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Competition policy and sector-specific economic media regulation: and never the twain shall meet?

by
Einar Hope

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Competition policy and sector-specific economic media regulation: and never the twain shall meet?

by

Einar Hope*
Norwegian School of Economics and Business Administration

1. Introduction

Against a background of dramatic structural and organizational changes in media markets, both nationally and internationally, most European countries are struggling with reforming their media policies and regulatory regimes to accommodate and comply with those changes, in accordance with stated policy and regulatory objectives. One interesting issue that has come up in this debate is the relationship between competition policy regulation of media markets on the one hand and sector-specific media regulation in general, and media ownership regulation in particular, on the other. Is it an appropriate and workable policy option to ”roll back” sector-specific regulation to general competition regulation of media markets? - to use the expression, and stated intention, of the EU-Commission in its proposal for regulatory reform of electronic communications services[1] There seems to be a general consensus among writers and researchers on media regulation that such a policy proposition is neither workable nor acceptable, because of special characteristics of media markets in economic terms and stated public policy objectives of media regulatory policy.[2] At the same time, however, there seems to be a general consensus that ownership regulation is not working properly as a regulatory instrument in practice; in fact, scepticism and even frustration often come to the surface, both from the side of media regulators and actors in media markets being exposed to regulation.

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[1] EU-Commission (2000): COM (2000)393.

[2] E.g. Gillian Doyle in a comprehensive study on media ownership regulation concludes that ”….effective and equitable upper restraints on ownership are vitally important tools that no responsible democracy can afford to relinquish. Curbs on ownership provide a direct means of preventing harmful concentrations of media power and, as such, are indispensable safeguards for pluralism and democracy”. Doyle (2002), p. 179.
Likewise, in a recent Law Proposition to the Storting (Norwegian Parliament) on ownership regulation of media the Norwegian Ministry of Culture and Church concludes, after a summary discussion of competition and ownership regulation, that the Competition Act is not suited for achieving pluralism and securing freedom of expression in media regulation, and that ownership regulation therefore is required as a policy instrument. (Ot.prp. nr. 81 (2003-2004)).

There are two aspects or levels of debate about the relationship between competition and sector-specific media regulation. The first level is the relationship between *general* or "traditional" media regulation, ranging from measures to safeguard freedom of expression, independence of media from ownership and political influence, cultural identity and language, pluralism etc. to technical regulation of e.g. wave frequencies in broadcasting, and *economic* regulation, safeguarding the same objectives and, in particular, the efficient functioning of media markets. The second level is the relationship between sector-specific *economic* regulation and general *competition* regulation. In my opinion, the debate on media regulation would have benefited considerably from establishing a clearer distinction between the two levels and on that basis identifying properties and characteristics of regulatory measures designed to achieve stated regulatory objectives for the media sector in the best possible way.

The focus of this paper is on the latter level and more specifically on the relationship between ownership regulation, as generally the most important instrument of sector-specific economic media regulation, and competition regulation. Are the two regulatory policies complementary to each other and, thus, "never shall meet" in a Kipling's sense, or can ownership regulation be rolled back to competition regulation without undue loss of regulatory impact or without sacrificing important regulatory objectives, in particular, media pluralism and diversity? Much of the debate on this policy relationship seems to have been rather "sector-specific" in the sense that it has originated in the media sector itself from a media policy perspective. This also seems to apply to a considerable degree to the academic literature on media regulation. The competition policy dimension is typically not anchored as solidly in the analysis and evalution of regulatory media issues, and sometimes one is left with a feeling that part of the literature suffers from an incomplete understanding of the analysis and instruments of modern competition policy and its theoretical foundation; first and foremost in industrial organization theory.

This paper makes an attempt at striking a balance in this regard, by comparing analytical approaches and instruments of sector-specific economic (ownership) regulation versus competition regulation of media, as a background for a discussion of their "proper" relationship. The paper also discusses various models for the institutional relationship between sector-specific and competition regulation and the division of labour and responsibility between sector-specific regulatory authorities and competition authorities.

The discussion of sector-specific versus competition policy regulation in the first part of the paper (sections 2 - 4) is fairly general and analytical in its approach. In section 5, there is a more specific, empirical, and case oriented discussion of the Norwegian media regulatory framework and the Norwegian experience with media ownership regulation, and some regulatory lessons that might be drawn from it in relation to sector-specific versus competition policy regulation. The paper ends with a discussion of some policy implications in section 6.

2. Some structural and regulatory developments in the media sector

As a background to the discussion on economic media regulation, let us list in a summary fashion some of the major, relevant developments that have recently taken place within the media sector.[3] These developments are partly exogenous in relation to regulatory policy in the sense they take place more or less independently of the regulatory regime, e.g. technological change, and so the regime must adjust to them, and partly endogenous, in the sense that developments are deliberately influenced and steered by policy in an intended way, e.g. merger and acquisition regulations in competition policy.

With regard to *market structure and organization*, some relevant developments are:

- *Media market convergence and network integration on a common digital technological platform.* Technological convergence has been a major driving force behind the restructuring of media markets in recent years. Integration has also to same extent taken place over and above digital convergence and integration, e.g. when energy companies with dedicated physical power or gas networks have invested in broadband facilities and started to offer broadband services, on the basis of alleged economies of scope in network integration. Under market convergence and integration, market players who formerly have operated in separate markets now become competitors. In order to reap potential efficiency gains from economies of scale and scope, consolidations occur through mergers and acquisitions, leading to increased market concentration, which may have detrimental effects on competition – a standard problem or dilemma in trade-off welfare analyses of economic efficiency and competition in competition policy regulation.

[3] For accounts, see e.g. EU-Commission (1977), Doyle (2002), McQuail and Siune (eds) (1998), Beesley (ed) (1996), Kelly, Mazzoleni, and McQuail (eds) (2004), and Syvertsen (2004).

- *Concentration in media markets*. Market concentration has taken four main forms: a) monomedia concentration, i.e. integration within a single media sector or business activity, b) horizontal integration across different media sectors or activities (multimedia concentration), c) vertical integration along different stages in the vertical supply chain from production of media content through packaging, distribution, to end-use, and d) conglomerate concentration, i.e. expansion into sectors or activities not traditionally understood as media markets, partly facilitated by forces of convergence and integration mentioned above. All forms of concentration can be observed in media markets, with b) and d) as perhaps the most prevalent ones. The different forms raise different issues and problems in relation to regulatory policy for the media sector.
- *Product bundling versus individual consumer targeting*. Market convergence and concentration pave the way for media product bundling, with potential cost-efficiencies on the supply side and also on the demand side, e.g. through reduced information search and transaction costs for consumers. However, IC-technology makes it possible at the same time to target individual consumers and create products and product packages tailored to the preferences of individual consumers. Given the complexities and problems of media regulation as seen from the supply side under convergence, concentration, and rapid technological change, this may imply a shift of regulatory focus from supply side to demand side regulation, in particular to consumer policy regulation.
- *Internationalization of media markets*. Media markets are increasingly moving from predominantly national markets to international and even global markets, especially the ”electronic” media markets. This has regulatory implications at least along two dimensions; first, a delegation of regulatory responsibility and tasks from national regulatory authorities to overnational or international bodies, in particular to the EU-Commission for European countries; and, second, a need for harmonising regulatory policies and approaches among countries to achieve common regulatory goals. It goes without saying that this is a major regulatory policy challenge.

