

COMPETITION AUTHORITY RESPONSE**TO****THE IRTC'S CONSULTATION DOCUMENT
"REGULATING FOR PLURALISM AND DIVERSITY IN BROADCASTING –
THE WAY FORWARD."****I. Introduction**

1. This document provides the Competition Authority's reaction to the Independent Radio and Television Commission (the "IRTC")¹'s recently issued public consultation document "*Regulating for Pluralism and Diversity in Broadcasting – The Way Forward*" (the "Consultation Document").
2. The IRTC issued the Consultation Document in June 2001, as part of its review of current policy and practices on regulating the ownership and control of independent commercial broadcasting services. The media marketplace is becoming increasingly dynamic, with an expanding number of information outlets and media platforms. The Consultation Document is intended to engage public debate on the appropriate policy responses to take account of changes in the industry. The question now posed by the IRTC is the extent to which those market changes mandate revision of the IRTC's existing rules on ownership and control of independent television and radio broadcasters.
3. The Competition Authority (the "Authority") welcomes this opportunity to contribute to the debate. While the Authority recognises that the primary purpose of IRTC regulation of the independent broadcasting sector is to promote diversity of media ownership and broadcast content, it considers that the practical implementation of these aims should be strongly guided by the goal of promoting competition. Competition can play an important rôle in the fulfilment of the IRTC's public interest mandate, because it promotes consumer welfare and the efficient use of resources and is a necessary component of diversity. A market which is competitive, in the sense that there are many competitors vying for a share of the market, and that new entrants can emerge, is one in which diversity can flourish.
4. A critical question that the IRTC must confront in reviewing its existing regulation of the sector is whether current levels of competition in the market

¹ The IRTC is to be renamed the Broadcasting Commission following the putting into effect of the relevant provisions of the Broadcasting Act, 2001. Consistent with that institutions current title, however, the term IRTC is used throughout this document.

have eliminated the need for, or require relaxation of, some or all of the IRTC's existing rules. Or, in other words, whether the existing ownership and control rules remain necessary in the public interest as competition evolves.

5. Existing restrictions enforced by the IRTC can have potentially negative consequences for competition. Ownership restrictions, for instance, can hinder broadcasters from achieving economic efficiencies, and/or hinder the emergence of new broadcasting ventures by existing broadcasters. Any determination on whether such restrictions remain necessary must be based on an examination of both competition and diversity issues in light of market conditions.
6. The IRTC's rules should ideally be based on the present and future characteristics of broadcasting, not on perceptions of the medium as it existed even five years ago. The publication of the Consultation Document is therefore timely and welcome. The Consultation Document does not, however, provide a detailed analysis of the current competitive structure of the broadcasting sector. Nor has the Authority had access to any such detailed analysis in formulating these comments.
7. In the absence of such information, the effects of the IRTC rules on the marketplace cannot be readily assessed. This limits any analysis of whether changes to those rules would produce positive or negative results. Nevertheless, the present consultation process has the potential to result in a forward-looking regime that provides increased flexibility and clarity and promotes the competitive process, while still avoiding the dangers of undue concentration of ownership of vital sources of news and information.
8. While it does appear likely that the world-wide trend towards increased ownership concentration among media companies will be replicated in Ireland, at this stage of market development, it is difficult to discern trends or patterns, which could readily be relied upon to guide the IRTC in amending its rules. Accordingly, the IRTC should continue to monitor consolidation and content diversity and gather information regarding the overall impact on competition and diversity. This information can then provide the basis to make a more informed estimation of the continued need to maintain in place existing IRTC regulation.
9. This document may be made publicly available.

