

# **Guidelines on Media Mergers**

**10 April 2024**

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## Section 1: Introduction

The current regulatory regime for media mergers was introduced by the Competition and Consumer Protection Act 2014, which amended the earlier regime in place under the Competition Act 2002 (the Act). The provisions of the revised Act significantly reformed the regulatory regime for media mergers, including the passing of responsibility for the Media Mergers process from the Minister for Jobs, Enterprise and Innovation to the Minister for Communications, Energy and Natural Resources<sup>1</sup>, giving the Minister a statutory function under Part 3A of the Act to make a determination on whether a proposed media merger will be contrary to the public interest in protecting plurality of media in the State.

This reform of the media mergers regime was in recognition of the fact 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. Given this critical role it is vital to the public interest that the State protect media pluralism as far as is practicable.

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; as such it is undesirable to allow any one media business or individual to hold excessive significant interests within a sector or particularly across different sectors of media businesses in the State. The objective of the media mergers regime is the pursuit of the public interest to protect and promote a diverse media, both in terms of ownership and content.

Part 3A of the Act addresses issues such as fragmented media, the rise of online media and an increasingly dynamic media sector. The primary and most important element of this section of the Act is a public value test, involving a more thorough definition of media concentration, which deals specifically with cross media ownership. The legislation also includes a statutory definition of media plurality which refers to both ownership and content.

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<sup>1</sup> Now the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media

These Guidelines aim to assist media undertakings and interested parties to understand the process involved and how the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media will apply the relevant criteria in making a determination on whether a proposed media merger will be contrary to the public interest in protecting plurality of media in the State. As experience is gathered dealing with the media mergers process and lessons are learned from both regulatory and industry perspectives, changes may be made to improve the value of the Guidelines and reflect refinements in the regime. As such, these Guidelines have been updated to reflect the establishment of a Simplified Media Mergers Notification Procedure, as set out under Section 3.4.

## Section 2: Interpretation of Terms

All terms in these Guidelines have the same meaning as defined in the Competition Act 2002 (as amended).

The following supplementary definitions are provided for clarity and guidance with regard to these Guidelines.

***‘relevant media asset’*** means:

Holdings which constitute a significant interest in an undertaking (other than an undertaking party to the merger) that carries on a media business in a media sector(s) in the State, and which are held either by an undertaking party to the merger or by a natural or legal person with a significant interest in an undertaking party to the merger.

***‘media sector’*** means one the following (and ‘media sectors’ means one or more of the following collectively):

1. Publishing – publication of newspapers or periodicals consisting substantially of news and comment on current affairs and the production of content for same.
2. Broadcasting – transmitting, re-transmitting or relaying a broadcast service including radio or television and the production of content for same.
3. Internet Media – making available on an electronic communications network any written, audio-visual or photographic material consisting substantially of news and comment on current affairs.

***‘significant interest’*** means:

Has sufficient voting, financial or ownership strength within the relevant media business or media businesses to influence directly or indirectly, to an appreciable extent, the direction or policy of the media business or media businesses with regard in particular to news, current affairs or cultural content. This includes sourcing, production, supply or delivery of such content.

The following thresholds in relation to voting power at a general meeting of the media business, or the nominal value of the shareholding, are provided by way of guidance in terms of what constitutes a significant interest:

- A holding or voting strength of between 10% and 19% (directly or indirectly) may constitute a significant interest.
- A holding or voting strength of 20% or more (directly or indirectly) will generally constitute a significant interest.

***‘near relative’<sup>2</sup>*** means:

- spouse, civil partner, cohabitant (within the meaning of Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, or any analogous legislation of another jurisdiction); and/or
- child, stepchild, brother, sister, parent, or grandparent; or (where appropriate) the spouse, civil partner or such a cohabitant of any of the aforesaid.

***‘primarily news and comment on current affairs’:***

The meaning of this phrase has not been altered in the new process and retains the same meaning as under the previous system administered by the Competition and Consumer Protection Commission.

***‘transmitting, re-transmitting or relaying’:***

Have the same meaning as defined in the Broadcasting Act 2009.

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<sup>2</sup> A person (being a natural person) is deemed, for the purposes of this definition, to have a significant interest in any media business in which his/her near relative has a significant interest.

