanged to those contained in the current Policy.

#### ***Consultation Feedback***

There was little support for the inclusion of additional character tests relating either to criminal offences or adverse findings of civil/public bodies. One respondent did, however, suggest that they were insufficient as they did not address what they characterised as legal and ethical issues relating to non-payment of tax, the perceived obstruction of debate through the use of defamation law and membership of a political party. This respondent also argued against adding any criminal offences to those specified in the current Policy. Separately, there was broad support for the proposal to reduce the application of character tests in terms of management roles. There were divergent views as to how far this should be reduced with some respondents proposing the tests should only be applied to the Directors and the Chief Executive. There was little support for the inclusion of character tests for the Company Secretary. On the proposals that the Authority would retain the right to apply character tests to other management positions having regard to the particulars of an application or in the context of a change in ownership and/or control, broadcasters did not favour this proposal and other respondents made no observations.

Finally, one respondent questioned the suitability of the BAI taking into account whether a licence or contract issued by any statutory body has been suspended or revoked in this or any other jurisdiction as part of the character test and argued that this test should be limited to licences or contracts issued by broadcasting bodies only.

#### ***Authority Decision***

Having considered the consultation responses, the Authority has decided to adopt the proposal to reduce the application of character tests in terms of the management roles which would be subject to a character test assessment. Notwithstanding this, it has decided to retain the discretion to consider a wider group of managers where there is a significant change in ownership in the sector. The Authority was of the view that this discretion is appropriate in order to provide adequate oversight of media plurality in the State.



On the matter of additional character tests, the Authority was of the view that additional tests in respect of criminal offences and other non-criminal findings are appropriate in order to protect the public interest. In this regard:

- the following criminal offences have been added to the character tests: membership of a criminal organisation; corruption; terrorist offences; money laundering; terrorist financing; child labour; human trafficking.
- the following non-criminal findings have been added to the character tests: 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.

The other elements of the character tests, and the proposals in respect of expertise and experience have been adopted in the final Policy.

### **Section 5.2: Financial Resources and Good Business and Economic Principles**

The provisions in the draft revised Policy under this section were unchanged from the current Policy as the BAI considered them to be appropriate in the context of the Policy objectives.

#### ***Consultation Feedback***

Regarding this section, respondents to the consultation were broadly supportive with one respondent highlighting the importance of applying proportionate levels of regulation to non-profit voluntary operators. One respondent stated that this section was not required and that 'standard scrutiny', the application of competition legislation and general business practice are sufficient. This respondent also commented negatively on the 50% limit on commercial revenue in place for community broadcasters.

#### ***Authority Decision***

Based on the feedback from the consultation and because such matters must be considered further to the 2009 Act, the Authority has decided to retained these provisions as proposed.

### **Section 5.3: Viability and Sectoral Sustainability**

As noted earlier in the document, in revising the Policy, the Authority has regard to the fact that a good deal of responses about the current Policy provided in the context of the targeted consultation focused on matters of viability and sustainability. In this context, these concerns are reflected in the draft Policy objectives that were set out in Section 3.



In addition, the draft revised Policy included a new provision that focused on viability and sectoral sustainability. This would mean that the broadcasters, when submitting requests for changes to ownership and control could make reference to matters related to the viability of the service. The BAI would consider such matters on a case-by-case basis having regard to the viability of individual services and, where required, the sustainability of the sector. The public interest is factored in via consideration of the Broadcasting Services Strategy, its objectives and provisions.

### ***Consultation Feedback***

Feedback in respect of the proposed addition of a policy provision dealing with viability and sectoral sustainability reflected that provided to the proposal to incorporate considerations of viability and sectoral sustainability in the Policy objectives (discussed above). Broadcasters, for the most part, favoured this new provision but some also articulated divergent viewpoints.

One respondent very favourably endorsed the inclusion of the Policy provision while another argued that an overhaul of the regulatory approach of the BAI, and the regulation of radio, was necessary in order to fully address issues of viability and sustainability. This respondent questioned the value of the proposed new provision in the absence of this level of regulatory change, which it considers necessary to address the challenges brought on by digitalisation and in a context where the draft policy proposed to retain the 25% upper limit on ownership of commercial radio services. Another respondent made the same case for consolidation as the best way to address the issues of viability and sectoral sustainability. A further respondent set out a detailed submission outlining why the viability and sectoral sustainability policy provision should not be included. The arguments in this regard have previously been set out briefly above under 'Policy Objectives'.