Some relevant *regulatory* developments are:[4]

- *Regulatory objectives*. A shift of focus from broadly defined media policy objectives related to culture, democracy, freedom of expression, pluralism, and the like, to more emphasis on economic objectives related to industrial and competition policy regulation of media markets. The shift of focus has not implied, however, that the former objectives have been unduly sacrificed, specifically the objectives of pluralism of media actors and diversity of media supply.
- *Regulatory instruments*. Following the change in the composition of the hierarchy of media policy objectives referred to above, a shift toward more emphasis on economic regulation of the market structure of the media sector, in particular ownership regulation, and gradually to some extent to the regulation of the market behaviour of media actors and content of media supply. Competition policy regulation has also implied a focus on non-discriminatory competitive aspects of the design and enforcement of media regulations and a more critical look at explicit policies to subsidise or give political support to specific media activities or products.
- *Regulatory institutions*. A clearer vertical separation of regulatory responsibility for the media sector from the political system and ministerial bodies in government to independent sector-specific regulatory bodies, subordinated to the ministries. In most countries those bodies have been restructured along with the restructuring of the media sector itself, e.g. merging monomedia regulatory bodies into multimedia bodies, but often with a fairly long institutional regulatory lag and maintaining the predominantly sector-specific nature of media regulation.
- From *national* to *international* media regulation; see above.

For the question whether sector-specific economic regulation might be rolled back to general competition regulation, three aspects of the above-mentioned developments are particularly relevant. Firstly, media market convergence and integration can further competition among media sectors and activities, if undue market concentration and dominance are avoided. Secondly, modern sector-specific regulatory regimes, particularly for network regulation, make more and more use of competition-like instruments, e.g. incentive regulation, regulation through contracts, auctioning out the right to supply specific activities, e.g. frequencies rights for broadcasting, etc. Thirdly, with multimedia and conglomerate integration, the sector-

[4] In addition to the references in footnote 3, see e.g. Hoffmann-Riem (1996), Humphreys (1996), and Østbye (1995).

specific media concept becomes diluted and less ”specific” compared to the traditional monomedia sector concept, making sector-specific regulation less well-defined in relation to specific sectors. This is not, of course, sufficient in itself to argue for a roll back to competition regulation. We must also take a closer look at, and comparing, properties and characteristics of instruments and approaches to regulation under sector-specific and competition regulatory regimes. This is discussed in section 3, with emphasis on ownership regulation as a sector-specific regulatory instrument.

3. Characteristics of approaches and instruments of sector-specific economic media regulation versus competition policy regulation.

Some properties and characteristics of the two policy fields are:[5]

a) Ex ante *sector-specific regulation versus* ex post *competition regulation*

Sector-specific regulation is often referred to as *ex ante* regulation, while competition regulation is characterized as *ex post* regulation; sometimes also referred to as proactive regulation versus reactive regulation, respectively. Such an *ex ante/ex post* dichotomy captures important features of the two policy areas, but is too simplistic both as a characterization and as a basis for the choice of regulatory policy regime. There are many examples of *ex ante* approaches to regulation in competition policy, e.g. with regard to exemptions from prohibition rules or regulation of mergers and acquisitions. For merger regulation, criteria for the delimitation of relevant market(s) and threshold values for market size or market share are defined by competition authorities in advance, though not legally binding from an enforcement perspective on a case-to-case *ex post* basis. Competition authorities may also *ex ante* enter into a dialog with e.g. dominant market players to make them adjust their market behaviour in order to avoid formal proceedings for possible breach of competition rules, as has often been the case e.g. in telecommunications after deregulation.[6] Similarly, sector-specific regulation is sometimes *ex post* based, in the sense that sector-specific regulatory authorities will await market developments or specific market outcomes to materialise before regulations are considered, e.g. price regulation.

[5] See Hope (2003).
[6] See e.g. Cave and Crowther (2004) for a discussion, primarily with reference to EU telecommunications and electronic media regulation.

b) Regulation of market structure versus regulation of market behaviour

Another too simplistic characterisation is that sector-specific economic regulation is *structural* regulation while competition regulation is *behavioural* regulation. True enough, sector-specific media regulation, in particular ownership regulation is very much about *ex ante* regulation of (ownership) structure, but competition regulation is not only about regulating market behaviour, but to a considerable part about market structure too. In fact, a fundamental analytical approach to competition policy regulation has traditionally been the SCP-paradigm (Structure, Conduct, Performance), where regulation of market structure has played an important role. This can partly be explained by the analytical belief of economists, based on economic theory, that specific market structures will typically generate specific forms of market behaviour, e.g. competition on price, and partly by a general regulatory lesson in competition policy that it is considerably more difficult to regulate behaviour than structure in practice. But then, of course, being equipped with a box of tools for regulating both dimensions, structure and behaviour, must generally be thought to be better than regulating only one of them.

This can be illustrated by regulatory issues raised by market dominance and market power in the media sector. The approach typically taken under sector-specific regulation has been to place *ex ante* structural restrictions on levels of monomedia, multimedia or cross-media ownership, defined in terms of maximum threshold values for market share, equity, or revenue for various geographic market delimitations (national, regional or local) for a given media sector or across media sectors, with the stated intention of avoiding undue media concentrations and securing pluralism of media suppliers and diversity of media output.[7] The upper ceilings on ownership have generally been rather low, typically in the area of 15 to 30 percent share, depending on media sector and whether it is mono-, multi-, or cross-ownership, and considerably lower than what has generally been defined as market shares for market dominance in competition policy. Recently, media ownership thresholds have been raised in a number of European countries, but still not to the general dominance level defined for other markets.

[7] For a detailed account of the UK media ownership policy, and also covering European countries, see Doyle (2002). For a discussion of the Norwegian case, see section 5.

Under competition policy regulation market dominance is not considered illegal *per se*, but rather the *abuse* of a dominant market position to exercise market power to the detriment of competition and economic efficiency. Still, most countries with a market dominance rule in their regulatory regime for competition,[8] have defined general dominance standards in terms of market shares, typically in the range from 40 to 60 percent for unilateral market dominance. These threshold values should, however, be considered partly as a preliminary screening device for the competition authorities for a closer inspection of markets where dominance may represent a competition problem in terms of the abuse of market power, and partly as a signalling device to market actors about the regulatory consequences of becoming dominant, i.e. becoming subjected to a closer scrutiny of their market behaviour by the competition authorities.