## Section 3: How to Apply

This section outlines the procedures for dealing with mergers and acquisitions notified to the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media. It is applicable from 10 April 2024.

### 3.1 Notifying the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media

In accordance with Section 28B of the Competition Act 2002 (as amended) (“the Act”), each of the undertakings involved that have notified the Competition and Consumer Protection Commission (“the Commission”) under Section 18(1) of the Act, or the European Commission, as the case may be, shall notify the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media<sup>3</sup> (“the Minister”) in writing, and shall provide them with full details of the proposal to put the merger or acquisition into effect.

Notifications must be made on or before the “relevant date”, but not before the Commission or European Commission have made their determination or the relevant period had elapsed (as set out in Section 28B(2)(b) of the Act. The relevant date has the same meaning as it has in the Act. In relation to media mergers, the relevant date means 10 working days from whichever of the following dates is applicable:

- a. The date of a determination by the Commission under paragraph (a) of Section 21(2) or under paragraph (a) or (c) of Section 22(3);
- b. The day after the period specified in subsection (2) of Section 21 has elapsed without the Commission having informed the undertakings that made the notification concerned of the determination (if any) that was made under paragraph (a) or (b) of subsection (2);
- c. Where the Commission has made a determination under Section 21(2)(b), the day after
  - (i) 120 working days have elapsed after the appropriate date within the meaning of Section 19(6), or
  - (ii) where a requirement or requirements referred to in Section 22(4A) were made under Section 20(2), 120 working days and any period of suspension that

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<sup>3</sup> While the Act refers to the Minister for Communications, Energy and Natural Resources these functions are now the responsibility of the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media.



applied pursuant to Section 22(4A) have elapsed after the appropriate date within the meaning of Section 19(6)

without the Commission having made a determination under Section 22;

- d. the date of a decision of the European Commission under Article 6(1)(b) or Article 8(1) or (2) of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings;
- e. the date that Article 10(6) of Council Regulation 139/2004 comes into effect.

Notifications are made using the Department's Notification Form. Undertakings are encouraged to make a joint notification, though they are not obliged to do so. Where undertakings make separate notifications, the "appropriate date" from which the merger review procedure commences, as defined in Section 28D (9)(10)(11) of the Act, shall be the date of receipt of the last notification. In the situation where one of the parties, which should have notified, fails to notify, the appropriate date is the latest date by which the non-notifying party could have notified on time.

For the purposes of establishing the "appropriate date" (which is the date upon which the undertaking actually notifies the Minister, and is used to calculate the time for requesting further information), a notification shall be deemed to have been received by the Department on the date (being a weekday (excluding public holidays) and between the hours of 9.15 and 17.30) upon which a complete copy of same, including all relevant supporting documentation, is delivered to the email address below. Where a notification is received later than 17.30, it shall be deemed to have been received on the next working day.

All notifications should be addressed to:

[mediamergers@tcagsm.gov.ie](mailto:mediamergers@tcagsm.gov.ie)

### **3.2 Pre-Notification Discussions**

It is the Department's intention, while fully implementing the Act, to manage its responsibilities with regard to the regulation of media mergers and the protection of media plurality in a manner that is both effective and efficient, imposing the least burden possible on business. To this end the Department will be happy to facilitate Pre-Notification discussions.

These discussions will allow parties to explore the nature of the transaction, identify what (if any) issues may arise in relation to media plurality as a result of the proposed merger, and seek any flexibility around information requirements that may be appropriate given the circumstances.

Pre-Notification discussions may be particularly beneficial where parties are considering the suitability of the media merger to be notified under the Simplified Media Merger Notification Procedure.

All requests for Pre-Notification discussions should be addressed to:

[mediamergers@tcagsm.gov.ie](mailto:mediamergers@tcagsm.gov.ie)

### **3.3 Appropriate and Flexible Information Requirements**

The objective of the media mergers regime is the protection of the public interest in maintaining media pluralism in the State; it is not an exercise in information gathering. Where the public interest can be secured with fewer burdens on the parties involved, it should be. For cases where there is no demonstrable impairment of the plurality of the media in the State, or where the information requirements under certain sections of the Media Mergers Notification Form are not applicable, flexibility may be appropriate. Parties may seek flexibility in terms of the requirements of certain sections of the Notification Form; this must be sought by the parties and granted by the Department in advance of notification. Notwithstanding the granting of any such flexibility the Department retains the right to request further information should it deem it necessary. The granting of such flexibility accords fully with the established practice of the Competition and Consumer Protection Commission and the European Commission.

