Submission by The Irish Times to Minister for Communications, Energy, and Natural Resources on guidelines for media mergers

“There is no question about the importance of maintaining a plural media...It is only through this plurality, specifically in news and current affairs, that we can ensure that the public is well informed on matters of local, national and international news and policy and able to play their full part in a democratic society. “ – Leveson Report on British media.

“The concentration of ownership of media organisations into the hands of a relatively small number of individuals or businesses represents a potential detriment to media plurality. It runs counter to the public interest that the organs of free expression should be overly influenced and potentially controlled by any one individual, group or organisation.” Consultation paper on media mergers, Department Communications, Energy and Natural Resources

The publication by the Minister of guidelines on media mergers arises directly from a responsibility imposed on him by the Competition and Consumer Protection Act 2014, and the guidelines correspond closely to the framework proposed in the Act. In the circumstances, the commentary set out here on the broad principles in the guidelines/Act may seem to have a quality of belatedly attempting to close a stable door after the horse has bolted. Such criticism as we make, however, is important to address lacunae in the Oireachtas debate on the Act and put in context the Irish Times’ perspective on its detailed implementation.

The introduction to the guidelines outlines the importance and unique character of the media as the reason why responsibility for competition legislation has been transferred to the Minister responsible for communications. The reasoning is something The Irish Times would concur with.

Similar sentiments are part of The Irish Times Trust document. We fully agree that ‘a free and pluralistic media is an essential component of our modern representative democracy. The media enjoy a position of special rights and responsibilities and are an important conduit for the exercise of freedom of expression, the development of civic discourse and the proper and adequate
representation of the diversity that exists in our society’ (Guidelines on Media Mergers, page 4). We also agree that it is detrimental to the media and runs counter to the public interest for it to fall into the hands of any one individual, group or organization, or control to be unduly concentrated. Excessive concentration in the advertising market which funds most of the media is also of concern.

Among the issues of specific concern raised by the Act are:

- the appropriateness of the central role in regulating print and online mergers of the Broadcasting Authority of Ireland (BAI);
- the degree to which the ad hoc Advisory Panels provided for to assess mergers are genuinely independent;
- the definition of plurality and
- the failure to provide for any mechanism to deal with existing seriously unhealthy concentrations of ownership.

Context:
The Act in its specific form arises from a broad domestic debate on media regulation that saw the establishment of an expert committee (the Sreenan committee) to look at the public interest aspects of media mergers in respect of plurality. The debate also produced a new Defamation Act with provisions for an independent Press Council to provide new means of redress for those aggrieved by press treatment – central to the rationale for the structure of the Press Council was the provision for a mechanism for the nomination of independent representatives of the public who form a majority on the council.

The bulk of the Sreenan recommendations were accepted and incorporated in the Act, although it also provides for the welcome transfer to the Minister of CENR of specific responsibility for considering the public interests/plurality dimension of mergers – the competition aspects remain to be examined by the new Competition and Consumer Protection Commission (CCPC) whose precursor made clear to Sreenan that it did not feel competent to assess the public interest test.

The Act also, as recommended, changes the plurality test to be applied by the Ministers in his or her review: i.e. whether the merger will impair the diversity of content and the density of ownership of media in the State.
Although the idea of regulating media mergers on plurality grounds is not a new one, no established “theory” or practice has emerged. The Minister/Guidelines could make it clear that this guidance is a “work in progress” and that more detailed guidance on the applicability of the criteria will be considered once the BAI report is received. This would be more comforting than the statement that the “guidelines may be changed from time to time, as deemed appropriate.”

We also accept that the guidelines are problematic on the issue of the definition of “market share”.

The definition of a “media business” has been broadened to encompass online media, such as the publication of newspapers or periodicals consisting substantially of news and comment on current affairs on the internet. Distinctions between sectors have become somewhat outdated - *The Irish Times* is available in print, in digital form, online, via desktop, tablet and mobile. In addition our content offering includes podcasts and video, which makes us also part of the audiovisual sector.

The changes are also the product of an international debate on media concentration which has seen important reports from the EU Commission (High-Level Group on Media Freedom and Pluralism (HLG), set up in October 2011 by Neelie Kroes, European Commissioner for the Digital Agenda) and by the OSCE and Council of Europe. It is important to note in that context the challenge to Irish domestic media represented by the dominance of huge conglomerates beyond our borders which impacts detrimentally on the domestic Irish media market and which also sucks huge volumes of advertising revenue out of the market. That international monopolisation is not addressed.

