

Broadcasting Commission of Ireland

Television Licensing Policy

Broadcasting Act 2001

Section 36, Satellite Content Contracts
Section 38, Local Content Contracts
Section 39, Community Content Contracts
Section 41, Cable/MMD Content Contracts

July 2004

Index

	<i>Page</i>
1. Introduction	3
2. <i>Part I</i> The Process for Developing Licensing Policy	5
3. <i>Part II</i> BCI's Guiding Regulatory Principles	7
4. <i>Part III</i> Legislative Framework	9
5. <i>Part IV</i> Summary of Key Policy Objectives	11
6. <i>Part V</i> Licensing Strategy and Framework	12
7. <i>Part VI</i> General Rules Governing Procedures and Criteria for the Award of Content Contracts	14
8. <i>Part VII</i> Broadcasting Act 2001: Section-specific Policy Details	17
• Section 36: Satellite Content Contracts	
• Section 38: Local Content Contracts	
• Sections 39 and 40: Community Content Contracts	
• Section 41: Cable/MMD System Channels	
9. <i>Part VIII</i> Provisions for Review of Policy	22
10. <i>Appendix 1</i> Legislative Provisions	23

Introduction

The Broadcasting Act, 2001, facilitates the expansion of television and radio services in Ireland. Advances made in digital technology, as well as the development of a strong indigenous media sector over the past fifteen years, have created the potential for new services. The 2001 Act provides the legislative framework within which the licensing of such additional services can occur.

The increasing possibilities for the licensing of new television programme services denotes a significant progression from the Radio and Television Act, 1988, which allowed for a range of radio programme services but for only one terrestrial free-to-air national television programme service. The 2001 Act, which makes the provision of a host of new analogue and digital radio and television services possible, also addresses the issue of diversity of sources and of content, in the interests of listeners and viewers. Viewed collectively, these points illustrate the important expansion of the Broadcasting Commission of Ireland's (BCI) licensing remit that occurred as a result of the introduction of this piece of legislation.

Significant differences are apparent when the provisions of the 2001 Act are compared with those of the Radio and Television Act, 1988. Primarily, the expansion of opportunities for broadcasting, and thus for licensing, is in evidence. The 2001 Act can be seen, therefore, in part as a reaction to technological advances and, in part, a response to the success of a strong indigenous broadcasting sector over the past fifteen years.

More specifically, the latter piece of legislation does not spell out rules and procedures for the licensing of services in as clear a manner as the 1988 Act. It merely sets out some minimum content rules that should apply to certain types of services. One might argue that this allows for more flexibility and adaptability to respond to a rapidly evolving technological environment. Such flexibility is also evident in that content contracts offered under the 2001 Act are not mutually exclusive. Consequently, a content contract may serve more than one purpose and it may be possible for a particular programme type to be licensed under a number of sections of the Act.¹ As the legislation varies its approach to licensing, with reference to platform and content, it is easier to consider licensing from a content perspective with reference to the types of audiences served and sub-categorised with reference to platform delivery.

¹ This was reflected in the expressions of interest received by the BCI, in which c.33% of submissions did not specify the platform for transmission. This may indicate that they do not see services they want to provide as being platform specific.

Another departure is that the 2001 Act does not provide guaranteed access to the delivery mechanisms for those being licensed except in limited circumstances.² This is a key difference when the contracts that can be offered under the 2001 Act are compared to those available under the 1988 Act.

The purpose of this policy statement is:

- (1) To identify and to clarify the process leading to the determination of the Commission's policy in respect of the licensing of new television content under the various provisions of the Broadcasting Act, 2001.
- (2) To identify the statutory provisions of relevance to this statement.
- (3) To summarise the BCI's key policy objectives arising from these provisions.
- (4) To set out the proposed framework for licensing.
- (5) To set out the rules governing the procedures and criteria for the award of content contracts.
- (6) To address issues arising from the specific provisions of the Act and to clarify and detail the BCI's policy in respect of such provisions.

While the provisions of the 2001 Act allow for licensing of both radio and television services, the BCI has decided to prioritise the licensing of new television services over radio at this juncture and this focus is reflected throughout the present document.

It should also be pointed out that this paper is only concerned with the Commission's policy in respect of the provisions of Section 11, and Sections 36 to 41 inclusive. The BCI's policy in respect of the licensing of digital terrestrial television (DTT) programme services, further to the provisions of Section 12 of the 2001 Act, has been deferred, pending the appointment of a multiplex operator.

The BCI has attempted to be as comprehensive as possible in addressing all of the potential issues raised by the statutory provisions. However, in the event that issues of policy are raised in the course of licensing services, which have not been addressed heretofore, the Commission will attempt to address these as speedily as possible in the interests of facilitating potential contractors, as well as the users of services.

2. Section 39 Community Content Contracts.

Part I

The Process for Developing Licensing Policy

From the outset of this process, the BCI has sought to ensure clarity and certainty in the licensing regime, as well as to avoid unnecessary delays in decision-making and the introduction of new services. However, it was necessary for the Commission to strike a balance between being responsive to the needs of those wishing to provide services, while being mindful of the need to establish a set of ground rules under which services could be licensed. The approach taken towards defining this system for licensing new television services, therefore, has been multi-layered and extensive.

Initial policy discussions began in March 2002, when Members of the Commission were briefed on the provisions of the 2001 Act in respect of licensing new services envisaged through the issuing of content contracts. A number of issues were identified for further research and discussion. Preliminary consideration was given to identifying a possible framework for licensing activities, the policy implications for the BCI and the criteria and procedures for the award of contracts.