### ***Authority Decision***

The Authority noted that a range of the issues highlighted in the consultation feedback relating to the proposed new objective dealing with viability and sectoral sustainability were re-iterated by respondents to the consultation in respect of this proposed policy provision. For the reasons set out above in its comment on the policy objective, the Authority is of the view that this new policy provision remains appropriate. In terms of how this provision will operate, additional guidance will be developed with a view to informing contractors and other relevant parties of the operational aspects of the revised policy.



#### **Section 5.4: An undue number of sound broadcasting services**

#### **Section 5.5: An undue number of sound broadcasting services in a specified area**

#### **Section 5.6: An undue amount of communications media in a specified area**

These sections of the draft revised 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 person 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 person 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 internet media. These sections of the Policy are those which provide the BAI with 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.

The draft revised Policy retained many of the provisions of the current Policy. In revising the Policy, the Authority had regard to the fact that this section of the Policy is underpinned by a legislative framework that has remained largely unchanged since 1988. Nevertheless, the BAI must operate within this legislative framework and in developing the draft revised Policy in respect of these sections it did so being mindful that its scope for updating the Policy is limited by the legislation.

Regarding Section 5.4, which deals with Sound Broadcasting Services only, the BAI proposed to retain the current upper threshold of 25% on the total number of commercial radio services that any person or groups of persons may own. The BAI's decision was 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 because it would raise the potential of a reduction in media pluralism without any sound basis. However, the BAI considered that the number of thresholds in this section of the Policy should be reduced from four to three and the extent of the tests that are applied in the case of higher percentages of ownership should also be reduced. In this regard, a person or group of persons would be permitted to own up to 20% of the total number of commercial radio services without any tests being applied. In the case of ownership between 20-25% of the total number, persons or groups of persons seeking ownership to this level would be required to successfully pass a compliance audit. However, the Policy proposed to remove the five additional tests currently applied at this level of ownership.



### ***Consultation Feedback***

Broadcaster respondents to the consultation favoured the removal of the 25% upper limit on ownership of the radio sector by a person or group of persons. Arguments in this respect reflected those made as part of the targeted consultation and considered by the Authority when finalising the draft revised Policy. These related to the radically changed media market since the current 2012 Ownership and Control Policy was introduced and the view that it is necessary to allow greater consolidation of the radio sector in order to meet the market challenges of digitalisation. Broadcasters argued that existing competition law, the new media mergers legislation and provisions of radio contracts (specifically Programme Policy Statements) provide sufficient protections for plurality. A number of broadcaster respondents argued, in effect, that a reduction in the diversity of ownership will be necessary in order to maintain a diversity of content and suggested that the current Policy restricts new investment and is contrary to the BAI's stated objectives in respect of viability, sustainability, diversity and plurality.

Two respondents did not favour the proposed changes to these policy provisions. One respondent stated that the change in media concentration thresholds from four to three is unwelcome. This respondent also did not favour the removal of the five additional tests currently applied when a proposal is being considered that involves ownership of the commercial radio sector moving into the 20-25% threshold. This respondent stated that the BAI had not made a compelling case for these changes, which the respondent argued has the potential to reduce plurality. The respondent further stated that the draft revised Policy is unclear regarding how the BAI uses the three media concentration tests and expressed concern about the degree of discretion that the Policy appeared to provide the BAI. The respondent also stated that greater emphasis should be given by the BAI to the audience market share as part of its assessment and outlined in a detailed response how this could be approached. More broadly, this respondent set out the view that the draft revised Policy is unclear about how the BAI applies the thresholds in practice. This respondent recommended that further guidance be provided and the publication of decisions in respect of changes in ownership and control and the reasons for these decisions reached.

### ***Authority Decision***

The Authority noted that many of the points raised during the targeted consultation that favour the removal of thresholds on ownership were restated in the submissions to the public consultation. Arguments favouring the retention of the current policy provisions, also made during the targeted consultation, were also highlighted.

Having considered these submissions, the BAI has decided to adopt the approach taken in the revised draft revised Policy. This is on the basis that the Authority is of the view that it is the best way at this time to ensure plurality in terms of a diversity of ownership and diversity of content within the current legislative framework.



