



Broadcasting Commission of Ireland
Coimisiún Craolacháin na hÉireann

Review of Submissions Received

Consultation

BCI policy on ownership and control

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Consultation:

BCI policy on ownership and control – review of submissions received

Introduction

On 16 June 2005, the Broadcasting Commission of Ireland (BCI) launched its consultation document, *BCI Ownership and Control Policy*.¹ The principal aim of the consultative process was to review the 2001 ownership and control policy, honouring a commitment made at the time of introduction. The aim of this document is to review submissions made during that consultation.

* * * * *

This section introduces aspects of the consultative process. It outlines the background to the policy while highlighting the need for consultation at this particular juncture. And it concludes by outlining the style of this current report.

Background information

October 2001 saw the introduction of the BCI's revised policy on the ownership and control of independent private commercial radio and television services in Ireland.² ³It was designed to coincide with the beginning of the second phase in the development of commercial radio broadcasting in Ireland under the *Radio and Television Act, 1988* as well as the potential introduction of new broadcasting services under the *Broadcasting Act, 2001*.⁴ In design, the policy aimed at ensuring the development of a viable, sustainable industry, characterised by plurality of ownership and diversity of content. The policy was also designed to provide more clarity and certainty in respect of the ownership and control of private broadcasters.

¹ The launch took place at the BCI's offices at Warrington Place, Dublin 2. From here on, the document will be referred to as the *Consultation Document*.

² BCI (2001), *Ownership and Control Policy*, October. The BCI has a separate policy in relation to not-for-profit community broadcasting services.

³ The revised policy replaced operational procedures which had been in place since the introduction of the *Radio and Television Act, 1988* and contractual provisions that applied to ownership and control up to that time.

⁴ See Appendix I for relevant legislation.

Current practice

Under the terms of their contracts with the BCI, all radio and television broadcasters are obliged to notify, and to obtain the consent of, the BCI before implementing changes to their ownership and control structures. Suggested changes are assessed and decided on by the BCI in accordance with statutory provisions and the *Ownership and Control Policy, 2001*. It is generally accepted that BCI policy has been successful in meeting objectives set. A review date, however, was set when this policy was introduced. The BCI is not only honouring this commitment but believes it is an appropriate juncture at which to do so given the level of change omnipresent in the Irish market and beyond.⁵ Consequently, the BCI recognises that, as a result of rapidly converging technologies and markets, a combination of competition law and media law, other regulatory measures are necessary to meet the public interest objective of media pluralism and diversity. In formulating its policy, the BCI takes into account the current and evolving legislative environment governing broadcasting in Ireland and at a European level.

Present report

The present report summarises information submitted in response to the consultation. A series of questions was posed in the *Consultation Document*. It is therefore advised that that document be read in conjunction with this *Review of Submissions Received*.

The approach taken in this summary is linear. It considers the initial request and the information received in the areas highlighted. Each section introduces the subject matter and groups responses made under the questions asked.

Views expressed often centred on recurring themes. Rather than duplicate concluding remarks in each section, an overview of points made is presented at the conclusion of this report.

Approach taken

Fifteen submissions were received, predominantly from existing and potential players in the industry but also from related interests and the general public.⁶ This was the level of response to the 117 documents which were sent out. Submissions could be made by email or post.

The approach adopted to the submissions received was systematic and analytic. As this was a general call, all representations were afforded equal weighting. The method applied allowed for a thorough appraisal of information received in terms of respondent's objectives, context, content and his/her overall contribution to the present discussion.

The reporting style of this document is informative rather than analytic. Responses received have been reviewed and similarities/differences highlighted therein. Where additional comments and/or observations were made, consideration was given as appropriate. Viewed as a whole, this document should be seen as part of the overall

⁵ See Appendix II for an outline of the five principal developments.

⁶ A list of submissions received is provided at the end of this report.

process in the discussion about issues of ownership and control rather than a stand alone report.

1. Guiding regulatory principles

1.1. Introduction

In the formulation and regulation of its regulatory policy, the Broadcasting Commission of Ireland (BCI) uses five premises as its guiding principles. These are as follows:

1. diversity;
2. flexible and consistent approach;
3. adequate regulation based on current conditions;
4. openness and dialogue;
5. clear decision-making.

Each endorses the Council of Europe's belief that the primary task of a regulator is to ensure that it functions smoothly by establishing a climate of dialogue, openness and trust in its dealings with stakeholders. Principles adopted by the BCI illustrate the importance attached to being able to respond adequately to unforeseen and often complex questions which will emerge in the developing broadcasting landscape. Furthermore, these principles are in line with those presented by the Government in its White Paper *Regulating Better* and subsequently, developed by the BCI in its own *Strategic Plan 2004-2008*.¹

1.2. Questions asked

In reference to the guiding principles, the BCI invited views on two key points. These were:

1. The continuing relevance and suitability of the guiding principles set out above in the context of the BCI's goals of pluralism of ownership and diversity of content.
2. How might the principles be modified or what practical steps may be taken to improve their application in the future?

Please provide a rationale for your response.

¹ For further information, see *Consultation Document*, 13-14.

1.3. Feedback

In general, the guiding principles were accepted as a relevant framework for achieving the BCI's goals of pluralism of ownership and diversity of content.² Comments made focused on two levels, on providing an overview of the principles outlined and on more specific elements contained therein. This division is reflected hereunder.

1.3.1. Overview of principles

The UTV owned stations accepted these principles as being 'conducive to establishing relationships between the BCI and Broadcasters, which are based on a climate of dialogue, openness and trust. They form the backdrop to regulation that facilitates licence holders in creating a broadcast environment where a diverse range of services, catering for the interests of listeners, can develop.'³

According to the Institute of Advertising Practitioners in Ireland (IAPI) and the Association of Advertisers in Ireland (AAI), the current approach has been practical, taking full cognisance of local issues and circumstances. Furthermore, they stated that 'the BCI [should] maintain this facilitory approach, to continue to formulate basic guiding principles, leading to a light touch, broad principled operation in full accordance with EU legislation and in line with expected regulatory direction.'⁴ Fox Radio Ltd., for example, endorsed 'the Commission's stance on the flexible and consistent approach to regulation, particularly in light of intense competition across all media sectors as well as the rapidly changing technology market.'⁵ It continued on to say that it feels 'the establishment of the Commission of a liberal and open approach allied to a clear decision process has provided the necessary clarity for good governance, investment and development of the sector.'⁶

While agreeing with the guiding principles, Mid West Radio believed it was important for the BCI to remain conscious of both technological and societal changes in order 'to ensure that service providers will be in a position to meet these challenges as they arise and not be constrained by too much bureaucracy.'⁷ Echoing this point, Fox Radio Ltd. proposed 'that the regulatory framework should be sufficiently flexible and robust to reflect not only the current environment but that of the future, taking into account the potential explosion in the range and volume of media enabled by the development of new technology.'⁸

1.3.2. Comments on specific elements

Kenneth Murphy voiced concern regarding the BCI's equation of plurality with diversity, believing that it sidesteps a more comprehensive approach to ensuring diversity in content. He continued on to say that this may 'lead to successes in

² See, for example, the Labour Party: e4, 1; Fox Radio Ltd.: e1, 2; Mid West Radio: e3, 1; Institute of Advertising Practitioners in Ireland (IAPI) and the Association of Advertisers in Ireland (AAI): w3, 2; Submission on behalf of UTV owned stations: e2, 2; Unique Media: w4, 1; Sunrise Radio: w5, 1; Phantom FM: e8, 3.

³ Submission on behalf of the UTV owned stations: e2, 2.

⁴ IAPI and AAI: w3, 2.

⁵ Fox Radio Ltd.: e1, 2;

⁶ Fox Radio Ltd.: e1, 2;

⁷ Mid West Radio: e3, 1.

⁸ Fox Radio Ltd.: e1, 3.

growing a “vibrant commercial radio market” but failure in ensuring cultural and social regulatory principles such as plurality and diversity.’⁹

For IAPI and the AAI, greater transparency in decision making is important. They argued that decisions should be made public, where relevant. In addition, they stated that principles should be reviewed within a three to five year period.¹⁰ Similar points were raised by McCann FitzGerald:

This would permit the emergence of a body of relevant BCI determinations that would assist both in understanding the rationale of the BCI’s decisions and in advising and predicting as to the unlikely BCI reaction to proposed changes in ownership and control. In line with the Competition Authority, we believe that the BCI could inaugurate such a practice while continuing to respect confidentiality and business secret concerns of the parties involved.¹¹

The UTV owned stations proffered some possible modifications. They suggested the inclusion of improved long-term planning to allow broadcasters to operate in an environment of greater certainty. In addition, they echoed sentiments expressed by IAPI and the AAI when they expressed the belief

that the BCI should establish more transparent and direct links between their guiding principles and the outcomes which they wish to act on. For example, the BCI currently use constraints on ownership as a means of creating diversity of programming services for the public. [They] contend that the diversity of programming is more directly and properly regulated by the BCI requiring positive programming undertakings from broadcasters. These modifications will lead to greater consistency in decision-making and regulatory certainty for broadcasters.¹²

TV3 contended that the BCI should follow more closely the Government’s principles as espoused in *Regulating Better*. It stated that these principles, ‘namely Necessity, Effectiveness, Proportionality, Transparency, Accountability and Transparency, should inform the BCI’s own approach to regulation.’¹³ River Media concurred with this view, believing ‘these guiding principles could effectively be augmented by incorporating the principles set out in the White Paper “Regulating Better”.’¹⁴

Reference was made to the BCI considering the possibility of ‘Co-regulation’.¹⁵ For Mid West Radio, proposals by the BCI on ‘co-regulation’ and ‘self-regulation’ would be welcome. It argued that this is an appropriate juncture ‘because the industry is now

⁹ Kenneth Murphy: e5, 1.

¹⁰ IAPI and AAI: w3, 2.

¹¹ McCann FitzGerald: e6, 4.

¹² Submission on behalf of UTV owned stations: e2, 2.

¹³ TV3: w2, 3.

¹⁴ River Media: e7, 1.

¹⁵ Unique Media: w4, 1.

well established and highly professional giving rise to the possibility of self regulation as opposed to an all statutory environment.’¹⁶

River Media declared its support for the BCI goal of diversity. It believed, however, that

this aim should not be pursued at the cost of undermining the economic viability or stability of local or national markets. In respect of pluralism of ownership [it believes] the policy must strike a balance between encouraging ongoing investment in the market with the necessity of ensuring that the market does not become dominated by a small number of companies whose shareholders are based outside the jurisdiction....it is essential that the policy should support the growth of Irish owned media groups with sufficient scale to compete with large overseas entities.¹⁷

While supporting the principles, Phantom FM, contended that ‘these aspects must be incorporated in to enforceable broadcast contract aspects where possible, in order ensure [sic] that the desired service is maintained and protected, regardless of what individual or organisation may end up having ultimate control of a particular station in the future.’¹⁸ McCann FitzGerald developed this point by saying that certainty,

or at least a reasonable degree of predictability in the application of Irish media ownership rules, is critical to the private sector. In particular, the commercial sector needs to know that there will be no unnecessarily subjective or inconsistent judgements involved in the regulation of media ownership. In addition, it is important that all forms of media be regulated in an even-handed way.¹⁹

Continuing on, McCann FitzGerald voiced concern about ‘flexibility’ and ‘certainty’ believing that these could pull in opposite directions. Here it said that ‘...an overly flexible regime may not provide the desired level of certainty’, resulting in similar situations being treated differently and thus, generating problems.²⁰

Communicorp Group Limited expressed concern vis-à-vis the fact that three separate bodies are involved in mergers. It regarded this as ‘inconsistent with the white Paper “Regulating Better” which suggests the application of principles including necessity, effectiveness, and consistency.’ It added that such a tripartite approach is ‘not in the interest of good regulation. It imposes unnecessary duplicity, undermines effectiveness and is inconsistent.’²¹ The Labour Party also made reference to the involvement of other organisations. Here it called for greater cooperation with ComReg and the Competition Authority, stating that these two bodies ‘already have a

¹⁶ Mid West Radio: e3, 1.

