

# EU, Competition and Regulated Markets

## Regulation of Media Mergers in Ireland

There appears to be a renewed political impetus for increasing the regulation of media mergers in Ireland.

### New Legislation Proposed

The Minister for Jobs, Enterprise and Innovation, Richard Bruton, (the Minister) recently confirmed that he will be seeking Government approval shortly for legislation arising, in part, from the review of the current legislative framework relating to the public interest aspects of media mergers in Ireland which was carried out by the Advisory Group on Media Mergers. The Advisory Group, chaired by barrister Paul Sreenan, was charged with reviewing and considering levels of plurality and diversity in the media sector in Ireland; examining and reviewing aspects of the current legislation in relation to media mergers, including the role of the Minister; considering international best practice; and making recommendations where appropriate. The Advisory Group presented its Report on Media Mergers to the last Government in June of 2008. The Minister's recent comments regarding the proposed new legislation arose in the context of his responses to a number of questions posed by Deputy Eamon O'Cuív in relation to media consolidation, the structure of media ownership, and diversity of ownership of local and national newspaper markets and the national commercial radio market in Ireland.

### Current Legislative Framework

Under the current legislation dealing with media mergers, namely the *Competition Act 2002* (as amended), all media mergers in Ireland must be notified to the Competition Authority regardless of the turnover of the undertakings involved. There are various sanctions for failure to notify, including that title to the shares or assets concerned does not pass to the purchaser. The Minister has a special role in relation to media mergers in that he has the power to overrule the Competition Authority's determinations. In making a decision in relation to a media merger, the Minister is permitted only to have regard to the "relevant criteria", which are as follows:

- The strength and competitiveness of media businesses indigenous to the State.
- The extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings.
- The extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings.
- The extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State.
- The market share held by the undertakings involved in the proposed media merger, or by any individual who has an interest in any of those undertakings.

Some media mergers require clearance from the Broadcasting Authority of Ireland (BAI) as well as from the Competition Authority/Minister. The BAI was established on 1 October 2009 following the enactment of the *Broadcasting Act 2009* and it is responsible for the licensing of broadcasting services, for example, commercial radio and television stations. In a situation where a media merger involves the assignment of a broadcasting licence, or the change in ownership or control of a broadcaster licensed by the BAI, the terms of the relevant licence agreement must be adhered to. Generally, this means that the prior written consent of the BAI is required for the proposed transaction to proceed.

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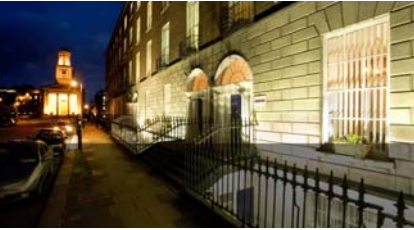
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### **Proposed Legislation and Recommendations of the Advisory Group on Media Mergers**

The Minister stated that he will be seeking Government approval shortly for legislation arising, in part, from the review of the Advisory Group, "including the possibility of extending certain public interest criteria for media mergers to certain aspects of the operations of undertakings involved in the provision of audio-visual material over the internet as recommended by the Advisory Group".

The Advisory Group made eleven recommendations in its Report which can be summarised as follows:

1. There should be a statutory definition of "media plurality" to include both diversity of ownership and diversity of content.
2. The Competition Act should be amended to incorporate a statutory test to be applied by the Minister in the discharge of his function in relation to media mergers.
3. The definition of "relevant criteria" in Section 23(10) of the Competition Act (as set out above) should be replaced by the following:
  - (a) The likely effect of the media merger on plurality, which includes both diversity of ownership and diversity of content.
  - (b) The undesirability of allowing any one individual or undertaking to hold significant interests within a sector or across different sectors of media business in the State.
  - (c) The consequences for the promotion of plurality in media business in the State of intervening to prevent the media merger or attaching conditions to the approval of the merger.
  - (d) The adequacy of other mechanisms to protect the public interest in plurality if the Minister was not to exercise his or her power under the Act.
  - (e) The commitments that the undertakings are prepared to offer and which might be effectively incorporated in any decision by the Minister.
  - (f) The extent to which the public interest can be secured by the imposition of any conditions by the Minister under the Act.
4. There should be an ongoing collection and periodic publication of information and employment of concrete indicators in relation to media plurality in the State.
5. The Competition Authority should neither be required to form nor to furnish an opinion on the application of the relevant criteria.
6. There should be a separate system of notification of media mergers to the Minister for clearance.



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7. There should be an obligation imposed by Statute on parties to a media merger to provide full information to the Minister on all circumstances that might impair media plurality in the State, and to notify any changes in information provided to the Minister, with appropriate penalties for non-compliance.
8. The Minister should publish guidelines to assist undertakings involved in media mergers in knowing how the Minister would in general apply the relevant criteria.
9. In the event of the Minister deciding to proceed with a detailed investigation of a proposed merger (other than a broadcaster to broadcaster merger), a three to five person Consultative Panel should be established on a statutory basis to provide advice to the Minister on the media merger.
10. The definition of "media business" should be amended to include publication of newspapers and periodicals over the internet and broadcast of certain audiovisual material over the internet.
11. The important role of the media in a democracy should be recognised by Statute, ideally in the long title of the Act containing the relevant provisions on media mergers.

Operators in the media industry can expect that there will be a change in the law regulating media mergers at some time in the future, but it remains to be seen what these changes will entail, whether the Minister will implement all of the Advisory Group's recommendations and when exactly the new legislation will be introduced.

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