II. Background

10. In carrying out the functions conferred on it, the IRTC is obliged to “ ... endeavour to ensure that the number and categories of broadcasting services made available in the State ... 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.” (The Broadcasting Act, 2001, Section 11(2).)
11. The Radio and Television Act, 1988 provides a list of criteria that the IRTC must have regard to in considering applications for what are termed “sound broadcasting contracts” in that Act (*i.e.*, radio broadcasting authorisations). Among other factors, the Radio and Television Act permits the IRTC to consider:
 - (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;
 - (c) the quality, range and type of the programmes proposed to be provided by each applicant ... ;
 - (d) the quantity, quality, range and type of programmes in the Irish language and the extent of programmes relating to Irish culture proposed to be provided;
 - (e) the extent to which the applicant will create within the proposed sound broadcasting service new opportunities for Irish talent in music, drama and entertainment;
 - (f) the desirability of having a diversity of services in the area specified in the notice under section 5 (5) catering for a wide range of tastes including those of minority interests.
 - (g) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under this Act;
 - (h) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area specified

12. The Radio and Television Act, 1988 also permits the IRTC to include in sound broadcasting contracts “ ... such terms and conditions as the Commission thinks appropriate and specifies in the contract” (the Radio and Television Act, 1988, Section 14(1)). Indeed, the Act explicitly states that sound broadcasting contracts may include “ ... a condition prohibiting the assignment of the contract or of any interest therein.”
13. Further, the Broadcasting Act, 2001, explicitly allows the IRTC (to be called the Broadcasting Commission following the putting into effect of the Broadcasting Act), to take the following criteria into account when deciding on the award of what are termed “local content contracts” in that Act:
 - (i) 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.
 - (ii) The desirability of promoting diversity in the sources of information available to the public and in the opinions expressed in the communications media.
14. According to the IRTC, “[t]he principles and objectives underlying [these] statutory provisions are ... to ensure a viable, sustainable industry, characterised by plurality of ownership, which will deliver diversity of content to listeners and viewers.” While, the method of achieving those objectives is not set out in statute, the IRTC contends that these statutory provisions provide a legal mandate for it to regulate both the control and ownership of broadcasters within its scope of jurisdiction.
15. The IRTC policy analysis on this front focuses upon the degree to which broadcast and non-broadcast media advance three types of diversity (*i.e.*, diversity in viewpoint, output and source). Viewpoint diversity refers to the range of diverse and antagonistic opinions and interpretations presented by the media. Outlet diversity refers to the variety of delivery services (*e.g.*, broadcast stations and cable) that select and present programming directly to the public. Source diversity refers to the variety of program or information producers and owners.
16. The two key policy objectives of any restrictions on ownership of broadcasting and non-broadcasting media are (i) to promote diversification of ownership, which in turn is geared towards maximising diversification of program and service viewpoint and (ii) to prevent any undue concentration of economic power contrary to the public interest.

17. According to the Consultation Document, we are now at “... the beginning of the second phase in the development of independent broadcasting in Ireland.” That “second phase” is heralded, in particular, by the IRTC’s plans to grant additional broadcasting contracts “in the near future.” The inauguration of the “second phase” also coincides with the passing of the Broadcasting Act, 2001, which provides a new framework for broadcasting in Ireland, particularly digital broadcasting.
18. In what the Consultation Document terms the “start-up” period (*i.e.*, the period leading up to the policy reform initiative launched by the IRTC), the IRTC acknowledges taking a “restrictive” approach in regulating the independent broadcasting industry. In particular, the IRTC pursued the goal of ensuring plurality of ownership in local areas “with conviction.” This approach led to, for instance, the adoption of a 25% ceiling, later raised to 27%, on the share that newspapers could have in a local radio station. Further, the Consultation Document states that the policy to date “... to determine an “undue number” of communications media in the area specified, [has been to] restrict the number of sound broadcasting licenses that can be held.”

III. Definitional Issues

19. The Consultation Document invites views as to the suitability of certain proposed definitions for the following statutory terms: “control,” “substantial interests,” “an undue number of sound broadcasting services,” “an undue amount of communications media in the area specified,” and “communications media.” As the Consultation Document demonstrates, these critical definitional issues affect the practical implementation of the IRTC rules.

“Control”

20. It may be useful for the IRTC to be aware of the definitions of “control” used in Irish and European merger legislation. The Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended, uses the following definition (Section 1(3)):

(b) Enterprises shall be deemed to be under common control if the decision as to how or by whom each shall be managed can be made either by the same person, or by the same group of persons acting in concert.