¹⁷ River Media: e7, 1.

¹⁸ Phantom FM: e8, 3.

¹⁹ McCann FitzGerald: e6, 3.

²⁰ McCann FitzGerald: e6, 4.

²¹ Communicorp Group Limited: w6, 3.

formalised agreement to ensure a more effective operation of both organisations and the avoidance of the duplication of resources. A similar guiding cooperative principle would enhance the ability of the BCI to achieve its aims.²²

1.4. Concluding remarks

There was overall support expressed for the application of the BCI's guiding principles. Comments were made, however, regarding elements of the principles outlined. These included a call for greater transparency, greater cooperation between relevant regulatory groups and that the principles carried in the governmental document, *Regulating Better*, be followed more closely. In addition, it was requested that the principles identified be reviewed and adapted at regular intervals to take account of changes occurring in the broadcasting sector.

²² The Labour Party: e4, 1.

2. Policy objectives

2.1. Introduction

In its *Ownership and Control Policy, 2001*, the Broadcasting Commission of Ireland (BCI) outlined its four principal policy objectives. These were as follows:

- to promote plurality of ownership of the communications media, with particular reference to radio and television services;
- to promote diversity in viewpoint, outlet and source; that is, diversity in the opinions expressed, in programming delivery and content, and in the sources of information available to the public;
- to ensure that broadcasting contracts are held by persons who have available to them the necessary character, expertise, experience and financial resources;
- 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 service.

Since introduction, it is believed that these policy objectives have generally been met. Grounded in statutory provision, and informed by the BCI's direct experience of regulating the broadcasting sector, it is believed that they provided a framework for decision-making by the BCI vis-à-vis issues of ownership and control. More specifically, the BCI considers each new licence application or proposal for change in the context of whether or not they can fulfil each of these policy objectives.

2.2. Questions asked

The BCI invited views on two principal areas. These were as follows:

1. Do these objectives continue to be relevant and suitable in respect of:
 - i. free-to-air services; and
 - ii. non free-to-air services.
2. If you do not consider them relevant or suitable, what changes would you suggest?

Please set out a rationale for your responses.

2.3. Feedback

Objectives specified were generally considered relevant and suitable for continued application to both types of service.¹ Indeed many viewed them quite favourably.² Unique Media, for example, contended that

Decisions may be made in a far away boardroom without taking into consideration the effect on the locality. Diversity, character and expertise of the applicant and broadcasting ethos should be assured as these objectives make for a better broadcasting business, but local ownership is the key to making sure that decisions are not made based on the bottom line without acknowledging the effect on the community.³

Suggestions for modifications were few. Comments were made regarding the perceived need to focus on increasing private sector investment. It was contended that the BCI 'should concentrate on ensuring a viable well run commercial sector regardless of individual's company's size and that must be a paramount consideration.'⁴ The Labour Party, however, believed such emphasis was incorrect in this instance:

There is some opinion that the BCI should concentrate on competition law as a guiding principle rather than continue with a strong emphasis on pluralism and diversity. This would not be a welcome development as maintaining the integrity of the Irish broadcasting market depends upon upholding a strong commitment to the promotion of these two objectives.⁵

Communicorp Group Limited believed the relevance of plurality of ownership was preferable to the criteria of 'an undue number of sound broadcasting licences.' For it, however, consolidation will 'facilitate more diversity and more broadcasting output.'⁶

Although agreeing with the objectives in principle, the UTV owned stations did not accept that the most appropriate way to achieve diversity of content is to ensure plurality of ownership. Explaining this opinion, they said

While acknowledging that plurality of ownership should be recognised as desirable, [it is contended] that to do so to the detriment of radio listeners is counter productive. In order to offer a quality, competitive service, independent stations require some level of scale. This scale can be achieved through common ownership or via shared operations and programming service and should coexist with local content,

¹ See, for example, Fox Radio Ltd.: e1, 4; Mid West Radio: e3, 1; Unique Media: w4, 1; Labour Party: e4, 1; Submission on behalf of the UTV owned stations: e2, 2; Sunrise Radio: w5, 1.

² See, for example, the Institute of Advertising Practitioners in Ireland (IAPI) and the Association of Advertisers in Ireland (AAI): w3, 2.

³ Unique Media: w4, 1.

⁴ TV3: w2, 4.

⁵ Labour Party: e4, 1.

⁶ Communicorp Group Limited: w6, 8.

management and resource. In many instances, policy objectives can be best achieved by the BCI fostering and embracing a reasonable level of ownership consolidation.⁷

For these stations, the goals which plurality of ownership are primarily designed to achieve are more easily attained directly by programming regulation. Referring to Programme Policy Statements and Programme Schedules, they argued that these controls ‘even in the absence of ownership regulation should be sufficient to meet current policy objectives.’⁸ Phantom FM mirrored this opinion.⁹ It stated that, irrespective of the objectives professed, ‘external market forces may limit the effect that a local regulatory body can have on the plurality of ownership aspects.’¹⁰ Reference to takeovers was made. Here Phantom FM stated that when this occurred, the BCI had little influence in the assessment of character, expertise and financial resources of those holding the broadcast contract. River Media also referred to this point, citing Scottish Radio Holdings and Emap as examples.¹¹

2.4. Concluding remarks

In general, the four policy objectives outlined by the BCI were accepted. Of the few comments made, the tendency was to focus on how diversity of content might be achieved through different means and how the BCI could foster future development of the broadcasting sector.

⁷ Submission on behalf of the UTV owned stations: e4, 3.

⁸ Submission on behalf of the UTV owned stations: e4, 3.

⁹ Phantom FM: e8, 3.

¹⁰ Phantom FM: e8, 3.

¹¹ River Media: e7, 1.

3. Policy provisions

3.1. Introduction

Necessitated by change in the sector, and according to recommendations made in the *Ox Report*, the Broadcasting Commission of Ireland (BCI) sought further clarification regarding areas mentioned in Part 4 of the *Ownership and Control Policy, 2001*. In this respect, it sought review and addition.

In line with developments nationally and internationally, a number of key provisions were used as reference points. A revised list of seven areas was compiled and this was as follows:

1. defining the statutory terms;
2. assessing “character”;
3. assessing “ethos” – management and programming;
4. assessing “undue number”;
5. defining “an undue amount” of communications media;
6. assignment of contracts (two-year moratorium);
7. *Competition Act, 2002*.

These were considered separately in the *Consultation Document* with questions posed at the end of each section. The format is duplicated here for the purposes of consistency. Conclusions are provided at the end rather than after each section.

3.2. Defining statutory terms

Definitions of key terms were presented for consideration. These were ‘control’, ‘substantial interests’ and ‘communications media.’

3.2.1. ‘Control’ and ‘substantial interests’

Section 6 of the *Radio and Television Act, 1988* and Section 38 of the *Broadcasting Act, 2001* require the BCI to interpret certain statutory terms. These are ‘control’ and ‘substantial interests’ as they pertained to ‘communications media’.^{1 2}

¹ In the *Ownership and Control Policy, 2001* ‘control’ is defined as ‘an individual or legal entity that is in a position proprietarily, financially or in terms of voting rights to determine or direct the policy of the company with regard to programme output, that is, sourcing, production, supply or delivery to the audience.’

In practice, the BCI's interpretation of these key terms has generally been in line with approaches taken in other EU member States albeit some differences occurring regarding the percentage thresholds which apply. To date, no significant difficulties have arisen regarding how these two terms have been interpreted since 2001.

3.2.2. *Questions asked*

The BCI sought views on two areas. These were as follows:

1. Do you consider that the current definitions of 'control' and 'substantial interests' continue to be suitable in an Irish context?
2. If the current definitions are not deemed suitable, what changes do you consider appropriate?

Please set out a rationale for your responses.

3.2.3. *Feedback*

While agreeing in principle, few respondents accepted the current definitions of 'control' and 'substantial interests' in their entirety. The Institute of Advertising Practitioners in Ireland (IAPI) and the Association of Advertisers (AAI) and the UTV owned stations were among the few who supported both.³ In addition, some may have accepted the definition of 'control' but not of 'substantial interests.'⁴ Comments made are divided by term.

3.2.3.1. Control

Fox Radio Ltd. considered the current definition of control, being effectively over 50% of the voting rights of a service, to be a suitable measurement in an Irish context. Referring to the application of this measure, however, it stated that 'in reality it is the day-to-day management, together with advertising sales arrangements, which controls the content of a service. [It] therefore recommended that as well as the legal de facto interpretation, the determination of control should include material interests.'⁵ Mid West Radio expressed similar sentiments when it said

It is unlikely that any individual or legal entity would be in a position to exercise control through financial strength if it did not have proprietary or voting control in the first instance. The definition restricts 'control' to programme output only and does not cover other aspects of the providers business – sales, and general business strategy to name but a few.⁶

² In the *Ownership and Control Policy, 2001* 'substantial interests' is defined as 'an individual or legal entity that has sufficient proprietary, financial or voting strength within a relevant company or companies to be able to influence directly or indirectly to an appreciable extent the strategic direction or policy of the company or companies with regard to programme output, that is, sourcing, production, supply or delivery to the audience.'

³ Institute of Advertising Practitioners in Ireland (IAPI) and the Association of Advertisers in Ireland (AAI): w3, 2; and Submission on behalf of the UTV owned stations: e2, 3.

⁴ See, for example, Fox Radio: e1, 5; Communicorp Group Limited: w9, 6; Unique Media: w4, 1; Sunrise Radio: w5, 1; River Media: e7, 2.

⁵ Fox Radio Ltd.: e1, 5.

⁶ Mid West Radio: e3, 2.

According to McCann FitzGerald, the BCI should be aware of the definition of ‘control’ used in Section 16.2 of the *Competition Act, 2002*. Being based on ‘a well-established and well understood definition of control at the EU level’, the *Competition Act* definition was deemed preferable.⁷ Furthermore, McCann FitzGerald stated that ‘there is now a body of precedent, both at EU and national level, as to the meaning of the above definition of control, giving business and advisers clear guidance as to when a change of control occurs.’⁸ Should the BCI’s current definition be retained, it is suggested that guidance should be given vis-à-vis ‘when an entity is deemed to be able to “...determine or direct the policy of the company with regard to programme output, that is, sourcing, production, supply or delivery to the audience.”’⁹

3.2.3.2. Substantial interests

In practise, the BCI has defined ‘substantial interests’ with reference to a number of factors which include capital share/voting rights and the constitution and management structure of an applicant. In terms of share capital, the BCI has not deemed a shareholding of less than five per cent capital share in an applicant to be a substantial interest in that applicant.

