

Belgium

by
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List of Abbreviations

ADSL	<i>Asymmetric Digital Subscriber Line</i>
AM	<i>Auteurs & Media</i> [Authors & Media: journal]
API	Application Programming Interface
AVMS	Audiovisual Media Services
BIPT	Belgian Institute for Postal services and Telecommunications (federal telecommunications regulator)
BRF	<i>Belgisches Rundfunk- und Fernsehzentrum</i> (public service broadcaster of the German-speaking Community)
BWHI	<i>Bijzondere Wet tot hervorming der instellingen</i> [Special Act on Institutional Reform]
CAS	Conditional Access Systems
CATV	Cable Television
CSA	<i>Conseil Supérieur de l'Audiovisuel</i> (French Community Media Regulator)
DTH	Direct-to-Home
DTT	Digital Terrestrial Television
DVB-C	Digital Video Broadcasting-Cable (TV)
DVB-H	Digital Video Broadcasting-Handheld (TV)
DVB-S	Digital Video Broadcasting-Satellite (TV)
DVB-T	Digital Video Broadcasting-Terrestrial (TV)
ECJ	European Court of Justice
EPG	Electronic Programme Guide
EU	European Union
FIRTA	Flemish Community Radio and Television Broadcasting Act of 2009
FrAMSA	French Community Audiovisual Media Services Act of 2009
GPRS	General Packet Radio Services
IP	Intellectual Property
IT	Information Technology
MHP	Multimedia Home Platform
MMS	Multimedia Messaging Service
PC	Personal Computer
PSB	Public Service Broadcasting/Broadcaster
RTBF	<i>Radio-télévision belge de la Communauté française</i> (public service broadcaster of the French Community)
SDTV	Standard-Definition Television
SMS	Short Messaging Service

List of Abbreviations

TV	Television
VDSL	Very high bit rate Digital Subscriber Line
VRM	<i>Vlaamse Regulator voor de Media</i> (Flemish Media Regulator)
VRT	<i>Vlaamse Radio- en Televisieomroep</i> (public service broadcaster of the Flemish Community)
WAP	Wireless Application Protocol

General Introduction

§1. GENERAL BACKGROUND OF THE COUNTRY

I. Political and Legal System of the Country

A. Introduction

1. Belgium is a federal State, established as a constitutional monarchy in 1830, with a civil law system strongly influenced by French law. Its Constitution dates from 7 February 1831 and has been revised a number of times since. One of the basic principles of the Belgian '*état de droit*' is the separation of powers. The legislative power is in the hands of the King and the Parliament (which is composed of the House of Representatives and the Senate), the executive power is vested in the King and his Ministers, and the judicial power is exercised by the courts and tribunals. Although the Kings fulfils a political as well as a symbolic role, he cannot act without his Ministers, who need to countersign every act.

B. Federal State: Structure

2. Belgium has a relatively complicated federal State structure.¹ It is composed of three Communities (the Flemish, French and German-speaking Community) and three Regions (the Flemish, Walloon and Brussels-Capital Region). There are five regional Governments and five regional Parliaments: the Flemish Government and Parliament (covering the Flemish Region as well as the Flemish Community), the Government and Parliament of the French Community, the Government and Parliament of the Walloon Region, the Government and Parliament of the Brussels-Capital Region and the Government and Parliament of the German-speaking Community.

1. Some background information on the various subsequent state reforms is given in: Peggy Valcke, Wouter Hins & Reinhard Ellger, 'Fernsehen im Breitbandkabel: Ein Rechtsvergleich – Die Regulierung in Belgien, Grossbritannien, den Niederlanden und den USA (Vier Rechtsgutachten im Auftrag der Kommission zur Ermittlung der Konzentration im Medienbereich)', in *Schriftenreihe der Landesmedienanstalten*, n° 27 (Berlin: Vistas, 2003), 24 et seq.

3. The federal State, the Communities and the Regions exercise their respective (sometimes exclusive, sometimes concurrent and sometimes hierarchical, cf. *infra*) powers in partly overlapping territories. To give a few examples: the territories of

the Walloon Region and of the French Community are to a large extent identical, with the important difference that the Walloon Region includes the German-speaking communes in the east of Belgium (Eupen, Sankt-Vith, Bütgenbach, etc.),¹ whereas the French Community has no powers in the German-speaking area (given that the German-speaking Community exercises its powers for cultural and personal affairs in that area).

1. Malmédy, however, belongs to the French Community.

4. Another difference concerns the bilingual area of Brussels-Capital. The French Community can exercise its (cultural) powers with regard to the French-speaking institutions and organizations in Brussels; whereas the Walloon Region has no (economic) competences in Brussels at all (these powers belong to the Brussels-Capital Region). Similarly, the Flemish Community is only competent to regulate the Flemish-speaking institutions and organizations in Brussels. This implies that bilingual institutions and organizations – or, using the terminology of the Belgian Constitution, institutions that, on the basis of their language, cannot be attributed exclusively to either the French or the Flemish Community (for instance, in the area of broadcasting, cable networks or Turkish radio stations) – reside under the (residual) powers of the federal State.

