

# GUIDELINES FOR INTERVENTION PURSUANT TO THE MEDIA OWNERSHIP ACT

The guidelines apply from 1 November 2005

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# 1 Introduction

A fundamental precondition for a functioning democracy is that the citizens have the right to express their views in public and to receive a variety of expressed opinions and information. Section 100 of the Norwegian Constitution directs the authorities to facilitate open and informed public discussions. One implication of this is that the authorities must prevent media ownership from being concentrated on so few hands that people's real opportunity to express themselves is weakened. Article 10 of the European Human Rights Convention, which Norway is bound by,<sup>1</sup> also implies a duty to prevent conditions resembling a monopoly in the media market.<sup>2</sup>

In 1995 the Media Ownership Committee (NOU 1995: 3 *Mangfold i media*) investigated what consequences a concentration of ownership might have for the freedom of expression.<sup>3</sup> On the basis of the committee's recommendations, the Government proposed in Odelsting Proposition No. 30 (1996-97) to introduce legislation regarding ownership of the media. The Act Relating to Supervision of the Acquisition of Newspaper and Broadcasting Enterprises of 13 June 1997 No. 53 (the Media Ownership Act) was adopted by the Storting in 1997 and entered into force on 1 January 1999.

In Storting White Paper No. 57 (2000-2001) the Government initiated a review of the Media Ownership Act. The final proposal for amendments was presented in Odelsting Proposition No. 81 (2003-2004), and the Amended Act (Act of 17 December 2004 No. 97) was adopted by the Storting in 2004. With the exception of section 11, the law entered into force from 1 January 2005. The new section 11 entered into force from 1 July 2005. With the amendment of the law its official name was also changed from "lov om tilsyn med erverv i dagspresse og kringkasting" (Act Relating to Supervision of the Acquisition of Newspapers and Broadcasting Enterprises) to "lov om eierskap i medier" (Act Relating to Media Ownership).

The purpose of these guidelines is to provide an overview and summary of the regulations, in order to ensure predictability and equal treatment for all actors. Section 100 of the Constitution and the international human rights rules which Norway is bound<sup>4</sup> by, provide a framework for practical application of the Act. The Act of 5 March 2004 No. 12 on competition between undertakings and control with mergers (the Competition Act), which is enforced by the Norwegian Competition Authority, will in many cases have a scope that overlaps with the Media Ownership Act, but both Acts apply in parallel and independently of each other.<sup>5</sup>

As regards the emphasis placed on the preparatory works, the preparatory works for the Amended Act will take precedence over the preparatory works to the original Act, in the event of contradictions. An important purpose of the guidelines is to explain the Norwegian Media Authority's practice. However, the Norwegian Media Authority reserves the right to

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<sup>1</sup> Cf. section 110 of the Constitution and Section 2 of the Act relating to the strengthening of the status of human rights in Norwegian law of 21 May 1999 No. 30 (the Human Rights Act).

<sup>2</sup> Cf. the so-called "Geillustreerde Peers" case and Kyrre Eggen: *Ytringsfrihet* (Freedom of Speech), p. 670.

<sup>3</sup> Media ownership is also discussed in a number of Storting White Papers, e.g. Storting White Papers No. 32 32 (1992-93), No. 31 (1994-95) and No. 18 (1996-97).

<sup>4</sup> See Act of 21 May 1999 No. 30 relating to the strengthening of the status of human rights in Norwegian law (the Human Rights Act)

<sup>5</sup> When both acts apply, the preparatory works for the Media Ownership Act presupposes that the various bodies exchange information on the specific case and coordinate any conditions that are drawn up, cf. Odelsting Proposition No. 97 (1996-97) p. 7.

develop its practice on the basis of specific cases. In those areas where there is as yet no established practice, the guidelines only contain signals on how the Media Authority is intending to practice the law in future cases. Thus no rights may be deduced from such signals, and the signals will have limited weight compared with established practice. The Norwegian Media Authority intends to update and amend the guidelines as practice develops.

Through the adoption of the Media Ownership Act in 1997, the Media Ownership Authority was established as an independent body. The Media Ownership Authority was operative from 1 January 1999. With effect from 1 January 2005, the Media Ownership Authority merged with the Mass Media Authority and the Norwegian Board of Film Classification to become the Norwegian Media Authority. From the same date the Media Ownership Act is enforced by the Norwegian Media Authority, (hereafter called the Media Authority) cf. section 5 of the Act.

The Media Authority is an administrative body subject to the same rules of public law as other public authorities, including the Act of 10 February 1967 relating to procedure in cases concerning public administration (the Public Administration Act) and the Act of 19 June 1970 No. 69 relating to public access to documents in public administration (the Freedom of Information Act). Section 6 of the Media Ownership Act states that the Media Authority is acting independently of the Ministry of Culture and Church Affairs when handling cases pursuant to the Media Ownership Act.

## **2 The scope of the Act**

### ***2.1 The purpose of the Act***

The purpose of the Media Ownership Act is to promote freedom of expression, genuine opportunities to express one's opinion and a comprehensive range of media (cf. section 1). The Act authorises the Media Authority to stop or draw up conditions for acquisitions in enterprises that operate daily newspapers, television or radio if the person acquiring the interest alone or in cooperation with others has or gains a significant ownership position in the national or regional media market, and this is contrary to the purpose set out in section 1 of the Act.

The Media Authority may also stop or draw up conditions for cooperation agreements that give a contracting party the same or a corresponding influence on the editorial product as an acquisition.

### ***2.2 The substantive scope of the Act***

The scope of the Media Ownership Act follows from sections 3 and 4 of the Act. According to section 3, the substantive scope of the Act is as follows:

*The Act shall apply to enterprises which operate daily newspapers, television, radio or electronic media, and to enterprises which as owners exercise an influence on such enterprises.*

With regard to the term "daily newspapers", the Media Authority adopts the definition of daily press used in NOU 1995: 3 "Media pluralism", where "newspapers" is defined as:

*(...)publications issued regularly and at least once a week and that contain mostly general news and items of general interest. A newspaper must also have an editor-in-chief with a status that correspond to the provisions in Redaktørplakaten (ethical rules adopted by the press sector to secure its editorial independence).<sup>6</sup>*

By "at least once a week" the Media Authority means that the paper must be published a minimum of 48 times a year.<sup>7</sup> The publication is assessed with regard to elements such as contents, layout, the quality of pictures and paper, as well as to what extent the publication majors on covering news of public interest or public content.

Free newspapers are also covered by this definition and thus by the Media Ownership Act. However, when calculating the circulation of daily newspapers on a national basis, the circulation of a free newspaper may not be used in the same way as for purchased newspapers. Free newspapers are distributed to the public without the recipients having to pay or actively do anything to receive the paper. For this reason it is likely that the average copy of a free newspaper is not read as much and as thoroughly as a purchased paper. The circulation of free newspapers is therefore divided by three when the circulation of national and regional daily newspapers is calculated.<sup>8</sup> Please see also Chapter 3.2.4 below.

Investigations have shown that several free newspapers, due to public holidays and other holidays, only are published 46 or 47 times a year. Free newspapers that meet the criteria for being included in the national daily newspaper circulation, but which are only published 46 or 47 times a year, may also be included in the national daily newspaper circulation following a specific assessment. Background information on the calculation of circulation numbers for free newspapers is available in the memo "Utrekning av opplag for gratisaviser" (Calculating the circulation of free newspapers), on the Media Authority's web site.

With regard to radio and television, the Media Authority bases its considerations on the definition that follows from section 1-1, first subsection, of the Act relating to broadcasting of 4 December 1992 No. 127 (The Broadcasting Act):

*(...) "Broadcasting" means the transmission of speech, music, images and the like by wire or over the air, intended or suitable for direct and simultaneous reception by the public.*

The provisions apply to all media enterprises, including enterprises that have been established after the Act came into force.

The scope of the Media Ownership Acts has been extended to apply for electronic media also (cf. section 3 of the Media Ownership Act). At present it is mainly internet versions of newspapers, broadcasting enterprises, and pure electronic newspapers, that are relevant electronic media in terms of the purposes of the Media Ownership Act, although other types of electronic contents communication may also be developing towards important channels of expression and arenas for the Norwegian public. At present section 9 of the Media Ownership Act does not permit the Media Authority to intervene against electronic media. The Media Authority's task is only to monitor the ownership of such media.

