SUBMISSION BY MATHESON IN RESPONSE TO THE INVITATION TO MAKE SUBMISSIONS TO THE MINISTER FOR COMMUNICATIONS ON THE GUIDELINES ON MEDIA MERGERS AND RELATED MEDIA MERGER NOTIFICATION FORM

DATED 22 JANUARY 2015
This submission on behalf of Matheson is in response to the invitation by the Minister for Communications, Energy and Natural Resources, Alex White, ("Minister") on 8 December 2014 to make submissions on draft Guidelines on Media Mergers ("Guidelines") that have been prepared pursuant to the Minister’s powers under section 28L of the Competition Acts 2002 – 2014 ("Act").

Matheson is Ireland’s largest law firm, with over 600 people. Our principal office is in Dublin and we also have offices in London, New York and Palo Alto, California. Matheson’s EU, Competition and Regulatory Group comprises specialist lawyers with many years of experience in advising on all aspects of EU and Irish competition law and regulatory matters, including merger control, cartel and dominance cases, public procurement law, State aid rules, competition law audits and compliance, competition litigation and sectoral regulation.

We welcome the opportunity to comment on the Guidelines. Our comments are made in light of our experience in advising parties on negotiating and making notifications, under the Act and under the EU Merger Regulation, of mergers involving media businesses. Our comments reflect the perspectives of a purchaser, target and vendor respectively, as well as the perspective of a third party complainant.

It is important that all Ministerial guidance on primary legislation is consistent with the Ministerial vires conferred by primary legislation and elucidates clearly the key concepts in the relevant primary legislation. The Guidelines need to meet these requirements in order to be of real practical benefit to businesses and their advisers in planning their mergers and acquisitions.

We support the stated intention of the Minister in the press release accompanying the Guidelines to ensure that the Guidelines clearly set out how the relevant tests will be conducted and provide real and effective guidance ‘to help media organisations and other interested parties to understand how the new media merger process will work in practice’. We note that it is envisaged by the Minister that the Guidelines will ‘set out the relevant criteria for making determinations for whether a proposed media merger is contrary to the public interest of media plurality’. We warmly welcome any guidance that would assist our understanding of the way in which the Minister intends to analyse media mergers.

Our comments on the Guidelines identify certain areas which would benefit from further clarity in relation to the process and tests involved in a media merger review process.

We note the power conferred on the Minister by section 28L of the Act is to make guidelines ‘on the general applicability of the relevant criteria to media mergers’ and that this is an enabling power and not a requirement. In this respect, we support the fact that the Minister has chosen not to provide guidelines in respect of section 28L(1)(a) at this time. It seems to us that it would be neither prudent nor desirable to make guidelines on levels of media ownership across different media sectors that would be regarded as contrary to the public interest given the dynamic changes currently taking place in the media industry in Ireland and elsewhere. We support the content of the Guidelines insofar as they provide guidance on section 28L(1)(b), namely ‘indicators of diversity of content and of diversity of ownership and control... that would be regarded as contrary to the public interest’ and those parts of
section 5 of the Guidelines which provide clarity. However, in our view, this area needs additional consideration and refinement.

Unfortunately, in our view, while the Guidelines provide some welcome clarity on how some of the relevant criteria might be applied, as currently drafted, they represent something of a lost opportunity to provide transparency on how the Minister can be expected to perform his role in a number of key respects. In a number of important areas, the Guidelines do not represent guidance at all but rather merely replicate large parts of the Act without any accompanying commentary. This failure undermines Recommendation 8 of the Advisory Report on Media Mergers which provides that the ‘Minister should publish Guidelines to assist undertakings involved in media mergers in knowing how the Minister would in general apply the relevant criteria’. More seriously perhaps unless remedied, the failure to include new / additional content in the Guidelines will both (i) lessen the ability of the Broadcasting Authority of Ireland (‘BAI’) and the Advisory Panel to perform the statutory obligations assigned to them, which includes an obligation to take account of the Guidelines, and (ii) expose the BAI, the Advisory Panel, and the Minister to criticism were there to be a judicial review of the Guidelines or an appeal / judicial review of a media merger decision of the Minister.

In our view, the key purpose of the Guidelines should be to articulate a clear test for how the Minister will apply the ‘relevant criteria’. As currently drafted, the Guidelines do not fulfil this task. In sum, the Guidelines should explain / expand on the nature of the public interest in protecting media plurality and in what circumstances plurality would be impaired. Media businesses in Ireland need to have legal and commercial certainty on these points. Finally, we consider that such disproportionately long review periods for media mergers may risk deterring investment and innovation which, in turn, may have the potential to undermine the objective of promoting plurality. The Guidelines present an opportunity to remedy and clarify these issues.

For ease of reference, we follow the chronological order set out in the Guidelines and, for brevity, we will only raise substantive comments where we consider necessary.

