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Broadcasting Authority of Ireland

Ownership & Control Policy Consultation – Submissions Received

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**Communicorp Response to Draft
BAI Ownership and Control Policy 2018**

Executive Summary

Communicorp Feedback on Consultation Process

- We believe the BAI consultation process is flawed. It is not transparent and provides no feedback or evaluation as to why proposals are introduced or excluded in policies despite significant input from Communicorp and other stakeholders.
- The BAI must justify why it brings forward certain proposals for further consultation while disregarding many others.
- The emergence of new proposals at very late stages in the consultation process with no reasoning or explanation is also baffling to Communicorp.
- In addition, the BAI has frequent consultations on matters without any material changes or where no revised thinking has been communicated.
- There is no obvious reliance on high quality research conducted by the BAI itself in influencing the consultation.

Ownership & Control Draft Policy Feedback

- Communicorp is deeply disappointed that the BAI is not taking the opportunity to bring the policy on Ownership and Control into the digital era.
- This draft policy is not relevant and appropriate for the Irish media market changes now and in to the future.
- The policy needs radical overhaul to ensure a viable, sustainable, indigenous independent, non-state radio sector in Ireland.
- The policy does not acknowledge the impact and material change that digital media and technological developments have had and will continue to have on consumers and advertisers.
- In the last 10 years, digital advertising has grown to account for 50% of the market. In the same period, radio has declined from 17% of the advertising market to less than 12%. The BAI has done nothing to help the industry in this period.
- This drastic decline in radio revenue coupled with no material easing of the regulatory burden increases pressure on operators impacting their profitability and viability .
- Google and Facebook control over 38% of total advertising revenue in Ireland and are wholly unregulated while broadcasting remains highly regulated. The BAI cannot continue with regulation that is stuck in a time-warp.

- The absence of serious change in BAI policy now will lead to significant job losses, reduced diversity in content and a reduction in Irish generated news and current affairs.
- The industry and audience cannot continue to have regulation that is 30 years out of date. The BAI policy on Ownership and Control has largely remained static during this time.
- The heavy-handed inflexible regulation needs to end. It has no place in helping create a proper future for the industry.
- Other markets, including the UK, have clearly demonstrated that changes can be successfully implemented while still maintaining diversity & appeal for audience and advertisers.
- There is an impression that the BAI's main role is to continue to prop up RTE and turn a blind eye to their business practices while continuing to ensure the independent sector operates under oppressive regulation.
- RTE is a 'protected species' with more relaxed regulation and the luxury of being multi-platform and dual funded through the licence fee and advertising income. Meanwhile, Communicorp radio stations and others provide significant and equitable news and current affairs and public service broadcasting output with more onerous restrictions.
- The repeated requests by Communicorp and the independent sector for a share of the RTE Licence fee or a widening of the Sound and Vision to fund news and current affairs and public service broadcasting has been repeatedly ignored.

The draft policy should be amended to incorporate these key points;

- The 25% threshold limit on the ownership of radio licences should end and restrictions on concentration of ownership of radio removed.
- Ownership & Control must be considered as part of the total media market not just broadcasting. The BAI must regulate in light of the significant impact of digitalisation and technology.
- The BAI should push to regulate other 'media businesses' such as Google and Facebook despite their large scale role in Foreign Direct Investment.
- The aim of viability must be backed by a level playing field, particularly for music radio services. Perceived longer established stations must no longer suffer more penal content obligations than almost identical services perceived as 'niche'.

Responses to Consultation Questions

1. Do you consider the objectives of the Policy appropriate, given the organisation's statutory obligations and Statement of Strategy?

Communicorp is in broad agreement with the objectives but overall it is very disappointed with the likely outcome of this review of the policy on Ownership and Control.

The review completely ignores the effects of digitalisation and the fact that Facebook and Google control 38% of the media advertising market in Ireland. It also fails to allow for essential consolidation in the sector, and while suggesting a new emphasis on sectoral viability, will not deliver on the change necessary to support it. An important opportunity to change policy in the face of profound changes in digital technology and the pattern of media consumption is being ignored.

In addition to concerns about the likely outcome, Communicorp is concerned by the underlying consultation process. It is especially perturbed by the following deficiencies, including:

- a) No apparent engagement with many of the detailed submissions made by Communicorp and other operators over many years.
- b) No obvious rationale for what issues are consulted upon leading to new issues emerging on an ad hoc basis late in the consultation process.
- c) A general failure to back up proposals with specific analysis so that the BAI's rationale for specific proposals can be properly understood.
- d) No obvious reliance on high quality research conducted on behalf of the BAI, or, for that matter, sufficient appreciation of its implications for the draft policy.
- e) A general failure to revise the overall draft policy adequately instead favouring modest changes such as sectoral viability.

2. What are your views on the additional references in the objectives to viability, sectoral sustainability and diversity of ownership?

Communicorp supports the newly proposed references to service viability and sectoral sustainability, however, we believe service viability should focus on the imposition of viable obligations and the creation of a level playing field among broadcasters.

Sectoral sustainability should be a priority objective against which all BAI action is measured, since the multi-faceted challenges now facing radio are very widely accepted. The BAI's own consultants Mediatique have documented this position very well.

With any new objectives, the real challenge for the BAI is how the new objectives will guide and inform day-to-day regulation of the sector.

3. Are there any other objectives which should be included in the Policy?

We believe two specific policy objectives should be included, one of which concerns the sustainability of the sector and the other, the effects of digitalisation. While the former is to be included, inexplicably, there is no reference to the effects of digitalisation and how that should be reflected in on-going regulation of the sector.

While digitalisation is an established phenomenon, there are few sectors where the effects are as fundamental as in broadcasting. Over 50% of the advertising market in Ireland is digital with the unregulated Facebook and Google taking the lions share. Meanwhile radio now accounts for only 12% of the total advertising market. It is staggering that that Facebook and Google remain unregulated in this context.

Digitalisation has completely disrupted the advertising market and led to significant imbalance in favour of social media and OTT players such as Google (including YouTube), Facebook, Netflix etc who now offer an expanding array of audio and audio-visual content but remain free of any regulation.

It is essential that fundamental changes in technology be reflected in BAI regulation of the sector.

Communicorp repeats its call for the adoption of an objective by the BAI that requires it to regulate in the light of the impact of digitalisation on the media sector generally, and broadcasting in particular.

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

Communicorp regards the BAI's approach to the concept of control (i.e., what is control versus a substantial interest) as relatively well-settled and clear.

Communicorp acknowledges that the BAI has provided reasons for not changing its current approach with which we agree, however, we think that the same type of reasoned conclusions should be apparent with all substantive issues addressed as part of the consultation including as to whether outright control and a substantial interest should be equated.

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

A distinction should be made between 'control' and a 'substantial interest' since there is clearly a difference between them in terms of the nature and extent of control. At present, when it comes to calculating the number of radio contracts held by a particular operator, those in which a substantial interest only is held are treated as if these were controlling interests, which is illogical.

Communicorp points out that since by definition the BAI defines a 'substantial interest' as an interest that does not confer actual control, then these concepts should not be equated for regulatory purposes.

This point was made in a detailed submission but rejected without a clear explanation. We encourage the BAI to provide transparent reasons why it accepts or rejects particular submissions.

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

While Communicorp welcomes the proposed change on the removal on restrictions on the ‘assignment of contracts’, we note that it is justified on the basis of a concern both for the interests of shareholders and a reflection of ‘changes in the wider media’ market.

Unfortunately, those changes are not spelled out in greater detail given that they almost certainly relate to the need for greater consolidation in the sector. Despite that, there is no significant change proposed to existing caps on ownership of broadcasting contracts. This must be revisited in the draft policy.

Communicorp welcomes the decision to remove ‘Concrete Indicators of Diversity’. We, however, note plans to introduce certain new policies and are concerned that they do not result in uncertainty for broadcasters.

7. What are your views on the seven character tests set out under this section of the draft Policy?

Communicorp agrees that character tests set out in section 5.1.1 are appropriate. The implications of the existence of a matter falling under one or more of the criteria should, however, be spelled out more clearly. We understand that the BAI is committed to doing this.

8. Do you think any additional tests should be added? For example, what are your views about whether other criminal offences should be included? Should findings of civil/public bodies, but which do not constitute a criminal offence, also be taken into account. If yes, what types of criminal offences or findings do you consider relevant?

Communicorp does not believe that any additional tests are required.

9. In the case of management positions, what are your views on the proposal to limit the character tests, in most instances, to the Chief Executive Officer and the Company Secretary?

Communicorp agrees with the proposed focus on the Chief Executive role, however the reason for the inclusion of the Company Secretary is less apparent. The suggestion that on an *ad hoc* basis certain other roles might become subject to the character tests is irrelevant.

While the BAI provides the example of a ‘very significant player’ entering the market, it is unclear why other roles should then become subject to the character tests. As Communicorp has emphasised in previous submissions, all of these matters should be seen in the light of existing requirements such as Programme Policy Statements and other regulatory safeguards including existing requirements as to independent and impartial journalism.

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

Communicorp does not wish to propose any other amendments.

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

Communicorp has nothing further to add in relation to submissions already made on these issues except to repeat its support for light-touch and proportionate regulation of the voluntary sector in line with its non-commercial remit.

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

Communicorp does not wish to propose any other amendments.

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

Communicorp had previously advocated and supported a focus on sectoral sustainability and viability. Sectoral sustainability requires a comprehensive appraisal of the entire regulatory framework for the sector. While the Broadcasting Services Strategy must focus on those issues, we are concerned the draft policy confines the application of the new objectives to contract awards and proposed changes of control.

We have argued in detail in previous submissions, digitalisation means the treatment of broadcasting as a 'regulatory island' within media is no longer justified. All of these submissions have been largely ignored in the past.

If sectoral sustainability is to become a meaningful objective, the relatively highly regulated position of independent broadcasters needs to be revisited comprehensively. That requires a 'sustainability' test for all facets of regulation. Unfortunately, the draft Policy does not do this adequately. That failure is very apparent in the proposed retention of the 25% cap in terms of the number of radio contracts despite the clear need for sectoral consolidation.

Communicorp considers that the relevant focus needs to be on the viability of legacy impositions on contractors in the current market. There is a danger that established stations are perceived to occupy a pre-determined position, which has traditionally led to certain obligations being maintained and renewed while newer formats or perceived 'niche' stations are not similarly regulated.

Obligations on all contractors need to be considered in the light of surrounding competitive dynamics since ultimately it is advertising revenue that can only sustain the services.

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

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

Communicorp has made a comprehensive argument in relation to the change in the upper threshold. We called for the abolition of the current 25% cap due to the obvious need for consolidation so that a large number of diverse broadcasters can be sustained in the sector.

Communicorp points to the UK where over 80% of independent contracts are held by two operators. There is good reason to consider that diversity could be secured if at least three substantial players were capable of emerging in Ireland.

Communicorp refers to the assessment of Mediatique, consultants which the BAI had itself retained. They indicated unequivocally that current restrictions on consolidation are already biting. While the BAI is proposing to increase the lower threshold, we are concerned that no detailed consideration has been given as to how the need to realise economies of scale and scope should inform the caps. All that the draft proposal indicates in that regard is that a number greater than 25% would be 'unacceptable' but with no supporting reasons.

Communicorp is very concerned that submissions previously made by it do not appear to have been addressed and the implications of the analysis of the BAI's own expert advisers appear not to have been fully appreciated and considered.

The treatment of this issue again illustrates the risk that a commitment to sectoral viability is not underpinned by any assessment of what is the optimal or required number of contracts that should be allowed to come under common control.

Communicorp accepts that the overall goal of plurality encompasses both diversity of ownership and diversity in terms of content, however, the current policy prevents consolidation that is becoming more and more essential to sustain the diversity of the content.

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

Communicorp renews its call for an end to the 25% threshold. It is a relic of the analogue age and means that in terms of optimising the mix of diversity of content and diversity of ownership is being jeopardised by an unnecessarily restrictive approach to ownership rules. Making the sector secure economically is a necessary precondition to ensuring plurality.

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

The BAI is continuing to propose the use of substitutability and dominance-based tests from competition law in relation to a reasonable number of sound broadcasting services in a specified area.

Communicorp is disappointed that a fundamental point that it has made frequently as to how overall ‘opinion-forming power’ be assessed, remains unaddressed.

We have repeatedly called on the BAI to commission appropriate national research on this issue. While media mapping and other studies have been pursued, the measurement of opinion forming power remains largely unexplored. That is despite it being key to the statutory framework.

The operation of the specified tests remains elusive. As a result, there is significant uncertainty as to what is being counted. This is another issue where it is not evident how points made by Communicorp in previous submissions have been considered.

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

With respect to an undue amount of communications media in a specified area, the proposal is to continue to use the substitutability/dominance tests as to which Communicorp would refer to our comments in the previous question.

18. What are your views of the proposed additional test in respect of news and current affairs programming and practices?

Communicorp considers that a commitment to impartial, credible, and independent journalism, in contrast to RTE, is already a hallmark of the independent broadcasting sector in Ireland. It is also an important objective in current policy on Ownership and Control and a principle that we think is observed across the independent sector to a very high standard. As a result, we do not see any basis for significant change.

With respect to a general requirement that programming and practices demonstrate a credible commitment to independent journalism, the draft policy supplies some general guidance as to the Programme Policy Statement, but with no specifics as to how a commitment to independent journalism can be demonstrated beyond specific programme proposals.

Again, at this very late stage in the consultation process, the BAI should have some specific initiatives in mind as to how commitment can be demonstrated. It may be that codes of practice or other safeguarding mechanisms are contemplated (which Communicorp would support), but no specific proposals are made.

In all events, Communicorp urges that a proportionate approach be taken that critically focuses on the financial consequences for the independent sector. Without that, far from being enhanced, sectoral sustainability may be further jeopardised.

19. What other amendments, if any, would you propose?

Communicorp does not wish to propose any other amendments.

20. Are there any other policy provisions that should be included in the document? If yes, what should these be and what reasons are there for adding the policy provision/s in the context of the Broadcasting Act and the BAI's role?

With respect to non-EEA entities and the requirements for a registered office, Communicorp does not wish to make any submissions.

21. Do you have any other views in respect of the draft BAI Ownership and Control Policy?

Communicorp has not further comments to make.



IBI Response to the BAI Consultation on Ownership and Control Policy

January 30th 2019

Introduction

Independent radio broadcasting was first introduced in Ireland in 1989. While listenership to Irish radio has remained remarkably robust throughout this period, the wider environment for all broadcasters has changed beyond recognition.

At no time has the pace of change in the media landscape or the threats to the future viability of indigenous Irish media presented such a danger. The operational environment for Irish broadcasters is incredibly challenging with no signs of improvement in the medium term. This change to the business environment on which all broadcasters rely is placing increasing pressures on broadcasters and will undoubtedly have profound impacts on ownership and control of radio stations.