(c) Without prejudice to paragraph (b), where an enterprise (in this paragraph referred to as ‘the first enterprise’), whether by means of

acquisition or otherwise, obtains the right in another enterprise (in this paragraph referred to as 'the second enterprise') which is a body corporate-

- (i) to appoint or remove a majority of the board or committee of management of the second enterprise, or*
- (ii) to shares of the second enterprise which carry voting rights, except where the voting rights in the second enterprise which are controlled by the first enterprise-*
 - (I) are not after the acquisition more than 25 per cent of the total of such voting rights, or*
 - (II) are before the acquisition more than one half of the total of such voting rights,**the said enterprises shall be deemed to have been brought under common control.*

21. The following definition of control is used in the EC Merger Control Regulation:

- (i) Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:*
 - i. ownership or the right to use all or part of the assets of an undertaking;*
 - ii. rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*
- (ii) Control is acquired by persons or undertakings which:*
 - i. are holders of the rights or are entitled to rights under the contracts concerned; or*
 - ii. while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.*

“Substantial interest”

22. The underlying purpose of the statutory provision granting the IRTC power to regulate not just acquisitions resulting in a change of control, but also

transactions that involve one or more entities gaining a “substantial interest” in a media firm, is to ensure that diversity considerations are not undermined where common holdings, but not necessarily common control, result in one person having the power to influence programming or viewpoints of two or more media companies. It may be unrealistic to expect true diversity from commonly held media companies, especially where that common holding allows the holding entity to influence the output of each affiliate.

23. This being the case, the more appropriate interpretation to be put on “substantial interest” of those proposed in the Consultation Document is the IRTC’s third proposed interpretation, *i.e.*, that the person “ ... has sufficient proprietary or voting strength within a relevant company or companies to be able to influence directly the policy of the company (companies) with regard to programme output, that is, sourcing, production, supply or delivery to the audience.”
24. An alternative interpretation, and one which is currently followed by the U.S. Federal Communications Commission would be “ ... those interests in or relationships to communications media that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core functions.²” This definition is sufficiently broad to encompass a situation where one shareholder may have a degree of interest falling short of outright control, but where the other shareholdings are small and scattered and their owners may be silent or be led by the shareholder with the largest interest.

“An undue number of sound broadcasting services”

25. Again, the primary purpose of this “multiple ownership / multiple interest” rule is to protect diversity of programming and viewpoints. It is not unreasonable to suggest that radio ownership concentration could have an adverse influence over the expression of viewpoint diversity and the level of news coverage within radio markets.
26. What may constitute unwanted control of “an undue number of sound broadcasting services” is a matter that, from a diversity perspective, the IRTC is better positioned than the Authority to address. At the same time, rigorous enforcement of this rule, without regard to the actual circumstances of the particular market, could damage the competitive process, in a manner disproportionate to the diversity concerns. In particular, such enforcement could stifle capital flows in the industry – for instance, by preventing

² *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986); *Notice of Proposed Rule Making* in MM Docket Nos. 94 – 150 *et al.*, 10 FCC Rcd 3606, 3614 (1995).

investment in stations with a small market share or where there is a sufficiently large number of stations to ensure diversity. The IRTC might implement, on a case-by-case or market-by-market basis, a careful analysis of the competitive structure of the market in advance of its determination on whether to apply this rule. The Authority would be happy to assist the IRTC in carrying out such an assessment.

“An undue amount of communications media in the area specified”

-- *An undue amount*

27. The comments provided immediately above in relation to an “undue number” of sound broadcasting services, apply equally to considerations of the IRTC in determining an “undue number” of communications media.

