

Media Merger Technical Review Stakeholder Consultation Paper

Submission of the Competition and Consumer Protection Commission to the Department of Communications, Climate Action and Environment

General Observations

1. The Competition and Consumer Protection Commission (“CCPC”) welcomes the opportunity to comment on the Media Merger Technical Review Stakeholder Consultation Paper (the “Consultation”) issued by the Department of Communications, Climate Action and Environment (the “DCCAE”) in respect of the media merger regime established by the Competition and Consumer Protection Act 2014 (“the 2014 Act”).
2. Under section 18(1)(b) of the Competition Act 2002, as amended, (“the Act”)¹, if a proposed merger or acquisition falls within the class of media merger, it must be notified to the CCPC irrespective of the turnover of the undertakings involved.² The CCPC solely assesses a media merger to determine if the media merger is likely to result in a substantial lessening of competition in any market for goods or services. Section 28B of the Act³ requires that a media merger which has been notified either to the CCPC or to the European Commission must also be notified to the Minister for Communications, Climate Action & Environment. The DCCAE will assess the media merger in respect of media plurality. The CCPC considers that this dual assessment system works well to protect both competition and plurality in the media sector.
3. The CCPC understands that the Consultation is a technical review; in particular, most of the questions in Appendix 1 of the Consultation appear to relate to the DCCAE’s internal procedure in respect of its media merger review procedure. The CCPC’s media merger review procedure is set out separately in the Act; therefore, the CCPC will not provide any observations on questions related to the DCCAE’s media merger review procedure.
4. The CCPC has noted three of the issues raised in Appendix 1 of the Consultation as being of potential relevance to the work of the CCPC, and this submission addresses these issues in turn.

¹ As inserted by section 55(a) of the 2014 Act

² This relates to media mergers and establishes the obligation to notify to the CCPC.

³ As inserted by section 74 of the 2014 Act

The phrase ‘news and comment on current affairs’

5. The Consultation identified that the phrase “*news and comment on current affairs*” contained in the current definition of a media business could be problematic as it could exclude media businesses that deal exclusively with either: (i) news; or (ii) comment on current affairs.
6. Section 28A(1)(b) of the Act⁴, as it relates to media business, states as follows:
“‘media business’ means the business (whether all or part of an undertaking’s business) of—
 - a. the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the internet,
 - b. transmitting, re-transmitting or relaying a broadcasting service,
 - c. providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service, or
 - d. making available on an electronic communications network any written, audio-visual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making available such material;
7. An issue may arise when a firm’s publication consists entirely of news *or* comment, and not a combination of the both. In this instance, it might be argued that such a firm does not fall under the definition contained within section 28A(1) of the Act and is therefore excluded from the obligation to notify the CCPC and the Minister for Communications, Climate Action and Environment.
8. The CCPC considers that the word “and” in “news and comment on current affairs” should be read disjunctively, ensuring that firms which consist solely of either ‘news’ or ‘comment’ are not excluded from the regime. Therefore, the Commission considers that “and” should be replaced by “and/or”.
9. Furthermore, the CCPC considers that the word “substantially” which precedes “news and comment on current affairs” should be interpreted qualitatively as opposed to quantitatively. This ensures that a firm is regarded as carrying on a media business if the communication of news and/or comment on current affairs is its principle object, even if the actual amount of space devoted to it is, say, less than 50%. Finally, in the absence of a statutory definition for ‘news’ or ‘current affairs’, the CCPC interprets these terms in accordance with the rules of statutory interpretation and ascribes them their ordinary meaning.
10. In conclusion, the CCPC considers that the above interpretation avoids firms which have an impact on media plurality being excluded from the media merger regime. The DCCAE are encouraged to clarify or modify the phrase “*news and comment on current affairs*” and the word “substantially” to avoid excluding mergers or acquisitions of firms which carry on media business from the media merger regime.

⁴ As inserted by section 74 of the 2014 Act.

