Competition and Mergers Review Group

Proposals For Discussion in Relation To Some Recommendations of the Report of the Commission on the Newspaper Industry

February 1999

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Foreword

This discussion paper is in response to the request from the Tánaiste and Minister for Enterprise Trade and Employment that the Review Group should take certain recommendations made by the Newspaper Commission into account in its work. To that extent, it is somewhat different in nature to the rest of the Group's work in that it is concerned with three specific recommendations made by another body and how best those recommendations can be accommodated. As explained in the Group's Proposals for Discussion in Relation to Mergers published in July 1998, the recommendations in question were considered by the Group in the context of the present law rather than in the context of the law as it might be if some or all of the Group's proposals in the area of competition and mergers law were adopted.
The Group itself has not finalised its views on its published proposals in relation to mergers and is still in the process of receiving comment and reaction to such proposals. The main focus of the Group's current work, aside from the completion of the within document, is a consideration of proposals in the area of competition law. In such a state of flux, it was felt unrealistic to put forward discussion proposals in relation to the Newspaper Commission recommendations in any context other than the current law.

The Group is hopeful however that irrespective of what form its final recommendations take in the area of competition and mergers law, the issues which are discussed in the within paper may be of value and assistance in considering in any context how best to implement the recommendations of the Newspaper Commission.
A point made by the Newspaper Commission and one which struck the Group forcefully is that the pace of technological change is such that the role of newspapers increasingly has to be considered in a media-wide context. The task of devising appropriate regulatory and control structures for the media sector as a whole is an unenviable one. Such matters are not within the remit of the Group so that it suffices to note that there is a case for approaching legislative reform in this area from the perspective of a unified system of media and broadcasting regulation as distinct from the particular focus provided by the lens of competition and mergers law.

Michael M. Collins SC
Chairman
Competition and Mergers Review Group
February 1999

Introduction

The background to the establishment of the Competition and Mergers Review Group ("the Group") is set out in the Group's Proposals for Discussion in Relation to Mergers published in July 1998. The Group's work falls into two broad areas, namely mergers and competition law respectively. The Group chose to work initially in the mergers area and since the publication of its proposals for discussion in relation to mergers, has concentrated primarily on the area of competition law. The Group is currently working on a set of proposals for discussion in relation to competition law.
At the end of October 1997, the Tánaiste and Minister for Enterprise, Trade and Employment ("the Tánaiste") referred to the Group three specific recommendations out of the sixteen recommendations made by the Commission on the Newspaper Industry ("the Newspaper Commission") which reported to the Minister for Enterprise and Employment on the 24th of June 1996.

The three recommendations to which the Tánaiste referred were recommendations 1, 2 and 10. Those recommendations are as follows:

Recommendation 1
"The Minister for Enterprise and Employment in exercising his powers to regulate changes of ownership in the newspaper sector should assess the implications of any change on:
The strength and competitiveness of the indigenous industry in relation to UK titles;
The plurality of newspaper ownership;
The plurality of titles;
The diversity of views in Irish society and
The maintenance of cultural diversity."

Recommendation 2
"By a majority of the Commission that consideration should be given to amending existing mergers controls in the newspaper industry so as to widen the powers to regulate not only the acquisition of shares but also the acquisition of control over newspapers by other means."

Recommendation 10
"Any issue of concentration of ownership in the media should be considered on a media-wide as well as on a single media basis and in any such consideration effect should be given to the difference in consequences arising from such concentration in one branch of the media and concentration in different branches of the media."

In referring these recommendations, the Tánaiste requested that the Group *"would take these recommendations into account as appropriate in your report."*

The purpose of the present discussion document is to set out the preliminary recommendations of the Group on how the above recommendations should be taken into account in the context of mergers and competition law and to seek submissions from the public on those recommendations.

It is important to appreciate that the Group approaches these matters with no specific expertise in either the area of newspapers or the media generally. That expertise lay

with the Newspaper Commission and the Group's present function is limited to considering how the three recommendations in question can best be accommodated and implemented in the context of the Group's review of mergers and competition law. The Group has therefore not considered the merits of the recommendations. The Group has however tried to bear in mind the complex issues discussed by the Newspaper Commission in its Report as an appreciation of those issues may have an impact upon the most appropriate way in which the recommendations in question can best be implemented. It is apparent, however, that both from a consideration of the Report of the Commission (and in particular the recommendation that any issue of concentration of ownership in the media should be considered on a media-wide as well as on a single media basis) that appropriate regulatory structures for the control of concentration in the newspaper industry may have to be dealt with as only one part of a larger issue of the appropriate regulation or deregulation of the media generally. As discussed later in this paper, there are reasons for believing that newspapers may occupy a niche in the media market-place which is qualitatively different to the respective and partially overlapping niches occupied by other components of the media. To that extent, it is justifiable to consider forms of regulation which are newspaper specific.

The Group has therefore approached its task in this area by having regard to the considerations which are specific to newspapers as outlined in the Newspaper Commission Report while attempting to place its recommendations against the background and in the context of the Commission's own emphasis on the importance of a media-wide perspective. Resolution of such media-wide issues is, however, beyond both the terms of reference and the expertise of the Group and references in this document to media-wide considerations are therefore primarily designed to place the Group's own proposals in relation to the three recommendations in question in context and to signal in broad terms the regulatory difficulties which arise rather than purporting to resolve such questions. The Group has prepared this paper with a view to inviting comments and observations on the options which are open to the Minister in terms of the legislative measures necessary to be adopted to implement the three recommendations of the Commission outlined above.
The Group welcomes observations. Any such observations or submissions should be sent to

Dominic McBride,
Secretary,
Competition and Mergers Review Group,
Department of Enterprise,
Trade and Employment,
Frederick Building,
South Frederick Street,
Dublin 2.
no later than 5 p.m. on 30th April 1999[1].

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[1] Anyone making submissions ought to bear in mind the possible application of the Freedom of Information Act 1997

Culture and Economics in the Newspaper Industry

In many countries around the world, there is a concern about the need to ensure competition in the media sector generally and the newspaper sector in particular. This concern is based largely on the key role which the media plays in influencing the values and views of a society. These concerns have been discussed at length in the Newspaper Commission Report and the reports of similar bodies[2].

Political concern with media pluralism is born of a sense of the value of free speech, a recognition that speech in this context is intimately connected with an entitlement to read, watch and listen to a diversity of views and the shared value that such diversity is essential to the healthy functioning of a democracy. The conventional free speech philosophy is defended and characterised by the image of an atomistic market-place of ideas in which ideas freely jostle and compete with each other for the attention, loyalty and ultimately the belief of the citizen. Just as the process of competition in the market-place for goods leads to the more efficient production of better refrigerators for the benefit of the consumer, so it is envisaged that debate, disagreement and diversity will lead, in the end, to truth[3].

It is this concept which underlies most of the issues which arise in the regulation of newspapers. In a case dealing with the newspaper industry in the United States, Judge Learned Hand stated famously that the newspaper industry

"serves one of the most vital of all general interests: the dissemination of news from as many different facets and colours as is possible. That interest is closely akin to, if indeed it is not the same as, the interests protected by the First Amendment[4]; it presupposes that right conclusions are more likely to be gathered out by a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all[5]."

There are those who argue that this metaphor, seductive though it is, is flawed on the basis that people either consciously or unconsciously listen selectively only to those viewpoints which reinforce their existing ideas, preconceptions, prejudices or unconscious desires. Just as goods are no longer sold in the sort of free market with which Adam Smith was familiar, so it is suggested that ideas are no longer traded, if ever they were, in a market-place of attentive, open-minded purchasers. But even if this criticism of the free speech paradigm be true (and it is clearly a controversial

[2] E.g., European Commission, Pluralism and Media Concentrations in the Internal Market; European Commission, Com (1992) 480 Final, 23 December 1992; Follow up to the Consultation Process relating to the Green Paper on Pluralism and Media Concentrations in the Internal Market - An Assessment of the Need for Community Action I.P. (93) 351; Competition Authority, Interim Report on Study of the Newspaper Industry, 30th March 1995.

[3] In his famous dissenting opinion in Abrams -v- United States, 250 US 616 (1919), Holmes J explained that "The best test of truth is the power of thought to get itself accepted in the competition of the market."

[4] The First Amendment to the US Constitution deals in part with freedom of speech.

[5] United States -v- Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), affirmed 326 U.S. 1.

criticism), it makes the need for the protection of diversity in the media and the organs which form public opinion all the more compelling[6].

There is therefore widespread agreement that competition law should be applied to media markets despite the contention that the nature of free speech is such that it should have a particular form of immunity from competition law. Even in the jurisdiction where the protection of freedom of thought and expression is perhaps most highly valued, the United States, the US Supreme Court has had no difficulty in applying competition (anti-trust) law against the publishers of newspapers or other periodicals[7] or the electronic media[8]. This is because of the clear recognition that there comes a point at which concentrations of media power in the hands of a small number can injure the market-place of ideas. As shorthand for the richness and cultural diversity that characterises a civilised society, such cultural considerations may prove fragile in a small country such as Ireland in the face of an increasingly globalised media, as recognised by the Newspaper Commission:

"The growth in international media, particularly in the area of electronic media, with its homogenising effect, is inimical to individual cultures of smaller countries such as Ireland and makes it more important to have a strong indigenous media in which newspapers must play a major role. The growth and the demand for accurate and reliable information from all areas and sections of modern society also strengthens the need for sound and indigenous media, including a vigorous newspaper industry.[9]

This in turn raises the question of why newspaper publishing companies should not be dealt with under competition law as if they were any other type of company. Why should it be that newspapers should be deserving of some separate or different treatment under mergers and competition law? It is not the Group's purpose or function to question that such special consideration is necessary, since this issue has been dealt with by the Newspaper Commission which has clearly concluded that special considerations do apply to newspapers in the context of competition and mergers. But to assist in the debate as to what is the most appropriate legislative structure to adopt to implement the recommendations in question, it is important to at least make some attempt to understand why conventional tools of competition and merger control may need modification in the case of newspapers.

Traditionally, economists and courts have found it difficult to apply traditional tools of micro-economic analysis to newspapers and the media industry generally. Much of this has to do with the difficulty of definition of the product market, the measurement

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[6] Perhaps on deeper questions, people do not make reasoned judgments about competing positions but merely acquire reinforcement of views that conform with social conventions or serve their particular interests or unconscious desires. In that event, the 'market-place of ideas' ... gives little promise of yielding truth even in the long run, particularly if the disproportionate influence of a few centres of private power over what gets communicated is likely to be exercised in favour of dominant and confoming views." Greenawalt, Free Speech Justifications 89 Columbia Law Review 119 at 135, quoted in Weinberg, Broadcasting and Speech, 81 California Law Review 1103 at 1143 (1993).

[7] Citizen Publishing Company -v- United States, 394 U.S. 131 (1969).

[8] Federal Communications Commission -v- National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

[9] Newspaper Commission Report, Introductory Chapter, paragraph 5. The Newspaper Commission Report drew attention in particular to the relatively unique problem (in a European context) which Irish newspapers face, namely the competitive threat posed by English titles which are imported into Ireland.

of cross-elasticity of demand where the nature and type of competition between one media product and the variety of other available forms of entertainment and enlightenment is by no means clear[10].