Thus, competition authorities must perform a two-way test for market dominance. First, to determine whether the *structural* conditions for market dominance are fulfilled, according to defined dominance standards and, second, to investigate specifically whether the *behavioural* conditions would justify an intervention against the abuse of a dominant position. The competition authorities can, in principle, define structural standards of dominance for individual markets or group of markets, depending on specific competitive features of markets, related e.g. to network externalities, sunk costs, demand complementarities among products, capacity constraints, etc. which are features associated with information and communications technology markets, to which many media markets belong.

Market dominance standards similar to the ownership thresholds defined in sector-specific media regulation could thus, in principle, be defined and signalled to the markets in competition policy regulation of media markets. A competition authority could also intervene, regardless of whether market dominance standards actually have been defined for a specific market or not, e.g. a local media market, if it thinks that a case of abuse of market dominance position can be raised. Behavioural regulation would thus be a cornerstone of the competition regulatory regime under “structural” market dominance.[9]

[8] Most European countries have by now adopted the dominant position rule and the concomitant prohibition of abuse rule of the EU competition policy, most recently by Norway in the new Norwegian Competition Act of 5 March 2004. An alternative to the market dominance test, more in line with economic theory, is the ”significant lessening of competition” (SLC) test, which e.g the US competition legislation is based upon. The new Merger Regulations of the EU now come closer to the American SLC-test concept.

[9] In the new Norwegian Competition Act, § 12 on market dominance regulation explicitly states that ”[S]tructural measures can only be enforced if equally efficient behavioural measures cannot be found, or if a

Lately, in telecommunications regulation, the former concept of strong market position has given way to the concept "significant market power" (SMP), and has thus moved closer to market and competition concepts in competition policy.[10] Most countries, with the only exception of the Netherlands so far (see section 4 below), have, however, maintained telecommunications regulation as the prime responsibility for a sector-specific regulatory authority, including the demarcation of relevant market(s) on criteria defined by the EU-Commission, definition of market dominance or market power criteria, etc. Thus, we see that sector-specific regulation and competition regulation converge, but without the full implications for the design of regulatory policy and the division of labour between regulatory bodies being drawn.

A somewhat different, and more general distinction, can be made in competition policy analysis between *structural* conditions for the potential exercise of market power and *incentives* for the actual exercise of power. The latter can be termed an incentive-oriented approach to competition policy analysis.[11] The basic idea or contention of this approach is that competition analysis should not be conducted in terms of structural conditions; if fact, the concepts of relevant market and market structure should be considered "irrelevant" for a proper analysis of competition, which should rather be framed as an analysis of the incentives of business entities to compete. A regulatory implication of this approach is that regulatory authorities should be more concerned with understanding the incentives and strategies for competition at the firm level and not so much with analysing structure as such at the market level, representing a considerable shift of analytical focus in competition policy analysis. In particular, an economic regulatory regime for media markets based on structural ownership regulation alone would become close to meaningless under this approach.

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behavioural measure would be more burdensome for the (dominant) firm." Similar regulations apply within the EU competition policy in relation to Articles 81 and 82 of the Treaty.

[10] Se EU Commission (2000).

[11] The approach is developed in von der Fehr et al (1998) (in Norwegian). An English summary of the main ideas is contained in Norman (2000). For a discussion of the approach and its implications for competition policy analysis, see Hylleberg and Overgaard (2000).

c) Static versus dynamic regulation

A regulatory issue related to the structural - behavioural dichotomy above is whether the regulatory outcome in terms of economic efficiency will be different under sector-specific regulation compared with competition regulation. An argument often met is that sector-specific regulation is more concerned with dynamic efficiency objectives related to technological change, innovation, and growth, and is also better equipped with regulatory instruments to further such objectives, while competition policy, at least the way in which it has traditionally been practiced, is steeped in short-run, static economic efficiency considerations and objectives. For the media sector, which has generally been characterized by rapid technological change and market restructuring, especially for the electronic communications part of it, a competition policy based on static competition and efficiency considerations thus could become too interventionistic from a dynamic regulatory perspective.

Again, such a static – dynamic regulatory dichotomy is too crude and simplistic as a characterization of the two regulatory policies; it may even be directly false. A critique often raised against sector-specific ownership regulation of media is, in fact, that it is too static and backward looking, in the sense that ownership restrictions are not adjusted in the wake of technological and market developments, or they are adjusted with a considerable regulatory time lag. It is also argued that ownership thresholds generally are set so low so that the full potential for cost efficiencies in terms of economies of scale and scope, positive network externalities by network integration and the like, cannot be realized in practice.[12] Low threshold values might also limit the resources available for innovation for media firms and owners, or weaken the incentives for innovation, and function as a barrier to entry for new competitors in media markets. In sum, this could represent a constraint on dynamic media competition and a loss of dynamic economic efficiency from sector-specific ownership regulation.

Competition policy, as traditionally understood, is vulnerable to a critique of being too focused on static price/quantity competition and static economic efficiency considerations. This is, however, more a critique of the enforcement practice in competition policy than against competition policy as such. Lately, interesting developments have taken place within

[12] For a discussion, see e.g. Doyle (2002).

the realm of competition policy, broadening the scope of competition analysis to include other parameters than just price and quantity competition, in particular innovation, and focusing more on dynamic efficiency. This reorientation of analytical approach and objective of competition policy has been particularly evident for innovative sectors like the ICT-sectors, and has, admittedly, not yet permeated the policy field as a whole, neither in theory nor in practice.[13]

This static – dynamic regulatory dichotomy is particularly interesting in relation to the stated media policy objectives of pluralism of media suppliers and diversity of media content. As mentioned in the Introduction, it is generally maintained that competition regulation is insufficient or inept to achieve such targets and therefore has to be supplemented by (sector-specific) ownership regulation.[14] This may offhand seem a little bit surprising on the basis of the discussion above. Competition policy enforcement may have been too lenient with regard to specific cases of media mergers and acquisitions, allowing too concentrated media markets to develop, to the detriment of pluralism from a static competition perspective. If so, however, this could be raised more as a critique of practical policy applications and not necessarily as a fundamental critique of analytical approaches and instruments of competition policy regulation, including dynamic regulation, as mentioned above. Ownership regulation seems, on the other hand, to be rather more steeped in a static analytical and regulatory framework, where short-run pluralism may result in less future pluralism through reduced competition and innovation in media markets, compared with dynamic competition regulation.[15] Whether this will be the actual outcome or not, is in the end an empirical question, on which little research yet has been done.