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<sup>6</sup> Cf. NOU 1995: 3 p. 26

<sup>7</sup> Cf. Regulations concerning production grants for daily newspapers of 7 November 1996 No. 1015

<sup>8</sup> This follows from practice and was assumed in the preparatory works for the Amended Act (Act of 17 December 2004 No. 97). See Odelsting Prop. No. 81 (2003-2004) Appendix 2.

Pursuant to section 3 of the Media Ownership Act, the Act also applies to enterprises which do not themselves operate daily newspapers, radio, television or electronic media, but which exercise an influence on such enterprises through ownership.

The substantive scope of the Act entails that some enterprises which in general speech are described as media enterprises, are not subject to the Act as defined in its section 3. Examples of such enterprises that are not subject to the Media Ownership Act are enterprises that operate print works, distribution networks, satellites or cable networks. Thus the Act also does not cover integration between such enterprises and enterprises that operate daily newspapers, radio or television (vertical integration).

### **2.3 The geographical scope of the Act**

The geographical scope of the Act is shown by section 4 first period of the Act: *"The Act shall apply to acquisitions of ownership interests or cooperation agreements which have an effect or are liable to have an effect in the realm"*. What matters is whether the acquisition in question has or is liable to have an effect with regard to the purpose of the Media Ownership Act in Norway. The Act applies to Norwegian as well as foreign enterprises. Firstly, the law will apply if foreign enterprises make acquisitions in Norwegian media enterprises. Secondly, acquisitions of foreign companies may be subject to the Act if these foreign companies have ownership interests that involve control of daily newspaper, radio or television enterprises in Norway. Since it might be difficult to force foreign companies to sell any of their ownership interests, decisions in such cases may be directed towards Norwegian legal entities.

The Act will not apply on Svalbard, Jan Mayen or the dependencies.

## **3 Interventions against acquisitions**

### **3.1 Presentation and the term acquisition**

Section 9 first subsection of the Media Ownership Act authorises the Media Authority to intervene against acquisitions in enterprises that operate daily newspapers, radio or television. The opportunity to intervene against acquisitions does not include electronic media.

The provision contains the two main conditions for interventions against acquisitions. The first condition is that the acquirer alone or in cooperation with others has or gains a significant ownership position in the national or regional media market. The other condition is that the ownership is in conflict with the purpose of the Media Ownership Act. The purpose of the Act is stated in its section 1, and reads as follows:

*The purpose of this Act is to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media.*

A basic precondition for the application of section 9 first subsection is that there is an acquisition of a media enterprise<sup>9</sup>. The acquisition may take place through a purchase, exchange, gift, lease, or acquisition by inheritance or division of an estate, a forced sale or expropriation, as well as by subscription to an ownership share in an enterprise, cf. section 2 of the Media Ownership Act. If an actor achieves a significant ownership position because other actors drop out, or because there is an increase in circulation, viewers or listeners, the

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<sup>9</sup> The provision applies to all media enterprises, including those that are established after the Act entered into force (cf. Chapter 2.2).

Media Authority will not be able to intervene against the ownership as such. Nor will the provision apply if an actor achieves a significant ownership position by establishing a new enterprise.<sup>10</sup> However, there is authority to intervene if the new enterprise is set up by two actors merging or if the media function is transferred to a new company.<sup>11</sup>

The authority to intervene pursuant to the first subsection may also be exercised with regard to agreements that in reality represent a circumvention of the law. For example, option agreements combined with agreements on how to use voting rights according to the circumstances may be equated with an acquisition. Even though section 9 sixth subsection of the Media Ownership Act now also encompasses cooperation agreements, such cases of circumvention will also be subject to section 9 first subsection. In this connection reference is made to the preparatory works,<sup>12</sup> which says: *"Some agreements that come close to purchases may also probably be considered "acquisitions" according to the definition of the law, or according to a liberal interpretation of the law"*. In its consideration of whether an acquisition has taken place, the Media Authority will emphasise the practice in the competitive arena in Norway and the EU as well as Norwegian legal practice.

### **3.2 The condition regarding significant ownership position**

The acquirer's ownership must be assessed both at the national and regional level. The condition regarding significant ownership position is further defined in sections 10 and 11 of the Media Ownership Act. Section 10 of the Media Ownership Act defines the thresholds for an ownership concentration in the national media market, while section 11 of the Act defines thresholds for ownership concentration at a regional level.

As will be seen from section 9 first subsection of the Media Ownership Act, a significant ownership position can be created "alone or in cooperation with others". In certain cases the provision allows the cooperation between two owners to be considered a constellation or a group with regard to the condition regarding significant ownership position.<sup>13</sup> The cooperation alternative includes any kind of cooperation where the effect is that two or more actors act in agreement.<sup>14</sup> The legal status and the type and degree of formalisation is not decisive in this connection.<sup>15</sup>

The provision also makes it clear that the Media Authority can intervene when someone "has or gains" a significant ownership position. Thus the provision also covers acquisitions that strengthen an already significant ownership position.<sup>16</sup> The Authority will therefore normally

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<sup>10</sup> Any increase in ownership that takes place through other actors withdrawing, audience increases for the actor's own media or through new enterprises being set up, will only become significant when the actor at a later date carries out an acquisition. In such cases the Media Authority will base its considerations on the actor's market share at the time of the acquisition.

<sup>11</sup> Odelsting Prop. No. 30 (1996-97) p. 17

<sup>12</sup> Odelsting Prop. No. 81 (2003-2004) p. 37

<sup>13</sup> The cooperation alternative in the first subsection only allows cooperation agreements to be taken into consideration when an acquisition is assessed with regard to significant ownership position, but it does not authorize the Media Authority to intervene against the cooperation agreement as such. Interventions against cooperation agreements must take place pursuant to Section 9 sixth subsection. This provision is further discussed in Chapter 6 below.

<sup>14</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 31

<sup>15</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 18

<sup>16</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 31

intervene if an actor who has exceeded the ownership thresholds defined in sections 10 or 11, undertakes further acquisitions.

In such cases the authority to intervene pursuant to section 9 first subsection also includes minority acquisitions where the acquirer does not gain control of the media enterprise in question. The Media Ownership Act also authorises intervention against minority acquisitions through so-called cross-ownership (cf. Chapter 3.2.3). The Media Authority will generally not intervene if the acquirer achieves control of less than five percent of the total shares in the particular media enterprise.<sup>17</sup> If an acquirer makes several small acquisitions which together will give the actor influence in the enterprise, the Media Authority will consider these acquisitions together. However, no intervention can be made against those acquisitions where the deadline for intervention has expired.

The two independent conditions for intervention are closely connected. According to the preparatory works it will be a presumption for a significant ownership position also being in conflict with the purpose of the Act.<sup>18</sup> The conflict condition will be discussed further in Chapter 3.3.

### **3.2.1 National thresholds for ownership concentration within one media market**

Section 10 litras a), b) and c) of the Media Ownership Act contains national thresholds for ownership concentrations within daily newspapers, radio and television respectively. Litras a), b) and c) entail that the national media market is divided into three, where the daily newspaper market, the television market and the radio market are considered three separate markets, and that a significant ownership position will normally exist in the following three cases, cf. section 10 of the Media Ownership Act:

- a) in the case of control through a share of 40 percent or more of the total daily circulation for the daily press,*
- b) in the case of control through a share of 40 percent or more of the total viewing figures for television, and*
- c) in the case of control through a share of 40 percent or more of the total listening ratings for radio*

The 40 percent threshold is a key policy instrument to promote freedom of expression, genuine opportunities to express one's opinion and a comprehensive range of media. The purpose is to prevent one actor from gaining a too strong ownership position within one particular market. In combination with the threshold for cross-ownership (see Chapter 3.2.3), this threshold shall also help maintain a situation where there is at least three major actors in the Norwegian media market.

The provision states that the condition regarding significant ownership position "normally" applies when an actor has a market share of 40 percent or more. The preparatory works also make it clear that a case would be exceptional if an intervention is not made above this level, or if an intervention is made below this level.<sup>19</sup>

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<sup>17</sup> Owners who have holdings of less than five percent will not be given any share of this enterprise's audience/readership when market shares are calculated (cf. Chapter 3.2.4). Nor will such holdings be registered in the Media Directory (cf. Chapter 7.4).

