Carmel Conaty

From:

Sent: 11 June 2015 16:16
To: FOI Unit
Subject: FOI request

Bridgette,

Under the freedom of Information Act, I would like to request copies of all records relating to the decision not to introduce any retrospective measure concerning the area of media ownership in relation to the Competition and Consumer Protection Act, 2014.

I look forward to hearing from you.

Many thanks,
9 July 2015

Ref: FOI/2014/59

Dear,

I refer to the request you have made under the Freedom of Information Act 2014, requesting copies of all of all records relating to the decision not to introduce any retrospective measure concerning the area of media ownership in relation to the Competition and Consumer Protection Act, 2014.

I have made a final decision to grant your request and I attach the relevant information with this letter. If you have any queries regarding this correspondence you can contact me by telephone at the number below, a schedule of the records covered by your request is also attached.

I wish to advise you that, if for any reason you are not satisfied with the outcome of your request, you are entitled to seek a review by appealing the decision. To appeal, you need to write to the FOI Unit, Department of Communications, Energy and Natural Resources, Elm House, Earlsvale Rd, Cavan, Co Cavan. You must make your appeal within 20 working days of the date of this letter, but the making of a late appeal may be permitted in certain
circumstances. The review will involve a complete reconsideration of the matter by a more senior member of the staff of this Department.

Please note that an application fee for an appeal is currently €30.00 and a reduced fee of €10.00 applies if you are covered by a Medical Card.

If claiming a reduced application fee, the request must also be accompanied by

- The Medical Card registration number
- The name of the issuing Health Board
- Your consent to the verification of these details with that Health Board.

Payment should be made by way of bank draft, money postal order, or personal cheque made payable to "Department of Communications, Energy and Natural Resources".

On receipt of the fee, you will be advised of when you can expect a decision on your appeal, and the contact details of the person handling the appeal.

Yours sincerely,

________________________

Justina Corcoran

Internet Policy Division

Phone: 016782906
FOI Request Reference: FOI/2015/59

Schedule of records: Summary of Decision Making

Copy of all records relating to the decision not to introduce any retrospective measure concerning the area of media ownership in relation to the Competition and Consumer Protection Act 2014.

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<thead>
<tr>
<th>Rec. No</th>
<th>Brief description</th>
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<td>Media Mergers Bill – Items for Discussion 10/05/12</td>
<td>Network File</td>
<td>1</td>
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<td>Note of Meeting with Minister Rabbitte – Media Mergers 11/05/2012</td>
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<td>Letter from Minister Bruton T.D, Minister for Jobs, Enterprise and Innovation to Minister Rabbitee Minister for Communications, Energy and Natural Resources 11/06/2012</td>
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<td>Granted</td>
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<td>A copy of Head 11 as referred to in this letter is also attached in the interests of full disclosure</td>
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Media Mergers Bill – Items for Discussion
10/5/12

Timelines
Discussion of the legislative process.

Threshold for Application of Process (Ownership vs Control)
Consideration could be given to extending the threshold for the application of the process to cover changes in the control of media, as well as ownership changes.

Override Consideration
In some jurisdictions, media merger authorities can override competition authorities in order to preserve media diversity (if not diversity of ownership).

Role of the BAI
There are considerable advantages to allocating some of the tasks associated with the new system to the BAI.

Resource Considerations
There are a number of resource considerations to be discussed.

Proactive Measure¹
In some Member States, the Communications Regulator can refer a matter to the relevant competition authority if it believes that a market has a feature that hinders competition. Consideration could be given to providing a power to the Minister, the BAI, or both to refer a matter to the Competition Authority outside of a merger situation for an investigation.

Note of Meeting with Minister Rabbitte – Media Mergers
11/5/12

This was a short meeting to discuss a number of issues around media mergers in
general sense, ahead of the Minister’s speech to the European Association of
Journalists.

A short agenda was prepared also – attached at end for reference.

In terms of process, the Minister noted that he has discussed this issue with the
Taoiseach and with Minister Bruton, and that both are amenable in principle to the
idea of a separate Act for Media Mergers (along with the AG). The Minister asked if
the Heads as presented to Government in May 2011 were suitable to be used for a
standalone Bill. It was pointed out that these needed updating, particularly around
Definitions, and that there were a number of other issues that needed to be considered
(see below), but that, in general, the draft heads could be used as a basis for a new
Bill.

It was agreed that, following sight of the submission presently on its way to the
Minister, Broadcasting Policy Division would work up a set of draft heads reflecting
the decision on the submission, with a view to their being used as the basis of a
discussion with the AGs office, ahead of a Memorandum to Government.

A number of policy related issues were also discussed in a very general sense, mainly
to air them as possibilities for a more full discussion later. Two of these were not
included in the Submission (2 + 3 below) on the basis that a formal decision would be
premature. The issue of resources was also raised as critical.

To summarise, at present there are 3 Substantive departures from the initial Heads
under consideration. These are as follows;

1. To have the BAI take a more active role in the entire process, and in particular
to have them conduct the Phase 2 Assessment.
2. To clarify the definition of ‘control’ of a media business to make it more
explicit and to outline clearly the implications of various levels of ‘control’, as
well as the roles the Minister/BAI might have with regard to addressing this.
3. To empower the Minister/BAI to refer a media business to the Competition
Authority for a sectoral review outside of a merger/control situation – in other
words where a structural imbalance may be emerging within the market.