[13] See e.g Hagen and Hope (2004) and contributions in Ellig (ed) (2001).
[14] See a.o the references listed in footnote 3. See also the discussion on Norway in section 6.
[15] From a more general regulatory perspective it may seem somewhat paradoxical that *ex ante* sector-specific regulation should be better adepted to achieve dynamic efficiency objectives in innovative industries and turbulent markets, with a high degree of uncertainty about outcomes of technological change and innovation, than under *ex post* competition regulation.

d) Economic versus general or "non-economic" media regulation

Media regulation is characterised by a number of different policy objectives[16], while general competition policy has just one overriding goal, i.e. economic efficiency.[17] Can a distinction be drawn between economic regulation on the one side and general media regulation, broadly defined as all non-economic regulation on the other? If so, and as a next step, would it then be operationally possible and meaningful to allocate economic regulation as a primary task for competition policy regulation while "non-economic" media regulation would be the main task under sector-specific regulation? If such a distinction could be made with a fair degree of precision, this would lead to a clearer division of responsibility and labour between competition authorities and sector-specific authorities, and a more efficient use or regulatory resources; cf section 5.

The crucial issue seems to be rooted in the policy objectives of pluralism and freedom of expression. Media regulators would tend to argue, as mentioned, that competition policy alone is not sufficient to achieve media pluralism and therefore has to be supplemented with ownership regulation to secure diverse media ownership as a means to media pluralism. In addition, measures to safeguard editorial independence and freedom of expression have to be in place, e.g. as self-regulation in the form of written, public editorial agreements to secure editorial independence from media owners, and diversity of content, or legal regulations to the same effect written into law.

If, therefore, measures can be designed to safeguard those objectives, this part of media regulatory policy could be separated from ownership regulation and from the regulation of supply and demand of media products and services in media markets. The enforcement of this part of regulatory policy would be a task for sector-specific regulation. Given the rather static and inflexible nature of media ownership regulation compared with the properties of modern

[16] Syvertsen (2004) distinguishes e.g. between the following main categories of objectives for Norwegian media policy: a) Diversity and pluralism, b) Democracy, freedom of expression, and public debate, c) Culture, identity, and language, d) Protection of minorities and vulnerable groups, e) Safeguarding consumers and efforts against commercialisation, f) Access to media supply on equal terms for all, and g) Support of national media industry and media production. She groups a) to c) into a *cultural policy* regulatory regime, d) and e) into a *consumer policy* regulatory regime, and f) and g) into an *industrial or competition policy* regulatory regime.

[17] Cf e.g. the opening paragraph of the 2004 Norwegian Competition Act: "The purpose of this Act is to further competition as a means to achieve efficient use of society's resources". Under the debate of the Act in the Norwegian Parliament (the Storting) a formulation was added: "When applying this Act, special consideration should be given to consumers' interests."

competition regulation, as discussed above, there should at least be a presumption for a regulatory policy case of considering to abolishing media ownership regulation as a sector-specific regulatory task and rolling economic sector-specific regulation back to competition regulation, as a basic proposition for practical media regulation. An empirical discussion of such a regulatory division of labour and responsibility between sector-specific versus competition policy media regulation is given in section 5, specifically in relation to the Norwegian media regulatory case of ownership regulation.

4. Models for organizing the division of labour and responsibility between competition and sector-specific regulatory authorities.

The division of labour and responsibility between competition and sector-specific regulatory authorities has a vertical and a horizontal dimension. Vertically, it concerns the division between different levels of government, e.g. between governmental ministries and subordinated sector-specific regulatory bodies, or between supranational bodies, e.g. the EU-Commission, and national bodies. Horizontally, it is a question of how the division is organised between regulatory bodies at the same level of government, *in casu* between competition and sector-specific-authorities, respectively, but also among sector-specific authorities themselves, e.g. between regulatory authorities for telecommunications and media, respectively. Only the horizontal dimension is discussed here.[18]

Along this dimension the division of labour and responsibility between competition and sector specific regulatory authorities can be organised according to four main types of model:[19]

- The competition authority has exclusive competence to monitor and enforce competition and (economic) regulatory policies in all sectors and markets.
- The sector-specific authority has exclusive competence to monitor and enforce competition regulation and sector-specific regulation for the respective sector(s).
- The two authorities have parallel or overlapping competence (most prevalent in practice).

[18] Vertical aspects are covered in Fehr (2000), Laffont and Tirole (2000), and Larouche (2000); the latter two with reference to telecommunications.
[19] Hope and Thorsen (1997) and Hope (2003).

- The two authorities both have competence, but in clearly defined competence areas: the competition authority has exclusive competition policy competence and the sector-specific authority has exclusive regulatory competence for its sector(s).

In practice, the models are rarely found in their pure form; most sector-specific regulatory regimes contain elements from more than one model. A common feature of the choice of institutional model in practice, however, is that the horizontal division of competence is vague and unclear with considerable overlaps and ”grey zones” between competition and regulatory authorities. The third model above thus seems to capture the actual division best in most countries. Such overlaps may create regulatory uncertainty with regard to case handling and outcome, duplication of regulatory efforts and resources, conflicts of competence among regulatory bodies, and inertia with regard to adjusting regulatory policies to a changing policy environment.

Some considerations relevant to the choice of model for the horizontal division between competition and sector-specific regulation for the media sector, in addition to those discussed in section 3, are:

- *Form and nature of media convergence and integration*: Will convergence and integration result in a well-defined demarcation of media sectors and markets for regulation, applying a common regulatory approach in terms of analysis and policy measures to them, or is the variation across sectors so large that such an approach is not justified? Convergence has, e.g., created a much closer regulatory ”affinity” for the electronic media sectors together than across-media integration between electronic media and the press.[20] If the variation across sectors is so large that a common regulatory regime cannot be implemented, this would imply an asymmetric regulation of media entities and activities within the media sector. Such regulation might be at variance with the fundamental principles of competition on a level-playing-field basis and non-discrimination of objects in competition policy.
- *Competition and incentives in regulation*: Should competition between regulatory bodies (competition and sector-specific bodies) be stimulated as an objective in itself, creating incentives for better decision-making and more efficient use of regulatory

[20] See e.g Doyle (2002). Electronic media integration has, however, implications for the horizontal division of labour between media regulation and telecommunications regulation.

resources? Is it, specifically, a problem to ”monopolise” all economic media regulation as the sole responsibility for a competition authority?