-- *In the area specified*

28. One of the most critical issues impacting the IRTC rules will be the assessment of the market within which the application of those rules must, on a case-by-case basis, be assessed.
29. Accordingly, it is critical that the means of defining markets (for instance, local radio markets), and the methods of determining the total number or “amount” of stations in those markets, as well as the number owned by a particular party in a market be clearly and objectively established. These rules should be publicly available, easy to apply, provide certainty for entities contemplating acquisitions, and result in a rational and consistent application of the IRTC’s control and ownership rules. Some further considerations on market definition are given in paragraphs 63 to 68 of this paper. The Authority’s Discussion Paper No. 11, “Market Definition and Market Power in Competition Analysis: Some Practical Issues” (available on our website at www.tca.ie), provides an overview of the approach to market definition taken in competition law and economics; the Authority’s Decision No. 489, “Category Certificate in respect of Agreements involving a Merger or Sale of Business” (also available on our website) also deals with related issues from a competition perspective. The European Commission has issued a “Notice on the Definition of Relevant Market for the Purposes of Community Competition Law” (OJ [1997] C 372/5) which may provide useful guidance.

“Communications media”

30. “Communications media” is proposed to mean “ ... all broadcasting, print and electronic media, however transmitted, in the area specified, or, in accordance with section 38(7) of the Broadcasting Act 2001, all broadcasting services (including sound broadcasting services) in the State or the publication of any newspaper of any newspaper, magazine or journal in the State.”
31. The broad scope of this definition might imply that any company that has an interest, no matter how limited, in the specified businesses (broadcasting, print and electronic media), would be considered to be engaged in "communications media." Indeed, it could potentially be argued that such a definition could include companies involved in evolving electronic-broadcasting services, including those provided over the Internet or via mobile phones. Such an overly-broad approach might go beyond the intended reach and purpose of the broadcasting legislation establishing the IRTC.

IV. Ownership Issues at the Local Level

Restrictions on Overlapping Ownership in Local Markets

32. Ownership diversity of local radio stations as well as other media forms can promote both competition and diversity of content and viewpoints simultaneously. The Authority understands that this is a central goal of the IRTC in regulating local markets.
33. From a competition and from a diversity perspective, when two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owner by different entities, so that they compete with each other, for the same audience and advertisers, rather than acting in concert, as stations under the control of a single person or group would. Similar observations apply equally to cross ownership of local radio and other local media assets, such as, for instance, local newspapers and/or local television stations. Further, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an undue effect, in a political, editorial, or similar programming sense, on public opinion at the regional level. It must be recognised, however, that the position of the incumbent broadcaster means that most markets in Ireland are highly concentrated, regardless of how ownership is distributed in the private sector.

34. By the same token, however, ownership rules may represent a serious impediment to market forces and competition. In particular, restrictions on ownership may prevent consolidation, which can produce economic gains that reflect improved economies of scale, in terms of operating cost reductions and the improved quality and quantities of radio services offered (On the other hand, there may be other ways in which scale economies can be realised, for instance by joint production). Economies of scope may also arise through the combination of complementary outputs, for instance radio stations and newspapers.
35. As stated above, the determination as to whether ownership restrictions remain justified should be made in light of competitive market conditions in each local market. Towards this end, the means by which the IRTC defines local radio markets and the methods for calculating the total number of stations in each market must be carefully scrutinised and justified.
36. A changed marketplace, with an increased number of broadcast stations, the introduction of new services and technologies, and the abundance of competition in local markets would provide compelling reasons to relax local ownership regulation.
37. A growth in the number of radio stations and increased competition from non-radio outlets such as cable and local television could result in a decline in growth in radio revenues, threatening radio's ability to serve the public interest. If this were to be the case, consolidation in the industry might be one way of allowing radio broadcasters to realise economies of scale and scope that would then generate greater programming investment and increase the collective competitiveness of radio and other media.

Daily Newspaper / Broadcast Cross-Ownership Rule

38. The IRTC's newspaper/broadcast cross-ownership rule rests on the twin goals of promoting diversity of viewpoints and promoting competition.
39. From a competition perspective, if different media form part of the same market for the purposes of competition law, permitting the owner of a broadcast TV or radio station to own a newspaper, or vice versa, could give a common owner *market power* – the ability to act without regard to competitors, customers or, ultimately, consumers, for instance by unilaterally raising local radio, television, and/or newspaper advertising rates. On the other hand, allowing newspapers to combine with local broadcast stations in order to realise the economies of joint operation could help them to preserve their newspaper (although newspapers, as well as radio stations, may be able to realise economies of scale in other ways, such as through chains of

newspapers operating in different regional markets). The easier it is for new competitors to enter the market, the less the concerns raised by concentration – if a new newspaper or a new radio station can be set up relatively simply and cheaply, it may be possible to sustain diversity while allowing some degree of cross-ownership.