In light of comments made, the definition of ‘substantial interests’ is in need of review. Many questioned the percentage applied. Mid West Radio felt the five per cent shareholding to be too small and asked that it be raised to at least ten per cent. It argued that ‘Despite the fact that the BCI does not consider a shareholding less than 5% to be a substantial interest, as it is not defined it could lead to inconsistency, lack of openness, confusion and also subjectivity from the BCI – which would be contrary to the Council of Europe’s premise for regulatory bodies.’¹⁰ It suggested that the BCI established percentages within certain ranges thus, leaving ‘the BCI with some of the flexibility it seeks as well as clearly defining for the service provider the guidelines in which to operate regarding control and ownership.’¹¹

Unique Media and Sunrise Radio suggested that the definition of ‘substantial interests’ be increased to twenty per cent.¹² Fox Radio Ltd. concurred with this view believing the current percentage to be irrelevant within the present context of a consolidating market. ‘In effect, unless the individual or legal entity is providing sales or management service to that specific company, we do not consider the shareholding to have a significant influence in terms of control.’¹³ Should an increase occur in the percentage applied, Fox Radio Ltd. recommended that ‘it is vital that minority shareholdings should not be used as a device to evade ownership restrictions.’¹⁴

⁷ The *Competition Act, 2002* defines ‘control’ as follows: ‘...if, by reason of securities, contracts or any other means, or any combination of securities, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by- (a) ownership of, or the right to use all or part of, the assets of an undertaking, or (b) rights or contacts which enable decisive influence to be exercised with regard to the composition, voting or decision of the organs of an undertaking.’

⁸ McCann FitzGerald: e6, 5.

⁹ McCann FitzGerald: e6, 6; quote from *European Commission notice on the concept of a concentration under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings*, OJ C66, 2.3.1998, 5.

¹⁰ Mid West Radio: e3, 2.

¹¹ Mid West Radio: e3, 2.

¹² Unique Media: w4, 1; Sunrise Radio: w5, 1.

¹³ Fox Radio Ltd.: e1, 5.

¹⁴ Fox Radio Ltd.: e1, 5.

Communicorp Group Limited suggested the bar be raised to twenty five per cent. Explaining its position, it said

if the definition is interpreted as likely to give rise to a decision that a company with a shareholding below 25% has a substantial interest then Communicorp would question its relevance. A company with 75% sharing, or a group of shareholders controlling 75% shareholding in a company, has the ability to pass most if not all resolutions, to increase share capital, and to control the board of management.¹⁵

TV3 suggested that the percentage applied be raised to fifty per cent and over. It argued that ‘substantial interest’ should ‘not be relevant at all unless it constitutes control as described...’ For it, ‘An overriding consideration must be whether the party that runs the station is a credible party (with appropriate finance and expertise) to do so and has the necessary commercial skills to compete in what is a business environment.’¹⁶ At present, it believed that too many investors were needed and that mitigated consolidation of ownership and weakened overall applications:

The BCI should use this process to declare, as have so many of its peers in Europe, that single ownership of a media outlet is not a detriment to the application and licensing process so as to raise the calibre and substance of the new entrants that may be licensed in this increasingly competitive and non-regulated (in the case of on line services) media world.¹⁷

3.2.3.3. General comments

Phantom FM agreed with the current definitions. While supporting their relevance and believing they were adhered to at the initial awarding stage, ‘it is not clear how they can be maintained in situations where Irish broadcasting organisations form a minor part of a takeover or merger negotiated and executed outside the state.’¹⁸

McCann FitzGerald felt that the BCI needs to differentiate more clearly its understanding of ‘control’ versus ‘substantial interests’. More specifically, it stated it understands that

a “substantial interest” will be deemed to arise where an entity can “...influence directly or indirectly to an appreciable extent the strategic direction or policy of the company or companies with regard to programme output, that is, sourcing, production, supply or delivery to the audience.” What specific rights, veto or otherwise, does the BCI consider will put a shareholder in the position to meet this test?¹⁹

¹⁵ Communicorp Group Limited: w6, 9.

¹⁶ TV3: w2, 5.

¹⁷ TV3: w2, 5.

¹⁸ Phantom FM: e8, 3.

¹⁹ McCann FitzGerald: e6, 6.

3.2.4. *'Communications media'*

The *Ownership and Control Policy, 2001* defined 'communications media' as 'all broadcasting services (including sound broadcasting services) in the State or the publication of any newspaper, magazine or journal in the State.'²⁰ In broadcasting contracts, however, the BCI adopted a more elaborate definition of 'communications media' which is termed 'media operator.' The *Consultation Document* listed the principal services, many of these are to be reviewed in this section (see below). The BCI proposes to develop a revised definition of communication media which will be applied in assessing media concentration issues.

3.2.5. *Question asked*

The BCI invited views on a number of aspects of 'communications media'. More specifically, it asked 'Which of the following should be excluded from the definition of "communications media"?'

- (a) a broadcaster who supplies a compilation of programme material which is broadcast in the State;
- (b) a programme production company which produces programmes which are broadcast in the State;
- (c) an advertisement production company which produces advertisements which are broadcast in the State;
- (d) the publisher of a newspaper which is displayed for sale in the State;
- (e) the publisher of a magazine which is displayed for sale in the State;
- (f) an advertising agency which produces advertisements that are broadcast in the State or which acts as a media buyer in respect of the broadcast of advertisements in the State;
- (g) a public relations company which carries on business in the State;
- (h) a music publisher which publishes music which is displayed for sale or broadcast in the State;
- (i) a distributor of recorded music which distributes recorded music in the State;
- (j) a provider of a broadcasting service platform for the transmission of programme material in the State;
- (k) a person who has a substantial interest in a person listed in (a) to (j) above.

Please provide a rationale for your response.

3.2.6. *Feedback*

A wide and varied range of views were expressed on the list provided. Fox Radio Ltd. supported this definition and believed it should be retained. It added that

In order for clarity, [Fox Radio Ltd. recommends] that the Commission issues some specific cross-media ownership regulation, based on a system of measuring share of voice across all media sectors and defined media communication

²⁰ A 'broadcasting service' is defined in the *Broadcasting Act, 2001* as 'a service which comprises a compilation of programme material of any description which is transmitted or relayed by means of wireless telegraphy, a cable or MMD system or a satellite device, directly or indirectly for reception by the general public, whether that material is actually received or not, but does not include such a service that is provided by means of the internet.'

services. [It] is of the view that this system would provide the best measurement of influence and plurality and would present the clearest and fairest way of determining a company's significance across markets.²¹

IAPI and the AAI were among those who supported retaining the full list while the UTV owned stations considered it to be 'broadly adequate.'²² It was recognised, however, that the list needs to be reviewed at appropriate junctures if it is to remain relevant to the rapidly changing media market. The UTV owned stations referred to the application of the list, stating its concern

that in BCI ownership policy to date, a narrower definition, which appears to isolate all communications media outside of BCI control is inappropriate. In deciding whether consolidation within independent radio is appropriate, the BCI must contextualise the situation in light of the broader definition above and acknowledge that even the independent radio sector in its entirety plays a minor role in the communications media as a whole.²³

The Labour Party also supported the current list albeit thinking that (a), (b) (d) and (e) were more critical in the definition when compared to others. Nevertheless, it saw the remaining criteria as important: 'A public relations company, advertising agency or distributor of recorded music are the possessors of content which if they then have access to a medium of communications could enable them to have an unfair advantage in the promotion of their content.'²⁴

Some respondents argued in favour of collapsing the list. TV3 suggested that the definition should be 'as narrow as possible so as to ensure that it does not stifle the creation of effective (if large) companies.' For it, television, radio and local newspaper ownership were the only criteria that should be included.²⁵ According to River Media, advertising agencies and public relations companies should be excluded. In addition, it argued that the relationship between print and broadcast media at both national and local level was a matter solely for the Competition Authority.²⁶ In its opinion, 'the BCI should confine itself to a definition of communications which includes entities that control broadcast platforms, produce broadcast content and radio television licensees.'²⁷ Communicorp Group Limited believed that (c), (f), (g), (h), (i) and (k) should be omitted from the list 'since none...has a significant role to play in the formation of public opinion or could in any sense be considered by their activities to undermine the system of democracy in Ireland.'²⁸

²¹ Fox Radio Ltd.: e1, 6.

²² IAPI/AAI: w3, 2; unique Media: w4, 2; Sunrise Radio: w5, 1; Phantom FM: e8, 4; Submission on behalf of the UTV owned stations: e2, 3.

²³ Submission on behalf the UTV owned stations: e2, 3-4.

²⁴ The Labour Party: e4, 2.

²⁵ TV3: w2, 5.

²⁶ River Media: e7, 2.

²⁷ River Media: e7, 2.

²⁸ Communicorp Group Limited: w6, 10-11 at 10.

McCann FitzGerald also argued for adopting a narrower approach. It contended that ‘by extending the definition to such a wide array of activities (and thus increasing the likelihood of non-compliance dramatically), the Ownership and Control Policy may undermine its intended purpose in this regard.’²⁹ A far less restrictive approach could enhance the BCI objective of sustaining plurality and diversity in the marketplace. For McCann FitzGerald, ‘the definition of communication media should be limited to major media of mass communication, such as newspapers, television and radio, where viewpoint diversity and plurality are particularly important.’³⁰

The Commission for Communications Regulation, ComReg, paid particular attention to ‘(j) a provider of a broadcasting service platform for the transmission of programme material in the State.’ It is ComReg’s opinion that this should be excluded from the BCI’s definition of communications media. In explaining its position, it referred to possible duplication with other authorities and legislation: ‘ComReg’s concern is that adding broadcasting transmission platforms could create confusion...any merger involving broadcasting platforms is already covered in Section 23 of the Competition Act, 2002 which includes “a business of providing a broadcasting service or a business of providing a broadcasting services platform” in its definition of a media business.’³¹ ComReg continued on to substantiate the notion of duplication:

The new EU Regulatory Framework for Electronic Communication introduced in 2003 also covers electronic communications networks and services used for broadcasting. Entities providing or planning to provide such networks or services are already obliged to notify ComReg and are subject to the conditions of general authorisation. Furthermore where entities in certain markets are identified as having significant market power (SMP) ComReg is obliged to impose one or more regulatory obligations on the SMP operator. Entities using spectrum for broadcasting transmission are also subject to ComReg licence conditions.³²

3.3. Assessing ‘character’

The statutory provisions do not define ‘character.’ The BCI, however, considers character with regard to services it licenses under the 1988 and 2001 Acts. More specifically, the *Ownership and Control Policy, 2001* does not differentiate between either the individual, family or the corporate status of the applicant. The policy does not differentiate between local, national or EU entities. Regarding non-EU entities, the 2001 policy does require it to have a registered office within the EU and the BCI has regard to the extent to which reciprocal arrangements for investment and licensing are in place with relevant foreign States. ‘Character’ is also considered when the BCI is assessing a licence application and applications for ownership and control changes.

²⁹ McCann FitzGerald: e6, 7.

³⁰ McCann FitzGerald: e6, 7-8 at 8.

³¹ ComReg: w1, 2.

³² ComReg: w1, 2.

The *Consultation Document* outlined issues that are taken into account in the assessment of character in relation to the 1988 and 2001 Acts.³³ Such separation was necessary as different statutory provisions apply to services licensed under each Act.

3.3.1. *Questions asked*

Respondents were asked one question in this regard. This was as follows:

Do you consider the current approach to assessing character to be satisfactory?