- *Time aspect in regulation*: Is it necessary to monitor and control a sector under regulation more or less continuously - a feature of sector-specific regulation, or is it sufficient to intervene more sporadically on a case-to-case basis when regulatory situations occur - a feature of competition regulation? Is consistency of the regulatory regime over time of importance, e.g. in relation to long-term investment decisions by media investors, and if so, is this more pronounced under sector-specific than under competition regulation?
- *Information, knowledge, and communication*: Are information and data requirements for regulation different between sector-specific and competition regulation and can they be communicated more efficiently under the typically more continuous and closer relationship between sector-specific regulatory bodies and market actors under regulation than under competition regulation? Is it necessary to have sector-specific knowledge and competence to regulate efficiently, and would competition regulation be at a disadvantage in this respect compared with sector regulation? A related question is whether the asymmetric information problem between regulators and regulatees is more pronounced under competition than under sector-specific regulation.
- *Regulatory capture*: Is regulatory capture of regulators by regulatees a more serious problem under sector-specific than under competition regulation, partly as a consequence of characteristics and properties of sector regulation discussed above?[21] Surprisingly little empirical research has done on this issue, in view of the role it plays in the regulatory literature and in the public debate on regulation.[22]
- *Complexity and intensity in regulation*: Sector-specific regulation is usually thought of as more detailed and comprehensive compared to the ”minimalistic” and general approach in competition regulation. Is there sufficient proportionality with regard to complexity and intensity in sector regulation, in the sense that the regulatory regime is not overburdened in relation to regulatory tasks and objectives? Is sector regulation susceptible to inertia or sluggishness of adjustment when confronted with rapid changes in the regulatory environment, compared with competition regulation?

[21] For some aspects of this discussion, see the analysis in Laffont and Martimort (1999). See also Fehr (2000).
[22] An interesting empirical analysis of lobbying, as an aspect of regulatory capture, is Neven, Papandropoulos, and Seabright (1998). See also Neven, Nuttal, and Seabright (1993) on regulatory capture.

- *Resource use in regulation*: Are there economies of scale and/or scope in regulatory functions that could be realized by reorganising the regulatory system, e.g. by merging regulatory institutions or making the division of labour among them more transparent and precise? Can regulatory costs be reduced by adopting more effective regulatory measures, including the regulatory cost of market actors being exposed to regulation?
- *Universal service obligations*: USO regulation has been the hallmark of sector-specific regulation, in relation to both regulation of dominant firms in formerly monopolised sectors, like e.g. telecommunications and electricity, and sectors or activities with explicitly stated obligations of universal service, like public broadcasting and television. Can USO be accommodated in a satisfactory way within a competition regulatory regime so that sector-specific regulation can be rolled back to competition regulation even under USO conditions? There is no simple, general answer to this question. The fundamental problem is to design and impose universal service obligations in a non-discriminatory and neutral way under a competition policy regime, but this problem also remains, in principle, with sector regulation. No fully satisfactory solution can be said to be found for this problem yet, neither from a theoretical nor from a practical regulatory perspective.[23]

The issue of universal service obligations illustrates a general point that can be made about the relationship between sector-specific and competition regulation, i.e. that it is not just an either-or question, but that there are complementarities in the relationship. This said, however, the present relationship in practical regulatory policy for the media sector seems to be far from optimal in most countries; the ”grey zones” being too large and ill-defined between the two policy areas. Policy improvements can be obtained by making the demarcation between sector-specific and competition regulation more consistent and precise, by harmonising policy objectives, and by tapping the synergies between the policy areas with regard to regulatory outcome and resource use.

[23] For a discussion see e.g Laffont and Tirole (2000). Hammer (2002) discusses USO under EU regulation, specifically for network regulation in relation to Article 16 in the Amsterdam Treaty, obligating Member States ….”to take care that such (public) services operate on the basis of principles and conditions which enable them to fulfil their mission”. Hammer concludes that such regulation ”… does not reflect a conflict between public service/universal service and competition. Both aspects can be derived from the new Art. 16 EC. On the one hand, it emphazies the importance of public service in a situation where state functions are outsourced in several European countries. On the other hand, it does not reflect a conflict between public service and competition”.

If economic sector-specific regulation should be rolled back to competition regulation, competition authorities might have to take over regulatory instruments that could seem ”alien” at first sight to them in their box of tools, as traditionally understood, e.g. specific ownership regulation of media. This should be considered as a transitory phase, however, until regular competition measures could be imposed.

The institutional setup for sector-specific media regulation and the relationship with competition regulation vary considerably among European countries.[24] Three developments seem, however, to be common to most countries; see also section 2: a) More focus on competition policy regulation, especially in relation to mergers and acquisitions, b) More focus on economic sector regulation in terms of ownership regulation, as a task for sector-specific regulatory authorities, and c) Merging monomedia regulatory bodies into multimedia bodies. A full rolling back of sector-specific media regulation to competition policy regulation has not taken place, however, in any European country yet.

The most interesting case in this regard is represented by the Netherlands, where a stated institutional policy objective of the government has been to pave the way for a so called ”sector-specific competition authority” organisational model. Under this model, sector-specific regulation should be gradually transferred to the Dutch Competition Authority (Nederlandse Mededingingsautoriteit (NNa)) and organised as sector divisions within the NNa, as a transitory phase until full integration of the sector divisions into the NNa could be implemented. This is intended to be the model not only for sectors like telecommunications, where the rolling back intention was stated in the EU Directives on telecommunications, but also for sectors like e.g. energy, health, and media. According to the chapter on the Netherlands by Kees Brants in Kelly et al (2004), the Dutch Post and Telecommunications Authority (Onafhankelijke Post en Telecommunicatie Autoriteit (Opta)) is supposed to merge with the NNa in 2005. Brants also mentions that the Opta would like to merge with parts of the Media Authority, …”but as yet that seems politically unviable”. (p. 153). The horizontal division of labour and responsibility in media regulation is thus not only a question of the division between competition and sector-specific regulation, but also between sector-specific regulatory bodies.

[24] See Kelly et al (2004) and Doyle (2002).

5. Sector-specific and competition regulation of media– the Norwegian case

Norway presents an interesting case of media regulatory policy in general[25] and media ownership regulation in particular. Some recent developments with regard to Norwegian media ownership policy are:

- A separate Media Ownership Authority (MOA) was established in 1998. The MOA has recently been merged with the former Mass Media Authority and the Film Authority into a common Media Regulatory Authority (MRA).[26]
- The Norwegian Government has proposed amendments to the 1997 Act on Regulation of Acquisitions in Press and Broadcasting, and extending the coverage of the Act.
- The Government has proposed new legislation with regard to securing freedom of expression and substituting media self-regulation with law based rules; specifically the Declaration of Rights and Duties of the Editor.
- As mentioned earlier, a new Competition Act was enacted in 2004, harmonising Norwegian competition legislation with that of the EU.