<sup>18</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 43 and 44

<sup>19</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 24

Chapter 3.2.4 provides more details on how to calculate market shares.

### **3.2.2 National thresholds for ownership concentration in several media markets**

An actor's market power and opinion-making power grows stronger the more media markets the actor is involved in. This is why the Media Ownership Act contains particular restrictions for ownership in several media markets. Ownership in daily newspapers, radio and television are the relevant ownerships as regards the Media Ownership Act's rules on multimedia ownership. Vertical integration, i.e. that such media enterprises own interests in various links in the production process such as print works, distribution networks, satellites or cable networks, is not covered by the Media Ownership Act (cf. Chapter 2.2 above).

#### **3.2.2.1 National thresholds for ownership concentration within two media markets**

Section 10 litra d) of the Media Ownership Act states that a significant ownership position in the national media market shall normally be considered to exist:

- d) in the case of control through a share of 30 percent or more in one of the media markets mentioned in litras a), b) or c), and 20 percent or more in one of the other media markets mentioned in litras a), b) or c),*

The litras a), b) and c) refer to the national markets for daily newspapers, radio and television (cf. Chapter 3.2.1). The restrictions on multimedia ownership in litra d) regulate those cases where an actor has large market shares in two of these media markets. The restriction only applies when the actor in addition to a market share of 30 percent or more in one media market has 20 percent in another media market. Litra d) will thus have no immediate significance for enterprises that have a market share of less than 30 percent. For instance, an actor can control 25 percent of the national daily newspaper market and increase his share of the national radio market to 25 percent without breaching litra d). Nor does the provision apply as long as the actor has a market share of less than 20 percent in the market where he has his second largest share. For example, the multimedia rule in litra d) does not prevent an actor who has a 37 percent market share in the newspaper market from increasing his share of the radio market to 15 percent.

On the other hand, the multimedia rule in litra d) may lead to the 40 percent threshold for ownership in one media market in litras a) to c) having no practical relevance. For an actor with more than a 20 percent market share in the market where he has his second biggest share, litra d) will in fact impose a threshold of 30 percent in the market where the actor has his biggest share.

#### **3.2.2.2 National thresholds for ownership concentration within three media markets**

If an actor has a large share of the market in the daily press as well as radio and television, the limitation in section 10 litra e) may take effect. This provision stipulates that there is normally a significant ownership position in the national media market:

- e) in the case of control through a share of 20 percent or more in one, 20 percent or more in another and 20 percent or more in a third of the media markets mentioned in litras a), b) or c)*



Litra e) will for example apply if an actor who has a market share of 20 percent or more in both daily newspapers and television, also makes an acquisition that makes his market share in radio reach 20 percent. As for the other provisions in section 10, litra e) does not allow intervention before the market shares are on a level with or exceed all the thresholds in litra e). For instance, an actor who has a 35 percent market share in the television market will be able to make acquisitions in both the newspaper market and the radio market as long as his market shares in these markets stay below the 20 percent threshold. Thus it is not the case that litra e) must be applied for all actors who own shares in three media markets while litra d) must be applied for all actors who have interests in two media markets. It is only when the enterprise in question has or acquires a market share of 20 percent or more in all three sectors, that litra e) applies.

### **3.2.3 National thresholds for ownership concentration - cross-ownership**

Section 10 litra f) of the Media Ownership Act states that significant ownership position in the national media market will normally be considered to exist:

- f) when an enterprise controlling 10 percent or more in one of the media markets mentioned in litras a), b) or c) becomes owner or part-owner of an enterprise forming part of another grouping controlling more than 10 percent or more within the same media market (cross-ownership).*

This provision is intended to prevent actors within the same media market from having significant ownership interests in each other. Litra f) only covers cross-ownership between actors within one and the same media market, and it imposes no restrictions on ownership between enterprises within different media markets (multimedia ownership). Multimedia ownership is regulated in litra d) and e), which are discussed above.

The reason for the provision in litra f) is that cross-ownership between major media enterprises can have a greater effect on the individual enterprise than what their shareholding might indicate, and the ownership might therefore reduce the actors' incentive to compete with each other.<sup>20</sup> One of the main purposes of the provision on cross-ownership is to retain at least three major independent actors in the Norwegian media market.<sup>21</sup> In this regard the preparatory works refer particularly to the situation in the newspaper market and the three media enterprises Schibsted, A-pressen and Orkla. Without a specific rule on cross-ownership, A-pressen and Orkla would be able to merge or acquire ownership interests in each other. According to the preparatory works, however, the Media Authority is not to intervene against acquisitions or mergers that in practice lead to the establishment of a fourth major actor in the market.<sup>22</sup> Nor is the Media Authority to intervene against acquisitions or a merger of two major independent actors if there are more than three major independent actors in that particular market.<sup>23</sup> The Norwegian Media Authority understands the preparatory works to mean that major actors in this connection are actors who each has a market share on a level with the market shares of A-pressen and Orkla when the Storting adopted the Amended Act.

Semantically the expression "cross-ownership" indicates that two actors have ownership interests in each other, but it emerges from the purpose of the provision and the general

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<sup>20</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 24

<sup>21</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>22</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>23</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

wording that litra f) also covers cases where only one of the actors acquires interests in the other. It is also clear from the preparatory works to the Act<sup>24</sup> and the purpose of the provision that the provision also covers mergers and complete takeovers.

According to the preparatory works, the provision on cross-ownership in litra f) will have a greater element of discretion than the other provisions in the act.<sup>25</sup> The discretionary assessment must take into account at what level of the enterprise shares are being acquired. Intervention will generally only be considered when the cross-ownership takes place at the parent company level.<sup>26</sup>

On the basis of the stated purpose that the provision is to prevent cooperation between major actors, the provision will only cover acquisitions of some significance. This means that the Media Authority will not normally intervene against acquisitions that give the acquirer an overall ownership interest that represents less than five percent of the acquired enterprise. In this connection, please see Chapter 3.2.4 below.

### **3.2.4 Calculation of national thresholds for ownership concentration**

#### **3.2.4.1 Daily newspapers**

According to the wording of section 10 litra a) of the Media Ownership Act, calculation of the daily newspaper market is based on the overall daily circulation for the daily press. National circulation for the daily press is calculated by totalling the circulation of all newspapers covered by the Media Ownership Act (cf. Chapter 2). The Media Authority bases its calculations on the circulation figures from Mediebedriftenes Landsforbund (MBL - the Norwegian Newspaper Publishers' Association) and Landslaget for Lokalaviser (LLA - National Association of Local Newspapers). For papers that are not members of either of these organisations, the figures are obtained directly from each newspaper. Figures from Norsk Opplagskontroll AS may also be used.

Since calculations are based on daily circulation, no weighting is done for the number of issues a week<sup>27</sup>. With regard to free papers, these are now generally distributed to all or most homes in a certain district without the recipient having to do anything to receive the paper. Because of this and in accordance with current practice, the Media Authority divides the circulation figures for free newspapers by three in order to weigh their importance more realistically in relation to the purpose of the Media Ownership Act.

#### **3.2.4.2 Radio and television**

According to section 10, the radio and television markets shall be calculated on the basis of figures for viewers and listeners. For television the market is calculated on the basis of viewing time, while the radio market is calculated based on listening time.<sup>28</sup>

Experience indicates that these figures will fluctuate more than what is common in the daily newspaper market. The Media Authority will therefore pay attention to the listening/viewing

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<sup>24</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>25</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>26</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>27</sup> This follows from practice and was accepted in the preparatory works for the Amended Act (Act of 17 December 2004 no. 97). See inter alia Odelsting Prop. No. 81 (2003-2004) Appendix 2.

<sup>28</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 30

over a certain period of time.<sup>29</sup> The Authority will make a discretionary assessment on the basis of listening/viewing for the last three calendar years.

NRK (The Norwegian Broadcasting Corporation) will be included in calculations of the radio and television markets.<sup>30</sup>

The restrictions imposed on the overall radio and television markets imply that local television and local radio are not seen as separate markets, but as part of the national television market and the national radio market respectively.<sup>31</sup> Within local broadcasting there are many channels that have no calculations for viewer and listener figures.

For channels that do not have such figures, the figures for the rest of the overall market for local television and local radio respectively will be distributed between the individual licensees on the basis of the population figures for the relevant licence area.