If not, what changes should be made to the range of factors considered in the context of

- (i) free-to-air services; and
- (ii) non free-to-air services.

Please provide a rationale for your response

3.3.2. *Feedback*

All but one of those responding to this question supported the current factors used to assess ‘character’ under the terms of both the 1988 Act and 2001 as they pertained to both free-to-air and non free-to-air services.³⁴ What follows is a sample of the views expressed.

For Fox Radio Ltd., criteria for assessment had worked well. ‘In particular’, it continued, ‘the adequacy of the expertise, the track record of the applicant, the depth of experience at management and board level, combined with the availability of necessary financial resources are vital issues to any successful application.’³⁵ Agreeing with the criteria outlined, TV3 contended ‘that apart from these factors the only other ones that should be important are the possession of the abilities to deliver in accordance with general content requirements (including those that may be specific to a particular geographic franchise) and regulation generally.’³⁶ In expressing support, the UTV owned stations stated that

Section 6(2)(b) [of the *Radio and Television Act, 1988*] deals with “the adequacy of the expertise and experience and financial resources” available to an applicant and [they] believe that this should be the cornerstone of the BCI’s assessment of character into the future. In fact, [they] would encourage the BCI to further develop the industry by actively encouraging those with relevant expertise, experience and available finance to either become involved or increase their

³³ For further information, see *Consultation Document*, 22-23.

³⁴ Fox Radio Ltd.: e1, 8; TV3: w2, 6; IAPI/AAI: w3, 2; Submission on behalf of the UTV owned stations: e2, 4; Unique Media: w4, 2; Sunrise Radio: w5, 1; Phantom FM: e8, 4; Communicorp Group Limited: w6, 12.

³⁵ Fox Radio Ltd.: e1, 8.

³⁶ TV3: w2, 6.

involvement for the betterment of listener, staff and the industry as a whole.³⁷

Similar sentiments were expressed by Communicorp Group Limited. It emphasised ‘the importance in awarding a licence of ensuring that the technical and professional experience of operating in Ireland is available and ensuring financial resources and commitment to the financing of the radio station are sufficient to ensure its continued operation during the first four years, during which period it is frequent that losses are sustained.’³⁸ For this group, it is not in the interest of the licence applicant or the audience of a new service if the service would discontinue due to financial insolvency.

Mid West Radio found the current approach unsatisfactory. For this respondent, the existing operator is placed at a disadvantage compared to new applicants, subjected to more rigorous character and financial assessment than those seeking to enter the market. Track record of the existing operator, where applicable, should carry greatest weight over character and economic/financial viability of newer applicants. It is Mid West Radio’s opinion that

Section 6(4) should be amended to obligate the BCI when reviewing the track record of an incumbent to provide a weighting to this assessment in that an incumbent with a good track record would be in a stronger position to retain its licence against ‘untested’ new applicants who have no record but only aspiration and as a corollary it would also provide the BCI with a mechanism to give a negative weighting to a licence holder how [sic] had a poor track record. This would incentivize all existing operators to work to maintain the highest standards in programming, finance and management, which appear to be the three criteria under which these assessments are made.³⁹

3.4. Assessing ‘ethos’ – management and programming

‘Ethos’ was central to the debate in 2001 on the local services licensed under the 1988 Act. Essentially, the BCI’s decision decided to relax its requirements in relation to local ownership was accompanied by a decision to increase its focus on the importance of ‘ethos’ from both a management and programming perspective in relation to these services.

After the introduction of the *Ownership and Control Policy, 2001*, the concept of ethos has broadened in the context of services which are not primarily defined by the area served; for example, niche music services. With regard to services licensed under the *Broadcasting Act, 2001*, ‘ethos’ has been considered only in relation to programming. Consequently, the *Consultation Document* outlined ‘ethos’ as it

³⁷ Submission on behalf of the UTV owned stations: e2, 4.

³⁸ Communicorp Group Limited: w6, 12.

³⁹ Mid Wes Radio: e3, 3.

pertained to management and to programming and sought views vis-à-vis to where such factors might apply.⁴⁰

3.4.1. *Questions asked*

The BCI invited views on three principal questions. These were as follows:

- In relation to free-to-air services, should the BCI continue to consider ethos from both a management and programming perspective?
- In relation to non free-to-air services, should the BCI continue to consider ethos from a programming perspective only?
- What changes, if any, should be made to the criteria set out above in determining if an applicant satisfies the ethos requirement from:
 - (i) a management perspective; and
 - (ii) a programming perspective?

Please provide a rationale for your responses.

3.4.2. *Feedback*

Views expressed can be grouped under questions asked. These are as follows:

In relation to free-to-air services, should the Commission continue to consider ethos from both a management and programming perspective?

With reference to free-to-air services, two respondents supported a consideration of ethos from both a management and programming perspective. The Labour Party believed ‘these two provisions [are] essential for maintaining management structures and programming arrangements that are most effective and responsive to the communities they serve.’⁴¹ Believing that all free-to-air providers receive public monies, it argued that services provided should be reflective of the nation.⁴²

Phantom FM also supported these dual provisions, believing that the BCI should continue to consider ethos from both a management and programming perspective. For this group, ‘Ethos is particularly relevant and important in the setting up of a specialist output service and this aspect should be defined in contractual terms in order to ensure that the originally intended service is maintained through any future changes in control or ownership.

The remaining respondents believed that experience and expertise to provide a locally styled service, to meet the needs and tastes of listeners in a given franchise area, took precedence over a requirement that the service be locally owned.⁴³ Furthermore, it was stated that ‘The acquisition of radio services by radio groups from outside the local area has clearly shown that a change of ownership has not had any adverse effect on local ethos.’⁴⁴ Commitments in Programme Policy Statements, it was

⁴⁰ For further information, see *Consultation Document*, 25-27.

⁴¹ The Labour Party: e4, 2.

⁴² While being free-to-air, TV3 does not, however, receive public monies.

⁴³ See, for example, Fox Radio Ltd.: e1, 9; Mid West Radio: e3, 4; UTV: e2, 4; IAPI and AAI: w3, 3.

⁴⁴ Fox Radio Ltd.: e1, 9.

argued, ensure that local ethos requirements are satisfied: ‘What is important is the ability of the management team to deliver on its programming policy statement and on its financial business plan.’⁴⁵

Agreeing with measures used to date, the UTV owned stations also emphasised meeting local needs over a requirement that management be local. Here it stated that ‘It is clear from independent research that commercial objectives are met by commitment to local programming and while audiences may fragment because of the greater number of choices of services, we believe that the local programming ethos of radio will continue to be central to its corporate success.’⁴⁶

In relation to non-free-to-air services, should the Commission continue to consider ethos from a programming perspective only?

Few respondents dealt with this section. Phantom FM believed that ethos should be considered from a management and programming standard for ‘all licensed stations.’⁴⁷ The Labour Party concurred with this view.⁴⁸ Unique Media argued that there are more restraints on non-free-to-air services and consequently, these should be assessed on a lighter basis than free-to-air services.⁴⁹

What changes, if any, should be made to the criteria in determining if an applicant satisfies the ethos requirement from: (i) a management perspective; and (ii) a programming perspective?

Some supported a continuation of assessing ethos from both management and programming perspectives.⁵⁰ Two respondents suggested changes. Fox Radio Ltd. recommended that the BCI use the criteria ‘with regard to their forthcoming determination of future Quasi-National, Regional, Multi-City and Niche Radio Services. [It contended] that these services which transcend local boundaries should be determined by programming ethos alone, subject to the applicant’s experience and expertise to operate such a service.’⁵¹ The Labour Party also argued for change. Here it said that the ‘incorporation of the criteria which are mentioned as being examined in many European states such as financial capabilities, professional experience, organisational structure and compliance record would make the assessment of the management ethos of the company a more comprehensive exercise.’⁵²

General responses

For the UTV owned stations, ‘local is essentially a programming matter and as such should be directly regulated from a programming perspective.’⁵³ They believed that a relaxation of ownership rules would enable involvement of experienced media professionals, thus expediting the development of a station’s local output. In addition, they argued that greater emphasis should be placed on achieving a strong local ethos and not on management perspective. On this point, they stated that

⁴⁵ Mid West Radio: e3, 4.

⁴⁶ Submission on behalf of the UTV owned stations: e2, 4.

⁴⁷ Phantom FM: e8, 4.

⁴⁸ The Labour Party: e4, 2.

⁴⁹ Unique Media: w4, 2.

⁵⁰ See, for example, Sunrise Radio: w5, 1; Unique Media: w4, 2; River Media: e7, 2; Communicorp Group Limited: w6, 13.

⁵¹ Fox Radio Ltd.: e1, 10.

⁵² The Labour Party: e4, 2.

⁵³ Submission on behalf of the UTV owned stations: e2, 5.

A greater pre-requisite is that management have the necessary relevant experience to create a radio service that truly reflects the area it services. The core strength of any local service is its ability to reflect its local area, its people and traditions, all of which can easily be dealt with through the approval and regulate monitoring of each station's programming policy statement and programme schedule. In conclusion, ethos should be considered from a programming perspective only, with management being approved based on professional experience and track record, if at all.⁵⁴

TV3 concurred with this view, believing that ethos should be examined from a programming perspective only. It added that

The BCI must realize that all licensees will have to compete and survive in an increasingly competitive and non-regulated media commercial environment as the new entrants increasingly take consumer's time and with it revenues. To revise regulation without a cold and sober review of the reality of the impact on the fullness of consumer choice is to do a disservice to the radio and television industry in Ireland and is in the long run to the detriment of diversity.⁵⁵

Fox Radio Ltd. argued against the need for ethos to be considered from either a programming or management perspective in this instance. It did not believe that it was necessarily relevant to consider

local ethos with regard to management of non-free-to-air services in a fast moving technological environment, as long as the board and management possess the essential skills to operate such a service. Therefore, [Fox Radio Ltd. is] of the view that the Commission should continue to consider ethos solely from a programming perspective.⁵⁶

3.5. Assessing an 'undue number'⁵⁷

The *Radio and Television Act, 1988* states that the BCI must have regard for 'the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Act.'⁵⁸ Under its current policy, the BCI has applied this provision by translating the total number of commercial licences held by an applicant into a percentage of the total number of commercial sound broadcasting licensed in the State. The BCI has not differentiated

⁵⁴ Submission on behalf of the UTV owned stations: e2, 5.

⁵⁵ Tv3: w2, 6.

⁵⁶ Fox Radio Ltd.: e1, 9.

⁵⁷ This applies to broadcasting services licensed under the *Radio and Television Act, 1988* exclusively.

⁵⁸ Section 6.2.(g).

between whether an applicant has ‘control’ or ‘substantial interests’ when making its determination with regard to the number of licences held by it.⁵⁹

3.5.1. Questions asked

The BCI invited views on one issue. These were as follows:

Do you consider the current approach to determining an ‘undue number’ continues to be relevant?

- If yes, what factors should the BCI apply in giving more careful consideration to companies seeking to move above the 15% threshold?
- If no, what alternative approach would you suggest?

Please provide a rationale for your responses.