40. On balance, it appears that this rule, because it favours diversity over competition considerations, could lead to distortions in the marketplace. In particular, where there is a single strong incumbent such as RTE, restricting consolidation which might lead to the emergence of a strong national competitor to the incumbent may restrict competition. There may be instances, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed. Accordingly, should the IRTC consider it necessary to retain the rule, it should be applied with reasonable caution, and that a transparent and non-discriminatory waiver policy be put in place to allow market conditions to be taken into account in the decision.
41. In particular, there may be good reason why the newspaper/broadcast cross-ownership rule should not apply where, for instance, the cross-ownership would only involve a newspaper and a small station (or *vice-versa*), there is already a high level of media diversity in the relevant market, the station is not a significant competitive force in the market, and the proposed combination is unlikely to have an adverse effect on media competition in the market.
42. Finally, the Authority considers that the newspaper/broadcast cross-ownership rule should only act to prohibit combinations in the same market. Again, this raises the important issue of how markets are to be defined for this purpose by the IRTC.

Radio – Television Cross Ownership Rule

43. The Authority understands that the IRTC currently restricts joint ownership of privately-owned radio and television stations in the same market, but is unaware whether it intends to restrict joint ownership of television stations in the same market. RTE, on the other hand, owns a number of both radio and television stations.
44. There may be efficiencies in joint ownership and operation of television stations in the same market and of radio-television combinations (such as, for instance, efficiencies generated from the ability to co-locate and share studio

facilities, as well as administrative and support staff)³. These efficiencies can in turn lead to cost savings, which can lead to programming and other service benefits that enhance public interest.

45. Accordingly, to the extent that restrictions on such structural changes are contemplated by the IRTC, these restrictions should be applied with reasonable caution. Also, it might be appropriate to provide for specific waivers to any such restrictions, in circumstances where the public interest benefits resulting from same-market common ownership outweigh the threat to diversity and localism. In other words, the system should recognise that there may be trade-offs between scale economies and diversity. Broadcasters and the public should be permitted to realise the benefits of common ownership where such common ownership does not undermine the IRTC's competition and diversity concerns.

Local Ownership of Local Broadcasters?

46. A key question raised in the Consultation Document is whether “... local ownership is a critical factor in the success of local radio and television programming or whether local programming objectives can be achieved in other ways.”
47. By “local ownership,” the Authority understands the IRTC to mean ownership of local radio and television stations by locals, thereby excluding “non-locals”. It may be difficult in practice to limit ownership of local stations exclusively to “locals” from within the broadcast range of that station. The Consultation Document does not give guidance as to how this rule would work in practice, in particular as to whether “locals” would need to be resident in the locality, or whether proof of birth within the locality would be required. Further, no guidance is given as to how corporations, which unlike individuals generally lack a local connection, may be considered under this rule.
48. We would suggest that the objective of ensuring local content, which local ownership seeks to achieve, could be met through more proportionate and less restrictive methods. It is possible that objections could be raised to such a scheme, on constitutional and other grounds. Some of the latter are discussed below.
49. First, such a rule would have a seriously adverse impact on competition and investment possibilities in a manner that could significantly disfavour less

³ See, for instance, Motta, Massimo and Polo, Michele: “Concentration and public policies in the broadcasting industry: the future of television”, *Economic Policy*, October 1997. See also United States Federal Communications Commission's Biennial Review Report of June 20, 2000 (FCC 00-191), at paragraph 34 and footnote 63.

developed or lower density regions. By restricting entry only to locals, or to consortia involving locals, broadcast quality may also suffer.