Part A: Comments on the Guidelines

1 Section 1 – Introduction

The third paragraph refers to the undesirability of allowing any one media business to ‘hold excessive significant interests within a sector or particularly across different sectors of media businesses in the State’. Neither this section nor the remainder of the Guidelines explain adequately the circumstances where ‘significant interests’ could be considered excessive or what the term ‘excessive’ means in a media merger context (please see subsequent comments on the term ‘significant’ in section 2 below). It is also a rather odd formulation as the significant interests held breach no provision of law and it is only the combination of the proposed merger under review and the significant interests that together fall to be analysed.

We suggest that the Guidelines should set out what is meant by the term ‘excessive’ giving some examples.
Section 2 – Interpretation of Terms: Definitions would benefit from further clarity in the Guidelines

We agree that the terms used in the Guidelines should have the same meaning as used in the Act. It is critically important that there is no ambiguity about key terms and concepts, and this objective is furthered by using the same meanings as in the Act.

Please see our subsequent comments on the term ‘significant interest’, which also touch upon the importance of maintaining consistency between the Act and the Guidelines,

2.1 Clarify the scope of important terms in the definition of ‘media business’ in the Act

The Guidelines offer the Minister / DCENR an important opportunity to clarify the scope of important terms which have a critical effect on determining jurisdiction. Currently, there is little or no guidance regarding what constitutes a ‘media business’ other than what is contained in the Act and / or the Broadcasting Act 2009. As Part 3A of the Act seeks to regulate media businesses that produce (i) print publications, (ii) audio-visual broadcast content, and (iii) online media, there is considerable scope for improving the Guidelines by explaining the technical definitions of certain terms that distinguish a ‘media business’ (discussed below). In particular, we note the Competition and Consumer Protection Commission (“CCPC”) has previously provided guidance on the meaning of a media business and we hope that the Guidelines will expand upon the same.

We will now identify certain key terms that are unclear in our view.

Firstly, the meaning of the term ‘making available’ in relation to online ‘material’ is uncertain. It is not clear if this term is only intended to cover the actions of the final undertaking in the supply chain which publishes the ‘material’ or whether it could refer to an undertaking which produces ‘material’ for publication by a third party (eg, a journalist / news agency / post-production producer). In this instance, each party may hold a varying degree of editorial control over the ‘material’. Further, would the person ‘making available’ ‘material’ have to “own” or “control” the electronic communications network (“ECN”) on which the material is made available? Clarity on these concepts would be helpful to assist parties confirm whether they fall within the scope of a media merger under the Act.

Secondly, the terms ‘transmitting, re-transmitting or relaying’ are not defined, although we expect the terms would be defined by reference to the Broadcasting Act, 2009, which is the case for the term ‘broadcasting service’. It would be helpful for the Minister / DCENR to provide further guidance on what does or does not constitute a broadcasting service.

Thirdly, the important term ‘news and comment on current affairs’ is also not defined in the Act. We appreciate that there may be an intention for these terms to remain open / flexible in order for assessment / interpretation on a case-by-case basis. However, given that a role of the Guidelines is to assist parties identify situations where a notification is required, it would be helpful to provide practical examples of the type of ‘news and comment on current affairs’ that the Minister / DCENR seeks to include. For example, could a law firm's
legal blog fall within the definition of ‘comment on current affairs’? We expect that it was likely not within the legislative’s intention to seek to include law firms within the scope of the media merger rules and suggest that further examples of the type of ‘news and comment on current affairs’ would be helpful to clarify this point.

Finally, we identify two particular areas of uncertainty in relation to the meaning of the term ‘undertaking involved’ in relation to the identification of a media merger.

The first issue concerns the extent to which an ‘undertaking involved’ falls to be characterised as a media business when only a minor or small aspect of its overall operations is media-related. For example, this question often arises if the purchaser is a private-equity undertaking – would a single portfolio company active as, say, a web-channel / blog, mean that the entire purchaser portfolio (ie, each separate company) be considered a media business because they form ‘part of an undertaking’ which would likely have more than €2 million turnover from customers in the State?

The second issue concerns the scope of the term ‘undertaking involved’ itself. For example, in an asset acquisition, we understand that the CCPC may interpret the term ‘undertaking involved’ to include both (i) the target and (ii) the vendor. Thus, in a scenario where a non-media business asset was being sold by a media business, a novel situation would arise whereby the transaction could be notified as a media merger notwithstanding that the target assets do not carry on a media business. We suggest that this approach is not consistent with the overall objectives of the Act and would benefit from further clarification in the Guidelines.

We regularly advise clients on these issues and would like to see a well-defined and clear scope of jurisdiction. We recommend that the Minister / DCENR consider publishing guidelines elaborating / addressing these questions.