C. Division of Competences between the Federal and the Community/Regional Level

5. The Communities mainly have powers in the domains of culture (theatre, libraries, audiovisual media, etc.), education, health care, social welfare and protection of youth; the Regions are competent for economic affairs (agriculture, energy, employment, city and local transport), environmental planning and tourism. The constitutional law provisions reserve some important powers for the federal State (for instance, regarding foreign policy, justice, social security, financial planning, and competition policy). Furthermore, a number of residual powers currently reside with the federal State.¹

1. Articles 1-7; Arts 127-140 of the Belgian Constitution. For more information, see: <www.belgium.be/> (under 'about Belgium', 'the State').

D. Overview of the Belgian Constitutional Situation in the Context of Broadcasting and Telecommunications Regulation

6. When dealing with media law related issues, it is highly relevant to sketch the constitutional structure in Belgium. Due to the federal character of the Belgian State and the internal division of powers, the competences to regulate the different

media and adjacent sectors, such as telecommunications, are split up between the federal and Community authorities. Consequently, an overview of the relevant constitutional law provisions and of the evolution in the case law of the Belgian Constitutional Court (*‘Grondwettelijk Hof’/‘Cour Constitutionnelle’*, formerly *‘Arbitragehof’/‘Cour d’Arbitrage’*)¹ regarding the notion of broadcasting, is crucial for a good understanding of the Belgian media law situation.

1. Website: <www.grondwettelijkhof.be/>. The Constitutional Court is a court of law composed of twelve judges who verify whether the Belgian legislative authorities comply with the Constitution. The Court has the power to annul and suspend laws, decrees and ordinances. The Constitutional Court was formerly known as the *‘Arbitragehof’* or *‘Cour d’arbitrage’*, which was established in 1980. Its original mission was to act as ‘arbitrator’ between the various legislatures of the federal State, the Communities and the Regions by supervising the conformity of laws, decrees and ordinances with the rules regarding the division of competences in the Constitution and the legislation on institutional reform. In May 2007 the switch to the Constitutional Court was made, this term more in keeping with its actual jurisdiction, which has been gradually expanded to cover the review of laws, decrees and ordinances with Title II of the Constitution (Arts 8–32 on the rights and freedoms of the Belgians) and with Arts 170 and 172 (legality and equality of taxes) and Art. 191 (protection of foreign nationals).

7. Since the first state reform (1970–1971), the domain of ‘radio broadcasting and television’ has been classified as a cultural matter, falling within the scope of the Community powers.¹ In 1988, the responsibility for press subsidies was also passed on to the Communities. Yet, other aspects of press regulation (for instance, right to reply, liability of journalists), film and telecommunications, remained federal competences.

1. Currently: Arts 127 and 130 Belgian Constitution and Art. 4, 6° Special Act on Institutional Reform of 8 Aug. 1980 (*Bijzondere Wet tot hervorming der instellingen*, *Official Gazette* 15 Aug. 1980, amended at several occasions – hereinafter: BWHI).

8. The federal State also has important ‘horizontal’ powers, i.e., powers that are cross-sectoral. Competition law, trade law, consumer protection law, IP and copyright law are the most important examples. They have been explicitly reserved for the federal State,¹ but the Communities can interfere (marginally) in these domains on the basis of the ‘implied powers’ doctrine.² At first sight, the competences of the federal State in the area of media and telecommunications policy might look more impressive than those of the Communities (cf. Figure 1). However, one should not underestimate the scope of the notion ‘radio broadcasting and television’, which has been expanded continuously over the years. The Belgian Constitutional Court has played a major role in this process, as will be demonstrated in the following paragraphs.

1. Article 6, § 1, VI, al.5, 4°, 5° and 7° BWHI.
2. Article 10 BWHI.

Figure 1. Schematic Overview of the Division of Powers in Belgium for 'Media Policy' in the Broad Sense

Federal State	Communities
Telecommunications	Radio broadcasting and television
Press (with the exception of subsidies)	Press subsidies
'Bilingual' (or of a foreign language) broadcasting activities in Brussels-Capital	BUT: 'radio broadcasting and television' has to be interpreted in a broad sense: <ul style="list-style-type: none"> - includes transmission/technical aspects of broadcasting (contrary to the German situation) - includes certain information society services, such as video-on-demand (contrary to the ECJ's definition of broadcasting) - includes 'accessory' aspects, such as economic regulation or IP rights if necessary for the efficient exercise of broadcasting powers (for instance, market control, regulation of conditional access systems...) = 'implied powers' doctrine
Film	
Information society services	
'Horizontal powers': copyright, competition law, consumer protection...	