Since the introduction of regulated broadcasting in Ireland, change has been incremental. This is no longer the case. Revolutionary changes as a result of digital disruption, alteration of business models and media consumption, while initially gradual have gained momentum and these changes are accelerating.

The difficult economic environment within which radio stations operate is forcing owners and management of radio stations to examine every opportunity to reduce overheads, curtail expenditure and cut back on operational costs. This stark reality was outlined in Core's Outlook for 2018;

- In 2017 the total media market in Ireland grew by 4.2% but traditional media, including radio, dropped by 7.9%;
- In 2008 media spend on Irish radio accounted for in the region of 17% of all media spend. Digital media comprised approximately 7%;
- In 2018 radio's share is expected to decrease by 3% to just under €120 million which will be shared between 34 independent radio stations and RTÉ's suite of radio stations. The digital share is predicted to increase by 20% to in excess of €541 million the majority of which will be shared between the "big two" Google and Facebook.

The impact on individual broadcasters has been variable to date but there is an unmistakable trend and the trend is negative. Indications are that this trend will continue and the prognosis for the short and medium term is bleak. The consequences for this profound shift in commercial revenue and the knock-on effect for broadcasters will be intense and acute. Core shared its worry about the potential impact of the growth in online and digital advertising spends in Ireland which will result in:

"the unintended consequence of closing publishers and broadcasters in this country, thereby denying the public of Irish-produced analysis, opinion and entertainment, which are essential to our democracy and identity".

Imagine what life in Ireland would be like if this happened – if there was no local radio station, if the only national talk radio station was RTÉ Radio1, if the only way to hear new Irish music was via an American website or app.

In parallel with the changes being experienced in the commercial environment, changes to "broadcasting" have created a transformation in the media landscape. Where formerly licensed radio stations were virtually the only producers of audio content, the market is becoming increasingly crowded with newspapers and websites, brands and individuals now vying for the attention of the listener through programming distributed through numerous channels. Everyone from the Irish Independent to Joe.ie is now a radio broadcaster albeit without an FM frequency and broadcasting online instead. Radio broadcasters licenced by the BAI operate under strict conditions and face

regulation and restriction but online radio stations from non-broadcast media operate without regulation.

It must be stated that the IBI is not anti-regulation a fact that has been borne out by the strong compliance record of its members to all aspects of both the BAI's regulations and self-regulatory codes such as the Alcohol Advertising Code. The IBI believes in adequate regulation which does not stifle the growth and development of radio stations, which allows radio stations to operate and compete successfully in the current market conditions and which ensures that the viability and sustainability of Irish indigenous broadcasters is at its heart. We cannot allow society to develop in a world that is governed by algorithms, where communities have no connection to each other and where there is no accountability, liability or responsibility. Ensuring Irish content, local stories, regional voices are available to Irish audiences is vitally important. Providing an alternative source of information and entertainment to the audience, not only to RTÉ's output but to the myriad of alternative audio options is crucial. Ensuring that the listeners can access news and current affairs that are balanced, truthful and reflect what is happening locally, nationally and internationally is a priority.

So, at a time when Mark Zuckerberg is the most powerful media owner in Ireland, when the vast bulk of commercial revenue is going online and democracy is threatened by fake news and curated selected newsfeeds, the Ownership and Control policy is being reviewed. The BAI and the radio stations agree that the audience is always at the heart of policy decisions. The current environment within which both BAI and radio broadcasters operate must be considered to shape the final version of the new Ownership and Control Policy so that Irish audiences can remain listening to their favourite radio stations.

The responses given to all the consultation questions are underpinned by the following key principles;

1. The regulatory burden on radio stations is reduced, not increased;
2. Regulatory flexibility is employed by the BAI in all decisions and policy positions;
3. Healthy competition in the radio market is maintained;
4. Programme output and content remains central to all decisions impacting on radio stations;
5. Regulation needs to operate in the context where media is no longer restricted to radio, tv and newspapers and decisions and policy direction recognise the full scope of the media landscape in Ireland.

POLICY OBJECTIVES

CONSULTATION QUESTIONS

1. Do you consider the objectives of the Policy appropriate, given the organisation's statutory obligations and Statement of Strategy?

Yes, the objectives are appropriate and align with the BAI's statutory obligations and its Statement of Strategy

2. What are your views on the additional references in the objectives to viability, sectoral sustainability and diversity of ownership?

The IBI welcomes the inclusion of viability and sector sustainability to the objectives. A strong argument was made by IBI and its members for their inclusion during the targeted consultation conducted by Dr Roderick Flynn. Their inclusion in the policy objectives should ensure that decisions taken by the BAI will result in the maintaining of a healthy broadcasting sector in Ireland. Support from the BAI is vital to ensure independent radio stations are nurtured, fostered and advanced and to allow for ongoing investment particularly in news and current affairs. We hope that a stronger and a more focused inclusion of viability and sectoral sustainability will ultimately lead to a stronger, progressive and advanced indigenous independent radio industry.

3. Are there any other objectives which should be included in the Policy?

There are no other objectives suggested for inclusion in the Policy

STATUTORY DEFINITIONS AND INTERPRETATION OF KEY TERMS

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

The interpretation as outlined is relevant and appropriate

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

There are no other proposed amendments to this section

POLICY PROVISIONS

CONSULTATION QUESTION

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

The IBI supports the removal of the sections of the policy dealing with Assignments of Contracts and Concrete Indicators of Diversity.

TESTS APPLIED BY THE BAI IN RESPECT OF EXPERIENCE AND EXPERTISE

CONSULTATION QUESTIONS

7. What are your views on the seven character tests set out under this section of the draft Policy?

The seven character tests are appropriate. It is vital, as indicated, that the BAI apply flexibility to the application of the tests and the fact that failure to pass any of these tests does not necessarily indicate disqualification is welcomed.

8. Do you think any additional tests should be added? For example, what are your views about whether other criminal offences should be included? Should findings of civil/public bodies, but which do not constitute a criminal offence, also be taken into account. If yes, what types of criminal offences or findings do you consider relevant?

There are no additional tests that should be added. On the question of the addition of other criminal offences or the non-criminal findings made by other bodies, the IBI does not believe that these should be explicitly included. If this was included, then breaches of broadcasting licences issued by the BAI would be one such finding of a public body that would be included and surely this would not warrant such serious consideration in the future ownership of a radio station?

9. In the case of management positions, what are your views on the proposal to limit the character tests, in most instances, to the Chief Executive Officer and the Company Secretary?

There is no need for the introduction of any new character tests. The IBI suggests that character tests be applied to the Chief Executive Officer only.

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

No other amendments are proposed.

FINANCIAL RESOURCES AND THE EXTENT TO WHICH THE APPLICATION ACCORDS WITH GOOD BUSINESS AND ECONOMIC PRINCIPLES

CONSULTATION QUESTIONS

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

The tests applied are appropriate and there are no suggestions for other tests or additional questions.

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

No other amendments are proposed

VIABILITY AND SECTORAL SUSTAINABILITY

CONSULTATION QUESTION

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

The inclusion of viability and sustainability is not only welcome it is a necessary addition to the policy documents of the BAI. The pace of change in the media landscape in Ireland is providing a real threat to the future viability of indigenous Irish media. The operational environment for Irish broadcasters is incredibly challenging with no signs of improvement in the medium term. This change to the business environment on which all broadcasters rely is placing increasing pressures on broadcasters and will undoubtedly have profound impacts on ownership and control of radio stations. Digital disruption, alteration of business models and media consumption, while initially gradual have gained momentum and these will have an impact on ownership and control of broadcasting services.

The tests applied are appropriate and it is reassuring to see that not only is the BAI considering the viability of a change in ownership to the station or group of stations, but it is also considering the extent to which a change in ownership will impact the sustainability of the broadcasting sector.

This is a huge step forward for the BAI and for the Irish broadcasting sector which will serve the broadcasters, and more importantly the audience, well.

THRESHOLDS APPLIED BY THE BAI IN RESPECT OF AN "UNDUE NUMBER"

CONSULTATION QUESTIONS

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

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

Thresholds and a cap on ownership are academic when the sustainability of the sector is in question. It is suggested that all thresholds and caps be removed completely.

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

No other amendments suggested

TESTS APPLIED BY THE BAI IN RESPECT OF “A REASONABLE NUMBER” OF SOUND BROADCASTING SERVICES IN A SPECIFIED AREA

CONSULTATION QUESTION

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

Not including digital media in Ownership and Control decisions is ignoring a significant and powerful media sector. The BAI would be deciding on Ownership and Control without a full and complete view of the media landscape if ownership of digital assets was excluded. Instead of ignoring the sector completely due to legislative restraints, the BAI should examine other ways of attaining the information for inclusions in its deliberations - BAI funded research (e.g. Reuters, Mediatique), other state bodies, Governmental Departments, associations and representative organisations should be considered. This position is underpinned by the principle that regulation needs to operate in the context where media is no longer radio, television and newspapers and decisions taken and policy direction recognises the full scope of the media industry in Ireland.

TESTS APPLIED BY THE BAI IN RESPECT OF “A REASONABLE SHARE” OF COMMUNICATIONS MEDIA

CONSULTATION QUESTION

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

IBI acknowledges the definition of media communications in the 2009 Broadcasting Act but also acknowledges the impact, the power and the presence of digital media in the media landscape in Ireland. It is suggested that the gathering of information via other methods should be employed by the BAI to include digital media in its deliberations. This position is underpinned by the principle that regulatory decisions cannot be made on the understanding that communications media is limited to radio, television and newspapers. Regulatory

decisions must be based on a full, broad and complete picture of the media landscape in Ireland.

PROGRAMMING

CONSULTATION QUESTIONS

18. What are your views of the proposed additional test in respect of news and current affairs programming and practices?

The inclusion of the additional test has caused some confusion amongst the members of the IBI. The IBI is unsure as to why an additional criteria is included considering that every radio station throughout the country is already operating under these stated practices and proposals. Independent radio stations are and have always been committed to achieving and sustaining impartial, credible and independent journalism. The inclusion of this criteria in the policy document is superfluous.

19. What other amendments, if any, would you propose?

No other amendments proposed.

20. Are there any other policy provisions that should be included in the document? If yes, what should these be and what reasons are there for adding the policy provision/s in the context of the Broadcasting Act and the BAI's role?

No other policy provisions are suggested for inclusion.

21. Do you have any other views in respect of the draft BAI Ownership and Control Policy?

Radio broadcasters today operate in a very difficult environment with new technologies, alternative media and new competitors emerging every day. Commercial revenue is increasingly difficult to secure, the number of audio outlets competing for the ears of the listeners is increasing and the number of media companies setting up online "radio stations" is growing. The reaction to the changes in the media world and the inevitable response to declining revenues has been high levels of consolidation in the sector.

Regardless of one's opinion of consolidation, of broadcasters sharing services or the desire for a high level of diverse ownership, **the importance of keeping all licenced broadcasters on the air cannot be disputed, its importance diluted, or the reality of its impact ignored.** It is vital to the audience, to the employees, to local communities and organisations. It also has an important role to play in democracy and ensuring that audiences are exposed to a variety of views on an assortment of topics from different voices.

Radio has always been a valuable, trustworthy and reliable source of information, something that is so vital in the world of fake news and algorithms that we live in. The importance of a balanced, fair and trustworthy source of information is becoming increasingly important to

audiences. This was highlighted in the Council of Europe's 2018 guidelines on media pluralism and transparency of media ownership;

“Internet intermediaries have acquired increasing control over the flow, availability, findability and accessibility of information and other content online. This may affect the variety of media sources that individuals are exposed to and result in their selecting or being exposed to information that confirms their existing views and opinions, which is further reinforced by exchange with other like-minded individuals. Selective exposure to media content and the resulting limitations on its use can generate fragmentation and result in a more polarised society”.

A recent EBU report states that 60% of Europeans trust radio making it the most trusted medium in Europe. In comparison 61% of Europeans do not trust the internet and a massive 97% have no trust in social media. Trends over the last few reports show a growing gap between the trust people have in traditional media and new media. All of this highlights the importance of retaining radio stations, ensuring ongoing operations and prioritising viability and sustainability of services. With developments in technology and the growth of alternative media outlets, radio broadcasting now operates as part of a much wider media world. The Ownership and Control Policy should enable the BAI to ensure broadcasters remain on air, that as many employees as possible are working in radio broadcasting, that potential investors are not dissuaded from investing in radio stations and that broadcasters can continue to provide the top-quality service and programming that is currently available.

When finalising its Ownership and Control policy the BAI firstly needs to decide what broadcasting landscape should exist in Ireland. Having done this, answers to the ownership and control questions will become much clearer. Viability, sustainability and a high level of reality must be central to the BAI's thinking in drafting the Ownership and Control Policy and it must remain to the fore when the policy is being implemented.

Draft BAI Ownership and Control Policy 2018

Wireless response – January 2019

1. Introduction

- 1.1. Wireless is the parent company of six BAI licensed FM radio services in the Republic of Ireland. These are Dublin's FM104 and Q102, Cork's 96FM and C103, LMFM and Limerick's Live 95 FM. Wireless also operates radio services in the United Kingdom. Wireless is owned by News Corp UK and Ireland Limited, publisher of The Times, The Sunday Times and The Sun.
- 1.2. It is our strong belief that the diversity and plurality of media ownership should be considered on a cross-media basis. This is in view of the rapidly changing digital ecology which makes different media sources inherently more substitutable for each other, and in light of the advanced media literacy of Irish consumers.
- 1.3. Wireless believes that retaining radio-specific rules on the diversity of ownership of broadcasting contracts acts counter to the interests of Irish consumers and citizens. We advocate the removal of all restrictions based on concentration of ownership of radio, in favour of overarching competition law rules and a light-touch plurality regime based on an operator's overall share of media businesses as defined in the Competition and Consumer Protection Act 2014 (CCPA). This proposal is the focus of our response to the BAI's twin consultations on Ownership and Control and Media Plurality.

2. Policy objectives

Q1. Do you consider the objectives of the Policy appropriate, given the organisation's statutory obligations and Statement of Strategy?

- 2.1. Wireless does not support the collective objectives of the Policy insofar as they encourage the BAI to maintain a layer of radio-specific restrictions on how many radio services can be operated by a single person or group. We regard such restrictions as unnecessary and counter-productive to the sector's commercial development, and to the interests of Irish consumers and citizens.
- 2.2. Instead, we advocate the removal of all rules which focus on the concentration of ownership of radio by applying a rigid threshold system, in favour of an approach which looks at an operator's overall share of the media business sector (including digital and social media services). We believe that such a cross-media ownership regime, coupled with overarching competition law principles, will support a more viable and healthy radio sector and so maximise public value from the broadcasting spectrum.
- 2.3. Such an approach will also help to address the manifest disparity between the way in which radio continues to be regulated, and the policy approach applied to other influential forms of media. Such other influential forms of media include print, digital and social media services, all of which account for a significant share of consumer attention and underpin a substantial share of the Irish news media. Digital and social media companies such as Facebook and Google are able to act nimbly and responsively to a changing media marketplace in a way that independent radio operators are unable to replicate.