3.5.2. Feedback

While three respondents argued in favour of retaining the current approach, the majority of respondents suggested changes^{60 61} As one of the respondents supporting the current situation, Unique Media, however, made suggestions vis-à-vis factors which it believes the BCI should take into account when seeking to move above the current percentage:

- likelihood of the company having total control of each radio station;
- consolidation of the various departments of the radio stations leading to a decrease in localism and employment;
- the company using its influence on the ethos of each radio station to reflect its views on air.⁶²

For TV3, the approach needs to be simplified to allow broadcasters to be of a size whereby they can compete effectively.⁶³ McCann FitzGerald argued that, whatever approach the BCI adopted in this regard, it should be clear enough to provide reasonable certainty and predictability to parties to allow transactions to be planned and to ease application processing.⁶⁴ Communicorp Group Limited also believed there was a need for review. In its view, inconsistencies exist when the *Radio and Television Act, 1988* and the *Competition Act, 2002* are compared. This group contended that controlling the number of sound broadcasting licenses held by one entity is largely unnecessary as it argued that ‘issues of plurality and diversity only arise in the context of cross media ownership’.⁶⁵ In the absence of cross media ownership, Communicorp questioned whether there should be any upper limit of

⁵⁹ The current threshold limits are set to ensure that the total number of radio operators in the commercial radio market could not fall below four. In addition, the current policy does not set out guidelines, measurements or criteria for determining what is ‘more careful consideration’ for an applicant exceeding the 15% threshold.

⁶⁰ Unique Media: w4, 2; Sunrise Radio: w5, 1; Phantom FM: e8, 4.

⁶¹ See, for example, TV3: w2, 7; Mid West Radio: e3, 5;

⁶² Unique Media: w4, 2.

⁶³ TV3: w2, 7.

⁶⁴ McCann Fitzgerald: e6, 9.

⁶⁵ Communicorp Group Limited: w6, 15-16.

sound broadcasting commercial licences owned by a single group. ‘Indeed in terms of creating diversity concentration of ownership achieves economies of scale which allows for more broadcasting per pound of revenue and thus facilitates greater diversity of views.’⁶⁶

Fox Radio Ltd. argued that, given the recent consolidation in the radio market, the manner in which the BCI evaluates ‘undue number’ needs to be reviewed. For this respondent, the numerical formula for ownership does not take into account the identification of the relative “media power” of individual owners. It sees financial turnover as the most effective indicator of individual media owners’ media power. In addition, it stated that it could not understand why a national station such as Today FM is measured as being equal to the same share of one of the smaller franchises, for example, Clare FM.⁶⁷ This point was echoed by, for example, Communicorp Group Limited and the UTV owned stations.⁶⁸ Fox Radio Ltd. suggested approach was outlined as follows:

A measurement of market power should be considered by the Commission as the basis on which “undue number” of services may be defined. [It considers] that this form of measurement is the fairest and most balanced approach across the board. Market power should be a proportion of total advertising revenue turnover derived from all the commercial radio services in the State. In this manner, each station would not carry the same weighting and subsequently, a suggested percentage of turnover would represent a more balanced determination of an “undue number”. Alternatively...audience share could be used as a measurement.⁶⁹

The UTV owned stations voiced concern regarding the current approach. Referring to the BCI objective to ensure that the total number of operators in commercial radio market could not fall below four, it argued that the definition of communications media from the *Ownership and Control Policy, 2001* was being ignored. With the BCI and the Competition Authority regulating the sector, they believed that one entity will not be able to rise to such a level that it can exert undue influence on media content.⁷⁰ Noting the rapid change that has taken, and is taking, place in the sector, they continued, ‘dictates that the future BCI policy on radio ownership and control should not just be looked at in the context of the independent radio sector only.’⁷¹ Of possible approaches, the UTV owned stations contended that applying different weightings to differently sized entities

would improve the current easily managed system. A market share system has two inherent problems, i.e. market shares consistently change and secondly, a station that improves its market share could actually be penalised as a result from an

⁶⁶ Communicorp Group Limited: w6, 16.

⁶⁷ Fox Radio Ltd.: e1, 11.

⁶⁸ Communicorp Group Limited: w6, 15; Submission on behalf of the UTV owned stations: e2, 6-7.

⁶⁹ Fox Radio Ltd.: e1, 11.

⁷⁰ Submission on behalf of the UTV owned stations: e2, 5-6.

⁷¹ Submission on behalf of the UTV owned stations: e2, 6.

ownership perspective. A system based on each franchise area does improve the weighting given to each station, but ignores the relative competitiveness of each marketplace and is therefore flawed.⁷²

For them, all the suggested systems ignore the situation whereby through consolidation, there could be significant media concentration within a particular area. Furthermore,

In such circumstances it is understandable that regulation should ensure that undue influence is not brought to bear on a local market place. [They] would however also contend that lighter regulation should be brought to bear where a media grouping operates completely in separate markets. In such situations, a media group is in no position to have an undue influence on either a local market or in fact the national market as a whole.⁷³

The UTV owned stations see radio groupings in a positive fashion, as entities able to bring greater expertise, professionalism and improved resources to bear on local services. ‘While there appears to be a fear of radio groupings emerging, evidence from more mature markets would indicate that if the Regulator manages the emergence of such groupings in a pro-active manner, the industry as a whole and in particular, the Irish listener can only but benefit.’⁷⁴

River Media argued that it would be detrimental to the development of quality radio services in Ireland if a large proportion of Irish licensees were to become outposts of overseas companies. More specifically, it stated that

The only means of avoiding such an eventuality is to ensure that the policies pursued by the BCI foster the creation of Irish owned and controlled groups with sufficient scale to compete with companies such as UTV and EMAP. If the threshold set by the BCI for “undue number” is too low, then even Irish owned groups will have difficulty in attracting investment capital. If it is too high, then you risk market domination by three or four overseas companies.⁷⁵

Based on the information it supplied, River Media argued for a modest rise in the threshold of twenty five percent and some relaxation of the policy in relation to substantial interest. ‘To balance this we believe the BCI should lay more emphasis on ethos issues in relation upon by the fact [sic] that a shareholder lives in the franchise area or 50 miles away, [River Media believed] it almost certainly is if the shareholder lives in another country.’⁷⁶

⁷² Submission on behalf of the UTV owned stations: e2, 6-7.

⁷³ Submission on behalf of the UTV owned stations: e2, 7.

⁷⁴ Submission on behalf of the UTV owned stations: e2, 7.

⁷⁵ River Media: e7, 2.

⁷⁶ River Media: e7, 2.

For Fox Radio Ltd., the maximum level that any one group should hold should not exceed twenty five per cent of total industry revenue/audience share. It argued that its approach was more balanced and could ensure that the total number of radio operators in the commercial market would not fall below four.⁷⁷

Mid West Radio expressed similar views. Believing that the present approach was too narrow and restrictive, taking no account of the size or location of that broadcaster, it argued in favour of retaining an upper limit ‘and 25% appears reasonable.’⁷⁸

IAPI and the AAI would support a percentage of twenty to twenty five as this would ‘ensure that there are always at least four media players in the marketplace, thereby maintaining competition and diversity.’⁷⁹ Supporting the BCI view that differentiation should not be made between ‘control’ and ‘substantial interest’ when assessing someone’s involvement, it stated that ‘the issue of “undue number” should relate more to the audience share impacted on, be that local, regional or national, rather than to the number of individual licences involved.’⁸⁰

For The Labour Party, the current method does not provide an accurate gauge of how dominant a player any media operator really is in the market. For this respondent,

The initial assessment must take into account franchise size, size of audience and type of service as the BCI document itself notes. A weighting of the type of other services that a company has rather than just a numerical count of licenses would provide a more accurate interpretation of what constitutes an “undue amount” of sound broadcasting contracts.⁸¹

It continued on to argue that the current percentage of twenty five was too high. ‘If a company has captured this percentage of the licences market it will hold significant market share and have the potential to deter new entrants.’⁸²

3.6. Defining an ‘undue amount’ of communications media

The *Radio and Television Act, 1988* requires the BCI to regard ‘the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of communications media in a specified area.’⁸³ Furthermore, the *Broadcasting Act, 2001* requires the BCI, when deciding whether to enter into a local content contract, to have regard to ‘the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of communications media in the locality served by the cable or MMD system proposed to transmit that material.’^{84 85}

⁷⁷ Fox Radio Ltd.: e1, 11.

⁷⁸ Mid West Radio: e3, 5.

⁷⁹ IAPI and AAI: w3, 3.

⁸⁰ IAPI and AAI: w3, 3.

⁸¹ The Labour Party: e4, 3.

⁸² The Labour Party: e4, 3.

⁸³ Section 6.2.(h).

⁸⁴ Section 38.6.

3.6.1. Questions asked

The BCI invited views on three questions. These were provided as follows:

1. The suitability of the definition of ‘undue amount’ as ‘more than a reasonable share of’?
2. Does the audience share model remain useful and appropriate to measure the various forms of media concentration? If not, what other model/s should be used?
3. Are the factors which the BCI take into account in considering an undue amount appropriate?

Please provide a rationale for your response.

3.6.2. Feedback

Information received is grouped by question. This is as follows.

The suitability of the definition of ‘undue amount’ or ‘more than a reasonable share of’?

Some respondents supported the current position.⁸⁶ Acknowledging that certain communications media have a greater impact on the formation of public opinion when compared to others, Communicorp Group Limited recommended that the BCI weight ‘the relevant media type according to its importance. Having weighted the relevant media, BCI should then consider the audience reach of the relevant media and make its assessment based on the combination of the audience reach and relevant weighting.’⁸⁷ This group argued, however, that in light of the *Ox report*, a need was identified vis-à-vis the interpretation of ‘undue amount’ in the context of cross media ownership. ‘This’, it continued, ‘would create greater transparency and openness.’⁸⁸

Agreeing with the *Ox report’s* view that the definition of an ‘undue amount’ should be more specific, Phantom FM argued that unspecified criteria could ultimately lead to legal challenges of decisions made. It concurred with BCI opinion that this aspect would undoubtedly become more complicated as further consolidation and service provision mergers occur within general telecommunications and broadcast industries.⁸⁹

Fox Radio Ltd. believed that the definition of ‘undue amount’ should be interpreted as more than a reasonable share of the range of communications media available to audiences in a specialised area. For it, ‘this approach represents a clear and fair way of ensuring that there is adequate plurality of ownership to safeguard a range of news and expression of opinion.’⁹⁰ According to this respondent,

⁸⁵ The BCI’s *Television Licensing Policy, 2004* extends this provision to all content contractors under the *Broadcasting Act, 2001*.

⁸⁶ See, for example, Unique Media: w4, 3; Communicorp Group Limited: w6, 17; Sunrise Radio: w5, 1.

⁸⁷ Communicorp Group Limited: w6, 17.

⁸⁸ Communicorp Group Limited: w6, 17.

⁸⁹ Phantom FM: e8, 5.

⁹⁰ Fox Radio Ltd.: e1, 12.

...there is ample evidence to suggest that a company with a number of services within a market will ensure diversity. In the [United Kingdom], there are many examples, which suggest that common owners of services deliver wider diversity than if the services were under single ownership. This often ensures that new owners do not move towards the middle ground of general taste. In such cases, it is in the commercial interest for the company to provide a wide variety of services that complement each other, rather than cannibalised audience through competition for the same type of listener.⁹¹

Mid West Radio felt that ‘more than a reasonable share’ was too broad and that this could give rise to conflicting views. Here it stated that the phrase allowed for different interpretations to be placed on it in different circumstances thereby leading to possible conflict with affected parties. It does however provide flexibility but where this is a preferred course for “undue amount” is questionable.⁹² Arguing that the BCI should be more definitive about what is ‘more than a reasonable share’, Mid West Radio concluded by saying ‘The audience share model is adopted in other countries and we see no reason to change.’⁹³

Does the audience share model remain useful and appropriate to measure the various forms of media concentration? If no, what other model/s should be used?