9. One of the consequences of the fact that the Flemish, French and German-speaking Communities are competent for broadcasting, while the federal legislator can regulate telecommunications, is that the exact scope of 'broadcasting' is of the utmost importance to know who can regulate what (aspects) of the information and communications sectors. Hence, it is not surprising that the definition of broadcasting has been the subject of intense discussions and continuous judicial disputes over the last twenty years (as the constitutional law provisions themselves do not provide any description). Moreover, especially in the light of the convergence between the telecommunications, broadcasting and IT sectors, it became more and more difficult to make a clear delineation between the competences of the Communities and of the federal State – both aiming at a maximum interpretation of their respective powers. Hence, at several occasions, the Belgian Constitutional Court was appealed to in order to shed some light on the scope of the notion 'radio broadcasting and television'.

10. The leading cases before the Constitutional Court are situated around three periods and relate to three (closely intertwined, but different) themes:

- 1990–1991: the Constitutional Court acknowledges the Communities' powers to regulate not only the content aspects, but also the transmission (technical aspects) of radio and television programmes;
- 2000–2002: the Court extends the scope of broadcasting in order to encompass new, interactive media services;

- 2004–2006: the Court obliges the federal State and the Communities to cooperate when regulating the electronic communications infrastructure, given the entangled character of their respective powers over these networks (due to the convergence between broadcasting and telecommunications).

1990–1991: Transmission of programmes is an integral part of the Communities' broadcasting competences

11. In the initial stage, it was recognized by all parties that 'radio broadcasting and television' essentially referred to the possibility for the Communities to organize and regulate their own public broadcasting organization and control the content of radio and television programmes. Spectrum management and licensing, as well as technical rules for cable networks, were considered to fall within the federal competences.

12. The practical consequence of this division was that new radio stations had to apply for a (cultural) authorization at Community level first, and then obtain a (technical) license for the use of a frequency from the federal authorities.

13. With its decisions of 25 January 1990¹ and 7 February 1991,² the Constitutional Court ended this practice of 'dual broadcasting authorization'. According to the Court, the Communities had full powers to regulate the domain of broadcasting, including the technical aspects of it. Both content and transmission regulation had to be seen as an integral part of the Communities' competence for 'radio broadcasting and television'. This implied that the Communities, and not the federal State, had the power to decide on the allocation of broadcasting frequencies. The Court made only one exception for the national coordination of frequency management. In order to avoid harmful interferences, the federal authorities remained competent to decide on common standards where necessary and to coordinate the frequency plans of the Communities.

1. Constitutional Court, 25 Jan. 1990, n° 7/90.

2. Constitutional Court, 7 Feb. 1991, n° 1/91.

14. This interpretation came as a total surprise and observers called it a 'landslide' in the division of powers. The Constitutional Court's 'revolutionary' conclusion is supposed to be inspired by the Court's concern to avoid situations in which the federal State could interfere with the Communities' broadcasting policies (as under the initial interpretation, the federal authorities could always block the decision of a Community to award an authorization to a specific radio station, by not granting it the right to use a frequency).

15. Shortly after these decisions, the Communities enacted their own regulations for the licensing of spectrum to broadcasters and – reasoning by analogy – for the operation of cable networks.

2000–2002: *Interactive radio and television programmes are broadcasting services*

16. During the second half of the nineties, the Communities introduced rules for so-called ‘other services via the cable networks’ (French Community) or ‘television services’ (Flemish Community). Their intention was to regulate the innovative, interactive audiovisual services that were expected to be developed in the near future, such as pay-per-view, (near-)video-on-demand, web-TV, thematic channels for closed user groups (e.g., doctors or farmers), and so on. The new regulations were based on a broad interpretation of their broadcasting powers. The French Community explicitly listed video-on-demand as an example of an ‘other service via cable’. For the federal State, this was one step too far, and it appealed both to the Council of State (*‘Raad van State’/‘Conseil d’Etat’*) and the Constitutional Court for annulment of the French regulations relating to ‘other services via cable’.

17. In a first decision of 31 October 2000, the Constitutional Court took a prudent step towards the recognition of interactive television services under the header of ‘broadcasting’.¹ In order to make the distinction between broadcasting and (other forms of) telecommunications in an era of convergence between both sectors, the Court gave the following definition of ‘radio broadcasting and television’:

The distinctive features of radio broadcasting, including television, distinguishing it from other forms of telecommunications, are the following:

- Radio broadcasting is by nature a matter of transmitting radio and television programmes.
- A broadcasting programme is intended for reception by the public at large or part thereof, even when it is transmitted at individual request. Neither messages from a sender to an individual receiver (point-to-point), irrespective whether the initiative [to transmit] comes from a broadcasting station, a viewer or a listener, nor services providing individualised information on demand, fall within the scope of the notion of broadcasting. The broadcasts have no confidential character.