### **3.4 Simplified Media Merger Notification Procedure**

The intention of the Simplified Media Merger Notification Procedure is to ease the regulatory burden on businesses in cases where the target of the media merger is not active in the State and is, therefore, unlikely to have an impact on the plurality of media in the State.

The Department may apply a Simplified Media Merger Notification Procedure when, in the view of the Department, the following conditions are met:

- (a) the target undertaking does not carry on a media business in the State and it is not intended that it would do so;
- (b) the target undertaking does not target audiences in the State and it is not intended that it would do so; and
- (c) there is no reason to expect that the transaction may have a direct impact on the activities of any media business that operates in the State.

Mergers under the Simplified Media Merger Notification Procedure are to be notified using the standard Media Merger Notification Form. Parties notifying under the Simplified Media Merger Notification Procedure will be granted flexibility in relation to sections 3.3-3.10 of the Notification Form.

Parties wishing to avail of the Simplified Media Merger Notification Procedure must discuss this possibility with the Department in advance of submitting a notification.

Following receipt of a notification under the Simplified Media Merger Notification Procedure, the Department will inform the undertakings involved, as soon as practically possible, whether it is appropriate to apply the Simplified Procedure or to revert to the standard procedure. Where the Department decides to proceed under the Simplified Procedure, the Minister will endeavour to make a determination as soon as practically possible.<sup>4</sup>

The Department may revert to the standard media merger notification procedure, at any point, where the Minister requires further information for the purposes of Section 28D, by issuing a requirement for further information under 28D(3) requiring the undertakings involved to submit more detailed information in relation to the media merger within a specified time period.

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<sup>4</sup> Notwithstanding that the Minister will endeavour to make a determination as soon as practically possible, the statutory deadline within which the Minister must make such a determination, as specified in 28D(1) of the Act, remains 30 days from the appropriate date.

## **Section 4: Media Merger Process**

### **4.1 Limitation of a media merger being put into effect**

The Commission must also notify the Minister of its determination on the media merger notification. A merger shall be deemed void if it has been put into effect before the Minister has made a determination, or it has not been put into effect within 12 months of the determination being made as per Section 28C(2) of the Act.

### **4.2 Initial Examination under Section 28D of the Act (Phase 1 Assessment)**

The Minister will inform the undertakings, that have made the media merger notification, within 30 working days (or 45 working days where proposed commitments referred to in Section 28D (5) have been made) from the relevant date or from the appropriate date, whichever is the later, of whichever of the following determinations they have made.

- a) That in their opinion the result of the media merger will not be contrary to the public interest in protecting plurality of the media in the State, and accordingly that the media merger may be put into effect;
- b) That in light of proposed commitments offered by the undertakings, in their opinion the result of the media merger will not be contrary to the public interest in protecting plurality of the media in the State, and accordingly the media merger may be put into effect subject to incorporation of those proposed commitments as specified conditions to be complied with; or
- c) That they are concerned that the media merger may be contrary to the public interest in protecting plurality of the media in the State, and accordingly that they intend to request Coimisiún na Meán<sup>5</sup> to carry out an examination under Section 28E of the Act.

#### **4.2.1 Basis of the Determination**

In making a determination as to whether the result of the media merger is likely to be contrary to public interest in protecting the plurality of the media in the State, in accordance with Section 28D(2) of the Act the Minister shall have regard to –

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<sup>5</sup> The Online Safety and Media Regulation Act 2022 dissolved the Broadcasting Authority of Ireland and established Coimisiún na Meán.

- a) The relevant criteria,
- b) These guidelines issued under Section 28L of the Act,
- c) All submissions made and information provided to the Minister by the undertakings involved in the media merger,
- d) And take full account of, where applicable, the determination of the Commission under paragraph (a) of Section 21(2) of the Act or under paragraph (a) or (c) of Section 22(3) of the Act,
- e) And take full account of, where applicable, the decision by the European Commission under Article 6(1)(b) or Article 8(1) or (2) of Council Regulation (EC) No. 139/2004 on the control of concentration between undertakings,
- f) Relevant reports published by the Minister under Section 28M of the Act, and
- g) Relevant research published by Coimisiún na Meán under Section 28M of the Act.