Only two groups replied to this question. Fox Radio Ltd. believed that the current audience share model is the most appropriate measurement to gauge media concentration.⁹⁴ Phantom FM agreed with this method, believing it to be the most suitable means of determining the penetration of a specific service in a given franchise area. It added, however, that such models may have to be adapted in the future ‘to take account of organisations with interests in developing technical areas such as internet provision services and satellite subscription radio.’⁹⁵

Are the factors which the BCI takes into account in considering an undue amount appropriate?

Only two respondents answered this question. Fox Radio Ltd. agreed with the application of current criteria but argued that the BCI should also consider some specific cross-media guidelines. Proposals made were as follows:

- no national television service should own more than 20 per cent of a national or local radio station;
- no national newspaper should own more than 20 per cent of a national television or radio services;
- no local newspaper should own more than 20 per cent of a local radio or television service in a franchise with less than two licenses;
- no media company can own more than 50 per cent of the services in any specific franchise area comprising less than three radio stations;

⁹¹ Fox Radio Ltd.: e1, 12.

⁹² Mid West Radio: e3, 6.

⁹³ Mid West Radio: e3, 6.

⁹⁴ Fox Radio Ltd.: e1, 12.

⁹⁵ Phantom FM: e8, 5.

- there must be at least three logical/regional commercial media groups in operation within franchise areas with more than 7 radio stations.⁹⁶

Such factors could be added to the BCI's current criteria, creating a more definitive framework. More specifically, it argued that these changes could 'provide a stable and transparent environment across separate media sectors, while ensuring continued plurality of ownership within each regulated sector, in particular television, radio and newspapers.'⁹⁷

Accepting factors currently used, Phantom FM highlighted the need for regular review and adaptation as appropriate. This, it argued, was necessary 'to take account of technical advances in broadcasting and general media provision (internet supply platforms such as broadband and WIFI, satellite subscription services).'⁹⁸

* * * * *

General responses

The majority of respondents gave one answer exclusively to the questions asked. What follows is a sample of opinions expressed and points proffered.

TV3 believed that questions asked in this section were 'symptomatic of the fact that this is currently too complex.' Consequently, it argued that only principles of competition law should apply.⁹⁹ River Media echoed this view, saying that 'this highly complex area would be better regulated within a competition framework.'¹⁰⁰

IAPI and the AAI expressed general agreement with the approach followed and the criteria currently applied. They supported the audience share model 'and advocate, as the Ox report suggests, that it relate to the overall total potential audience, be that viewers, listeners or readers. This, when relevant, should be looked at on a local, regional or national basis, for each media owner.'¹⁰¹

Kenneth Murphy voiced concern vis-à-vis the audience share model, believing it difficult to assess how it may reflect fully the impact of cross media concentration. According to Murphy, different media have different contexts of operation in relation to regulatory background and accepted criteria of balance and impartiality. More particularly, he stated that

There are dangers associated with allowing a convergence between these cultures in relation to the broadcasting environment. The suggestion is therefore that there should be clear separation between newspaper and broadcast ownership based on set limits. It should then be the responsibility of commercial media interests to demonstrate how editorial independence will not be compromised and how efficiencies

⁹⁶ Fox Radio Ltd.: e1, 12-13 at 13.

⁹⁷ Fox Radio Ltd.: e1, 13.

⁹⁸ Phantom FM: e8, 5.

⁹⁹ TV3: w2, 7.

¹⁰⁰ River Media: e7, 3.

¹⁰¹ IAPI and AAI: w3, 3.

of operation beneficial to the public interest will arise out of expansion in cross media ownership.¹⁰²

McCann FitzGerald believed that whatever cross interest policy the BCI adopts 'should be clear enough to provide reasonable certainty and predictability to parties to allow transactions to be planned and to ease applications processing.'¹⁰³ It suggested that the BCI be more succinct in its definition of the term 'specified area' when assessing whether an 'undue amount' of communication media in such as can arise. It added that

...if the BCI does adopt a clear rule in this regard, [McCann FitzGerald] would suggest that the BCI also be willing to grant waivers to that rule as justified on a case-by-case basis. A key purpose of cross-ownership restrictions in any specified areas would appear to...be to protect viewpoint diversity at the local level that might otherwise be lost to consolidation. At the same time, any ban on cross-ownership in local areas could well prevent efficient combinations that would allow for the production of high quality local news...it is by no means certain that commonly-owned newspapers and broadcast stations necessarily speak with a single voice.¹⁰⁴

The UTV owned stations contended that a more flexible ownership policy could be pursued by the BCI without reducing the quality of broadcasting. Indeed, they continued, this would fit more closely with the needs of a rapidly developing and thus, changing broadcast environment. If the BCI continues to use the audience share model to regulate the industry into the future,

it should be clearly understood that the Irish communication industry includes not only the stations under the aegis of the BCI, but also numerous television, radio, press, magazine and new media options, etc. The Ox Report also rightfully recommends that the number of information sources in a specific area should be taken into account when considering an undue amount. Even if future regulation is to be looked at on the narrower basis of the radio broadcast industry only, the dominance of RTE, with its market share of almost 50% within this, must be factored in.¹⁰⁵

For these stations, the BCI's guiding principles can be respected and the quality of programming service maintained when no one group dominates the national market place. They believed that BCI objectives 'could still be met under a more liberal ownership policy, but the increasing of ownership levels within independent radio to at least 33% should ensure that the objectives of both the BCI and the independent broadcast sector can be met on a more long-term basis.'¹⁰⁶ Stating that the regulation

¹⁰² Kenneth Murphy: e5, 1, 4-5 at 4-5.

¹⁰³ McCann FitzGerald: e6, 9.

¹⁰⁴ McCann FitzGerald: e6, 10.

¹⁰⁵ Submission on behalf of the UTV owned stations: e2, 8.

¹⁰⁶ Submission on behalf of the UTV owned stations: e2, 8.

of percentage shares in a range of companies to ensure pluralism and diversity, is a misconception, they believed local ethos to be safeguarded by programme policy statements of individual stations and the professionalism of staff employed therein.¹⁰⁷ Reference was also made to the United Kingdom where no cap is currently placed on the number of stations owned. This, they asserted, had not had ill-effects on the sector and such an approach would have no ill-effects if adopted in this country.¹⁰⁸

3.7. Assignment of contract – two year moratorium¹⁰⁹

The *Ownership and Control Policy, 2001* stated that proposed changes to the ownership structure being made in the first two years of the contract would be looked on unfavourably. This policy provision has its basis in Section 14(2) of the 1988 Act which empowers the BCI to prohibit an assignment or any material change in the ownership of a company, either by specifying a condition in the contract itself, or by making the assignment subject to the previous consent in writing of the BCI, in which case the BCI shall have regard to the ownership and control provisions set out in Section 6(2) of the 1988 Act. In essence, this provision was designed to prevent new licences being sold on within a very short time from the award of the contract, thereby undermining the integrity of the licensing process and being unfair to unsuccessful applicants.

3.7.1. Questions asked

Views were invited on two key points. These were:

1. Should the moratorium continue to apply to new licence holders in the future?
2. If yes, should any exceptions be made if the licence is awarded to the previous contractor? If so, what are the relevant criteria?

Please provide a rationale for your response.

3.7.2. Feedback

The majority of respondents dealing with this section favoured retention of the two year moratorium.¹¹⁰ In general, it was believed that the sale of a new licence in too short a time frame from the award

undermines the integrity of the licensing process and is unfair to unsuccessful applicants...an operator who delivers a service for only a short period of time before selling the licence, cannot be said to have fully discharged the obligations and programme philosophy outlined to the Commission in its licence submission, and it is not in the public interest for

¹⁰⁷ Submission on behalf of the UTV owned stations: e2, 7-8.

¹⁰⁸ Submission on behalf of the UTV owned stations: e2, 8.

¹⁰⁹ This pertains to free-to-air services exclusively.

¹¹⁰ See, for example, Fox Radio Ltd.: e1, 14; Phantom FM: e8, 5; Mid West Radio: e3, 6; IAPI/AAI: w3, 1; Submission on behalf of UTV owned stations: e2, 9; Unique Media: w4, 3; Sunrise Radio: w5, 2; River Media: e7, 3; Communicorp Group Limited: w6, 18.

private individuals or companies to make personal profit from the exploitation of the public spectrum in this way.¹¹¹

While many supported the moratorium, different camps were discernible. Supporting the moratorium in principle, there were those who believed that a flexible approach should be applied. Exceptions suggested were as follows. Firstly, where a successful applicant has held the original licence for a number of years, the two year moratorium might not be deemed applicable.¹¹² And secondly, ‘some flexibility should be introduced to deal with unforeseeable circumstances and the moratorium should not be absolute.’¹¹³

The period of two years was considered too short by one respondent. Mid West Radio believed that a period of five years should be set with the word ‘unfavourably’ deleted and the period be made mandatory. It explained its position by saying: ‘A 5 year moratorium will ensure that this commitment is in fact followed through – 2 years for new entrants does not provide sufficient time for a new station to prove that it is committed to providing quality radio and not just in it for a “quick buck”.’¹¹⁴

There were also those who did not favour the two year moratorium. TV3 argued that it should not continue to apply. More specifically, it stated that

The issue has only arisen as broadcasters have responded to the environment of the effect of an unregulated state broadcaster and increasing consumer choices outside the jurisdiction of the BCI. Broadcasters must have strong ownership to be able to react to market forces and changes, and if a stronger broadcaster in the service of the public can be achieved by consolidation or change of ownership, then it must be encouraged.¹¹⁵

McCann FitzGerald argued against the rigorous application of this rule, ‘without regard to the actual circumstances of the particular contractor, [as this] could damage the competitive process in a manner disproportionate to the diversity concerns.’¹¹⁶ It continued on to say that ‘such enforcement could stifle capital flows in the industry – for instance, by preventing investment in “start-up” stations with a small market share.’¹¹⁷ Assessment on a case-by-case basis might ensure against such an outcome, it was suggested.

3.8. Competition Act, 2002

An addendum to the *Ownership and Control Policy, 2001* was introduced by the BCI in 2004. It takes account of the statutory provisions contained in the *Competition Act*,

¹¹¹ Fox Radio Ltd.: e1, 14.

¹¹² See, for example, Fox Radio Ltd.: e1, 14; Unique Media: w4, 3; River Media: e7, 3; Phantom: e8, 5; Communicorp Group Limited: w6, 18.

¹¹³ Communicorp group Limited: w6, 18.

¹¹⁴ Mid West Radio: e3, 6-7 at 7.

¹¹⁵ TV3: w2, 7.

¹¹⁶ McCann FitzGerald: e6, 10.

¹¹⁷ McCann FitzGerald: e6, 10.

2002 in relation to media mergers. It provides that, in assessing applications for changes in ownership and control of an applicant, the BCI will have regard for the role and powers of the Competition Authority and the Minister for Enterprise, Trade and Employment, pursuant to the provisions of the *Competition Act, 2002*. All applicants for the change are required to adhere to the provisions of the 2002 Act in addition to the requirements contained in the *BCI Ownership and Control Policy, 2001*.