- 2.4. The BAI's own research on the Irish broadcasting sector also supports a revised approach. The study by Mediatique commissioned by the BAI in 2018 states amongst its findings and recommendations that:
- "The BAI should aim at removing any remaining administrative constraint and achieving faster decision making"; and
 - "The BAI should consider changes to licence terms and ownership regulations to optimise flexibility and commercial opportunities in the radio market."¹
- 2.5. We agree with this analysis, and it is our belief that the current regime does not strike an appropriate balance between the requirements of legislation and the needs of a contemporary media marketplace.
- 2.6. Consolidation of radio services into larger groups such as Wireless has brought clear benefits to listeners of the relevant stations as well as to the wider radio sector, delivering economies of scale supporting investment in new product innovations, cross-media sales, enhanced editorial collaboration and creative synergies. Under the right circumstances, further consolidation involving ourselves or others would offer a path to extending these benefits.
- 2.7. Competition law provides a separate safeguard against undue concentration of ownership, removing the need for an additional complex layer of sector-specific ownership controls. In addition, the responsible Minister has a separate statutory power in relation to media mergers.
- 2.8. Rather than acting against the interest of listeners, there are numerous examples from around the world of how common ownership of radio services contributes to differentiated programming output. This is due to the natural incentive that exists for an operator to differentiate the output of services. The current policy assumption that diversity of programming is positively correlated to diversity of ownership is therefore flawed.
- 2.9. As well as removing all radio-specific concentration of ownership rules in favour of a cross-media approach, we also support appropriate revisions to other Ownership and Control Policy rules, so that the broadcasting sector is able to execute appropriate changes to programming output, ownership and management structure without undue delays in BAI approval.
- 2.10. Wireless recognises the statutory basis of the BAI's Ownership and Control Policy and the requirement that exists for the BAI to execute the requirements of legislation, however we would encourage the BAI to implement the maximum possible deregulation, using the full scope of its discretion as afforded under statute.

Q2. What are your views on the additional references in the objectives to viability, sectoral sustainability and diversity of ownership?

- 2.11. Wireless does not agree that it should be a defined objective of the BAI to secure diversity of ownership within radio. This is for the reasons given in our response to Question 1.

¹ Mediatique, BAI Broadcasting Services Strategy Research, April 2018, p. 91-92

Q3. Are there any other objectives which should be included in the Policy?

- 2.12. We believe that the BAI should set itself the objective of removing all radio-specific restrictions on how many radio services can be operated by any single person or group, for the reasons given in our response to Question 1.

3. Statutory Definitions & Interpretations Of Key Terms Used In The Policy

Q4. What are your views in respect of the interpretation of the terms ‘Control’ and ‘Substantial Interest’ as set out in the Policy? If you believe the interpretation should be changed, please detail how it might be changed and how this change would improve in practical terms the application of the Policy, bearing in mind the BAI’s rationale for retaining the current interpretation.

Q5. What other amendments, if any, would you propose to the above section?

- 3.1. We propose a wider definition of ‘Communications media’, as set out in our response to Question 17, to align with the definition of media businesses as set out in the CCPA 2014.
- 3.2. Wireless does not have any further comments to make on this section.

4. Policy Provisions

Q6. What are your views on the removal of the sections of the Policy dealing with the ‘Assignment of Contracts’ and ‘Concrete Indicators of Diversity’?

- 4.1. Wireless believes that the BAI has an opportunity to be more radical still in its revisions to the policy, in order to satisfy the requirements of a contemporary media marketplace. We advocate the removal of all provisions relating to the concentration of ownership of radio services, for the reasons given in our response to Question 1.

(5.1) Character, Expertise and Experience

Q7. What are your views on the seven character tests set out under this section of the draft Policy?

- 4.2. Wireless does not have any further views to add in relation to this section.

Q8. Do you think any additional tests should be added? For example, what are your views about whether other criminal offences should be included? Should findings of civil/public bodies, but which do not constitute a criminal offence, also be taken into account. If yes, what types of criminal offences or findings do you consider relevant?

- 4.3. Wireless does not believe that any additional tests are required.

Q9. In the case of management positions, what are your views on the proposal to limit the character tests, in most instances, to the Chief Executive Officer and the Company Secretary?

- 4.4. We believe that the character tests should apply solely to the registered directors (including the station director) of the contractor and that the operating group which owns each licence should have the commercial flexibility to determine how to structure and resource itself to meet its BAI contract obligations.

Q10. What other amendments, if any, would you propose to the above section?

4.5. Wireless has no further comments on this section.

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

Q11. In the case of commercial and community broadcasting services, what are your views on the specific tests applied? Should any other tests/questions apply?

Q12. What other amendments, if any, would you propose to the above section?

4.6. Wireless has no comments on this section.

(5.3) Viability and Sectoral Sustainability

Q13. Do you think the inclusion of this additional policy provision is appropriate in the context of the stated objectives of the Policy? What are your views on the tests that are proposed in respect of viability and sectoral sustainability and are there any additional tests that the BAI should apply in this context?

- 4.7. Wireless is focused on supporting the growth of the Irish radio sector, both in audience and commercial terms. Our vision is not just to sustain the sector and maintain the status quo, but to reinvigorate advertiser demand by fostering programming and product innovation.
- 4.8. We believe that the most appropriate policy change to support the commercial development of the sector would be to remove all provisions relating to diversity of ownership of radio services, for the reasons given in our response to Question 1. We believe that this will allow the sector to restructure itself and meet head on the challenges of an evolving media marketplace.

(5.4) An undue number of sound broadcasting services

Q14. What are your views on the proposed modifications to the thresholds which would:- Increase the first threshold from 15%-20% - Apply a Compliance Audit from 20%-25% - Maintain the 25% threshold in respect of ownership of the total number of sound broadcasting services?

- 4.9. Wireless fundamentally disagrees with the retention of radio-specific rules concerning the number of sound broadcasting services which can be operated by any one individual or legal entity. Such rules are not necessary to safeguard pluralism in a contemporary media marketplace and they act as a constraint on programming diversity and investment in new services – thereby contradicting stated BAI objectives.
- 4.10. Accordingly we support the removal of all radio-specific concentration of ownership restrictions, including the current radio threshold system, judging that plurality of ownership is best assessed with a light regulatory touch and on a cross-media basis.
- 4.11. Our reasons for advocating the removal of all radio-specific ownership restrictions are set out in our response to Question 1. We also note that the last policy review was in 2012 – seven years ago – when the media landscape was very different to that which exists today. This highlights the lack of flexibility in the current prescriptive regime and the likely negative consequences of maintaining a rigid and prescriptive framework.

- 4.12. To the extent that the BAI's hands are tied by statute, we suggest that the BAI exercises the fullest extent of its regulatory discretion in removing unnecessary rules and in making appropriate recommendations for future legislative change.

Q15. What other amendments, if any, would you propose to the above section?

- 4.13. In line with our responses to previous questions, we propose the removal of this section.

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

Q16. What are your views in respect of this section of the Policy? What other amendments, if any, would you propose to the above section?

- 4.14. Consistent with our wider views on radio ownership regulations, we believe that media plurality should be approached on cross-media basis, in order to remove obstacles to the growth of the Irish radio sector. We propose the removal of this section.

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

Q17. What are your views in respect of this section of the Policy? What other amendments, if any, would you propose to the above section?

- 4.15. Wireless supports the maximum flexibility to allow communications media businesses to reorganise themselves in response to rapid changes in the media market and the continuing growth in competition from digital media. The starting premise for policy makers should be to acknowledge the extent of substitutability between different forms of media, and to assess dominance with reference to radio's role in commenting upon, informing and interacting with other platforms including print, television and digital outlets rather than in isolation.
- 4.16. We believe that the 2009 Broadcasting Act definition of communications media is no longer fit for purpose, and that the media market should be defined in broad terms. The more up to date definition which appears in the 2014 Competition and Consumer Protection Act incorporates not just broadcasting services, newspapers and periodicals but also digital media.
- 4.17. To the extent that statute permits it, and ahead of future legislative reforms being enacted, we advocate the BAI moving to the more modern definition of 'Communications media'. This would recognise the rise of digital and social media alongside other forms of communication, and acknowledge that whilst radio is still influential, it is by no means the preeminent form of news media in Ireland, but rather forms part of a dynamic mixed ecology. In turn this will allow the BAI to take account of the influence of digital and social media in assessing change of ownership proposals.

(5.7) Programming

Q18. What are your views of the proposed additional test in respect of news and current affairs programming and practices?

Q19. What other amendments, if any, would you propose?

- 4.18. Wireless does not believe that additional regulatory intervention is required to ensure the delivery of distinctive and high-quality programming from Irish sound broadcasting

contractors. The proposed introduction of an additional criterion is contradictory to the deregulatory approach Wireless would advocate to stimulate growth and investment in the sector. For these reasons we do not support the proposed addition.

(5.8) Non-EU Entities

Q20. Are there any other policy provisions that should be included in the document? If yes, what should these be and what reasons are there for adding the policy provision/s in the context of the Broadcasting Act and the BAI's role?

Q21. Do you have any other views in respect of the draft BAI Ownership and Control Policy?

4.19. Wireless has no specific comments to make on this section at this time.



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

February 7, 2019

By Email: consultations@bai.ie

Confidential

To whom it may concern,

Virgin Media welcomes the opportunity to respond to the BAI's public consultation on the draft ownership and control policy. Virgin Media has limited its responses to those questions on which it has a particular view.

In the event that you have any questions or require additional information on any of the responses, please do not hesitate to get in touch.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Kate O'Sullivan".

Kate O'Sullivan
VP Corporate Affairs
Virgin Media

Virgin Media response to the public consultation on the BAI's draft Ownership and Control Policy

Question 6: Virgin Media agrees with the BAI's proposal to remove the current Policy provisions dealing with "Assignment of Contracts." Virgin Media agrees with the BAI's position that given the maturity of the broadcasting sector, and having regard also to the property rights of shareholders as well as taking account of wider changes in the media market, these changes are no longer necessary.

Question 7: Virgin Media broadly agrees with the proposed seven character tests, however we would suggest that test (vi) should be reconsidered to the extent it relates to the revocation or suspension of a licence from any other statutory body. The suspension or revocation of the licence should only be of relevance where it relates to a broadcasting licence. As drafted, the condition is too broad and should be re-defined to ensure that it covers licences that have been issued by an equivalent broadcasting authority elsewhere.

Question 8: No, Virgin Media believes the tests as identified by the BAI are sufficient.

Question 9: Virgin Media agrees with the BAI's approach given the maturity of the sector and to minimise administrative burden.

Question 10: Virgin Media has no further views on this.

Question 13: Virgin Media would caution against the inclusion of a new provision that would attempt to test the 'viability and sustainability' of a new Contractor. From prior experience (of a public procurement process unrelated to the BAI or the broadcasting licensing process), Virgin Media would suggest that in the event this required is adopted, it has to be applied and interpreted in the broadest sense. For example, Virgin Media does not believe that the assessment of 'viability' should not be put down to a simple assessment of a Contractor's annual financial accounts. This is because the manner in which a Contractor reports financially may not be a relevant indicator of a Contractor's 'financial health' or indeed, an indication as to the level of finances a Contractor has at their disposal to invest in the proposed business.

Question 17: Virgin Media believes that any proposed transaction that satisfies the Competition and Consumer Protection Commission (CCPC) and is approved on competition grounds should not have to have a separate test – in particular with regards dominance – by the BAI. Further, Virgin Media believes that any transaction that does not have a material impact on market share, should not fall in scope for review (from a competition standpoint) by the BAI. Or put another way, Virgin Media believes the BAI should consider introducing thresholds if it decides to introduce these new tests. Any proposed transaction that are below these thresholds would not be subject to these proposed tests.

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By Email consultations@bai.ie

30 January 2019

Dear Sirs

Response to BAI Consultations on Media Plurality Policy and BAI Ownership and Control Policy

Matheson welcomes the opportunity to comment on the draft versions of the Media Plurality Policy and Ownership and Control Policy, as published by the BAI on 11 December 2018.

Matheson is a market leader in providing legal advice to media companies based in Ireland and elsewhere. We have substantial experience in the provision of legal advice in the context of media merger transactions and advising on the Irish broadcasting framework.

We have the following comments:

- **Media plurality definition**

In general, Matheson welcomes moves to ensure that the approach to particular definitions by the Competition and Consumer Protection Commission (“**CCPC**”) is followed also by the BAI. Our clients are consistently seeking to invest in well-regulated and predictable environments and the common approach to definitions plays an important role in this regard.

- **Ownership and control and substantial interests**

The BAI appears to be continuing to take a wide view of the meaning of “ownership” of a media business. The adoption of a definition of ownership of a media business to include the ability to review and take account of the ownership of shares in a media business which does not amount to actual ownership of a media business is confusing. We suggest that the BAI look again at its policy in this regard. It seems to us that arguably the key consideration for both sets of Policy documents is whether or not a person or undertaking has the ability to control a media business. This would be consistent with the CCPC’s analysis under the

Managing Partner: Michael Jackson - Chairman: Tim Scanlon - Partners: Brian Buggy, Helen Kelly, Sharon Daly, Ruth Hunter, Tony O’Grady, Paraic Madigan, Tara Doyle, Anne-Marie Bohan, Patrick Spicer, Turlough Galvin, Patrick Molloy, George Brady, Robert O’Shea, Joseph Beashel, Deirdre-Ann Barr, Daila Coughlan, Deirdre Dunne, Fergus Bolster, Christian Donagh, Bryan Dunne, Shane Hogan, Peter O’Brien, Thomas Hayes, Nicola Dunleavy, Julie Murphy-O’Connor, Mark O’Sullivan, Brian Doran, John Gill, Joe Duffy, Pat English, Shay Lydon, Aidan Fahy, Niamh Coughlan, Gerry Thornton, Liam Collins, Darren Maher, Michael Byrne, Philip Lovegrove, Rebecca Ryan, Catherine O’Meara, Elizabeth Grace, Deirdre Cummins, Alan Keating, Peter McKeever, Alma Campion, Brendan Colgan, Garret Farrelly, Michael Finn, Rhona Henry, April McClements, Gráinne Dever, Oisín McClenaghan, Rory McPhillips, Niall Pelly, Michelle Ridge, Sally-Anne Stone, Matthew Broadstock, Emma Doherty, Leonie Dunne, Stuart Kennedy, Brian McCloskey, Madeline McDonnell, Claire McLoughlin, Barry O’Connor, Donal O’Donovan, Karen Reynolds, Kevin Smith, Ciaran Healy, Chris Bolland, Deirdre Kilroy, Michael Hastings, Maria Kennedy, Barry McGettrick, Kate McKenna, Donal O’Byrne, David O’Mahony, Russell Rochford, Gráinne Callanan, Geraldine Carr, Brian Doohan, Richard Kelly, Niamh Maher, Yvonne McWeeney, Mairéad Ní Ghabháin, Padraic Roche, Vahan Tchrikian, Kieran Trant.