Secondly, the failure of a newspaper publishing company due to competitive forces is not regarded from a regulatory perspective with the same equanimity as the failure of an inefficient manufacturing firm. The silencing of the voice which the failed newspaper represented can, depending upon the extent to which that voice is elsewhere represented, be regarded as a social evil in itself of a kind quite different to the evil represented by the failure of a manufacturing firm. The Newspaper Commission's first recommendation, stressing diversity on the occasion of a transfer of ownership, may therefore paradoxically involve a consideration of circumstances in which the normal competitive process should not be allowed to take its course and consideration may have to be given to mechanisms by which an otherwise failing newspaper may be saved. This is discussed further below in dealing more specifically with the Newspaper Commission's first recommendation.

Thirdly, while radio, television, satellite broadcasting, cinema, videos, CD-ROMs, the Internet, computerised information services and so forth are increasingly likely to be regarded as having a degree of substitutability so as to constitute one form a competitor of another, to at least some degree (although it seems unlikely that a proposal by the Federal Communications Commission that all media are perfect substitutes in the context of communications regulations will find favour), the particular service and product offered by newspapers seems to be regarded by consumers as qualitatively different. A newspaper provides a level of in-depth news coverage, analysis and features which broadcasting and electronic media have traditionally found hard to match in the same way. Many newspapers are relatively confined in their geographical market which gives them certain unique advantages in terms of reporting local events, advertisements and other needs of the local community[11].

Fourthly, the type of State regulation which has generally arisen in relation to the broadcast media is very different to the regulation or lack thereof of newspapers, notwithstanding that the concern for the market-place of ideas is a value that is as important in the context of broadcast media as in the context of newspapers. The reason generally ascribed to this difference in regulatory structure is the limited availability of broadcast frequencies on the relevant spectrum. Not everyone who wishes to broadcast on a radio or television frequency can do so irrespective of the amount of money the person may have because a suitable frequency may simply be unavailable. By contract, there is no such impediment to the person of sufficient resources who wishes to set up a newspaper. The solution adopted initially was to allocate frequencies in accordance with the public service broadcasting ideal which therefore required a form of regulation of the nature of the programming. No such

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[10] National Association of Theatre Owners -v- FCC, 420 F. 2d 194, 204 (D.C.Cir. 1969), Cert. Denied, 397 U.S. 922 (1970).

[11] See generally, Roberts, Anti-Trust Problems in the Newspaper Industry 82 Harvard Law Review 319 (1968), especially at pages 320-23 where the author argues that newspapers have certain important and irreplacable functions.

regulation of newspaper content (beyond the laws of defamation and public decency) arose.[12]

Fifthly, newspapers can, in certain circumstances, show monopolistic tendencies i.e. that the competitive forces are such that there is a tendency for one newspaper to emerge as the dominant newspaper in the market. Different explanations have been advanced for this phenomenon[13]. A common explanation is what is sometimes termed the "downward spiral" theory. The newspaper with the larger circulation will tend to attract more advertisers. As the larger newspaper's revenues increase and the smaller newspapers' revenues decline, the latter have less money to spend on news, editorial departments, features and so forth. Their quality declines thereby reinforcing the decline in circulation which in turn causes a further drop in advertisers and advertising revenues. Charging a lower rate for advertisements will not necessarily help the smaller newspapers. Advertisers look not at the rate per line charged by the newspaper but at the rate for reaching a given number of readers with that line. Advertising with the larger circulation newspaper may therefore ultimately be cheaper. The smaller newspapers thus find themselves in a downward spiral which, if it does not result in their failure, at least results in one newspaper becoming increasingly dominant.

The credibility of these reasons will differ from case to case. But taken together they have traditionally justified the view that newspapers should, for regulatory and competition law purposes, be regarded as different to all other forms of communication and entertainment. Because of the extent to which there are so many localised newspapers in the United States, it is in the case law of those jurisdictions that the issue of newspaper mergers has frequently fallen to be analysed. In US jurisprudence involving the acquisition by one newspaper of another, the court has usually excluded other media such as radio and television from the definition of the relevant product market, at least in relation to the choice facing the consumer as distinct from, say, the choice facing the advertiser.[14]

These issues are not confined to newspaper mergers. Increasingly, there is the phenomenon of cross-media ownership whereby a newspaper publisher seeks to take a stake in a radio or television station or some other communications medium. Such transactions throw into sharp relief the differing approaches to the regulation of newspapers as distinct from broadcasters. For example, the UK 1990 Broadcasting Act proscribed excessive cross-media concentrations. Broadcast mergers had to satisfy the Independent Television Commission that certain public interest criteria would be satisfied. On the other hand, newspaper mergers were (and still are)

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[12] It seems to be widely accepted that the scarcity of frequencies was to a large extent created by the perceived necessity for the State to reserve a wide variety of frequencies for security and other State purposes. See Coase, The Federal Communications Commission, 2 Journal of Law and Economics 1 (1959); Home Office, Report of the Committee on Financing the BBC, 1986, Cmnd. 9824, (Peacock Committee).

[13] See, for example, Bruce R. Lyons, Market Definition for Media Mergers, Paper delivered at the Workshop on International Trade and Industrial Organisation 19/20 December 1997 in Barcelona at pages 3-11, discussing why media markets are different.

[14] See, for example, Times-Picayune 345 U.S. 594 (1953); US -v- Citizen Publishing Company 280 F. Supp. 978 (D.Ariz. 1968); US -v- Times Mirror Company 274 F. Supp. 606 (CD. Cal. 1967, affirmed 390 U.S. 712 (1968); Paschall -v- Kanzas City Star Company, 697 F. 2d 322 (8th Circuit, 1982); Community Publishers -v- Donrey Corporation, 892 F. Supp. 1146 (W.D. Ark 1995).

regulated in the United Kingdom in a more straightforward fashion under the provisions of the UK Fair Trading Act 1973 pursuant to which a transfer of a newspaper to an owner whose papers would then have a daily circulation of over 500,000 is unlawful and void without the consent of the Secretary of State for Trade and Industry. In Ireland, any concentration involving a newspaper must be notified to the Minister for Enterprise, Trade and Employment irrespective of the value of the assets or turnover of the enterprises involved or the circulation of the newspapers in question. The Newspaper Commission's recommendation that any issue of concentration of ownership in the media should be considered on a media-wide as well as on a single media basis is a reflection of these concerns of principle although it is noteworthy that in the opinion of the Newspaper Commission, there are not

"any grounds at present for intervention by the State on the basis of undue concentration of media-wide ownership in Ireland.[15]

Any legislative response to the three recommendations of the Newspaper Commission under discussion must, of necessity, have regard to both these features of the economics of the newspaper industry and the relationship of newspapers to other media.

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[15] Newspaper Commission Report, paragraph 4.10.

The Current Legislative Situation

Competition regulation in the media/newspaper sector generally deals with two primary issues:

i. Concentration of businesses; and

ii. Particular practices such as predatory pricing and refusal to supply.

The recommendations of the Newspaper Commission which the Group has been asked to take account of relate only to the regulation of concentrations and accordingly the regulation of anti-competitive practices in the newspaper sector is not dealt with in this discussion paper.

Media mergers are regulated by EU law or Irish law, depending on the facts of the transaction.

The EU Position

Large-scale concentrations are controlled under EU law by means of the European Community's Merger Control Regulation ("the Merger Regulation"). The merger regulation applies to relatively few concentrations. Such transactions normally involve businesses with very large turnovers and significant activities in various EU Member States. Very occasionally, the Regulation may apply to a transaction involving parties on a smaller financial scale where the Member State(s) involved request the European Commission to regulate the concentration to the exclusion of Member State(s). In limited cases, the European Commission may refer the transaction back to a Member State where there are specific circumstances which mean that the case is best dealt with at a national level rather than at an EU level.
When the Merger Regulation applies, the transaction is subject to the exclusive control of the European Commission. This is subject to two important qualifications. First, European Commission decisions may be appealed to the Court of First Instance/European Court of Justice in Luxembourg. Secondly, although the European Commission has sole jurisdiction pursuant to Article 21(1) of the Merger Regulation, Article 21(3) provides that Member States

"may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of community law."

These legitimate interests include *"plurality of the media."*

The test used by the European Commission under the regulation is whether the proposed concentration would create or strengthen a dominant position. The Newspaper Commission has been particularly vigilant in monitoring concentrations in the media sector.

At the end of 1992 the European Commission published a Green Paper "Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for

Community Action."[16]. Following a consultation process, the European Commission published an information memorandum on the 12th of May 1993 entitled *"Pluralism and Media Concentration in the Internal Market: Initial reactions to the Green Paper."*[17]. It must be recalled that in an EU context, even competition law is ultimately only a means towards the achievement of a common market in which goods, services, labour and capital move at least as freely throughout the Community as they do within the national territory of each Member State; the progressive co-ordination of the economies of the Member States; and the establishment of the internal market i.e. an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured.[18]. As means towards these ends, a variety of activities are specified in Article 3 of the Treaty, of which only the sixth is "the institution of a system ensuring that competition in the common market is not distorted."[19]. In other words, the Treaty has, as its base, the political goal of closer integration between the Member States, and the prohibition on anti-competitive behaviour, far from being an end in itself, is merely one of many tools which are used in the Treaty to move the community towards that political goal.[20].

Thus, while the European Commission's Green Paper acknowledged the fundamental importance of the protection of pluralism in addressing the issue of media concentration, that importance, to the European Commission, is not because pluralism necessarily has the inherent values discussed earlier, but rather that it can assist in the task of completing the internal market. At Community level therefore, the regulation and control of the media can be seen as requiring action only to the extent that inaction would interfere with the internal market.

The Green Paper came to four basic conclusions:

1. It was for the Member States primarily to protect pluralism and the European Commission did not consider that it had any particular role to play in respect of the objective of safeguarding pluralism alone.

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[16] Com (1992) 480 Final, 23 December 1992, Celex No. 592DC0480.

[17] I.P. (93) 351

[18] Articles 2, 3 and 8A of the Treaty. See for example, the judgment of the European Court of Justice in Continental Can (1973) ECR 215: "Article 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3(f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted … [Thus] it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is "to promote throughout the Community a harmonious development of economic activities." Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonise the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3." Paragraphs 23-24. To the same effect is the judgment of Keane J in Masterfoods Limited -v- HB Icecream Limited (1993) ILRM 145: "Article 85 is not to be considered in isolation from the other provisions of the Treaty. In the first place, Articles 2 and 3 of the Treaty, which set out its principal objectives, may need to be considered … The competition rules can thus be seen as part of the grand design of the Treaty to achieve a single market." Page 184.

[19] Article 3.

[20] See Metro SV - Grobmarkte GmbH and Company Kg -v- Commission of the EC (1977) ECR 1875 at 1904; HB -v- Mars (1993) ILRM 145.

2. The European Commission's concern was that national laws designed to protect pluralism within the media (such as various restrictions on ownership) could lead to interference in the operation of the internal market.

3. Restrictions on ownership and control of media were not incompatible with community law if they pursued a public interest objective associated with freedom of expression.

4. General competition law, and, in particular, the Merger Control Regulation was not necessarily appropriate for this area. Whilst mergers might affect pluralism, they would not come under competition law scrutiny unless they also affected competition.[21].

The Green Paper incorporates a survey of the various types of restrictions on media ownership in the national laws of the Member States. This revealed very differing approaches to the regulation of media concentrations. Four primary forms of regulation were identified:

1. Restrictions on multiple ownership in the same medium (usually referred to as "monomedia restrictions"). A restriction on the number of newspapers or television stations which might be owned by the one organisation would be an example.