3.8.1. Questions asked

Questions were asked vis-à-vis the addendum. More specifically, the BCI asked:

- Do you consider the procedures set down in the addendum to be satisfactory?
- If not, what alternative procedures would you propose?

Please provide a rationale for your response.

3.8.2. Feedback

Some support was expressed for the addendum.¹¹⁸ Phantom FM, for example, believed that the BCI should not operate in isolation from other statutory bodies with direct or indirect responsibilities for aspects of broadcast or associated business regulation. ‘Indeed’, it continued, ‘we would suggest that a greater level of communication and co-operation between the BCI and ComReg in particular would be desirable in the interests of co-ordinating the development of the Irish broadcasting industry.’¹¹⁹ The UTV owned stations expressed their opinion thus:

Any concerns which the BCI may have about consolidation endangering programme diversity, is misplaced. We believe that the BCI does not need to enter into an economic analysis of the market to determine what affects certain acquisitions might have on that market. We would suggest that cross ownership may fall more naturally within the area of competence of the Competition Authority. We therefore welcome the BCI’s recognition of the inter-face between them and the Competition Authority as they approach the new challenges of regulating converging media.¹²⁰

While accepting the addendum in principle, many reservations were voiced. These centred around the duplication of powers between the different bodies. Uncertainty surrounds how concurrent powers might be executed. Fox Radio Ltd. was unsure that, given all the other authorities involved in the process, ‘a system of defined and transparent guidelines on ownership and control needs a second level of ratification.’¹²¹ According to The Labour Party,

¹¹⁸ See, for example, Fox Radio Ltd.: e1, 15; Unique Media: w4, 3; Sunrise Radio: w5, 2; River Media: e7, 3; Phantom FM: e8, 6.

¹¹⁹ Phantom FM: e8, 6.

¹²⁰ Submission on behalf of the UTV owned stations: e2, 9.

¹²¹ Fox Radio Ltd.: e1, 15.

The procedures set down in the addendum to the Competition Act 2002 are not fully satisfactory. The fact that the BCI must have “regard to the role and powers of the Competition Authority and the Minister for Enterprise, Trade and Employment” does not sufficiently establish a framework for dealing with anti-competitive behaviour and prospective media mergers.¹²²

According to The Labour Party, this relationship must be addressed and a formal agreement established between the two main bodies. It continued on to say that ‘If the prospect of the BCI having concurrent powers with the Competition Authority is not likely, then there should be a strengthening of the institutional relationship between the two organisations to ensure that any prospective merger does not lead to any company enjoying a monopoly in the broadcasting sector.’¹²³

McCann FitzGerald also referred to this relationship and the need for review. Here it stated that

Given the evident similarity between the relevant criteria that the Minister must have regard to in assessing media mergers and the relevant principles in the Ownership and Control Policy, it is critical that the criteria be interpreted in a consistent fashion...Towards this end, we would suggest that much closer cooperation between the Minister and the BCI is required.¹²⁴

Greater cooperation, it continued, could aim to produce a common understanding of the ‘relevant criteria’ set out in Section 23.10 of the *Competition Act, 2002*. For it, ‘the clear objective of the “relevant criteria” is to allow the Minister to assess notified media mergers on diversity and plurality grounds similar to those consider [sic] in the Ownership and Control Policy.’¹²⁵ It believed that criteria outlined in the *Competition Act* was more consistent with the proper objectives of regulating the radio sector. In addition, it contended that the existence of a body of precedent decisions would greatly assist business and their advisers in planning and deciding on prospective media mergers.¹²⁶ Furthermore, it stated that

As a practical matter, the BCI and the Competition Authority could harmonise, to the extent possible, their procedures and timeframes in vetting common notifications. In particular, recognising that there may be some differences in the information required by both agencies, a joint prescribed notification form in relation to the common assessment criteria could be adopted. It would also improve clarity and consistency if agencies were to use similar definitions for key

¹²² The Labour Party: e4, 3.

¹²³ The Labour Party: e4, 3.

¹²⁴ McCann FitzGerald: e6, 12.

¹²⁵ McCann FitzGerald: e6, 12.

¹²⁶ McCann FitzGerald: e6, 3.

threshold terms (such as, for instance, the definition of “control”).¹²⁷

A common notification form in relation to the common assessment criteria, McCann FitzGerald was suggested, could be used to notify both bodies when vetting media mergers. A request was also made that the BCI adopt and publish formal procedures for the consideration of notifications.¹²⁸

For TV3, the addendum is unnecessary. It believes that competition principles and competition regulation are the only ones which should apply.¹²⁹ Communicorp Group Limited also questioned the addendum: ‘The effect of the addendum is to suggest that the BCI, contrary to their statutory remit, will apply the criteria set out in Section 23 of the Competition Act, 2002 when assessing application for changes in ownership and control.’¹³⁰ Developing this point, it stated that, while it welcomed the intent expressed in the addendum, ‘it however exposes the BCI and applicants to a challenge that the BCI took into consideration as matters beyond their statutory remit. The only appropriate way to remedy the duplication and inconsistency between the two statutory remits is by a statutory amendment.’¹³¹ It believes that the criteria for assessing the competitiveness of the indigenous broadcasting sector is an important criterion, ‘one which should properly be incorporated within the statutory remit of the BCI.’¹³²

3.9. Concluding remarks

This chapter traced through the key provisions of the BCI’s *Ownership and Control Policy, 2001* regarding criteria for assessment. Seven provisions were considered in this regard. Throughout, it was seen that while agreement might emerge on general points, material submitted to substantiate comments made differed greatly thereafter. In short, little common ground was discovered.

¹²⁷ McCann FitzGerald: e6, 3.

¹²⁸ McCann FitzGerald: e6, 12.

¹²⁹ TV3: w2, 8.

¹³⁰ Communicorp Group Limited: w6, 18.

¹³¹ Communicorp Group Limited: w6, 18.

¹³² Communicorp Group Limited: w6, 18-19.

Concluding remarks

Throughout submissions reviewed, no distinct camps of opinion were discernible. While agreement might centre on general tenets, individual comments made thereafter distinguished greatly one respondent's views from another. What follows is a brief overview of information reviewed in this document.

Chapter One considered the guiding principles applied to the work of the BCI. There was general acceptance for their continued application but specific comments revealed a perceived need for greater transparency and for key principles to be reviewed at regular intervals. Suggestions were made that maximum flexibility be given in regard to the plurality of owners. Some respondents asked that principles espoused in the Government's White Paper, *Regulating Better*, be reflected and/or followed more closely. Greater and more formalised co-operation was sought between the principal regulators – the BCI, ComReg and the Competition Authority. It was also recommended that decisions made be more public and that a body of precedent be established.

The second chapter identified the four principal policy objectives which had been presented in the BCI's *Ownership and Control Policy, 2001*. Respondents were asked to consider their relevance vis-à-vis today's broadcasting sector. In general, support was expressed for these principles albeit comments being made regarding how diversity might be achieved through alternative means and how the BCI might foster future development of the broadcasting industry. It was suggested that the goals which plurality of ownership are primarily designed to achieve are more easily attained directly by programming regulation. Some respondents also argued that competition policy should play a more central role. Commitments made in Programme Policy Statements were accepted as paramount in this quest for diversity and the preservation of 'local' services.

Seven elements were reviewed in Chapter Three. Regarding definitions of statutory terms, few respondents accepted these in their entirety. A need was perceived for greater consistency to occur between definitions used in the *Competition Act, 2002* and those featuring in broadcasting legislation. Many believed that definitions must be reviewed at appropriate junctures and adapted accordingly. Were this to occur, attempts should be made to bring them into line with national and international equivalents. The need to review the percentage used in determining 'substantial

interests' was highlighted by some respondents. Comments made in this respect centred on two main points. Essentially, if 'substantial interests' were set at twenty percent or over, it was argued that minority shareholdings should not be used as a device to evade ownership restrictions. And secondly, it was stated that the whole area needed to be simplified so as not to impede investment.

No common opinion emerged regarding the definition of 'communications media'. Many suggested deletions and/or modifications. Suggestions made centred on narrowing the approach currently taken, including only those who directly shape public opinion or who have the potential to influence it. Suggestions were made that a context should be created whereby larger, stronger entities would be enabled to exist and thus, compete. Factor (j) emerged as potentially problematic as it might impinge on ComReg's remit.

All but one respondent supported factors presently used to assess character in both the *Radio and Television Act, 1988* and the *Broadcasting Act, 2001*. In general, the approach taken was seen as appropriate by which to carry out a valid assessment of 'character'. One respondent, however, disagreed, believing the method used placed existing operators at a disadvantage vis-à-vis new applications. It was therefore argued that track record should carry most weight over character and financial viability.

Consideration of 'ethos' from both programming and management perspectives followed. While many agreed that it should be assessed from a programming point of view, there was less support for the management ethos principle which was considered to be less relevant. In general, it was believed that 'local' ethos was ensured in Programme Policy Statements of those awarded licenses and consequently, there was no need for management to be local too. It was argued that emphasis should thus be shifted from 'local' and more importance ascribed to experience, expertise, ability to deliver and to support a station. For many, these factors also took precedence over requirements that a service be locally owned. To be successful, it was recognised that it is essential for a station to match programming to the tastes of an audience in a given area.

Comments were also made regarding the non free-to-air services. Here it was believed that local ethos should pertain particularly to programming. In relation to determining if an applicant satisfies the ethos requirement from a management and programming perspective, the criteria should be reviewed in the context of forthcoming determinations of quasi-national, regional, multi-city and niche radio services.

Many respondents believed that the manner in which 'undue number' is calculated should be reviewed. It was felt that companies need to be of a certain size to compete effectively and that larger entities should be seen as positive rather than as something to fear. The application of different weightings, it was suggested, could improve the current system. Financial turnover was seen by one respondent as the most effective indicator. Few referred to the percentage which might be applied but of those responding, the percentage preferred was set at between twenty and twenty five.

There was general support voiced for the definition of 'undue amount', the use of the audience share model and the factors to be taken into account. Additional comments

were made, however. Some respondents argued that the definition of ‘undue amount’ could benefit from being more specific. Succinct factors such as audience share, size and location of franchise area should be taken into account when making determinations. It was believed that larger entities were as capable of delivering diversity when compared to smaller operators. One respondent described the existing system as being too complex and consequently, stated that competition law should prevail in its stead. A more liberal regime was recommended by one respondent who also felt that the dominant position of RTÉ should be recognised. Specific cross media guidelines should also be developed as factors to be considered in assessments. Overall, it was felt that a more flexible policy could be pursued without reducing the quality of broadcasting.

The majority favoured retention of the two year moratorium which restricts the sale of radio stations shortly after the award of a licence. Some argued that a more flexible approach could be taken, where relevant license holders could be assessed on a case-by-case basis. One respondent suggested that while such a moratorium could apply to new incumbents, it should not apply to existing operators who have had their licenses renewed. Another respondent argued that two years was too short, suggesting that five years was preferable as it was a better timeframe by which to judge overall commitment to the sector.

The addendum was accepted in principle but reservations were also voiced. For some, its inclusion did not provide an adequate framework while others urged for greater cooperation between relevant bodies. Some respondents believed it to be unnecessary, arguing that competition law alone should prevail. One group argued that the powers of the BCI should be strengthened in this regard.