2.2 ‘Significant interest’

We note the inclusion of the term ‘significant interest’ in the definition of ‘relevant criteria’ in section 28A of the Act. We understand the definition of ‘significant interest’ included in the Guidelines to mean that the Minister intends to have regard to the undesirability of allowing any one undertaking wishing to acquire control of a media business under Part 3 of the Act to also hold rights to ‘influence directly or indirectly, to an appreciable extent, the direction or policy of [another] media business’.

The above formulation of significant interest has some merit and is a concept that is understood by competition lawyers as there is a UK test of “material interest” and guidance on its application.

However, the threshold generalities in the second paragraph of the definition are seriously flawed and wholly undermine the apparently clear message in the above described text. In our view, as regards “ownership strength” the holding of shares giving an undertaking significant voting rights so as to enable it to influence a media business should be the critical issue as it is the voting rights attached to shares that typically enable an undertaking
to influence the direction of an undertaking. To the extent that an undertaking holds non-voting shares which are not easily convertible into voting shares then we consider it inappropriate that they be evaluated as suggested. It is also critical that enough such shares are held to enable the undertaking to influence to an appreciable extent the media business. The main thrust of the Minister’s evaluation must be to determine whether the holding can ‘influence directly or indirectly, to an appreciable extent, the direction or policy of the media business’.

Given the very important impact of the application of this new term, it is critical that the meaning to be given to the term ‘ownership strength’ is clear and that the consequences of such a position are fully considered and contradictory rule of thumb guidance is avoided.

It seems to us that the Guidelines definition of ‘to influence directly or indirectly, to an appreciable extent, the direction or policy of the media business…’ follows the UK test of “material influence”, to some extent, in so far as it relates to the ability to materially influence the policy of the entity concerned. We note that the UK guidance on this matter is much clearer and more detailed than that provided by the Guidelines and we would suggest that this area be revisited by the Minister / DCENR. Moreover, we note that the concept of “material influence” has not yet been incorporated in Irish merger control / competition law and that the European Commission is currently considering submissions in respect of whether such a concept should be introduced by way of EU legislation. In accordance with the above-described objective of maintaining consistency between the Act and the Guidelines, we suggest that the Minister should wait until there is clarity at about how “material influence” will be defined in EU law before seeking to introduce a very similar concept in the discrete area of media plurality regulation at a national level.

In particular, we note that a holding or voting strength of ‘more than 20 per cent or more’ (presumably a typographical error) will ‘generally constitute a significant interest’. We do not understand the basis for such a remark. In general, a shareholding of 25 per cent or more with associated voting rights may reasonably indicate some presumption of influence given that it enables the holder to block special resolutions of the company. We do not follow the logic in the Guidelines as regards 20 per cent of voting strength, in particular because there must be influence of a ‘appreciable extent’. Furthermore, we see no basis for the view as regards holdings of 10 per cent to 19 per cent. Can the logic be explained? Again, we note that the UK guidance refers to the fact that it may look at voting shares below 15 per cent only exceptionally and that it may look at voting shareholdings in the range of 15 to 25 per cent in order to see whether there is material interest. In our view, the UK position as explained by the CMA is worth considering as an alternative template and in any case that the current second paragraph of ‘significant interest’ is deleted. We reiterate our concerns about what a ‘holding’ could mean and why / how it might be deemed problematic.

Section 3 – How to Apply: Timing of Notification

Section 3 of the Guidelines (page 8 – 9) outline the timing for notifying a media merger.

We note with great concern the change introduced by the Intellectual Property (Miscellaneous Provisions) Act 2014 ("IP 2014 Act") which amends the Act to prevent notification of a media merger to the Minister until after the CCPC / European Commission has issued its decision.³ This prevents the possibility of the Minister and the CCPC / European Commission from conducting a parallel review of a media merger transaction. Rather, parties will now be required to endure a consecutive review of a media merger. Thus, the effect of the IP 2014 Act is to dramatically lengthen the overall media merger review period. Apart from the question as to why the Minister introduced an amendment to the Act less than two months following its enactment in October 2014, there are real concerns that the date / timing when it is open to parties to notify the Minister is unduly restrictive.

Section 28C(3) of the Act provides that a transaction that is put into effect without clearance from the Minister is void. In circumstances where parties to a media merger are now faced with a minimum delay of 60 working days to complete a transaction, there is a risk that pro-competitive transactions will not take place given the lengthy period of intervening uncertainty. In addition, there is a real and substantial danger that it will not be possible to carry out “failing firm” / “rescue-mergers” given the obligation to notify a media merger is irrespective of the parties turnover and there is now a lengthy timeframe for (a) competition, and (b) media plurality review.

We suggest that the Minister should have the ability to undertake the media merger review concurrently in order to minimise delay to the greatest possible extent. In our view, lengthy review periods create commercial uncertainty. This may deter media businesses from certain transactions and could act as a disincentive to innovation and investment in content. We would like to see the media merger aspects of the IP Act 2014 amended / removed.

