

# *Ownership & Control*

## *Policy Statement*



Broadcasting Commission of Ireland  
Coimisiún Craolacháin na hÉireann

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### *INTRODUCTION*

The Radio and Television Act 1988 requires the BCI to formulate and apply a policy that takes account of plurality of ownership and diversity of content in broadcasting. The Broadcasting Act 2001, which makes provision for the introduction of a host of new analogue and digital radio and television services, also addresses the issue of diversity of sources and of content, in the interests of listeners and viewers.

Following the Commission's announcement of its strategy for future licensing in the first half of 2000, it was decided that the question of the Commission's ownership and control policy was appropriate for review. Initial consideration of the matter was addressed at the Commission's policy meeting in November 2000 with a more detailed analysis prepared for the subsequent meeting in April 2001. It was decided at that point to undertake a comprehensive review of the policy on ownership and control. The timing of the review was designed to coincide with the beginning of the second phase in the development of commercial broadcasting in Ireland under the 1988 Act, and with the introduction of new broadcasting services under the Broadcasting Act 2001.

Following the implementation of a wide-ranging consultation process with the broadcasting sector and the public, the Commission has now decided that it is appropriate to develop the existing policy in a number of respects to address the characteristics and needs of a sector that is rapidly evolving and expanding in response to technological, social and economic change. The Commission'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.

The Commission's revised policy is divided into four sections as follows: -

1. [Guiding Regulatory Principles](#)
2. [Legislative Framework,](#)
3. [Policy Objectives, and](#)
4. [Policy Details.](#)

## **1. Guiding Regulatory Principles**

The principles set out in this section are those that the Commission considers important in formulating and implementing its regulatory policy into the future. 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.

### ***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 or self-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.

## **2. Legislative Framework for Ownership and Control Policy**

### *Introduction*

The framework for the Commission's Ownership and Control Policy is set out in Sections 6 and 14 of the Radio and Television Act 1988. The Broadcasting Act 2001, while more concerned with diversity of content, also includes a number of provisions relevant to ownership and control matters at Sections 11, 38 and 41. The relevant sections of each Act are set out hereunder

### **Radio and Television Act 1988**

The relevant sections of the 1988 Act are sections 6(2) and 14(2).

#### ***Section 6 (2) - Criteria for consideration when awarding a contract***

Section 6 (2) requires the IRTC, in awarding a contract, to have regard to

**(a)** the character of the applicant ... the character of the body and its directors, manager, secretary or other similar officer ..."

**(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;

**(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 a notice under Section 5 (5)

#### ***Section 14 (2) - Assignment or change of ownership***

Section 14 (2) concerns the assignment of a contract or any interest therein. In essence, it empowers the Commission 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 Commission, in which case the Commission shall have regard to the criteria set out in section 6 (2) and, where applicable s.6 (3)\* .

*\*This relates to the awarding of contracts for the provision of services in areas which include Gaeltacht areas.*

## **Broadcasting Act 2001**

The relevant sections of the 2001 Act are Sections 11(2), 38(6), 41(4) and 60

### **Section 11 (2) - General obligation in relation to numbers and categories of services**

Section 11 (2) puts an onus on the BCI to ensure that the number and categories of broadcasting services made available

"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" (s.11.2).

### **Section 38 (6) - Local Content Contracts**

With regard to local content contracts, the Act (s.38 (6)) carries over the requirement for the Commission to 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.

For that purpose, the Commission may require (s.38 (7)) the person(s) concerned to supply information with respect to the extent 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.

If the person fails to comply, the Commission shall not enter into a local content contract with him or her.

### **Section 41 (4) - Cable and MMD Content Contracts**

In addition, section 41(4) states that the Commission may enter into a cable-MMD content contract with a person if, but only if, it is satisfied that the entering into the contract

"will result in the range and diversity of broadcasting services available in the relevant area being increased".

## **Section 60 - Amendment to Section 6 of 1988 Act**

Section 60 of the 2001 Act amends s.6 of the Radio and Television Act 1988 by inserting additional subsections after subsection 3. These new provisions require the Commission in considering the suitability of an applicant for the award of a sound broadcasting contract to have regard to "the overall quality of the performance of the applicant" with respect to any sound broadcasting service already provided by him under a sound broadcasting contract (s.6(4)). The Commission is also required to give reasons where it decides to refuse to award a sound broadcasting contract to an applicant (s.6 (5)).

