

# **The Curious Tale of Pigs, Papers and Peru: Media Mergers in Ireland**

**By**

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## **1. Introduction**

Over the last four years of merger control under the Competition Act 2002 ("the Act"), the Competition Authority ("the Authority") has received 72 media merger notifications. In the majority of these mergers there is minimal or no local nexus with the State. This has led to:

- an unwanted and perhaps unnecessary onus, both in terms of financial and human resources, on those undertakings required to notify media mergers to the Authority;
- the Authority is placed under obligation to devote resources to investigate, process and issue determinations in relation to mergers that do not have the potential of raising any competition concerns in the State; and,
- the Minister is placed in a position where he or she is required to evaluate mergers that have minimal or no local nexus and in some instances where the transaction in itself does not relate to a media business.

Some of the notifications described in this paper are not too far a cry from the fictitious example, which is now much quoted in legal circles, involving a foreign newspaper group such as *Le Monde* diversifying and buying a sausage factory in Peru. Such a transaction is a mandatory notification to the Authority, because one of the undertakings involved (*Le Monde*) carries on a media business in the State, as its newspapers are sold in the State although it does not produce them in the jurisdiction.

In this paper we attempt to answer the following questions: (i) why are media mergers with little or no nexus with Ireland being notified under the Act? (ii) should this situation be changed? and, (ii) how can it be changed? The paper is

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divided as follows. Section 2 describes the background to the current regime of competition regulation of media mergers by briefly reviewing international approaches to competition regulation of media mergers and the legislative background to competition regulation of media mergers in the State. Section 3 discusses the current legislative regime and the nature of media mergers assessed by the Authority between 2003 and 2006. Section 4 presents the conclusion of the paper and suggests questions aimed at stimulating discussion as to how to address the problems associated with the current legislative regime in respect of media mergers in the State.

## **2. Background**

### ***International Approach to Regulation of Media Mergers***

Protection of media plurality and diversity is not an objective exclusive to Ireland and has long been a feature of many other legal systems. In this section, the findings from a review of the approaches used to protect media diversity and plurality in a number of jurisdictions are discussed.<sup>1</sup> Where possible, the following questions as they pertain to the State are addressed: (i) how are media mergers defined? (ii) how is nexus to the jurisdiction identified? and, (iii) how are the “undertakings involved” in respect of media mergers identified?

The varying approaches to protect media plurality and diversity, summarised in Table 1 below, are divided into three groups: the structural approach; the regulatory approach; and, the merger-specific approach. Of course, these approaches are not mutually exclusive and so more than one approach might be used to protect media diversity. A short explanation of these three approaches is set out below.

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<sup>1</sup>This is based on Hargreaves et al (2006)

**Table 1**  
**Overview of Approaches to Media Mergers in Selected Jurisdictions**

<b>Country</b>	<b>Approach</b>	<b>Media Merger Definition</b>	<b>Carry on Media Business</b>	<b>Undertakings Involved</b>
<b>Ireland</b>	Mixed (Regulatory/merger specific)	Yes	Limited or no Local Nexus	Group
<b>United Kingdom</b>	Mixed (Regulatory and merger specific)	No	Local Nexus	Group
<b>European Union</b>	Left to Member States	No	Community	Group
<b>United States</b>	Structural	No	Local Nexus	Group
<b>Australia</b>	Regulatory/Structural	No	Local Nexus	Group

Source: Based on Hargreaves et al (2006)

### The Structural Approach

Under this approach, the legislature may provide for the creation of mono-media and/or cross-media ownership rules. Such rules restrict to a greater or lesser extent the freedom of firms to own media outlets. The rules normally allow the ownership of only specified numbers of media companies on given markets (mono-media rules), or restricted combinations of media companies on different media markets (cross-media rules).

This approach is used in the United States and Australia, where it is based upon a concern for both viewpoint diversity and economic competition.

### The Regulatory Approach

The regulatory approach is the most common. This approach, through legislation, may provide for regulators to write diversity requirements into their licensing agreements with broadcasters. Such requirements may require the delivery of specified numbers of hours for certain types of output (such as news, current affairs, or national/cultural programming) or insist upon some less tangible criterion (such as 'balance'). The regulatory approach is most often used to regulate media plurality and diversity in broadcast media and is rarely used in print media.