#### **3.2.4.3 Distribution of each media enterprise's rating**

When assessing significant ownership position, the Media Authority emphasises the actors' degree of control over and opportunity to influence each enterprise. 'Rating' is used as a generic term for circulation, viewing time and listening time. The different media's rating is distributed according to the following rules<sup>32</sup>:

- An owner who has an ownership share of 50 percent or more is ascribed the entire media enterprise's rating. The other owners are not ascribed any of this media's rating.
- If two otherwise equal owners each has a 50 percent interest, the rating will normally be distributed half and half.
- In those cases where no owner has a 50 percent interest or more, the rating will generally be distributed among the owners according to their ownership interest. Cooperation agreements between the owners may change this. If for example two out of three basically equal shareholders have a cooperation agreement, this may lead to the rating being distributed among the partners, or being ascribed to one of them. Ownership interests of below five percent will in general not count.

The Media Authority may in certain cases find that an actor who has less than a 50 percent ownership interest has control of the enterprise. In such cases the actor will be ascribed the entire rating for the media enterprise. This normally presupposes that no other actor has more than a 50 percent interest in the same media enterprise. In the overall assessment, attention may also be paid to factors such as the distribution of the remaining shares, voting rights, the company's by-laws, agreements between shareholders, representation in the company's management bodies, options, loan terms, etc.<sup>33</sup> A decision that an owner with less than 50 percent ownership interest is considered to have control of an enterprise may be made during the processing of the acquisition or because the Media Authority on its own initiative conducts an assessment of the ownership in a media enterprise. In either case the owner in question will be given the opportunity to make a statement on the matter, and will be

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<sup>29</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 30

<sup>30</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 29

<sup>31</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 43

<sup>32</sup> This follows from practice and was accepted in the preparatory works for the amended Act (Act of 17 December 2004 no. 97). See inter alia Odelsting Prop. No. 81 (2003-2004) p. 28.

<sup>33</sup> Factors that may be emphasised in such an assessment emerge inter alia from the European Commission's announcement regarding the merger concept, EFT No. C 66, 2 March 1998. See also NOU 1995:3 Appendix V.

informed of the outcome of the Media Authority's assessment. The Media Authority's web site will have information on any decisions to the effect that an owner with less than a 50 percent ownership interest has control of the enterprise. In its assessment of this issue the Authority will emphasise Norwegian legal practice as well as practice from the competition area in Norway and the EU.

### **3.2.5 Regional restrictions for ownership concentration in the daily newspaper market**

According to section 9 first subsection of the Media Ownership Act, the Media Authority can intervene against acquisitions that lead to a significant ownership position in the regional media market when this is in conflict with the purpose of the Act.

According to the wording of the provisions they also cover the regional markets for daily newspapers, radio and television, but it emerges from section 11 and statements in the preparatory works<sup>34</sup> that the authority to intervene only applies to the regional newspaper market. In addition, there are no restrictions on multimedia ownership at the regional level.<sup>35</sup>

Section 11 of the Media Ownership Act defines the condition regarding significant ownership position at the regional level in further detail. The provision says:

*A significant ownership position in the marked regionally shall normally be considered to exist in case of control through a share of 60 percent or more of the total daily circulation of regional and local newspapers in one media region.*

*The King determines the media regions in regulations.*

The purpose of the provision is to retain media diversity at the regional level. The threshold is 60 percent of the daily circulation of regional and local newspapers. The Ministry indicates in the preparatory works<sup>36</sup> that a higher percentage would be contrary to the purpose of the act (cf. Chapter 3.3).

The media regions are set out in Forskrift om medieregioner (Regulations on Media Regions) of 1 July 2005 No. 75.<sup>37</sup> The regulations divide Norway into the following ten media regions:

- Medieregion Nord-Norge
- Medieregion Trøndelag
- Medieregion Nordvestlandet
- Medieregion Vestlandet
- Medieregion Sørvestlandet
- Medieregion Sørlandet
- Medieregion Vestviken
- Medieregion Østviken
- Medieregion Innlandet
- Medieregion Stor-Oslo

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<sup>34</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 17

<sup>35</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 19

<sup>36</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 19

<sup>37</sup> Established by the Crown Prince Regent's Decree of 1 July 2005. Section 11 of the Media Ownership Act and the regulations to the Act entered into force on the same date.

For a precise indication of the different media regions' geographical extent, please see the Regulation of Media Regions.

In contrast to section 10's ownership restrictions at the national level that cover all newspapers, only regional and local newspapers must be included at the regional level. This means that papers that basically do *not* address a clearly defined coverage area, will not be included when regional market shares are calculated. This applies to newspapers such as *VG*, *Dagbladet*, *Dagens Næringsliv*, *Vårt Land*, *Nationen*, *Finansavisen*, *Søndag Søndag*, *Fiskaren*, *Fiskeribladet*, *Morgenbladet*, *Dagen*, *Klassekampen*, *Dag og Tid*, *Ny Tid*, *Magazinet* and *Norge i Dag*.<sup>38</sup>

Furthermore, only newspapers that are published in the media region in question should be included when market shares are calculated. The reason for this principle is that it will primarily be newspapers that are published in the region that function as a source of information on regional issues.<sup>39</sup> This means that a newspaper cannot be included in the calculations for more than one region. *Tidens Krav* will therefore not be included in the calculation of market shares in Trøndelag, while *Aftenposten* can only be included in the calculations for Medieregion Stor-Oslo, even though the newspapers are circulated outside their own region.

By implication, that proportion of the circulation which goes to readers outside the region are also excluded from the calculation. This means that *Adresseavisen*'s sales and subscriptions in the Medieregion Stor-Oslo area are excluded from calculations of market shares in Trøndelag. The total circulation for all the regions will therefore be less than the overall national circulation. This is not a problem since each region is treated separately.

The MBL has figures that show circulation for each municipality, whereas the LLA only announces the total circulation for their member newspapers. With the current figures from LLA it is therefore difficult to calculate the percentage of the LLA papers' circulation which are sold and subscribed to in each region. These newspapers generally have a smaller circulation. Analyses of smaller papers that are MBL members, show that the proportion of these papers' circulation that goes outside their own region amounts to between five and ten percent, with some variation up or down. Until we have figures from the LLA, the Media Authority will deduct ten percent from the circulation of papers that only are members of the LLA.

In other respects the principles for calculation of the national daily circulation will also apply for calculations at the regional level. This also applies to the division of the circulation among the various owners. Please see Chapter 3.2.4.

### **3.3 The Conflict Condition**

The condition regarding significant ownership position is the first main condition for intervention. The second condition is that the significant ownership position is in conflict with the purpose of the Act. The purpose of the Act is to promote freedom of expression, genuine

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<sup>38</sup> Even though such newspapers' circulation is not included in the calculation of regional market shares, such papers can operate as owners of local or regional papers. In such cases the ownership will be assessed in the same way as for other owners, and the market shares will also be included in any parent company's regional market shares.

<sup>39</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 21

opportunities to express one's opinion and a comprehensive range of media (cf. section 1). The condition stating that the ownership must be in conflict with the purpose of the Act is also called the Conflict Condition.

As mentioned previously, there is a close connection between the two conditions for intervention.<sup>40</sup> Even though sections 10 and 11 according to their wording only apply to the condition concerning significant ownership position, the preparatory works state that the Conflict Condition must also be interpreted in light of these provisions. As regards the national thresholds there will, according to the preparatory works, be a strong presumption that a conflict exists when the thresholds are exceeded. In such cases the Conflict Condition will be more like an exceptions rule than an independent condition.<sup>41</sup> The same applies at the regional level.<sup>42</sup> With regard to cross-ownership in section 10 litra f), however, the assessment of the Conflict Condition will be more discretionary than for the other provisions in sections 10 and 11.<sup>43</sup>

Even so, the Media Authority has to conduct a specific assessment of whether the Conflict Condition is fulfilled in each case.<sup>44</sup> Since there is an underlying presumption that a significant ownership position also will be in conflict with the purpose of the Act, the considerations regarding the Conflict Condition will focus on whether the acquisition, although there is a significant ownership position, nevertheless is *not* in conflict with the purpose of the Act.