R Browne
11/5/12
Briefing Note for Minister Rabbitte on Media Mergers (Consumer and Competition Bill, 2012)

Speaking Points

- There have been specific powers to deal with media mergers in Irish law for an extended period of time, but the existing regime is more than a decade old. The purpose of the new Bill is to update this regime, dealing with issues like an increasing fragmented media, the rise of online and an increasingly dynamic media sector.

- More specifically, the primary and most important element of this Bill is a new public value test, which will involve a far more exhaustive definition of media concentration than before and which will deal explicitly with cross media ownership.

- There will be a statutory definition of media plurality which will refer both to ownership and content, and the Act will incorporate a statutory test to be applied by the Minister in the discharge of his or her function in relation to media mergers which will involve both of these elements.

- The Bill will also involve the transfer of this function from the Minister for Jobs, Enterprise and Innovation to the Minister for Communications, Energy and Natural Resources, with a view to better leverage existing skills and knowledge base around media governance and of the media sector in Ireland generally.

- Before the Bill is enacted, the Department plans to publish a set of guidelines as to how the new public value test will be applied in practice.

Present State of Play
The Consumer and Competition Bill 2012 is presently at drafting stage in the Attorney General’s Office, the heads of which having been cleared by Government in July 2011. The Parliamentary Draftsmen’s Office (PDO) is presently working on the Bill. The Department of Jobs, Enterprise and Innovation has recently sought an update from the PDO with regard to timing; none has been forthcoming thus far, but the general expectation is that it will be Q3 2012 before a draft will be available for publication.
Provisions of Competition Act, 2002 on Media Mergers

Section 23 of the Competition Act, 2002 allows the Minister for Jobs, Enterprise and Innovation to order the Competition Authority (CA) to conduct an investigation into any merger (after the Authority has made an initial determination that results in a positive outcome for the merger). The Minister may, on receipt of a report of this investigation from the Authority, make an order providing that (a) the merger may go ahead, (b) that the merger may not go ahead, or (c) that the merger may go ahead, subject to those conditions as the Minister may specify. In making this order, the Minister may have regard only to the "relevant criteria", which are set out in the Act as follows;

"relevant criteria" means the following matters—

(a) the strength and competitiveness of media businesses indigenous to the State,

(b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings,

(c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings,

(d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State, and

(e) the share in the market in the State of one or more of the types of business activity falling within the definition of "media business" in this subsection that is held by any of the undertakings involved in the media merger concerned, or by any individual or other undertaking who or which has an interest in such an undertaking.

Recommendations of the 2008 Advisory Group on Media Mergers

1. There should be a statutory definition of media plurality (referring both to ownership and content).
2. The Competition Act should be amended to incorporate a statutory test to be applied by the
Minister in the discharge of his or her function in relation to media mergers.
3. The definition of the "relevant criteria" in Section 23 (10) of the Competition Act should
be replaced.
4. There should be an on-going collection and periodic publication of information and
employment of concrete indicators in relation to media plurality in the State.
5. The Competition Authority should neither be required to form nor to furnish an opinion on
the application of the relevant criteria.
6. There should be a separate system of notification of media mergers to the Minister for
clearance. The Group has proposed an outline of such a system.
7. There should be an obligation imposed by Statute on parties to a media merger to provide
full information to the Minister on all circumstances that might impair media plurality in the
State, and to notify any changes in information provided to the Minister, with appropriate
penalties for non-compliance.
8. The Minister should publish Guidelines to assist undertakings involved in media mergers
in knowing how the Minister would in general apply the relevant criteria.
9. In the event of the Minister deciding to proceed to a detailed investigation of a proposed
merger (other than a broadcaster to broadcaster merger), a three to five person Consultative
Panel should be established on a statutory basis to provide advice to the Minister on the
media merger.
10. The definition of "media business" should be amended to include publication of
newspapers and periodicals over the Internet and broadcast of certain audiovisual material
over the Internet.
11. The important role of the media in a democracy should be recognised by Statute, ideally
in the Long Title of the Act containing the relevant provisions on media mergers.

Membership of the Advisory Group on Media Mergers
Paul Sreenan S.C. (Chairman)
Dr. Olive Braiden.
Peter Cassells
Marc Coleman
John Herlihy
Prof. Colum Kenny
Michael O'Keeffe
Definitions of Ownership and Control in the Competition Act 2002
The Competition Act 2002 is the present statute governing merger activity, including media mergers, in the State. As such, it defines what is regarded as 'Merger' as follows;

"16.—(1) For the purposes of this Act, a merger or acquisition occurs if—

(a) 2 or more undertakings, previously independent of one another, merge, or
(b) one or more individuals or other undertakings who or which control one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings, or
(c) the result of an acquisition by one undertaking (the 'first undertaking') of the assets, including goodwill, (or a substantial part of the assets) of another undertaking (the 'second undertaking') is to place the first undertaking in a position to replace (or substantially to replace) the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition."