To fall within the powers of the Communities, the service offered by a broadcaster has to fit in with its broadcasting activities. The very substance of these latter activities is the initial transmission, in un-encoded or encoded form, of programmes intended for direct reception by the public. Broadcasting activities do not lose their character of broadcasting because technological evolution offers viewers or listeners more possibilities to make their own choice.²

1. Constitutional Court, 31 Oct. 2000, n° 109/2000.

2. Author’s translation from Dutch.

18. The least that could be said about this description was that it was ambiguous and did not offer the desired clarity.¹ On the one hand, the Court acknowledged that, even if the transmission took place at individual request, the service could be qualified as broadcasting (*‘a broadcasting programme is intended for reception*

by the public at large or part thereof, even when it is transmitted at individual request'). So far, the Court seemed to adopt quite a progressive viewpoint. But, on the other hand, it excluded point-to-point communication from the scope of broadcasting ('neither messages from a sender to an individualised receiver (point-to-point) . . . fall within the scope of the notion of broadcasting'). This clarification again narrowed down the scope of broadcasting considerably. It is hard to think of a service providing audiovisual content on demand on a point-to-multipoint basis. In our opinion, near-video-on-demand would not qualify as such a service, since the transmission takes place even without an individual demand (so, even if no one would order the code necessary to unscramble the signals, the programme would still be transmitted by the provider of the near-video-on-demand service at regular intervals, contrary to what happens in the case of genuine video-on-demand, where the programme is kept on a server and only transmitted to the home terminal or PC upon request by an individual end-user).

1. Caroline Uyttendaele, Jeroen Van Nieuwenhove & Peggy Valcke, 'De aanzet van het Arbitragehof tot een klaardere definitie van omroep: een vingerwijzing voor verdere audiovisuele ontwikkelingen?', *AM* 1 (2001): 130–139.

19. The fact that the Court still applied a technical criterion (point-to-point versus point-to-multipoint) to draw the line between telecommunications and broadcasting, was criticized by the legal doctrine. Indeed, relying on a technical criterion in times when technologies are converging does not seem very efficient, nor future-proof.

20. Two years later, the Court had to take a decision in a similar case.¹ At that occasion, it overruled its case law from 2000 by stating explicitly that the *technical means of transmission* do *not* constitute a decisive factor in the qualification of a service as broadcasting. It revised its definition of broadcasting as follows:

The distinctive features of radio broadcasting, including television, distinguishing it from other forms of telecommunications, are the following:

- Radio broadcasting is by nature a matter of transmitting radio and television programmes.
- A broadcasting programme is, from the viewpoint of the sender, intended for reception by the public at large or part thereof, and has no confidential character, even when it is transmitted at individual request and irrespective of the technology used for the transmission, including the so-called point-to-point technique that was formerly not applied in a broadcasting environment. Services providing individualised information characterised by a certain level of confidentiality do not fall within the scope of broadcasting.²

1. Constitutional Court, 6 Nov. 2002, n° 156/2002.
2. Author's translation from Dutch.

21. According to this definition, services such as interactive television programmes, non-linear audiovisual services, video-on-demand, radio or television programmes offered via Internet, etc., can be qualified as broadcasting and fall

within the scope of the Communities' powers. *Not* the *technology* used, but both the *intention of the sender* and the *degree of confidentiality* of the information provided are the decisive factors: if the content provider intends to make the information available to the public at large (or part thereof, e.g., only those paying a subscription fee) and if this content has no confidential character, then his service is considered a broadcasting service, even if it is offered at the viewer's or listener's individual request or via distribution means – such as point-to-point techniques – that were formerly not used for the transmission of broadcasting programmes. This definition was definitely more consistent and future-proof than the one suggested by the decision of October 2000,¹ but still left room for unresolved questions.²

1. And definitely goes further than the European notion of 'television broadcasting', as interpreted by the Court of Justice in the case *Mediakabel* (ECJ, case C-89/04 (*Mediakabel*), 2 Jun. 2005, *OJ C* 182, 23 Jul. 2005, 16); cf. Peggy Valcke, 'Television Broadcasting or Information Society Service: Can the ECJ Learn Something from a Small But Complex Country as Belgium?', *OfcomWatch* 3 Apr. 2005, <www.ofcomwatch.co.uk/2005/04/television-broadcasting-or-information>.
2. Peggy Valcke & Caroline Uyttendaele, 'De kwalificatie van interactieve informatiediensten als omroep: loopt het Belgische Arbitragehof voor op Europa?', *Mediaforum* 3 (2003): 112–116.

2004–2006: Compulsory cooperation for the regulation of electronic communications infrastructure

22. Mid 2004, the Constitutional Court shocked the Belgian communications scene once again. In its decision of 14 July 2004,¹ it annulled Article 14 of the federal BIPT-Act, which contained the core provisions of this Act, listing the various tasks and powers of the federal telecommunications regulator, the BIPT (Belgian Institute for Postal services and Telecommunications). Even though the constitutional law provisions do not prescribe (a form of) cooperation between the federal and Community authorities in the domains of broadcasting and telecommunications, the Court took the position that technological convergence has tied their competences with regard to electronic communications infrastructures together to such an extent that they can only be exercised in mutual consultation. Hence, by regulating the BIPT unilaterally, the federal legislator had acted unconstitutionally. In order to give the various parties sufficient time to discuss and agree on a workable solution, the Court decided to uphold the annulled provisions until the entry into force of a joint regulation, and until 31 December 2005 at the latest.