Below, I will briefly describe the main developments and the new legislative proposals, as a background for discussing empirically the relationship between sector-specific media regulation and competition policy regulation and, more specifically, whether Norwegian sector-specific media ownership regulation might be rolled back to competition regulation, as long-term regulatory proposition.

Norwegian media ownership regulation – some issues[27]

Media ownership regulation was introduced in Norway in 1997 on the basis of the Act on Regulation of Acquisitions in Press and Broadcasting. A separate, independent ownership regulatory authority, the MOA, was established in 1998 and became operative as of 01.01.99.

The purpose of the Act was to ”further freedom of expression, real possibilities of expression, and media pluralism”. The MOA was given the right to intervene against acquisitions in the

[25] For a survey of Norwegian regulatory policy for the media sector, see Chapter 14 on Norway by Helge Østbye in Kelly et al (2004). See also Syvertsen (2004) (in Norwegian).
[26] St.meld. nr. 17 (2002-2003). The merger was effectuated as of 01.01.05.
[27] For a detailed account, see Syvertsen (2004), Chapter 7.

daily press and broadcasting sectors that would give a media firm, alone or in cooperation with others, a ”considerable ownership position in the media market, nationally, regionally, or locally”, in conflict with the purpose of the Act. Thus, interventions could only be made against acquisitions of ownership shares and not against established ownership positions before the enactment of the Act and only in the daily press and broadcasting sectors.

The term “considerable ownership position” was not explicitly defined in the Act, nor were maximum threshold values for ownership positions defined for the various media markets covered by the Act. However, in the Ownership Proposition to the Storting (Norwegian Parliament) (Ot.prp. nr. 30 (1996-1997)), it was indicated that acquisitions resulting in an ownership position of more than 1/3 of the national daily newspaper circulation in the daily press market would most likely give scope for considering interventions. On the other hand, a minimum threshold value was explicitly stated in the Act, i.e. that interventions could not be performed against acquisitions resulting in ownership positions of 20 per cent or less of the daily circulation in the national daily press market, defined as the relevant market. If such acquisitions, however, would create considerable ownership positions in regional or local markets, interventions could be made in relation to those markets.

Thus, the MOA was given considerable discretion with regard to defining criteria for the demarcation of relevant media markets and for ownership threshold values for the various markets. The Authority approached this legal situation by issuing a set of guidelines to create a fair degree of transparency and consistency in its enforcement practice. The guidelines were worked out in close cooperation with the media sector. They are guidelines, however, and thus not legally binding, and the final responsibility for decisions in actual cases rests, of course, with the MOA.

According to the Act, the MOA has to perform a two-way test or procedure in actual case handling. First, to determine what would be a considerable ownership position in the actual case, and second, to consider whether the ownership position might be used by the media actor in question detrimental to the purpose of the Act. In practice, the Authority seems to have taken the position that a considerable ownership position in itself is a sufficient indication of a potential violation of the purpose of freedom of expression and media pluralism; in other words that a one-to-one correspondence can be established between structural ownership positions and legal purpose. Thus, the Authority may be said to have

relinquished itself from an explicit interpretation of the purpose of the law in relation to actual cases.

However, situations may arise where an acquisition could result in a considerable ownership position in a specific market, but where an intervention might be considered as a second-best solution in relation to the stated purpose of the Act. This could e.g. be the case in a ”failing firm” situation, i.e. where a media firm otherwise would go bankrupt and disappear from the market it not being allowed to be acquired by another media firm, resulting in less pluralism, even if the acquiring firm would become a dominant player. Under such conditions a trade-off has to be made between ownership concentration and pluralism, implying a specific interpretation of the purpose of the Act. A failing firm argumentation has been used by the MOA in a number of cases, particularly for acquisitions in local newspaper markets.[28] From a competition policy perspective a failing firm argument in merger and acquisition cases is debatable.[29]

The Acquisitions Act and the enforcement practice of the MOA have been open to considerable discussion and critique from a number of sources, not the least from the media sector itself, as may be expected when new regulations are effectuated. The critique has mainly concerned the following issues:

Firstly, it has been questioned whether ownership regulation is an appropriate or efficient measure of achieving stated objectives of freedom of expression and media pluralism. When the law was enacted, there was considerable disagreement in the Storting about the need for such legislation and it was specifically argued that competition regulation would be sufficient to achieve objectives of media pluralism and diversity. In fact, in 2001 the Government suggested in a White Paper to merge the MOA with the Competition Authority, but this was not effectuated.[30]

[28] For information, see www.medietilsynet.no and www.eierskapstilsynet.no. For most of the case decisions there is an English summary. For competition policy cases, see www.konkurransetilsynet.no, where there normally are English summaries too.
The majority of decisions made by the MOA have been on acquisitions of ownership positions within the daily press sector. In addition, there have been some cases of acquisitions of ownership positions by newspapers in broadcasting companies.
[29] For a discussion, see e.g. Persson (2004).
[30] St.meld. nr 57 (2000-2001)

Secondly, the considerable discretionary power given to the MOA in the Act and the way the Authority has chosen to use its power have been criticized. It seems to have been at deliberate policy of the Authority to cooperate closely with the media sector and pursue a ”soft” regulatory policy. Still, a majority of its decisions has been appealed to the institutionalised Appellate Body of the Act, (”Klagenemnda”) and then brought to court after the Appellate Body, invariably, has upheld the decisions of the Authority. In a number of cases the MOA has lost its case in the court system.

Thirdly, criticism has been raised against the focus of the enforcement policy of the MOA, and more specifically that it has been too preoccupied with acquisitions of newspapers in regional and local markets and not with acquisitions that might matter in relation to the purpose of the Act. A statement by Helge Østbye, media professor at the University of Bergen, may illustrate this criticism: ”It seems as if the Authority let the big fish pass, but in order for the Authority not to loose credibility and running the risk of being closed down, it catches some small ones and shows them off”.[31]

Fourthly, a type of criticism related to the first one, is that the Authority seems to be confident with a structural analysis based on a one way test of media ownership concentration and not with the two-way test as envisaged by the Act, as mentioned above, in relation to the stated purpose of the Act. When the Authority has had to make an explicit evaluation, it has invariably fallen back on a failing firm argumentation, which is open to criticism with regard to the trade-off issue between media concentration and pluralism.[32]

A final, general type of criticism is that there tends to be an inherent bias in a regulatory system based on structural ownership regulation in terms of threshold values towards static economic efficiency considerations to the neglect of dynamic efficiency, as discussed in Section 3. The potential efficiency loss from such a system can be particularly large under conditions of rapid structural and technological change, as has been the case for many media markets. This is, however, basically a critique of the chosen regulatory approach as such and

[31] Østbye (2000). (My translation). This is, in fact, a common, general criticism of regulatory policy not only in sector-specific regulation but also in competition policy. See e.g. the discussion in relation to EU competition policy in Neven et al (1998).
[32] A failing firm argument is e.g. insufficient or incomplete without taking potential entry and effects of potential competition into account.

not necessarily of the enforcement policy and procedures of the regulatory authority in charge.