This approach is used in combination with both of the other approaches in Ireland, the UK and Australia. The regulatory approach is usually applied only to the broadcasting industries, which were traditionally constrained by the scarcity of the radio spectrum.

### The Merger-Specific Approach

Under this approach the legislature may choose to introduce a media diversity component into the case-by-case review of merger transactions by competition authorities. That is, alongside the standard competition test (for example, the 'substantial lessening of competition' or 'creation or strengthening of dominance' standards), the competition authority or some state authority may be required to assess the impact of a media merger on viewpoint diversity.

This approach is common to the UK and Ireland. One important difference between Ireland and the United Kingdom is that the role of the Authority in Ireland is advisory in respect of diversity rather than determinative.

The following messages can be taken from this brief review:

- merger-specific approaches to protection of media diversity and plurality are rare in practice;
- except for Ireland, jurisdictions do not treat media mergers differently from non-media mergers and as a result media mergers are subject to the same notification provisions; and,
- except for Ireland, local nexus with the jurisdiction is consistent with international best practice.<sup>2</sup>

### ***Legislative History of Media Mergers in Ireland***

#### The Mergers Take-overs and Monopolies (Control) Act, 1978

In 1978, the first merger-specific law in the State came into effect, the Mergers Take-overs and Monopolies (Control) Act, 1978 ("the 1978 Act"). However, the 1978 Act did not specifically make reference to media mergers.<sup>3</sup> Nonetheless, section 2(5) of the 1978 Act provided for the Minister for Enterprise and Employment ("the Minister"), to declare by order that a specific class of proposed mergers or takeovers would be subject to the 1978 Act. Such an order had to be made where in the opinion of the Minister, the exigencies of the common good so warranted.

In 1979, the Minister made an order which applied to "proposed mergers or take-overs of the following class, namely, proposed mergers or take-overs involving

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<sup>2</sup> Best practice is discussed below. At present media mergers with little or no nexus to the State are being notified on a mandatory basis, an issue discussed further below.

<sup>3</sup> Neither the Competition Act, 1991, nor the Competition Act, 1996 contain such a provision.

enterprises as least one of which is engaged in the printing or publication (or printing and publication) of one or more than one newspaper” (“the 1979 Order”). The 1979 Order did not apply to broadcast media (radio or television), as prior to 1988 no commercial broadcasting was licensed in the State<sup>4</sup>. However, the 1979 Order provided for the use of competition legislation and competition tools to protect media plurality and diversity.

Any merger notified to the Minister under section 5 of the 1978 Act and any merger falling into the class of merger specified by the 1979 Order would be treated in the same manner,<sup>5</sup> i.e., subject to the same ‘competition’ test. The 1979 Order and the 1978 Act did not provide any guidelines to the Minister as to what he or she should do when faced with one of these mandatory media mergers other than to treat it at a minimum like any other notifiable merger or take-over under the 1978 Act.

The move towards the concept of a specific provision for media mergers in Irish competition law found its origin in recommendations from the Newspaper Commission and the Competition Merger Review Group.

#### The Commission on the Newspaper Industry

The Commission on the Newspaper Industry (“the Newspaper Commission”) was established in 1995 to review the ‘state-of-play’ of the newspaper industry in Ireland. In its 1996 report, the Newspaper Commission identified a number of concerns about the newspaper industry including:

- that “further ... concentration of ownership in the indigenous industry could severely curtail the diversity requisite to maintain a vigorous democracy” (p.30).; and,
- the powerful position of Independent Newspapers<sup>6</sup>.

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<sup>4</sup> In 1988, the Radio and Television Act 1988 came into effect setting up a licensing and content regulation body, the Irish Radio and television Commission (“IRTC”) which would be responsible for the regulation of commercial broadcasting in the State. The IRTC was replaced by the Broadcasting Commission of Ireland (“BCI”) under the Broadcasting Act 2001. For more information on the role of BCI see: <http://www.bci.ie>

<sup>5</sup> Unless the Minister decided not to make an order under section 9 of the 1978 Act prohibiting the proposed merger, the merger would be referred to the Competition Authority for investigation in relation to the competition and non-competition criteria set out in section 8(2) of the 1978 Act. However, none of these criteria related in any specific way to newspapers and broadcast media or issues, such as, cultural or editorial diversity.