1. Constitutional Court, 14 Jul. 2004, n° 132/2004.

23. One year later, the Court confirmed its viewpoint in a case launched by the BIPT against the Flemish Decree of 7 May 2004 (implementing the electronic communications directives¹ in the Flemish broadcasting law).² It annulled the provisions with regard to *ex-ante* market regulation (SMP procedure), as well as the provisions regulating the broadcasting networks.³ Again, it based its decision on the argument that these provisions had been enacted unilaterally by the Flemish regulator, notwithstanding the fact that the federal State is also competent to regulate the electronic communications infrastructure. In November 2006, this position

was confirmed again, when the Constitutional Court annulled the provisions of the 2003 French Community Broadcasting Act which related to electronic communications networks.⁴

1. I.e., the Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council of 7 Mar. 2002 on a common regulatory framework for electronic communications networks and services, *OJ L* 108, 24 Apr. 2002, 33) and the four specific directives (Access Directive 2002/19/EC, Authorization Directive 2002/20/EC, Universal Service Directive 2002/22/EC and Privacy in Electronic Communications Directive 2002/58/EG).
2. Constitutional Court, 13 Jul. 2005, n° 128/2005.
3. Including provisions on CAS, API and EPG. It remains unclear whether it was really the intention of the Court to overrule its case law of 2000, when it applied the ‘implied powers’ doctrine to confirm the Communities’ competence to enact regulations for CAS, even though these touched upon federal affairs such as intellectual property and competition law (judgment of 31 Oct. 2000, mentioned *supra*).
4. Constitutional Court, 8 Nov. 2006, n° 163/2006.

24. In order to find a way out of this *impasse*, on 17 November 2006 a cooperation agreement was agreed upon between the federal State and the Communities.¹ This agreement entered into force in September 2007 and installs procedures for mutual consultation and consent between *regulators* when taking decisions in the context of market analysis (via the CRC or *Conférence des Régulateurs du secteur des Communications électroniques*), on the one hand, and between *legislators* when prescribing rules for the electronic communications infrastructure (which is not further detailed in the cooperation agreement, but in practice goes via the *Overlegcomité* composed of the competent federal and regional ministers), on the other hand.

1. Cooperation agreement regarding the mutual consultation with respect to the drafting of regulation related to electronic communication networks, the exchange of information and the execution of the competences in the field of electronic communication networks by the regulatory instances competent for telecommunications or radio and television.

II. Geography and Population

25. Belgium is a small country with a territory of 30,528 km². It borders on the Netherlands (north), Germany (east), Luxemburg and France (south), and is also bounded by the North Sea (west). Belgium is composed of ten provinces: Antwerp, Flemish Brabant, West and East Flanders and Limburg (which together form the Flemish Region), and Hainaut, Walloon Brabant, Liège, Luxemburg and Namur (which together form the Walloon Region); and 589 cities and towns.

26. The country has a population of 10.66 million (in 2008):¹ 6.16 million in Flanders, 3.45 million in the Walloon region (of which 74,500 are German-speaking), and 1.04 million in Brussels, the capital of Belgium. Approximately 972,000 foreigners are living in Belgium, of which a little less than a third live in Brussels. The average density of population is 349 inhabitants per square kilometre, with a significantly higher density in the north (Flanders).

1. Cf. <www.statbel.fgov.be/figures/d21_nl.asp>.

27. Belgium has four linguistic regions: the Flemish-speaking¹ region, the French-speaking region, the German-speaking region and the bilingual region of Brussels, where Flemish as well as French is spoken.

1. Flemish, as a language, is very similar to Dutch, but is not exactly the same. There are a number of differences, most importantly with respect to pronunciation and vocabulary.

III. Social and Cultural Values

28. Belgium does not have one single socio-economic reality or cultural identity. Social and cultural values differ according to the (linguistic) Communities. This has been acknowledged in the division of competences (*supra*) by attributing competences in the field of culture, education and social welfare to the Communities. Language has an important influence on the development of individuals and their cultural anchorage. In this context, it can be noted that the respective linguistic communities also have close links to the neighbouring countries: France (for the French-speaking Community), Germany (for the German-speaking Community), and to a lesser degree the Netherlands (for the Flemish-speaking Community). This also has a significant impact on the media use and media landscapes in Belgium, given the fact that radio and television broadcasts are important with regard to the creation and development of a national or regional identity (*infra*).