This means that the upper threshold on the total number of commercial radio services that can be owned by one person or group of persons remains at 25%. In reaching this decision, the Authority also noted that the highest percentage of the total number of services currently owned by any one individual or company is 18% and therefore there already remains scope for consolidation under the current and revised policy thresholds. This is evident from the recent purchase of Clare FM and Tipp FM by the Radio Kerry Group. It is the Authority's policy-making approach to keep an open mind to changes in the regulatory environment and to consider revisions to policy where it considers them necessary and warranted.

The Authority has also decided to adopt unamended the other draft revised Policy provisions detailing the tests in respect of 'an undue number of sound broadcasting services in a specified geographic area' and 'an undue amount of communications media'. In the case of the test concerning 'communications media' the BAI cannot consider the impact of internet media without a change in the 2009 Act and the Authority could not therefore address consultation respondents concerns in this regard. The Authority was also of the view that, given the decision to retain thresholds on ownership, the tests of substitutability and dominance and the manner in which these are undertaken remain suitable.

Arising from responses to the targeted and public consultations, the Authority is of the view that, for some stakeholders, there is confusion as to how all three tests set out under sections 5.4, 5.5 and 5.6 are considered by the BAI when assessing ownership and control changes. In practice, the BAI has regard to all three tests when considering requests for changes to contracts. For this reason, the Authority is of the view that there is an evident need to provide more information about how the Policy applies in practice since both the protections afforded by the Policy in respect of the public interest and its flexibility in responding to issues on a case-by-case basis are, in its opinion, underestimated by a range of stakeholders. The Authority will address this in the context of the implementation of the Policy.

### **Section 5.7: Programming**

This section of the draft revised Policy highlighted 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. 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 revised Policy retained the current criteria and proposed a further criteria which is intended to ensure that changes of ownership secure a mix of voices, opinions, outlets and views in respect of news and current affairs. This proposed change is intended to reflect the BAI's commitments regarding plurality.



In addition, it is also intended to allow 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.

#### ***Consultation Feedback***

In their response to the consultation, no broadcaster favoured the adoption of the additional criteria under the programming heading. One respondent states that the additional criteria is superfluous as existing requirements already achieve the intended outcome of this new proposal. Another respondent requested specific details as to how this new criteria would be measured. A further respondent stated that this criteria is unwelcome as it would entail the addition of further regulation when greater deregulation should be driving the BAI's approach.

#### ***Authority Decision***

It is the view of the Authority that broadcasters are correct to highlight that the regulatory framework includes strong protections in respect of ensuring news and current affairs content is broadcast and complies with the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs. However, while the BAI Code is assessed in terms of statutory complaints, the current Policy does not include an assessment of how commitments to support impartial, credible and independent journalism are applied in terms of journalistic practice, resourcing and other relevant considerations. The Authority is of the view that the inclusion of a reference to practice in addition to proposals in respect of news and current affairs would allow a more rounded assessment of the contactor's commitment to achieving and sustaining impartial, credible and independent journalism. Regarding the request to outline how this would be assessed, it would be a matter for the contractor to set out how its proposals and practice addresses this issue. As with other aspects, the BAI will provide guidance. This guidance will highlight matters such as complaints upheld and also seek information on editorial practices, training etc., or other measures applied with a view to ensuring impartial, credible and impartial journalism.

### **Section 5.8: Non-EU Entities**

This section of the draft revised Policy reflected the current Policy position. In this regard it states that, in considering ownership and/or control proposals, the BAI requires that non-EU entities shall have established a registered office within the EU. It further states that 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 Audiovisual Media Services Directive will be applied as required.



### ***Authority Decision***

As no issues arose from the consultation responses in respect of this section of the draft revised Policy, the Authority has agreed to adopt in the final Policy the draft wording as proposed. While the BAI is cognisant that issues arising from Brexit may need to be reflected under this section, the Authority will review these elements once there is clarity regarding the outcomes to current negotiations with the EU.

### **Appendix 1 - Legislative Provisions & Appendix 2 - Statutory Definitions**

The two appendices provide information regarding the statutory provisions, including statutory definitions underpinning the Policy. No issues arose in respect of the consultation responses received in respect of the appendices and the Authority has agreed to adopt the draft provisions.

### **Removal of Policy Provisions in respect of 'Assignment of Contracts' and 'Concrete Indicators of Diversity'**

The provisions prohibiting the 'Assignment of Contracts' and a commitment to develop 'Concrete Indicators of Diversity' were proposed for removal from the Policy.