Furthermore, 'control' is defined as follows;

"(2) For the purposes of this Act, control, in relation to an undertaking, shall be regarded as existing if, by reason of securities, contracts or any other means, or any combination of securities, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by—

(a) ownership of, or the right to use all or part of, the assets of an undertaking, or
(b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.
(3) For the purposes of this Act, control is acquired by an individual or other undertaking if he or she or it—

(a) becomes holder of the rights or contracts, or entitled to use the other means, referred to in subsection (2), or
(b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived therefrom."
Alternatively, it may well be that general provision in those sections relating to the BAI would suffice, in that these could be constructed in such a way as to allow the BAI to revise its guidelines and practices on a regular basis (every 2-4 years) to take cognisance of best practice, a process that would allow them to integrate any developments in terms of measuring media ownership or diversity into their process.

4. General Amendments

Broadcasting Policy Division has a number of additional queries and suggested amendments to make on the draft heads. Most of these are procedural, and are designed to ensure that the media mergers process can be run in an efficient manner. These are set out overleaf, along with comments as to where the points raised at 1-3 above could be best addressed.

Richard Browne
Broadcasting Policy Division
8/5/12
DCENR Comments

Media Mergers elements of Draft Heads of Consumer and Competition Bill 2012
(Draft Heads 93-101)

Head 93 – Definitions

‘Diversity of ownership'; the use of the term “other appropriate methods” is quite vague, although some means of capturing the consumption of online content is required.

‘Diversity of content'; the last sentence seems unnecessarily specific and opens the possibility of excluding certain views? Perhaps an amendment to excise that, and replace the term “broad diversity of views and cultural interests prevalent” with “diverse range of cultural, political and other views and interests prevalent” would serve the purpose better?

Media Merger: Does the reference to the ‘order’ need more specificity?; as it stands, it gives the Minister powers without clear guidance as to where they might be used, and to what end.

Head 94. Examination by the Minister of a Media Merger Notification

1(a) at present requires the Minister to ‘have regard to’ the determination of the Authority on a proposed merger. While it is not clear that this precisely implies a requirement on the Minister to accept a negative determination, there is an argument for precisely this. From a practical perspective, there seems little point in the Minister (for CENR) proceeding to an evaluation of a merger under the relevant criteria if TCA have already ruled it out on competition grounds. This head should be explicit in saying that the authorisation of both bodies is required, unless an override function is to be allowed for the Minister for CENR. If that function is not to be added, and if TCA refuse any merger application at first pass, then the Minister for CENR should not even commence an evaluation.
1(a)(iii) requires that the Minister have regard to submissions made, "whether orally or in writing ... by any individual or any other undertaking".

Leaving aside the wisdom or otherwise of compelling regard to oral (and thus potentially unrecorded comments), it isn't clear from this whether the legislation envisages a formal consultation process, or whether that could or should include oral hearings (in either the case of the Phase I, or Phase II evaluation).

This section could be revised to make it clear that, in the case of both Phase I and II type evaluations, the Minister should have regard to written comments from parties to the merger. Also, it could empower the Minister to hold a public consultation in the case of both types of evaluation, but should make it a specific requirement of a more detailed Phase II evaluation. It could also set out the nature of that consultation, including the publication of material on the internet, and specify minimum time periods for consultation (21-28 days).

Head 95. Provisions with regard to Media Mergers
The draft heads suggest using the same criteria for the public interest test under both Phase I or a Phase II type evaluations. Given the fact that a 30 day turnaround is implied, with a possible consultation period, this puts a substantial time pressure on the Department to conduct the initial evaluation.

There is a case for a simpler set of criteria to be used in the case of a Phase I assessment, together with a simple administrative procedure, to determine whether or not a notification could proceed, or whether it should be the subject of a full Phase II assessment. The nature of this initial 'test' requires significant further discussion, but should focus on delivering a readily applied test to determine whether a proposed merger could pass without further intervention, or whether there were sufficient grounds for concern that would warrant a full Phase 2 investigation.

Head 96. Full Ministerial Investigation
In the first instance, it is proposed to effectively split this function, with the conduct of the investigation itself becoming a matter for the BAI, with the Minister deciding, on the basis of their investigation, whether or not to allow the merger to proceed. Accordingly, were this recommendation to be accepted, this Head would require substantial revision.

The time limits proposed under this measure are extremely tight, particularly given the requirement to consult with the relevant Oireachtas Ctte (and the fact that there are several months in any year when the Oireachtas is not in session).

Similarly, the specific 2 week time limits around responses are very restrictive, both to parties to such a merger and to the Department. It might be more appropriate to have more 'contingent' limits⁴ - expressed in days rather than months. Similarly, a Ministerial or Government decision on the enforced involvement of an Oireachtas Ctte may be required. If it is decided that this is required, then an amendment to the heads to allow for the relevant Oireachtas Ctte to be recalled would be required.

Similarly, if a public consultation procedure is envisaged, time limits should be established in respect of same. Consideration should also be given to whether this consultation should occur at the outset of any Ministerial Investigation or once a draft report has been made, either by the Minister or by the BAI.