Moving from the consideration of the opportunities afforded by the new legislative provisions to the actual awarding of licences had to be strategically planned. The approach adopted was multi-pronged with strands running parallel rather than sequentially. These activities included research, an invitation for expressions of interest in the provision of new services and consultation with relevant groups within the broadcasting sector. The main activity of the BCI, however, centred on discussion and information exchanges between the Commission Members and the BCI Executive at regular intervals, based primarily on the legislative provisions. This work was supplemented with consultation between the BCI Executive and its legal advisors, in order to clarify and understand the construction and intentions of the statutory provisions that would underpin the licensing of new services.

Research was identified as a core element in the process. The BCI sought to inform itself of the situation existing in other polities with regard to the licensing of television services. Research carried out on an in-house basis showed that no clear-cut model could be discerned in the countries considered.³ Moreover, it showed that there was no single obvious framework for licensing which the BCI could readily adopt, with appropriate modification. The study showed that in the majority of instances, the emergence of additional television services was organic rather than a deliberate product of the legislative process, and that the services often predated the legislation introduced. Consequently, the approach taken was largely reactionary, rather than strategic, as it sought to put order on the past rather than co-ordinate future development and necessary expansion.

³ A comparative analysis of local television services available in United Kingdom, Canada, Norway, Denmark, the Netherlands and Switzerland. For further information, see R-B M. Quinn (2003), *Local Television Services*, Dublin: Broadcasting Commission of Ireland, February.

Viewing Ireland in this broader context helped to identify two key points for the Commission to consider. Firstly, research findings could inform the approach to be taken, by highlighting the many pitfalls encountered by others that could thus be avoided. Secondly, and more importantly, it was seen that Ireland was in a more advantageous position than might have been thought. It lagged behind in chronological terms but not in respect of the appropriate legislative provisions. In design, the legislation is forward-looking, giving decision-makers a basis on which to not only introduce a permanent framework but one with the flexibility to surmount problems as they arise. Consequently, the BCI discovered that it could adopt a proactive approach, reacting to social need and economic demand rather than trying to co-ordinate existing practices which was the situation faced by other polities.

Consultation occurred with relevant groups within the sector. In addition, it believed that it was appropriate to draw on its own substantial experience of licensing services under the provisions of the Radio and Television Act, 1988. In short, the BCI realised that it might set out its approach in each area of licensing using the statutory provisions, combined with its own experience of developing and regulating independent broadcasting services over many years for guidance.

An invitation for expressions of interest in the provision of additional television services was issued in November 2002.⁴ This invitation related to specific provisions of the 2001 Act⁵. It was believed that eliciting expressions of interest from relevant groups would help gauge more accurately the level of interest which existed in the provision of additional services, thereby helping to plan and implement its overall work programme in respect of licensing and other related activities.

This policy statement is the result of many months of discussions and deliberations between the Board and Executive of the Commission. The Commission has decided on a practical approach to the licensing of additional services under the 2001 Act. It might be described as "consultation in action". While the issue of consulting more widely was considered, it was thought best to have some services introduced and operating, to facilitate a more practical and succinct consultation to occur. The BCI has set its policy based on information and knowledge collated to date. Rather than consulting on the terms of this policy, the BCI has decided to respond to demand from those interested in providing new services, to set its policy on a provisional basis and to learn from its experiences over a two/three year period of licensing. This, it has decided to do, in the interest of facilitating those who wish to implement their ideas and business plans, as well as those wishing to provide, for the first time, community television services in this country.

Estimating the exact numbers of services that the BCI can expect to licence in the medium-to-long term is difficult. Based on the experiences of other jurisdictions, it appeared more feasible to start small, to build and refine as appropriate. It is believed that as these services come on stream, and the licensing potential of the Broadcasting Act 2001 becomes clearer, the BCI can expect a corresponding increase in the interest shown in providing these services. Consequently, a review of licensing policy, it is envisaged, will happen within a two- to three-year time frame.

⁴ An advertisement was placed in the national press on 1 November 2002. By the closing date, the BCI had received 48 expressions of interest for these new television programme services.

⁵ Sections 36, 38, 39, 41.

Part II

BCI's Guiding Regulatory Principles

The principles set out in this section are those that the BCI considers important in formulating and implementing its regulatory policy. They are based on an endorsement of the Council of Europe's premise that the primary task of a regulatory body is to ensure that it functions smoothly by establishing a climate of dialogue, openness and trust in dealings with broadcasters. The principles recognise the importance of the BCI being in a position to respond flexibly and adequately to unforeseen and often complex questions that will emerge in the developing broadcasting landscape. The objectives of encouragement, promotion and facilitation are to the forefront of principles presented hereunder.

Diversity of programming services for the public

- In fulfilling its statutory obligations under the 1988 and 2001 Acts (deciding on applications, determining contracts, monitoring programming and drawing up codes for broadcasters), the BCI aims to put the public into a position which gives them access to a diversity of programming from a variety of sources in the form of broadcasting services of such number and categories as will 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.

Flexible and Consistent Approach

- The BCI aims to develop and operate a simple, flexible but comprehensive regulatory scheme, capable of responding to technological and market developments, as well as national and local conditions. Its goal is regulation that will encompass flexibility and adaptability to the needs of change, to prevent it being overtaken by technology or appearing to be too rigid, inconsistent, arbitrary, or biased.
- The BCI recognises the need for regulation to be technically literate and well informed about new developments in the marketplace. In a world of converging technologies, it must be able to react to the needs of a situation, which is constantly developing, in order to secure the best possible deal for listeners and viewers who are the main clients of regulation.

Adequate regulation based on current conditions

- The BCI takes the view that regulation needs to be capable of facilitating broadcasting, as well as setting standards and applying them. The BCI intends to adopt a lighter touch, that is, a facilitative approach to regulation, in the light of prevailing conditions, while adhering to its statutory obligations of ensuring pluralism and diversity in the interests of the listener and viewer. It sees its role as being largely confined to formulating basic principles, which will be formalised in actual agreements with broadcasters.
- The BCI is committed to fair, reasonable and non-discriminatory access, and to regulation that accords with EU law and ensures effective competition in both existing and new, emerging, markets. In that regard, the BCI, while mindful of its cultural remit, aims to work in co-operation with other regulators, e.g. telecommunications and competition authorities, in order to achieve an overall coherence and co-ordination in regulation.