- Tax Principals: Greg Lockhart, John Kelly, Catherine Galvin. - Tax Department Chair: John Ryan. - Of Counsel: Chris Quinn, Liam Quirke.

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Competition Acts 2002-2014 and the EU Merger Regulation. There may be an argument that some categories of share ownership rights/some circumstances either taken alone or along with other considerations should be reviewed where such rights gives rise to a “material interest” in a media company, similar to UK media merger practice. However, such reviews should always take account of whether there is a genuine ability to influence, taking account of safeguards. Any other approach tends to lead to unpredictability and is likely to undermine the objectives of viability and sectoral sustainability.

When reviewing control in the context of plurality, the question should be whether there is an ability to *control the policy of a company with regard to programme output*. To the extent that there are meaningful safeguards in place to prevent such influence, then proper account should be taken on these measures, as in those circumstances, such control of the entity overall might not raise plurality issues.

We do not consider the guidance on when an interest is “substantial” in the draft Ownership and Control Policy to be compelling overall. We believe that the emphasis should be on the ability to influence to an appreciable extent the strategic direction of the entity as regards programme output (as explained in the core paragraph). We do not support the rough “rule of thumb” guidance as regards shareholdings of more than 10 per cent as shareholdings that “may be deemed to constitute a substantial interest” as helpful to the core paragraph and in our view, this paragraph merely tends to confuse.

- Objectives of the draft Policy on Media Plurality/how this will be supported by the BAI

We consider the four objectives outlined to be reasonable. In our view, the critical issue is how media plurality is supported in an effective and practical manner.

We welcome that account is taken of the severe revenue decline, strong online competition/e-substitution and threat to sustainability facing media companies. It is important to note that industry consolidation may be necessary to support investment and ultimately a more sustainable and vibrant future for industry players and the public audience alike.

- Objectives of the draft Ownership and Control Policy

We support the additional references in the objectives to viability and sectoral sustainability. We believe that the BAI may be overemphasising the importance of diversity of ownership when it might be better to focus on diversity of control.

There is a clear need for the BAI policy to adjust to take due account of the severe revenue decline, strong online competition/e-substitution and threat to sustainability facing licensed operators. The proposed increase to thresholds for ‘undue number’ of licenses represents a much needed first step towards a new order where there is acceptance by the BAI that industry consolidation may be necessary to support investment and ultimately a more sustainable media sector. We believe that the BAI should seriously consider raising the suggested thresholds further as even the suggested thresholds remain obstacles to commercial viability and sustainability.

We hope that the views expressed in this letter are of some assistance to the BAI in its review.

Yours faithfully

Sent by email, bears no signature

MATHESON



Ownership and Control Policy of Broadcasting Services in Ireland: Response to Public Consultation

By

Dr Paul K Gorecki¹

Adjunct Lecturer, Department of Economics, Trinity College Dublin

8th February 2019

Introduction

The Broadcasting Authority of Ireland (BAI) is an independent statutory body charged with certain key regulatory roles in respect of broadcasting in Ireland, including licensing and approving changes in ownership and control.² The BAI is currently conducting a public consultation on its *Ownership and Control Policy* with regard, *inter alia*, to its regulation of radio and television services.^{3,4} Important changes have been proposed by the BAI compared to its existing 2012 policy.

These changes are designed, *inter alia*, to:

- support the viability and sustainability of broadcasting services by making this an explicit highly ranked policy objective; and,
- facilitate increased concentration in the provision of commercial radio services through limited relaxation of current State-wide ownership thresholds.

¹ I should like to thank the BAI for clarifying a number of issues; Sean Lyons and Francis O'Toole provided helpful comments. The submission represents the author's views. It has received no financial or other support from third parties nor is it written on behalf of any special interest. The author was a member of the Competition Authority with responsibility for merger review, including media mergers. The Competition Authority, together with the National Consumer Agency, became the Competition and Consumer Protection Commission in 2014.

² For further information see www.bai.ie.

³ Collectively referred to as broadcasting services. Sound broadcasting service and radio station are used interchangeably.

⁴ The BAI is also conducting a review of its media and plurality policy (BAI, 2018b), for which it commissioned and published Kevin (2018).

To assist the BAI in its review of the *Ownership and Control Policy* the BAI commissioned: research on the market structure, dynamics and development of the Irish media; and, a summary of the views of targeted stakeholders in response to a series of questions prepared by the BAI.⁵

This response to the public consultation argues that serious consideration should be given to removing viability/sustainability from the list of proposed *Ownership and Control Policy* objectives. There is insufficient justification for including this policy objective. The issue of viability/sustainability is already addressed on an ex ante basis when a commercial radio station is licensed. This ex ante evaluation should be strengthened by retaining (rather than abolishing) the existing BAI two-year time limit on a licensee being able to transfer ownership. If the viability/sustainability objective is, however, to be retained then it should be ranked much lower than second out of eight objectives.

In terms of the BAI's proposals for facilitating greater concentration of ownership of commercial radio stations through relaxation of the current State-wide ownership thresholds, serious consideration should be given to retaining the Five Additional Factors for reviewing changes in the ownership and control of commercial radio stations. These five factors go to the heart of plurality and diversity which are core, not peripheral, to the aims and objectives of the BAI. As with the proposal concerning viability/sustainability, there is insufficient justification for change in the ownership thresholds. The BAI also needs to clarify the relationship between these State-wide thresholds and the two specified area tests. The latter two tests refer to issues to undue concentration of radio stations and communications media in the geographic area covered by a radio station license.

Policy implementation and public understanding of the BAI's interpretation of the *Ownership and Control Policy* would be enhanced by greater transparency. First, the BAI should publish reasoned decisions when it makes determinations concerning licensing and changes in ownership and control of broadcasting services. For changes in ownership and control this would bring the BAI in line with the 2014 regime for media mergers, which includes

⁵ Mediatique (2017) and Flynn (2018), respectively.

broadcasting services, where the Competition and Consumer Protection Commission (CCPC) and the Department of Communications, Climate Action and Environment (DCCA) both publish reasoned decisions. Second, the BAI should provide guidance on the definition of viability and sustainability, the Five Additional Factors, the specified area tests, and so on.

Background

The BAI in the introduction to its draft proposed *Ownership and Control Policy* sets out the context within which it is conducting its review:

The work of the BAI is principally guided by the Broadcasting Act, 2009 One of the principle objectives of the BAI ... is 'to provide for open and pluralistic broadcasting services'. The BAI must also 'promote diversity in control of the more influential commercial and community broadcasting services'. These objectives are also reflected in the BAI's Strategy Statement (2017-2019) under the strategic theme - 'Promoting Plurality and Diversity'. The BAI has developed its Ownership and Control Policy so as to give practical effect to the achievement of these objectives. The Policy is intended to provide clarity and certainty in respect of the ownership and control of commercial broadcasting, community and multiplex contractors.

In practical terms, the Policy is used by the BAI to assess applications for broadcasting, content provision and multiplex contracts. It is also used to assess requests for variations to the ownership and control structures of these contractors. More broadly, the Policy is designed to facilitate the continued development of a viable and diverse broadcasting sector that is characterised by a plurality of ownership.⁶

In other words, the BAI's interest in regulating broadcasting services is seen through the lens of diversity and plurality. Too great a concentration of broadcasting services in the hands of few individuals and/or corporate entities is thus seen as raising issues relating to reduced diversity and plurality.

⁶ BAI (2018a, p. 2, emphasis in original). A multiplex is defined as "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 telegraph directly or indirectly for reception by the general public" (BAI, 2018a, p. 32).

It should be noted that evaluating the competitive aspects of a broadcasting merger is the responsibility of the CCPC, while the DCCAЕ is concerned with plurality.⁷ After the CCPC has approved a media merger it is referred to the DCCAЕ.⁸ The DCCAЕ shall, if appropriate, have regard to the BAI's *Ownership and Control Policy*.⁹ In the DCCAЕ's decisions the views of the BAI are recorded in terms of whether or not the BAI has approved the change in ownership in view of the considerations in the *Ownership and Control Policy*. If the DCCAЕ come to the view that a media merger could be contrary to the public interest then it must request the BAI to conduct a full examination. The DCCAЕ must have regard to this report in making its final decision.

One of the roles of the BAI under the media merger regime introduced in 2014 is to produce a report that shall describe: the ownership and control arrangements for firms carrying on a media business in the State; the changes in ownership and control over the past three years; and, analyse the effects on plurality of the media in the State. Two such reports have been completed referring to: 2012-2014; and 2015-2017. However, to date, only the former has been published with the latter expected to be released in the very near future.

The 2012-2014 report on ownership and control reported that there had been little change over that period. Although there were three broad changes in ownership and control they did not "*have a material impact on plurality as they represented a 'one in, one out' change, rather than one media business/individual obtaining a share of media ownership that reduced diversity of ownership or diversity of content.*"¹⁰ The situation as of 2014 is summarized in Table 1.

In the period 2015-2017 (and beyond) it appears that again there has been an element of one in, one out change in ownership and control. TV3, for example, was acquired by Liberty Global (Virgin Media) in 2016.¹¹ However, there have also been some changes of ownership and control that are likely to lower diversity and plurality:

⁷ For a discussion of media mergers and the role of the BAI, CCPC and DCCAЕ see Andrews, Gorecki and McFadden (2015, pp. 362-373). The relevant legislation is the Competition and Consumer Protection Act 2014, which amends the earlier Competition Act 2002.

⁸ If the CCPC prohibits the media merger then the DCCAЕ is not required to assess the merger.

⁹ Strictly speaking the Minister responsible for the DCCAЕ.

¹⁰ BAI (2015, p. 6).

¹¹ For details see DCCAЕ (2016).

- News Corp, which already had extensive national daily and Sunday newspapers in Ireland, acquired six radio stations in 2016;¹²
- the *Irish Times* acquired Landmark Media, which included newspapers (e.g. *Irish Examiner*) and radio stations in 2018;¹³ while
- two existing radio station groups purchased several additional radio stations in 2018 and 2019.¹⁴

Hence it appears that since 2014 there have been *within* media increases in concentration (i.e. newspapers and radio stations) and *across* media (i.e. newspapers and radio stations). However, a more definitive view will only be forthcoming once the 2015-2017 report on ownership and control is published.

Table 1
Market Shares,^a Selected Media Groups, by Media Sector, Ireland, 2014

Media Group	Media Sector			
	Irish TV	Online	Radio	National Newspapers
Public Broadcaster^b				
RTE	86.6%	8.2%	31.7%	-
Commercial Broadcasters				
INM/Communicorp	-	43.3%	21.5%	45.7%
Landmark Media	-	5.3%	2.7%	7.1%
UTV Media	- ^c	-	14.1%	-
TV3	13.0%	-	-	-
Irish Times	-	25.4%	-	15.9%
Radio Kerry Group	-	-	5.1%	-
Other	0.4%	17.8%	24.9% ^d	31.2%
Total	100%	100%	100%	100%

- Measured as shares of the listeners, viewers or users.
- Although RTE is the public broadcaster, its broadcasting services include several which can be classified as commercial in that they sell advertising.
- UTV TV launched in Ireland on 1 January 2015. Its estimated Q1 TV news share was 4%.
- The next largest radio group is Highcross Communications (iRadio) with 3.9% share.

Source: Kenny & Suter (2015, Figure 2, p. 5).

Although Reporters Without Borders For Freedom of Information (RWB) in their 2018 World Press Freedom Index rank Ireland 16th out of 180 countries,¹⁵ it nevertheless heads its

¹² News Corp owns the *Irish Sun*, the *Times* Ireland Edition, *Irish Sun on Sunday* and the *Sunday Times*.

¹³ For details see DCCA (2018).

¹⁴ See Table 2 for details.

commentary on Ireland, ‘*Unhealthy Concentration.*’ RWB’s justifies this heading by commenting that,

“The highly concentrated nature of media ownership in Ireland continues to pose a major threat to press freedom, and contributed to Ireland’s two-place fall in the 2018 World Press Freedom Index. Independent News and Media (INM) controls much of the daily and Sunday newspaper market, while broadcasting is dominated by the semi-state company RTE.”¹⁶

While the *Ownership and Control Policy* does not include RTE within its licensing remit, in making decisions concerning, for example, changes in ownership and control of commercial broadcasting services, the BAI currently takes into account cross-media ownership.

Policy Objectives: Sustainability & Viability

Proposal

An “*important change*”¹⁷ in BAI’s proposed *Ownership and Control Policy* is the inclusion of an additional policy objective:

*To support both the viability of broadcasting services and the greater sustainability of the broadcasting sector as a whole.*¹⁸

This is the second ranked of the eight proposed policy objectives (Box 1). It is the only one solely related to viability/sustainability, although there is reference to “*financial resources*” in policy objective (v) to which we will return to below. There is no comparable policy objective among the seven current *Ownership and Control Policy* objectives.¹⁹ These current policy objectives are largely related to issues such as diversity, pluralism and democratic values.

Viability appears to refer to whether or not the broadcasting service has sufficient revenues to fund its services at a point in time, whereas sustainability refers to whether or not the current business model is capable of funding the broadcaster’s services over the longer term. In

¹⁵ Over the period Ireland ranked between 9th and 16th, with a mean rank of 13.5.

¹⁶ <https://rsf.org/en/ireland>. Accessed 1 February 2019.

¹⁷ BAI (2018a, p. 8).

¹⁸ BAI (2018a, p. 9).

¹⁹ BAI (2012, p. 5).

considering whether or not a new FM radio license should be awarded, for example, existing licensees argued that given the saturated nature of the market there were doubts concerning the viability of any new FM station and if such an FM license were awarded about the sustainability of existing licensees.²⁰

Box 1: The BAI’s Proposed Policy Objectives for Ownership and Control in Broadcasting Services

- i. To promote open and pluralistic broadcasting services, with particular reference to radio and television services;
- ii. To support both the viability of broadcasting services and the greater sustainability of the broadcasting sector as a whole;
- iii. To ensure that the ethos of a broadcasting service is such that it will best serve the needs of the audience it is licensed to serve;
- iv. To contribute to the promotion of diversity in control of the more influential commercial and community broadcasting services;
- v. To ensure that broadcasting and multiplex contracts are held by persons who are of suitable character, and who have available to them adequate expertise, experience and financial resources;
- vi. To promote diversity in voices, viewpoints, outlets and sources, that is, diversity in the opinions expressed, in programming delivery and content, in ownership and in the sources of information available to the public;
- vii. To contribute to the upholding of the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, and;
- viii. To contribute to the achievement of a regulatory environment that will sustain independent and impartial journalism.