### **Overall Goal of Statutory Provisions**

The principles and objectives underlying the statutory provisions are therefore clear. The overall goal of the provisions of the 1988 Act is to ensure a viable, sustainable industry, characterised by plurality of ownership, which will deliver diversity of content to listeners and viewers. The provisions of the 2001 Act concentrate principally on diversity of content and ensuring that a range of services and information sources, which directly reflect their needs, are available to Irish audiences. The precise methods of achieving those objectives, however, are not set out in the legislation but are left to the Commission to determine as a matter of policy.

### **Commission's Approach to Implementation of Statutory Provisions**

The Commission takes the view that it is necessary, in accordance with the legislative provisions, to have a policy on ownership and control. Both Acts list certain factors to which the BCI is to have regard and thereby require the Commission to focus on issues that will affect diversity, both within the broadcasting sector and within each specified (franchise) area. The Commission is obliged by the legislation to cover all radio and television services, but is entitled to take account of the differences between existing and new services and between radio and television services (in terms of different market conditions, cost factors and expertise), and between services which are guaranteed access and those that are not.

### *3. Policy Objectives*

The policy objectives set out here emanate from careful consideration of the various issues and concerns addressed by the statutory provisions, from the Commission's own experience in regulating the broadcasting sector to date and from the wide-ranging consultation process entered into with the sector. They provide a benchmark and overall context in which the Commission will develop, implement and assess ownership and control measures and will respond to new issues emerging in relation to licence applications and to changes in ownership and control structures applying to existing services.

The policy objectives are 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.

## 4. Policy Details

The legislation under which the Commission operates requires it to have regard to certain specified issues that may affect diversity. In order to meet its statutory obligations, the Commission first needs to interpret the terms used and then to adopt decision-making criteria to give effect to them in practice. The policy details therefore, are divided into three sections:

- Definition of Statutory Terms
- Decision-making Framework
- Other Policy Details

The Commission would also point out that the policy details relate to commercial broadcasting services only – the Commission has separate ownership policies in respect of institutional and community services.

### i) Definition of Statutory Terms

The Commission will give effect to the statutory terms as follows:

**"Control"** – is in a position proprietorially, 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.

**"Substantial interests in"** - 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 (companies) with regard to programme output, that is, sourcing, production, supply or delivery to the audience.

**"Communications Media"** – includes all broadcasting services (including sound broadcasting services) in the State or the publication of any newspaper, magazine or journal in the State.

The Commission will not differentiate between whether an applicant has 'control' or 'substantial interests' when making a determination under Sections 6 (2)(g) and (h) of the 1988 Act. The application of these sections is set out hereunder.

### **Section 6 (2)(g) - "An undue number of sound broadcasting services licensed under the 1988 Act"**

The Commission has taken the view that, in order to provide guidance for applicants and a degree of certainty for the sector, it would be preferable to set minimum and upper limits, in respect of what the Commission considers an "undue number". This is designed to ensure that a reasonable range and number of different voices be available to the public.

The Commission is of the view that a number equivalent to 15% or less of the total number of commercial sound broadcasting services licensed under the Act would

likely be an acceptable level for any one investor. A number equivalent to between 15% and 25% would require more careful consideration by the Commission and would be necessary for an applicant to justify. A number equivalent to over 25% would be unacceptable..

**Section 6(2)(h) - “an undue amount of communications media in a specified area”.**

The Commission is of the view that “undue amount” should mean “more than a reasonable share of the range of communications media available to audiences in the franchise area”. However, the Commission also takes the view that there is no obvious practical model for determining what constitutes “reasonable share” in all cases. The Commission will therefore consider each application on a case-by-case basis with particular reference to the circumstances i.e. the total communications media in the specified area.

The following criteria will be applied by the Commission in making its determination:

- An examination of the totality of the communications media in the area specified including, a different weighting to be given between national and local services.
- The application of a test of substitutability, i.e. in assessing the extent to which one communications media can be deemed to be a substitute for another, regard will be had to the characteristics of the communications media in question, the cost to the user and/or its target audience.
- An examination of the applicant’s ability to influence opinion-forming power, its dominance of the local advertising market and dominance of the market share of any communications media in which it held an interest.

Each applicant will be asked to justify its application in the context of all of the above criteria.

**ii) Decision-making Framework**

In light of the more complex environment of the future, the Commission recognises the need to adopt points of reference, levels and models for determining concentration and to have a structured policy in that regard, based on a clear identification of the different strands of convergence in the industry.