#### **4.2.2 Requirements to provide additional information**

The Minister may make a written request under Section 28D (3) of the Act, upon any one or more of the undertakings involved to provide further specified information within a specified time period.

This information must be requested within 30 working days from the appropriate date.

#### **4.2.3 Proposals under Section 28D(4) and (5) of the Act**

The Minister may enter into discussions with the undertakings involved in the media merger or with any individual or any undertaking with a view to identifying measures which would ameliorate any potential negative effects of the media merger on the plurality of the media in the State

In the course of these discussions any of the undertakings involved in the media merger concerned may submit to the Minister proposed commitments with regard to the manner in which the media merger may be put into effect. This would be done with a view to the proposed commitments becoming binding on them if the Minister incorporates the proposed commitments as specified conditions to be complied with in their determination.

#### **4.2.4 Notification and Publication of a Determination under Section 28D(7) and (8) of the Act**

Once the Minister has made a determination, they –

- a) Shall furnish to the undertakings involved a copy of the determination, and
- b) May publish with due regard for commercial confidentiality –
  - i. The fact of the making of the determination,
  - ii. Whether the determination was made under paragraph (a), (b) or (c) of Section 28D (1) of the Act, and
  - iii. Where the determination was made under subsection 28D (1)(b) of the Act, a summary of the conditions specified in the determination.

After the Minister has furnished the determination to the undertakings involved, they may correct the determination at any time before the determination is published to remove any clerical or typographical errors but may not reconsider or re-open any aspect of the determination.

The Minister will publish the determination within 15 working days from the date of the determination, with due regard for commercial sensitivity.

#### **4.3 Full Examination (Phase 2 Assessment)**

The full examination will be carried out in accordance with the provisions of Sections 28E and 28F of the Act, a number of which provisions are set out below.

##### **4.3.1 Determination to carry out a full investigation under Section 28E(1) of the Act**

Where, having considered the information provided and all the submissions received, the Minister is concerned that merger may be contrary to the public interest in protecting the plurality of the media in the State, they will request Coimisiún na Meán to carry out a full investigation (i.e. proceed to Phase 2).

#### **4.3.2 Publication of the determination to carry out a full investigation**

As soon as Coimisiún na Meán receive this request, they must publish a copy of the request on their website.

#### **4.3.3 Submissions**

Coimisiún na Meán must invite public submissions and forward a copy of the request to the relevant Oireachtas Committee inviting them to make a submission. All submissions must be made within 20 working days from the date of publication of the request. Submissions should clearly indicate any information which should be treated as confidential.

#### **4.3.4 Discussions and Proposals**

Coimisiún na Meán may enter into discussions with the undertakings involved with a view to identifying measures which would amend any potential negative effects of the media merger on plurality of media in the State.

In the course of discussions, any of the undertakings involved in the media merger concerned may submit to Coimisiún na Meán, not later than 20 working days before Coimisiún na Meán is due to make its report to the Minister, proposed commitments with regard to the manner in which the media merger may be put into effect, as provided for in Section 28E(11), with a view to the proposed commitments becoming binding on it or them if the Minister incorporates the proposed commitments as specified conditions to be complied with in the determination in relation to the media merger.

#### **4.3.5 Requirement to provide further information**

Where Coimisiún na Meán requires further information in making its report it may, by notice in writing, served on the undertakings, require any one or more of the undertakings involved to supply to them specified information within a specified period. The undertaking is obliged to comply with this request, as per Section 28E(7) of the Act.

The level of detail required will determine the length of the specified period. Such a request must be made no later than 20 working days before Coimisiún na Meán is required to make its report.

#### **4.3.6 Establishment of an Advisory Panel under Section 28F of the Act**

The Minister may establish an advisory panel to provide its opinion to Coimisiún na Meán on the application of the relevant criteria to the media merger in question once it becomes a full media merger investigation. The panel will consist of between 3 and 5 persons, of requisite experience, appointed by the Minister. Individuals will be appointed by the Minister on the basis of the applicability of their expertise to the media merger at hand. Any imbalance of expertise with regard to the examination of any particular media merger will be addressed through appointments to the Advisory Panel, so that parties to a media merger can be assured of an expert examination of their proposed merger regardless of their individual circumstances. The panel must produce a report on the relevant criteria within 20 working days from the date of the request and must provide clarification of its opinion in writing if requested by Coimisiún na Meán. Once the Minister makes a determination, the panel will be dissolved.