The current Policy 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). In developing the draft revised Policy, the Authority took the view that these restrictions were no longer necessary 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. The Authority was also of the view that the Policy provisions applied as a whole 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', the Authority was of the view that this section was no longer required as it was only explanatory in nature and other BAI policies dealt with issues relating to diversity, including the recently developed Media Plurality Policy.

### ***Consultation Feedback***

Regarding the proposed removal of the provisions in respect of 'Assignment of Contracts' and 'Concrete Indicators of Diversity', broadcasters favoured these proposals for the reasons set out in the BAI's consultation document. One respondent stated that the change regarding assignments appears to implicitly accept the need for industry consolidation but that this logic is not followed through in the rest of the Policy, in particular via reductions in the media concentration thresholds. Another respondent stated that the BAI should take a more radical approach than simply removing restrictions on assignments but should also remove all media concentration restrictions.



One respondent favoured the retention of the restrictions on assignments of contracts as a measure to protect plurality and the integrity of the licensing process while another favoured the change subject to information about ownership changes being made public.

### ***Authority Decision***

As there were no significant issues highlighted by respondents to the consultation in respect of the proposal to remove the section titled 'Concrete Indicators of Diversity', it is proposed to adopt this proposal in the final document.

Regarding the removal of restrictions on assignments, arguments against removing this section were linked, for the most part, to arguments opposing the proposal to introduce considerations of viability and sectoral sustainability in the objectives and as a policy provision. The Authority remains of the opinion that its initial rationale for removing the restrictions on assignments remains valid and for this reason, it has agreed to remove this section of the Policy.

### **Other Matters**

The consultation responses also highlighted a number of other issues. These included the following:-

- One respondent was critical of the BAI's approach to the development of the draft revised Policy, citing it as a flawed process. This respondent stated that the rationale for including some and excluding other proposals in the draft revised Policy were not justified or transparent given the range of submissions made as part of the targeted consultation. This respondent also stated that the draft revised Policy included new proposals introduced 'late in the day'. The respondent further noted that the BAI, in developing its proposals, did not have regard to its own 'high quality' research. Finally, the respondent made a number of general points about the regulatory approach of the BAI overall and stated that the BAI had taken no action to address sustainability in the sector.
- A number of other suggested changes were made by one respondent. These included a request that the BAI take measures to ensure broadcasters make their data open to the public to allow an independent assessment by the public of performance. The proposed data to be made available included playlists, interviews, running order etc. This respondent also recommended that the dominance test should be assessed using a citizen's jury and that broadcaster management roles would be approved on a licensed basis with the potential for non-renewal and that ethics and other governance measures be applied by the BAI as part of its licensing and compliance processes.



### ***Authority Decision***

On the issue of the criticism of the process for developing the draft revised Policy, the Authority noted the very general nature of the comments by this respondent (which cited no specific examples). The Authority is of the view that the criticism set out by this respondent is not supported by their submission and is rebutted by the processes undertaken. In this regard, the approach taken was that commonly used by the BAI to develop policies and other regulations. In developing the draft revised Policy and finalising it, the Authority has had full regard to the research produced, submissions provided to the targeted and public consultations, its own regulatory experience and the relevant statutory and policy frameworks. The Authority is satisfied that the policy development process was appropriate. Decisions reached on foot of policy making processes will, inevitably, not meet the satisfaction of all stakeholders. In reaching decisions, the BAI is always mindful to balance the interests of all stakeholders with the public interest being the overriding concern.

Regarding other matters, as it is the BAI's statutory role to take decisions in respect of ownership and control, the use of a citizen's jury as part of a dominance test is not considered warranted by the Authority. Regarding licensing of managerial roles, such a move would be outside the BAI's remit. Regarding making data open, some of this information is located in the BAI and an option to make it more publicly available will arise in the context of the introduction of the Open Data and Public Sector Information Directive agreed by the EU earlier this year. Outside of this, it is not clear that the BAI could compel broadcasters to make other data available.



## **Appendix 1**

### **List of Written Responses to the Public Consultation**

- Communicorp Media
- Independent Broadcasters of Ireland
- Wireless Media
- Virgin Media
- Matheson Solicitors
- Dr. P. Gorecki
- Mr. M. Keogh