Openness and Dialogue

- It is the intention of the BCI to ensure that the regulatory regime functions smoothly by establishing a climate of dialogue, openness and trust in dealings with broadcasters.
- In a spirit of openness and co-operation with the sector, the BCI will consider possibilities or opportunities for co-regulation on the part of the sector.

Clear Decision-making

- The BCI understands the need to provide a rationale for its decisions (in accordance with section 6(5) as inserted by section 60 of the 2001 Act) in the interests of certainty and predictability for the sector and for would-be entrants or participants.
- The BCI appreciates the need also, in the interests of the sector and the public, to ensure clarity and certainty in the regime, and to avoid unnecessary delays in decision-making.

These are the principles that guide the formulation and implementation of the BCI's regulatory policy as it pertains to the key functions of its remit, including its licensing function. Openness and adaptability are at the core of this approach. Catering for the interests of audiences and having the flexibility to respond to a rapidly changing technological environment are paramount. Essentially, consideration of these principles demonstrates the BCI's overriding commitment to supporting a range of diverse services.

Part III

Legislative Framework

Introduction

The framework for the Broadcasting Commission of Ireland's licensing policy for television services is set out in the provisions of the Broadcasting Act, 2001. Sections 11 and 36 through to 41 are most relevant to this Policy Statement.

Content contracts are provided for in the provisions of Sections 36, *Satellite Content Contracts*, Section 38, *Local Content Contracts*, Section 39, *Community Content Contracts* and Section 41, *Cable/MMD Content Contracts*. Other related provisions are contained in sections 11, 37 and 40.

The relevant sections of the Broadcasting Act 2001 are set out in Appendix I to this document. A brief note introduces each section below.

Section 11 – Principles guiding the licensing of additional services

While conferring additional functions on the BCI, this section addresses the basis upon which these are set. More specifically, it places an onus on the BCI to ensure that the number and categories of broadcasting services made available should meet the needs and interests of the Irish people, reflecting the character and traditions, and the religious, cultural and ethical diversity of this island. In short, it highlights that the BCI is obliged to ensure pluralism and diversity of new services provided, while reflecting the ethos and interests of the island of Ireland.

Section 36 – Satellite Content Contracts

The provisions of Section 36 allow for television and/or radio programme services to be carried on satellite. Services broadcast on this system can be directed towards international, national or other non-national audiences (such as regional, local audiences). Regulation of programmes transmitted on this platform is also dealt with in the Broadcasting Act, 2001. Broadcasters will be obliged to comply with Section 19 Codes and Rules. Fines may be imposed for non-compliance with contract terms. Conditions for the termination of the contract arise from Article 22 and 22A of the Council Directive. The provisions of the Prohibition of Incitement to Hatred Act 1989 will also apply. Fees may also be charged by the BCI for such contracts.

Section 37 – Transmission of broadcasting services by cable or MMD system

This section refers to broadcasting by means of cable or MMD system. Material to be transmitted, however, must come from a licensed source and conditions provided hereunder must be adhered to. In addition, retransmission is permitted under certain circumstances and with the approval of the BCI.

Section 38 - Local Content Contracts

This section deals with contracts designed to facilitate and encourage broadcasting of material of special interest to persons living in a specific geographical location. It allows for commercial television to be broadcast on analogue or digital cable/MMD systems with specific conditions in respect of the source, character and the age of the content. Applicants for contracts to supply such services, in accordance with the legislative provisions, would need to satisfy the BCI in respect of the nature and source of programme material to be broadcast and in respect of the audience being targeted. This section also states that broadcasting such material must be done in compliance with Section 19 Codes and Rules and according to other conditions that the BCI may specify vis-à-vis advertisements, funding or programme material, as well as ownership and control matters.

Section 39 – Community Content Contracts

Community television services are addressed in Section 39 of the 2001 Act. Community members can apply for a licence to broadcast to a geographical entity of a town or other urban or rural area. The programme material must specifically address the interests of the community concerned. Provision is also made to qualitatively determine the needs of an identified community in respect of broadcasting.⁶ The terms of this section are essentially designed to allow for community television to be produced by local people on a not-for-profit basis.

Section 40 – Assessment of community needs in respect of broadcasting

The 2001 Act allows for the BCI to assess the many aspects of a specific community in respect of a community television programme service. It can initiate a review or do so at the request of a given community group. The aim of such an assessment would be to establish the viability of the service suggested to the identified area in terms of needs and resources –facilities, financial and human.

Section 41 – Cable/MMD Content Contracts

Section 41 allows for commercial television to be broadcast on analogue or digital cable/MMD. It carries the proviso that the Broadcasting Commission of Ireland may only enter into such contracts if it is satisfied that in entering into that contract, the range and diversity of broadcasting services available in a relevant area will be effectively increased. Such contracts shall, where appropriate, include conditions in respect of the Council Directive in relation to European Works.

Overall Goal of Statutory Provisions

The principles and objectives underlying the statutory provisions are, therefore, clear. The overall goal of the provisions specified in the Broadcasting Act, 2001, is to provide a broad framework for the licensing of new services. The provisions of this Act concentrate principally on diversity of content while ensuring that a range of services and information sources are made available for audiences. Services licensed must, where appropriate, reflect the needs, interests and character of Irish audiences.

⁶ See also Section 40.