§2. THE MEDIA LANDSCAPE

I. Overview of Media Markets and Main Actors

A. Introduction

29. There is no such thing as a homogeneous Belgian media landscape. Different media markets can be distinguished which run parallel to the country's communities, i.e., the Flemish Community, the French-speaking Community and the – much smaller – German-speaking Community. Being a small country with three official languages, Belgium has always turned to its neighbours. This is especially the case for the small German-speaking Community looking to Germany, but also for the French Community, which is strongly oriented towards France and French television channels.¹ In Flanders, before the introduction of commercial television, the channels from the Netherlands were very popular. But as Dutch and Flemish are not entirely identical, the Flemish public massively turned to its own commercial channels as soon as these were introduced.²

1. Aline Franck, 'Belgique: regards croisés sur deux paysages audiovisuels', *Régulation* 41 (2009): 18.
2. Moreover, the legislative framework initially provided for compulsory shareholding by the local press in the commercial TV station. This might explain why Flanders has quite some successful local channels, while the in French Community television companies from France, such as TF1, are still very popular.

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Part I. Freedom of Speech

§1. CONSTITUTIONAL FRAMEWORK

54. The Belgian constitutional framework concerning the right to freedom of expression and freedom of the press is shaped by Articles 19, 25, and 150 of the Constitution:¹

Article 19 Constitution

Freedom of worship, public practice of the latter, as well as freedom to express one's opinions on all matters, are guaranteed, except for the criminalisation of offenses committed when using these freedoms.

Article 25 Constitution

The press is free; censorship can never be established; no security from authors, publishers, or printers can be demanded. When the author is known and resident in Belgium, neither the publisher, nor the printer, nor the distributor can be prosecuted.

Article 150 Constitution

The jury is established for all criminal matters, in addition to political and press crimes, except for press crimes inspired by racism or xenophobia.²

Article 19 refers to the freedom of expression, Article 25 introduces the freedom of the press, and Article 150 stipulates that 'press crimes' (*'drukmisdrijven'*/*'délits de presse'*) (except for those inspired by racism or xenophobia) should be brought before a jury at the *'Hof van Assisen'*/*'Cour d'Assises'* (i.e., a court of law composed of both professional judges and a jury of citizens, which judges the most serious and delicate offences).

1. A detailed description of these articles is available in: Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 25–30 and 53–68; Eva Lievens, Peggy Valcke & David Stevens, 'Vrijheid van meningsuiting', in *Praktijkboek Recht & Internet*, ed. Rogier De Corte (Brugge: Vanden Broele, 2005), 9; Peggy Valcke, 'Democratie en diversiteit op de informatiesnelweg: beschouwingen over de vrijheid van meningsuiting op het Internet', in *De rechten van de mens op Internet*, ed. Interuniversitair Centrum Mensenrechten (Antwerpen: Maklu, 2000), 93; Caroline Uyttendaele, *Openbare informatie – Het juridisch statuut in een convergerende mediaomgeving* (Antwerpen: Maklu, 2002), 244 et seq.; Stéphane Hoebeke & Bernard Mouffe, *Le droit de la presse* (Louvain-la-Neuve: Bruylant Academia, 2005), 57 et seq.
2. Author's translation from Dutch.

§2. SCOPE

55. The three articles regarding freedom of expression and freedom of the press are still formulated in exactly the same way as in 1831,¹ despite the enormous evolution that has occurred in the media landscape. It is, however, generally accepted that – due to the technology-neutral wording of Article 19² – the constitutionally protected freedom of expression is applicable to any medium: the written press, radio, television broadcasting, movies, the Internet, as well as any future medium.³

1. Jan Velaers, 'De actuele toepassing van de grondwettelijke waarborgen inzake de vrijheid van de media', in *Jaarboek Mensenrechten 1995–1996*, ed. Interuniversitair Centrum Mensenrechten (Antwerpen: Maklu, 1996), 83.
2. Caroline Uyttendaele, 'Bescherming van de communicatievrijheid in digitale omgevingen: verminderde bruikbaarheid van nationaal (grondwettelijk) recht?', in *Jaarboek Mensenrechten 2000–2001 van het Interuniversitair Centrum Mensenrechten*, ed. Interuniversitair Centrum Mensenrechten (Antwerp: Maklu, 2002), 11–44.
3. Jan Velaers, 'De actuele toepassing van de grondwettelijke waarborgen inzake de vrijheid van de media', in *Jaarboek Mensenrechten 1995–1996*, ed. Interuniversitair Centrum Mensenrechten (Antwerpen: Maklu, 1996), 85; Caroline Uyttendaele, *Openbare informatie – Het juridisch statuut in een convergerende mediaomgeving* (Antwerpen: Maklu, 2002), 253; Monica Macovei, *Freedom of Expression – A Guide to the Implementation of Art. 10 of the European Convention of Human Rights (Human Rights Handbooks, No. 2)* (Strasbourg: Council of Europe, 2004), 15.