Lastly, there are a number of other actors in the sector whose role may intersect in the case of a full investigation – not least the TCA, the European Commission and the BAI. It is entirely possible that any of these bodies may commence an investigation, publish findings or otherwise engage in activities that may be pertinent to the Ministerial investigation. As such, consideration should be given to the insertion of a clause to allow the Minister to 'pause' such an investigation pending the outcome of other processes, or to abandon it (including in cases where either or both parties to a merger indicate that they no longer interested in pursuing same).

**Head 97. Consultative Panel**

⁴ An example would be in Section 53 of the Broadcasting Act, 2009, whereby additional periods are triggered in given circumstances.
The precise role of the panel is unclear from the heads, as is its relationship with the Minister of the day. If the role of the panel is to advise, and the Minister is to 'have regard to', then this should be specified more clearly. Similarly, if the panel is to apply the tests, and forward a report on same to the Minister, then this should also be specified.

Likewise, the life of the panel should be made explicit in the context of the timelines established under Head 96, as well as the procedure for what occurs when a panel is unable to agree, and when minority reports will be accepted. The situation around the publication of such reports should also be specified. It should also be made clear if the panel can meet with parties to the merger, and of the panel, or the chair of the panel, can meet the Minister, officials to the Minister, or officials from other relevant bodies (such as the BAI or TCA).

Under point (8), the question arises as to whether someone with a pecuniary interest should be appointed to a consultative panel in the first place.

Head 98. Obligation to Provide Information
No obs

Head 99. Guidelines
Were the suggestion to transfer the investigation function to the BAI to be accepted, then the production of the guidelines would issue from that organisation. Moreover, if provision is to be made to introduce a formal empirical measure at a later stage, it is in this Head that such a measure would be introduced.

On point (1)a and (1)b, and the guidelines as to what would be deemed unacceptable – is it intended that the guidelines would suggest fixed empirical limits on acceptable concentration of media?

Similarly, consideration should be given to having these guidelines reflect the possibility of changing circumstances in the sector, and concentration occurring by means other than M&A activity. This should include the possibility of anti-trust type measures, whereby the Minister could intervene if an entity were to become dominant
by dint of market developments (companies exiting the market, or just through commercial growth).
Briefing Note for Tánaiste Burton

New Media Mergers Regime and Guidelines

Leaders Questions, 11 December, 2014

- The Consumer and Competition Protection Act 2014 repeals the previous Section 23 of the Competition Act 2002, and introduces an entirely new system for dealing with oversight of media mergers. This involved the transfer of this function from the Minister for Jobs, Enterprise and Innovation to the Minister for Communications, Energy and Natural Resources.

- The key improvements in this new system are the inclusion of a statutory definition of media plurality, which in turn refers to definitions of both ownership and diversity of content. It also contains a statutory test to be applied by the Minister in fulfilment of his duty to examine proposed media mergers in context of their impact on the plurality of media in the state. The purpose of this new regime, is to update the oversight of media mergers and specifically to deal with issues of a cross media nature dealing with issues like an increasing fragmented media, the rise of online media and an increasingly dynamic media sector. Furthermore the new regime is one responsive to the scale and complexities of each media merger.

- The system reflects the varying degrees of complexity that individual mergers present and provides a system flexible enough to respond accordingly. As such for relatively simple mergers that pose no threat of adversely impacting media plurality the process will be of reduced length. For more mergers of greater scale and complexity and that potentially threaten adverse impacts on media plurality the process will be longer and involve a broader investigation.

- The primary and most important element of this section of the new media mergers regime is a new public value test, which involves a far more exhaustive definition of media concentration than before and which deals explicitly with cross media ownership.

- The recently published guidelines illustrate a robust system for ensuring the ongoing protection of the public interest in maintaining media plurality in the state and make clear that media organisations will be subjected to a fulsome examination including importantly on content plurality. This will involve examining media businesses with regard to the relevant criteria in terms of editorial ethos, sourcing policy and corporate governance.

- Comment has been made that these guidelines are being published in a belated fashion. It is important to note that these guidelines have been properly developed in accordance with the legislation passed by the Houses of the Oireachtas. They have been published to assist relevant parties understand the operation of the enhanced media mergers process and currently open for
public consultation until the 22\textsuperscript{nd} of January, interested parties should highlight their concerns and make whatever contribution they wish.

While the notion of retrospective powers to break up large media businesses might seem alluring to some on the face of it, it should be noted that such retrospective powers would be fraught with difficulties.
Briefing Note

1. How much ownership is too much?
2. Why have we changed the way the system operates Vs that recommended by the Advisory Group?
3. What is the role for the Minister for DCENR?
4. What is the role for the BAI?
5. What happens if the Minister makes a decision contrary to the recommendations of the BAI? (or the advisory Ctte?)
6. What kind of conditions can the Minister apply?
7. What happens if a merger goes ahead before the Minister has made a decision?
8. What about foreign owned media companies that just happens to sell here?

1. How much ownership is too much?

There are no concrete numerical limits as to a permissible level of concentration contained in this Act.