2. Restrictions on multimedia ownership such as a restriction limiting the percentage shareholding which, say, the owner of a television station could take in a newspaper. Such restrictions are becoming increasingly complex and diverse as the various types of electronic media develop e.g. terrestrial and satellite broadcasting.

3. Certain persons or bodies, by their nature, are prohibited from forms of media ownership. For example, under the UK Broadcasting Act 1990, a political party could not hold a broadcasting licence.

4. A variety of transparency provisions exist in the laws of different member states whose purpose is to provide information about the identity and activities of those operating in the media

It is also possible to characterise all these forms of media controls by reference to whether they involve quantitative or qualitative criteria. Quantitative criteria set down specific numbers (whether in terms of percentage shareholdings, number of newspapers which may be owned and so forth) which limit the activities of media owners. Qualitative criteria give a discretion to some form of regulatory body to take decisions on individual cases. The system in Ireland whereby the IRTC considers the suitability of applicants for radio licenses by reference to a number of criteria is an example of the latter type of regulation.[22].

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[21] See Green Paper pages 7-9.

[22] See Section 6 of the Radio and Television Act 1988. Perhaps inevitably in this area, the Green Paper was subject to much criticism. For a useful review of the Green Paper, see Hitchens, Media Ownership and Control: A European Approach (1994) 57 Modern Law Review 585. Hitchens makes a number of points of which the following extracts will suffice to give the flavour: "No consideration was given to

The Position in Ireland

Concentrations in the Irish media market sector generally can be regulated in certain circumstances by (a) the Mergers and Take-overs (Control) Acts 1978-1996; and/or (b) the Competition Acts 1991-1996. The functioning of the merger control system in Irish law has already been discussed by the Group in its July 1998 discussion proposals and reference should be made to that document.

The mergers legislation in Ireland does not in itself contain any specific reference to the newspaper sector but section 2(5) of the Mergers, Take-overs and Monopolies (Control) Act 1978 provides as follows:

"(a) Where he is of opinion that the exigencies of the common good so warrant, the Minister may by order declare that, notwithstanding subsection (1),[23]. this Act shall apply to a proposed merger or take-over of a particular class specified in the order and, upon the making of such an order, this Act shall apply to a proposed merger or take-over of that class.

(b) The Minister may by order amend or revoke an order under this subsection."

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whether a precise or discretionary form [of regulatory control] was better able to achieve its goals. Nor was any attention given as to whether these forms were sufficient to meet the goal of pluralism. Perhaps, not surprisingly, the Green Paper also failed to address the question of what might constitute 'control'. [Page 590] ...[T]he Green Paper tended to ignore the phenomenon of non-media companies acquiring interests in media companies. Its proposals for regulation have tended to focus on mono-media and cross-media restrictions. This approach, compounded by the Commission's proposals having to fit into a context that is primarily concerned with the completion of the internal market, means that there is no coherent strategy covering also risk to the independence of communication sources of non-media interests ... In the Green Paper's fleeting examination of the possible substance of community rules on media ownership and control, it mentions the need 'to define the concept of controller' and the need to set rules limiting 'controlling interests'. However, it elects not to give any indication as to what it means by the concept of control. Given that its review of national rules on ownership and control confined itself to Member States, one can assume that a concept of control is most likely to rely upon control through equity or voting power. This is certainly the approach of the UK legislation. The problem with this approach is that it ignores the possibility that controller influence might be exercised in much more diffuse ways [pages 599-600] ... The tension for the Commission in trying to balance the needs of pluralism with the demands of the internal market has both contributed to, and compounded, its failure to look at the complexities of media ownership and control, and the scope for regulation broadly or creatively [page 601]." See also Sheldo and Wheadon, Media Controls - The Controls and Restrictions Applying to Transactions which Involve Newspaper and Broadcasting Companies in the UK, Volume 90 Law Society's Guardian Gazette No. 43, page 24 (24th November 1993); Gibbons, Aspiring to Pluralism: The Constraints of Public Broadcasting Values on the Deregulation of British Media Ownership, 16 Cardozo Arts and Entertainment Law Journal 475 (1998); Harcourt, European Commission and Regulation of the Media Industry 16 Cardozo Arts and Entertainment Law Journal (1998). Commissioner Van Miert in an answer given on the 13th of September 1996 in response to a question tabled by a number of persons as to what steps the Commission was taking to ensure that newspaper proprietors' and distributors' actions did not breach Community competition policy, pointed out that the Commission's continuing work on the harmonisation of specific national media ownership rules aiming to safeguard pluralism did not regulate the behaviour of economic operators in the newspaper distribution market. He stated that consideration of the use of the community competition rules was not warranted in relation to the practice of distributors of refusing to distribute for retail purposes publications with limited circulations. Official Journal JC060, 26/02/1997 page 0125.

[23] Specifying the thresholds of assets and turnover below which the Act does not generally apply to the transaction.

On the 25th January 1979, the then Minister for Industry, Commerce and Energy made the Mergers, Take-overs and Monopolies (Newspaper) Order 1979 which declared that the Act should apply to

"proposed mergers or take-overs of the following class, namely, proposed mergers or take-overs involving enterprises as least one of which is engaged in the printing or publication (or printing and publication) of one or more than one newspaper."

Thus, all take-overs or mergers involving the acquisition of a newspaper must be notified to the Minister irrespective of the turnover or assets of the enterprises concerned. Thereafter, the Minister deals with the transaction as she would any merger or take-over which was notified to her under section 5 of the 1978 Act. In particular, unless the Minister decides not to make an order under section 9 prohibiting the proposed merger or take-over, the Minister must refer the notification to the Competition Authority for investigation in relation to the competition and other criteria which are set out in section 8(2) of the 1978 Act[24]. (none of which criteria specifically relate to newspapers or issues such as cultural or editorial diversity). However, having received the report of the Competition Authority, the only statutory precondition to the Minister prohibiting the proposed merger or take-over is that the Minister thinks "that the exigencies of the common good so warrant."[25]. The Minister must take the section 8 criteria into account but is not confined to these criteria and could, therefore, consider other criteria specific to the transaction in question (such as a newspaper merger) if such other factors were relevant to the exigencies of the common good. There seems no reason why issues of cultural and editorial diversity could not be considered in this way.

It is true however that the current legislation leaves the Minister in the position where she has no guidance whatsoever as to what factors should count towards the common good beyond the very broad criteria specified in section 8. Such lack of guidance is not helpful to either the Minister or to the parties who are considering such a transaction. The statutory reference to the exigencies of the common good can therefore be subject to the criticism that it gives an unbridled discretion to the Minister rather than providing guidance as to a principled exercise of discretion. As against that, it can be said that it is impossible to be more precise and that the statutory criteria give the Minister the necessary flexibility to deal with all relevant issues.

In its report, the Newspaper Commission noted that legal schemes in other countries recognised

"the special position of the media, including newspapers, as purveyors of information and opinion to the public and as organs of public opinion. The tests applied to other products or services in relation to distortion of the market, abuse of a dominant position in the market, or any other anti-competitive conduct, are not necessarily appropriate to apply to newspapers. This does not mean that the regimes appropriate to newspapers are necessarily either more or less stringent than those applied to other goods and services but simply means that they are and should under some

[24] As amended by section 17 of the Competition Act 1991.

[25] Section 9(1)(a) of the Mergers, Takeovers and Monopolies (Control) Act 1978.

circumstances be different. They should be consistently concerned as a fundamental matter with the diversity of viewpoint and culture and the representation of a wide variety of interests."[26].

As appears from the Newspaper Commission Report, in a number of respects the newspaper industry in Ireland in is quite a healthy position from a consumer perspective. The Newspaper Commission was satisfied that

"there is a remarkable range of daily and weekly newspapers circulating on a national basis in Ireland. These titles provide a significant, and in general, a satisfactory diversity of editorial viewpoint and of cultural content. There is, however, a perception that women, minority groups and also those who hold traditional views on some social and political issues may not be adequately represented."[27].

The Newspaper Commission did however express a concern that

"any further reduction of titles or increase in concentration of ownership in the indigenous industry could severely curtail the diversity requisite to maintain a vigorous democracy."[28].

As pointed out above, the Newspaper Commission was also of the view that there are not

"any grounds at present for intervention by the State on the basis of undue concentration of media-wide ownership in Ireland."[29].

Leaving aside pricing and distribution issues (not being matters referred to the Group), such concern as may exist in relation to the newspaper industry in Ireland seems to arise primarily in two areas. First, there is the relatively unique position that by virtue of Ireland's close links with the United Kingdom and at least one language which is common to most people in these islands, there is a significant market for English newspapers in Ireland (although not necessarily vice versa). Such cross border competition in newspapers is relatively rare. French readers will not normally buy an Italian newspaper. Even in a country such as the United States which shares a common language, most newspapers are local in the sense of serving a particular city or area as distinct from the country as a whole. The Los Angeles Times does not face any real competition from the Philadelphia Inquirer. The position in Ireland however is very different as the Newspaper Commission noted:

"Ireland's newspaper market is unique in that approximately 28% of daily newspapers and 36% of Sunday newspapers which sell in Ireland are imported, from the UK. Technological developments now permit not only ready editionalising but rapid transmission by satellite of complete newspaper pages to on site locations in Ireland. This penetration of the market and these technological advances are now all

[26] Newspaper Commission Report, paragraph 1.15.

[27] Paragraph 1.2.

[28] Paragraph 1.10.

[29] Paragraph 4.10

the more serious having regard to the recent activities of UK publishers including News International."[30].

The UK newspapers have a distinct advantage over Irish papers in that they can run off an additional 10 to 100,000 copies with a change to one sheet, or four pages, as an "Irish edition" at little extra cost. They may have a small Irish office, augmented with freelance journalists.

As a proportion of the total costs of the newspaper, the cost of this Irish edition is extremely small and the marginal costs of the additional run are also very low. In this way, the Irish edition of some UK based newspapers could be said to be produced at below average cost. It is true however that there are some British newspapers with Irish editions which have a more substantial Irish office and the production of the newspaper is in Ireland.

The second area of concern appears to derive from the position of Independent Newspapers in the Irish market. The Newspaper Commission noted:

"It is clear that Independent Newspapers occupies a powerful position in the indigenous newspaper market and that it is in terms of circulation, the largest selling newspaper group in the entire Irish market. There is at present no evidence of any predatory or below cover cost pricing by Independent Newspapers or by any other nationally circulated indigenous newspaper nor is there any evidence of any form of price war being undertaken by them. Mere size cannot taken to establish unfair competition.

The position of Independent Newspapers in relation to the Sunday Tribune is that it has relatively recently[31]*. purchased its 29.9% interest in it. In addition, it is at present financing the operation of that paper (which is apparently running at a loss) by substantial regular loans which are not being paid off."*[32].

In October 1994, the Minister for Enterprise and Employment requested the Competition Authority to carry out various studies in relation to the newspaper industry.

"On the 22nd of December 1994, in the light of possible implications of the announcement that Independent Newspapers plc had purchased a 24.9% interest in Irish Press Newspapers Limited and Irish Press Publishing Limited and had made a loan of £2 million to these companies, the Minister requested that the study be extended to include the issue of possible dominance and its implications for competition in the newspaper industry, and that an early report be submitted."[33].