Part IV

Summary of Key Policy Objectives

The BCI's key policy objectives in respect of the licensing of additional television programme services can be summarised as follows:

1. To provide a framework, within which it may fulfil its statutory remit, further to the additional functions conferred on it by the provisions of the Broadcasting Act 2001.
2. To facilitate the licensing of an increased number and categories of television programme services and content, which, in particular, cater for the specific interests and needs of the people of the island of Ireland, (including local and regional communities), bearing in mind their languages and traditions and their religious, ethical and cultural diversity.
3. To facilitate the development of communities through the provision of television programme services designed to acknowledge and support such development.
4. To provide a licensing regime which caters for new media opportunities in content and which responds to technological and market developments and needs.
5. To facilitate business opportunities for those in the media sector.

Part V

Licensing Strategy and Framework

While providing the grid within which new licensing will occur, the legislation does not prescribe the precise methods for achieving the BCI's licensing objectives. It is left, therefore, to the Broadcasting Commission to determine these as a matter of policy.

The 2001 Act provides two key reference points for the BCI when developing a framework for licensing new television services – i.e. an audience focus (community, local, national, trans-national) and delivery platforms (satellite, cable and MMD systems).⁷

The BCI debated a number of options for its licensing strategy and framework. Given the economic and technical constraints that exist in respect of the development of additional television services licensed under the 2001 Act, the Commission has adopted a responsive approach to date and has licensed a number of services on a short-term basis.

Moving forward, the Commission has decided to adopt an open-ended application approach to the licensing of television services under the legislation. In practical terms, this means that interested parties may apply at any time for a content contract further to the provisions of Sections 36, 38 and 41. The Commission sets out later in this document its particular approach to the licensing of services further to Section 39 (see *Part VII*), as informed by those who expressed interest to the Commission in providing such services.

The licensing mechanisms for Sections 36, 38 and 41 content contracts will be reviewed after a period of two years. This will facilitate the task of building a more permanent licensing regime based upon the BCI's experiences in "practical consultation". This approach is in keeping with the licensing strategy adopted to date by the BCI and with representations made to the Commission by interested parties who expressed the view that the Commission should have an open, flexible and facilitative approach to the licensing of new services under the 2001 Act.

Section 11(2) as a Guiding Principle

Section 11(2) provides the broad guiding principle under which all services will be licensed.

⁹ The 2001 Act also provides for licensing on digital and analogue versions of platforms.

In approaching this new area of licensing, the BCI takes the view that regulation needs to be capable of facilitating and encouraging broadcasting, as well as setting standards and applying them. Consequently, the BCI's overall goal is to achieve a fair, reasonable and proportionate regulatory regime that will serve the sector and the public well in the developing media environment. Twinned with this, is its commitment to licensing programme content that fits the needs, and reflects the ethos, of Irish audiences. Significant time has been spent in the preliminary stages to iron out foreseen difficulties, to view Ireland in the context of other countries offering similar services and to review material as it arises. Such key influences have informed the BCI, allowing it to pursue a decidedly pro-active approach to the licensing of such new services. In short, the Commission seeks to facilitate, encourage and promote new services in respect of this level of broadcasting.

Part VI

General Rules Governing Procedures and Criteria for Award of Content Contracts

In setting its policy on the rules governing the procedures and criteria for the award of contracts, the BCI was mindful of its own experience to date, in licensing and regulating the radio and television market under the Radio and Television Act, 1988. The Commission balanced this experience with the specific requirements of the 2001 Act, as well as its own objectives of facilitating, promoting and encouraging the development of new content and services.

1. Section 11(2)

All applicants for content contracts will be required to present their proposals and to elaborate on their rationale for the service proposed, in the context of the provisions of Section 11(2) of the Broadcasting Act 2001.

2. Platform-specific Applications and Contracts

Each service (or each selection of content) for which an application is made will require a separate application and, therefore, a separate contract for each platform on which it proposes to transmit.

3. Competitive vs Non-competitive Licensing Process

The Commission considers that a competitive licensing process is not appropriate in the context of the provisions of Sections 36, 38 and 41 of the Broadcasting Act, 2001. However, the Commission has decided that Section 39 licences will be the subject of open competition, given the potential for must-carry status on cable and MMD systems.

4. General Application Process

In general, the level of information required for the consideration of licences under the 2001 Act will be less onerous than that for services licensed under the 1988 Act. Information will be sought which will be consistent with the requirements of the 2001 Act and the EU Television Without Frontiers Directive and any other information which the BCI considers appropriate. Guidelines for the making of applications will be available for all services.

In addition, applicants for all content contracts will be required to submit information to enable the Commission to take a view on the following:

- The character of the applicant applying for a content contract
- The character of the body and its directors, manager and other officers
- Its members
- The person/s entitled to the beneficial ownership of the shares.

Furthermore, in considering applications for content contracts, the Commission will apply the provisions of its Ownership and Control Policy. It considers it appropriate to do so, in the interests of promoting plurality of ownership in the communications media in a specified area. It also considers it appropriate to do so in the interests of promoting diversity in viewpoint, outlet and source, and, principally, to ensure that the ethos of a broadcasting service is such that it will best serve the needs of the audience it is licensed to serve.

5. Term of Contracts

Initially, a maximum contract period of ten years will apply.

6. Application Fees

Nominal application fees will apply to all content contracts. These will be set with reference to the level of work and resources involved in processing licence applications.

7. Advertising Minuteage

With regard to the level of advertising minuteage allowed on new services to be licensed under the 2001 Act, the BCI's current policies will apply. Commercial services will be allowed a maximum of ten minutes of advertising content in a clock hour, commencing at the beginning of the clock hour. Community services will be permitted a maximum of six minutes of advertising content in a clock hour, commencing at the beginning of the clock hour. Any revision to these arrangements will be considered in the context of a general review of the rules, which may be undertaken by the BCI, in accordance with the provisions of Section 19 of the Broadcasting Act, 2001. Any appropriate revisions will also be made on foot of any revisions to the EU Television Without Frontiers Directive.

