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The logo for Matheson, featuring the word "Matheson" in a white serif font, underlined, set against a red rectangular background.

BAI Ownership and Control Consultation  
Broadcasting Authority of Ireland  
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**By Email [consultations@bai.ie](mailto:consultations@bai.ie)**

30 January 2019

Dear Sirs

## **Response to BAI Consultations on Media Plurality Policy and BAI Ownership and Control Policy**

Matheson welcomes the opportunity to comment on the draft versions of the Media Plurality Policy and Ownership and Control Policy, as published by the BAI on 11 December 2018.

Matheson is a market leader in providing legal advice to media companies based in Ireland and elsewhere. We have substantial experience in the provision of legal advice in the context of media merger transactions and advising on the Irish broadcasting framework.

We have the following comments:

- **Media plurality definition**

In general, Matheson welcomes moves to ensure that the approach to particular definitions by the Competition and Consumer Protection Commission ("**CCPC**") is followed also by the BAI. Our clients are consistently seeking to invest in well-regulated and predictable environments and the common approach to definitions plays an important role in this regard.

- **Ownership and control and substantial interests**

The BAI appears to be continuing to take a wide view of the meaning of "ownership" of a media business. The adoption of a definition of ownership of a media business to include the ability to review and take account of the ownership of shares in a media business which does not amount to actual ownership of a media business is confusing. We suggest that the BAI look again at its policy in this regard. It seems to us that arguably the key consideration for both sets of Policy documents is whether or not a person or undertaking has the ability to control a media business. This would be consistent with the CCPC's analysis under the

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- Tax Principals: Greg Lockhart, John Kelly, Catherine Galvin. - Tax Department Chair: John Ryan. - Of Counsel: Chris Quinn, Liam Quirke.

Competition Acts 2002-2014 and the EU Merger Regulation. There may be an argument that some categories of share ownership rights/some circumstances either taken alone or along with other considerations should be reviewed where such rights gives rise to a “material interest” in a media company, similar to UK media merger practice. However, such reviews should always take account of whether there is a genuine ability to influence, taking account of safeguards. Any other approach tends to lead to unpredictability and is likely to undermine the objectives of viability and sectoral sustainability.

When reviewing control in the context of plurality, the question should be whether there is an ability to *control the policy of a company with regard to programme output*. To the extent that there are meaningful safeguards in place to prevent such influence, then proper account should be taken on these measures, as in those circumstances, such control of the entity overall might not raise plurality issues.

We do not consider the guidance on when an interest is “substantial” in the draft Ownership and Control Policy to be compelling overall. We believe that the emphasis should be on the ability to influence to an appreciable extent the strategic direction of the entity as regards programme output (as explained in the core paragraph). We do not support the rough “rule of thumb” guidance as regards shareholdings of more than 10 per cent as shareholdings that “may be deemed to constitute a substantial interest” as helpful to the core paragraph and in our view, this paragraph merely tends to confuse.

- Objectives of the draft Policy on Media Plurality/how this will be supported by the BAI

We consider the four objectives outlined to be reasonable. In our view, the critical issue is how media plurality is supported in an effective and practical manner.

We welcome that account is taken of the severe revenue decline, strong online competition/e-substitution and threat to sustainability facing media companies. It is important to note that industry consolidation may be necessary to support investment and ultimately a more sustainable and vibrant future for industry players and the public audience alike.

- Objectives of the draft Ownership and Control Policy

We support the additional references in the objectives to viability and sectoral sustainability. We believe that the BAI may be overemphasising the importance of diversity of ownership when it might be better to focus on diversity of control.

There is a clear need for the BAI policy to adjust to take due account of the severe revenue decline, strong online competition/e-substitution and threat to sustainability facing licensed operators. The proposed increase to thresholds for ‘undue number’ of licenses represents a much needed first step towards a new order where there is acceptance by the BAI that industry consolidation may be necessary to support investment and ultimately a more sustainable media sector. We believe that the BAI should seriously consider raising the suggested thresholds further as even the suggested thresholds remain obstacles to commercial viability and sustainability.

We hope that the views expressed in this letter are of some assistance to the BAI in its review.

Yours faithfully

Sent by email, bears no signature

**MATHESON**