At a minimum, the Guidelines should clarify the types of media mergers that could be subject to a shortened review period. For example, the Guidelines should have a materiality threshold, below which the ‘relevant criteria’ will not be applied when a business is acquired but the “media” activity of the business is overall, very small. In such cases, we suggest that there should be an expedited notification procedure with only minimal information requirements, so that businesses are not unnecessarily burdened. This is the practice of the CCPC in cases where no horizontal overlap arises between the merging parties. At a minimum, we recommend that the Guidelines should state that parties to a media merger may consult with the Minister in cases where an expedited review period is necessary eg, failing firm / rescue merger etc. In any event, we expect that the Guidelines will now require clarification as a result of the IP 2014 Act.

³. The IP Act 2014 was signed by the President into law on 23 December 2014.
Section 4 – Media Merger Process

In this section, we provide comments on the media merger process outlined in the Guidelines. We note that section 4.1 does not appear in the Guidelines.

4.1 Replication of Act

Section 4.3.1 refers to the Basis of the Determination. However, we note that the text therein is a replication of the text in section 28(D) 2 of the Act. Is it intended to give any guidance on how these terms are to be applied?

For example, we note that there is no description of how these various factors are to be weighed against each other. Equally, certain provisions merely require the Minister to ‘have regard’ to other provisions (eg, BAI reports) while others add that the Minister shall ‘take full account’ of other factors (eg, the CCPC Determination). It is not clear how these varying provisions impose qualitatively different obligations on the Minister.

4.2 Certain processes unclear

There is a lack of clarity on the date on which the Determination must be provided to the parties – we interpret section 28G(3)(a) of the Act as requiring that the determination is provided to the parties on the date of its issue and we suggest that the Guidelines should be clear on this point. The Guidelines should also make clear how this timing for provision of the determination to the parties interacts with the formal request to review (as set out in 4.6).

The Guidelines do not elaborate on the circumstances in which a formal information request stopping the clock might be regarded as appropriate. Given the very extensive time periods available to the Minister under the Act, we believe that these circumstances should be narrow and that the Guidelines should make this clear and provide some examples of the unusual situations where stopping the clock may be appropriate.

Section 4.6 of the Guidelines, entitled “Judicial Review”, should be amended to make clear two highly important points. Firstly, the Guidelines should make clear what parties can avail of the statutory appeal mechanism, in particular given that Section 28J(1)(a) of the Act only contemplates proceedings being brought by the “undertakings involved in the media merger”. Secondly, the Guidelines should make clear whether the legislative intent is for there to be an alternative right of action, for example under normal judicial review rules, for third parties that may be affected by a media merger to appeal a media merger determination.

4.3 Section 4.4 – Full Examination: Role of the BAI and the Advisory Panel

Section 4.4 of the Guidelines sets out the process for a full media merger examination and, in particular, an outline of the process for the BAI to conduct a report (“BAI Report”).
The text provided appears in large part to be a direct citation from the Act itself and provides no guidance at all. It is not clear to us what the purpose is of the repetition of large parts of the Act when the Act itself is well drafted and clear in this area.

It is not clear to us the nature of the examination that the BAI is to carry out or the expertise that the BAI might be reasonably expected to have at its disposal to enable it to carry out the examination expected. The Act makes clear that the BAI report must contain a recommendation as to whether the merger should be cleared, blocked or cleared subject to conditions, but there is no guidance on how the BAI should carry out its examination and the factors it should take into account in making its recommendation. Accordingly, the requirement of the BAI to take account of the Guidelines issued does not make any sense. It would appear to be the intention of the legislature that the BAI in conducting its review would have actual guidance from the Minister in carrying out its role. The absence of clear guidance on key areas casts serious doubt on the ability of the BAI to perform its statutory role.

In particular, it is not clear to us what expertise the BAI is expected to have at its disposal to perform its functions under the Act. Again, it is not clear to us what criteria are to be employed by the Minister in deciding to appoint an Advisory Panel in some Phase II cases and not in others. We note the provisions in section 28F of the Act that the Minister may appoint an Advisory Panel where he believes that its opinion ‘is required in order to assist’ the BAI. It would be helpful if the Guidelines were to set out what the criteria in question would be in such circumstances and the similarities and difference in expertise that an Advisory Panel would be expected to have vis-a-vis the BAI. If the expertise is very similar, the question would be why it is necessary to appoint a second body to make a recommendation on the same issues. If the expertise is very different, it rather begs the question of what type of expertise can an Advisory Panel be reasonably expected to hold. Again, the stated factors to be taken into account by the Advisory Panel are very similar to those to be taken into account by the BAI.

