

Extract from Guidelines on Media Mergers May 2015

Contents

Section 2: Interpretation of Terms	2
Section 5: Application of the Relevant Criteria	3
5.1 Ownership and Control	3
5.2 Market Share.....	4
5.3 Governance and Editorial Management.....	4
5.4 Content	4
5.6 The scale and reach of RTÉ and TG4	5
5.7 Part 6 of the Act of 2009 and the ownership and control policy of the Broadcasting Authority of Ireland.....	6
5.8 Proposed Commitments	6

Section 2: Interpretation of Terms

All terms in these guidelines have the same meaning as defined in the Competition Act 2002 (as amended). The following supplementary definitions are provided for clarity and guidance with regard to these Guidelines.

'relevant media asset' means Holdings which constitute a significant interest in an undertaking (other than an undertaking party to the merger) that carries on a media business in a media sector(s) in the State, and which are held either by an undertaking party to the merger or by a natural or legal person with a significant interest in an undertaking party to the merger.

'media sector' means one of the following (and 'media sectors' means one or more of the following collectively):

1. Publishing – publication of newspapers or periodicals consisting substantially of news and comment on current affairs and the production of content for same.
2. Broadcasting – transmitting, re-transmitting or relaying a broadcast service including radio or television and the production of content for same.
3. Internet Media – making available on an electronic communications network any written, audio-visual or photographic material consisting substantially of news and comment on current affairs.

'significant interest' means Has sufficient voting, financial or ownership strength within the relevant media business or media businesses to influence directly or indirectly, to an appreciable extent, the direction or policy of the media business or media businesses with regard in particular to news, current 7 affairs or cultural content. This includes sourcing, production, supply or delivery of such content.

The following thresholds in relation to voting power at a general meeting of the media business, or the nominal value of the shareholding, are provided by way of guidance in terms of what constitutes a significant interest:

- A holding or voting strength of between 10% and 19% (directly or indirectly) may constitute a significant interest.
- A holding or voting strength of more than 20% or more of the voting power (directly or indirectly) will generally constitute a significant interest.

Near Relative - A person (being a natural person) is deemed, for the purposes of this definition to have a significant Interest in any media business in which his/her Near Relative has a significant interest. A near relative means

- (a) spouse, civil partner, cohabitant (within the meaning of section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 or any analogous legislation of another jurisdiction); and/or
- (b) child, stepchild, brother, sister, parent, or grandparent; or (where appropriate) the spouse, civil partner or such a cohabitant of any of the aforesaid.

'primarily news and comment on current affairs' The meaning of this phrase has not been altered in the new process and retains the same meaning as under the previous system administered by the Competition and Consumer Protection Commission.

'transmitting, re-transmitting or relaying' Have the same meaning as defined in the Broadcasting Act 2009

Section 5: Application of the Relevant Criteria

As part of the notification process media businesses will be required to complete the Media Merger Notification Form in full. Undertakings may also be required to submit additional information. This information will then be assessed under the Relevant Criteria headings as set out in Section 28A of the Act. The information will be evaluated under each of the headings below which comprise ownership and control; market share; governance; editorial ethos; content; sources and finance. Regard will be given to the presence of other media players in the relevant sector and across the State in this evaluation. Before coming to a determination the Minister will also have regard to the adequacy, if applicable, of the scale and reach of RTE and TG4, Part 6 of the Broadcasting Act of 2009 and the ownership and control policy of the BAI in protecting plurality should the merger proceed.

In addition the Minister will have regard to any proposed commitments offered by the undertakings and any impositions he wishes to impose. In accordance with Section 28D(1) the Minister will then issue a determination either to approve the merger, approve the merger with conditions or determine that the merger may be contrary to protection of plurality and direct the BAI to carry out a Phase 2 examination under Section 28E.

The Phase 2 examination will provide the Minister with a broader, more in-depth view than that achievable under the Phase 1 examination.

The objective of the Act is the pursuit of the public interest in the protection of media plurality in the state and in particular to prevent the diminution of this essential public interest by way of media merger and the concentration of the media, both in terms of ownership and content. To achieve this important objective the Minister will seek information on and have regard to the situation on a before and after the proposed merger basis. This will allow the Minister to assess the impact of the proposed merger on media plurality should the merger proceed.