Source: BAI (2018a, p. 9).

The BAI’s proposed *Ownership and Control Policy* explains how the new policy objective on viability and sustainability will be implemented. When there is a proposed change of ownership and control of a broadcasting service, the BAI “*shall have regard to the extent to*

²⁰ BAI (2018c, p. 14). These arguments are redolent of those used by incumbents to prevent entry in a range of activities in Ireland including pubs and pharmacies. For details see Gorecki (2011) and OECD (2001).

which the proposal will support the viability of a contractor and/or sectoral sustainability.”²¹

More specifically, 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.*

The first point relates to an individual contractor, while the second relates to the broadcasting sector as a whole.

Rationale

Introduction

Two rationales are relied upon by the BAI for the proposed additional policy objective on viability and sustainability: the views of targeted stakeholders; and, the recommendation of a BAI-commissioned report on market structure, dynamics and developments in Irish media. In order to get a better understanding of the two rationales used by the BAI to include a policy objective relating to viability and sustainability we examine not only the BAI’s stated justification but also the two sources identified by the BAI.

Targeted Stakeholder Views

BAI Rationale

The first BAI rationale for the proposed additional policy objective on viability and sustainability is based on the response to the BAI’s targeted stakeholder consultation on its review of the

²¹ BAI (2018a, p. 19).

ownership and control policy.²² Targeted stakeholders included providers of broadcasting services, the National Union of Journalists (NUJ), third level colleges, the CCPC and the DCCA. ²³ However, the targeted stakeholders were dominated – in terms of numbers - by commercial radio and TV stations.²⁴ On the relevance of this targeted consultation exercise, the BAI states that the *“issues of viability and sustainability were identified by **broadcasters** participating in the targeted consultation as ones that should be given greater emphasis in the Policy. The BAI agreed with this view and has updated the Policy accordingly”*²⁵

Discussion

Dr Roddy Flynn, School of Communications, Dublin City University, was commissioned by the BAI to provide a summary of the targeted stakeholder consultation on the BAI review of ownership and control policy. Flynn’s summary of the views of the targeted stakeholders also includes the methodology employed. Stakeholders were requested to complete a BAI designed questionnaire. The summary report is organized as a series of targeted stakeholder responses to these questions. There were also follow up interviews conducted by Flynn.²⁶ The resulting report does not evaluate or comment on the responses.

One of the questions that the targeted stakeholders were asked was: *“Should any additional objectives be included?”*²⁷ In response Flynn (2018, p. 12) states *“many respondents emphasize the need to include the viability and sustainability of the indigenous radio sector,”* in view of its *“precarious state.”*²⁸ Other respondents wanted to extend the remit of the application of viability/sustainability policy objective to include television services, again with emphasis on the

²² These views are summarized in Flynn (2018). In a number of cases written responses were made by the targeted stakeholders (e.g. as noted below in answering a questionnaire). These documents, either unredacted or redacted do not appear to be posted on the BAI’s website.

²³ Flynn (2018, p. 3).

²⁴ Flynn (2018, Appendix 1, pp. 44-45).

²⁵ BAI (2018a, p. 8, emphasis supplied).

²⁶ Flynn (2018, p. 5).

²⁷ Flynn (2018, p. 12).

²⁸ Elsewhere in Flynn (2018, p. 7) the language is much stronger. *“For many respondents, the effect of this [online competition] is to create an imbalanced playing field across media undermining the viability of locally-regulated radio (and television) stations, threatening their very existence.”*

indigenous sector.²⁹ The implications of the viability/sustainability objective were also outlined: the BAI might permit the use of the Sound and Vision Fund for news and current affairs programmes; and the Broadcasting Levy – not levied upon online competition – could be reduced.³⁰

It should be noted that no evidence is presented by Flynn (2018) to substantiate the point that broadcasting services as a whole need to be supported because of their “*precarious state*.”

Mediatique Report Recommendation

BAI Rationale

The second BAI rationale for the proposed additional policy objective on viability and sustainability is based on the BAI-commissioned Mediatique (2017). The BAI argue that Mediatique “*highlighted the issues of viability and sustainability and recommended that the BAI have regard to these issues in the context of its Ownership and Control Policy.*”³¹ In other words, the broadcasters’ concerns about viability and sustainability elicited through the targeted consultation are consistent with the evidence and recommendations of Mediatique, a “*strategic advisory firm specialising in the media and communications industries.*”³²

Discussion

The BAI quite sensibly commissioned Mediatique (2017, para. 1.5) that “*analysed the sustainability of the revenue models that underpin expenditure on audio and visual content, particularly Irish content, and to consider whether the current regulatory framework needs to evolve in line with the identified market dynamics.*” Sensible because BAI’s reliance on the views of targeted stakeholders that are broadcasters, without a firm empirical underpinning, risks the BAI recommendation concerning the proposed additional policy objective on viability and

²⁹ Flynn (2018, p. 12).

³⁰ Flynn (2018, p. 12).

³¹ BAI (2018a, p. 18).

³² <http://www.mediatique.co.uk/>. Accessed 21 January 2019.

sustainability being seen as an example of regulatory capture.³³ Regulatory capture is where the regulator operates in the interests of the regulated entity. In other words, the regulator's policy prescription accords with the preferences and objectives of the regulated entities, rather than the welfare of listeners and viewers.

Mediatique's characterization of radio and TV broadcasting services in Ireland is as "*mature and competitive, hosting multiple business models, scores of operators providing a wide range of both domestic and international audio and video content.*"³⁴ Mediatique does identify challenges to the current revenue models of broadcasters which puts pressure on the funding of domestic Irish content. These pressures are the relative weakness of the advertising market and the continued austerity with respect to the license fee, which primarily funds public broadcasting. Mediatique (2017, paras. 8.6 and 8.7) makes a number of recommendations as to how broadcasters can "*innovate to improve revenue generation*" as well as a number of proposed regulatory developments that "*might enhance the ability of the Irish media sector to develop and fund Irish content.*"

Mediatique does not, however, characterize the broadcasting sector as being in a "*precarious state.*"³⁵ In the case of commercial radio, for example, it is the case that advertising revenue is expected to be flat at best over the next five years;³⁶ margins have been reduced from 30 per cent prior to the financial crisis to between 10 and 12 per cent,³⁷ and, "*operating profits have declined markedly across commercial radio since the recession.*"³⁸ Furthermore, one radio station license failed to get any bidders when it expired.³⁹

³³ In Flynn (2018, p. 12) the only targeted interests identified with respect to the sustainability and viability objective were industry-based: TV3/Virgin; Beat 102-103 FM; and the Independent Broadcasters of Ireland. As noted above in bold in the text, the BAI specifically mention endorsing the views of broadcasters in the context of viability and sustainability.

³⁴ Mediatique (2017, para. 8.1).

³⁵ Or that its "*very existence*" is threatened. See footnote 28 above.

³⁶ Mediatique (2017, p. 3).

³⁷ Mediatique (2017, para. 5.35).

³⁸ Mediatique (2017, para. 5.50).

³⁹ Mediatique (2017, para. 5.50).

However, notwithstanding these negative factors, there are a number of positive signs. Radio listenership is high in Ireland compared with other EU Member States.⁴⁰ There are “*no signs of any other licensee currently preparing to abandon the field.*”⁴¹ It is not clear that the appropriate benchmark to measure advertising revenues and margins are those recorded at the height of the most recent economic cycle. The BAI’s proposed *Ownership and Control Policy* states as a “*fact that the radio sector in Ireland remains viable and sustainable,*”⁴² while a recent Deloitte report predicts for 2019 a modest increase in global radio advertising revenues.⁴³

If the commercial radio sector is in a “*precarious state*” and its “*very existence*” threatened then it seems unlikely that radio stations would attract the interest of buyers. However, that it not the case: Irish commercial radio stations continue to attract interest from both large international buyers as well as from smaller locally owned firms. As shown in Table 2 over the period 2016 to the present approximately a third of the 34 licensed commercial radio stations in Ireland⁴⁴ experienced changes in ownership and control, although the column marked “Price Paid” may refer to more than just the radio stations listed in the adjacent column. In the case of News Corp, for example, it paid €255 million for six Irish radio stations plus a number of other radio stations in the UK.

While the broadcasting sector faces a challenging market, Mediatique did not “*recommend[ed] that the BAI have regard to these issues [viability and sustainability] in the context of its Ownership and Control Policy.*”⁴⁵ Such a recommendation is not included in the list presented by Mediatique (2017, pp. 91-93). While it is the case that Mediatique (2017, p.4) refers to “*key*

⁴⁰ Mediatique (2017, Figure 1, pp. 10-11).

⁴¹ Mediatique (2017, para. 5.50).

⁴² BAI (2018a, p. 20).

⁴³ Stewart (2018). Although there is no specific reference to Ireland, in the relation to the UK Stewart states, “*In Q1 2018, for example, not only was radio ad spending in the United Kingdom up 12.5 percent year over year (after a lengthy period of decline), but radio advertising was the fastest-growing type of advertising, outpacing even internet advertising*” (ibid, p. 63).

⁴⁴ Mediatique (2017, Figure 22, p. 31) provides a listing of all commercial radio licenses extant between 1988 and 2017. There were 35 commercial radio stations listed as of around 2011. However, when TXXM’s license expired in 2016 the holders decided not to re-apply and there were no alternative bidders (ibid, para. 5.50). Hence from 2016 onwards there were 34 commercial radio stations in operation. It is that number we use in this submission.

⁴⁵ BAI (2018a, p. 18).

policy options” such as “*potential changes to the regulatory environment governing commercial radio, including ... further modest deregulation of ownership restrictions ...*” it is difficult to argue that these have any relevance to the issue of viability/sustainability.

Table 2

Acquisition of Commercial Sound Broadcasting Services, Licensed by the BAI, Ireland, 2016 - Jan 2019^a

Acquirer	Target	Radio Stations ^b	Price Paid/(Year)
News Corp	Wireless Group	Q102, FM104, 96FM, C103, Live95M, LMFM	€255 million ^c (2016)
Bay Broadcasting	Classic Rock Broadcasting	Radio Nova	€3.010 million (2018)
Palariva (Irish Times)	Sappho (Landmark Media)	Beat 102-103, WLR FM & Red FM	n.a. ^d (2018)
Radio Kerry Group	Clare Community Radio Holdings & Dreamglade	Clare FM, Tipp FM	€2.67 million (2019)

- a. All media mergers in Ireland are subject to review by the Department of Communications, Climate Action and Environment. This provided the frame of reference for acquisitions of radio stations for 2016 to 2019, plus a press report and a CCPC filing concerning the 2019 acquisition. A press report was relied upon for the valuation of Wireless Group.
- b. In some instances full control was not obtained.
- c. One radio station in Northern Ireland was also acquired: U105.8FM, plus a number of radio stations in Great Britain.
- d. Various newspapers were also acquired, including the *Irish Examiner*. n.a. = not available.

Source: <https://www.dccae.gov.ie/en-ie/communications/topics/broadcasting-media/media-mergers/Pages/Media-Mergers.aspx>; <https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m-19-002-kerry-fm-clare-radio-dreamglade/>; Brennan & Slattery (2016) and Deegan (2019).

Consultation Questions

Introduction

In its public consultation exercise on the proposed *Ownership and Control Policy* the BAI poses a number of consultation questions: on the inclusion of the viability and sustainability objective;⁴⁶ and the three issues, set out above, to which the BAI shall have regard when interpreting the viability/sustainability objective.⁴⁷ In framing our answer to these consultation questions a number of factors need to be borne in mind.

⁴⁶ BAI (2018a, p. 9, q. 2).

⁴⁷ BAI (2018a, p. 19).

Sound Rationale?

It is not at all clear that there is a sound rationale for the inclusion of the viability and sustainability objective in the BAI proposed *Ownership and Control Policy*. Reliance on the self-interested views of broadcasters is not an appropriate basis for policy. While the available evidence suggests the environment in which broadcasters are operating is challenging, Mediatique (2017), the expert report commissioned by the BAI, did not recommend that viability/sustainability be added as an objective for the BAI's *Ownership and Control Policy*. Rather it made other suggestions. Furthermore the BAI itself remarks that the commercial radio sector is viable and sustainable.

Double Counting?

At the present time, when the BAI licenses a broadcaster it already takes into account its financial resources and the extent to which the application accords with good business and economic principles. The BAI has, for example, under current legislation, 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.”*⁴⁸

In implementing these provisions with respect to commercial broadcasting the BAI shall have regard 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?”*⁴⁹

In other words, when the BAI licenses a broadcaster it considers questions of future or prospective viability and sustainability. Indeed, the BAI (2018a, p. 17) specifically state that *“good licensing processes are appropriately focused on ensuring that those granted licenses have in place financing and a business model that will ensure ongoing viability and sustainability of the particular service licensed.”* After all the license is likely to be for a 10 year period. The

⁴⁸ BAI (2018a, p. 17).

⁴⁹ BAI (2018a, p. 18).

BAI will, no doubt, in making these judgments be assisted by the projections and considerations set out in Mediatique (2017).

In view of this it is difficult to understand why the BAI should consider, in reviewing a variation in ownership and control, the viability/sustainability of a contractor subsequent to the initial license being granted by the BAI. If a license holder experiences financial or other difficulties then is that relevant? If the license holder can no longer provide the licensed service why should not the licensing process be started afresh or awarded to the second ranked applicant (if there was more than one) when the license was originally awarded? If a change of ownership and control is to be considered why shouldn't the other policy objectives set out in Box 1 be sufficient to determine the BAI's decision?

Ex ante, Ex post and Appropriate Incentives

At the present time the ability of licensed broadcasters to provide licensed services is evaluated for their financial soundness at the point of licensing, i.e. on an ex ante basis. This creates the correct incentives for the licensed broadcaster to provide projections that are credible and reliable. What the BAI is arguing for in its proposed *Ownership and Control Policy* is that there should also be ex post considerations of viability and sustainability when there is a change in ownership and control of broadcasting services. If licensed operators come to believe that overly optimistic forecasts in their initial license applications can be to some extent offset or given positive consideration at a later stage because of the viability and sustainability objective this is likely to complicate the BAI ex ante assessment.

The existing *Ownership and Control Policy* contains a provision that to some degree ameliorates these concerns. Under the current policy the BAI "*looks unfavourably upon proposed changes in ownership within a **two-year period** after the award of a contract.*"⁵⁰ The rationale for this is set out by the BAI in its existing *Ownership and Control Policy* as follows:

"This policy provision takes account of the competitive nature of the licensing process for these contracts and the resources dedicated to the preparation of

⁵⁰ BAI (2012, p. 11, emphasis in original).