Section 4.4.9 refers to the requirement of the BAI to furnish a draft report and draft recommendations to the undertakings involved. It is also not clear what the purpose is of a draft report being provided to the parties to the merger. In merger scenarios, there is typically a requirement for an initial or preliminary interpretation by the adjudicating body with the notifying parties making a submission in response. It is hard to see how matters can be materially advanced in a draft report scenario. We do think it valuable that the actual opinion of the Advisory Panel be provided. However, again, we do not see how the Guidelines here are providing any actual guidance to the public at large as in many important respects the Guidelines are only replicating what is actually in the Act itself and provide no additional level of information on the process either substantively or procedurally. This is, in our view, a wasted opportunity.

As regards the Advisory Panel, it is not clear how it is to be recruited / constituted and readily available, what expertise it will have (how conflicts will be managed), how it will be supported, and how it can be in a position to deliver views within the relevant timetables.
It is noteworthy that the Act itself sets out at section 28G the factors to be taken into account by the Minister in deciding whether to clear or block the merger or block it subject to conditions, including that he will have regard to the reports of the BAI and the Advisory Panel, but no further guidance is provided by the Guidelines themselves.

4.4 **BAI role in respect of print and online media**

Currently, the BAI deals with the television / radio sectors while the Press Council of Ireland ("PCI") and Office of the Press Ombudsman deals with independent press regulation. The members of the PCI include national daily and weekly newspapers such as The Irish Times, Irish Independent, Irish Examiner, Sunday Business Post, Sunday Times etc. We note that certain "web based publications" such as thejournal.ie are also registered with the PCI.

It is not clear in the Guidelines if the Minister envisages any role for the PCI to be fulfilled during a media merger. For example, in a print media merger, it is not clear if the Minister would seek to appoint the PCI under the Advisory Panel mechanism to assist with a review of the media merger.

While the Guidelines (at section 5.10) suggest the BAI 'as a matter of policy' consider media concentration across other mediums when assessing ownership and control, we consider its expertise is significantly different to the PCI's knowledge / input in respect of the print sector.
5 Section 5 – Application of the Relevant Criteria

The introductory paragraphs do not clearly set out how the Minister will apply the relevant criteria – only that information provided will ‘be assessed under the Relevant Criteria headings as set out in the Act’. There is a need for greater clarity on how the terms described below will be evaluated. We support the proposed analysis of the factors identified and the clear indication that the Minister will have regard to proposed commitments.

We understand section 5.1 to 5.8 of the Guidelines as designed to give effect to section 28L(1)(b) of the Act so as to enable third parties to understand the indicators of diversity of content and of diversity of ownership and control that would be used in determining whether a media merger would be regarded as contrary to the public interest. Our comments are made on this basis. We understand section 5.9 – 5.10 of the Guidelines as designed to give effect to section 28L(1)(c) of the Act. We understand section 5.11 of the Guidelines as designed to give effect to 28L(1)(e) of the Act. Our comments are made on this basis.

5.1 Ownership and Control

We note that section 5.1 refers to ownership and control representing the primary indicators of media plurality in the State. While the terms ‘ownership’ and ‘control’ are in the Act, with 28L(1)(a) referring to ‘levels of media ownership’, we consider that ownership levels amounting to “control” of media businesses would be the issue requiring focus. We are concerned that the use of the terms ‘ownership’ and ‘control’ together might be regarded as seeking to introduce some new concept or meanings to these terms without appropriate virens. As stated above, it is important that terms in the Guidelines have meanings that are consistent with the Act so as avoid bringing confusion to this new area of law. In addition, we are concerned by the content of the Guidelines in introducing consideration of ‘levels and structure’ of ownership and control, which suggests that some levels or structures might be of concern but without setting out clearly what those might be. We note that the Minister has provided no guidance as regards 28L(1)(a) of the Act in terms of levels of media ownership and we consider this to be the correct course.

In order to avoid confusion, it is important that the Minister adopts the meaning given in section 16 of the Act to ‘control’ (ie, decisive influence) and, where necessary, that he evaluates the nature of that control (ie whether it is sole or joint control), and does not use any new and unclear concept of ‘control’. This should be confirmed in the revised Guidelines.

The term ‘ownership’ has a number of potential meanings and we suggest that the Guidelines clarify that, where the term is used, it is ownership of shares / assets etc, which gives rise to ‘control’ over a media business that would be explored. We note that the Minister will ‘have regard to other relevant media assets’. We assume that what is meant is control of other assets in the same geographic markets as the merger and in the same or neighbouring product markets. This should be confirmed in the Guidelines.
For example, it is not clear if the Minister’s examination of ownership and control will inevitably lead to a conclusion that merely because there is a diminution of plurality of ownership, there is also by definition, an impairment of media plurality for the purposes of section 28A of the Act. Such an approach would be mechanistic and place undue weight on ownership and control. This could result in an inadequate or incomplete substantive assessment of the actual or potential effects of a media merger on media plurality. We agree with the Report of the Advisory Group on Media Mergers which recommended that “…Guidelines on levels of ownership should not be regarded as fixed or bright line rules but should depend on consideration of the particular circumstances of any notified media merger.”