5.1 Ownership and Control

Ownership and control represent primary indicators of media plurality in the state. The Minister will examine media businesses party to the proposed merger in relation to levels and structure of ownership and control.

The Minister will not only examine the ownership and control structure of the media businesses that are party to the merger but will also have regard to other relevant media assets.

This is essential as determinations on public interest and media plurality must be made across all media sectors. Individual holdings that may not appear pertinent can have a serious impact when considered collectively.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

5.2 Market Share

Market share is an important indicator of media pluralism in the State. As the market share of undertakings increases, pluralism may be affected. To achieve the objectives 23 of the legislation in protecting the plurality of media in the State the Minister will have regard to the market share of each of the media businesses party to the merger, and other relevant media assets. This will include, but is not necessarily limited to: readership, listenership and viewership demographics as relevant.

The Minister will engage in a complete examination to ensure that the market share is understood in its proper context in order to protect the public interest in maintaining a plural and diverse media. This may involve examining market share in relation to subgroups within the various sectors, such as gender, geographical areas, age profile and socio-economic groups, and specific interest groups.

The more sectors in which an individual or entity has a significant interest, the lower the threshold for it to be considered to have an adverse effect on plurality. The cross-media sectors for consideration are Television, Radio, Print Media, Internet, other media interests.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

5.3 Governance and Editorial Management

Governance structures and editorial ethos in media businesses may have a significant impact on the independence of media businesses and thus media plurality in the State. The Minister will examine the governance structure of parties to a proposed merger and other relevant media assets, and their future plans for the proposed merged entity. Higher levels of consolidation of management structure of the parties to the proposed merger may adversely affect media pluralism in the State.

The Minister will also have regard to the levels of control and influence exercised by the management structure of the media business on the editorial function, and the nature and level of editorial accountability to corporate management and particularly to shareholders.

Consistent or declared editorial positions as well as stated political, or cultural allegiances expressed by media businesses party to the merger and any relevant media 24 assets, may be viewed in pursuance of the objectives of the legislation in protecting the public interest in maintaining the plurality and diversity of media in the State.

For a comprehensive list of information required under this section please refer to Media Merger Notification Form.

5.4 Content

Diversity of content is an essential component of the plurality of the media in the State. Diversity of content can be measured in a number of ways that are not mutually exclusive. 'Internal diversity' may be evident in, for example, the nature of particular media content and sourcing methods of media organisations. 'External diversity' may be evident in the range of public, private and community media of various types in a particular locality or market. Such measures of diversity are generally complementary to one another.

The Minister will examine the breakdown of content for each of the media businesses party to the merger in terms of news, current affairs, opinion and cultural interests and user generated content.

The Minister will also have regard to any impact of the proposed merger on the Irish language; therefore evidence of Irish language content and measures to protect its continuation or plans to introduce more lingual diversity will be considered. This accords with the Government's '20-Year Strategy For The Irish Language 2010 – 2030', and aligns with the stated aims of ensuring increased visibility of the Irish language and ensuring that in public discourse the use of the Irish language will be, as far as practical, a choice for the citizen.

The means by which media businesses source news and current affairs content may have an impact on diversity of content and thus on media pluralism in the State, particularly given the recent trend for increased outsourcing of content generation to large international newsgathering organisations. To secure the objective of the legislation the Minister will have regard to the type and range of sources engaged by the media organisation and other relevant media assets.

In order to achieve the objectives of the legislation in pursuing the public interest in protecting the plurality of media in the state the Minister will also have regard to any 'external diversity' surrounding the proposed media merger. This will include 25 alternative content provided by other media businesses in an area and across all media sectors which may protect against any adverse impact the proposed merger could have on diversity of content and thus on media plurality in the State. Consolidation of content between the parties to the merger may diminish the plurality of media in the State contrary to the public interest. For a comprehensive list of information required under this section please refer to the Media Merger Notification Form

5.5 Financial

The financial structure of media businesses may have important implications for the ownership, control and independence of the media businesses; consequently it is of relevance in achieving the objectives of the legislation in pursuing the public interest in protecting media plurality in the state. The Minister will have regard to the financial structure of the media businesses party to the proposed merger, of particular relevance is the proposed structure of debt following the proposed merger. This is solely to verify the sustainability of the proposed post-merger media business(es) and that the plurality of media is not under threat.