The Competition Authority submitted an interim report on the 30th of March 1995 which was *"confined to the topics of competition from UK newspapers in Ireland and*

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[30] Paragraph 2.2 of the Newspaper Commission Report. The latest available audited figures for January-June 1998 show that UK titles have 27%

[31] The Newspaper Commission Report is dated the 24th of June 1996.

[32] Newspaper Commission Report, paragraph 3.15 and 3.16.

[33] Competition Authority Interim Report of Study on the Newspaper Industry, 30th March 1995.

possible dominance in relation to the share acquisition and loan by Independent Newspapers."[34].

The interim report concluded that radio, television, magazines and regional newspapers were not part of the same market as the market for national newspapers although the national market could be divided into seven separate markets. The Authority considered that Independent Newspapers *"already has a dominant position in the various newspaper markets in the State and also in those advertising markets where newspapers represent the only real outlet."* [35].

It summarised its conclusion in relation to the purchase by Independent Newspapers of a 24.9% shareholding in the Irish Press and the associated loans as follows:-

"The Authority considers that the purchase by Independent Newspapers of a 24.9% shareholding in the Irish Press, and the associated loans, will further strengthen Independent's dominance in the various relevant markets for newspapers and advertising. At the very least, Independent will exercise some influence, direct or indirect, over the commercial conduct of the Irish Press. As such it will lessen the degree of competition in the markets in which the newspaper titles compete. In the Authority's opinion, such behaviour constitutes an abuse of a dominant position, contrary to section 5 of the Competition Act. The share purchase was designed to prevent a rival of Independent Newspapers acquiring control of the Irish Press. It has already had the effect of preventing acquisition by a rival group, and it represents a strong deterrent to other investors acquiring outright or substantial control of these newspapers in order to compete head on with Independent Newspapers. The Authority also considers that the arrangements amount to an anti-competitive agreement between undertakings which is contrary to section 4 of the Competition Act."[36].

In September 1995, the Minister for Enterprise and Employment set up the Newspaper Commission on the Newspaper Industry. In its report, the Newspaper Commission noted that "the Minister directed that the Competition Authority's Interim Report of its Study on the Newspaper Industry should form an input to the work of the Commission but that the Commission should not repeat the work of the Authority."[37].

The Group's proposals in the present document in relation to three of the sixteen recommendations made by the Newspaper Commission therefore form part of this sequence of reports and should be read in that context.

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[34] Competition Authority Interim Report, Summary.

[35] Interim Report, Summary, page 3.

[36] Interim Report, Summary, pages 4-5.

[37] Commission Report, page 8.

Change of Ownership Recommendation

Recommendation 1 refers to the Minister's powers *"to regulate changes of ownership in the newspaper sector."* As pointed out above, these powers are primarily concerned in the Mergers Acts. However, the Minister has some powers under the Competition Acts to regulate concentrations as well. For example, in respect of any agreement, decision or concerted practice or an abuse which is prohibited under section 4 or 5 of the Competition Act 1991, the Minister herself has an independent right of action to seek either an injunction or a declaration or both (but not damages).[2]

Thus, if the Minister was of the opinion that an undertaking in a dominant position in the relevant market was abusing that dominant position, the Minister would be entitled to bring proceedings seeking an injunction to restrain whatever practice was alleged to constitute the abuse in question. Equally, if two undertakings came to an agreement or engaged in concerted practices which have as their object or effect the prevention, restriction or distortion of competition in newspapers, the Minister is entitled to seek a declaration that such agreements or concerted practices are prohibited and void and can seek such positive or negative injunctions as may be appropriate in the circumstances of the case.

A further power which is available to the Minister where she is of the opinion that there is, contrary to section 5, an abuse of a dominant position, is to request the Authority to carry out an investigation.[3] Having considered the report of the Authority, the Minister may, if the interests of the common good so warrant, after consultation with any other Minister of the Government concerned, by order either

(a) prohibit the continuance of the dominant position except on conditions specified in the order, or

(b) require the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as she may specify.

Such an order must be confirmed by a resolution of each House of the Oireachtas to have effect.

The recommendation in question of the Newspaper Commission requires the Minister in exercising her powers to regulate changes of ownership in the newspaper sector to assess the implications of any changes on the five matters specified in the recommendation. The Group is of the view that to implement this recommendation, no change is required to the provisions of the Competition Acts 1991-1996, although some change (discussed below) may be needed to the Mergers, Takeover and Monopolies (Control) Act 1978.

There are however some modifications of the provisions of the Competition Acts 1991-1996 which may be desirable generally and which will be referred to in the

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[2] Section 6(3) and (4) of the Competition Act 1991. By virtue of an amendment made by section 7 of the Competition (Amendment) Act 1996, this independent right of action has now also been given to the Competition Authority.

[3] Section 14 of the Competition Act 1991.

proposals for discussion which the Group intends to publish in relation to competition law. While these matters will be of general application, the Group considers that it is appropriate to briefly mention them in the present discussion paper in that they would have application to the newspaper industry as much as to any other industry in the economy.

The Minister's power in section 14 to request the Competition Authority to carry out an investigation is confined to circumstances where the Minister forms the opinion that there is an abuse of a dominant position. It may be difficult for the Minister to form such an opinion in advance of the investigation to which the opinion is the necessary pre-condition. In addition, while section 11 of the Competition Act 1991 (as amended by section 8 of the Competition (Amendment) Act 1996) enables the Minister to request the Competition Authority to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services, there seems no reason in principle why section 14 should be couched in terms that are limited to an investigation of a possible abuse of a dominant position. In the Group's view, section 14 could be widened so as to expressly empower the Minister to request the Authority to carry out an investigation into any agreements, decisions or concerted practices which may contravene section 4 of the Competition Act 1991.

In either case, the Group considers that the necessary precondition to such a request by the Minister should not be the formation of an opinion by the Minister that there is a violation of section 4 or 5 (as the case may be), but that the Minister has reasonable grounds for believing that there may be a violation of section 4 or 5. This represents a lower level of confidence required of the Minister as to the existence of a violation of section 4 or 5 before requesting an investigation.

The power of the Minister under section 14(3)(b) to adjust a dominant position by a sale of assets or otherwise is a significant and dramatic power amounting to a power to order divestiture, subject to the sanction of the Houses of the Oireachtas. It is ambiguous as to whether or not the High Court has a similar power of divestiture in circumstances where the court finds that there has been an abuse of a dominant position. The court can grant relief by way of an injunction[4] and while it may be that this seemingly conventional remedy is wide enough to encompass an adjustment of the dominant position by ordering divestiture, the Group is of the view that it may be desirable that such power be expressly given to the High Court.

However, there is an issue as to whether or not the power of divestiture should only be available at the suit of the Minister or the Competition Authority as distinct from a private plaintiff who brings an action alleging that he has suffered harm as a result of an abuse of a dominant position. The argument in favour of confining the divestiture remedy to an action brought by the Minister or the Competition Authority is based on the relatively draconian nature of the remedy. The argument that it is a remedy which should be available to any plaintiff is that if divestiture is necessary to remedy the abuse of the dominant position, then to deny a private plaintiff such a remedy will be to deny him effective indication of his rights. The Group would welcome submissions on this issue.

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[4] Section 6(3)(a).

In the case of a merger subject to the Mergers, Takeovers and Monopolies (Control) Act 1978, when the Minister receives a notification of a proposed merger or takeover, she must either decide to make no order or alternatively, within a thirty day period, refer the notification to the Competition Authority for investigation. The primary issue for the Competition Authority is whether or not the proposed merger or takeover would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good.[5] However, the Competition Authority is also obliged to give its views on the likely effect of the proposed merger and takeover on the common good in respect of a wide variety of matters which are specified in the Act,[6] which go well beyond competition concerns. In considering the report of the Competiton Authority, and in particular in considering the exigencies of the common good, the Minister must consider all of these matters but is not confined to the criteria in section 8.[7]

The Group considers that some amendment is required to section 9 of the 1978 Act to give effect to the Newspaper Commission's recommendation on change of ownership.The Group is of the view that the concept of the "exigencies of the common good" should be specifically defined in the case of a proposed merger or take-over of a newspaper to include the five criteria identified by the Newspaper Commission. While precisely how this should be done is a matter for the Parliamentary draftsman, it seems to the Group that the easiest way to do it is that a new subsection 6 be inserted into section 9 providing specifically that the Minister may prohibit any proposed merger or take-over which comes within the Mergers, Take-overs and Monopolies (Newspaper) Order 1979 where the exigencies of the common good so warrant having particular regard to the five factors identified by the Newspaper Commission. The group is also of the view that having regard to the Newspaper Commission's recommendation number 10 concerning a consideration of the issues on a media-wide basis it would be appropriate to add a sixth criterion to any such new subsection 6 which would refer to the position of any of the enterprises involved in the proposed merger or takeover in the media market.

If the Oireachtas were to enact legislation to regulate concentrations in the media sector generally (as opposed to the newspaper sector particularly), the proposed new subsection 6 would refer to a merger or take-over in the media sector as distinct from one which fell within the newspaper order.

In that event, it would be necessary to bring clarity to the definition of the "media sector". The Group is of the view that the Mergers and Take-overs (Control) Acts 1978-1996 should be amended to enable the Minister to adopt statutory instruments generally. One such statutory instrument could define the concept of the "media sector" in the event that the version of the subsection dealing with the media sector generally (see below) was adopted. The Group would welcome comments on what constitutes the "media sector" for present purposes.

The Group suggests the following new subsection to be inserted into Section 9:

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[5] Section 8(2)(a) of the 1978 Act.

[6] Section 8(2)(b) of the 1978 Act.

[7] Section 9(1)(a) of the 1978 Act.

"(6) Notwithstanding the foregoing, the Minister may prohibit any merger or takeover of any business which consists, in whole or in part, of the printing, publishing or distribution (other than the retailing to the general public) of newspapers, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

(a) the strength and competitiveness of the indigenous newspaper industry; (b) the plurality of ownership;
(c) the plurality of titles;
(d) the diversity of views in Irish society;
(e) the maintenance of cultural diversity; and
(f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises."

If the Oireachtas were to enact legislation to regulate mergers or concentrations in the media sector generally (as opposed to the newspaper sector particuarly) then the following provision could be considered by the Oireachtas:

"(6) Notwithstanding the foregoing, the Minister may prohibit any merger or takeover of any business which is, in whole or in part, in the media sector, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

(a) the strength and competitiveness of the indigenous newspaper industry;
(b) the plurality of ownership;
(c) the plurality of titles;
(d) the diversity of views in Irish society;
(e) the maintenance of cultural diversity; and
(f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises."

The Group is cognisant that the criteria specified by the Newspaper Commission which would be incorporated in a new section 9(6) are broad. Nonetheless, the criteria set out in the Mergers Acts which have had to be taken into account by the Competition Authority (and its predecessors) for over twenty years in assessing concentrations have included criteria such as "regional development", "access to markets", "consumers" and "rationalisation of operations in the interests of greater efficiency". The Group believes that the criteria set out by the Newspaper Commission are workable.

A separate issue is whether or not the Competition Authority, when requested to examine a proposed merger or take-over in the newspaper sector under section 7 of the 1978 Act should be required to take into account the factors identified by the Newspaper Commission.[8] If so, it would be necessary to amend the section 8(2)(b) criteria by the addition of the factors identified by the Newspaper Commission, such

[8] and the "media-wide" factor referred to above.

additional factors to be operative only in the case of a proposed merger or take-over involving newspapers or in the media sector generally (as the case may be).