#### **4.3.7 Recommendation by Coimisiún na Meán under Section 28E(4) of the Act**

Coimisiún na Meán has 80 working days to report back to the Minister, including a recommendation on whether the media merger should be put into effect with or without conditions or whether the media merger should not be put into effect by the Minister.

After Coimisiún na Meán has furnished its report to the Minister, it has 7 working days to correct the report to remove any clerical or typographical errors but may not reconsider or reopen any aspect of the determination.

#### **4.3.8 Basis of Coimisiún na Meán's recommendation**

Coimisiún na Meán, when making its report, shall form a view as to whether the result of the media merger is likely to be contrary to public interest in protecting the plurality of the media in the State. Coimisiún na Meán shall have regard to –



- a) The relevant criteria,
- b) These Guidelines issued under Section 28L of the Act,
- c) All submissions made and information provided –
  - i. to the Minister by the undertakings involved in the media merger
  - ii. to Coimisiún na Meán by the undertakings involved in the media merger, by any other person in response to an invitation for submissions under Section 28E(2)(b) of the Act or by the Joint Oireachtas Committee in response to an invitation for submissions under Section 28E(2)(c) of the Act,
- d) And take full account of, where applicable, the determination of the Commission under paragraph (a) of Section 21(2) of the Act or under paragraph (a) or (c) of Section 22(3) of the Act,
- e) And take full account of, where applicable, the decision by the European Commission under Article 6(1)(b) or Article 8(1) or (2) of Council Regulation (EC) No. 139/2004 on the control of concentration between undertakings,
- f) Where applicable, the opinion of the Advisory Panel,
- g) Any responses made by the undertakings in relation to the draft report and recommendation,
- h) Relevant reports published by the Minister under Section 28M of the Act, and
- i) Relevant research published by Coimisiún na Meán under Section 28M of the Act.

#### **4.3.9 Provision of a Draft Report**

Coimisiún na Meán must furnish a draft report and draft recommendations to the undertakings involved not later than 30 working days before it is due to make its report to the Minister. They must also forward a copy of any opinion and clarifications issued by the Advisory Panel and any submissions received.

The undertakings have 10 working days from the receipt of the draft report to respond to Coimisiún na Meán.

#### **4.4 Determination of the Minister after a full media merger examination under Section 28G(1) of the Act**

The Minister has 20 work days from the date on which the report of Coimisiún na Meán was furnished to them to make a determination that the media merger:

- (a) may be put into effect;
- (b) may not be put into effect; or
- (c) may be put into effect subject to the conditions, specified in the determination, being complied with,

on the ground that they consider that the result of the media merger will or will not, as the case may be, be contrary to the public interest in protecting plurality of the media in the State or, as appropriate, will not be contrary to the public interest in protecting plurality of the media in the State if conditions so specified are complied with.

Where the Minister considers, notwithstanding the report of Coimisiún na Meán, any proposed commitments, and the consequences for plurality of media in the State in refusing to permit a merger to proceed, that on balance the result of the proposed media merger would ultimately be contrary or detrimental to the public interest in protecting the plurality of the media in the State, they will make a determination that the proposed media merger may not be put into effect.

##### **4.4.1 Notification and Publication of the Determination**

After the Minister has furnished the determination to the undertakings involved, the Minister may correct the determination at any time before the determination is published to remove any clerical or typographical errors but may not reconsider or re-open any aspect of the determination.

The undertakings may request the Minister in writing to omit from the public version of the determination any information that they consider to be commercially sensitive. This must be done within 15 working days of the determination.

The Minister must publish on the internet their determination after 15 working days from the date of the determination, but not later than 30 working days from this date, as well as the

report of Coimisiún na Meán and, where applicable, the opinion of the advisory panel established under Section 28F of the Act.