8. Decision-making Process for the Award of Content Contracts

Criteria, consistent with the information required in the application process, will be drawn up and will be available in advance to all potential applicants for content contracts. In situations where applications are refused, reasons for the refusal will be given.

Both the Executive and Board of the Commission will be involved in the decision-making process. The Executive will analyse and critique all applications for content contracts. Applications will be submitted to the Board of the Commission with a recommendation from the Executive. The Board of the Commission will make a final determination in the award of a contract.

9. Conditions upon which Contracts are awarded

Conditions upon which contracts are to be awarded will be in line with the information requested in the application process and will reflect the requirements of the appropriate statutory provisions and instruments, including, *inter alia*, the Broadcasting Act 2001 and the EU Television Without Frontiers Directive and any revisions thereto. Additional conditions may be imposed, as considered appropriate by the Commission, in line with its statutory and regulatory functions, policies and principles.

Part VII

Broadcasting Act 2001: Section-Specific Policy Details

Specific provisions within the Broadcasting Act 2001 require the BCI to make policy determinations specific only to that section of the Act. This section addresses the key issues arising.

Section 36: Satellite Content Contracts

The provisions of Section 36 allow potentially for the licensing of a broad range of television content, targeting national, international or smaller local, regional and/or community audiences. It allows for the re-transmission of services carried on other platforms and for services offered to viewers on a subscription or pay-per-view basis.

- ***Carriage on Cable/MMD***

The Commission requires the holders of Section 36 Satellite Content Contracts to obtain a separate, additional content contract if it wishes to carry that content on cable and/or MMD platforms. Such separate content contracts could be issued further to the provisions of Section 38, 39 or 41 as appropriate.

- ***Fees***

Further to the provisions of Section 36(4), the Commission may charge a fee for the provision of satellite content contracts. The Commission may also vary its fees depending on the category of content contract to be licensed. The BCI has decided to set its charges as follows:

(a) *Services licensed under the 1988 Act, RTÉ services, local and community content contractors licensed under sections 38, 39 and 41 of the Broadcasting Act 2001*

A nominal fee will be charged.

(b) *All other services*

Initially, a fixed fee linked to the level of regulation will be charged. €2000 per annum, for each year the service is licensed.

- ***Local and Community Content***

Providers of community or local programme content and/or services who wish to be transmitted on satellite only will have applied the ownership, content and other relevant provisions of Section 38, as considered appropriate by the BCI.

- ***European Works***
Article 4 of the Television Without Frontiers Directive and Regulations 4(1) and 3(b) of SI 313/1999 and Article 9 of the Directive and Regulation 3(a) of SI 313/1999, regarding European Works will apply to all content contracts issued under Section 36 except the following:
 - i) Services that are intended for local audiences and do not form part of a national network;
 - ii) Services that are exclusively devoted to sport, news, games, teleshopping or promotion; and
 - iii) Teletext services.

Section 38: Local Content Contracts

Section 38 provides for the licensing of local content material and/or services. The BCI considers that Section 38 content contracts are more likely to be in the form of a block of content supplied to a cable or MMD system, to be combined with other licensed content.

In order to satisfy the legislative provisions, applicants for local content contracts will have to satisfy the Commission as to the nature of the content as follows:

- The programme material to be supplied pursuant to a Section 38 Content Contract will be made by the person with whom the Commission proposes to enter into that contract or the making of the programme material will be commissioned by that person.
- The locality to be served is described with reference to an area served by a cable or MMD system, authorised under the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003 (Statutory Instrument No. 306 of 2003).
- The programme content should also be of such a character as is likely to make it of special interest to persons living in that locality. The BCI may issue guidelines in respect of the general character of the programme material that may be supplied for the purpose of such contracts.

For the purposes of guiding applicants for such content contracts, the Commission has defined a number of the statutory terms, as follows:

- ***"Substantial Proportion"***
For the purposes of Section 38(2)(b), the Commission has decided that 51% shall constitute a substantial proportion of material that should be made in the locality served by the cable or MMD system. This percentage will apply regardless of the time of broadcast. A reasonable proportion of repeat programming will be permitted to satisfy the 51% requirement.

- ***"Specified Period"***
For the purposes of Section 38(5)(b), the Commission has determined that a reasonable proportion of material should constitute works transmitted within **five years** of their production.
- ***Ownership and Control***
For the purposes of Section 38(6), the Commission will apply the provisions of its ownership and control policy. No additional requirements will apply for the present.
- ***Transmission on Satellite***
Services licensed under the provisions of Section 38, which also wish to be transmitted on satellite, will require an additional content contract under the provisions of Section 36.

Sections 39 and 40: Community Content Contracts

Guided by the contents of Sections 39 and 40 of the Broadcasting Act 2001, the Commission has worked in consultation with representatives of community groups towards the realisation of the common objective of delivering community television programme services. As a statutory body, the BCI has taken the lead in a number of respects but has elicited the views and general agreement of its community partners at key junctures in the process.

Consultation and consensus are the hallmarks of the approach taken by the Commission, in setting its community radio broadcasting policy. A similar approach was undertaken in respect of the development of community television broadcasting, in order to inform the policy. A number of consultative meetings were held between July 2003 and January 2004 with those groups who had expressed an interest in the provision of community television services.

Broad agreement was reached on the main principles that should underpin the BCI's community television policy. The following will apply:

- ***Definition of Community Television***
Community television will be licensed to serve a specific geographic community and/or community of interest. Additionally, a community television channel should promote and support active participation in, and demonstrate commitment to, principles of community empowerment and community development. Endorsing these principles, the following definition will apply:

'A Community Television channel is characterised by its ownership and programming, and by its interaction with the community it is licensed to serve. It is owned and controlled by a not-for profit organisation whose structure provides for membership, management, operation and programming primarily by members of the community at large. It should be based on community access and should

address the special interests and needs of those it is licensed to serve. In supporting these principles, it should serve as a tool for community development.'

