

Concentration and Ownership in Irish Broadcasting: Proposals for Reform

Kluwer Competition Law Blog
March 13, 2019

Paul K. Gorecki (The Economic and Social Research Institute, Trinity College Dublin)

Please refer to this post as: Paul K. Gorecki, 'Concentration and Ownership in Irish Broadcasting: Proposals for Reform', *Kluwer Competition Law Blog*, March 13, 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/03/13/concentration-and-ownership-in-irish-broadcasting-proposals-for-reform/>

Introduction

The Broadcasting Authority of Ireland (BAI) is an independent statutory body charged with certain key regulatory responsibilities in respect of broadcasting services, including licensing and approval of changes in ownership and control. The BAI is guided in making these decisions by its *Ownership and Control Policy* (the *Policy*). The *Policy* gives practical effect to the BAI's objective of promoting open and pluralistic broadcasting services. This, in turn, leads to a desire for plurality of ownership of broadcasting services.

In January 2019 the BAI concluded a public consultation on its draft proposed *Policy*, which was designed to amend and replace the current *Policy* dating from 2012. Important changes were proposed:

- in assessing *changes* in the ownership and control of broadcasting (i.e. television and commercial sound) service licenses the viability/sustainability of broadcasting services should be ranked second out of eight policy objectives. The other objectives relate to promoting a diversity of voices, upholding democratic values and serving audience needs; and,
- facilitating greater concentration of ownership of commercial sound broadcasting services (radio stations) through limited relaxation of the current ownership thresholds, expressed as a percentage of the *number* of radio stations owned and controlled by a single entity. The 25 per cent cap is retained. For the 20-25 per cent range compliance with existing license conditions is examined. However, the BAI no longer has to have regard to the Five Additional Factors which relate to issues of plurality, diversity and competition.

To assist its review of the *Policy* the BAI commissioned: research on the market structure, dynamics and development of the Irish media; and, a summary of the views of targeted stakeholders. The BAI also drew on its ownership and control of media businesses covering 2012-2014 and 2015-2017.

Viability/Sustainability of Broadcasting Services

It is vitally important that licensed broadcasters have the expertise and financial resources to be able to deliver the services for which they are contracted with the BAI. The issue becomes, of course, the best way for that to be secured. There are serious doubts, however, concerning the merits of adding the viability/sustainability objective with respect to changes in ownership and control.

First, it is not at all clear that there is a *sound rationale* for the inclusion of this objective. While the available evidence suggests the environment in which broadcasters are operating is challenging, the expert report commissioned by the BAI did not recommend inclusion of the viability/sustainability objective. Rather it made other suggestions. Furthermore the BAI itself remarks that the commercial radio sector is, for example, viable and sustainable.

Second, there is an element of *double counting*. At the present time when the BAI licenses a broadcaster, which could be up to 10 years, it already takes into account its financial resources and the extent to which the application accords with good business and economic principles. The BAI has, for example, under current legislation, to have regard to:

"the adequacy of the financial resources that will be available to each applicant and the extent to which the application accords with good business and economic principles."

In implementing these provisions with respect to commercial broadcasting the BAI shall have regard to the following:

"Does the applicant have available to it adequate financial resources and does its approach accord with good business and economic principles, having regard to the nature of the service proposed?"

Indeed, the BAI specifically state that *"good licensing processes are appropriately focused on ensuring that those granted licenses have in place financing and a business model that will ensure ongoing viability and sustainability of the particular service licensed."*

Third, there are issues concerning incentives. At the present time the ability of licensed broadcasters to provide licensed services is evaluated for their financial soundness at the point of licensing, i.e. on an ex ante basis. This creates the correct incentives for the licensed broadcaster to provide projections that are credible and reliable. What the BAI is arguing for in its proposed *Policy* is that there should also be ex post viability/sustainability considerations when there is a change in ownership and control of BAI-licensed broadcasting services. These arguments are redolent of those used by incumbents to prevent entry in a range of activities in Ireland including pubs and pharmacies. If licensed operators believe that overly optimistic forecasts in their initial license applications can be to some extent offset or given positive consideration at a later stage because of the viability and sustainability objective this is likely to complicate the BAI ex ante assessment.

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

"This policy provision takes account of the competitive nature of the licensing process for these contracts and the resources dedicated to the preparation of applications by each applicant group. The BAI believes this approach is desirable because a change in ownership within a two-year period would be likely to undermine the integrity of the licensing process itself and be unfair to unsuccessful applicants."

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

Fourth, there are questions with respect to implementation. The terms viability and sustainability are not defined, nor is any guidance provided as to how viability/sustainability - now the second ranked objective - is to be weighed in comparison to plurality, diversity and so on. Does, for example, viability mean that the broadcaster has to be a failing firm as understood in competition merger assessment?

Concentration of Sound Broadcasting Services

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

The Five Additional Factors are concerned with questions that go to the heart of the BAI's plurality and diversity remit. These tests take into account the degree to which the radio stations of the acquirer and target operate in the same or separate franchise area, market share measured by audience size, the extent to which the acquirer and target have the same target audience and the degree to which the acquirer and target *"represent concentration of the supply of news and information taking into account all communications media."*

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

Transparency & Accountability

Policy implementation and public understanding of the BAI's interpretation and administration of its *Policy* would be greatly enhanced by increased transparency. The BAI should consider not only publishing guidance in relation to terms such as viability and sustainability, the Five Additional Factors and so on, but also publishing reasoned decisions on applications for changes in ownership and control of broadcasting licenses.

Concluding Thought

Although Reporters Without Borders For Freedom of Information (RWB) in their 2018 World Press Freedom Index ranks Ireland 16th out of 180 countries, it nevertheless heads its commentary on Ireland, *'Unhealthy Concentration.'* RWB's justifies this heading by commenting that, *"The highly concentrated nature of media ownership in Ireland continues to pose a major threat to press freedom, and contributed to Ireland's two-place fall in the 2018 World Press Freedom Index."* Given these concerns and with little or no indication of a decline in such concentration, indeed, if anything the reverse is the case, gives pause for thought in terms of the BAI's proposals which privilege viability and sustainability and raise virtually no BAI-regulatory barriers to four as opposed to five entities, which may be individuals, owning all of the BAI-licensed commercial radio stations operating in Ireland.

Explanatory Note. This blog post is based on a Munich RePEc Archive paper: <https://mpra.ub.uni-muenchen.de/92606/>. The paper represents the author's views. The author was a member of the Competition Authority between 2000 and 2008 during which he had responsibility for merger review, including broadcasting mergers. (The Competition Authority, together with the National Consumer Agency, became the Competition and Consumer Protection Commission (CCPC) in 2014). Under the 2014 reform of the treatment of media mergers (a subset of which are broadcasting mergers), the CCPC conducts a competition assessment, the Minister for Communications, Climate Action and Environment a media plurality evaluation, while the BAI's appraisal of a broadcasting license transfer is guided by the *Policy*. All three bodies are required to approve the merger. This blog only deals with the BAI component. For further discussion of the overall media merger regime see Philip Andrews, Paul K Gorecki & David McFadden (2015) *Modern Irish Competition Law*. Netherlands: Wolters Kluwer, pp. 362-373.