This issue was covered at length in the Advisory Group Report, and again in initial discussions around the drafting of the Act. In both cases, it was felt that specifying such metrics in the legislation would be fraught with risk. In the first instance, the question of 'normal' market mechanics arose – if the numbers of active market participants in a given media market were to attrite over time to the extent that the concentration metric was breached without a merger having taken place, then the next merger would have to be ruled out regardless of its merits. This would be particularly relevant for a Country like Ireland that has a relatively small media market and where the application of reasonable limits on concentration could be undermined following the closure of a single media outlet.

Secondly, the question of which index to use also arises, something of emerging concern given the rise of online media. Already, the question of how to measure cross media impact arises – how does one accurately measure the relative weight of newspaper circulation, of radio or television audience and of online page views (or downloads or podcasts or individual viewings)?

Under Section 28L of the Act, the Minister for Communications, Energy and Natural Resources will draft Guidelines “... on the general applicability of the relevant criteria to media mergers, including ... (a) levels of media ownership including across different sectors of the media that would, subject to the particular circumstances of each media merger, be regarded as contrary to the public interest".
When making a decision under 28D (initial examination) or 28E (full or Phase 2 examination) the Minister has to ‘have regard to’ these guidelines. As such, these Guidelines will establish general metrics around concentration, in a similar way to the manner in which the Broadcasting Act 2009 does not contain finite metrics, but the BAI Ownership and Control Policy does set out different levels of concentration that will attract different levels of analysis.

The guidelines also have to include "indicators of diversity of content and of diversity of ownership and control of media businesses that would be used in determining whether a media merger would be regarded as contrary to the public interest"; and "what will constitute 'significant interests' within a sector or across different sectors of media businesses in the State for the purposes ... of the definition of 'relevant criteria'".

The Act also sets out a process by which these Guidelines are to be finalised, including for a public consultation process following the publication of a draft. These have now been published.

2. Why have we changed the way the system operates vs. that suggested by the Advisory Group?

While the Act closely follows the recommendations of the Advisory Group, the system outlined in this Act is different in some ways to that proposed by the Advisory Cttee. The key differences are as follows;

a) The Advisory Group recommended that the Minister for Jobs, Enterprise and Innovation be responsible for the Media Mergers process in future. Government decided in May 2011 to pass this function to the Minister for Communications, Energy and Natural Resources. The impetus to transfer the entire function to DCENR was done on the basis that there was a body of knowledge relating to plurality and diversity in the broadcasting sphere present under the auspices of DCENR in the form of the BAI. The rationale was expanded with the suggestion that, with the rise of new media and the fragmentation of and challenges to existing operators, it was highly likely that future such mergers would be likely to be either cross media or new media in nature, and thus more likely to fall more properly under the purview of DCENR.

b) Following on from this, and partially in recognition of their expertise and extant role in this area, the Broadcasting Authority of Ireland have been granted a number of functions in this Act, namely the drawing up of a Report where the Minister decides that a Phase 2 Assessment or ‘Full Media Merger Examination’ is required (under Section 28D) and the conduct of the research functions as proposed in Recommendation 4 (under Section 28M). Also it was felt that the ‘at
arm's length' nature of the initial report by the BAI would result in a clearer and more independent review process.

c) Because of the roles granted to the BAI, the manner in which the Consultative Ctte recommended in Recommendation 9 is to be established has changed. The Group recommended that such a Ctte be established every time a Phase 2 Review is triggered, the Act stipulates that establishment be at the behest of the Minister for Communications, Energy and Natural Resources and contingent on whether he or she thinks it is necessary or proportionate. This was done to reflect the significant expertise that the BAI has in this area while also recognising that an obligation to form such a Ctte would be unnecessarily onerous to the process.

d) Lastly, stemming from legal advice from Advisory Council there is a change in the manner in which the relevant Oireachtas Ctte is advised and notified. The Advisory Group recommended that the Ctte be made a notifiable body however the Act instead (in Section 28E) requires that the Minister notify the relevant Oireachtas Ctte and invites a submission from them; any such submission then has explicit recognition as one of those documents to which the Minister has to give specific recognition in coming to a decision.

3. What is the role of the Minister for DCENR?

Notification of Media Merger to Minister for Communications, Energy and Natural Resources
The Minister must be notified, in writing, by the undertakings of the proposal to put the media merger or acquisition into effect (section 28B). This must be done within 10 days of the Competition and Consumer Protection Commission (CCPC) notifying the undertakings of their determination on the notification. Notifying parties must furnish full information and any changes to that information on all circumstances in relation to the media merger concerned that might impair plurality of media in the State.

Limitation on media merger being put into effect
The CCPC must also notify the Minister of its determination on the media merger notification. A merger shall be deemed void (under section 28C) if has been put into effect before the Minister makes a determination or it has not been put into effect within 12 months of the determination being made.

Initial examination by Minister for Communications, Energy and Natural Resources of media merger notification
The initial (or phase 1) assessment is carried out by the Department and is conditioned by a set of requirements, namely that the assessment be guided by 'relevant criteria' and adherence to a previously published set of guidelines (to be drafted by this Department and provided for under section 28L of the Act). The Minister (under section 28D) must inform the undertakings within 30 working
days (or 45 working days if further proposals are submitted by the undertakings involved) of the notification to him of his determination to (a) clear, (b) clear with conditions or (c) proceed to request the BAI to carry out an investigation. The Minister may enter into discussions with the undertakings with a view to gaining certain commitments that protects media plurality in the State. The Minister must publish a statement of the reasons for his making a determination on the date on which the determination is made.