* * * * *

This report considered submissions made to the BCI consultative process on ownership and control. Such a review was necessitated by developments on both national and international fronts where change is omnipresent in the sector. It also honoured a commitment made by the BCI in 2001 to review its *Ownership and Control Policy, 2001* within a designated time period. Information reviewed will feed directly into the decision making process of the BCI in producing a revised policy on ownership and control.

Appendices

Appendix I

Relevant legislation

Radio and Television Act, 1988

Section 6: Determination of applications for award of sound broadcasting contracts

‘(2) In the consideration of applications received by it and in determining the most suitable applicant to be awarded a sound broadcasting contract, the Commission shall have regard to-

- (a) the character of the applicant or, if the applicant is a body corporate, the character of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares;
- (b) the adequacy of the expertise and experience and of the financial resources that will be available to each applicant and the extent to which the application accords with good economic principles;
- (c) the quality, range and type of the programmes proposed to be provided by each applicant or, if there is only one applicant, by that applicant;
- (d) the quantity, quality, range and type of programmes in the Irish language and the extent of programmes relating to Irish culture proposed to be provided;
- (e) the extent to which the applicant will create within the proposed sound broadcasting service new opportunities for Irish talent in music, drama and entertainment;
- (f) the desirability of having a diversity of services in the area specified in the notice under section 5(5) catering for a wide range of tastes including those of minority interests;
- (g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Act;
- (h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified in the notice under section 5(5);
- (i) the extent to which the service proposed-
 - (i) serves recognisably local communities and is supported by the various interests in the Community, or

- (ii) serves communities of interest, and
- (j) any other matters which the Commission considers to be necessary to secure the orderly development of sound broadcasting services.

(3) In considering the suitability of any applicant for the award of a sound broadcasting contract to provide a sound broadcasting service of an area which includes a Gaeltacht area, the Commission shall have particular regard to the preservation as a spoken language of the Irish language.

Section 14: Terms and conditions of sound broadcasting contract

(2) Without prejudice to the generality of subsection (1), the Commission may specify in a sound broadcasting contract all or any of the following terms or conditions:

- (a) the period during which the contract shall continue in force;
- (b) whether the contract may be renewed and, if so, the manner in which the terms on which, and the period for which, the contract may be renewed;
- (c) a condition prohibiting the assignment of the contract or of any interest therein;
- (d) if the sound broadcasting contractor be a company, a condition prohibiting any alternation in the Memorandum or Articles of Association of the company or in so much of that Memorandum or of those Articles as may be specified or prohibiting any material change in the ownership of the company;
- (e) a condition requiring the sound broadcasting contractor to provide the quality, range and type of programmes which he proposed to offer in his application for the award of the contract.

Broadcasting Act, 2001

Section 11: Additional functions of Commission

(2) In performing the function conferred on it by this section or the functions conferred on it by the Act of 1988, the Commission shall endeavour to ensure that the number and categories of broadcasting services made available in the State by virtue of this Act or the Act of 1988 best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity.

Section 38: Local interest channels

(6) In deciding whether to enter into a local content contract with a particular person, the Commission shall have regard to whether the entering into of such a contract would operate against the public interest and, in particular, shall have regard to-

- (a) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in

the locality served by the cable or MMD system proposed to transmit that material, and

(b) the desirability of promoting diversity in the sources of information available to the public and in the opinions expressed in the communications media.

(7) For the purposes of *subsection (6)*, the Commission may require the person referred to in that subsection to furnish to it such information as it specifies with respect to the extent (if any) of-

- (a) any interest of a proprietary or financial nature held by him or her in relation to the provision of broadcasting services (including sound broadcasting services) in the State or the publication of any newspaper, magazine or journal in the State, or
- (b) the control he or she may exercise in relation to the provision of any such service or the publication of any such newspaper, magazine or journal,

and if the person fails to comply with any such requirement, then the Commission shall not enter into a local content contract with him or her.

Section 60: Amendment of section 6 of Act of 1988

Section 6 of the Act of 1988 is hereby amended by the insertion of the following subsections after subsection (3):

“(4) In considering the suitability of an applicant for the award of a sound broadcasting contract, the Commission shall have regard to the overall quality of the performance of the applicant with respect to the provision by him of a sound broadcasting service under any sound broadcasting contract held by him at, or before, the date of the making of the application.

(5) Where the Commission decides to refuse to award a sound broadcasting contract to an applicant therefor [sic], the Commission shall notify the applicant of the reasons for the decision.”

Competition Act, 2002

Section 23: Provisions with regard to media mergers

- (1) Within 5 days after the receipt by it of a notification in relation to a media merger, the Authority shall
 - a. forward a copy of the notification to the Minister, and
 - b. notify the undertakings involved in the merger that it considers the merger to be a media merger.
- (2) If the Authority makes a determination referred to in *section 21 (2)(a)* in relation to a media merger it shall, immediately after doing so, inform the Minister of that fact and the Minister may, notwithstanding that determination, within 10 days after the date on which the determination is

made, direct the Authority to carry out an investigation under section 22 in relation to the merger.

- (3) Upon such a direction being given-
 - a. the determination referred to in section 21 (2)(a) shall not operate to permit the media merger to be put into effect, and
 - b. the Authority shall notify the undertakings involved in the merger that an investigation under section 22 in relation to the merger will be carried out pursuant to the direction.
- (4) Where the Authority makes a determination under *paragraph (a)* or *(c)* of *subsection (3)* of section 22 in relation to a media merger it shall, immediately after doing so, inform the Minister of the determination and the Minister may within 30 days after the date of the making of that determination, notwithstanding that determination, having regard to, and only to, the relevant criteria, by order provide-
 - a. that a merger may be put into effect,
 - b. that the merger may be put into effect subject to specified conditions being complied with, or
 - c. that the merger may not be put into effect.
- (5) The Minister shall publish, with due regard for commercial confidentiality, a statement of the reasons for his or her making such an order within 2 weeks after the date on which the order is made.
- (6) For the purpose of the exercise of the power under *subsection (4)*, the Minister may consider such submissions or observations from persons claiming to be interested in the matter as the Minister thinks proper.
- (7) In addition to the functions conferred on it by section 22 in relation to a merger or acquisition, the Authority shall, in dealing with a merger or acquisition under that section that is a media merger, form an opinion as to how the application of the relevant criteria should affect the exercise by the Minister of his or her powers under *subsection (4)* in relation to the merger.
- (8) The Authority shall inform the Minister of the opinion it has so formed on request being made by the Minister of it to do so.
- (9) The following provisions shall have effect on account of the additional procedures provided by the foregoing provisions in relation to media mergers:
 - a. a media merger which could otherwise be put into effect upon a determination referred to in section 21 (2)(a) being made in relation to it may not be put into effect until the expiry of 10 days after the date on which that determination is made,
 - b. a determination under section 22 in relation to a media merger shall not have effect until the expiry of 30 days after the date on which that determination is made and then only if, within that period that the Minister has not made an order under *subsection (4)* in relation to the merger or has stated in writing that he or she does not propose making such an order in relation to the merger.
- (10) In this section-

“broadcasting service” means a service which comprises a compilation of programme material of any description and which is transmitted or relayed by means of wireless telegraphy, a cable system or a multipoint microwave distribution system, a satellite device or any other transmission system, directly or indirectly for reception by the general

public, whether that material is actually receive or not, and includes a sound broadcasting service within the meaning of the Radio and Television Act, 1988, but does not include any such service (whether involving audio-visual material or audio material) that is provided by means of the system commonly known as the Internet;

“cable system” has the same meaning as it has in the Broadcasting Act, 2001;

“media business” means-

- (a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs,
- (b) a business of providing a broadcasting service, or
- (c) a business of providing a broadcasting services platform;

“media merger” means a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State;

“programme material” has the same meaning as it has in the Broadcasting Act, 2001;

“providing a broadcasting service” shall be construed in accordance with *subsection (11)*;

“providing a broadcasting services platform” shall be construed in accordance with *subsection (12)*;

“relevant criteria” means the following matters-

- (a) the strength and competitiveness of media businesses indigenous to the State,
- (b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings,
- (c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings,
- (d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State, and
- (e) the share in the market in the State of one or more of the types of business activity falling within the definition of “media business” in this subsection that is held by any of the undertakings involved in the media merger concerned, or by any individual or other undertaking who or which has an interest in such an undertaking

(11) A reference in this section to providing a broadcasting service shall be construed as a reference to the doing of either or both of the following:

- a. supplying a compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service,
- b. transmitting or relaying as a broadcasting service programme material.

(12) A reference in this section to providing a broadcasting services platform shall be construed as a reference to the transmitting or re-transmitter of programme material by means of wireless telegraphy, a cable system or a multipoint microwave distribution system, a satellite device or any other transmission system.

Television Without Frontiers directive

Directive 97/36/EC of the European Parliament and of the Council of 19 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

Extracts from: Article 2

1. Member States shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable in that Member State.
2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:
 - those established in that Member State in accordance with paragraph 3;
 - those to who paragraph 4 applies.
3. For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:
 - (a) the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;
 - (b) if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Member States, the broadcaster shall be deemed to be established in the Member State where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;
 - (c) if a broadcaster has its head office in a Member State but decisions on programme schedules are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Member State.

Appendix II

Extract from: *BCI Ownership and Control Policy – consultation document (2005)*, 4

- Since 2001, a degree of concentration in the radio market has taken place, which has resulted in the establishment of a small number of significant media groups in the market.
- The enactment of the *Competition Act, 2002*, introduced new statutory provisions for the control of media mergers by the Competition Authority and the Minister for Enterprise, Trade and Employment. In June 2004, the BCI introduced an addendum to its *Ownership and Control Policy, 2001* which took into account these new statutory provisions.
- The BCI's *Television Licensing Policy*, published in July 2004, provided for the licensing of a range of new television services under the *Broadcasting Act, 2001*.
- In July 2004, the *Ox Report*, a comprehensive study and review of radio licensing in Ireland was published by the Department of Communications, Marine and Natural Resources. With regard to the *Ownership and Control Policy (2001)*, the Report concluded there was a need for clearer guidance on cross media ownership rules and controls and it made recommendations in this regard. The *Ox Report* informed the subsequent *Review of Radio Licensing in Ireland* Consultation Paper, published by the Department of Communications, Marine and Natural Resources. The Report addressed the BCI's policy objectives for the independent sector and posed questions on the impact and nature of the existing rules under Section 6(2), subsections (g) and (h), of the *Radio and Television Act, 1988*.
- In December 2004, the BCI announced a review of its *Ownership and Control Policy (2001)*. Pending completion of the review, the BCI revised one element of the policy relating to the application of Section 6(2)(g) of the *Radio and Television Act, 1988*. The revision thereto imposed an ownership cap on any one broadcaster of 17.9% of the total number of services licensed under the 1988 Act.

Submissions

Submissions

Communicorp Group Limited
ComReg
Dublin Rock Radio Ltd. (Phantom FM)
Fox Radio Ltd.
Institute of Advertising Practitioners in Ireland (IAPI) and the Association of
Advertisers in Ireland (AAI)
Labour Party, The
McCann FitzGerald Solicitors.
Mid West Radio
Murphy, Kenneth
River Media Group
Submission on behalf of the UTV owned stations (Cork's 96 and 103FM; Limerick's
Live 95FM; Dublin's Q102; and LMFM)
Sunrise Radio
TV3
Unique Media