<sup>6</sup> The Newspaper Commission noted that the size of the group was not indicative of anti-competitiveness in itself. However, the actions of Independent Newspapers in relation to its

In light of its concerns, the Newspaper Commission made sixteen recommendations. Of those, three recommendations had competition law/mergers implications:

- the Minister in assessing changes in the ownership in the newspaper sector should assess the implications of any changes in relation to plurality and diversity criteria (Recommendation 1);
- amendment of the existing Irish merger regime in respect of activities in the newspaper industry resulting in a widening of the powers to regulate not only the acquisition of shares but also the acquisition of control over newspapers by other means (Recommendation 2); and,
- that any issue of concentration of ownership on the media should be the subject of cross-media as well as mono-media considerations (Recommendation 10).

#### Competition and Mergers Review Group

On 30 September 1996, the Competition and Mergers Review Group ("the CMRG") was established to review and make recommendations on: (i) mergers legislation; (ii) effectiveness of competition legislation and associated regulations; (iii) cultural matters in the context of the Competition Act 1991 ("the 1991 Act") and in particular, section 4(2) of that Act;<sup>7</sup> and, (iv) appropriate structures for implementing the proposed new legislation.

In its final report in 2000 the CMRG made the following recommendations, which have implications for the current legislative regime of media mergers:

- the concept of the "exigencies of the common good" as referred to in section 9(1)(a) of the 1978 Act should be specifically defined in the case of a proposed merger or takeover of a newspaper to include the criteria identified by the Newspaper Commission. (Recommendation 3);
- amendments should be made the Mergers and Takeovers (Control) Acts 1978-1996 to enable the Minister to adopt statutory instruments

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acquisition of 29.9% share in the Sunday Tribune, which was operating at a loss and continued to operate so being supported by loans from the Independent Newspapers, raised concerns. Consequently, the Competition Authority was required by the Minister to carry a study in relation to the newspaper industry. The report of which was never published.

<sup>7</sup> Section 4(2) of the 1991 Act is dissimilar to section 4(2) of the Act. Section 4(2) of the 1991 Act relates to the granting of licence whereas section 4(2) of the Act relates to the subject of declaration.

generally. One such statutory instrument could define the concept of the "media sector". (Recommendation 4); and,

- the Competition Authority should be both entitled and required to take account of not only the competition test but also the criteria referred to Recommendation 3 (Recommendation 5).

### **3. The Current Legislative Regime in the State**

The current regulation of media mergers is provided for by a combination of certain provisions of Part 3 of the Act and S.I. No. 622 of 2002 ("the 2002 Order"). Section 18(1)(b) of the Act provides that any merger or acquisition falling within a class of merger or acquisition specified in an order under subsection (5) shall be notified to the Authority within a month of the conclusion of an agreement or the making of a public bid. Section 18(1)(5) of the Act provides that the Minister may, after consultation with the Authority, by order specify a class or classes of merger or acquisition for the purposes of section 18(1)(b) of the 2002 Act. By virtue of the 2002 Order, the Minister specified "media mergers" as such a class.

Section 23 of the Act provides that the Authority must forward a copy of all media mergers to the Minister for Enterprise Trade and Employment. The Authority must also forward a copy of its Phase 1 determination in a media merger to the Minister, who can direct that the Authority carry out a Phase 2 or "full investigation". The Minister has never made such a direction to the Authority.

When the Authority makes, at Phase 2, a determination either to clear a merger or to clear it with conditions, it must furnish a copy of that determination to the Minister who can, notwithstanding that determination, and having regard to non-competition criteria, by order provide:

- that the merger may be put into effect;
- that the merger may be put into effect subject to specified conditions being complied with; or,
- that the merger may not be put into effect.

The Minister has never made an order in this respect.

Table 2, below, shows that media mergers represent over 23% of all mergers notified to the Authority over the period 2003 to 2006. This large proportion of

notifications represented by media mergers may be due to a number of elements including:

- the classification of media mergers;
- the Authority’s current interpretation of “carries on a media business in the State”;
- the Authority’s interpretation of “undertakings involved”; and,
- the Authority’s interpretation of “Publication”.

The last point is discussed in a paper prepared by our colleague Noreen Mackey (2007).