- ***Ownership and Control***

Community television services will be owned and controlled by not-for-profit organisations and the community they are licensed to serve, with ownership/control structures which provide for membership, management, operation and programming primarily by members of that community.

- ***Programming***

Community programming will be based on community access and should reflect the special interests and needs of the community it is licensed to serve. The Irish experience demonstrates that the development of a viable community broadcasting service depends on the provision of a new and unique forum for communication between individuals and groups within the community served. It is, therefore, deemed important that a community television channel addresses the interests and the specific needs of the community. The service provided should add to the diversity of programming available. Due to the specific ethos of community broadcasting, audience participation should be promoted.

- ***Funding and Finance***

Community broadcasting will operate on a not-for-profit basis and services will be funded from a variety of sources with any surplus reinvested in the service. A limit of 50% of funding emanating from any one source should be put in place in order to ensure the independence of the channel and the community served.

- ***Community Needs Assessments in Respect of Broadcasting***

Section 40 of the *Broadcasting Act 2001* allows for the BCI to assess the needs of a specific community in respect of broadcasting; notably in regard to the availability to the community of production facilities, training and resources. The community organisations consulted see the value of such assessment and are in agreement that the BCI should initiate such assessments as appropriate. Though the design and the methodology to be used have yet to be formulated, the groups have expressed a preference for Section 40 assessments to be carried out after the awarding of a contract with the successful applicants. It should be noted that the statutory requirements would support such a preference. However, the Commission will also, in line with the statutory provisions, consider any requests made at any time, by a community organisation.

Section 41: Cable/MMD System Channels

- ***Carriage on Satellite***

The Commission requires the holders of Section 41 Content Contracts to obtain a separate, additional content contract if it wishes to carry that content on a satellite platform. Such a contract could be issued further to the provisions of Section 36 of the 2001 Act.

- ***European Works***

Article 4 of the Television Without Frontiers Directive and Regulations 4(1) and 3(b) of SI 313/1999 and Article 9 of the Directive and Regulation 3(a) of SI 313/1999, regarding European Works will apply to all content contracts issued under Section 36 except the following:

- i) Services that are intended for local audiences and do not form part of a national network;
- ii) Services that are exclusively devoted to sport, news, games, teleshopping or promotion; and
- iii) Teletext services.

Part VIII

Provisions for Review of Policy

The Commission has drawn up its licensing policy under the provisions of the 2001 Broadcasting Act so as to facilitate the licensing of additional services. As already indicated in this document, this is to respond to and facilitate the needs and interests of service providers, as well as viewers and consumers of services.

Based on its experiences over a two/three year period, the Commission will review and, if necessary, redefine its policy in respect of any or all aspects of licensing. The Commission reserves the right to amend or to add to its policy at any time as it considers appropriate, during this period.

Appendix I

Legislative Provisions

Section 11 Additional Functions of Commission

(1) Without prejudice to the functions conferred on it by the Act of 1988 or any other enactment, it shall be a function of the Commission to make arrangements, in accordance with the provisions of this Act, for the provision of broadcasting services in the State additional to those provided by the Authority, Teilifis na Gaeilge, the television programme service contractor and each sound broadcasting contractor.

(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.

(3) The Commission shall have all such powers as are necessary for or incidental to the performance of its function under this section.

Section 36 Satellite Content Contracts

(1) A person who is under the jurisdiction of the State (within the meaning of the Council Directive) shall not supply a compilation of programme material for the purpose of its being transmitted as a broadcasting service (whether for reception in the State or elsewhere) by means of a satellite device otherwise than under and in accordance with a satellite content contract.

(2) The Commission may enter into a contract with a person whereby that other person may supply a compilation of programme material for the purposes referred to in *subsection (1)*, and such a contract shall, without prejudice to *subsection (4)*, be known as a ‘‘provision of content (satellite) contract’’ and is in this Act referred to as a ‘‘satellite content contract’’.

(3) A satellite content contract shall include the same kind of conditions as subsections (4) and (5) of section 12 provide that a digital content contract shall include.

(4) The Commission may divide the contracts it may enter into under this section into different classes by reference to the different conditions which, in pursuance of its powers under this Act, it may attach to the contracts and may style each such class of contract by the addition of such distinguishing words as it considers appropriate to the name by which subsection (2) provides a contract under this section shall be known.

(5) The Commission may, before it enters into a satellite content contract with a person, require that person to pay a fee to it of such amount as it considers appropriate; if that person fails to pay that fee to the Commission, the Commission shall not enter into the contract with him or her.

(6) The fee referred to in subsection (5) is in addition to any fee the Commission may charge under section 56 in respect of an application by the person concerned for a satellite content contract.

(7) The amount of any fee paid to the Commission under *subsection (5)* may be used by it for the purpose of defraying the expenses incurred by it in performing its functions generally.

Section 37 Transmission of Broadcasting Services by Cable or MMD System

(1) A holder of a licence granted by the Director, being a licence that authorises the transmission by means of a cable or MMD system of programme material, shall not transmit, by such means, a broadcasting service unless the programme material, the subject of the broadcasting service, is supplied for such transmission—

(a) by—

- (i) the Authority,
- (ii) Teilifis na Gaeilge,
- (iii) the television programme service contractor,
- (iv) the holder of a digital content contract or satellite content contract and the programme material so supplied by him or her is the compilation of programme material authorised by that contract to be supplied by him or her for transmission otherwise as a broadcasting service, or
- (v) an excepted person,

or

(b) pursuant to—

- (i) a local content contract,
- (ii) a community content contract, or
- (iii) a cable-MMD content contract.