If the alternative to the purchase is that the acquired enterprise is closed down, this will be an important factor in the assessment of the Conflict Condition.<sup>45</sup> Then the acquisition will in many cases not be in conflict with the purpose of the Act, even though it leads to or strengthens a significant ownership position. On the other hand, an acquisition might make it more difficult for other actors to get established in the market, and the acquisition will further strengthen the actor's power over the creation of information and opinions in the market in question.

If the acquirer claims that the only other alternative is to close down the enterprise, two issues must be considered. First of all, the purchased media's financial situation must be so weak that it is impossible to continue without new owners. There must be a genuine risk of having to close down at the time of the acquisition, or of the enterprise gradually being impoverished.<sup>46</sup> The acquirer is best placed to provide information on this issue, and the Media Authority will pose stringent requirements regarding documentation and substantiation. If necessary the Media Authority will obtain expert assistance to assess the enterprise's financial situation and future prospects and the material presented by the acquirer.

It must also be substantiated that there are no other potential buyers. With regard to the acquisition of radio and television enterprises one must also take into account that the licence can be handed in and announced again. If it is likely that others will apply for and be awarded

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<sup>40</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 43 and 44

<sup>41</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 43

<sup>42</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 18-19 and 44

<sup>43</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 25

<sup>44</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 27, 43 and 44

<sup>45</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 17

<sup>46</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 17

the licence, the acquisition will generally be in conflict with the purpose of the Act, so that the conditions for intervention are in place.

As regards the assessment of an acquisition in relation to the purpose of the Act, one might reach different conclusions depending on whether the assessment is made with regard to the media market nationally or regionally. It may be the case that even though an acquisition is in conflict with the purpose of the Act regionally, it may have positive effects with regard to the purpose of the Act nationally, or vice versa. If this is so, the case must be decided on the basis of an overall assessment of what serves the purpose of the Act best.

### **3.4 The contents of the decision**

If the conditions for an intervention are fulfilled, the Norwegian Media Authority can carry out an intervention. Pursuant to section 9 second subsection of the Media Ownership Act, interventions can be measures such as:

- a) *prohibiting the acquisition,*
- b) *ordering the divestment of ownership interests that have been acquired and issuing orders necessary to ensure that the purpose of the divestment order is achieved, or*
- c) *allowing an acquisition on such conditions as are necessary to prevent an acquisition from conflicting with the purpose set out in section 1 of the Act.*

This list is not exhaustive, there are also other types of measures not listed in the provisions. The Media Authority must therefore consider what kind of intervention should be made in each case. The purpose of the Act will provide a framework for the discretionary assessment. There will also be a general administration requirement for proportionality between the end and the means.

If the conditions for an intervention are in place, a decision will normally be made to prohibit the acquisition (cf. litra a). This applies to mergers as well as purchases. The reason why there will normally be a decision to prohibit the acquisition even when it constitutes a purchase, is that there are normally few alternative buyers. Ordering a divestment will thus rarely be an appropriate way of enforcing the Act. A prohibition can also be used for acquisitions that have already been implemented.<sup>47</sup> The decision will then usually be directed towards both the buyer and the seller. In such cases the decision to prohibit the acquisition will mean that the assets are returned to the seller. Any return of the purchase amount from the seller to the buyer is a matter between the contracting partners, and the buyer must bear the risk that the seller is unable to repay the compensation. Either party having disclaimed the risk of the Media Authority intervening, does not in any way restrict the Authority's ability to prohibit the acquisition.

Litra b) is relevant e.g. where only parts of the acquisition lead to a significant ownership position in conflict with the purpose of the Act. It might for instance be relevant to order the divestment of certain shares in the acquired company or the divestment of a subsidiary that is part of the acquisition, so that the market shares come under the limitations for ownership concentration in sections 10 and 11. The decision will normally also prohibit the use of voting

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<sup>47</sup> The Media Ownership Act is patterned on Sections 3-11 of the former Competition Act and Section 42 a of the former Price Act, and this is noted in the preparatory works to the Price Act, cf. Odelsting Prop. No. 78 (1986-87) p. 12.

rights until the sale has been implemented. The provision may also be used in other cases following a specific assessment.

Litra c) is relevant in those cases where the Media Authority has found that there should be no intervention against the acquisition, even though the conditions for intervention have been fulfilled. (Cf. the wording "may intervene" in section 9, first subsection). In such cases the Media Authority can stipulate the necessary conditions to prevent the acquisition from conflicting with the purpose of the Act. Such a solution will normally be found in order to effect a result following negotiations for an amicable solution (cf. Chapter 3.6).

### **3.5 Time limit for interventions against acquisitions**

Pursuant to section 9 fifth subsection of the Media Ownership Act, the general time limit for interventions against acquisitions is six months after the "final agreement" on acquisitions has been entered into. Neither the Act itself nor the preparatory works for the Media Ownership Act provide a more specific definition of what is meant by "final agreement". The expression "final agreement" was initially taken from the Competition Act current at the time, and it makes it clear that there must be a contractually binding agreement and that all necessary decisions in the relevant company bodies must have been made.<sup>48</sup> The Media Authority will base its assessment on the factual situation and will assess this in relation to the normal rules for entering into a contract. The Authority will normally request a copy of board minutes or a resolution from the general meeting to determine the date of the final agreement. Only resolutions made in the relevant bodies of the parties to the agreement (the buyer and seller) are significant for determining the time limit. If the board of the sales object refuses to consent to the acquisition, cf. section 4-15 second subsection of the Act relating to limited liability companies of 13 June 1997 No. 44 (The Limited Liability Companies Act) and section 4-15 second subsection of the Act relating to public limited liability companies of 13 June 1997 No. 45 (The Public Limited Companies Act), this will not have any influence on when the time limit starts running.

If "special considerations" so warrant, the Act allows the time limit to be extended to one year. In the Norwegian Law Gazette 2003 p. 662 the Supreme Court underlined that this exception is reserved for exceptional cases. It may be relevant e.g. to gain sufficient time to gather all necessary information, when the parties request it, or if the parties do not provide the Media Authority with the information required to make a decision in the matter. Internal issues in the Authority will not normally warrant an extension of the time limit.<sup>49</sup> The main reason for this rule is that sufficient information on the case must have been obtained. Thus cases that include particularly difficult questions and cases that are particularly complex and difficult to grasp may lead to an extension of the time limit. If the Media Authority finds that the time limit must be extended to one year, the Authority must inform the parties of this as soon as possible.

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<sup>48</sup> Cf. NOU 2003: 12 p. 97. Thus the term "final agreement" does not correspond to the term "signed agreement" that is used by the EU/EEA court and where it is sufficient that the agreement is binding according to contract law. In the Norwegian Law Gazette 2003 p. 662 which concerns the Media Ownership Act, the Supreme Court found that the final agreement was entered into when the board of the acquirer (A-pressen) approved the agreement, but this issue was of no significance to the outcome of the decision.

<sup>49</sup> In the Norwegian Law Gazette 2003 p. 662 the Supreme Court said that weighty reasons would be required to extend the deadline because of internal issues in the Authority.



### **3.6 An amicable solution**

Pursuant to section 9 fourth subsection of the Media Ownership Act, the Norwegian Media Authority has a duty to attempt to find an amicable solution with the acquirer or others against whom an intervention will be directed, before the Authority makes a decision pursuant to the first subsection.

The Media Authority will issue a notification of a potential decision to the actor against whom such a decision would be directed, with an invitation to a meeting regarding an amicable solution. If the actor does not want such a meeting, the Authority will consider that it through its invitation has fulfilled the requirement to attempt to find an amicable solution, cf. section 9 fourth subsection of the Media Ownership Act. This is because it will not be possible to force the parties into compromise solutions that they themselves see as unacceptable. If the parties are not amenable to a compromise, a prohibition will be the best solution for the acquired enterprise.

Negotiations for an amicable solution will take as their starting point the aspects of the acquisition which the Media Authority considers problematic. The person/enterprise which the intervention is directed against will normally be the one to initiate other solutions than a prohibition. One possible solution may be that the acquirer sells other media enterprises, so that his market share falls below the ownership thresholds in sections 10 or 11. Solutions where the acquirer retains the share majority but carries out a partial divestment of shares in combination with changes to the by-laws and/or shareholder agreements, will only be acceptable in exceptional cases and only if the Media Authority believes this solution will comply with the purpose of the Act to a sufficient degree. As a rule the Authority will place greater emphasis on the ownership share than on the contents of by-laws and shareholder agreements.