**Table 2**  
**Notifications Classified as Media Mergers, Ireland, 2003-2006**

<b>Year</b>	<b>Total Merger Notifications</b>	<b>Media Mergers Notifications</b>	<b>Percentage</b>
<b>2003</b>	47	13	27.66
<b>2004</b>	81	14	17.28
<b>2005</b>	84	23	27.38
<b>2006</b>	98	22	22.45
<b>Total</b>	<b>310</b>	<b>72</b>	<b>23.23</b>

Source: Competition Authority, *Annual Reports*, various issues

### ***The Classification of Media Mergers***

The 2002 Order applied the provisions of Part 3 of the 2002 Act to all mergers or acquisitions in which *one or more* of the undertakings involved carried on a media business in the State. In other words, if only one of the undertakings involved carried on a media business in the State and the other undertaking(s) carried on business completely outside the State, the merger had to be notified under the Act. Section 23 (10) of the Act defines a “media business” as

- a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs,
- a business of providing a broadcasting service, or
- a business of providing a broadcasting services platform.

Unlike non-media mergers, such mergers had to be notified to the Authority regardless of the location of the activities of the undertakings involved and the size of their turnover in the State.

For example, Trinity Mirror/Paldonsay<sup>8</sup> concerns the acquisition of a UK-based Internet service provider by a UK-based newspaper undertaking. Even though the target, Paldonsay, did not carry out any business in the State, the transaction was mandatorily notified to the Authority because some of Trinity Mirror's newspapers are distributed in the State. This implies that all transactions involving the Trinity Mirror and a non-media undertaking were mandatorily notifiable to the Authority.<sup>9</sup> This clearly demonstrates that transactions that had neither a competition nor a media diversity or plurality implication for the State, were being caught by the interpretation of the phrase "carrying on a media business".

Acting on a proposal by the Authority,<sup>10</sup> the Minister has recently revoked the 2002 Order, and made the Competition Act 2002 (Section 18(5) and(6)) Order 2007 ("the 2007 Order") which specifies two classes of merger or acquisition for the purposes of section 18(1)(b) of the Act: "the class of each merger and each acquisition in which at least two of the undertakings involved carry on a media business in the State," and "the class of each merger and each acquisition in which at least one or more of the undertakings involved carries on a media business in the State and at least one of the undertakings involved carries on a media business elsewhere." The 2007 Order will come into effect on 1 May 2007 and we believe that, when combined with other proposed changes discussed below, it should ensure that only media mergers with a nexus with the State will be notified to the Authority.

### ***The Authority's Interpretation of "carries on a media business in the State"***

While the terms "media merger" and "media business" are defined by the legislature, the phrase, "carries on a media business" is not. The Authority has provided its own understanding of the expression "carries on business on any part of the island of Ireland".<sup>11</sup> However there is currently neither a definition nor an Authority interpretation of the expression "carries on a media business in the State".

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<sup>8</sup> M/05/083.

<sup>9</sup> Other examples include: Trinity Mirror/Smart Media, M/05/051; Trinity Mirror/Financial Jobs Online, M/05/052; and, Trinity Mirror/Hotgroup, M/05/058.

<sup>10</sup> This is alluded to in Competition Authority (2007, p.35).

<sup>11</sup> See *Notice on the Interpretation of certain terms used in section 18(1) of the Competition Act 2002* (N/03/002) as amended on 12 December 2006 ("2003 Notice").

Whereas the phrase "carries on business" in relation to non-media mergers relates to the whole of the island of Ireland, the term "carries on a media business" only relates to the State. The interpretation of "carrying on business" set out by the Authority in its 2003 Notice was applied de facto to "carrying on a media business"; the only difference being that "into the island of Ireland" was replaced by "into the State". Thus, once a "media business" element had been identified, sales to customers in the State arising from that media business became the defining criterion as to whether or not a media business is being "carried on" in the State.

The Act specifies no *de minimis* level of sales in order to be carrying on a media business in the State. Neither was any *de minimis* threshold specified in the Act in relation to "carries on business". The interpretation in the 2003 Notice was very broad; sales as low as one unit or €1 technically qualified under that interpretation.

Thus taking newspapers as an example, sales to customers in the State suffice to meet the "carries on a media business in the State" test. So a newspaper which is published abroad and which is not even sold in retail outlets but has a couple of postal subscribers in the State technically satisfies the test. For example, in March UK/Gus Ireland,<sup>12</sup> the target, Gus Ireland was not involved in any media activities in the State but the transaction was classified as media merger because the ultimate owners of March UK also ultimately owned Scotsman Publications Limited, which neither have a physical presence in the State nor does it supply its titles to newsagents in the State. It only had four postal subscribers in the State.