(2) A person, other than a person referred to in subparagraph (i), (ii), (iii) or (v) of subsection (1)(a) but including a holder of the licence concerned, shall not supply a compilation of programme material for the purpose of its being transmitted as a broadcasting service by means of a cable or MMD system, the subject of a licence

referred to in subsection (1), unless—

(a) the material is supplied under and in accordance with a local content contract, a community content contract or a cable-MMD content contract, or

(b) in case the person is the holder of a digital content contract or satellite content contract, the material is the compilation of programme material authorised by that contract to be supplied by him or her for transmission otherwise as a broadcasting service.

(3) A holder of a licence referred to in subsection (1) who transmits by the means referred to therein a broadcasting service shall—

(a) if that service was being transmitted by him or her immediately before the Commencement of this section, forthwith, after such commencement, notify, in writing, the Commission of the fact that that service is being transmitted by him or her,

(b) if the transmission of that service begins on or after the commencement of this section, forthwith, after that transmission begins, notify, in writing, the Commission of the fact that that service is being transmitted by him or her.

(4) A holder of a licence granted by the Director, being a licence that authorises the re-transmission by means of a cable or MMD system of programme material shall—

(a) in relation to any broadcasting service that is being re-transmitted by him or her, pursuant to that licence, immediately before the commencement of this section, forthwith, after such commencement, notify, in writing, the Commission of the fact that that service is being re-transmitted by him or her,

(b) in relation to any broadcasting service the re-transmission of which, pursuant to that licence, by him or her begins on or after the commencement of this section, forthwith, after that re-transmission begins, notify, in writing, the Commission of the fact that that service is being re-transmitted by him or her.

(5) The holder of a licence referred to in subsection (4), being a licence that authorises the re-transmission of programme material by means of a cable system, shall re-transmit, by those means—

(a) in case the cable system used by that holder is, in whole or in part, an analogue system, each free-to-air service of an analogue nature provided for the time being by the Authority, Teilifis na Gaeilge and the television programme service contractor and which that body or contractor requests the holder to so re-transmit,

(b) in case the cable system used by that holder is, in whole or in part, a digital system, each free-to-air service of a digital nature provided for the time being by the Authority, Teilifis na Gaeilge and the television programme service

contractor and which that body or contractor requests the holder to so re-transmit.

(6) The holder of a licence referred to in subsection (4), being a licence that authorises the re-transmission of programme material by the means of a MMD system, shall re-transmit, by those means—

(a) in case the MMD system used by that holder is, in whole or in part, an analogue system, each free-to-air service of an analogue nature provided for the time being by the television programme service contractor and which that contractor requests the holder to so re-transmit,

(b) in case the MMD system used by that holder is, in whole or in part, a digital system, each free-to-air service of a digital nature provided for the time being by the television programme service contractor and which that contractor requests the holder to so re-transmit.

(7) If a dispute arises between the holder of a licence referred to in subsection (4) and the Authority, Telifis na Gaeilge or the television programme service contractor in relation to the placement by the holder, relative to the placement by him or her of another broadcasting service, on the system concerned of a free-to-air service provided by that body or contractor, being a placement made on an analogue cable or MMD system for the purposes of the holder's complying with a request by that body or contractor under subsection (5)(a) or (6)(a), as the case may be, the dispute shall be referred to the Commission for its determination and the determination of the Commission in the matter shall be final.

(8) The holder of a licence referred to in subsection (4), being a licence that authorises the re-transmission of programme material by the means of a cable system, shall re-transmit, by those means, each national sound broadcasting service provided for the time being by the Authority and each sound broadcasting contractor and which the Authority or the contractor concerned requests the holder to so retransmit.

(9) The holder of a licence referred to in subsection (4) shall not impose a charge in relation to the making available to a person of any service referred to in subsection (5), (6) or (8) if he or she imposes a charge on that person in relation to the making available of any other service to that person by means of the cable or MMD system concerned.

(10) Subject to subsection (11), the Commission may require the holder of a licence referred to in subsection (1) to transmit as a broadcasting service, by means of the cable system or, as the case may be, the MMD system concerned, the whole or part of the programme material supplied under one or more specified community content contracts the holders of which are members of the local community that is served by the said system and who request the first mentioned holder to so transmit the whole or, as the case may be, a part of that programme material.

(11) Subsection (10) shall not apply if the system used by the holder of the licence concerned is an analogue MMD system.

(12) A person of whom a requirement is made by the Commission under subsection (10) shall comply with that requirement.

(13) The holder of a licence referred to in subsection (1) shall not impose a charge in relation to the making available to a person of any service referred to in subsection (10), pursuant to a requirement made of him or her under that subsection, if he or she imposes a charge on that person in relation to the making available of any other service to that person by means of the cable or MMD system concerned.

(14) In this section “re-transmission” means simultaneous, unaltered and unabridged transmission.

Section 38 Local Interest Channels

(1) Subject to subsection (2), the Commission may enter into a contract under this section with a person whereby that person may supply a compilation of programme material for the purposes of its being transmitted as a broadcasting service under and in accordance with a licence referred to in section 37(1), and such a contract shall be known as a “provision of local content contract” and is in this Act referred to as a “local content contract”.

(2) The Commission shall not enter into such a contract unless it is satisfied that—

(a) either—

(i) the programme material to be supplied pursuant to the contract will be made by the person with whom it proposes to enter into that contract, or

(ii) the making of that programme material will be commissioned by that person, and

(b) a substantial proportion of that programme material will be made in the locality which the cable or MMD system, the subject of the licence concerned referred to in subsection (1), serves or will be of such a character as is likely to make it of special interest to persons living in that locality.