The higher the degree of consolidation of the financial structure between the parties to the proposed merger the more likely it is that this may affect media pluralism.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

5.6 The scale and reach of RTÉ and TG4

RTÉ & TG4 are independent national Public Service Broadcasters whose remit and obligations are set out in Part 7 of the Broadcasting Act 2009. RTÉ and TG4 are obliged inter alia to establish, maintain and operate national television and sound 26 broadcasting services which have the character of a public service, are free-to-air and are to be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.

These Public Service Broadcasters are obliged to provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island of Ireland and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity.

The Public Service Broadcasters are, in addition, obliged to provide programmes of news and current affairs in the Irish and English languages, to facilitate or assist contemporary cultural expression and encourage or promote innovation and experimentation in broadcasting.

The Public Service Broadcasters have an impact on media pluralism in the state. Accordingly the Department of Communications, Energy and Natural Resources, when considering the appropriateness of proposed media mergers, will have regard to the contemporary scale and reach of the Public Service Broadcasters and their consequential impact on the plurality of the media in the State and how they interplay with the parties to the proposed merger.

5.7 Part 6 of the Act of 2009 and the ownership and control policy of the Broadcasting Authority of Ireland

The BAI has a statutory remit to protect media plurality in broadcasting. Part 6 of the Broadcasting Act 2009 provides the statutory framework for the licensing and regulation of broadcasting and multiplex services in Ireland. In addition, the BAI has a policy on the ownership and control of its broadcasting and multiplex contractors - the BAI Ownership & Control Policy (2012) ("the Policy"), which gives practical effect to the statutory objectives of Part 6.

The BAI applies this Policy in assessing the ownership and control elements of applications for broadcasting, content provision and multiplex contracts and to assess 27 relevant requests for variations or any compliance issues that may arise subsequently in respect of such contracts. In applying the Policy, the BAI assesses the following, as outlined under the Broadcasting Act:

- (i) the desirability of allowing a 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 the 2009 Act;
- (ii) 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 a specified area
- (iii) 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 a specified area. Section 71 of the 2009 Act does not include a specific provision in relation to media concentration in respect of applicants for other content contracts under that Section. However, the BAI, as a matter of policy, applies this test when considering applications for all "Content Provision Contracts".

The decisions and recommendations made by the BAI under its statutory remit and the Policy will be taken into consideration by the Minister, if relevant.

5.8 Proposed Commitments

Media businesses party to the proposed merger may submit proposed commitments as part of the notification process as per Section 28D(5) of the Act and as outlined in detail at paragraph 4.3.3 of these Guidelines. The Minister will consider commitments submitted that set out ways and means to be employed by media businesses to protect the public interest in maintaining the plurality of media in the State. The Minister will consider proposals that may involve positive action or commitments to refrain from particular actions.

The Minister will only accept commitments that are readily verifiable and would amount to concrete contractual arrangements that would be binding on the media businesses.

In the initial assessment the Minister may allow the media merger to proceed with the proposed commitments incorporated as specified conditions in the determination. The proposed commitments are therefore in effect provisions of the determinations. A breach of a provision of the determination is an offence and there are penalties for such a breach as per Section 28I.

Should the media businesses breach any of the proposed commitments the merger may be null and void. The media businesses would then have to reinitialise the process.

The following list gives examples of possible commitments that may be considered to positively promote plurality, which commitments may be incorporated as specified conditions imposed by the Minister in a determination.

- The divestment or sale of specified assets.
- A restriction on the purchase of particular assets for a specified period of time.
- A restriction on the publication or the purchase of particular content.
- A restriction on the exchange of competitively sensitive information between the merged companies post-merger.
- Physical separation of the merged companies.
- Safeguards to ensure editorial freedom.
- Agreement of financial restrictions.
- To protect the unique editorial ethos of a particular product or service.

This list is neither prescriptive nor exhaustive.

