Consultation on Draft Media Mergers Guidelines

Comments/Observations by National Newspapers of Ireland (NNI)

National Newspapers of Ireland (NNI) is grateful to the Minister for Communications, Energy and Natural Resources for the opportunity to put forward its views in relation to the draft Media Mergers Guidelines (the “Guidelines”).

About NNI

NNI represents 16 national and 25 local news brands delivering multi-platform content to readers.

The combined weekly print circulation of NNI newspapers is almost 3.7m copies. This means that over 190m newspapers are sold annually in Ireland. Their production, distribution and sale accounts for thousands of jobs and millions of euro in direct and indirect tax revenue for the country.

Additionally, our members operate online news websites attracting millions of unique users and offer mobile news services via “apps.”

The newspaper industry continues to progress through a period of rapid change and enormous innovation. In responding to the demands of their readers, NNI publishers have invested heavily in staff development and training to provide the reader with the highest quality editorial content and journalism. They have also invested significantly in innovative production methods and delivery to give the reader access to a better quality print and digital product.

NNI believes that newspapers – in all their forms - are a major contributor to the cultural, social, economic, intellectual and political life of Ireland. The free flow of information of all kinds is clearly critical to the functioning of Ireland as a modern democracy where freedom of expression is fully safeguarded. Newspapers provide the diverse and insightful news and analysis necessary to inform citizens and foster the democratic debate.

NNI is committed to education and, in support of Government aims to address concerns about literacy amongst young people, NNI established a Newspapers in Education programme three years ago. NNI Press Pass, aimed at transition year students, has been hugely successful with 14,500 thousand TY students participating this year.
NNI also represents the interests of its members in a number of areas and strives to ensure the industry can operate within a fair and balanced legislative framework and within an advertising market that facilitates fair competition between all media.

NNI promotes the importance of press standards and played a pivotal role in the establishment of the Office of Press Ombudsman and Press Council of Ireland. All member titles subscribe to the Code of Practice, which provides the basis for the independent press complaints mechanism.

In the context of the need to assure plurality of the media, it should be noted that Principle 2.3 of the Code of Practice provides:

2.3 Readers are entitled to expect that the content of a publication reflects the best judgment of editors and writers and has not been inappropriately influenced by undisclosed interests. Wherever relevant, any significant financial interest of an organization should be disclosed. Writers should disclose significant potential conflicts of interest to their editors.

Principle 1.1 states:

1.1 In reporting news and information, newspapers and magazines shall strive at all times for truth and accuracy.

Below, we outline our comments and observations in relation to the Guidelines.

**Media Mergers Guidelines – NNI Comments/Observations**

1. Although the idea of regulating media mergers on plurality grounds is not a new one, no established “theory” or practice has emerged in Ireland. Given that a report from the BAI is to be prepared by the BAI, it could be made 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”.

2. In relation to Section 2, it is unfortunate that such a “legal” approach is being taken in relation to guidelines, which are designed to guide media undertakings and interested parties rather than lawyers. It would be more appropriate to “define” terms, rather than to “interpret” them as the heading suggests. More importantly, it is unhelpful to have to cross refer to Section 2 when reading Section 5, especially when detailed process issues are discussed in-between and it would be better to include the definitions in Section 5 itself.

One "interpretation" of particular concern is that of "significant interest". The word "significant" is in itself rather vague, and it may be better to use the word "material" which is more apt to suggest a relationship which, even if falling short of control, may cause plurality concerns.

In any event, as the interpretation is worded, it appears that any degree of influence could suffice for there to be a significant interest. It should be made clear that such
influence should be at least "material". In addition, the guidance in terms of what would constitute a "significant interest" is unhelpful. It is not helpful guidance simply to state that a given range “may”, or above that range will “generally”, constitute a significant interest.

It therefore needs to be made clearer just when a holding or voting strength of between 10% and 19% "may" constitute a significant interest. As a rule, such a range would be presumed not to have such a result unless there was strong evidence to the contrary. It is also submitted that a holding or voting strength of more than 20% should not “generally” constitute a significant interest. Such a percentage may lead to such a conclusion, but, again, there would have to be additional evidence to show this is the case. This more rigorous approach appears to be consistent with that taken in the UK. NNI therefore believes it would be appropriate to explain in more detail just when an interest becomes "significant" and therefore relevant from the perspective of assuring media plurality.

3. In relation to Section 5, it would be helpful if the Guidelines clearly addressed all of the relevant criteria. In this respect, an explicit reference could be made to the relevant criterion covered by each of the headings used in Section 5. It appears that the first eight headings refer to the first of the relevant criteria (plurality), but that the first heading, on “ownership and control”, may also refer to the second (multiple interests). The ninth and tenth headings refer to the fourth of the relevant criteria. The final heading (proposed commitments) refers to the fifth relevant criterion. (It appears that two of the relevant criteria are not addressed in the Guidelines, and it would be helpful if this were made clear)

There is a fair amount of guidance on the factors that the Minister will take into account in assessing the likely effect of the media merger on plurality, much of which is self-evident, but very little guidance on what will/or will not pose a problem. In this respect, the fact that the guidelines are, under Section 28L of the Act, to be on the “general applicability of the relevant criteria” (emphasis supplied) does not mean that more detailed guidance, including the approach to be taken in hypothetical situations, cannot be provided (as it is in the UK and Australian guidelines).

In this regard, under each of the headings in Section 5, reference is made to “a comprehensive list of information required under this section” in Appendix I. It would be helpful if the relevance of this information were explained in the guidelines. It would also be helpful if reference could be made to the specific paragraph/s in the notification form which relate to each heading.