In the UK the Leveson inquiry included in its final report a strong statement on the central place of media plurality in democracy and recommended a new definition of media plurality with a strong emphasis on news and current affairs. Leveson, significantly, stressed the need for the Government to find a mechanism for “conducting regular plurality reviews” and on the transparency of the process, as indeed the new guidelines require of the BAI.

Leveson also appropriately recommends that the secretary of state should, in making his final ruling on the merger, accept the independent regulator’s view or publicly explain why he is not doing so. That requirement here would do
much to ensure that decisions were not made, or perceived to be made, on a political basis.

The BAI:
The Minister, whose responsibility for the media overall, and not just broadcasting, should be made explicit, relies on the BAI both to assess the plurality effect of specific mergers, and to commission three-yearly reviews of the landscape of media pluralism in the State. The current mandate of the BAI under Part 6 of the Broadcasting Act requires it to promote “the provision of open and pluralistic broadcasting services”, and, the BAI has a policy on the ownership and control of its broadcasting and multiplex contractors - the BAI Ownership & Control Policy (2012) (“the Policy”), to give practical effect to the statutory objectives of Part 6.

But an expanded mandate to include the print and online media would necessitate embracing significantly new skills and expertise. And not least because the requirements of the Broadcasting Act on broadcasters for specific types of political balance involve a different type of news and current affairs culture to that in print and online. It is precisely the effects of mergers on that culture which the panels or the BAI will be expected to examine.

That said, clearly cross-sectoral mergers will require an assessment and balancing of such differing cultures by whichever body performs these tasks.

The statutory basis of the BAI, however, with its direct ministerial appointments of both board and Advisory Panel members, remains problematic for newspapers. Both here and in the UK the industry has insisted that it regards ministerial involvement in appointments to bodies regulating the media as an intrusion on the freedom of the press and potentially politicising and oppressive.

We would suggest the minister consider appointing a permanent body to monitor issues to do with media plurality. It would take on the role of the advisory panel (4.4.6), in that it could advise the Minister where necessary, but also be empowered to make recommendations concerning plurality within and across sectors, print, online and broadcasting. It is imperative that the media is viewed as a whole, and also that journalism, as a specific media
activity, be highlighted and offered special mention, due to its importance within Irish society.

The independent panel of distinguished public figures which vets and appoints candidates for the Press Council of Ireland provides an important buffer and protection that we value, and profoundly distinguishes the nature of the council from the state-controlled BAI. It would, for example, make any merger of the two bodies, however logical in terms of common functions and the evolution and overlapping convergence of the broadcasting, online and print media, unacceptable.

At a very minimum, the role ascribed by the Minister to the BAI and to Advisory Panels would require a new approach to appointments to both which took stronger, explicit account of the need to see the print and online sectors adequately represented as equals and to reassure about the independence from political interference of both bodies.

There is no suggestion that the State or any body it establishes should have any say in media content, only to ensure channels exist to allow diversity and plurality. Other than that legislation, where it exists, will determine the legality of content, in term of libel, incitement to hated etc.

**The Media Landscape:**
The requirement on the BAI to conduct periodic reviews of the current state of media plurality is welcome and would certainly contribute usefully to debate on individual future mergers.

But such a provision begs the obvious question “should existing over-concentrations be left in place untouched?”

Clearly, expansion through merger or takeover by any current media group that might already be perceived as over-dominant would prompt an inquiry under this legislation. But would its launch of a new title or, say, other natural expansion into a rival’s readership, not also raise the same issues? And also possibly require intervention?

Provisions for the enforcement through the High Court of undertakings given by media organisations in the course of merger determinations by the Minister also make clear that the roles of the BAI and Minister in relation to a specific
merger do not stop with the merger. The BAI should be specifically tasked with an ongoing, say biennial, review of whether undertakings made are being honoured.

The ongoing review of adherence to new merger conditions would be anomalous were the BAI also not required to ask existing unhealthy media concentrations identified in its triennial review of the media landscape how they intend to adhere to the standards set for new mergers.

[This submission to the ministerial review of the guidelines should be seen as complementary to the comments submitted by the National Newspaper of Ireland with which we broadly concur.]

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