With regard to broadcasting, sales to customers in the State generally do not occur directly, but via a broadcasting services platform. The platform enters into contracts with suppliers of programme material in the form of channels and then markets this in a package to subscribers. Thus sales occur in a more indirect fashion, since the subscriber is purchasing the channel as part of a package, as opposed to individually. For example, in GE/CNBC,<sup>13</sup> CNBC had no physical presence in the State but generated a minimal turnover from "pay-tv" subscribers in the State. This transaction was classified a media merger within the meaning of section 23(11)(a) because CNBC was deemed to be "supplying a

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<sup>12</sup> M/03/016.

<sup>13</sup> M/05/053.

compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service”.

The scenarios outlined above, when taken together, result in many transactions being classified as media mergers when arguably they should not have been because they have little or no media nexus with the State. In December 2006, the Authority amended its interpretation of “carries on business”, to include (a) a physical presence and sales to customers on the island of Ireland or (b) where there is no physical presence, to generate a minimum level of sales of €2 million to customers on the island of Ireland. This raises the question of whether the Authority should adopt a similar approach to carries on a media business in order to ensure that there is sufficient nexus for a media merger to have the possibility of raising a competition concern under the Act.

### ***Interpretation of “undertaking involved” to include Entire Group***

The term “undertaking involved” is not defined in the Act, although section 18(2)(b) does state that a vendor is not deemed to be involved in a merger or acquisition by virtue only of its being the vendor of any securities or other property involved in the merger or acquisition.

Consistent with the EU Commission’s interpretation, the Authority has interpreted the term “undertaking involved” in its 2003 Notice to include the entire group.<sup>14</sup> Since EC law does not contain a special provision for media mergers as a separate class of mergers or acquisitions this does not raise any particular issue. However, in the Irish context, the interpretation of undertakings involved to include the entire group of companies for purposes of notification of media mergers has led to undesirable results in terms of lack of a local nexus for notified mergers. Such an approach does not appear to be consistent with international best practice in respect of establishing local nexus.

The International Competition Network (“ICN”).<sup>15</sup> has identified thirteen areas as the most important to facilitating convergence towards best practice in merger review. Although not specific to any class of mergers, the first recommended

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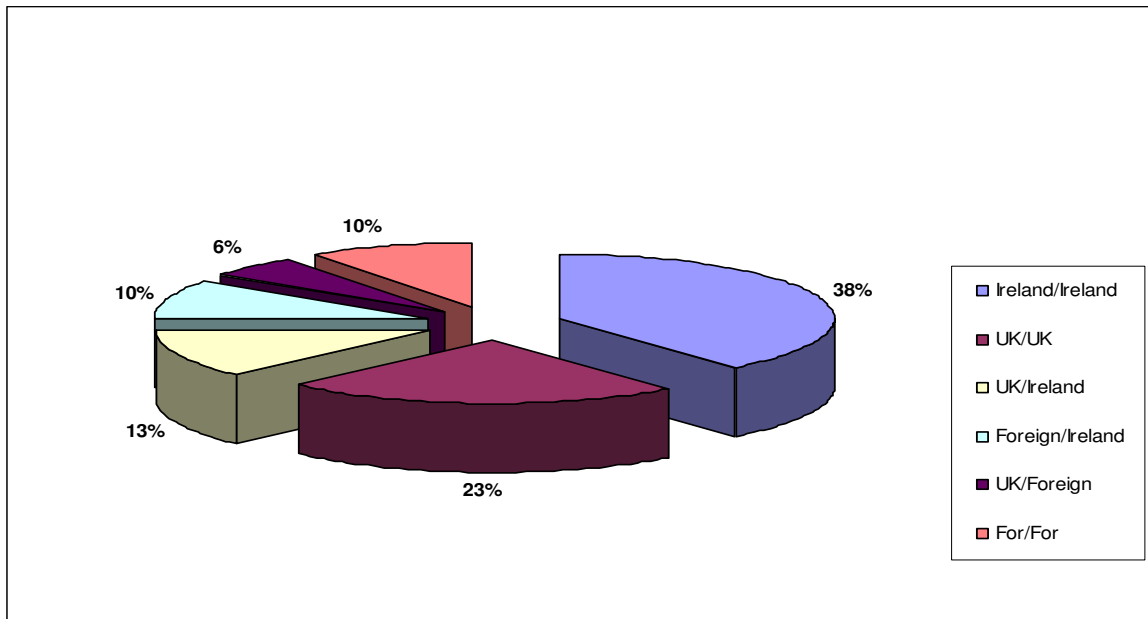
<sup>14</sup> See the 2003 Notice. The entire group thus refers to all economic activity under common control, regardless of its legal form.