***Types of Concentration***

The Commission will consider applications in the context of the three recognised types of media integration: horizontal integration (ownership and capital integration on the part of companies operating in the same market (i.e. broadcasting companies), diagonal integration (ownership and capital integration among companies that do not belong to the same market and do not stand in a supplier-purchaser relationship, e.g.

among broadcasting companies and other media, such as print) and vertical integration (ownership and capital integration where a company combines with other companies, upstream or downstream in production or trading terms).

### ***Models for Determining Concentration***

The consultation document identified four models for measuring concentration which are used to varying degrees in different parts of Europe. The four models are: The audience share model (which determines the percentage of the total audience reached by programmes attributable to one company over a certain time period), the licence-holder share model (which limits the involvements that a company may have in different licence holders), the revenue share/frequency limitation model (which combines two thresholds, namely the share of programmes relative to the total frequencies available for commercial broadcasting and the revenue earned by one market player relative to the revenues earned in the market as a whole), and the capital share/broadcasting licence model (three separate criteria applied cumulatively, namely capital share limits in one broadcaster, number of licences, limits on capital shares in a number of broadcasters).

No one model is particularly appropriate to the Irish sector, given the various elements contained within the legislation. However, the Commission will apply the capital share/broadcasting licence model in the context of the number of licences and the limits on capital shares in a number of broadcasters. The audience share model will be applied as a measure for determining the undue amount of communications media in a specified area.

### **iii) Other Policy Details**

#### ***Local ethos***

There is considerable support within the broadcasting sector for the maintenance of a local ethos within licensed broadcasting services. The Commission also supports this view and includes the principle of local ethos as a key ownership and control policy objective.

The Commission does not regard local ownership as an essential element in the achievement of a local ethos. In considering whether an application for a licence or a change in ownership will satisfy the local ethos objective, the Commission will make its determination based on an analysis of the application from both an organisation and programming perspective. The following criteria will be applied:

- Is the general quality, range, type and schedule of programming to be provided on the service appropriate to listeners in the specified local area.
- Does the Programme Policy Statement of the service reflect sufficient commitment to:-

- (i) serving local communities and communities of interest within the specified local area.
  - (ii) the creation of new opportunities for Irish talent in music, drama and entertainment and
  - (iii) programmes relating to Irish language and culture.
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- Is the management structure of the company adequate and does the membership and make-up of the management team have sufficient experience and expertise to operate a service relevant to the specified local area.
  - Does the Board of the Company include sufficient personnel with the necessary experience, expertise and knowledge relevant to the specified local area.

### **Non-EU Applicants**

Non EU applicants will be required to have their place of residence or registered office within the EU or as otherwise required by EC law.

When considering such applications, the Commission will also have regard to the extent to which reciprocal arrangements for investment or licensing are in place with the relevant foreign state/s.

### **100% Ownership and Composition of Company**

The 1988 Act requires the Commission to have regard to the character of a company and its main personnel, as well as the expertise, experience, financial resources available to it and the good economic sense of its application.

The Commission has previously operated a maximum percentage holding in order to ensure compliance with these statutory provisions. However, in the light of the changing broadcasting environment, the Commission will consider allowing 100% ownership, where all the other criteria set out in its policy are met. It would be a matter for an applicant wishing to take 100% to make a case to the Commission that all of the safeguards necessary to ensure pluralism and diversity, as envisaged in the Commissions policy, are in place and will be met.

In considering the composition /structure of a company, the Commission will not differentiate between either an individual/family, or a private or public company subject to the aforementioned safeguards for pluralism and diversity being in place.

***Contractual Provisions in Relation to Assignment of Contracts and Alterations in the Ownership of Contractors***

The 1988 Act (s.14 (2)) addresses the assignment of a contract or any interest therein. In essence, it empowers the Commission 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 Commission, in which case the Commission shall have regard to the criteria set out in section 6(2) and, where applicable s.6 (3).

The Commission is conscious of the competitive nature of the licensing process for sound broadcasting services and is equally conscious of the resources dedicated to the preparation of applications by each applicant group. The Commission will generally look unfavourably upon proposed changes in ownership structures within a two-year period after the granting of a licence. The Commission takes the view that such changes are likely to undermine the integrity of the licensing process itself and be unfair to unsuccessful applicants. A term bringing this general principle into effect will be included in all future broadcasting contracts.