#### **4.5 Review of Conditions in a Determination under Section 28H of the Act**

Where all the undertaking parties to the merger are of the opinion that market conditions applicable to the merger have substantially changed since the date of Coimisiún na Meán report to the Minister they may, not later than 40 working days from the date on which the determination is notified to them, request the Minister to review the determination. Where the Minister has made their determination subject to conditions, they may with the consent of the undertakings amend or revoke, in writing, one or more of the conditions made in the original determination. The Minister has 40 working days to amend or revoke in writing one or more of the conditions.

#### **4.6 Enforcement of certain determination under Section 28I of the Act**

The High Court can grant an injunction to enforce compliance with the terms of a determination on the motion of the Minister, Coimisiún na Meán or any of the undertakings involved in the media merger.

#### **4.7 Judicial Review under Section 28J of the Act**

An application to the High Court for leave to seek judicial review must be made within 40 working days from the date of the determination; if it is outside the 40 working days the High Court cannot grant leave unless it is satisfied that there are substantial reasons why the application was not made within that period and that it is just to grant leave having regard to the interests of other affected persons and the public interest. The High Court must also be satisfied that the application raises a substantial issue for its determination.

The High Court can make any orders that it sees fit, including sending the matter back to the Minister.

Leave of the High Court is required to bring an appeal to the Supreme Court; leave will only be granted if the decision of the High Court involves a point of law of exceptional public importance. This does not apply in relation to Constitutional matters.

#### **4.8 Fees under Section 28K of the Act**

Coimisiún na Meán may charge, receive and recover, for the costs incurred by it during a full media merger examination, such fees as it may, with the consent of the Minister, given with the approval of the Minister for Public Expenditure, NDP Delivery and Reform, from time to time determine.

#### **4.9 Reports under Section 28M**

Coimisiún na Meán must publish a report on the operation of media in the State. This must be done within 1 year of the commencement of the Act and must be updated every three years thereafter. The report will describe ownership and control arrangements for undertakings carrying on a media business in the State, describe the changes to the ownership and control arrangements of such undertakings over the previous 3 years and analyse the effects of such changes on plurality of the media in the State.

Coimisiún na Meán shall also conduct and publish the results of periodic methodological research on matters relating to plurality of the media, which may include the development of appropriate measurement indices.

The Minister must lay a copy of the Coimisiún na Meán report on the operation of media in the State before each House of the Oireachtas.

#### **4.10 Research under Section 28M(5) of the Act**

Coimisiún na Meán may also be requested to conduct research on matters relating to plurality of the media that it considers necessary and shall conduct other research relating to plurality of media as the Minister may request. Coimisiún na Meán will publish the results of such research.

## Section 5: Application of the Relevant Criteria

The below section summarises the application of the Relevant Criteria under the standard media merger notification procedure. Media mergers which, in the view of the Department, meet the requirements of the Simplified Media Merger Notification Procedure will be subject to a more streamlined assessment in line with Section 3.4.

As part of the standard media merger notification process, media businesses will be required to complete the Media Merger Notification Form in full. Undertakings may also be required to submit additional information. This information will then be assessed under the Relevant Criteria headings as set out in Section 28A of the Act. The information will be evaluated under each of the headings below which comprise ownership and control; market share; governance; editorial ethos; content; sources and finance. Regard will be given to the presence of other media players in the relevant sector and across the State in this evaluation. Before coming to a determination the Minister will also have regard to the adequacy, if applicable, of the scale and reach of RTE and TG4, Part 6 of the Broadcasting Act of 2009 and the ownership and control policy of Coimisiún na Meán in protecting plurality should the merger proceed.

In addition, the Minister will have regard to any proposed commitments offered by the undertakings and any impositions he or she wishes to impose. In accordance with Section 28D(1), the Minister will then issue a determination either to approve the merger, approve the merger with conditions, or determine that the merger may be contrary to protection of plurality and direct Coimisiún na Meán to carry out a Phase 2 examination under Section 28E.

The Phase 2 examination will provide the Minister with a broader, more in-depth view than that achievable under the Phase 1 examination.

The objective of the Act is the pursuit of the public interest in the protection of media plurality in the state and, in particular, to prevent the diminution of this essential public interest by way of media merger and the concentration of the media, both in terms of ownership and content. To achieve this important objective, the Minister will seek information on and have regard to the situation on a *before and after the proposed merger basis*. This will allow the Minister to assess the impact of the proposed merger on media plurality should the merger proceed.