<sup>15</sup> The ICN is an international organization designed to promote sound and effective competition policy enforcement by disseminating and developing best practice guidelines and practices.

practice is relevant to the discussion at hand and relates to the nexus with the reviewing jurisdiction. The ICN recommends that:

- jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned;
- merger notification should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification; and,
- determination of a transaction's nexus with the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.

**Figure 1**  
**Origin and Location of Activities of Undertakings Involved, Media Mergers Notified to the Authority, 2003-2006**



Source: Based on records of the Competition Authority<sup>16</sup>

Figure 1 above provides a summary of the origin and location of the main activities of the undertakings involved in mergers caught under the current media merger legislative regime. All 72 media mergers notified to the Authority over the period 2003-2006 were reviewed. Such mergers were allocated to each of six categories varying from cases where the target and acquirers main activities

<sup>16</sup> See Annex A below for a yearly breakdown of the figures.

were in the State (i.e. Ireland/Ireland) to where both the target and the acquirer had their main activities not only outside Ireland, but also the UK (i.e. Foreign/Foreign).

Of the mergers classified as media mergers over the period 2003 to 2006, Figure 1 shows that:

- 38% (or 9% of all notified mergers) met the “nexus with the jurisdiction” test measured by reference to the activities of at least two of the parties to the transaction on the island of Ireland;
- 23% (or 5% of all notified mergers) involved transactions for which the local nexus is the United Kingdom; and,
- 10% (or 2% of all notified mergers) involved transactions for which the local nexus is foreign.

The figures clearly show that the current regime concerning media mergers does not conform to international best practice as specified by the ICN, since a large number of mergers with little or no nexus with the State are being notified.

For example, in *Trader Publishing/Webzone*,<sup>17</sup> the acquirer, *Trader Publishing*, was a classified advertiser of automobiles and the target, *Webzone*, was a provider of IT services. Because the acquirer was part of the *Guardian Newspaper Group*, which sells newspapers in the State, the transaction amounted to a media merger within the meaning of the 2002 Act.

A more recent notification, which underlined the consequences of “undertaking involved” including the entire group was *GE/Zenon*.<sup>18</sup> This transaction was notified as a non-media merger, since the turnovers of the undertakings involved met the threshold set out in section 18(1)(a) of the 2002 Act. However, the Authority deemed *General Electric Company*, by virtue of its previous acquisition of the *CNBC news-broadcasting network* (itself the subject of a notification to the Authority<sup>19</sup>), to be carrying on a media business in the State. Thus *General Electric Company’s* subsequent acquisition of *Zenon Inc.* (a water treatment facility) although notified as a non-media merger, amounted to a media merger within the meaning of the 2002 Act.

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<sup>17</sup> M/05/061

<sup>18</sup> M/06/023

<sup>19</sup> See also, *GE (NBC)/ Business News (CNBC)*, M/05/053.

In this particular instance, it was General Electric Company itself making the acquisition. However, if one of its subsidiaries, even one which had no media activities, was to have been the acquiring vehicle, the transaction would still amount to a media merger, since the term “undertaking involved” includes the entire group. One possible solution to this issue is to in some way redefine the terms “undertakings involved”. However, it is not clear how this can be done and some of the other possible changes discussed above may be sufficient for local nexus to be achieved for media mergers.

#### **4. Conclusions and Questions**

The current application of the media merger provisions of the Act based on a combination of a Media Merger Order and the interpretative approaches of the Authority has led to some ‘interesting’ results. For example, businesses are being required to notify mergers which have no competition or media plurality or diversity implications in the State and in respect of which the Minister is unlikely to ever make an order under the Act. Over the last 4 years, the Minister has made no order in respect of any of the media mergers notified to him or her.