Negotiations for an amicable solution are considered to be concluded when one has either reached an amicable solution or the Media Authority or the acquirer finds that it is impossible to arrive at such a solution. If the negotiations end with an amicable solution, the case will be concluded with an agreement which will be signed by both the Media Authority and the person/enterprise which the decision is directed against. The agreement will be included in a decision pursuant to section 9 second subsection *litra c*). If no amicable solution has been reached, the Media Authority will conclude the case by deciding on an intervention.

The duty to attempt to reach an amicable solution only applies to decisions regarding interventions against acquisitions pursuant to the first subsection. In cases regarding cooperation agreements, the Media Authority will also take an initiative to find a compromise together with the parties to the agreement.

## **4 Temporary prohibition**

Section 9 third subsection of the Media Ownership Act allows the Media Authority to adopt a temporary prohibition against an acquisition as well as adopting other measures. The prohibition and any other measures will apply until the Media Authority has made a final decision in the case. The reason for this provision is given in the preparatory works for the Act: *"The Ministry would point out that there is a danger that the parties to a purchase may integrate the enterprises in such a way that it might be difficult or impossible for the Media*

*Authority to intervene against the purchase*". The Ministry also refers to the considerations behind the introduction of a similar provision in the former Competition Act.<sup>50</sup>

In order to adopt a temporary prohibition or other measures, two conditions must be fulfilled. Firstly, there must be reasonable cause to assume that the conditions for an intervention have been met for the case in question. Secondly, the Media Authority must consider the prohibitions or the measures to be necessary in order to enable a decision on intervention later on. The preparatory works demand that the Media Authority conduct a specific assessment of whether the criteria have been met in each case and of what measures are required.

If it is likely that an acquisition will give an actor a market share that exceeds the thresholds for ownership concentration in sections 10 and 11, it will generally be reasonable to assume that the conditions for an intervention have been fulfilled. In this connection there will also be a strong presumption that the Conflict Condition also has been fulfilled in such cases.

The assessment of whether the prohibition or the measure is necessary in order to implement a later decision will depend on a number of factors. Of a discretionary nature, whether it will be feasible to restore one or more independent units with more or less the same content and strength as the former independent enterprises.<sup>51</sup> Firstly, a prohibition or measures will normally be necessary if the acquisition means that two media enterprises are merging. A prohibition or other measures will usually also be needed if the acquisition means that other media will be closed down. It will also be relevant if the acquisition leads to organisational changes or the transfer of personnel. A further factor is whether the acquisition gives the acquirer insight into information of strategic or competitive significance.

The provision concerning temporary prohibition in the third subsection does not require that there must be a "final agreement". This means that the Media Authority will be able to adopt a temporary prohibition or other measures as soon as the parties have signed the agreement.<sup>52</sup>

Adoption of a temporary prohibition must only apply for a limited period and it must expire when there is a final decision in the case at the latest. If the Media Authority finds that no intervention should be made against the acquisition, the temporary prohibition must be repealed.

Decisions regarding a temporary prohibition may be appealed, and the general rules concerning the right to lodge complaints and reversal of individual decisions laid down in the Administration Act will apply. The considerations that led to the adoption of a temporary prohibition indicate that an appeal will not lead to a delay in implementing the temporary prohibition.

According to the wording in section 9 third subsection of the Media Ownership Act, the provision only applies to an acquisition. There is thus no opportunity to adopt a temporary prohibition against cooperation agreements (cf. section 9 sixth subsection. See also Chapter 6 below).

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<sup>50</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 39. The preparatory works also say that practice according to the former provision in the Competition Act will be relevant for the interpretation of this rule.

<sup>51</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 39 and Recommendation to the Odelsting No. 48 (1999-2000)

<sup>52</sup> See Chapter 3.5 for more information on the difference between a "signed agreement" and a "final agreement".

For further details on temporary prohibition, please see Odelsting Proposition No. 81 (2003-2004) p. 39-40 and the preparatory works to the former provision in the Competition Act, Odelsting Proposition No. 97 (1998-99).

## 5 Advance clearance

Pursuant to section 12 of the Media Ownership Act, an actor who has a relevant interest may request advance clearance of an acquisition before the agreement is implemented. This is to ensure predictability for the parties to an agreement on the transfer of all or parts of an enterprise within daily newspapers, radio or television. The parties to such an agreement may request a confirmation within 30 days to the effect that there is no possibility of an intervention pursuant to the Media Ownership Act. The advance clearance presupposes that the Media Authority has been given correct information and that the case is relatively uncomplicated. If advance clearance is not given, the time limits in section 9 of six months and a year apply if the parties still enter into the agreement.

The fact that there is an advance clearance case, as well as the identity of the agreement partners, is public knowledge. Individual documents in the case may, however, be exempt from public disclosure in accordance with the provisions of the Freedom of Information Act. Please see Chapter 7.3.

The condition for obtaining an advance clearance of an acquisition is that the actor who notifies the Media Authority of the acquisition has a relevant interest in a clarification on whether there might be an intervention. This means *inter alia* that the actor who notifies the Media Authority of the acquisition, must be a concerned party, i.e. normally one of the parties to the agreement. A general wish from either or both parties to clarify whether an agreement might be accepted, will not meet the conditions for advance clearance.

According to the preparatory works, a fully negotiated agreement must be submitted for the Media Authority to process the case according to the rules for advance clearance.<sup>53</sup> As a main rule this means that there must be a "signed agreement", i.e. an agreement which has been signed by both parties, even though advance clearance may also be possible at an earlier date<sup>54</sup>. Until negotiations regarding the agreement have been completed, the Media Authority will only be able to issue informal statements. In such cases the regulations concerning advance clearance will not enter into force.

An advance clearance presupposes that the Media Authority has all the information which it considers necessary to issue an advance clearance within the time limit. The notification must therefore contain all relevant information, including:

- a) a copy of the agreement on the acquisition
- b) information on the acquirer, including by-laws, a certificate of registration or similar documentation, a description of the acquirer's activity, the owners of the acquirer, ownership interests in other enterprises, shareholding agreements and cooperation agreements
- c) the reason and purpose for the acquisition, including whether there are investment plans and the content of such plans

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<sup>53</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 32

<sup>54</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 32

- d) any cooperation agreements that may be significant in the assessment of the acquisition, including cooperation agreements with other actors than the acquired enterprise
- e) the significance of the acquisition for future activities
- f) information on the enterprise in which there is an agreement to purchase ownership interests, or the assets involved in the agreement, including the coverage area and circulation, viewing and listening figures, by-laws, certificate of registration or similar documentation, a description of the activity, which other companies have ownership interests in the same enterprise, what ownership interests the company in which interests are purchased has in other companies, and cooperation agreements.

If the Norwegian Media Authority has not received all the information it considers necessary to assess the notification, it can demand more information or more detailed information within a set, short deadline. This also applies to information over and above what is listed in items a) to f), if the Authority needs other types of information in order to make a decision. The Media Authority will not be able to give an advance clearance if the information is not provided within the set deadline.

An application for advance clearance will have one of the following possible outcomes:

- The Media Authority makes a decision to give advance clearance.
- The Media Authority makes no decision, thereby also waiving the right to intervene against the agreement at a later date.
- The Media Authority makes a decision not to give advance clearance because of insufficient information, negotiations for the agreement not being completed or because the applicant does not have a relevant interest.
- The Media Authority makes a decision not to give advance clearance because it finds it likely that the acquisition is in conflict with the Media Ownership Act or there is doubt concerning this issue.

## 6 Intervention against cooperation agreements

According to section 9 sixth subsection of the Media Ownership Act, the provisions concerning acquisition in section 9 apply correspondingly for cooperation agreements that give a partner to the agreement the same or equivalent influence over the editorial product as an acquisition. The reason for this provision is that cooperation agreements may also give an actor too much control in the media market and thus potentially too much power to influence public opinion.<sup>55</sup>

According to section 9 first subsection of the Media Ownership Act, cooperation agreements may also be subject to interventions against acquisitions. The first subsection allows the Media Authority to take cooperation agreements into consideration when an acquisition is to be assessed in relation to the condition concerning significant ownership position. However, this provision does not authorise the Media Authority to intervene against the cooperation agreement itself. There must be an acquisition, and if so, the intervention must be made against this acquisition. The sixth subsection of the provision, on the other hand, authorises the Media Authority to intervene against the cooperation agreement itself.