56. Articles 25 and 150 are not formulated in the same technology-neutral manner, as they use the word 'press' or 'print press'. The Constitution does not contain a definition of 'press crimes'. Over time, legal doctrine has constructed the following description: '*a view or an opinion, criminalised by law, made public by means of printed media*'.¹ It is important to note that when the printed matter does not contain the crime, and only functions as the means to commit the crime, the label 'press crime' does not apply. Instead, such a crime will be classified as a 'print crime' ('*drukkerijmisdrijf*') or 'publication crime' ('*publicatiemisdrijf*').

1. Dirk Voorhoof & Peggy Valcke, *Handboek Mediarecht* (Brussel: Larcier, 2010), Ch. 3, s. 3; Evi Werkers & Peggy Valcke, FLEET – An interdisciplinary research project on Flemish E-publishing Trends: State of the Art E-journalist & E-user (WP 2 & 3: internal report for IWT), March 2008, Leuven, 88.

57. The Belgian courts seem reluctant to extend the traditional freedom of the press to new information and communication technologies.¹ The Belgian Supreme Court ('*Hof van Cassatie*'/'*Cour de Cassation*'), for instance, is of the opinion that Article 25 is not applicable to audiovisual media.² Whether 'press crimes' can be committed over the Internet is still undecided in Belgium. Several lower courts have explicitly adopted a teleological interpretation by considering the Internet as a type of 'press' ('*attendu que les messages diffusés par Internet peuvent constituer des délits de presse*')³ and accepted without much hesitation that a press crime could be committed for instance on Internet newsgroups or forums.⁴ This interpretation is followed by an increasing number of Courts of Appeal,⁵ but has not yet been confirmed by the Belgian Supreme Court.

1. Caroline Uyttendaele, *Openbare informatie – Het juridisch statuut in een convergerende mediaomgeving* (Antwerpen: Maklu, 2002), 252.

2. 'Article 18 Constitution [since 1994: Art. 25, authors' note] is not applicable to broadcasts via television or cable television, since these are not forms of expression by means of printed writing' (authors' translation from Dutch). Cf. Cass. 9 Dec. 1981.
3. Corr. Court Brussels 22 Dec. 1999 (with comment of Dirk Voorhoof), *AM* 1–2 (2000): 134–138. The reasoning of the Court is as follows:
Attendu que si le concept de délit de presse devait être limité par l'approche de son sens littéral (presse écrite par opposition aux nouveaux moyens, toujours plus sophistiqués, d'expression de la pensée), une telle interprétation constituerait une 'méconnaissance' de l'esprit du constituant qui a voulu protéger la libre diffusion des idées et non pas l'instrument de celle-ci, la presse en tant que telle dont, de surcroît, l'évolution future sous des formes nouvelles telles que la télévision lui était bien évidemment inconnue. Attendu que pareil raisonnement doit être tenu en ce qui concerne le nouveau mode d'expression de la pensée que constitue le réseau Internet.
4. Court of First Instance Brussels 2 Mar. 2000 (with comment of Marc Isgour), *AM* 1 (2001): 151–157; Court of First Instance Mons 13 Feb. 2007, *AM* 1 (2007): 178 (with comment of Dirk Voorhoof): 'The notion "press" must be interpreted in a broad manner; taking into account the technological evolution. Forums on the Internet have been the common transmission channels for information and opinions' (author's translation from Dutch).
5. For instance: Court of Appeal Antwerp 9 Feb. 2006, *AM* 2 (2006): 204 (qualifying a fax and e-mail newsletter as 'press'; Court of Appeal Mons 14 May 2008, *Journal des Tribunaux* (2009): 47 (confirming that 'the process of multiplication of texts expressing an opinion via an internet site is, in the current stage of technological evolution, comparable with and substitutable for print publishing and similar methods; it consequently constitutes a press crime which should be brought before the Cour d'Assises' (author's translation from French); Court of Appeal Brussels 19 Mar. 2010, *AM* 3 (2010) (forthcoming) (confirming that defamation via a text posted on an internet forum constitutes a press crime).

58. This does not alter the fact that a more extensive interpretation of the concept 'press' has been advocated.¹ The problem is that an extension of this concept in Article 25 would also lead to an extension of the competence of the '*Hof van Assisen*'/'*Cour d'Assises*', the Court that is competent for all press crimes, except those inspired by racism or xenophobia, according to Article 150 of the Constitution. Since the Second World War, however, only one 'press crime' has been brought before this court.² Hence, *de facto*, an extension of the concept 'press crime' would also lead to an extension of criminal immunity.³ Although Article 150 has been declared 'open for constitutional review' a number of times, this has still not led to an actual constitutional change.⁴ Consequently, it can be argued that the protection mechanism of Article 150 is rather weak.⁵