Full media merger examination and establishment of an Advisory Panel
Where the Minister makes a determination that a full media merger investigation is warranted, he will request the BAI (under section 28E) to undertake the investigation.
The Minister may (under section 28F) establish an advisory panel to provide its opinion to the BAI on the application of the relevant criteria to the media merger in question once it becomes a full media merger investigation. The panel should consist of between 3 and 5 persons of requisite experience appointed by the Minister. The panel must produce a report on the relevant criteria within 20 working days from the date of the request and must provide clarification of its opinion in writing if requested by the Minister. Once the Minister makes a determination the panel will be dissolved.

Determination of Minister for Communications, Energy and Natural Resources after full media merger examination
The Minister must make his determination (under section 28G), having regard to the BAI report and a number of other matters – not least the Relevant Criteria, the Guidelines, the findings of the Competition Authority and any submission made by the JOC, on whether the media merger may (a) be put into effect, (b) not be put into effect, (c) be put into effect subject to the conditions specified in the determination being complied with.
He must do this within 20 working days of receiving the report and recommendation from the BAI.
The Minister must supply the undertakings with a copy of the determination.

Where the Minister has made a determination subject to conditions, he may with the consent of all the undertakings amend or revoke, in writing, one or more of the conditions made in the original determination after the parties have sent a formal request to review the determination. This is likely to arise where opinion that market conditions applicable to the merger have substantially changed since the date of the BAI report to the Minister.
The Minister must lay a copy of the BAI Report on the operation of media in the State before each House of the Oireachtas.

Review of conditions in determination
There is also a provision for a review of conditions (in Section 28H) in any determination within 40 days from the date of notification where all undertakings involved in the media merger have
substantially changed since the date of the BAI report to the Minister under Section 28E. Section 28I provides for the enforcement of the terms of a determination and allows the High Court to grant an injunction to enforce compliance on the motion of the Minister and sets out the procedures for granting leave to be granted for judicial review for any determination made by the Minister (in Section 28J).

Guidelines
Under section 28L of the Act, the Minister may prepare and make guidelines on the general applicability of the relevant criteria to media mergers including the levels of media ownership that would be regarded as contrary to the public interest and indicators of diversity of content and diversity of ownership and control of media businesses that would be used in determining whether a media merger would be regarded as contrary to the public interest. The guidelines must be published on the Internet in draft form to allow persons 30 working days from the date of publication to make written representations to him in relation to them.

4. What is the role of the BAI under the Revised Media Mergers System?
Where the Minister makes a determination that a full media merger investigation is warranted, he will request the BAI (under section 28E) to undertake the investigation. The BAI must publish a copy of the request on its website, invite submissions and forward a copy of the request to the relevant Oireachtas Committee inviting them to make a submission within a relevant time period.

The Minister may establish an advisory panel to provide its opinion to the BAI on the application of the relevant criteria to the media merger in question once it becomes a full media merger investigation.

The BAI may enter into discussions with the undertakings involved with a view to identifying measures which would amend any effects of the media merger on plurality of the media in the State and it must provide its draft report and draft recommendation to the undertakings involved.

The BAI has 80 working days to report back to the Minister including a recommendation on whether the media merger should be put into effect with or without conditions or not go ahead based on the outcome of its investigation.

In addition, the BAI must publish a report on the operation of media in the State (section 28M). This must be done within 1 year of the commencement of the Act and must be updated every three years thereafter. The report will describe ownership and control arrangements for undertakings carrying on a media business in the State, describe the changes to the ownership and control arrangements of such undertakings over the previous 3 years and analyse the effects of such changes on plurality of the media in the State.
The BAI will also be requested to conduct research on matters relating to plurality of the media and publish the results of such research (section 28O)

5. What happens if the Minister makes a decision contrary to the recommendations of the BAI? (or the advisory Ctte?)

The Advisory Group were explicit in their recommendation that the decision making role was one essentially of political judgement as to how the public interest is best protected as a result of particular media merger. They stated that the Minister was the most appropriate person to intervene in media mergers in the public interest.

Section 28(G) of the Act sets out the Ministers responsibility in making the final determination on whether he considers it appropriate that the media merger-
   a) be put in to effect
   b) not be put into effect or
   c) be put into effect, subject to conditions specified in the determination being complied with

In line with this the Minister is within his rights to make a decision which is contrary to the recommendations of the BAI or the Advisory Ctte if he feels it is appropriate to do so.

However, when making a determination under section 28G(1) the Minister must have regard to:
   a) The relevant criteria
   b) The report of the BAI
   c) The guidelines issues under section 28E
   d) All submissions made and information provided to the Minister and the BAI
   e) Where applicable the determination of the European Commission
   f) Where applicable the opinion of the Advisory panel established under section 28F
   g) Relevant reports published by the Minister under section 28M
   h) Relevant research published by the BAI under section 28M

His decision is subject to the procedures of judicial review and Section 28(1) sets out procedures for granting leave for judicial review for any determination made by the Minister.