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<sup>55</sup> Odelsting Prop. No. 81 (2003-2004) p. 36

The distinction between an acquisition and a cooperation agreement will not always be equally clear. Depending on the circumstances, some cooperation agreements will be covered by the definition of an acquisition in section 2 of the Act, possibly after a more liberal interpretation. This applies particularly to agreements that appear to be a circumvention of the Act's definition of an acquisition. In such cases and following an overall assessment the Media Authority may decide that the agreements in question do in fact constitute an acquisition. In such cases the Act's concept of an acquisition must be assumed to be wide-ranging. Chapter 3.1 has more details on the Act's concept of acquisition.

The two conditions for interventions against acquisitions will also apply to interventions against cooperation agreements (cf. the formulation in section 9 sixth subsection "shall apply correspondingly"). This means that interventions against cooperation agreements may only be carried out if the cooperation partners individually or together have or will gain a significant ownership position in the market in conflict with the purpose of the Act. A further condition for intervention is that the cooperation agreement must give one of the agreement partners "the same or a corresponding influence on the editorial product as an acquisition" (cf. section 9 sixth subsection). In addition to issues that are directly related to the editorial product, factors that have the potential to influence the editorial product will also be covered by the formulation in the sixth subsection. This applies *inter alia* to voting rights, board representation and the authority to employ and dismiss the editor. The Media Authority will assess relevant shareholder agreements, voting rights, other by-laws and the share distribution in the media enterprise. With regard to purely administrative matters, the preparatory works state that coordination of advertising, printing, distribution etc. will not generally be covered by this provision.<sup>56</sup>

It emerges from the preparatory works that the provision in section 9 sixth subsection must be practiced with caution and that intervention should only be carried out in relatively clear-cut cases.<sup>57</sup> In the following a few types of cases will be listed which the Media Authority will be particularly aware of. Section 9 sixth subsection will in many instances apply to such cases, but the list is not intended to be exhaustive.

The provision will be particularly relevant to agreements on editorial cooperation. The preparatory works mention agreements on a joint editor, editorial coordination or joint news production as examples of agreements that might be covered by the sixth subsection. Whether an intervention should be made against such agreements depends on an overall assessment of whether the cooperation may have significant negative effects in relation to the purpose of the Act to promote freedom of expression, genuine opportunities to express one's opinion and a comprehensive range of media. According to the preparatory works it will normally not be relevant to intervene against agreements that only have effects on a regional and local level.<sup>58</sup>

The duration of the agreement and the real opportunity to cancel it will also be important in the overall assessment. Another key issue in the assessment is how many areas of the enterprise are included in the agreement.

In addition, the different types of cooperation agreements must also be assessed in relation to shareholder agreements, what regulations apply for voting rights in the decision-making

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<sup>56</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 36

<sup>57</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 36

<sup>58</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 38

bodies of the media enterprises, the distribution of the remaining shares, by-laws and financial and competition-related issues.

Even though the wording in section 9 sixth subsection says that the provisions in this section "*apply correspondingly*", it emerges from the preparatory works that there is no time limit for interventions against cooperation agreements. The six months' time limit in section 9 fifth subsection will thus not apply to interventions against cooperation agreements. The preparatory works state that the reason for this is that it may be difficult to uncover such cooperation agreements, that cooperation may develop over time and that it may be difficult to gain an overview of the consequences of such cooperation at an early date.<sup>59</sup> According to section 12 of the Media Ownership Act there is no opportunity to apply for advance clearance of cooperation agreements. This emerges from the wording of section 12.

See also Chapter 3.

## 7 Information

### 7.1 Duty to provide information

For the enforcement of the Media Ownership Act it is crucial that the Norwegian Media Authority is given access to updated, correct and complete information.

According to section 13 of the Media Ownership Act everyone is obliged to provide the Media Authority and The Appeals Board for Media Ownership with the information which the Media Authority or the Appeals Board requires to perform their functions pursuant to this Act. The Media Authority's functions pursuant to the Act are stated in section 7 of the Media Ownership Act, where it says that the Media Authority shall inter alia:

- a) *supervise market conditions and ownership of the daily press, television, radio and electronic media,*
- b) *contribute to creating greater openness about, awareness and knowledge of ownership in Norwegian media, and*
- c) *make decisions pursuant to section 9*

All information that is required to perform these functions is included in the Duty to provide information in section 13. The provision states that the Media Authority is able to demand information from "anyone". This also includes private individuals and enterprises that are not considered media enterprises pursuant to section 3. The formulation "anyone" also authorises the Media Authority to obtain information from competitors, advertisers, industry associations, trade unions and distributors. The purpose will be to gain a picture of the facts that is as complete and correct as possible and that gives a sound understanding of the effects of the acquisition/cooperation agreement. If the Media Authority is given information that is subject to confidentiality (cf. Chapter III of the Public Administration Act), the Media Authority will be bound by this.

For its examination the Media Authority is formally entitled to obtain information and documents from the tax assessment authorities, other tax authorities and authorities charged with monitoring public regulation of acquisition activities, notwithstanding the statutory duty of confidentiality, cf. section 13 third subsection. To the extent it finds it necessary, the Media

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<sup>59</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 36-37

Authority will exchange information with the Norwegian Competition Authority, which enforces the Competition Act. This will be particularly relevant in cases that are being assessed by both authorities. However, the Media Authority will primarily relate to the parties and will inform them if it obtains information from other authorities.

The information may be required to be given in writing or orally within a specific time limit, both from an individual enterprise and from groups of enterprises. Such a requirement may be given in the form of an individual order, and a violation of the order may lead to sanctions (cf. section 16 of the Media Ownership Act).

Section 13, second subsection of the Media Ownership Act authorises the Media Authority to make a standing order to send notification of any acquisitions of shares and interests in media enterprises, cf. section 3. The order may be given to "anyone", including private individuals and enterprises which are not media enterprises.<sup>60</sup> Orders to send notification are given as a decision and are valid for a maximum of three years at a time. Standing orders to send notification will be particularly relevant for enterprises that might be envisaged to exceed the thresholds for ownership concentration in sections 10 and 11, and for enterprises that have already exceeded the thresholds in sections 10 and 11.

## **7.2 The parties' right to acquaint themselves with the documents in the case**

The parties to a case are entitled to acquaint themselves with the documents in the case pursuant to section 18 and onwards of the Public Administration Act. This includes the right to acquaint themselves with consultation statements from industry associations and others. However, the right does not include documents which the Media Authority prepares in its internal case work, including documents prepared by special advisors or experts. The Media Authority will however continuously consider giving the parties access to individual documents beyond those they are entitled to see pursuant to the provisions of the Public Administration Act.

## **7.3 Public access**

Decisions on intervention, information to the Appeals Board for Media Ownership, annual reports and guidelines must be made public unless this is prevented by the provisions regarding confidentiality in the Public Administration Act. All consultation memos and decisions will be published at the Media Authority's web site, together with press releases and any reports prepared for the Media Authority. The Media Authority aims to practice extended public access. The Media Directory ([www.medieregisteret.no](http://www.medieregisteret.no)) also provides an overview of ownership in Norwegian media enterprises in order to help create a greater openness about, awareness and knowledge of ownership in Norwegian media, cf. section 7 litra b. Chapter 7.4 has more information on the Media Directory.

The purpose of the Freedom of Information Act and the goal of creating greater openness about, awareness and knowledge of ownership in Norwegian media, must however be balanced against the actors' need for confidentiality. According to section 5a first subsection of the Freedom of Information Act, information that is subject to confidentiality pursuant to legislation, is exempt from public disclosure. Section 13 No. 2 of the Public Administration Act enjoins government officers to maintain confidentiality concerning "*operational or business matters which for competition reasons it is important to keep secret in the interests*

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<sup>60</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 44

*of the person whom the information concerns*”. This means that the contents of an agreement often will have to be exempt from public disclosure. In exceptional cases the ownership of specific shares may also be made exempt from public disclosure and they will therefore not be registered in the Media Directory until they have been announced in some other way (cf. section 5a first subsection of the Freedom of Information Act and section 13a No. 3 of the Public Administration Act). It is up to the Media Authority to assess whether the conditions for being exempt from public disclosure are present. Extended public access will not be practiced with regard to such information.