*applications by each applicant group. The BAI believes this approach is desirable because a change in ownership within a two-year period would be likely to undermine the integrity of the licensing process itself and be unfair to unsuccessful applicants.*⁵¹

However, under the proposed *Ownership and Control Policy* these provisions concerning little or no change in ownership for two years are to be abolished because of the “property rights” of shareholders, unspecified changes in the wider media market and license provisions that ensure the contracted services will be provided.⁵² When a shareholder invests in a broadcasting license that is difficult to sell within two years, surely that is just one of the many conditions attached to the license? Presumably the same logic of interfering with shareholder’s property rights would also apply to the programming requirements of the license. Finally, it is not clear that the programming changes will reduce or eliminate the incentives identified above.⁵³ In sum, the two year moratorium should be retained.

How Will it Work?

There is no BAI guidance or rationale provided on how the application of the viability and sustainability policy objective will be implemented. At least two issues need to be addressed here: definitions and trade-offs.

There are no definitions of viability and sustainability presented by the BAI in its proposed *Ownership and Control Policy*. Does, for example, viability mean that the broadcaster has to be a failing firm as set out in guidance issued by the CCPC (2014) in respect of mergers? Does sustainability refer, for example, to the period for which the broadcaster is licensed as a commercial radio or TV operator? Is viability/sustainability confined only to the operations of

⁵¹ BAI (2012, pp. 11-12).

⁵² BAI (2018a, p. 12).

⁵³ The programming changes proposed by the BAI (2018a, p. 25) include the addition of the following criteria when assessing programming as follows: “*Whether, in the context of news and current affairs programming proposals and/or practices, the proposals effect a sufficient and demonstrable commitment to achieving and sustaining impartial, credible and independent journalism.*” Such behavioural considerations are difficult to monitor and enforce. Hence it is much more appropriate to consider the issues, in the case of sound broadcasting services, relating to undue concentration when examining the State-wide thresholds and the Five Additional Factors. These are discussed further below.

the licensed broadcasting service? If the licensed broadcasting service is part of a larger firm how will issues of common costs be dealt with by the BAI?

In terms of trade-offs, as noted above, most of the other objectives of the proposed *Ownership and Control Policy* relate to long standing issues/objectives such as diversity, plurality and democratic values. If one accepts the BAI view that issues of viability/sustainability are likely to become more important in the future, then that raises the issue of how the BAI is going to trade-off viability/sustainability against diversity, plurality and democratic values. How much (say) diversity will be sacrificed in order to ensure the viability of an individual broadcaster?

These are inherently difficult if not impossible dimensions to weigh. Oranges and apples are being compared. Notwithstanding the difficulty of comparing and making trade-offs, the fact that the BAI has proposed that the viability/sustainability objective is placed second of eight objectives suggests that it will be given considerable weight by the BAI above the long standing objectives of diversity, plurality and so on. This result is likely to be a substantial reordering of the priorities of the BAI in favour of the interests of incumbent broadcasters that experience viability/sustainability problems and is likely to lead to greater concentration and less diversity.⁵⁴

Conclusion

The BAI is right to raise the issue of viability and sustainability of broadcasters that are licensed to provide commercial radio and TV for Irish audiences. It is vitally important that licensed broadcasters have the expertise and financial resources to be able to deliver the services for which they are contracted with the BAI. The issue becomes, of course, the best way for that to be secured.

Serious consideration should be given to removing viability/sustainability from the list of proposed *Ownership and Control Policy* objectives. There is, for reasons set out above,

⁵⁴ There is some evidence to support this contention since the BAI (2018a, p. 20) state: “*The BAI’s decision is informed by the fact that the radio sector in Ireland remains viable and sustainable and the loosening of the 25% maximum level is therefore not desirable since it would raise the potential of a reduction in media pluralism without any basis.*”

insufficient justification. The issue of viability/sustainability is already addressed on an ex ante basis when a broadcaster is licensed. This ex ante evaluation should be strengthened by retaining (rather than abolishing) the existing BAI two-year time limit on a licensee being able to transfer ownership.

If the viability/sustainability objective is, however, to be retained then it should be ranked much lower than second out of eight objectives. Furthermore, the BAI should not only provide guidance as to the tests to be met concerning viability and sustainability, but also publish reasoned decisions when applying these criteria. This would bring the BAI in line with the 2014 regime for media mergers, which includes broadcasting services, where both the CCPC and the DCCA provide detailed guidance and publish reasoned decisions.

Thresholds and Measuring an Undue Concentration of Sound Broadcasting Services

Proposal

Under the Broadcast Act 2009 there are,

“statutory provisions that require the BAI, when assessing applications for new contracts, to consider the desirability of allowing any individual or group of persons to have control of, or substantial interests in an undue number of the total number of broadcasting services in the State, as a whole ..., or in a specified area”⁵⁵

The BAI must also consider,

“the desirability of allowing any individual or group of persons to have control of, or substantial interests in, an undue amount of communications media Communications media include broadcasting services and platforms and newspapers and periodicals consisting of substantially of news and comment on current affairs but so not include digital media.”

Thus the BIA is charged with addressing concerns over undue concentration in broadcasting services and communications media more broadly, but excluding digital media.

⁵⁵ BAI (2018a, p. 19).

The BAI's existing and proposed method of determining whether or not there is an undue concentration of ownership and control by a single entity refers exclusively to commercial sound broadcasting services for which it has licensing responsibility. The resulting thresholds *"provide a key mechanism for managing plurality and diversity in terms of ownership and they are applied not only at the licensing stage but also in the context of consideration of requests for changes in ownership and control."*⁵⁶

The BAI proposed *Ownership and Control Policy* changes with respect to the State-wide thresholds for determining undue concentration of commercial sound broadcasting services represent a limited relaxation of the degree to which a single entity can own and control such services. While no one entity can own and control more than 25 per cent of the *number* of sound broadcasting services under both the current and proposed thresholds, the BAI is content that in future one entity can own up to 20 per cent of the number of commercial sound broadcasting licenses with no regulatory barriers, whereas it is currently 15 per cent.

Under both the current and proposed thresholds if a single entity wishes to control 20 to 25 per cent of the number of sound broadcasting licenses then it must be subject to a review by the BAI. However, the review is much more thorough under the current system than the proposed revisions. In both cases a Compliance Audit⁵⁷ must be conducted, but under the current system the BAI also has regard to five highly relevant factors relevant to issues of plurality, diversity and competition such as the degree to which the services operate in common or separate franchise areas or the extent to which the relevant services have common target audiences and relevant audience market shares or the extent of concentration in the supply of news and information taking into account *all* communication media.⁵⁸ These will be referred to the Five Additional Factors.

⁵⁶ BAI (2018a, p. 20).

⁵⁷ On a Compliance Audit the BAI (2018a, p. 21) states, *"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."*

⁵⁸ These criteria are listed in footnote b of Table 3.

Table 3

Thresholds for Acceptable/Unacceptable Levels of Concentration by A Single Entity, Current & Proposed, Commercial Sound Broadcasting Services, Licensed by the BAI, Ireland

Percentage of Sound Broadcasting Licenses in Which One Entity Has Control and/or a Substantial Interest (Number of Licenses)^a	Current Threshold Requirement	Proposed Threshold Requirement
15 per cent or less (5 licenses or less)	Acceptable Level of Concentration	Acceptable Level of Concentration (i.e. less than 20 per cent)
15-20 per cent (6 licenses)	Compliance Audit ^b Required to Determine if Acceptable or Unacceptable Level	
20-25 per cent (7 to 8 licenses)	Compliance Audit ^b Plus Five Additional Factors ^c Required to Determine if Acceptable or Unacceptable Level	Compliance Audit ^b Required to Determine if Acceptable or Unacceptable Level
More than 25 per cent (9 licenses or more)	Unacceptable Level of Concentration	Unacceptable Level of Concentration

- a. The thresholds are expressed by the BAI as percentages, with no reference made to the corresponding number of licenses. The number of commercial licenses is 34. 25 per cent of 34 is 8.5. Since nine license would take the owner above the 25 per cent threshold (i.e. $9/34=265$ per cent) the upper bound is considered to be eight. This is consistent with the interpretation of Flynn (2018, p. 22).
- b. *“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.”*
- c. *“In addition the BAI shall have regard to the following five factors: I. The number of services where an entity has control rather than a substantial interest; II. The extent to which the relevant services are operating in common or separate franchise areas; III. The relative audience shares of the relevant services when compared with all sound broadcasting services licensed under the 2009 Act; IV. The extent to which the relevant services have a common target audience focus; V. The extent to which the relevant services represent a concentration of the supply of news and information taking into account all communications media.”*

Source: BAI (2012, pp. 9-10; 2018a, pp. 21-22).

The proposed changes in the BAI percentage thresholds are presented in Table 3, together with the corresponding number of commercial radio licenses which were not included in either the current nor the proposed *Ownership and Control Policy*. The proposed changes would see one entity owning up to and including six radio licenses with no regulatory intervention, and up to and including eight with minimal regulatory intervention. Theoretically, three entities could own cumulatively up to 24 of the 34 commercial radio licenses.

Rationale

On the rationale for the retention of the 25 per cent upper bound threshold the BAI argues that,

“... maintaining healthy pluralism in this sector [sound broadcasting] is a key strategic concern for the BAI. For this reason, the BAI is proposing to retain the current upper threshold of 25% of the total number of sound broadcasting services that any one individual or legal entity may own. The BAI’s decision is informed by the fact that the radio sector in Ireland remains viable and sustainable and the loosening of the 25% maximum level is therefore not desirable since it would raise the potential of a reduction in media pluralism without any basis.”⁵⁹

In terms of the revisions of the thresholds below the 25 per cent cap, the BAI offers the following rationale,

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

In the case of ownership between 20-25% of the total number of sound broadcasting services, individuals or legal entities seeking ownership to this level will be required to successfully pass a compliance audit but the five additional tests [Five Additional Factors] currently applied at this level of ownership are not retained.”⁶⁰

No reference is made to either Mediatique (2017) or Flynn (2018).

⁵⁹ BAI (2018a, p. 20).

⁶⁰ BAI (2018a, p. 20).

Consultation Questions

Introduction

In the public consultation on the proposed *Ownership and Control Policy* the BAI asks for respondent's views in relation to its recommended State-wide thresholds for ownership of radio stations: the increase in the lower bound threshold from 15 to 20 per cent; the retention of the upper bound threshold of 25 per cent; and, the application of only a Compliance Audit governing ownership and control within the 20 to 25 per cent threshold. The BAI also asked for any other amendments that respondents might consider appropriate in relation to the proposed thresholds.⁶¹ In framing our response to these issues a number of factors need to be borne in mind.

Sound Rationale?

The BAI does not provide an extensive reasoned rationale for the revised thresholds on the number of radio stations that can be owned and controlled by a single entity at a State-wide level. Indeed, no justification is offered for the revision of the thresholds below the 25 per cent cap.

On maintaining the cap at 25 per cent the BAI seems to be implying that there is a positive relationship between the viability/sustainability of the radio sector and the degree of concentration: in other words, the greater the degree of concentration, the more likely it is the sector will be viable and sustainable. This in turn implies a negative trade-off between viability/sustainability and plurality and diversity.

No evidence is presented by the BAI to support the contention the increased concentration is associated with enhanced viability and sustainability. The issue is in any event a complex one.⁶² Empirical research across a number of industries suggests a weak positive relationship between concentration and a measure of profitability. However, this has been subject to considerable criticism. Furthermore the measure of concentration used in these studies takes into account

⁶¹ BAI (2018a, p. 22) sets out the 'Consultation Questions.'

⁶² See, for example, the discussion in Lipczynski, Wilson & Goddard (2017, pp. 359-387).

the relative size of the firms based on their sales (or a similar measure of size) whereas the BAI's measure of concentration, implicit in the thresholds, is based on the percentage of the number of commercial radio stations owned, irrespective of their size (measured, for example, using audiences or advertising revenues).

Mediatique (2017) does not recommend a revision of the thresholds.⁶³ It does refer under *'Regulatory Challenges and Options'* to *"considering the case for further modest deregulation of ownership restrictions"* under *"potential changes to the regulatory environment."*⁶⁴ However, in its recommendations under *'Ownership Restrictions,'* Mediatique (2017) argues that the BAI *"should consider changing the basis on which ownership restrictions are set for commercial radio stations – taking into account license/target area size."*⁶⁵ In other words, Mediatique (2017) seems more concerned with the way in which the importance of a radio station is measured than the actual thresholds themselves.

There was no consensus among the targeted stakeholders as to the appropriate ownership thresholds.⁶⁶ Some respondents were satisfied with the existing thresholds, others thought that thresholds should be retained but increased, while several respondents thought that the thresholds should be abolished. The latter group included those entities with the largest number of radio licenses: Communicorp; and, News Corp.⁶⁷ A number of respondents felt that the importance of radio stations should be weighed by audience size.

The Removal of the Five Additional Factors

The BAI proposes relaxing the ownership restrictions on how many radio stations a single owner can own, but within the 25 per cent cap. Essentially, if the owner complies with their license then there is no bar to reaching the cap. This reflects the fact that the BAI proposes to remove the Five Additional Factors, which currently would operate in the 20-25 per cent threshold range. There are a number of arguments against this proposed change.

⁶³ Mediatique (2018a, pp. 91-93) lists the recommendations.

⁶⁴ Mediatique (2018, p. 4).

⁶⁵ Mediatique (2018, p. 93). See also Mediatique (2018, para. 7.19).

⁶⁶ Flynn (2018, pp. 22-24). On the number of licenses held by each owner, see Table 4.

⁶⁷ Flynn (2018a, p.23) actually refers to Wireless Group Limited, which was acquired by News Corp in 2016 (Table 2). For consistency we refer to New Corp in the text.

The Five Additional Factors are concerned with questions that go to the heart of plurality and diversity. These tests take into account the degree to which the radio stations of the acquirer and target operate in the same or separate franchise area, market share measured by audience size,⁶⁸ the extent to which the acquirer and target have the same target audience and the degree to which the acquirer and target “*represent concentration of the supply of news and information taking into account all communications media.*”⁶⁹ Just because a radio station owner complies with its license conditions does not remove possible concerns about plurality and diversity.

The Five Additional Factors are concerned with the impact of the proposed change in ownership going forward. Like all merger analysis it is forward looking. The factors relate to the impact of the fact that distinct entities are all brought under common control, perhaps by a single individual. Examination of the compliance record does not address such significant issues.

Are the Ownership Thresholds Less Binding?