6. What kind of conditions can the Minister apply?

Section 28D provides that the Minister must inform undertakings within 30 working days (or 45 working days if further proposals are submitted by the undertakings involved) of the notification to him of his determination on whether the media merger may
   a) be put into effect
b) be put into effect subject to proposed commitments offered by the undertakings being incorporated as specified conditions. These commitments would centre on ensuring the protection of media plurality and diversity in the State.

c) be forwarded to the BAI for a full (or phase 2) assessment.

Where the merger is forwarded to the BAI for a full assessment the Minister (under section 28G) must make a determination within 20 days of receiving the report from the BAI on whether the media merger may

d) be put in to effect

e) not be put into effect or

f) be put into effect, subject to conditions specified in the determination being complied with

This must be done on the grounds that he considers that the result of the media merger will or will not as the case may be, be contrary to the public interest in protecting plurality of the media in the State or, as appropriate, will not be contrary to the public interest in protecting plurality of the media in the State if conditions so specified are complied with.

Some of the conditions that the Minister may apply include:

a) the divestment or sale of specified assets

b) a restriction on the purchase of particular assets for a specified period of time

c) a restriction on the publication or the purchase of particular content

d) a restriction on the exchange of competitively sensitive information between the merged companies post-merger

e) physical separation of the merged companies

f) constraints on editorial control

g) Financial restrictions

Where the Minister has made a determination subject to conditions, he may with the consent of all the undertakings amend or revoke, in writing, one or more of the conditions made in the original determination after the parties have sent a formal request to review the determination. This is likely to arise where opinion that market conditions applicable to the merger have substantially changed since the date of the BAI report to the Minister.

7. What happens if a merger goes ahead before the Minister has made a decision?

The Competition and Consumer Protection Commission (CCPC) must notify the Minister of its determination on the media merger notification.
A merger shall be deemed void (under section 28C) if has been put into effect before the Minister makes a determination or if it has not been put into effect within 12 months of the determination being made.

8. What about foreign owned media companies that just happens to sell here?
The legislation defines ‘carries on a media business in the State’ in relation to a media business as

a) having a physical presence in the State, including a registered office, subsidiary, branch, representative office or agency, and making sales to customers located in the State, or

b) having made sales into the State of at least €2m in the most recent financial year.
11 June 2012

Mr Pat Rabbitte TD
Minister for Communications, Energy
and Natural Resources
Adelaide Road
Dublin 2.

Re: Media Merger legislation

Dear Pat,

I wish to refer to your letter and enclosure of 7 June in relation to the above.

I have asked my officials to examine the text of the draft Bill that you have supplied. I note that you have suggested adding a new provision (Head 11) relating to control of the media which goes beyond what was recommended by the Advisory Group on Media Mergers. This, in particular, will require careful examination, especially on whether or not it is appropriate for inclusion in a competition law framework (given the provenance of competition law in EU Treaty obligations and requirements), its relationship with EU and Irish company law provisions, its apparent retrospective applicability and possible Constitutional implications in respect of property rights.

As you are aware, the Advisory Group on Media Mergers suggested a new legal framework for consideration of the public interest aspect of media mergers. As you are also aware from the Government’s consideration and approval of the draft Heads of the Bill last July, a suite of revisions based on the report of the Group are being made in the proposed Consumer and Competition Bill. Until those revisions become law, the current legal framework in the Competition Act 2002 will continue to apply. Thus, it would be wrong to infer that there is a lack of policy instruments to deal with such media mergers.

I believe that the approach approved by Government in July 2011 remains the best route forward and introduces a comprehensive set of reforms, which are all equally important in our competition framework. In particular, two Programme for Government commitments – a statutory code of practice for the grocery goods sector, and the amalgamation of the National Consumer Agency and the Competition Authority – are being implemented as well as the recommendations of the Advisory Group on Media Mergers. I do not believe that detaching just one element of this package is necessary or desirable. The consolidation of the various elements of consumer and competition law into a single Act is entirely in keeping with the
principles of better regulation and with the trend within Government to consolidate and simplify legislation for ease of reference for all users.

In the interim, I can assure you that my Department and the Competition Authority are monitoring developments that might have a bearing on potential media merger applications. However, you must appreciate that I have to avoid public comment on such matters because, under the current legislative provisions, I, as Minister for Jobs, Enterprise and Innovation, have a potential adjudicative role in the matter and thus I need to protect my independence in the matter to ensure that any decision made in the context of a media merger is not compromised.

My Department has been pressing for the expeditious drafting of the Consumer and Competition Bill for some time. Indeed, you will be aware that my Department and my predecessors originally raised the issue of the Advisory Group on Media Merger’s recommendations in the context of the Bill with your Department and your predecessors as far back as late 2009. Drafting of this Bill is affected by the pressure of legislative priorities across the whole of Government. Once we get legislative attention in the Office of the Parliamentary Counsel (OPC), my Department will work with the OPC to endeavour to ensure that the Bill is drafted as soon as possible and introduce it in the Oireachtas.