In support of the view that the Competition Authority should not concern itself with the factors identified by the Newspaper Commission is the argument that the Competition Authority's area of expertise lies in the economics of competition and dominance in the market-place and not in the issues of freedom of speech, cultural and editorial diversity and so forth which underpin the criteria identified by the Newspaper Commission. Such factors, it is argued, are political factors which properly fall to be considered by the Minister but that it is both unfair and inappropriate to ask a body with the makeup and remit of the Competition Authority to consider such factors.

The contrary view argues that the nature of the newspaper industry or the media sector (as the case may be) is such that part of the competition issues which arise relate to issues of cultural and editorial diversity. It may well be true, it is argued, that traditional concepts of neo-classical micro-economics do not always lend themselves readily to an analysis of the newspaper or media sectors but the consequences of a merger or take-over for cultural and editorial diversity are not so remote from the usual consequences of mergers or take-overs that the Competition Authority should be deemed incapable of at least considering such factors and expressing an opinion on them. Finally it is argued that it would be odd if the Minister were to seek a report from the Authority on one set of criteria and then take her decision having regard to other criteria which were not considered by the Authority.

The Group is of the view that the Competition Authority should be both entitled and required to take account of not only the existing section 8 criteria but also the six factors referred to in the Group's suggested new section 9(6) of the 1978 Act when considering a proposed merger or take-over in the newspaper or media sector (as the case may be) However, the Group welcomes submissions on this issue.

A number of other ancillary points arise.

The Newspaper Commission stressed the importance of the indigenous newspaper industry.[9]

The Group has a concern that no amendments should be made to the legislation which would have the appearance of specifically targeting UK titles or indeed other titles in other Member States. This is because of the possibility that the specific isolation of UK titles may then be regarded as a particular impediment or hurdle facing only UK titles which may be contrary to Articles 6 and 52 of the EC Treaty which prohibit discrimination between EU citizens in matters such as in the present situation. In any event, it may be difficult to classify a title as being a UK title when, in fact, the newspaper company may have an "Irish edition". The Group's recommendation above

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[9] As already been indicated imported titles contribute to the diversity of viewpoint and cultural content to the extent to which they direct their editorial material to Irish interests. The Commission however is satisfied that the value of such diversity, as an expression of public opinion contributing to a vigorous democracy, is necessarily less than that which can be provided by an indigenous newspaper industry which maintains the value and objectives already set out in the introductory chapter to this report." Newspaper Commission Report, paragraph 1.7.

does not involve any such isolation of UK titles but the Group is concerned that any alternative proposals which may be canvassed would not inadvertently breach EU law.

The Group would also welcome views on the possible establishment of an independent body, other than the Competition Authority, to advise the Minister on mergers and acquisitions in the newspaper or media sectors.

Alternatively, the Minister may wish to give consideration to exercising the power contained in paragraph 1(3) of the schedule to the Competition Act 1991 which provides that the Minister may appoint additional temporary members to the Competition Authority for such period and on such terms and conditions as she may specify in the appointment. In the case where a proposed merger or take-over in the newspaper or media sector is referred by the Minister to the Competition Authority for investigation under section 7 of the 1978 Act, the Minister could appoint one or more persons as additional temporary members of the Competition Authority for the duration of the Authority's investigation into the transaction in question. Such person or persons to be appointed would be persons with particular expertise in assessing media mergers whether in the context of the specialised economics of media mergers or the more general values of cultural and editorial diversity. Some members of the Group have expressed the reservation that it might be difficult to find suitable persons to be appointed on such a temporary basis from the media sector who did not already have some vested interest in the outcome of the merger in question. Other members are of the view that it should be possible to obtain the services of suitable persons either from the media industry itself who do not have such a conflict of interest or alternatively from academic life, outside consultants and the like.

While there was some disagreement among members of the Group as to the practicality of appointing temporary outside members to the Competition Authority, there was a general view that such a proposal would be preferable to setting up another independent body to assess newspaper or media mergers on the grounds that the creation of another such body would be an unwelcome addition to the bureaucracy of the mergers process. The Group would welcome submissions on the question of the desirability of the Minister exercising her powers to appoint additional temporary members to deal with specific transactions.

One other issue arises in the context of the change of ownership recommendation and it arises more particularly out of a consideration of the discussion in chapter 1 of the Newspaper Commission Report which culminates in the change of ownership recommendation rather than in the literal terms of the recommendation itself.

In its report, the Newspaper Commission pointed out that the mere fact that newspapers are held in different ownerships does not in itself guarantee editorial diversity. Equally, it is possible for there to be editorial diversity between newspapers under common ownership.

"There is a clear link between plurality of ownership and diversity of editorial viewpoint and of cultural content, but it is not an automatic connection nor is plurality of ownership the only feature contributing to such diversity ...

It is possible, for example, for a number of titles separately owned and competing for a particular sector of the market to present remarkably similar editorial viewpoints and cultural content. It is also possible on the other hand for separate titles in a single ownership to present significant diversity in editorial viewpoint on cultural content, particularly when they are directed at recognisably different sectors of the market."[10]

The Newspaper Commission Report emphasises the importance of the indigenous newspaper industry and the extent to which competition from UK titles may threaten editorial and cultural diversity in the indigenous newspaper industry. A striking feature of the Newspaper Commission's analysis is that its recommendation as to how the Minister should exercise her powers to regulate changes of ownership in the newspaper sector is, in a sense, the second best solution identified by the Newspaper Commission. The Newspaper Commission points out that

"If a situation were to arise where diversity of viewpoint and cultural content had noticably decreased, particularly in the indigenous newspaper industry, ideally market demand and entrepreneurial activity should fill the gap. This, however, presumes ease of access into the market and fair competition coupled with favourable trading conditions within the market after entry." [11]

The Newspaper Commission Report goes on to say that the

"The best guarantee against a weakness of these important diversities must therefore be the adoption of measures to strengthen -
(a) competitiveness of the industry against the challenge of UK titles;
(b) fairness of competition within the industry.
(c) favourable trading conditions for the industry in general; and
(d) ease of access to the industry for new entrants who are likely to contribute to diversity of viewpoint and culture."

Attempting to achieve the goal of editorial and cultural diversity through the essentially prohibitory mechanisms of mergers control is, as the Newspaper Commission Report acknowledges, an alternative method of achieving these goals.

"The alternative method of seeking to promote more sustained diversity of viewpoint in the indigenous industry by encouraging plurality of ownership, is a negative procedure of curbing the growth of indigenous newspaper enterprises by prohibiting mergers, takeovers or other procedures for the acquisition of control by one company over another."[12]

It is on the basis of this "alternative method" that the Newspaper Commission identified the particular criteria which the Minister should consider when exercising her powers to regulate changes of ownership in the newspaper sector.

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[10] Newspaper Commission Report, 1.4 and 1.6

[11] Newspaper Commission Report, paragraph 1.11, emphasis added.

[12] Newspaper Commission Report, paragraph 1.14.

The Group considers that in light of the objectives sought to be served by this recommendation, the Minister, in considering the particular matters identified by the Newspaper Commission such as the strength and competitiveness of the indigenous industry in relation to UK titles, the plurality of ownership, editorial and cultural diversity and so forth, should be entitled to consider circumstances where an acquisition by one newspaper of another might be approved rather than prohibited if the target of the acquisition was otherwise likely to fail resulting in the elimination of that newspaper entirely. The integration of such a feature into mergers control in the newspaper industry is a characteristic of such merger control in both the US and the UK.

In 1969, the US Supreme Court declared that joint operating agreements (commonly referred to as JOAs) between newspapers involving price fixing, pooling of profits and market allocation were contrary to US anti-trust laws.[13]This ruling meant that a failing newspaper could not be saved by a joint operating agreement between the failing newspaper and a rival which involved price fixing, pooling of profits etc. Precisely because of the concern for the social value of a diversity of newspapers, the US Congress enacted the Newspaper Preservation Act 1970[14] Under the Newspaper Preservation Act, two newspapers, one of which is in probable danger of failure, can combine their business operations under a joint operating agreement whereby they share costs and divide the joint profits. However, to avail of the anti-trust exemption under the Act, arrangements must be put in place whereby the newspapers must maintain separate and independent editorial departments. In an attempt to ensure that the Act can only be availed of in circumstances where one of the newspapers is genuinely in probable danger of failure, the two newspapers must obtain the Attorney General's approval to the joint operating agreement by showing that at least one of the newspapers qualifies as a failing newspaper by reference to certain specific criteria. The Act expressly provides that no joint newspaper operating arrangement or any party thereto shall be exempt from any anti-trust law. In other words, the Act enables two newspapers to come together in a manner which might otherwise be regarded as anti-competitive for the sake of preserving two editorial voices but beyond this exemption, the ordinary rules of US anti-trust law continue to apply to the entities operating the agreement.

The rationale for the Act has been succinctly summarised as being because

"newspapers promote First Amendment interests in society and confront unique economic forces that endanger newspapers involved in commercial competition."[15]

A similar idea underpins section 58 of the UK Fair Trading Act 1973. Sections 57-62 of the UK Fair Trading Act 1973 deal with newspaper mergers. A transfer of a newspaper or of newspaper assets to a newspaper proprietor whose newspapers have an average circulation per day of publication amounting, together with that of the newspaper concerned in the transfer, to 500,000 or more copies is unlawful and void

[13] Citizen Publishing Company -v- US 394 U.S. 131 (1969) holding that such practices were contrary to sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.

[14] Codified at 15 U.S.C. sections 1801-1804 (1982).

[15] Gertler, Michigan Citizens for an Independent Press -v- Attorney General: Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers? 39 American University Law Review 123 (1989) at 126.

unless the transfer is made with the written consent give (conditionally or unconditionally) by the Secretary of State who in turn must receive a report from the Monopolies and Mergers Commission.[16]

Section 58(3) deals with the case of a failing newspaper:

"Where the Secretary of State is satisfied that the newspaper concerned in the transfer is not economic as a going concern and as a separate newspaper, then –

(a) If he is also satisfied that, if the newspaper is to continue as a separate newspaper, the case is one of urgency, he may give his consent to the transfer without requiring a report from the Newspaper Commission under this section;
(b) If he is satisfies that the newspaper is not intended to continue as a separate newspaper, he shall give his consent to the transfer, and shall give it unconditionally without requiring such a report."[17]

Both the US and the UK legislative schemes for preserving newspapers which would otherwise disappear have been subject to criticism, sometimes by reference to alleged defects in the legislation and sometimes by reference to the manner in which the legislation has been applied.[18]

It is interesting to note that one of the criticisms of the English legislation is that all newspaper mergers should be referred to the Monopolies and Mergers Commission:

"Newspaper Mergers ... are subject to a stricter form of control [than other mergers] requiring prior approval ... Control of the media is a matter of political sensitivity and importance ... There would be much to be said for removing the element of political discretion in this area by [referring] all newspaper mergers subject to a de minimis exception."[19]

It is of course the case that under Irish law, any newspaper merger, independent of the size of the parties or the circulation of the papers concerned requires the approval of the Minister.

One commentator has expressed the following view of the English provision:

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[16] The Secretary of State can give his consent to the transfer without requiring a report from the Mergers and Monopolies Commission if he is satisfied that the newspaper concerned in the transfer has an average circulation per day of publication of not more than 25,000 copies.