NNI has the following comments on the specific headings addressed in Section 5:

- In relation to “ownership and control”, it is stated that these represent primary indicators of media plurality in the State. However, it is totally unclear what will be regarded as such “ownership and control” and just how this can impact on plurality. It would be helpful if the Guidelines could indicate what is meant by “ownership” and “control” - in what circumstances, for example, will a minority
stake in a company amount to control? In this regard, it should be explained how, if at all, the concept of “control” used for the purposes of merger control by the Competition Authority/European Commission would differ from that employed here for the purposes of protecting media plurality. The guidelines should also give some clear indications when ownership and control considerations would give rise to media plurality concerns.

The Guidelines also need to make it clear that an analysis of media plurality needs to take into account what is happening elsewhere in the media – it cannot be assessed with reference only to the position of the parties.

- In relation to “market share”, the Guidelines correctly state that “market share is an important indicator of media pluralism”. It would be useful if the Guidelines could address what is meant by “market”, and the extent to which this will differ from the definition of market which will be used by the Commission or the European Commission. It would also be useful to understand what level of market share will raise plurality concerns. The reference to “significant interest” in the third paragraph of Section 5.2 is not clear, since the term relates to interests and a business or businesses, and not to a sector.

Under para. 3.3 of the Notification Form, it may be more useful to speak of “possible” or “candidate” markets in the various media sectors, and ask parties to provide information on these and segments (such as particular audience groups).

- In relation to “governance”, the Guidelines state that “governance structures may have a significant impact on content and thus media plurality”. It is explained that “higher levels of consolidation of the management structure of the parties to the proposed merger may adversely affect media pluralism in the State”. The principle is understood. However, more guidance should be provided on what levels of consolidation will cause concerns, or, from another perspective, what degree of autonomy as between the parties would be expected not to raise concerns.

The Guidelines state that “evidence of corporate governance standards may also be relevant” to media plurality. It should be made clearer how this may be the case with reference to the types of evidence that the parties will be expected to provide under para. 3.4 of the Notification Form. At first sight, general compliance and labour relations issues will have little to do with plurality of the media.

- In relation to “editorial ethos”, it is correctly stated that this “may have a significant impact on the content of media businesses and thus on media plurality”. This is clearly an important and sensitive area with huge potential implications for the independence of the media and the Guidelines need to be much clearer as to the circumstances in which concerns would be raised. The key consideration here should be whether the current position as regards
editorial ethos will be materially changed as a result of the merger. There is a clear link with the question of governance.

- In relation to “content”, it is stated that this is “an essential component of the plurality of the media in the State”. A distinction is made between “internal diversity” and “external diversity”, with these measures seen as complementary to one another. However, it is not clear how such theories will be applied in concrete cases and more guidance needs to be provided. It is also difficult to see how the information sought in para. 3.8 of the Notification Form will help in considering the extent of “internal diversity” as described. Furthermore, a “content” analysis can be made only by looking at the content of other players in the relevant sector/s. This is, a little strangely, addressed in another heading - “Other media”. It would make more sense to integrate this into the “content” section.

In the Notification Form, paras. 3.8, 3.9 and 3.10 should move ahead of para. 3.7 in order to tally with the Guidelines. In addition, it would be useful to provide some indications of the period for which relevant information should be provided.

- In relation to “sources”, the Guidelines state that “the sourcing policy employed by media businesses may have an impact on diversity of content and thus on media pluralism in the state”. Para. 3.7 of the Notification Form requires information to be provided on the sources of information of news, current affairs or cultural interests and sets out what this information should include. More guidance could be provided on when a reduction in the diversity of sources taking into account this information will cause plurality concerns. In addition, an analysis of whether such a reduction could have adverse effect on plurality in the State can be made only by looking at the position of other players in the marketplace and specific reference should be made to this in the Guidelines.

- In relation to “financial structure”, this seems to be naturally-related to “governance” and could be more usefully addressed in that context. It could be explained in detail why media pluralism will be more likely to be affected “the higher the degree of consolidation of the financial structure between the parties to the proposed merger”. The ability to finance any given merger will clearly be of the utmost importance and it is critical for the party/ies concerned to know in advance what types of sources of financing and debt structures will risk being unacceptable in terms of media plurality.

- In relation to the “scale and reach of RTE and TG4”, the Guidelines contain a fairly detailed summary of the remit and obligations of the Public Service Broadcasters and state, self-evidently, that they have an impact on media pluralism in the State. It would be helpful if the Guidelines could clarify how it will consider such “scale and reach” in the non-broadcasting media sectors. In addition, it is submitted that, as well as looking at contemporary reach, the
Minister should also look at future reach when this can be reasonably anticipated.

- In relation to "Part 6 of the Act of 2009 and the ownership and control policy of the Broadcasting Authority of Ireland", the Guidelines are rather descriptive and provide little guidance as such. Since these issues are addressed separately in the 2014 Act, it would be appropriate to deal with them separately in the Guidelines.

- Finally, in relation to “proposed commitments", the Guidelines provide welcome guidance on the types of possible commitments that may be considered to positively promote plurality. However, in relation to the Notification Form, it seems premature to require proposals for commitments to be submitted at the time of making the notification. To do so would be in the nature of a rather uncertain bet. The nature and extent of any commitments can be properly determined only if and when the nature and extent of any prospective “injury” to plurality of the media has been established.

Conclusion

NNI believes that the Guidelines provide a measure of useful guidance on how the Minister for Communications, Energy and Natural Resources will apply the relevant criteria. However, it considers that concrete and more detailed guidance should be provided on the general applicability of the relevant criteria. This will allow parties to prospective media mergers to anticipate how they will be viewed by the Minister when exercising his/her role of protecting plurality of the media in the State under the Competition Act 2002.

Should further clarification on the observations outlined in this document be required, NNI would be happy to do so.

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