In an attempt to focus the discussion of possible solutions to the challenges posed by the current regime of competition regulation of media mergers in Ireland, we propose the following questions:

##### **Q1 Is the new 2007 Order sufficient for establishing local nexus with the State?**

The 2007 Order provides that a merger or acquisition will only be classified as a “media merger” if two or more of the undertakings involved in the merger or acquisition are engaged in a media business. This will result in: (i) a significant and substantial fall in the number of media merger notifications; (ii) the notification of only those mergers which may have competition or media plurality or diversity implications in the State; and (iii) the merger control regime being consistent with international best practice on nexus with the jurisdiction.

**Q2 Should the Authority, as heretofore, adopt a parallel application of its amended interpretation of “carries on business” to its interpretation of “carries on a media business”?**

Given the Authority’s current broad interpretation of “carries on a media business” with no *de minimis*, the issue arises as to whether or not it should be revised to be in conformity with the recent revision to the Authority’s interpretation of carries on business – an undertaking carries on business when it has either (a) a physical presence and sales to customers on the island of Ireland or (b) where there is no physical presence, to generate a minimum level of sales of €2 million to customers on the island of Ireland

**Q3 Should the Authority apply a narrower interpretation to the phrase “undertaking involved” in respect of media mergers?**

Given the nature of the media mergers notified to the Authority due to its broader interpretation of “undertakings involved” for purposes of media mergers, the issue arises as to whether the Authority should apply a narrower interpretation to the phrase “undertakings involved” in respect of media mergers, as Ireland appears to be the only jurisdiction with a special provisions for media mergers. However, as noted above, it is not at all clear how this could be implemented in practice and the other changes discussed above may be sufficient to address the nexus issues raised in the paper.

**Q4 Should the Act be amended, so that the Authority is no longer required to form an opinion on the relevant criteria under section 23(7)?**

The Authority’s expertise in assessing mergers is mainly in the area of the competition test, i.e., whether a media merger will lead to a substantial lessening of competition in markets in the State. However, under section 23(7) of the Act the Authority is required to come to an opinion on the relevant criteria in relation to a media merger. These criteria are not competition criteria but rather relate to diversity, the strength of media businesses indigenous to the State, the dispersion of media ownership amongst individuals and other undertakings and so on. The Minister has a determinative role in respect of the relevant criteria under section 23(7). The issue therefore arises as to whether the Authority should be required to provide an opinion on issues outside its core area of expertise?

**Q5 Should the 2002 Act be amended to provide for convergence in media platforms?**

Our review of the approach of other jurisdictions to media mergers has given insight into some new developments that we consider useful to note here. The issue of platform neutrality/convergence of media platforms possesses new challenges for competition regulation of media mergers. This is evident from the increase in the number of mergers between undertakings active on different platforms – for example, traditional newspapers and broadcasters acquiring Internet services providers. However, the Act is not technology neutral. For example, it excludes the Internet from its definition of media business, which is forming the basis for electronic communications convergence. Therefore, we would like to consider whether the Act should be amended to provide for convergence in media platforms.

28 March 2007

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**Annex 1:  
Notified Media Mergers Classified by Nexus, 2003 – 2006.**

<b>Classification; 2003-2006</b>								
Geographic Location	Number	Percentage						
Ireland/Ireland	28	38.89						
UK/UK	17	23.61						
UK/Ireland	9	12.50						
Foreign/Ireland	7	9.72						
UK/Foreign	4	5.56						
For/For	7	9.72						
Total	72	100.00						
<b>Yearly Figures for Local Nexus</b>								
<b>Geographic Location</b>	<b>2006</b>		<b>2005</b>		<b>2004</b>		<b>2003</b>	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Ireland/Ireland	8	36.36	8	34.78	8	57.14	4	30.77
UK/UK	5	22.73	6	26.09	2	14.29	4	30.77
UK/Ireland	3	13.64	5	21.74	0	0.00	1	7.69
Foreign/Ireland	2	9.09	3	13.04	2	14.29	0	0.00
UK/Foreign	0	0.00	0	0.00	1	7.14	1	7.69
For/For	4	18.18	1	4.35	1	7.14	3	23.08
<b>Totals</b>	<b>22</b>	<b>100.00</b>	<b>23</b>	<b>100.00</b>	<b>14</b>	<b>100.00</b>	<b>13</b>	<b>100.00</b>

Source: see text