[17] UK Fair Trading Act 1973, section 58(3). The legislation contains definitions of, among other things, "newspaper proprietor", "transfer of a newspaper or of newspaper assets" and "average circulation per day of publication." It also contains a provision that a person has a controlling interest in a body corporate if (but only if) he can, directly or indirectly, determine the manner in which one quarter of the votes which could be cast as a general meeting of the body corporate are to be cast on matters, and in circumstances, not of such a description as to bring into play any special voting rights or restrictions on voting rights (section 57(4)).

[18] See generally, Marsden, Egregious Cases: A Study of Media Ownership Concentration Through the Recent History of News Corporation (1994); Marsden: Regulating Media Owners in Digital Television: Lessons from UK Policy Formation 16 Cardozo Arts and Entertainment Law Journal 501 (1998).

[19] Whish, Competition Law 701 (Second Edition, 1989).

"The main difficulty with this procedure is that it has not proved capable of resisting commercial responses to loss making ventures such as quality newspapers. The Times was not financially viable when it was bought by the Thompson Organisation in 1966, and the incumbent Monopolies Commission had little choice but to accept assurances that editorial autonomy would be respected. When the same paper was bought by News International, the matter was not referred to the Newspaper Commission by the Minister, presumably on the basis that the papers' survival was at stake, despite the fact that the Sunday Times was included in the deal and remained a going concern, and that News International owned two major tabloids, the Sun and the News of the World. When the Observer was bought by Lonhro, it was also in financial straits and the Monopolies Commission approved the change of ownership. In all these cases, the appointment of independent directors was thought to provide some protection against any proprietorial interference that the concentration of ownership might bring."[20]

In the US, the Newspaper Preservation Act 1970 has also proved controversial although despite the criticisms, it remains on the US Statute Books.[21] Its constitutionality, interpretation and application have all been the subject of litigation in the US.[22]

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[20] Gibbons, Aspiring to Pluralism: The Constraints of Public Broadcasting Values on the Deregulation of British Media Ownership 16 Cardozo Arts and Entertainment Law Journal 475 at 480 (1998). The author points out that under what is now the English Competition Act 1998 (under which the role previously played by the Monopolies and Mergers Commission will be incorporated into the role of the new Competition Commission) the special regime for newspaper mergers continues because of the impact of such mergers on freedom and variety in expression of opinion (see Department of Trade and Industry, A Prohibition Approach to Anti-Competitive Agreements and Abuse of Dominant Position (1997). Gibbons comments that this explanation "ignores the effect of the wide discretion given to Ministers and the fact that, in the past, such discretion has not noticably been used to further media pluralism."

[21] Gertler, op., cit., argues that despite the criticisms of joint operating agreements ("JOAs") under the Newspaper Preservation Act (the main criticisms being (1) JOAs create monopolies and exclude potential newspaper competition from entering the market that JOAs serve; (2) JOAs do not save newspapers; (3) JOAs encounter delays in the approval process; and (4) JOAs fail to guarantee independent and separate editorial operations), a joint operating agreement "encourages diversity in the newspapers serving a local community because it forces greater market segmentation" (page 137) and that in practice, most joint operating agreements "continue to perform according to congressional guidelines in the NPA" (page 138). For a contrary view, see Steel, Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms, 138 University of Pennsylvania Law Review 275 (1989): "Proponents of the NPA envisioned JOAs as cost effective substitute for competitive newspapers that would ensure the continued existence of autonomous sources of news and opinion. However, the practical effect of JOAs has been to place a stranglehold on both the newspaper market and the market-place of ideas. The financial advantages gained by newspapers engaging in JOAs deter new market entrants and inhibit smaller existing competitors while augmenting the substantial concentration of power in large newspaper chains. Rather than preserving the existence of 'diverse and antagonistic' voices, the Newspaper Preservation Act has merely preserved the status quo: the NPA has constrained, rather than furthered, First Amendment interests. Newspapers operating under JOAs generally fail to provide greater depth of coverage or editorial diversity than monopolistic newspapers. The NPA is also impossible to implement: congressional enforcement of the conditions of editorial and reportorial autonomy necessarily entails government entry into the newsroom, thereby violating the First Amendment. The NPA's failure may be traced to a fundmental flaw in its underlying premise: the First Amendment goal of providing varied sources of news and opinion is consistent with, rather than mutually exclusive of, the anti-trust laws. The NPA accords the newspaper industry special, favourable economic treatment that inherently impedes true competitive journalism." (Page 276). Steel argues that in effect, such legislation merely relieves owners and publishers of the responsibility they should bear for mismanagement of newspapers. As against that, it can be argued that the reason for the newspaper's imminent failure is less important than the fact that it will fail unless some step is now taken.

[22] For example, in Michigan Citizens for an Independent Press -v- Attorney General 868 F.2d 1285 (B.C. Cir.), 110 S.Ct. 398 (1989), the US Supreme Court, equally divided, affirmed the decision of the US Court of Appeal which upheld the Attorney General's approval of a joint operating agreement between the Detroit News and the Detroit Free Press although no reasons were given by the Supreme Court. Gertler comments: "Thus, twenty years after the passage of the Newspaper Preservation Act, and after

Some commentators have suggested that the basic idea behind the Newspaper Preservation Act is a good one but that newspapers which operate under joint operating agreements should be forced to undergo *"periodic review which would bring issues of abuse directly in front of administrative and judicial bodies."*[23]

The Group would welcome submissions as to whether the criteria identified by the Newspaper Commission as being appropriate for consideration by the Minister in considering a proposed change of ownership in the newspaper sector should incorporate a clarification that in considering each of the matters identified by the Newspaper Commission, the Minister may have regard to the likelihood that one or more of the newspapers the subject of the proposed transaction may fail should the transaction not proceed.

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more than three years of litigation on the issues in Michigin Citizens, the newspaper industry remains without guidelines that clearly enunciate permissible conduct for separate, independent and competitive newspapers in the United States" (Gertler, op. cit., page 170). See also Committee for an Independent Post - Intelligencer -v- Hearst Corporation 704 F. 2d 467 (Ninth Circuit), Cert. denied, 464 U.S. 892 (1983). A passage from Gertler's analysis of this case will suffice to illustrate the sort of issues that arise: "In its analysis, the Ninth Circuit approached the [Newspaper Preservation Act's] post-1970 [Joint Operating Agreement] standard - in probable danger of financial danger - as an economic test. As such, it framed the NPA standard in terms of whether the failing newspaper suffered from losses which more than likely could not be reversed. The court, however, demanded an alternative purchaser requirement as an additional evidentiary burden to the post-1970 standard. Under this requirement, the existence of willing purchasers of a failing newspaper must be considered relevant to the question of a newspaper's actual failure. Moreover, the court underscored this burden by requiring [joint operating agreement] applicants to establish that they reasonably managed the failing newspaper and that the newspaper's trend toward failure was irreversible under any management. Nevertheless, in upholding the Attorney General's approval of the JOA application, the court ruled that although seven individuals inquired into the possibility of buying the Post-Intelligencier, the evidence did not show that a new publisher could continue to operate the newspaper as an independent and successful publication." (Page 149).

[23] Marvin: Above the Law? Dealing with the Abuse of Joint Operating Agreements Under the Newspaper Preservation Act, 42 Wayne Law Review 1719 (1996) page 1751. Marvin suggests that "JOAs would regularly undergo the same process through which they were originally granted, but there would be a presumption for renewal unless serious violations were found ... Open hearings subject decisions to public scrutiny and provide a forum to introduce allegations of abusive conduct. Severe conduct that is anti-competitive, inconsistent with the policy objectives of the NPA, or otherrwise detrimental to a local market would result in a refusal to renew the JOA ... Abuses [should] be measured by the economic impact on the market that the JOA functions in, and whether the conduct in question was intentional or a good faith violation of unsettled law." (Pages 1751-1752).

The Acquisition of Control Over Newspapers by Other Means

The second recommendation of the Newspaper Commission with which the Group is concerned is that which recommends that the Minister's powers be widened to regulate not only the acquisition of shares but the acquisition of control over newspapers by other means. This recommendation is also contained in chapter 1 of the Newspaper Commission's Report and follows immediately after the recommendation discussed above. The Newspaper Commission Report does not contain any discussion of what "other means" the Newspaper Commission had in mind.

The concept of "control" is one that is notoriously difficult to define, especially in a corporate context. Clearly control over company's affairs can be exercised in ways other than the holding of a majority ownership of the issued share capital. For example, the Articles of Association of a company may give a particular shareholder the power to control the board of directors. A person who is neither a shareholder on the share register nor an appointed director may nonetheless in fact control a company if the directors are accustomed to carry on the affairs of the company in accordance with the wishes of that person (leading to the concept of a "shadow director" under section 27 of the Companies Act 1990). One company may be so dependent upon another for supplies or other crucial inputs, that the supplier may be in a position to exercise a substantial form of control over the other company. There may be voting arrangements between family members or beneficiaries of a trust which may in fact create a control where no control appears to exist. Arms length transactions between two companies may contain terms and conditions which are such as to give one company effective control over the other, either generally, or with respect to specific aspects of the business.

Broadly speaking, for the purposes of the definition of "connected persons" in section 26 of the Companies Act 1990, a director of a company is deemed to control a body corporate if he together with his spouse, parent, brother, sister or child (or a trustee where the beneficiaries are such family members) is interested in more than one half of the equity share capital of the company or is entitled to control the exercise of more than one half of the voting power at any general meeting of the company.[24]

Defining "control" in very specific terms designed to capture a catalogue of potential situations and transactions runs the inevitable risk that such a list will miss out on a particular structure which may be adopted and which may give a form of control to one party over another which the policy behind the relevant legislation would have sought to encompass if the draftsman had been aware of the structure in question. On the other hand, defining a concept such as "control" in very broad terms creates an undesirable area of uncertainty where neither parties nor their advisors can be sure as to what is required by law. This may result in parties acting in good faith and finding themselves inadvertently in breach of some legal or regulatory provision, often with potentially serious consequences.

A middle ground is to attempt to give some susbstantive content to the sort of control or the extent of control which is perceived as presenting a regulatory problem while at

[24] Section 26 Companies Act 1990.

the same time allowing for some element of judgment and discretion on the part of the regulatory authority. Such an approach itself can be implemented in at least one of two ways - a brief legislative provision framed in somewhat general terms which will leave a large measure of discretion to the regulatory authority or a legislative provision which, while leaving considerable discretion to the regulatory authority, provides more specific guidelines as to the type of transaction sought to be covered.

To implement the acquisition of control recommendation in a relatively brief way, the Group considers that the most appropriate amendment would be to amend the definition of "merger or takeover" in section 1(3) of the Mergers, Takeovers and Monopolies (Control) Act 1978 to provide that in the case of newspapers, a merger would be deemed to exist if one enterprise not only acquired control of another, but acquired a decisive influence by any particular means which would not be confined to the acquisition of shares.

The Group therefore puts forward for consideration a recommendation that the definition of "merger or takeover" in section 1(3) of the Mergers, Takeovers and Monopolies (Control) Act 1978 be amended to include, as the last paragraph in section 1(3), the following provision:

"Notwithstanding the foregoing, a merger or takeover shall be deemed to exist for the purposes of this Act where an enterprise acquires control or a decisive influence by whatever means (including, without limitation, the provision or use of finance, services, facilities or resources or any combination thereof) of the whole or part of an enterprise engaged, in whole or in part, in the publication, production or distribution (other than retailing to the general public) of newspapers."