Moreover, the Guidelines should distinguish between different types of control (ie, (a) ownership, (b) ability to control policy, and (c) ability materially to influence policy. In practice, ownership may confer little control or control over certain issues, depending on voting rights. For example, in BSkyB v Competition Commission, the UK Court of Appeal considered various aspects of the media plurality public interest test contained in the UK Enterprise Act 2000 and noted that:

“….when it comes to assessing the plurality of the aggregate number of relevant controllers and to considering the sufficiency of that plurality, the Commission may, and should, take into account the actual extent of the control exercised and exercisable over a relevant enterprise by another, whether it is a case of deemed control resulting from material influence under section 26 or rather one of actual common ownership or control.”

It also important that the guidance is flexible enough to take proper account of situations where a State or Sovereign fund owns shares in more than one media business but does not have the ability to exercise control over such business (like the situation as between the State and certain of the Irish banks at present) or in the case of a publically listed company where there is no issue of joint or sole control but it holds minority interests in certain media businesses or media businesses own shares in the publicly listed company falling short of control.

5.2 Market share

As regards section 5.2, we note the view expressed that market share is an important indicator of media pluralism in the State. We believe that high and stable market shares in certain markets can be an important indicator of the existence of market power and thus where merging parties enjoy substantial market power this could be taken into account in considering the level of media pluralism in a particular market / market segment post-merger. We would, of course, expect an examination of all market participants and their shares and not just those of the merging parties (see our comments on Other Media

---

4 Recommendation 8.15, page 124.
6 Paragraph 121.
below). However, the current formulation in the Guidelines is rather simplistic and raises a number of concerns.

First, any analysis of merging parties' market shares has to be preceded by the employment of appropriate market definitional tools to ensure that markets are appropriately defined using the various product and geographic market assessments. We note that the Minister is to ensure that there will be a ‘complete examination to ensure that the market share is understood in its proper context’. It is not clear to us if this is something that the Minister will undertake or that he expects the BAI and / or Advisory Panel to undertake or if he intends to have regard to the manner in which the market shares are calculated by the CCPC and / or European Commission. It is important for the Minister to bear in mind that in a significant proportion of merger cases the competition regulatory body takes no view on market definition at all or presents a number of possible market scenarios and that in many markets there are no reliable independent figures for market size and shares.

Second, we note the statement in the Guidelines that ‘the more sectors that an individual or entity has significant interests in the lower the threshold where it is considered to have an adverse effect on plurality’. In the context of the Minister providing guidance in relation to the evaluation of market shares, we caution against relying (heavily / solely) on cross-sectoral interests as an indicator of a potential adverse effect on plurality. For example, most daily newspapers now publish, to varying degrees, much of their hardcopy news content online. Equally, many television and radio stations may also publish content online. Accordingly, these entities may be “customer-facing” on a number of different markets (to extent that television, radio, print media and internet represent separate markets). However, without any appreciation of the dynamics on each separate market or for the ability of customers (ie, the viewers, readers, listeners) to switch, we caution against finding that participation in various media sectors alone would be helpful as an indicator of an adverse effect on media plurality.

Thirdly, it is important that market share results arising from such definitions are evaluated in a sophisticated, professional manner. In particular, account should be taken of market shares of the merging parties over a three to five year period as appropriate, as well as other factors that may influence the linkage between market shares and market power, such as barriers to market entry / exit, the maturity of a market, and the level of innovation present. Factors specific to the merging parties, such as closeness of competition and customer switching patterns, should also be considered and economic input / evidence should be taken into account.

5.3 Governance

We note the view that governance of media businesses can be a factor in indicating the likely amount of diversity that might be expected post-merger. However, we find the last sentence relating to higher levels of consolidation confusing. We assume that what is meant is that where the same management team are responsible for a number of media businesses this may raise concerns about diversity of content and, conversely, where there
are different management teams different considerations might apply. We think this ought to be clarified. We also think it important that the Minister properly weigh up each factor as a requirement to replicate entire management teams post-merger can deprive a merger of the necessary synergies and efficiencies that would be likely to make a merger succeed / media businesses continue to thrive. It seems to us that governance issues and ring fencing of teams might be capable of being dealt with in the context of commitments.

5.4 Editorial Ethos

We note the views expressed on the impact of the editorial ethos on content of media businesses and, thus, plurality. The language here however is not clear. It would seem that the Minister would be influenced by the degree of independence that the editorial team might be expected to enjoy over content and how that could be secured and maintained.