Application of the media merger regime where the object of the merger has no activity in the State

11. The Consultation also raised as a relevant issue the scope of the application of the media merger regime in cases where the object of the merger has no activity in the State. In such cases, the potential for an impact on plurality is unlikely or possibly non-existent, and so there is a risk that the application of the regime in these cases places an undue administrative burden on parties to the merger.
12. Section 28 A(1)(b) of the Act, states as follows:
‘media merger’ means—
 - (a) a merger or acquisition in which 2 or more of the undertakings involved carry on a media business in the State, or
 - (b) a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State and one or more of the undertakings involved carries on a media business elsewhere.”
13. The CCPC has concerns regarding the possibility of a *per se* exclusion from the remit of the media merger regime of mergers or acquisitions where the object of the merger has no activity in the State, without having regard to the actual effects on media plurality of the mergers or acquisitions in question. Changes to the remit of the media merger regime may have unintended consequences, particularly in cases where the object of the merger has the technical capabilities to allow it to operate a media business and access customers in the State. For example, the object may possess important technologies or platforms which could change the competitive landscape of the relevant media sector in the State. Such changes could be rapid and accelerated in situations where consumption of online media has increased significantly, such as during Covid-19. Therefore, further consideration should be given to the possibility that a rapid entry and expansion into the media sector in the State could happen either with or without the implementation of such a merger.
14. The CCPC appreciates the reasonable concerns from the merging parties, in a world where online consumption of media is limited, regarding undue administrative burden if the object of the media merger currently has no activities in the State and will not enter the relevant sector in the State within a certain period. To reduce the burden on notifying parties, the CCPC has developed and implemented a [Simplified Merger Notification Procedure](#), which will reduce the time and resources required of businesses. Under the simplified procedure notifying parties are exempt from providing certain information when filing mergers or acquisitions which do not raise significant competition concerns. The DCCAE may consider a similar approach in assessing media mergers which do not raise significant concerns.
15. Bearing this in mind, the CCPC recommends that the DCCAE give careful consideration to possible administrative solutions before determining exemptions for media mergers where the object of the merger has no activity in the State.

Application of the media merger regime in respect of local/regional newspapers

16. The Consultation raises the question of whether the approach to the assessment of media mergers should vary based on the media involved, such as in the case of local/regional newspapers.

17. The CCPC acknowledges that sales of local/regional newspapers in the State have been, broadly speaking, declining in recent years. As such, it may be desirable for the DCCAE to consider whether or not the approach to the assessment of media mergers should be varied based on the media involved. In merger control, the same principles of competitive assessment are applied in respect of a declining market as in a non-declining market. In its assessment of a merger, the CCPC will articulate the relevant counterfactual and take into account the market structure and any evidence that the object of a merger is a “failing firm”.⁵
18. The CCPC appreciates that the acquisition of local/regional newspapers by large media firms may potentially have an adverse impact on media plurality. However, preventing such mergers may force local/regional newspapers out of the market, resulting in a similarly adverse impact on media plurality. The CCPC considers that striking an appropriate balance between these two situations is a question of policy and cannot be addressed properly through the media merger technical review.
19. Therefore, the CCPC submits that careful consideration should be given to any proposal for varying the approach to assess local/regional newspapers in the media merger regime. The CCPC also submits that studies should be carried out before granting any such exemption.

Conclusion

20. The media merger regime highlights the special importance of media plurality in a democratic society, and seeks to safeguard that plurality through the imposition of an obligation by parties to a proposed media merger to notify the Minister for Communications, Climate Action and Environment. The CCPC encourages the DCCAE to:
- clarify or modify the phrase “*news and comment on current affairs*” and the word “substantially” to avoid excluding mergers or acquisitions of firms which carry on media business from the media merger regime.
 - give careful consideration to possible administrative solutions before determining exemptions for media mergers where the object to the merger has no activity in the State.
 - give careful consideration to any proposal for varying the approach to assessing local/regional newspapers in the media merger regime, with studies carried out before granting any such exemption.

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⁵ See the ‘[failing firm defence](#)’, outlined in section 9 of the CCPC’s Guidelines for Merger Analysis.