The Group suggests that if such a provision were adopted, there should be an exception for licensed banks as well as insolvency practitioners who were appointed in the ordinary course of business.

As pointed out above, the Group is cognisant of the difficulties attending upon such generalised provisions. For example, the crucial concept of "a decisive influence" would, on this proposal, fall to be decided by a court in the event of a dispute. The Group believes however that such a broad concept is capable of application to the facts of a particular transaction in that it will be possible to ascertain on a particular set of facts as to whether one party has a "decisive influence" over another even though such concept may be hard to define in the abstract and independent of the facts of any particular transaction. It appears to the Group that the reference by the Newspaper Commission to the acquisition of control over newspapers "by other means" implies a recognition that broad language may be required so as to avoid enterprises intent on circumventing the legislation resorting to artificial devices.

If, however, it is felt desirable that a more specific and detailed provision be adopted, then the Group commends for consideration a legislative model available in the shape of the Australian Broadcasting Services Act 1992 as amended.[25] The Australian

[25] The Act has since been amended by the Broadcasting Services Amendment Act 1995, the Broadcasting Services Amendment Act 1997 and the Broadcasting Services Legislation Amendment Act 1997. The extracts from the Australian legislation in the Appendix are taken from a reprint of the 1992 Act prepared by the Office of Legislative Drafting, Attorney General's Department, Canberra

legislation is dealing primarily with television and radio broadcasting but contains some interesting provisions in relation to the concept of control, both in the wider context of broadcasting and in the context of newspapers. The clauses of the Act relevant to the concept of control are set out in the Appendix.

At the time that legislation in the form of a Bill was before the Parliament in Canberra, Australia, the Australian Minister for Transport and Communications issued a booklet containing his Ministerial Statement on the draft bill and an explanation of the provisions and key principles in a simplified format.[26]

"The overriding concern of governments in media ownership policy is with those who are in positions to exercise control over significant aspects of broadcasting service. Ownership is only a factor in helping to decide whether control exists. A key element of the approach to control in the Bill has been to construct a regime that does not try to define every possible scenario that results in control. That approach leaves scope to exploit loopholes by omission. As noted previously, loophole exploitation has been a major problem with the current Act and has required regular amendment to the Act every time a new avoidance mechanism was constructed.

This Bill recognises that the concept of control is a complex one that does not lend itself to rules that try to provide a definitive answer in deciding control in all cases. This philosophy is elaborated in a legislative "essay" at part 1 of Schedule 2 of the Bill. The Schedule goes further to provide guidance at part 2 in deciding when a person is in a position to have effective control, and measuring "tools" at part 3 and 4, examples of tracing provisions that can be used by the Australian Broadcasting Authority] to help in reaching a decision. It provides the ABA with the discretion to decide in difficult cases whether control exists.

This approach will not create loopholes by omission. Rather, it will require the ABA to monitor the industry, without waiting for a transaction or another trigger, and empower it to investigate and decide at any time where it considers, prima facie, that a breach of control limits exists. The approach should be effective in enforcing limits imposed by the Government, but will require a willingness to move from the current, highly specific and definitive approach."[27]

Clause 7 of the Act contains a definition of the term "control" as follows:

"7. Interpretation - Meaning of Control
Schedule 1 sets out mechanisms that are to be used in:
(a) deciding whether a person is in a position to exercise control of a licence, a company or a newspaper for the purposes of this Act; and
(b) tracing company interests of persons."[28]

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which reprints the Act as in force on the 31st of January 1998 (including amendments up to Act No. 180 of 1997).

[26] Draft Broadcasting Services Bill, Explanatory Papers, Department of Transport and Communications, 8th November 1991.

[27] Pages 24-25.

[28] Section 8 contains definitions of the terms shareholding interests, voting interests, dividend interests and winding up interests.

Schedule 1 to the Act sets out some detailed provisions which are

"intended to provide a means of finding out who is in a position to exercise control of commercial television broadcasting licences, commercial radio broadcasting licences, subscription television broadcasting licences, newspapers and companies and a means of tracing company interests."[29]

The schedule recognises that the concept of control in this context can be a complex one and that company interests are only one method by which control can be exercised. Agreements and arrangements between people and accustomed courses of conduct between people can also be important.

Thus the schedule provides that a person who has company interests exceeding 15% in a company is regarded as being in a position to control the company. There are circumstances set out where even a holding of less than 15% may be sufficient to give control (e.g. where a person holds company interests of 10% but where no other person holds company interests of more than, say, 2% and those other persons do not act in concert).

The Australian schedule also recognises that the relevant concept of control in this context may be control of the media section of a particular enterprise as distinct from the enterprise as a whole.

Part 1 of the schedule, which contains a general introductory "essay" on the question of control, sounds a cautionary note:

"Because of the complexities involved in this area, it is not possible to provide rules which will give a definite answer in all cases. Therefore, the [Australian Broadcasting Authority] is given a monitoring role over the broadcasting industry and suitable powers of investigation in order to reach a conclusion as to whether a person is in a position to exercise control or not. In order to provide certainty for persons involved in the industry, the ABA is also given, under section 74, a power to give a binding opinion on the question of control."

The Group draws attention in particular to clause 3 of the schedule which sets out the circumstances when a person is in a position to exercise control of a newspaper. Paragraph 4 of the schedule sets out special provisions for authorised lenders (i.e. a bank or some such similar institution) and provides, in effect, that if an authorised lender has a loan agreement with a media company and any associated transactions are entered into in the ordinary course of carrying on a business of providing financial accommodation, then such loan agreement and associated transactions are to be disregarded in deciding whether the lender or any controller of the lender is in a position to exercise control of the media company or of any licence or newspaper of which the media company is in a position to exercise control. The corollary is if that such loan agreements or related transactions are entered into by a party who is not an authorised lender then such loan agreement and any associated transaction can be taken into account in deciding on the question of control.

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[29] The quotation is from an "essay" which is part of the schedule in question.

Certain amendments were made to this Act by the Broadcasting Services (Amendment) Act 1995. In moving that the Bill be read a second time, the Minister stated as follows:

"On the 27th June 1995, the Government announced a package of changes to buttress and strengthen the current ownership and control provisions to reinforce the policy approach of the Broadcasting Services Act.

The amendment to the 15% control rule included in this Bill followed a report by the ABA on the operations of the ownership and control rules in the Act. That report drew attention to the perception that the existing 15% rule was causing a degree of uncertainty within the industry and a lessening of public confidence in the predictability of the operation of the rules.

Part of the reason for this uncertainty was the requirement for the ABA to exercise a judgment in determining control in each particular instance. The Government believes that the establishment of a 15% limit, which no longer requires such a judgment to be made, will overcome these difficulties and provide greater transparency and certain in the operation of the Act."[30]

The relevant amendment provides, in effect, that for the purpose of the "control" limits in the Act, a person will be deemed to be in a position to control a company by holding more than 15% of company interests in the company, without the need for factual inquiry as to whether the person is otherwise in a position to exercise control over that company.[31]

Certain clauses of the Australian Broadcasting Services Act 1992, and schedule 1 to that Act as amended are attached to this discussion paper as Appendix. The Group invites submissions as to whether the provisions in relation to control contained in the Australian legislation form a model which could be adopted in this jurisdiction for the purpose of implementing the Newspaper Commission's acquisition of control recommendation. Insofar as persons consider that the Australian model is broadly suitable but with modifications, the Group specifically requests that submissions on this issue should detail any modifications which may be felt to be appropriate.

[30] Extract from second reading speech of the Minister for Communications and the Arts, the Honourable Michael Lee MP, Parliament of the Commonwealth of Australia, House of Representatives.

[31] Clause 5, subclause 12(2) of the Broadcasting Services Amendment Act 1995.

Concentration of Ownership on a Media-Wide Basis

The final recommendation which the Group has been asked to take into account is the Newspaper Commission's recommendation dealing with the consideration of any issue of concentration of ownership in the media on a media-wide as well as on a single media basis.

This recommendation occurs in chapter 4 of the Newspaper Commission Report dealing with one of the terms of reference of the Newspaper Commission, namely "concentration of ownership in the media generally." The Newspaper Commission pointed to the fact that there are many other sources of news, entertainment and varying degrees of views and opinions, aside from those relayed through newspapers. Television (both terrestrial and satellite), radio and magazines all form part of the spectrum of these alternative sources. The speed of change is such that it seems fair to add the Internet and various information storage devices such as CD-ROMs to the list since the Newspaper Commission Report was published in June 1996. The Newspaper Commission stated:

"Concentration of ownership either in them, between them and newspapers, or between them inter se, has the same potential for limiting or impeding diversity of views and opinions in a manner harmful to the democratic processes as concentration of ownership in newspapers."[32]

The Newspaper Commission pointed out that there are some differences between the consequences of a concentration of ownership in a given medium (such as newspapers) and a concentration of ownership on a cross-media basis (e.g. where one person or a small group owns or has a stake in a variety of media such as newspapers and television). As the Newspaper Commission Report puts it:

"There is some difference between the consequences in general of concentration of ownership in one branch of the media, e.g. newspapers or TV stations, and of ownership extending over units of different branches of the media."[33]

However, the Newspaper Commission did not spell out what these difference in consequences are or may be or the signficance of the difference in such consequences although the Newspaper Commission's essential recommendation in this respect is that this difference of consequences should be given effect to in considerations with regard to media-wide ownership of different branches of the media. Presumably, what the Newspaper Commission had in mind was that a particular transaction might have unacceptable consequences (presumably from the viewpoint of editorial and cultural diversity etc.) when looked at in the context of a single medium (e.g. where one newspaper is acquiring another) but that the same transaction might have other consequences (for example certain beneficial effects) when looked at on a multi-media basis (as where, for example, the cross-media ownership structure between a given number of newspapers and television stations might be such that the acquisition of one newspaper by another could constitute a beneficial balance to a particular concentration of ownership of television stations).

[32] Newspaper Commission Report, paragraph 4.2.

[33] Newspaper Commission Report, paragraph 4.6.

While there might at first sight appear to be a contradiction between the Newspaper Commission's first recommendation (discussed above) which was focused exclusively in the context of the newspaper industry and recommendation number 10 to the effect that media-wide consequences should be considered, it appears to the Group that any such contradiction is more apparent than real. For the reasons analysed earlier in this discussion paper, there are good grounds for regarding newspapers as belonging to a qualitatively different category to other forms of news media and it is logical therefore to consider the impact of a transaction in a newspaper specific context. It is not, in the Group's view, inconsistent with such an approach that having so analysed the transaction, regard should then be had to the overall impact of the transaction on the scope for diversity of views in society as a whole, having regard to the fact that newspapers are in competition, to at least some extent with the other forms of news media.

As pointed out in the Newspaper Commission Report, there is at present a restriction created by statutory regulation which limits the interests of local newspapers in local radio stations operating in their region to an interest of not more than 25% although rather anomalously, radio owners are not subject to the same restriction in taking an interest in local newspapers.[34] As previously noted, there is a further anomaly in that the regime and criteria for the allocation of broadcast licences of various types and the criteria by which such licences may be acquired are different to the specific criteria set down in relation to newspapers. The question of whether such a dual system of regulation makes sense has been discussed in other jurisdictions.[35] The UK Broadcasting Act 1990 prohibits excessive cross-media concentrations[36] but there seems to be an increasing view in the United Kingdom that British media companies have to be allowed to become bigger and more concentrated in order to compete in the international market. It was the emergence of this view in the deregulation debate in the 1990s in the UK which led in large part to the UK Broadcasting Act 1996.[37]

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[34] Newspaper Commission Report, paragraph 4.4.