Proposed revisions of the Norwegian media regulatory system

The Government (Ministry of Culture and Church) has proposed a number of changes in the media ownership regulations, the most important ones being:[33]

- Extending the coverage of the Acquisitions Act to include electronic media and changing the name to Media Ownership Act. However, the extension is supposed, as a first step, to be limited to a market surveillance function of electronic media for the MOA, without the legal right to intervene.
- Extending the scope of the Act to cover cooperative agreements between media firms and not only acquisitions; and also covering multimedia and cross-ownership.
- Supplying the ”box of tools” of the MOA with the right to issue a temporary prohibition against the consummation of an acquisition until the Authority has decided on the case.
- Defining ”considerable ownership position” in terms of threshold values and introducing threshold values for media markets explicitly into the Act. The proposed thresholds are:

  For *national* media markets:

  1. 40 per cent or more of the total daily circulation for the daily press market. The same threshold value applies for the television market, measured in terms of number of viewers, and the radio market, measured in terms of number of listeners (voice).
  2. 30 per cent or more in one of the media markets under 1 above and 20 per cent or more in one of the other markets under 1, or
  3. When a media firm controlling 10 per cent or more in one of the media markets under 1 becomes owner or part owner in a firm belonging to another ownership constellation controlling 10 per cent or more within the same media market (cross-ownership).

[33] Ot.pr. nr. 81 (2003-2004).

For *regional* markets:

1. 60 per cent or more of the total daily circulation of regional and local newspapers in a media region.
2. 45 per cent or more of the total daily circulation of regional and local newspapers and 33 per cent or more of the market for local TV or local radio in the same media region; the media regions being defined by the government (the MOA) and introduced by secondary legislation. It is to be noticed that the concept of local media markets, as a separate geographic market entity, no longer exists in the new law proposal.

In addition to the ownership proposals, the Government has, as mentioned, proposed new media legislation to safeguard freedom of expression and media independence and pluralism. First, an amendment to Article 100 on freedom of expression of the Norwegian Constitution has been proposed, following up on proposals from the Commission on Freedom of Expression, appointed by the Government in 1996. A constitutional amendment has to be passed by two subsequently elected Stortings. If the proposed amendment is passed, the scope of Article 100 will be broadened and no longer be linked to specific media; also making it an obligation for the government, broadly defined, to ”create conditions for an open and informed public debate” – an expression coined by the Commission.

A second set of proposals is aimed at trying to separate media ownership from control to alleviate some of the potential problems associated with concentrations of media ownership, as a means to safeguard media independence and pluralism. First and foremost is the proposal to write the self-regulations in the Declaration of Rights and Duties of Editors (”Redaktørplakaten”) into law and thus making them legally binding.[34] This Declaration, dating back to 1953 and agreed on by both editors and owners/publishers, gives a.o. the editors ”full freedom to shape the opinion of the paper” and requires them to ”promote an impartial and free exchange of information and opinion”, and to ”strive for what he/she feels serves society”. Writing the intentions of the regulations in the Declaration into law would make infringements by media owners and others liable to legal sanctions and would, intentionally, contribute to a more effective separation of ownership from control than under the present self-regulatory system.

[34] This proposal rests with the Government until the Storting has voted on the amendment to Article 100.

Vertical relations

Vertical integration has generally not been considered to be a serious problem in the media sector, at least for the traditional sectors, compared to horizontal ownership concentrations. This is also the general position taken by the Norwegian Government in its ownership proposals to the Storting, and also by the MOA in a contributed Appendix to the ownership Proposition.

However, the proposed extension of the Media Ownership Act to cover electronic media could pose potential ownership and competition issues with regard to vertical relations, in terms of control of bottlenecks and digital portals in the vertical distribution system.

This is acknowledged by the Government, but it is not considered to be a sufficiently serious problem to require regulation for the time being. Measures to control for vertical integration are therefore not proposed to be included in the Media Ownership Act. The Government argues that regulating vertical integration would have to be shaped differently compared with horizontal integration, focusing on the abuse of a dominant position instead of structural ownership regulation in terms of threshold values for considerable ownership position. Thus, without stating it explicitly, the Government seems to relegate economic issues of vertical relations in the media sector to general competition regulation.

A vertical relation issue of a somewhat different nature, but with potentially important regulatory implications, not discussed in the Proposition, is rooted in the ”vertical” division of regulatory responsibility between different layers of government and their relationship to media actors. The issues can be illustrated by the case of allocating the rights to build a new digital, earth-based distribution system for broadcasting in Norway. The only applicant to the concession is Norges televisjon a/s (NTV), a distribution company owned 50/50 by the Norwegian public broadcasting company NRK and the commercial television company TV2. NRK is wholly state owned by the Ministry of Culture. The Ministry is concessionary authority for the allocation, and also media regulator of last resort.

This constellation raises two potential vertical regulatory issues. Firstly, how to avoid conflicts of interest for the Ministry and, in particular, infringements on the fundamental

requirement of separation of the roles and functions as regulator and owner, respectively, as foreseen e.g. in the EU directives on telecommunications. Secondly, if the concession is given to the NTV under the present ownership structure, how to secure access to the distribution system on transparent and non-discriminatory terms for interested parties, given the strong market positions of NRK and TV2 as media content producers, and without extending their positions. With the position, referred to above, on vertical integration taken by the Ministry of Culture in the ownership Proposition, this should logically be considered an issue to be tackled by competition policy.

The division of labour between sector-specific and competition policy media regulation: what have we learnt from the Norwegian case?

As mentioned, at the time when the Norwegian Media Ownership Authority (MOA) was established on the basis of the Media Ownership Act, there was a lot of discussion and disagreement about the relevance and functionality of this type of regulatory model. Some argued that it was unnecessary to establish a separate regulatory entity for media ownership regulation and that this function could be performed equally well by the Competition Authority (NCA). The experience with regard to the division of labour between the two authorities may be briefly summed up in the following points:

- The authorities seem to have agreed on a division of labour where the NCA has not explicitly considered media ownership positions and issues as such, leaving that to the MOA. However, the NCA has decided on several cases of media mergers and acquisitions on the basis of the legal measures and procedures laid down in the Competition Act.
- The MOA has only dealt with horizontal media ownership issues within the press and broadcasting sectors, given its original legal foundation, while the NCA has also handled vertical relations and covering the media sector on a broader basis, including electronic media.
- Until the new Competition Act of 2004, the NCA did not explicitly deal with market dominance in terms of threshold values etc., and abuse of market power, but intervened on a case-to-case basis, where market power (unilateral as well as collective) could be expected to be exerted on the basis of structural or behavioural indications.