Yours sincerely,

Richard Bruton TD
Minister for Jobs, Enterprise and Innovation
HEAD 11 CHANGE IN CONTROL OF MEDIA BUSINESS: ADDITIONAL PROVISIONS

To provide that –

(1) This head applies in any case where, notwithstanding that there is no proposal for a media merger capable of being notified to the Authority and the Minister –

(a) there is an acquisition by one or more individuals already controlling at least one undertaking, or by one or more undertakings, of indirect control of the whole or parts of one or more other undertakings (whether such acquisition occurred before or after the coming into operation of this Act), and

(b) one of the conditions referred to in head 4 (2) (i) to (iii) is satisfied.

(2) For the purposes of subhead (2) there is an acquisition of indirect control of an undertaking where the individuals or undertakings concerned:

(a) do not have control of the powers of voting on all questions affecting the undertaking which, if exercised, would yield a majority of the votes capable of being exercised on such questions,

(b) cannot obtain such control by an exercise of any power exercisable by them or at their direction or with their consent,

(c) do not have a right to receive more than one-half of the total amount of the dividends of the undertaking, whether declared or not,

(d) do not have an interest in the shares of the undertaking of an aggregate nominal value representing one-half or more of the total aggregate nominal value of those shares, but

(e) have the capacity, or could by an exercise of a power exercisable by them or at their direction or with their consent obtain the capacity, whether acting alone, jointly with another person or with the consent of another person, to exercise or to control the exercise of any of the following powers:

(i) the powers of a board of directors of the undertaking,

(ii) power to nominate a majority of the directors of the undertaking,

(iv) the power to veto the appointment of a director of the undertaking, or

(v) powers of a like nature.
(2) The Minister may intervene by order ("an intervention order") in any case to which subhead (1) applies.

(3) When making an intervention order—

(a) the Minister shall inform all directly involved parties and shall request information from them in such form and manner as he may determine,

(b) may order all parties to cease any particular acquisition until such a time as a determination has been made, or, if the acquisition has come into effect, to not resell the holding to another person until such time as a determination has been made.

(4) In making a determination on an acquisition in respect of which the Minister has made an intervention order, the Minister—

(a) shall have regard to—

(i) the relevant criteria,

(ii) the guidelines, if any, issued by the Minister under head 13,

(iii) all submissions made to the Minister, whether in writing or orally, by the undertakings involved in the transaction or by any individual or any other undertaking,

(iv) such other relevant matters as he or she sees fit,

(b) may enter into discussions with the undertakings involved in the acquisition or with any individual or any other undertaking with a view to identifying measures which would ameliorate any effects of the media merger on media plurality,

(c) shall form a view as to whether the result of the acquisition is likely to be contrary to the public interest in protecting plurality of the media in the State,

(5) Within 6 weeks of the date of the intervention order, the Minister shall inform the undertakings which were parties to the acquisition of whichever of the following determinations he or she has made, namely—

(a) that, in his or her opinion the result of the acquisition will not contravene the public interest test referred to in head 2 (1) (c) and, accordingly that the acquisition may stand or continue, as the case may be, or

(b) that, in light of commitments offered by the undertakings, in his or her opinion the result of the acquisition will not contravene the public
interest test referred to in head 2(1)(c) and, accordingly the acquisition may stand or continue, as the case may be, subject to the incorporation of those commitments as specified conditions to be complied with, or

(c) that he or she is concerned that the acquisition may contravene the public interest test referred to in Head 2 and accordingly that he or she intends to carry out an investigation under Head 5 in relation to the acquisition.

(5) The Minister shall publish, with due regard for commercial confidentiality, a statement of the reasons for his or her making a determination under subhead (4) on the date on which the determination is made.

(6) The Minister shall cause a notice of his or her decision to carry out a full Ministerial investigation under this head to be published.

(7) The Minister shall, no later than 4 months after the decision to carry out a full investigation under this head, issue to the undertakings concerned a notice of his or her proposed determination and the undertakings concerned may, within 2 weeks, make submissions to the Minister on the proposed determination.

(8) The Minister, on taking a decision to carry out a full investigation, request the BAI to initiate the Phase 2 review process, and to report to him in writing within 4 months.

(9) The Minister shall, no later than 5 months after the decision to carry out a full investigation under this head, make whichever of the following determinations he or she considers appropriate, namely that the acquisition –

(a) may continue,

(b) may not be put into effect,

(c) if it has already occurred, must be reversed, or

(c) may continue subject to conditions specified by it being complied with,

on the grounds that he or she considers that the result of the acquisition will or will not contravene the public interest test referred to in head 2 (1)(c) or, as appropriate, will not contravene the public interest test if conditions so specified are complied with.

(10) Where the Minister makes a determination under subhead (9), he or she shall—

(a) furnish to the undertakings concerned a copy of the determination within 2 months, and
(b) publish, with due regard for commercial confidentiality, a statement of the reasons for his or her making such an order on the date on which the order was made.

(11) Where there is a contravention of subhead (3) the person in control of an undertaking which has failed to notify the Minister commits an offence

EXPLANATORY NOTE
This draft head sets out a new process by which the Minister can intervene in particular situations whereby an individual or company gains a certain degree of control over a media business without actually taking outright ownership. It uses the same system as the ‘merger’ provisions of the heads, including the phase 2 investigation.