50. Second, the logic behind the proposal – essentially that locals are likely have a greater interest in providing content of local interest on local stations than non-locals – appears questionable. The primary aim of any owner (whether "local" or otherwise) of a commercial radio station will be to capture audience interest (in many cases, that of a specific target audience based on disposable income), increase listenership, and thereby increase advertising revenues. Critical to this aim, will be the content (including local news and entertainment) provided by the radio station. In order to survive in local (effectively niche) markets, that content will need to be clearly distinguishable in local flavour from its nearest competitors, and from the national incumbent. In other words, there may well be a commercial incentive for owners of local radio stations to specifically target local audiences with local content, notwithstanding the place of origins or residence of the owner. If this is the case, then the objective of local content may, in fact, be met through the market mechanism, and regulation may not be necessary.
51. Third, there appears a far less restrictive and yet equally effective means by which the IRTC can promote local radio and television programming. Indeed, at least as regards local content contracts for television broadcasting, the IRTC is empowered to stipulate “ ... the general character of the programme material that may be supplied in pursuance of local content contracts” (Broadcasting Act, 2001, Section 38(3)). Further, in awarding radio station contracts, the IRTC may take into account the extent to which the application “serves recognisably local communities” (Radio and Television Act, 1988, Section 6(i)(i)). Based on these provisions, there is statutory authority for the IRTC to regulate the local content of both radio and television local broadcasters. Such an approach, while still restrictive, represents a more justifiable and less intrusive restriction, and one that may have considerably less anti-competitive affects than the local ownership rule. Moreover, it is more closely targeted on the IRTC’s objectives than a rule aimed at ensuring local content through local ownership.
52. Finally, the proposed approach (*i.e.*, permitting only locals or consortia involving locals to own local radio and television stations) could run counter to the IRTC’s stated policy of promoting diversity in ownership of radio stations as well as in their content.

V. Guiding Principles

53. The Authority understands that the ultimate objectives of the IRTC’s ownership and control rules are to promote diversity and to foster

competition. Nevertheless, sector specific regulation, such as that currently being discussed by the IRTC, can, if used without care, represent an intrusive intervention in market mechanisms and thereby limiting investment incentives. As a guiding principle, we would therefore propose that ownership and control rules should be used with caution and be reduced in scope as competition grows.

54. The Authority also considers that any use of licensing or any regulatory limitation on market entry represents a potential barrier to the provision of services, to investment and to fair competition and should therefore be limited to justified cases. In particular, the outright refusal to license or otherwise authorise an operator that already benefits from an authorisation could, depending on the market circumstances, be a disproportionate restriction on competition. This again points to the need for a system of regulation which is flexible enough to take account of market circumstances on a case-by-case basis.
55. Finally, in relation to the proposed guiding principle on co-regulation or self-regulation, media industry self-regulation may have competition implications. While self-regulation initiatives can often be pro-competitive, they can also in certain circumstances harm the competitive process by denying consumers the full range of choices or by preventing new forms of competition from emerging. In short, co-regulation and self-regulation should not invite collusion. The Authority would be happy to work with the IRTC and industry groups to develop self-regulatory initiatives that do not unnecessarily restrict competition in the market.

VI. Media Integration

56. There may be a positive correlation between a station's ownership and its editorial viewpoint. A key question, not fully addressed in the Consultation Document, is whether the IRTC has discerned that radio ownership concentration has had a significant influence over the expression of viewpoint diversity and the level of news coverage within local markets.
57. Nevertheless, diversity of ownership should generally foster diversity of viewpoints. This being the case, it follows that promoting diversity in the number of separately owned broadcasting agencies will contribute to a goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers.
58. Unchecked concentration of media ownership, on the other hand, could mean that the overlapping ownerships act to discourage diversity of programming and viewpoints among the commonly owned broadcasters. Structural changes

taking place in the marketplace, such as merger and take-over activity may therefore raise both competition issues and specific concerns relating to the diversity of media ownership. This emphasises the fact that there is a close correlation between the two.

59. Competition rules, and particularly applicable merger control rules, can and do currently regulate mergers, acquisitions and joint ventures in the media sector. These merger rules, which apply to all media transactions involving a change of control, are geared towards preventing the emergence or enhancement of dominant positions in the market.
60. The Consultation Document invites views as to the appropriate means by which the IRTC should measure and check media concentration.