- The principles and criteria for media market demarcation and measurement of market concentration (dominance) are somewhat differently defined between the two authorities.[35] The NCA has been mainly preoccupied with the effects on competition in the markets for advertising, when e.g. handling exemptions from the Competition Act, or mergers and acquisitions.[36]
- The legal and institutional system for the appeal of decisions is different between the two. For the MOA there is an independent appellant, as mentioned above, while decisions of the NCA have to be appealed to the Ministry to which it is subordinated. The NCA appeal system is an unfortunate one in general, from the perspective of regulatory independence, and perhaps even more so for a sector like media which may be particularly exposed to political influence and pressure in relation to specific regulatory decisions. If competition policy regulation should take over sector-specific media regulation, the present appeal system should be changed to better secure independence.[37]
- The revision of the Media Ownership Act to adept itself to changing regulatory circumstances and media environments seems to have been relatively slow, influencing on the ability of the MOA to adjust its regulatory practice to those changes. The NCA has had the instruments and the powers to deal with a changing media environment, including, in principle, market dominance.

Rolling back sector-specific economic media regulation to competition policy regulation?

We may now collect the various strands of argument discussed above regarding the relationship between sector-specific and competition regulation of media to see whether economic sector regulation can effectively be rolled back to competition regulation,

[35] For example, the MOA seems to measure market shares for newspapers mainly in terms of the number of circulations, while the NCA typically would measure shares in economic terms, i.e. on the basis of number of newspapers actually sold.

[36] In the Ownership Proposition to the Storting (Ot.prp. nr. 81 (2003-2004) it says, rather surprisingly, that the media markets for readers (newspaper), listeners, and viewers are not markets in economic terms according to the Competition Act.

[37] Proposals for such a change have been put forward in the legislative process.

specifically in view of the proposals of the Norwegian Government for new media legislation and the new Competition Act.

As mentioned, the new Norwegian Competition Act of March 2004 is modelled on the EU competition law model and harmonized with EU competition legislation. It contains a.o. prohibitions on cooperative agreements and abuse of market dominance positions in restraint of competition, as well as a temporary prohibition on the consummation of a merger or an acquisition by the parties involved, until the Norwegian Competition Authority (NCA) has decided on the case. It also introduces a new system of compulsory reporting and registration of mergers and acquisitions above a proposed limit of NOK 20 mill. (2.5 mill Euro). The Act applies to the media sector.

The measures proposed to control for ownership and cooperation in the new Media Ownership Act are basically the same as the instruments of the Competition Act to control for restraints on competition to the detriment of economic efficiency. Because the objectives of the Media Ownership Act are differently formulated than for the Competition Act, the question remains whether the objectives of freedom of expression and pluralism can be safeguarded under a competition policy regime, combined with legislation to separate ownership from control.

The proposed, parallel new legislation on Article 100 the Constitution and the Declaration on the Rights and Duties of Editors should, in my opinion, instil sufficient safeguards for those objectives into the regulatory system. Making the regulations legally binding and enforceable by sanctions, gives a strong signal from the legislators of the importance they attach to media independence and separation of ownership from control. The “voice” effect in the public opinion of possible infringements on the extended freedom of expression safeguards in Article 100, works in the same direction. It should be the responsibility of the Media Regulatory Authority to address and enforce such aspects of the new regulatory system.

The economic regulatory issue then boils down to whether direct ownership regulation in terms of threshold values etc., as envisaged in the Media Ownership Act, is a better regulatory model than general competition regulation. In my opinion, it is not; cf the discussion in Section 3. Competition policy regulation is more flexible and targeted in comparison; it has a larger box of regulatory tools, it offers more flexibility in terms of market demarcation and

definition of dominant ownership positions for regulatory purposes,[38] it attacks the issue of abuse of market dominance directly, it handles vertical restraints, it can accommodate dynamic competition and efficiency issues in more consistent and constructive ways, etc.[39]

On this background, I would argue from a position that economic sector-specific (ownership) regulation of the Norwegian media sector could be rolled back to competition regulation without unduly endangering objectives of pluralism and freedom of expression, on the condition that the proposed new media legislation is enacted.[40] In this context, the proposed Media Ownership Act thus seems to be superfluous. Parallel sector-specific legislation will here overlap with the Competition Act to such a degree that it may result in regulatory uncertainty in case handling and in the division of responsibility between regulatory bodies. It may also result in lack of consistency within the media regulatory system as a whole as well as duplication of regulatory resources and efforts to the detriment of economic efficiency.

An organisational consequence of a rolling back of sector-specific ownership regulation to competition regulation could be that the Media Ownership Authority be merged with the Competition Authority and its legislative powers and resources transferred there. In a transitory phase, until the direct ownership regulations would be abolished, the activities of the MOA could be organised as a sector-specific competition division within the NCA, based e.g. on the Dutch institutional regulatory model referred to above.

[38] In competition policy analysis, concentration indices have been developed, taking account of e.g. direct and indirect ownership, and cross-ownership, for the analysis of unilateral as well as collective market dominance. See e.g. Nordic competition authorities, Report (2003), applied to energy markets.

[39] The relationship between sector and competition regulation is discussed rather summarily by the Ministry of Culture in the media ownership Proposition, the conclusion being that the policy fields are complementary rather than competitive, as mentioned in the Introduction. It seems e.g. to be taken for granted, without discussion, that competition is at odds with media pluralism. In a hearing statement to the Proposition, the Norwegian Competition Authority agrees in principle with the complementary relationship argument, but then considered in isolation within an ownership regulatory system alone, and not with the proposed parallel legislation on freedom of expression and media pluralism.

[40] A similar conclusion has been reached by a leading Norwegian legal expert on competition policy and legislation, Siri Teigum, in a comment to the ownership proposals in the daily economic newspaper *Dagens Næringsliv*.

6. Concluding remarks

The media sector is characterised by rapid structural and technological change. Under such conditions it is important that the time lag in adjusting the regulatory system to a changing environment is not too long, and that regulatory measures are developed to be tailored and targeted effectively to cope with changing environments. On a higher policy ambition level, a regulatory regime should also be in the forefront of changes in the regulatory environment, so as to act as a stimulus and a steering device for an *intentional* development and not only as a lagging and controlling device.

The media sector presents public regulatory policies and bodies with a demanding challenge, because the sector is so diversified and because such a complex set of regulatory objectives is attached to it. This paper has discussed a fairly narrow regulatory issue in this complex problem, i.e. whether economic sector-specific regulation can be separated from other forms of regulation, and more specifically whether sector-specific ownership regulation can be rolled back to competition regulation. My conclusion is a qualified yes as a long-term proposition, dependent on a set of conditions discussed in the paper.

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