## 5.1 Ownership and Control

Ownership and control represent primary indicators of media plurality in the state. The Minister will examine media businesses party to the proposed merger in relation to levels and structure of ownership and control.

The Minister will not only examine the ownership and control structure of the media businesses that are party to the merger, but will also have regard to other relevant media assets.

This is essential as determinations on public interest and media plurality must be made across all media sectors. Individual holdings that may not appear pertinent can have a serious impact when considered collectively.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

## 5.2 Market Share

Market share is an important indicator of media pluralism in the State. As the market share of undertakings increases, pluralism may be affected. To achieve the objectives of the legislation in protecting the plurality of media in the State, the Minister will have regard to the market share of each of the media businesses party to the merger, and other relevant media assets. This will include, but is not necessarily limited to: readership, listenership and viewership demographics as relevant.

The Minister will engage in a complete examination to ensure that the market share is understood in its proper context in order to protect the public interest in maintaining a plural and diverse media. This may involve examining market share in relation to subgroups within the various sectors, such as gender, geographical areas, age profile and socio-economic groups, and specific interest groups.

The more sectors in which an individual or entity has a significant interest, the lower the threshold for it to be considered to have an adverse effect on plurality. The cross media sectors for consideration are: Television, Radio, Print Media, Internet, other media interests.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

### **5.3 Governance and Editorial Management**

Governance structures and editorial ethos in media businesses may have a significant impact on the independence of media businesses and thus media plurality in the State. The Minister will examine the governance structure of parties to a proposed merger and other relevant media assets, and their future plans for the proposed merged entity. Higher levels of consolidation of management structure of the parties to the proposed merger may adversely affect media pluralism in the State.

The Minister will also have regard to the levels of control and influence exercised by the management structure of the media business on the editorial function, and the nature and level of editorial accountability to corporate management and particularly to stakeholders.

Consistent or declared editorial positions as well as stated political, or cultural allegiances expressed by media businesses party to the merger and any relevant media assets, may be viewed in pursuance of the objectives of the legislation in protecting the public interest in maintaining the plurality and diversity of media in the State.

For a comprehensive list of information required under this section please refer to Media Merger Notification Form.

### **5.4 Content**

Diversity of content is an essential component of the plurality of the media in the State. Diversity of content can be measured in a number of ways that are not mutually exclusive. ‘Internal diversity’ may be evident in, for example, the nature of particular media content and sourcing methods of media organisations. ‘External diversity’ may be evident in the range of public, private and community media of various types in a particular locality or market. Such measures of diversity are generally complementary to one another.

The Minister will examine the breakdown of content for each of the media businesses party to the merger in terms of news, current affairs, opinion and cultural interests and user generated content.

The Minister will also have regard to any impact of the proposed merger on the Irish language; therefore, evidence of Irish language content and measures to protect its continuation or plans

to introduce more lingual diversity will be considered. This accords with the Government's '20-Year Strategy for The Irish Language 2010 – 2030', and aligns with the stated aims of ensuring increased visibility of the Irish language and ensuring that in public discourse the use of the Irish language will be, as far as practical, a choice for the citizen.

The means by which media businesses source news and current affairs content may have an impact on diversity of content and thus on media pluralism in the State, particularly given the recent trend for increased outsourcing of content generation to large international newsgathering organisations. To secure the objective of the legislation the Minister will have regard to the type and range of sources engaged by the media organisation and other relevant media assets.

In order to achieve the objectives of the legislation in pursuing the public interest in protecting the plurality of media in the state, the Minister will also have regard to any 'external diversity' surrounding the proposed media merger. This will include alternative content provided by other media businesses in an area and across all media sectors which may protect against any adverse impact the proposed merger could have on diversity of content and thus on media plurality in the State.

Consolidation of content between the parties to the merger may diminish the plurality of media in the State contrary to the public interest.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form

## **5.5 Financial**

The financial structure of media businesses may have important implications for the ownership, control and independence of the media businesses; consequently, it is of relevance in achieving the objectives of the legislation in pursuing the public interest in protecting media plurality in the state.