## **7.4 The Media Directory**

In accordance with the functions of the supervisory authority under section 7 litra a) of the Media Ownership Act, the Media Authority is to supervise market conditions and ownership in the daily press, television, radio and electronic media. Pursuant to section 7 litra b) the Media Authority is to contribute to creating greater openness about, awareness and knowledge of ownership in Norwegian media.

The Media Directory ([www.medieregisteret.no](http://www.medieregisteret.no)) was established as a tool in the performance of these functions.

The purpose of the Media Directory is to allow the public and the media industry access to information on ownership in the Norwegian media market by continuously ensuring updated information on ownership within the daily press and broadcasting. Another purpose of the Media Directory is to create predictability for the media industry.

The Media Directory must at all times contain:

- All enterprises that operate daily newspapers, radio or television and that are covered by the Media Ownership Act
- Owners that have more than a five percent share in media covered by the Media Ownership Act
- The circulation of newspapers plus how often and where they are published

The Norwegian Media Authority intends to further develop the Media Directory so that the actors' market shares in the various national and regional markets, as well as other relevant and important data, are included in the directory.

Pursuant to section 13 litra c) of the Media Ownership Act, everybody is obliged to give the Media Authority the information it requires to contribute to creating greater openness about, awareness and knowledge of ownership in Norwegian media. See Chapter 7.1. The Media Directory is generally updated once a year, when the Media Authority sends out a form which the media enterprises are obliged to return with updated information. The media enterprises must respond to the enquiry within a set time limit. To ensure that the directory stays as updated and reliable as possible, the Media Authority may, however, demand information at any time from individual enterprises as well as groups of media enterprises, if the Authority finds it necessary.

Apart from information that is exempt from public disclosure under the Freedom of Information Act and the Public Administration Act, the collected information is immediately published in the Media Directory.



## **8 Case administration**

### **8.1 Contact with the parties**

The Media Authority will, during its consideration of a case, maintain a dialogue with the parties and will generally inform them of the Media Authority's internal assessment. This is because the cases that are handled by the Media Authority require detailed factual knowledge and frequently involve a significant amount of discretionary evaluations, including evaluations of future developments in the media market. The Media Authority therefore considers it appropriate to establish as much openness as possible vis-à-vis the actors with regard to the facts a decision will be based on, and how these facts are weighted.

The Media Authority considers it very important to be open vis-à-vis the actors in the media market, not least to be able to discuss matters in order to clarify whether an acquisition or a cooperation agreement is problematic with regard to the media ownership legislation.

### **8.2 Case procedures**

The Media Authority intends to keep abreast of acquisitions and relevant cooperation agreements through media publicity, direct contact with the media industry, the Duty to provide information pursuant to section 13 third subsection, applications for advance clearance and tip-offs from outsiders.

The Media Authority will generally conduct a quick screening of those acquisitions and cooperation agreements where the intervention conditions may be fulfilled. This will take place without any extensive investigation. If a further investigation is instigated, the actors will always be informed in writing. At the same time the Media Authority will ask the actors to produce the information it needs to conduct a further assessment of the case. The actors will be given a time limit of two weeks at most to produce this information. If the Media Authority, once it has assessed this information, finds that it should conduct a thorough analysis of the case, the Authority will normally ask for a meeting with each of the parties where the case will be discussed and the parties will be informed of the further case procedures. The actors will be given an opportunity to give their opinion on the factual matters in the case during this part of the process. In addition, the Media Authority will when necessary get in touch with competitors, advertisers, industry associations and others who may shed light on the matter.

In cases where the Media Authority conducts a thorough analysis, the Authority will prepare a consultation memo that is sent to the parties, other media enterprises, government institutions and organisations. The consultation memo will also be published on the Media Authority's website so that others who have an interest in the matter can have their say during the consultation round.

If after the consultation round the Media Authority finds that there are grounds for an intervention, the Authority will prepare a memo for the acquirer stating the Authority's preliminary assessment and a draft decision. The notification of a decision will be sent with an invitation to a meeting regarding an amicable solution.

The Media Authority may close the case at any point in the process. If the case is put aside without a formal decision being made, the actors will be informed of this. The Media Authority may also make a decision that there are no grounds for an intervention.

The Media Authority aims to conclude a case within four months.

## **9 Appeals**

### **9.1 Right of appeal**

The right of appeal is governed by the Public Administration Act. The time limit for appeals is three weeks after the parties have been notified of the administrative decision, cf. section 29 of the Public Administration Act.

The appellant must have a legal interest in the appeal, cf. section 28 of the Public Administration Act. The question of who has an interest in the appeal in a particular case, is determined on a case-by-case basis. The parties to the acquisition or a cooperation agreement certainly have a legal interest in the appeal. As a rule, only these parties will have such an interest. However, there may conceivably be cases where, for instance, competitors in the relevant market, advertisers or organisations have a legal interest in appealing the decision of the Media Authority. In cases where the Authority is uncertain whether a party has an interest in the appeal, the Authority will for its part allow the appeal.

If, after considering a particular case in full, the Media Authority concludes that an intervention is not desirable, this decision will be an administrative decision. Actors with a legal interest in the appeal may appeal such a decision. Since the parties to an agreement seldom will have an interest in appealing a decision not to effect an intervention, and there will often be no other parties with a legal interest in the appeal, the legislature has found that the Appeals Board for Media Ownership should have an opportunity to request a written explanation of why the Authority did not carry out an intervention in specific cases, cf. section 8, fifth paragraph, of the Media Ownership Act. However, the Appeals Board may not on its own initiative reverse the Authority's decision not to carry out an intervention. It is stipulated in the preparatory works that an explanation of this type addressed to the Appeals Board will be available to the public insofar as this is not precluded by the rules regarding confidentiality.

If the Authority concludes that an acquisition will not be assessed in more detail because it does not represent a problem vis-à-vis the Act, this will not be an administrative decision that can be appealed.

### **9.2 The Appeals Board for Media Ownership**

An independent board for appeals against decisions by the Media Authority has been established, cf. section 8 of the Media Ownership Act. The reason for this is the desire to ensure the Authority's autonomy from the central authorities, cf. section 6 of the Media Ownership Act. The Appeals Board for Media Ownership consists of three members and two deputy members<sup>61</sup> who are appointed for four years at a time. The Appeals Board has its own secretariat.

The Media Authority considers appeals for submission to the Appeals Board in accordance with Chapter VI of the Public Administration Act.

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<sup>61</sup> Cf. Odelsting Prop. No. 81 (2003-2004) p. 42

### **9.3 The appeals procedure**

Appeals shall be lodged with the Media Authority, which may reverse or annul the decision. If this is not the case, the Authority will refer the case to the Appeals Board.

The Appeals Board may not consider cases on its own initiative. In order to genuinely ensure that appeals are dealt with by two bodies, the Appeals Board may not instruct the Media Authority in specific cases.<sup>62</sup>

### **9.4 Delayed implementation**

The general rule is that the Media Authority's intervention decision should be implemented as soon as the decision is made. This follows conditionally from section 42 of the Public Administration Act. The same provision allows for exceptional cases where a decision is not implemented before the deadline for appeals has expired or an appeal has been decided. The issue of delayed implementation must be decided following an overall assessment of the specific case, where it will be relevant to emphasise the advantages and disadvantages which a delay or an implementation of the decision will have for the parties and for other affected public interests.

With regard to interventions against acquisitions, a delayed implementation will often make it difficult to implement an intervention decision once the appeal procedure has been completed and the courts have completed their deliberations on the case. During such a period the acquirer might have integrated the media enterprise with his other activities in such a way that it will be difficult or impossible to distinguish the enterprise from the acquirer's other activities. For this reason, delayed implementation will rarely be considered with regard to interventions against acquisitions.

With regard to interventions against cooperation agreements that cannot be said to entail a circumvention of the Act's concept of acquisition, the conditions for delayed implementation may be present, but delayed implementation will not normally be granted.

### **9.5 Legal action**

Any legal action taken shall be brought against the State represented by the Appeals Board for Media Ownership, cf. section 8 of the Media Ownership Act.

Legal action may only be brought when the appeals procedures under the Act are exhausted, cf. section 437 of the Act of 13 August 1915 relating to court practice and procedure in civil disputes.

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<sup>62</sup> Cf. Odelsting Prop. No. 30 (1996-97) p. 31