DRAFT MEDIA MERGER GUIDELINES CONSULTATION

Response to Consultation

A. Introduction

1. Mason Hayes & Curran would like to thank the Minister for Communications Energy and Natural Resources (the “Minister”) and the Department of Communications Energy and Natural Resources (the “Department”) for the opportunity to comment on the Draft Guidelines on Media Mergers (the “Draft MM Guidelines”).

2. As one of the leading law firms in Ireland with a significant merger control practice and particular expertise in the media sector, we have been involved in the notification of many media mergers under the previous media merger regime under the Competition Act 2002 (the “Act”). Equally, we expect to be involved in a significant proportion of media mergers that will be notified to the Minister under the new media merger regime. As such, we have a particular interest in the procedures around the process as well as how the Minister intends to apply the media plurality test set out in the Act.

3. Any requirement to obtain approval for the implementation of a transaction imposes a regulatory burden on the parties involved. The more lengthy the review process, the greater the uncertainty injected into the transaction. The new media merger regime will likely add at least six weeks to the completion standstill requirement which applied to media mergers notified to The Competition Authority under the previous regime. In the context of a commercial transaction, this represents a significant degree of additional completion uncertainty. This will bring, at the very least, increased transactional costs.

4. We welcome the Draft MM Guidelines and would urge the Minister to include as much clarity as possible in the final version of the guidelines to ensure that the media merger review process does not act as a deterrent to parties considering entering into a transaction that would trigger a notification requirement to the Minister. In this regard, we set out below a number of points which we feel would merit clarification or further explanation. We hope that this is of assistance to the Department in finalising the guidelines.

B. Timing of notifications

5. The new media merger regime, as amended by the Intellectual Property (Miscellaneous Provisions) Act 2014 at the end of last year, means that it is not possible for the Minister’s review to run concurrently with the general merger review process conducted by the Competition and Consumer Protection Commission (the “Commission”). Rather, parties must wait until after the Commission has issued a determination under the general merger regime before submitting a notification to the Minister.

6. Given that a review under the general merger regime could take at least six weeks, even in straightforward cases, and the media merger review could take at least an equivalent period, this will be of concern to parties contemplating entering into such transactions. The delay in parties’ ability to complete a transaction has implications in terms of transactional costs and deal financing, as well as the level of certainty around closing generally. If parties perceive there to be too much uncertainty around the ability
to close a transaction (at all, or in a timely manner), this could have a chilling effect on these types of transaction.

7. We would, therefore, urge the Minister to expand the Draft MM Guidelines to explain how the procedure and timelines will work in practice. In particular, the Act sets out a statutory timeline in terms of maximum periods within which the procedure must operate. We would suggest, however, that in transactions that clearly do not raise substantive media plurality issues, the Minister could adopt a “fast-track” approach to assessing whether a proposed media merger will be contrary to the public interest in protecting plurality of media in the State.

8. The onerous timelines under the Act could be further off-set if a pre-notification system were put in place. This would allow parties to approach the Department in advance of any formal notification, with a view to explaining the nature of the transaction and identifying what, if any, issues may arise in relation to media plurality as a result of the deal. This might be best achieved through submission of a draft notification form, as is the practice in similar processes in other jurisdictions, for example the European Commission’s process under the EU Merger Regulation. We would envisage that any pre-notification discussions would overlap with the Commission’s general merger review.

9. Where the parties consider that the proposed transaction does not raise substantive concerns, they could suggest appropriate waivers in respect of information that would otherwise be required by the notification form. This approach could then be tested by the Department through the pre-notifications discussions with the parties.

10. There are advantages to both the Minister and the parties of a pre-notification process. From the Minister’s point of view, the Department will be up-to-speed when a media merger is notified and the statutory review timelines kick-in. From the parties’ perspective, they will have the opportunity to “educate” the Department on the particular transaction and possibly reduce the information requirements on them, as well as the timelines for formal approval in non-problematic cases.

11. The approach set out above would, we believe, go some way towards addressing the significant increase in regulatory burden brought about by the introduction of the new media merger regime.

C. ‘relevant media asset’

12. Section 2 of the Draft MM Guidelines defines the term ‘relevant media asset’ without limitation to the State. Any review of the impact of a proposed transaction on the sufficiency of media plurality in the State should, we would submit, be made by reference to media businesses’ operations and presence in the State. Indeed, the Act recognises this through, amongst other things, the definition of ‘diversity of content’ and ‘diversity of ownership’, both of which expressly refer to activities, and ownership and control, of media businesses in the State.

13. We would suggest, therefore, that the definition be amended in the guidelines to expressly limit the term ‘relevant media asset’ to relevant media assets in the State.
D. ‘significant interest’

14. Section 2 of the Draft MM Guidelines explains the term ‘significant interest’ and that a holding or voting strength of between 10% and 19% (directly or indirectly) in a media business “may” constitute a significant interest. In contrast a holding or voting strength of more than 20% will generally constitute a significant interest.

15. The acknowledgement that holdings of less than 20% will not generally constitute a significant interest would suggest to us that in such cases parties should not be subject to the same burden in terms of information provision as applies in holdings of 20% and more. The Notification Form, however, seems to require extensive information for holdings over 10% (see section 3.2). This seems unwarranted and we would suggest that the Notification Form reflects the definition of ‘significant interest’ in the Draft MM Guidelines such that burdensome information requirements only apply where the Minister has identified a potential concern arising from a holding or voting strength of less than 20%.