(3) Without prejudice to subsection (4), a local content contract shall include a condition requiring the holder of the contract to comply, in relation to the programme material supplied in pursuance of the contract, with such guidelines as the Commission may from time to time issue for the purposes of this section with respect to the general character of the programme material that may be supplied in pursuance of local content contracts.

(4) A local content contract shall include a condition requiring the holder of the contract to comply with the codes and rules under section 19 with respect to the programme material supplied in pursuance of the contract.

(5) A local content contract may include one or more of the following conditions, namely—

(a) a condition requiring the holder of the contract not to include in the programme material supplied in pursuance of the contract a specified class or specified classes of advertisement,

(b) a condition requiring the said holder to ensure, as respects that programme material, that a specified proportion of that material supplied for the time being constitutes material that has been made within a specified period ending immediately before that time,

(c) a condition requiring the said holder to ensure, as respects that programme material, that a specified proportion of the financial resources for the time being used for the purpose of funding the provision of that material is used for the purpose of funding the provision of programme material that has been made within a specified period ending immediately before that time.

(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 be used 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 39 Community Channels

(1) Subject to the provisions of this section, 2 or more members of a local community may supply a compilation of programme material for the purposes of its being transmitted as a broadcasting service under and in accordance with a licence referred to in section 37(1).

(2) Subject to subsections (3) and (4), the Commission may enter into a contract with 2 or more members of a local community whereby those members may supply a compilation of programme material for the purposes referred to in subsection (1) if it is satisfied that—

(a) those members are representative of the community concerned,

(b) the supply of programme material in pursuance of the contract will be effected with the sole objective of—

(i) specifically addressing the interests of the community concerned,
and

(ii) achieving a monetary reward of no greater amount than is reasonably necessary to defray the expenses that will be incurred in effecting that supply, and

(c) there is a reasonable prospect that all such expenses as are likely to be incurred during the period of the contract will be defrayed, and such a contract shall be known as a ‘‘provision of community content contract’’ and is in this Act referred to as a ‘‘community content contract’’.

(3) The Commission shall not enter into a community content contract save after consultation with the person who it appears to the Commission will transmit or, as the case may be, will be the subject of a requirement under section 37(10) to transmit, the programme material supplied pursuant to the contract as a broadcasting service.

(4) The Commission shall establish procedures whereby members of local communities are enabled, at regular intervals, to make submissions to the Commission as to what particular contracts ought, in their opinion, to be entered into under this section and what particular terms and conditions ought, in their opinion, to be included in such contracts and requiring the Commission to furnish, on request, to any such members particulars of any proposals formulated, for the time being, by the Commission itself with regard to each of those matters.

(5) Before entering into a community content contract, the Commission shall have regard to any submissions made to it under and in accordance with procedures established under subsection (4) and which appear to it to be of relevance to that contract.

(6) The Commission shall conduct, or arrange with members of the local community concerned for there to be conducted, a survey, which shall be as comprehensive as is practicable, amongst members of that community for the purpose of ascertaining—

(a) the extent to which that community is facilitated in the active participation by it in the compilation and transmission of the programme material supplied pursuant to a community content contract,

(b) the extent to which those members view any broadcasting service on which there is transmitted that programme material, and

(c) the opinion of those members with regard to—

(i) the quality of that programme material, and

(ii) whether that material specifically addresses the interests of their community, and shall have regard to the results of such a survey in deciding, in relation to any community content contract it proposes to enter into with members of that community next after the conduct of that survey, with whom it shall enter into such a contract and the nature of the terms and conditions it may include in that contract.

(7) For the avoidance of doubt, if the holder of a licence referred to in subsection (1) of section 37 is required under subsection (10) of that section to transmit as a broadcasting service the programme material supplied pursuant to a community content contract, he or she shall not be—

(a) under any duty to ensure that the material complies with the terms and conditions of that contract or the enactments that apply in respect of the supply of the material by virtue of section 18,

(b) regarded, for the purposes of the law of defamation, malicious falsehood or any other form of civil liability as having, by virtue of such transmission, published the material, or

(c) liable in damages, by virtue of such transmission, for any infringement of copyright, other intellectual property rights or other legal rights of any person.

(8) In this section “local community” means the community of a town or other urban or rural area.

Section 40 Assessment of Community Needs in respect of Broadcasting

The Commission may, on its own initiative or at the request of a community group or organisation, carry out an assessment of the needs of a community in respect of broadcasting and such an assessment shall include an ascertainment of the extent to which production facilities, training and resources are available to the community to enable the community to best serve its interests in respect of those needs.

Section 41 Commercial Cable and MMD System Channels

(1) Without prejudice to the means under section 38 or 39 that may enable him or her to make such a supply, a person may supply a compilation of programme material for the purpose of its being transmitted as a broadcasting service by means of a cable or MMD system, the subject of a licence referred to in section 37(1), under and in accordance with a contract entered into by him or her with the Commission under this section, which contract shall be known as “a provision of content (cable-MMD) contract” and is in this Act referred to as a “cable-MMD content contract”.

(2) The Commission may enter into a cable-MMD content contract with a person if, but only if, it is satisfied that the entering into that contract will result in the range and diversity of broadcasting services available in the relevant area being increased.

(3) In subsection (2) “relevant area” means the area served by the cable or MMD system by which it is proposed that the programme material concerned will be transmitted as a broadcasting service.

(4) Subject to subsection (5) but without prejudice to subsection (6), a cable-MMD content contract shall, where appropriate, include a condition that, as respects the programme material supplied pursuant to it, the provisions of the Council Directive in relation to European works (within the meaning of that Directive) shall be complied with.

(5) Subsection (4) shall not apply in relation to a cable-MMD content contract the programme material supplied pursuant to which does not contain any advertisements that are to be broadcast in return for payment or for similar consideration.

(6) A cable-MMD content contract shall include the same kind of conditions as subsections (4) and (5) of section 12 provide that a digital content contract shall include.