Measuring Media Markets

61. A critical policy issue to be addressed in measuring media concentration is whether the IRTC should focus on the number of independent “voices” (or broadcasters) remaining in the market post-merger, or on the market rank of those remaining in the market (the “audience share model”). Where there are a minimum number of independent sources of news and information available to listeners and viewers, and a minimum number of alternative outlets available to advertisers, and as long as new entry is feasible, a rule based on the number of independent voices may accurately reflect the actual level of diversity in the market. It will also take account of changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets. Competition policy, on the other hand, as expressed through merger control and the Competition Acts’ prohibition on anti-competitive agreement, should be sufficient to address concerns about undue concentration and the emergence of dominant players on the market. There may be complementary roles for sectoral regulation, in ensuring diversity through the number of voices, and competition policy, in preventing undue concentration in terms of market share.
62. It may be that the IRTC should, in adjudicating on the effects of a planned acquisition by one media entity of another both of which are involved in overlapping markets, consider in its assessment of market concentration daily newspapers and cable systems. Such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets. Possibly, at some future date when penetration levels have increased, the types of media included as “voices” for competition and diversity purposes should be expanded to include the Internet.

63. A good starting point from which to define markets will be data collected by audience measuring services that are used by radio and television stations in deciding what programming should be aired, and by advertisers and stations in negotiating advertising rates – e.g. the Joint National Listenership Research (JNLR) survey undertaken each year by the Market Research Bureau of Ireland. The objective of the survey is to provide reliable estimates of audiences to both National and Local Radio, as a basis for the planning of advertising schedules and as a guide to programme planning in each radio station.
64. The Authority notes on this front that the U.S. Federal Communications Commission (the FCC) has recently decided to commence defining the geographic scope of local media markets by what it terms “Nielsen Designated Market Areas” (“DMAs”).⁴
65. According to the FCC, there are several benefits to defining the geographic dimensions of the local television markets by reference to DMAs. Most importantly, unlike a rule relying on predicted field strength contours, DMAs reflect actual television viewing patterns and are widely used by the broadcasting industries. DMAs reflect the fact that a station’s audience reach, and hence its “local market,” is not necessarily co-extensive with the area of its broadcast signal coverage. For example, a station’s over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems. In designating DMAs and compiling DMA-based ratings of television programs, Nielsen Media Research, a broadcast audience measuring service, collects viewing/listening data from diaries placed in households four times a year.
66. An alternative approach in measuring geographic coverage is the “Area of Dominant Influence” (“ADI”), frequently used in the U.S. to define a television station’s geographic market according to audience viewing patterns.

Controlling Concentration / Cross-Interests

67. The Consultation Document asks whether caps on the percentage of cross ownership of media firms should be retained. The Authority understands that the IRTC currently implements a restriction on any type of media operator (defined broadly to include any and all types of print and broadcast media operators) acquiring more than a 27% interest in a sound broadcasting service. The Authority is unaware whether the IRTC intends this restriction to also apply to local TV stations. There is a concern that a too-rigorous application

⁴ Report and Order in MM Docket Nos. 91-221 & 87-8, 14 FCC Rcd 12903 (1999).

of this rule could have the unfortunate effect of stifling the flow of capital to broadcasters.

68. The effects of media cross-ownership will depend on the state of competition in the market concerned. Clearly, if a small, locally-owned regional newspaper were to purchase a radio station in another geographical area not served by the newspaper, the diversity concerns raised would not be the same as if the same newspaper were to buy a radio station within its own geographical market, or if a national newspaper were to buy into a national radio station.
69. Further, the Authority recommends that whatever cross interest policy is adopted by the IRTC, it should be clear enough to provide reasonable certainty and predictability to parties to allow transactions to be planned, and to ease application processing.
70. In recognition of the fact that there are potentially difficult trade-offs to be made between certainty and flexibility, we recommend that the IRTC provide for specific waivers to any such restrictions, in circumstances where the public interest benefits resulting from cross ownership and the resultant capital flows outweigh the threat to diversity and localism. Again, broadcasters and the public should be permitted to realise the benefits of common interests where such common interests do not undermine the IRTC's competition and diversity concerns.