16. Further, we would note that Section 28L(1)(d) of the Act requires that the Guidelines clarify “what will constitute significant interests within a sector or across different sectors of media businesses in the State for the purposes of paragraph (b) of the definition of ‘relevant criteria’ in section 28A(1)” (emphasis added). However, the definition of ‘significant interest’ focuses only on significant interest in a media business rather than in a sector or across different sectors. The Draft MM Guidelines do not otherwise appear to clarify what will constitute a significant interest within a sector or across different sectors.

17. Clarity around this important issue would be welcomed.

E. References to “days” and “working days”

18. We would note that section 4 of the Draft MM Guidelines makes reference to deadlines laid down by statute which should refer to “working days” rather than “days”. In particular,

- The reference in paragraph 4.3 to “45 days” should be changed to “45 working days” as per Section 28D(1) of the Act.
- The reference in paragraph 4.3.2 to “30 days” should be changed to “30 working days” as per Section 28D(9)(b) of the Act.
- The reference in paragraph 4.4.3 to “20 days” should be changed to “20 working days” as per Section 28E(2)(b) of the Act.
- The reference in paragraph 4.4.5 to “20 days” should be changed to “20 working days” as per Section 28E(10) of the Act.
- The reference in paragraph 4.4.7 to “7 days” should be changed to “7 working days” as per Section 28E(12)(a).
- The reference in paragraph 4.4.9 to “10 days” should be changed to “10 working days” as per Section 28E(9)(a) of the Act.
- The reference in paragraph 4.5.1 to “15 days” should be changed to “15 working days” as per Section 28G(4)(b) of the Act.
- The references in paragraph 4.6 to “40 days” should be changed to “40 working days” as per Section 28H(1) and Section 28H(3) of the Act.
F. Internet Media

19. The Draft MM Guidelines do not make any particular reference to how the impact of Internet Media on media plurality will form part of the Minister’s assessment. While we appreciate that the guidelines do not go into particular detail in relation to any sector, we would suggest that Internet Media as well as the impact of new technologies on media plurality merits special attention.

20. Internet Media, in particular social media such as Twitter, Facebook and blogs are bringing increasingly greater proportions of citizens closer to events as they happen and giving them the ability to express and share opinions on these events in real-time. In addition, media businesses, regardless of sector, are also tapping into Internet Media. For example, many newspapers now have a significant on-line presence and again facilitate readers engagement with content through on-line commentary. Further, advances in technology, for example more powerful and portable devices, allow citizens access to ever-increasing amounts of data through an ever-increasing range of sources and dedicated content apps.

21. In short, the relatively recent explosion of Internet Media has given the general public ready and real-time access to more diverse content through multiple sources. The ability to interact with these sources in real-time arguably empowers the general public to drive the editorial agenda of media businesses to an extent not seen before. Media businesses ignore social media at their peril. This is set to continue, as more and more people are connecting through high speed broadband which is becoming more affordable and more available.

22. These trends are relevant to key issues around media plurality, such as ownership and control, in particular editorial control, as well as sourcing. Given that this is a relatively new phenomena, it would be helpful if the guidelines could set out some specific guidance on how the Minister intends to incorporate the impact of Internet Media into any assessment of media plurality.

G. Commitments and impositions

23. The introduction to section 5 of the Draft MM Guidelines (Application of the Relevant Criteria) makes reference to “any impositions” that the Minister wishes to impose.

24. We would welcome clarity around the term “impositions”. In particular, is it meant to refer merely to those commitments proposed by the undertakings which the Minister intends to accept and attach as conditions to his determination? As we understand the statutory framework, the Minister does not have power to impose conditions that have not been put forward by the undertakings. It would be helpful if the guidelines could confirm this understanding.

H. Editorial Ethos - political allegiances

25. We would query the relevance (at least in the vast majority of cases) of political allegiances to the Minister’s assessment of media plurality and editorial ethos in
particular (see section 5.4 of the Draft MM Guidelines). As a member of a political party, we would be concerned that the Minister could open himself to claims of bias if political allegiances were included as a consideration in his assessment.

26. If such a consideration is to be retained, we would suggest that the Guidelines set out clearly why it is relevant to an assessment of plurality, in particular as political allegiances were not a concern identified by the Advisory Group in its report in 2008, which formed the basis for the review which has culminated in the new media merger regime.

I. Concluding remarks

27. Media plurality is of fundamental importance to any democratic state and the new media merger regime is to be welcomed as an important tool in protecting citizens’ access to diverse opinion across all media sectors in the State.

28. As with any new regime of this nature, certainty around process and application will be key to ensuring that regulatory oversight of media mergers does not dampen commercial activities in respect of notifiable transactions that would not be contrary to the public interest in protecting plurality of media in the State. In this context, the Draft MM Guidelines are to be particularly welcomed and we thank the Minister and the Department for the opportunity to engage in the consultation process.

29. In light of the importance of certainty to parties contemplating media mergers, we would urge the Minister to publish updated guidelines as soon as possible.