The language on ‘political or cultural allegiances’ is ambiguous and troubling in terms of the fundamental freedoms of natural and legal persons. It should be explained how the ‘allegiance’ described might be defined so as to exist in one case or another and be evaluated. Such a position might also conflict with the Constitutional rights of legal and natural persons to certain freedoms including the right of freedom of expression as guaranteed under European and international law and inhibit media businesses from taking any views at all on political or cultural matters thus reducing debate and pluralism. It would also be important that any analysis might be prospective.

5.5 Content

We note the definitions in the Act on diversity of content. The explanation of ‘internal diversity’ in the Guidelines is comprehensible in part insofar that we understand that different views and interests can exist in any one media business. However, we do not understand what is meant by ‘external diversity’ as the term is wholly unclear. Is it the case that what is meant is that other forms of media available in the same geographic market is diverse such that it might be sufficient to allay diversity concerns where a merger takes place? Perversely, use of this criterion would tend to indicate that parties considering a possible merger should take steps to reduce the level of diversity of their media offerings prior to a merger announcement as the more similar the views / interests arguably the more likely it will be to secure merger approval. We suggest that this can hardly be the outcome that the Minister would be likely to desire.

We note the view expressed that ‘consolidation of content… may diminish the plurality of media in the State contrary to the public interest’. It is difficult to separate the issues of content and sourcing. The Guidelines seem to ignore the strong trend towards media businesses acquiring content from large international houses with global reach such as Associated Press and Reuters and the huge pressure on costs and need for investment in digital media and market consolidation to generate efficiencies in media businesses and guarantee long term survival.
5.6 **Sources**

This section is difficult to understand in isolation from content. It would be helpful if the Guidelines could set out how the concept of diversity of sourcing will be examined as distinct from the diversity of content factor.

5.7 **Other media**

We do not understand what is meant by having regard ‘to any alternative content provided by other media’ unless it is to be understood as suggesting that whether there is diversity in other media available in the relevant geographic market which could be viewed as protecting against a concern. The premise of this indicator of media plurality appears to be closely linked to the market share analysis described above – if there are other market participants with a share in the relevant markets, this would have been taken into consideration above. We suggest that clarification on this point would be helpful.

5.8 **Financial**

It is not clear to us what the Minister intends to address. Is it the case that the Minister would be more likely to approve a merger where, absent the merger the target is a “failing firm” or would be likely to decline due to an inability to invest in its media business or is likely to ultimately fail in a period of say 18 months, or a situation where a purchaser is not a credible buyer with the ability to fund its own media business / the target, thus jeopardising the financial health and competitiveness of one or both in the near term, eg 18 months.

We strongly recommend the Minister take great care if he / she seeks to supplant his / her view of appropriate financial structuring for that of businesses with competent management staff.

We do not understand at all what is meant by ‘the higher degree of consolidation of the financial structure’ the more likely it is to affect pluralism. Where business are well financed, media pluralism may be more likely to flourish as there is an ability and incentive to invest and an efficient financial structuring with all the economies of scale that generally entails might be likely to increase business confidence and investment. For this reason in particular, we do not identify any legal basis in the Act for the Minister to consider financial structure issues as part of his review of a media merger.

5.9 **The scale and reach of RTÉ and TG4**

We agree that the activities of the Public Service Broadcasters are relevant. Given that the vast majority of Irish homes also have access to foreign-based broadcasters including the UK public service broadcaster (BBC), we recommend that the Guidelines also consider the real possibility that the availability of such content would mitigate a media plurality concern. In addition, the use of the words ‘if appropriate’ in section 5.9 should be explained so that businesses can predict the type of media merger case to which the role of the Public Service Broadcasters would not be relevant.
5.10 **Ownership and control policy of the BAI**

We note that the views of the BAI under its statutory remit and “the Policy” will be taken into account by the Minister. However, we suggest that the Guidelines should clarify whether the Minister intends to consult with the BAI so as to ensure so far as possible that the media plurality assessments of both bodies are consistent. For example, it would be illogical for a media merger to be unconditionally cleared by the Minister and then to be undermined by a BAI decision to refuse to grant a broadcasting contract etc. based on media plurality concerns / the Policy.

5.11 **Proposed commitments**

This is an important section of the Guidelines but it lacks detail and we recommend that more information and guidance is provided on how these commitments might be framed. It is critical, however, that commitments are only sought where they are reasonable to satisfy a genuine and clearly articulated concern of the Minister and that they are proportionate to the harm sought be avoided.

We note the reference to the list of examples of possible commitments and that it is neither prescriptive nor exhaustive. We consider some of the suggestions as capable of execution in certain circumstances.