[35] See, for example, Barendt, Structural and Content Regulation of the Media: United Kingdom Law and Some AMERICAN Comparisons Y.B. Entertainment and Media Law (1997) cited in Marsden, op. cit., page 502.

[36] Schedule 2 of the 1990 Broadcasting Act as amended by schedule 2 of the 1996 Broadcasting Act.

[37] The deregulation brought about by the UK Broadcasting Act 1996 has vociferous opponents. In the House of Lords, at the Second Reading of the Broadcasting Bill, Lord Annan said as follows:

"Not a shred of evidence is cited to substantiate this obsession with size. Indeed, these days large entrepreneurial projects are usually undertaken by consortia, joint ventures or alliances ... If the Government believes that past legislation has stifled expansion, how does anyone explain the rise of Mr. Murdoch's satellite empire in Britian? Did he not reach for the sky entirely within the law? ... Such anomalies make me suspicious of the whole argument. Building larger media companies in order to fight the world brings no guarantee of success, and may hamper the entry and growth of small innovative companies into that domestic market." Cited in Marsden, op. cit., page 505.

Marsden clearly agrees with this view and argues that diversity is being sacrificed for the sake of economic competitiveness. Among other things, he draws attention to the fact that if one is concerned about diversity in terms of viewpoint and culture, then comparisons of newspaper circulation figures with television audience figures is not comparing like with like and some form of "media exchange rate" would be needed to equate newspaper readership with television viewing. See further, Gibbons, op. cit.: "In all such discussions, and certainly in the United Kingdom, it was accepted that media power, and its relationship with pluralism, was an appropriate issue for public policy, but a more sophisticated way of squaring that power with the economic advantages of joint ventures and mergers was sought. The theme which emerged as a likely basis for legislation was the notion of "market share". The basic idea which underlies the market share approach is that media power should be

It is neither the purpose nor within the competence of the Group to analyse these conflicting views as to the merits or otherwise of cross-media ownership.[38] The Newspaper Commission's recommendation in question merely recommends that these issues have to be considered when considering a concentration of ownership issue in the media sector. The question therefore arises as to whether, under existing law, the Minister and/or the Competition Authority (as the case may be) have the authority and jurisdiction to consider what might be termed these cross-media consequences.

In the discussion and recommendations above in relation to the Newspaper Commission's first recommendation, the Group has put forward a recommendation for discussion pursuant to which the Minister would, when considering a newspaper merger, consider the various criteria identified by the Newspaper Commission in its first recommendation. It will be noted however that the Group has added to that list a consideration of *"the position in the media market of any of the enterprises involved in the proposed merger or takeover."* If this recommendation is adopted, the Group considers that it will be sufficient to give the Minister power to consider the media-wide consequences which are the subject of the Newspaper Commission's recommendation number 10.

The Group also recommends that the Minister's power to order the Competition Authority to carry out investigations (whether in its existing forms under section 11 (as amended by the 1986 Act) and 14 of the Competition Act 1991 or any variation on such investigative powers as suggested in Chapter 4 above) should be amended so as to empower the Competition Authority, in dealing with any notification or investigation under the Competition Acts, to take into account the effect of any merger, acquisition or interest on competition in the media market generally.

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assessed by reference to the influence that it has on its readership and audience. Rather than regulating crudely in terms of individual media sectors (newspapers, radio, television), there should be an attempt to quantify the relative impact of different kinds of media on the individuals who use them. Different genres within each medium and their relative impact on pluralism should, ideally, be fundamental to such an assessment. Competition issues aside, extensive control over news and current affairs output might be expected to raise greater concern than dominance in comedy or entertainment. Furthermore, if influence on audience or readers' opinion is the purpose of regulation, the relationship between radio and television companies and the wider media market (books, magazines, cinema, video, theatre) should be included in the measure. Obviously, the problem is how to devise a suitable measure." (Pages 490-491).

[38] As will be apparent from this brief discussion of cross-media issues, such issues are complex in the extreme. It may be salutary to recall a passage from Professor Weinberg's article "Broadcasting and Speech" which runs to 101 pages with 477 footnotes: "I present in this article no policy solution that will solve all of the problems of the broadcasting system. Rather, my ultimate argument in this article is that no such policy solution can exist. There is nothing we can do in broadcast regulation that will not leave us grappling with further contradictions and unresolved issues. In considering how to revise broadcast law, we do badly to look for sweeping, ideologically pure, universal solutions. The better course may be to look for second best solutions." (Pages 1203-1204).

Summary of Recommendations

Change of Ownership Recommendation

1. The Group recommends that section 14 of the Competition Act 1991 be widened so as to expressly empower the Minister to request the Competition Authority to carry out an investigation into any agreements, decisions or concerted practices which may contravene section 4 of the Competition Act 1991.

2. The Group recommends that the necessary precondition to such a request by the Minister should not be the formation of an opinion by the Minister that there is a violation of section 4 or 5 of the Competition Act 1991 (as the case may be), but that the Minister has reasonable grounds for believing that there may be a violation of section 4 or 5. This represents a lower level of confidence required of the Minister as to the existence of a violation of section 4 or 5 before requesting an investigation.

3. The Group recommends that the concept of the "exigencies of the common good" as referred to in section 9(1)(a) of the Mergers, Takeovers and Monopolies (Control) Act 1978 should be specifically defined in the case of a proposed merger or takeover of a newspaper (or, if the Oireachtas were to enact legislation to regulate concentrations in the media sector generally, a proposed merger or takeover in the media sector) to include the five criteria identified by the Newspaper Commission and a sixth criterion which would refer to the position of any of the enterprises involved in the proposed merger or takeover in the media market. Accordingly, the Group suggests the following new subsection to be inserted into section 9:

"(6) Notwithstanding the foregoing, the Minister may prohibit any merger or takeover of any business which consists, in whole or in part, of the printing, publishing or distribution (other than the retailing to the general public) of newspapers, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

(a) the strength and competitiveness of the indigenous newspaper industry;
(b) the plurality of ownership;
(c) the plurality of titles;
(d) the diversity of views in Irish society;
(e) the maintenance of cultural diversity; and
(f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises."

If the Oireachtas were to enact legislation to regulate mergers or concentrations in the media sector generally (as opposed to the newspaper sector particuarly) then the following provision could be considered by the Oireachtas:

"(6) Notwithstanding the foregoing, the Minister may prohibit any merger or takeover of any business which is, in whole or in part, in the media sector, having considered a report of the Authority, where the Minister believes that the exigencies of the common good so warrant having particular regard to:

(a) the strength and competitiveness of the indigenous newspaper industry;
(b) the plurality of ownership;
(c) the plurality of titles;
(d) the diversity of views in Irish society;
(e) the maintenance of cultural diversity; and
(f) the position in the media market generally of any of the enterprises involved in the proposed merger or takeover or of any enterprises with an interest in any such enterprises."

4. The Group recommends that the Mergers and Takeovers (Control) Acts 1978-1996 should be amended to enable the Minister to adopt statutory instruments generally. One such statutory instrument could define the concept of the "media sector" in the event that the proposed amendment to section 9 extends to mergers or takeovers in the media sector (as distinct from the newspaper industry only).

5. The Group recommends that when a proposed merger or takeover in the newspaper or media sector (as the case may be) is referred by the Minister to the Competition Authority pursuant to section 7 of the 1978 Act, the Competition Authority should be both entitled and required to take account of not only the existing section 8 criteria but also the six factors referred to in the Group's suggested new section 9(6) of the 1978 Act.

6. The Group draws attention to the powers of the Minister contained in paragraph 1(3) of the Schedule to the Competition Act 1991 which provide that the Minister may appoint additional temporary members to the Competition Authority for such period and on such terms and conditions as she may specify in the appointment. While there was some disagreement among members of the Group as to the practicality of appointing temporary outside members to the Competition Authority, there was a general view that such a proposal would be preferable to setting up another independent body to assess newspaper or media mergers on the grounds that the creation of another such body would be an unwelcome addition to the bureaucracy of the mergers process.

7. The Group recommends that in light of the objectives sought to be served by the first recommendation of the Newspaper Commission, the Minister, in considering the particular matters identified by the Newspaper Commission such as the strength and competitiveness of the indigenous industry in relation to UK titles, the plurality of ownership, editorial and cultural diversity and so forth, should be entitled to consider circumstances where an acquisition by one newspaper of another might be approved rather than prohibited if the target of the acquisition was otherwise likely to fail resulting in the elimination of that newspaper entirely.

The Acquisition of Control Over Newspapers by Other Means

8. To implement the acquisition of control recommendation in a relatively brief way, the Group recommends that the most appropriate amendment would be to amend the definition of "merger or takeover" in section 1(3) of the Mergers, Takeovers and Monopolies (Control) Act 1978 to provide that in the case of newspapers, a merger would be deemed to exist if one enterprise not only acquired control of another, but acquired a decisive influence by any particular means which would not be confined to

the acquisition of shares. The Group therefore puts forward for consideration a recommendation that the definition of "merger or takeover" in section 1(3) of the 1978 Act be amended to include, as the last paragraph in section 1(3) the following provision:

"Notwithstanding the foregoing, a merger or takeover shall be deemed to exist for the purposes of this Act where an enterprise acquires control or a decisive influence by whatever means (including, without limitation, the provision or use of finance, services, facilities or resources or any combination thereof) of the whole or part of an enterprise engaged, in whole or in part, in the publication, production or distribution (other than retailing to the general public) of newspapers."

The Group recommends that if such a provision were adopted, there should be an exception for licensed banks as well as insolvency practitioners who were appointed in the ordinary course of business.

9. The Group invites submissions as to whether the provisions in relation to control contained in the Australian Broadcasting Services Act 1992 form a model which could be adopted in this jurisdiction for the purpose of implementing the Newspaper Commission's acquisition of control recommendation. Insofar as persons consider that the Australian model is broadly suitable but with modifications, the Group specifically requests that submissions on this issue should detail any modifications which may be felt to be appropriate.

Concentration of Ownership on a Media-Wide Basis

10. Recommendation number 3 above requires the Minister, when considering a newspaper merger, to consider not only the various criteria identified by the Newspaper Commission in its first recommendation, but also "the position in the media market of any of the enterprises involved in the proposed merger or takeover." If this recommendation is adopted, the Group considers that it will be sufficient to give the Minister power to consider the media-wide consequences which are the subject of the Newpaper Commission's recommendation no. 10.

11. The Group recommends that the Minister's power to order the Competition Authority to carry out investigations (whether in its existing forms under section 11 (as amended by the 1986 Act) and section 14 of the Competition Act 1991 or any variation on such investigative powers as suggested at recommendations numbers 1 and 2 should be amended so as to empower the Competition Authority, in dealing with any notification or investigation under the Competition Acts, to take into account the effect of any merger, acquisition or interest on competition in the media market generally.

The Group welcomes submissions on all or any of the above proposed recommendations.

Appendix

Extract from AUSTRALIAN BROADCASTING SERVICES ACT 1992 as amend.

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- Preliminary 1 – 8

- Schedule 1 – Control and Ownership of Company Interests