The Minister will have regard to the financial structure of the media businesses party to the proposed merger, of particular relevance is the proposed structure of debt following the



proposed merger. This is solely to assess the sustainability of the proposed post-merger media business(es) with a view to ensuring that the plurality of media is not under threat.

The higher the degree of consolidation of the financial structure between the parties to the proposed merger, the more likely it is that this may affect media pluralism.

For a comprehensive list of information required under this section please refer to the Media Merger Notification Form.

## **5.6 The scale and reach of RTÉ and TG4**

RTÉ & TG4 are independent national Public Service Broadcasters whose remit and obligations are set out in Part 7 of the Broadcasting Act 2009 (as amended) (“the Broadcasting Act”). RTÉ and TG4 are obliged inter alia to establish, maintain and operate national television and sound broadcasting services which have the character of a public service, are free-to-air and are be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland.

These Public Service Broadcasters are obliged to provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island of Ireland and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity.

The Public Service Broadcasters are, in addition, obliged to provide programmes of news and current affairs in the Irish and English languages, to facilitate or assist contemporary cultural expression and encourage or promote innovation and experimentation in broadcasting.

The Public Service Broadcasters have an impact on media pluralism in the state. Accordingly, the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, when considering the appropriateness of proposed media mergers, will have regard to the contemporary scale and reach of the Public Service Broadcasters and their consequential impact on the plurality of the media in the State and how they interplay with the parties to the proposed merger.

## **5.7 Part 6 of the Broadcasting Act and the ownership and control policy of Coimisiún na Meán**

Coimisiún na Meán has a statutory remit to protect media plurality in broadcasting. Part 6 of the Broadcasting Act provides the statutory framework for the licensing and regulation of broadcasting and multiplex services in Ireland. In addition, Coimisiún na Meán has a policy, prepared under its predecessor the BAI, on the ownership and control of its broadcasting and multiplex contractors - the BAI Ownership & Control Policy (2019) (“the Policy”), which gives practical effect to the statutory objectives of Part 6.

Coimisiún na Meán applies this Policy in assessing the ownership and control elements of applications for broadcasting, content provision and multiplex contracts and to assess relevant requests for variations or any compliance issues that may arise subsequently in respect of such contracts. In applying the Policy, Coimisiún na Meán assesses the following, as outlined under the Broadcasting Act:

- (i) the desirability of allowing a person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in respect of which a sound broadcasting contract has been awarded under the 2009 Act;
- (ii) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of sound broadcasting services in a specified area;
- (iii) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in a specified area. Section 71 of the 2009 Act does not include a specific provision in relation to media concentration in respect of applicants for other content contracts under that Section. However, Coimisiún na Meán, as a matter of policy, applies this test when considering applications for all “Content Provision Contracts”.

The decisions and recommendations made by Coimisiún na Meán under its statutory remit and the Policy will be taken into consideration by the Minister, if relevant.

## 5.8 Proposed Commitments

Media businesses party to the proposed merger may submit proposed commitments as part of the notification process as per Section 28D(5) of the Act and as outlined in detail at paragraph 4.2.3 of these Guidelines. The Minister will consider commitments submitted that set out ways and means to be employed by media businesses to protect the public interest in maintaining the plurality of media in the State. The Minister will consider proposals that may involve positive action or commitments to refrain from particular actions.

The Minister will only accept commitments that are readily verifiable and would amount to concrete contractual arrangements that would be binding on the media businesses.

In the initial assessment, the Minister may allow the media merger to proceed with the proposed commitments incorporated as specified conditions in the determination. The proposed commitments are therefore, in effect, provisions of the determinations. A breach of a provision of the determination is an offence and there are penalties for such a breach as per Section 28I.

Should the media businesses breach any of the proposed commitments, the merger may be null and void. The media businesses would then have to reinitialise the process.

The following list gives examples of possible commitments that may be considered to positively promote plurality, which may be incorporated as specified conditions imposed by the Minister in a determination:

- The divestment or sale of specified assets
- A restriction on the purchase of particular assets for a specified period of time
- A restriction on the publication or the purchase of particular content
- A restriction on the exchange of competitively sensitive information the merged companies, post-merger
- Physical separation of the merged companies
- Safeguards to ensure editorial freedom
- Agreement of financial restrictions
- To protect the unique editorial ethos of a particular product or service

This list is neither prescriptive or exhaustive.