However, we are unclear as to what is suggested in the third bullet ie, the imposition of a restriction on publication or purchase of particular content. It seems to us that such a restriction and the related penalty for breach could undermine fundamental freedoms and undermine the on-going financial stability and flexibility of the media businesses. We are also concerned by what is intended as regards the penultimate commitment, imposition of financial restrictions. It is difficult to envisage what might be intended. It would be extraordinary if a media business were to be prevented from making investments in existing media businesses or precluded from entering other media segments.
Part B: Comments on the Media Notification Form

6 The requirements of the form are unduly onerous on notifying parties

Parties to a media merger filing will already be required to complete the CCPC’s Merger Notification Form (“CCPC Form”) or the Form CO to the European Commission as applicable.

Sections 1 and 2 of the Media Merger Notification Form (“Media Form”) appear to closely replicate the CCPC Form. On the basis that the same content is required by the Media Form, sections 1 and 2 of the Media Form are relatively straightforward and unlikely to create confusion or unnecessary costs for business.

However, section 3 of the Media Form requires a substantial volume of information without any regard as to whether a material media plurality overlap / concern occurs in the media merger. The level of detail requested in section 3 is unduly onerous and this section should only be mandatory to complete in cases where there is a real possibility of a media plurality concern. For example, where there is no potential media plurality concern, it is not clear why detailed information is needed in relation to: (i) market share, (ii) composition of boards, (iii) corporate governance, (iv) grievance procedures, (v) editorial ethos, (vi) source of news content, (vii) a breakdown of all content, (viii) user generated content, (ix) alternative content providers, (x) financial structures pre and post-merger, (xi) future business plans, (xii) staff changes, and (xiii) staff remuneration policies. Parties to a media merger will be subject to significant cost implications by virtue of being required to prepare and submit this set of detailed – and often unnecessary – information.

In sum, we believe that the requirement to complete section 3 of the Media Form should be automatically disapplied where there is no overlap with respect to media activities in Ireland. If this option is not acceptable to the Minister, there should at least be an option whereby parties can apply for individual waivers (for clear and substantiated reasons) from the requirement to complete section 3 of the Media Form.

Page 3 states that signature pages should be provided by fax. We suggest that the Media Form should clarify whether e-mail delivery of these documents is acceptable, given that it is a more commonly used and a more reliable method of communication.

The Media Form should also make clear whether the required information on ‘holdings’ under section 3.2 must be provided in relation to (i) the target only, (ii) the target and the acquirer group, or (iii) the seller group (including the target) and the acquirer group. Also, it would be useful for the Media Form to explain the intended meaning of the request for information on (4) investor-investee relationships, (5) interchange or managerial personnel, or (6) provision of essential technical information.

The Media Form should make clear whether the required information under sections 3.3 – 3.12 inclusive must be provided in relation to either (i) the target and the acquirer group, or (ii) the seller group (including the target) and the acquirer group: see discussion above at
section 2.1 in relation to ‘undertaking involved’. Further, we understand these sections as requiring the provision of information only in respect of the “media business” activities of the relevant entities, but it would be helpful if this point could be clarified also.

Finally, the Media Form should make clear why the information on ‘Grievance procedures for employees’ that is required under section 3.4 is pertinent in the context of the ‘relevant criteria’ for examination of a media merger by the Minister. If no strong reasons to this effect exist, this requirement for information should be removed from the Media Form.

Section 3.2 of Media Form – Information on Significant Holdings

As stated above, the threshold in the Guidelines for the possibility of exercising a ‘significant interest’ is set very low (10 per cent – 19 per cent) without adequate justification. Moreover, the concept of being able to influence directly or indirectly ‘to an appreciable extent’ is not a clear or recognised concept, although a perhaps similar concept is applicable under English law. These interpretational points are likely to cause difficulty for parties who are required to complete the requirement in section 3.2 of the Media Form to provide information on holdings of greater than 10 per cent. As stated above, we recommend that the revised Guidelines should re-visit the relevant definitions of ‘interest’ / ‘control’ / ‘ownership’ so as to ensure consistency between Irish merger control and Irish media merger concepts where possible.

Section 3.11 of Media Form – Information on Financial Structure

As stated above, we do not identify any reason why the financial / debt structure of a business should influence the Minister’s review of a media merger unless he has strong grounds for believing that the media business in question are likely to fail within a defined future period of say 18 months. We suggest that the Minister should re-consider the requirement to provide such information under section 3.11 of the Media Form.

Other: Sharing of confidential information

The Guidelines do not make clear what confidentiality protections will be granted to notifying parties, who are likely to have to disclose highly confidential and sensitive information as part of the Media Form. While the Media Form does note that undertakings should mark information as confidential, no guidance is provided to notifying parties as to how ‘the Department will decide whether to accede to a request’ for redaction of confidential information in any public version of the Minister’s decision.

Additionally, we suggest that both the Guidelines and the Media Form should provide clear assurances as to how confidentiality will be protected in a case where the Minister appoints the BAI / Advisory Panel to review a media merger.