The proposed ownership thresholds relax the regulatory requirement for a single entity to own multiple radio stations up to the 25 per cent cap. However, the impact of the relaxation depends in part how binding are the current constraints, which in turn depends on the current structure of ownership (Table 4). All of the current owners of radio stations are able to acquire additional radio stations because none are at the 25 per cent cap (i.e. none own eight stations).

News Corp could add two radio stations to reach the cap of eight, subject only to a Compliance Audit under the proposed thresholds. Under the current thresholds such an acquisition would be subject to the Five Additional Factors which would take into account, *inter alia*, the extensive interests of News Corp in national daily and Sunday newspapers. Communicorp and the Radio Kerry Group could each add one station with no regulatory impediment under the proposed thresholds, but a Compliance Audit under the current thresholds. Finally, if

⁶⁸ The use of audience is consistent with the recommendations of Mediatique (2017) and some of the respondents to the targeted stakeholder consultation discussed above.

⁶⁹ BAI (2012, pp. 9-10).

Communicorp or the Radio Kerry Group added a second and third radio station then they would be in the same position as News Corp. This would mean, for example, that Communicorp's extensive other media interests, as set out in Table 1, would be taken into account under current thresholds but not the proposed thresholds.

Table 4
Ownership of Commercial Sound Broadcasting Services, Licensed by the BAI, Ireland, 2019.

Owner	Names	Number
News Corp	Q102, FM104, 96FM, C103, Live95FM, LMFM	Six (18%)
Communicorp	Today FM, 98FM, Spin103.8, Newstalk, Spin South West	Five (15%)
Radio Kerry Group	Shannonside104FM, Radio Kerry, Northern Sound Radio, Clare FM, Tipp FM	Five (15%)
Bay Broadcasting	Radio Nova, Classic Hits 4 FM, Sunshine 106.8	Three (9%)
Palariva (Irish Times)	Beat 102-103, WLR FM, Red FM	Three (9%)
Highcross Communications	iRadio NE & Midlands, iRadio NW	Two (6%)
Ten Separate Owners Each Owning One Radio Station	East Coast FM, KCLR 96FM, KFM, Mid West Radio, Midland's 103, Ocean FM, South East Radio, Spirit Radio, Highland Radio, Galway Bay FM	Ten (3% each)
Total		34 (100%)

Methodology. Kenny & Suter (2015) provide a snapshot of ownership in 2014. Subsequent changes in ownership of radio stations have to be notified as media mergers to the BAI, CCPC and the DCCAE. Radio Kerry's acquisition of Clare FM and Tipp FM was been notified to the CCPC on 25 January 2019, but no decision has been made by the CCPC or the BAI or DCCAE. In the case of TFXM105.2 when the license expired in 2016 the holders decided not to re-apply and there were no alternative bidders. Table valid as of 31 January 2019.

Source: CCPC (merger determinations, various); DCCAE (merger examinations, various); Kenny & Suter (2015, Figure 2, p. 5; pp.38-52); & Mediatique (2017, para. 5.50).

Measuring the Thresholds: Which Metric?

At the present time the BAI in determining whether a single entity exceeds the various State-wide ownership thresholds is concerned solely with the number of radio stations the entity owns in relation to the total number of radio stations. This is equivalent to weighing all radio stations equally. Given that there are 34 licensed radio stations, each radio station has a weight of 1/34 or 2.9 per cent. The question is whether or not this is a reasonable assumption.

To answer this question an alternative weighting system is needed. Obvious alternatives include audience size, advertising revenue or a composite measure of mean daily minutes of listening multiplied by the proportion of the listeners that tuned in the day before.⁷⁰ It seems likely no matter which metric is selected that there will be considerable inequality in size across radio stations. Some licenses are State-wide, others are regional, some confined to particular cities such as Dublin and Cork. The licenses also vary by the age group targeted and the programming content.

An attempt to estimate the audience market share by radio ownership group is presented in Table 5. It should be viewed very much as a work in progress. As the notes to the table make clear a number of assumptions have been made in order to generate the column headed ‘Share of Radio Audience of Commercial Radio Stations.’ When the BAI’s 2015-2017 report on ownership and control of media businesses in Ireland is released then the table can be updated. Nevertheless, notwithstanding these caveats, a number of inferences can be drawn from the table.

Table 5
Measures of Ownership Concentration, Commercial Sound Broadcasting Services, Licensed by the BAI, Ireland, 2014/9.

Owner (Number of Radio Stations)	Share of Number of Commercial Radio Stations (%)	Share of Radio Audience of Commercial Radio Stations (%)
News Corp (6)	18%	20.6%
Communicorp (5)	15%	31.5%
Radio Kerry Group (5)	15%	11.6%
Bay Broadcasting (3)	9%	6.1%
Palariva (Irish Times) (3)	9%	4.0%
Highcross Communications (2)	6%	5.7%
Ten Separate Owners Each Owning One Radio Station (10 x1)	3% each for total of 30%	2.0% each for total of 20.0%
Measure of Concentration		
HHI Index	1,062	1,677

Methodology. The market shares refer to 2014 but with the 2019 ownership 2019 (Table 4). Kenny & Suter (2015, Figure 2, p. 5) provide a snapshot of ownership by market share in 2014. It was assumed that the market share of TXFM105.2 was zero in 2014, which is likely to impact a slight upward bias in Communicorp’s audience market share. Nineteen of the thirty four radio stations were matched using this source. It was assumed that the remaining audience market share was

⁷⁰ The latter is proposed, for example, by Mediatique (2017, para. 2.101).

equally shared between the remaining 15. The HHI index is the sum of the squares of the market shares of each of the owners. It will vary between 10,000 (one firm owns all the radio stations) and each of the 16 owners has an equal share (i.e. 6.25 per cent) or 625.

Source: Table 4; and, Kenny & Suter (2015, Figure 2, p. 5).

The use of audience measure market share, but retaining the proposed threshold percentages in Table 3, suggests that one owner, Communicorp, is substantially in excess of the 25 per cent cap, while News Corp should it decide to acquire additional radio stations will have to complete a Compliance Audit. All the remaining radio stations are well under the proposed 20 per cent market share threshold, suggesting that they face much lower, if any, regulatory barriers to acquiring additional radio stations. In other words, if the same thresholds are retained as in Table 3 but applied to audience size as the measure of market share then the results in terms of the impact of the thresholds is dramatically different.

A Summary Measure of Concentration

The BAI approach to market share analysis only considers thresholds in relation to one entity. Generally in considering whether or not there is excessive concentration summary measures are used that reflect the number and relative size of all of the firms concerned. One widely used measure is the Herfindahl-Hirschman Index (HHI), which is included in the bottom row of Table 5. This index is defined as the sum of the squares of the market shares of each of the radio station owners. It will vary between 10,000 (one firm owns all the radio stations, $100^2=10,000$) and 625 (each of the 16 owners has an equal share, $6.25^2 \times 16=625$). The HHI is used by competition agencies to defined markets in terms of low, high and very high concentration. It is a benchmark, albeit partial, against which to measure whether concentration is high in radio station ownership. Competition policy is concerned with plurality and diversity in terms of the number and size distribution of firms in contributing to a thriving market.⁷¹

The thresholds used by Ireland's competition agency using the HHI are set out in Table 6, together with those implicit in the current and proposed BAI thresholds. The thresholds used

⁷¹ Of course if a competition agency were undertaking such an exercise it would consider the degree to which publicly owned radio stations competed with commercial radio stations. The former are excluded from the analysis here. As shown in Table 1 the State broadcaster accounts for about a third of radio audiences.

by the BAI seem to be greater than that used by the CCPC. For example, low concentration where there are unlikely to any concerns is much higher for the BAI under current and proposed thresholds.

Table 6
HHI Concentration Thresholds, CCPC & BAI.

Threshold Description	CCPC	BAI: Current	BAI: Proposed
Low	1,000	1,500	2,000
High	1,000-2,000	1,500-2,500	2,000-2,500
Very High	2,000	2,500	2,500

Methodology: To derive the BAI thresholds it was assumed that firms held market shares indicated by the thresholds in Table 2. For example, if the threshold was 25 per cent, then it was assumed each firm had 25 per cent of the market. $4.25^2=2,500$.

Source: CCPC (2014, para. 3.10) & Table 2.

If we consider these thresholds in relation to the estimated HHI's in Table 5 then it appears while using the HHI estimate based on the number of radio stations that there are no concerns about undue concentration: 1,062 is well below the low concentration level of the BAI's current (1,500) and proposed (2,000) thresholds and only slightly above the CCPC threshold (1,000). However, the HHI estimate based shares measured in terms of audiences is 1,677. This falls into the high concentration category using the CCPC (1,000-2,000) and current BAI thresholds (1,500-2,000), but would be considered low using the BAI's proposed thresholds (2,000). In other words, the BAI's proposed thresholds suggest a marked relaxation in ownership concentration thresholds.

A Caveat: Specified Area

Introduction

Apart from the apparent lack of a sound rationale, the criticisms of the proposed State-wide BAI thresholds set out in Table 3 centre on the abolition of the Five Additional Factors and the metric used to measure market share. It could be argued, however, that the current and proposed *Ownership and Control Policy* do take these factors into account in the tests for undue concentration in specific areas for: radio stations; and, communications media. We consider each in turn. It should be noted that in both cases the BAI proposes no changes.

Specified area refers to the geographic area covered in the commercial radio license issued by the BAI. The specified area may be State-wide (e.g. Today FM), regional (e.g. South West) or confined to a single county (e.g. Sunshine 106.8, Co. Dublin). Hence there can be a certain amount of overlap in a specified area by different commercial radio stations.

An Undue Concentration of Radio Stations in a Specified Area

In considering whether or not there is an undue number of sound broadcasting services in a specified area under the control of a single entity, rather than replicating the thresholds in Table 3 for a specified area, undue number is defined by the BAI as “*more than a reasonable share of the range of sound broadcasting services available in a specified area.*”⁷² The BAI take 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.*”⁷³ In other words, there are no bright line thresholds.

The BAI, however, takes into account two factors when considering reasonable share:

- i. the total number of the sound broadcasting services in the relevant geographical area;*
- ii. the share of the total audience of the various sound broadcasting services in the relevant geographical area (the “audience share” model).*⁷⁴

A couple of tests are also applied in respect of the reasonable number in a specified area: substitutability⁷⁵ and dominance.⁷⁶ In both cases the tests are drawn from competition policy: substitutability is at the heart of market definition,⁷⁷ while dominance is a necessary condition for a firm with market power to be held accountable for abusing that position.⁷⁸ However, no

⁷² BAI (2018a, p. 22)

⁷³ BAI (2018a, p. 22).

⁷⁴ BAI (2018a, p. 22, footnote omitted)

⁷⁵ “*i.e. in assessing the extent to which one sound broadcasting service may be deemed to be a substitute for another.*” BAI (2018a, p. 23).

⁷⁶ “*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.*” (BAI, 2018a, p. 23, emphasis in original).

⁷⁷ CCPC (2014, pp. 6-11).

⁷⁸ Whish & Bailey (2018, pp. 187-221).

change in these tests is proposed, although the BAI does pose a consultation question concerning whether or not there are amendments that should be considered.

Several points can be made concerning the BAI analysis with respect to undue concentration of radio stations at the specified area. First, to some degree the criticisms made above concerning the proposals at the State-wide level will be taken into account at the specified area. For example, market share is based on audience size rather than the number of radio stations. However, the BAI needs to be more explicit as to the relationship between the analysis at the State-wide level and that at the specified area.

Second, at the specified area reference is made to sound broadcasting services which is wider than BAI licensed sound broadcasting services which are the subject of the State-wide test set out in Table 3. The difference between the two definitions is that sound broadcasting services includes RTE, the public broadcaster, in addition to those radio stations licensed by the BAI. Hence sound broadcasting services is a wider definition than BAI licensed services.

Third, if we were to apply the thresholds in Table 3 to the specified area, then the results in terms of approving a sound broadcasting merger are sensitive to whether sound broadcasters or BAI licensed sound broadcasters are used. A recent case makes the point. The BAI approved the acquisition by Bay Broadcasting of Radio Nova. If we accept – as the CCPC does in its analysis of the merger – that the relevant specific area is Co. Dublin, then Table 7 presents market shares using the number of radio stations and audience size, measured by minutes listened.

Several inferences can be drawn from the table. In terms of market share measured by *number* of radio stations, the acquisition of Radio Nova by Bay Broadcasting would have been prohibited for BAI licensed radio stations (i.e. 22.2 per cent + 11.1 per cent > 25 per cent), but not using radio stations including those of RTE (i.e. 16.7 per cent + 8.3 per cent ≤ 25 per cent). Irrespective of whether market share is measured in relation to the number of BAI licensed radio stations or radio stations including RTE, Communicorp's market share is above the 25 per cent maximum (i.e. 44.4 per cent and 33.3 per cent, respectively).

Table 7

Market Shares, by Number & Share of Minutes Listened, All Adults Aged 15+, Commercial Sound Broadcasting Services, Various Definitions, Radio Stations, Co. Dublin, Oct, 2016-Sept. 2017.

Owner	BAI Licensed Radio Stations		All Radio Stations	
	Market Share: Minutes Listened	Market Share: No. Stations	Market Share: Minutes Listened	Market Share: No. Stations
RTE	-	-		
Radio 1	-	-	35.1% ^a	8.3%
2FM	-	-	3.9% ^a	8.3%
Lyric FM	-	-	3.3% ^a	8.3%
<i>Market Share</i>	-	-	42.5%	25.0%
News Corp				
FM104	21.0%	11.1%	12.1%	8.3%
Q102	11.0%	11.1%	6.3%	8.3%
<i>Market Share</i>	33.0%	22.2%	18.4%	16.7%
Communicorp				
Newstalk	17.2%	11.1%	9.9%	8.3%
Today FM	6.6%	11.1%	3.8%	8.3%
Spin 103.8	12.9%	11.1%	7.4%	8.3%
98FM	11.3%	11.1%	6.5%	8.3%
<i>Market Share</i>	48%	44.4%	27.6%	33.3%
Bay Broadcasting				
Classic Hits 4 FM	8.9%	11.1%	2.1%	8.3%
Sunshine 106.8	3.7%	11.1%	5.1%	8.3%
<i>Market Share</i>	12.6%	22.2%	7.2%	16.7%
Classic Rock Broadcasting				
Radio Nova	7.0%	11.1%	4.0%	8.3%
<i>Market Share</i>	7.0%	11.1%	4.0%	8.3%
Total	100%	100%	100%	100%

a. The breakdown of RTE's minutes listened, by Radio 1, 2FM and Lyric FM, refers to the period April 2015 to March 2016. CCPC (2018, Table 1, p. 6) did not provide this breakdown.

Source: CCPC (2018, Table 1, p. 6) based in Joint National Listenership Research and JNLR (2016, Table 5, p. 6).

Turning to market share measured by *audience*, the acquisition of Radio Nova by Bay Broadcasting would have been approved, irrespective of whether or not BAI licensed radio stations (i.e. 12.6 per cent + 7.0 per cent < 20 per cent) or radio stations including RTE (i.e. 7.2 per cent + 4 per cent < 20 per cent) was used. Irrespective of whether BAI licensed radio stations or radio stations including RTE, Communicorp is above the 25 per cent maximum (i.e. 48 per cent and 27.6 per cent); while News Corp is only above the maximum for BAI licensed radio stations (i.e. 33.0 per cent). RTE exceeds the maximum threshold for radio stations including RTE (i.e. 42.5 per cent). However, in the absence of reasoned decisions by the BAI it is

impossible to know with any certainty how decisions are made and legislative terms interpreted at the specified area.

Fourth, an issue may arise as to which radio stations should be included in analysis for a specified area. In Table 7 we have followed the convention of including radio stations listed by the CCPC as having listeners in Co. Dublin. However, it could be argued that attention should be confined to those radio stations whose license specifies that their broadcast or franchise area is Co. Dublin.⁷⁹ That would dramatically reduce the number of radio stations to: FM104; Spin 103.8; Q102; Sunshine 106.8; and, Radio Nova. Again this is an issue that the BAI needs to provide guidance.

An Undue Concentration of Communications Media in a Specified Area

The BAI should, under the Broadcasting Act 2009, also have regard to the desirability of whether or not there is undue concentration in communications media in a specified area.⁸⁰ Communications media includes not only broadcasting services but also the “*publication of newspapers or periodicals consisting substantially of news and comment on current affairs.*”⁸¹ In determining whether or not there is undue concentration in communications media, the BAI replicates that the methodology used to assess undue concentration of radio stations in a specified area. Again market share is measured in terms of audiences, while there is also the use of the concepts of substitutability and dominance. However, there is little elaboration as to how these concepts are defined or what is meant by more than a reasonable share.

Conclusion

When the BAI reviews a change in ownership and control of a radio station to determine whether it will lead to an undue number of stations under the ownership and control of a single entity, it considers this question at the level of the State and with reference to a specified area. The BAI also has to consider whether the change in ownership and control will lead to an undue

⁷⁹ CCPC (2018, para. 34) argues that advertisers “*seeking to target only listeners located in Co. Dublin are likely to advertise on radio stations whose franchise area is limited to Co. Dublin.*”

⁸⁰ BAI (2018a, pp. 23-24).

⁸¹ BAI (2018a, p. 31).

amount of communications media in a specified area coming under common ownership and control. Thus the BAI is charged with applying a threefold set of tests. Under the BAI's revised *Ownership and Control Policy* the only changes proposed relate to the relaxation of ownership restrictions at the State-wide level. No changes are proposed at the specified area level, although respondents are asked if they have any amendments that they would like to advance.⁸²

The BAI is right to raise the issue of the appropriate tests to be employed in reviewing changes in ownership and control of radio stations. As the BAI has gained experience reviewing such transactions there may be ways in which the process can be streamlined and/or the tests clarified so as to reduce the regulatory burden on business and, at the same time, ensure greater compliance with the BAI's *Ownership and Control Policy* which is vital to maintain diversity and plurality. Furthermore, the new media merger regulatory regime involving the CCPC and the DCCAIE may have caused the BAI to reconsider various concepts and tests.

Against this contextual background several points can be made concerning the consultation questions raised by the BAI with respect to sound broadcasting services.

First, the BAI needs to specify clearly the relationship between the three sets of tests used to review a change in ownership and control of a radio station. It is assumed that these three tests all have to be satisfied. In other words, there is not a trade-off in that two out of the three have to be satisfied or that there is some balancing of the degree to which the three tests are satisfied.

Second, while the State-wide tests have clear bright lines, the two specified area tests, one for radio stations including those of the public broadcaster, the other for communications media, appear to contain no such bright lines. Instead there is reference to "*more than a reasonable share,*" but with no definition of what that might be. This in turn implies a substantial element of judgment and discretion by the BAI in deciding what is unreasonable. If the BAI published reasoned decisions, as suggested above in the discussion of viability/sustainability,

⁸² BAI (2018a, pp. 23-24).

then a body of decisions would be built which would provide some guidance to radio station owners and others. Furthermore based on this body of jurisprudence the BAI could develop guidelines on how the terms should be interpreted.

Third, the BAI has not made a compelling case for the relaxation of the State-wide ownership and control thresholds. This applies especially to the removal of the Five Additional Factors from application to ownership changes in the 20 to 25 per cent range. As noted in the discussion under 'A Caveat: Specified Area' to some extent the issues raised under the Five Additional Tests might be considered under the two specified area tests. However, the fact that the BAI makes no reference to this possibility in its proposed *Ownership and Control Policy* and the fact that it is not at all clear how the specified area tests are applied makes it unlikely that these tests are an adequate substitute for the Five Additional Factors.

Fourth, in measuring the degree to which a single entity can own more than one radio station the BAI should consider the use of audience size or some other metric of the importance of a radio station other than the number. One possible solution is to retain State-wide ownership thresholds for the number of radio stations that a single entity can own and control, but for the BAI to articulate much more clearly how it takes into account market share at the specified area. For example, the BAI states that it uses the concept of dominance at the specified area. Reference to competition case law suggests a minimum market share of 40 per cent is necessary to establish dominance.⁸³ Whether or not that would be an appropriate benchmark is for the BIA to decide, but at least it provides a point of departure.⁸⁴

Concluding Comments

The BAI has quite rightly decided to review its vitally important *Ownership and Control Policy* which underpins achieving its objectives with respect to plurality and diversity. It sensibly commissioned research on the media scene and the views of targeted stakeholders. However,

⁸³ Whish & Bailey (2118, Figure 1.1, pp. 46-48).

⁸⁴ Forty per cent may not be appropriate given the high barriers to entry into commercial radio broadcasting and the fact that radio stations – even in the same specified area – may be aimed at different audiences. Furthermore due attention would need to be given to the State owned broadcaster which, as shown in Table 1, accounts for about a third of the audience.

the BAI's *Report on Ownership and Control of Media Businesses in Ireland 2015-2017*, although completed, was not released in time for respondents to take into account its findings prior to commenting on the BAI's proposed *Ownership and Control Policy*.⁸⁵ Despite a request the BAI refused to extend the consultation so that account could be taken of the 2015-2017 report.⁸⁶

As indicated earlier in this submission the evidence, albeit partial, suggests that in the recent past media ownership concentration has increased both *within* newspapers and radio and *across* newspapers and radio and, as a result, plurality and diversity likely declined. It would have been helpful to have had the 2015-2017 report to determine whether or not this is the case. Taken together with the Reporters Without Borders concerns about the "*Unhealthy Concentration*" in Irish media gives pause for thought in terms of the BAI's proposals which privilege viability and sustainability and raise virtually no regulatory barriers to four as opposed to five entities, which may be individuals, owning all of the BAI licensed commercial radio stations operating in Ireland.

⁸⁵ Nor would the BAI comment on the results of this report when the issue was raised at the launch of the public consultation of the proposed *Ownership and Control Policy*. See Paul (2018) for details.

⁸⁶ The author made this request to the BAI in an email dated 14 January 2019; the BAI responded the same day.

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1. Do you consider the objectives of the Policy appropriate, given the organisation's statutory obligations and Statement of Strategy?

'4. To contribute to the promotion of' should be changed to '4. To ensure through regulation' Sections 2 and 5 should be moved to the bottom of the list as radio is used as a loss leader in shaping consumer demand, political support and social norms.

2. What are your views on the additional references in the objectives to viability, sectoral sustainability and diversity of ownership?

Viability implies commercial success, which means sponsorship support and this runs counter to diversity of control and diversity of viewpoint. This section should be contextually considered in the primary purpose of BAI's policy as it serves the citizen, ahead of the needs of the service provider.

3. Are there any other objectives which should be included in the Policy?

Yes. The recording and provision of open data, publicly, as it relates to the other policies. In practical terms radio stations hold play lists of what they play and when this should be publicly available. More importantly the guest lists, topics and % of time spent on each guest per topic and their view. Radio stations already hold this information in computerised production notes on specialist software. The output of this should be automatically sent to a central point in a standardised (xml) format. This is used to allow 'active citizenship' like coder dojos to test the policy objectives against the broadcasters actions.

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

The definitions are unsuitable for 2019. With the release of the panama papers and media scandals technical definitions should be used. There are technical definitions available by the OECD and other credible organisations for the control and substantial interests. Control is engineered via proxy voters e.g. pension fund managers use their votes over commercial shares to effect profit and benefit a parallel interest which is counter to BAI's policies.

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

See 4. above

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

As long as all the information regarding 'Assignment of Contracts' and 'Concrete Indicators of Diversity' is publicly released in standardised xml format via a central data holder for public, regulatory and academic scrutiny then the change should have no impact. Otherwise it is a loss of information and control by the public.

7. What are your views on the seven character tests set out under this section of the draft Policy?

Insufficient for 2019. Considering the political scandals of the last few years from An Garda Siochana back to the charity corruption cases and the Anglo Irish Bank case failure the seven characteristics need to be expanded. A start would tax residency of every entity and person in the chain to the ultimate beneficial owner. Also the number of journalistic obstruction cases via litigation for defamation, the more cases worse one's character is. Also membership of political parties and politically affecting organisation is a sign of poor character.

8. Do you think any additional tests should be added? For example, what are your views about whether other criminal offences should be included? Should findings of civil/public bodies, but which do not constitute a criminal offence, also be taken into account. If yes, what types of criminal offences or findings do you consider relevant?

The case of criminal offence should be removed from good character. Many of Ireland's founders, including Constance Markievicz, who are now lauded were serious criminals. This is not restricted to Ireland as Nelson Mandela, Mother Theresa and many others were criminals. How many people that have served their sentence under laws since removed from the statute books (homosexual acts) would be shown to have a character that does not meet BAI's standards. Excluding people who have paid their price and hopefully learned their lesson means that a large group is wrongfully silenced. I recognise that served sentences are not the same as spent convictions. However the criminal offence and full context should be easily publicly available.

9. In the case of management positions, what are your views on the proposal to limit the character tests, in most instances, to the Chief Executive Officer and the Company Secretary?

See 8.

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

Add the a section on the active and constant scrutiny of management's actions is far more important than past actions. Management roles in broadcasters should be on licence with clear means of non-renewal. Perhaps start with annual ethics courses and signed assurances, I hear the Gardai do this now. Perhaps involving Barnadoes rootsofempathy.org training. Assistance from UCD's Geary institute of Behavioural Economics may be required.

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

The commercial test need not apply. Standard scrutiny and legislation by CCPC is sufficient. The open data mentioned above should help any case. Commercial broadcasters should run the rules of the free market and approach financing, risk, reward and failure as any other company without a specific test.

The 50% limit for community broadcasters makes no sense. What if they get 100% of sponsorship via public service announcements from the state under topics which is relevant. What should be

discussed it revenue raise as a goal through community benefiting content production and licensing/sales.

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

See 11.

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

Again, viability should be by 'in house' content production licensing and sales internationally. The content should be in line with the constitution of the company e.g. documentaries, music profiles, comedy shows. Broadcasters should move away from owner funding and advertising to a subscription model so that the public fund the stations and control/interest is removed from the sponsors. The model of subscription is the crux of the question. To start with this, why can I go into a Tesco and buy an anonymous gift/user card for netflix, google play store, halfords or Debenhams, but I cannot buy one for Irish broadcasters (either individually or as a collective like an All4One card)!

14. What are your views on the proposed modifications to the thresholds which would:- -Increase the first threshold from 15%-20% - Apply a Compliance Audit from 20%-25% - Maintain the 25% threshold in respect of ownership of the total number of sound broadcasting services?

These are horrendously harmful. The thresholds should be reduced, enforced and expanded to factor in publication (paper and digital) as these are the most direct indicators of egregious control and manipulation of the diversity principles in the BAI policy. Ownership should be as low as 15% and again it should be on an open data system of real time share holdings to the ultimate beneficial owner as prescribed under OECD's best practices. If the broadcaster cannot show all ownership and demonstrate that the threshold has not been breached then it cannot get its annual licence renewed. This is crucial in using tax havens to hide ownership before the shareholders AGM to appoint the board of directors.

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

See 14 above.

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

"The BAI shall apply two tests" ... "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."

This should be changed to “The BAI shall select and brief as random and diverse jury of 12 people from the the relevant geographical area to apply two tests”. If section is to hold to the diversity principles of the policy then it should do so actively.

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

See 16. above.

18. What are your views of the proposed additional test in respect of news and current affairs programming and practices?

Add: The creation of new opportunities for expanding the diversity of viewpoints and agenda setting with Irish news and current affairs programming?

19. What other amendments, if any, would you propose?

The recognition, support and facilitation of independent and free lance journalism to be expanded in the regular production of content for commerical broadcasters.

20. Are there any other policy provisions that should be included in the document? If yes, what should these be and what reasons are there for adding the policy provision/s in the context of the Broadcasting Act and the BAI’s role?

The documenting and disclosure of shareholdings all the way to the ultimate beneficial owners are disclosed to the audience on either the broadcaster’s or the BAI’s website in a standardised xml format.

21. Do you have any other views in respect of the draft BAI Ownership and Control Policy?

Any broadcaster that chooses to stream and podcast any of its live broadcasts should do so in a downloadable format (not just itunes, but a downloadable .mp3). This is to ensure documentation and scrutiny of the broadcaster in meeting BAI’s policy standards.

Also the broadcasters should be forced, by licensing renewal control, to comply with EU net neutrally directives so as to ensure that community broadcasters are not disadvantaged over commerical broadcasters when broadcasting online.

Broadcaster company documents documents that are initially or annually submitted to the companies registration office should be available to download (for free) on the broadcasters website. This availability should be as long, and when, they are available on cro.ie. The reason for this is to allow unfettered analysis by academic students on on the ownership and control of broadcasters without incurring unnecessary costs. These costs may seem small to some, but to a Msc or phD. student they can be substantial.

Consideration for the scrutiny of programming should be extended to presenters. If a programme is without diversity of viewpoint, or with bias, it may be the producer or the presenter. And tracking

the diversity of viewpoints expressed. This is not to say that a biased presenter should be removed, if anything many diversity of biased presenters should be encouraged. However if there is no documenting and disclosure (via open data xml) then there is no way for the public to understand which broadcasters are influencing their opinions through excessive or neglectful exposure to a diversity of viewpoints.

Also the authority, quality, position and repetition of invited experts should also be recorded and disclosed by open data. The purpose is to demonstrate the ability to influence a debate. If one world class person for an issue is presented against an unqualified or unconvincing person from the other side of the debate, and this happens repeatedly, then influencing a debate becomes clear.