1. Jan Velaers, *De beperkingen van de vrijheid van meningsuiting* (Antwerp: Maklu, 1991), 70 and 194–196; Belgische Kamer van Volksvertegenwoordigers, Verslag 23 april 2007 namens de Commissie voor de herziening van de Grondwet en de hervorming der instellingen uitgebracht door Dhr. H. Hasquin en P. Tant, DOC 51 3056/005, 8, 32, <www.dekamer.be/FLWB/pdf/51/3056/51K3056005.pdf> (proposal to extend Arts 25 and 150 to other means of information).
2. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 86.
3. Caroline Uyttendaele, 'Bescherming van de communicatievrijheid in digitale omgevingen: verminderde bruikbaarheid van nationaal (grondwettelijk) recht?', in *Jaarboek Mensenrechten 2000–2001 van het Interuniversitair Centrum Mensenrechten*, ed. Interuniversitair Centrum Mensenrechten (Antwerp: Maklu, 2002), 36. Another problem lies in the tension between the application of the cascade liability under Art. 25 of the Constitution and the 'safe haven' provisions in the E-Commerce Act of 2003; see: Sandrien Mampaey & Evi Werkers, 'Drukpersmisdrijven in de digitale informatie-maatschappij: tijd om te bezinnen over de toekomst van art. 25 G.W.', *AM* 2 (2010): 150–165.
4. Jan Velaers, *De beperkingen van de vrijheid van meningsuiting* (Antwerp: Maklu, 1991), 202–203; Caroline Uyttendaele, 'Bescherming van de communicatievrijheid in digitale

omgevingen: verminderde bruikbaarheid van nationaal (grondwettelijk) recht?', in *Jaarboek Mensenrechten 2000–2001 van het Interuniversitair Centrum Mensenrechten*, ed. Interuniversitair Centrum Mensenrechten (Antwerp: Maklu, 2002), 41.

5. Jan Velaers, *De beperkingen van de vrijheid van meningsuiting* (Antwerp: Maklu, 1991), 29.

§3. NO A PRIORI CENSORSHIP

59. The Belgian Constitution, and more specifically Article 25, establishes a system based on a prohibition of preventive measures;¹ a priori censorship is not accepted. This entails that press freedom can only be restricted a posteriori. At first sight this article provides greater freedom than Article 10 ECHR,² but it has been argued that the constitutional protection in Belgium has been eroded over the past decades. Legislative measures which limit freedom of expression are very fragmented, and, moreover, courts have sometimes allowed far-reaching restrictions, such as confiscations of publications or publication bans. In 2000, for instance, the Belgian Supreme Court issued a judgment that stated that, if a certain publication has already been printed, published and distributed, a judicial distribution/publication ban imposed in summary proceedings is not contrary to Article 25.³ In addition, the Belgian Supreme Court argued in 2006 that the prohibition of preventive measures or censorship is not applicable to broadcasting.⁴

1. For more information: cf. Koen Lemmens, *La presse et la protection juridique de l'individu: attention aux chiens de garde!* (Brussels: Larcier, 2004), 603 p.
2. Cf. IEL Medialaw – Council of Europe, Volume X (forthcoming).
3. Cass. 29 Jun. 2000 (with comment of Eric Brewaeys), *AM* 4 (2000): 443: 'The judge who decides in summary proceedings that a magazine that has been printed and been offered for sale must be taken from the market, does not introduce censorship' (author's translation from Dutch).
4. Cass. 2 Jun. 2006, *AM* 4 (2006): 355:
Article 25 of the Constitution is not applicable to audiovisual media given that television broadcasts are not an expression by means of printed writings. [...] The judge in summary proceedings does not violate Art. 10 ECHR by preventively prohibiting the broadcasting of a television programme if he finds that this broadcast may needlessly damage the honour, reputation and private life of a third party (author's translation from Dutch).

60. Quite often in media cases summary proceedings are instituted. The aim is to obtain a judicial decision as quickly as possible in order to prevent a publication or programme from being distributed or broadcast. However, one can wonder whether the requirement of 'urgency' necessary to institute such proceedings exists when the publication has already been distributed. Recently, a number of summary proceedings aiming to prevent the publication of magazine articles,¹ to remove publications from the shelves or to prevent television programmes from being broadcast,² have been instituted unilaterally ('*op eenzijdig verzoekschrift*'). This, however, has been heavily criticized because of the disrespect for basic procedural guarantees.³

1. See, in particular, the famous *Humo* case: Pres. Court of First Instance Brussels (in summary proceedings) 4 Nov. 2008, 6 Nov. 2008 and 7 Nov. 2008 (with comment of Dirk Voorhoof), *AM* 6 (2008): 493–507; confirmed Court of Appeal Brussels (in summary proceedings) 31 Jul.

- 2009 (with comment of Koen Lemmens), *AM* 1 (2010): 86–99. *See also* about a similar case: Dirk Voorhoof, Rechter had meer eerbied voor de Pfaffs dan voor de Grondwet, *De Morgen*, 28 Sep. 2009, <www.psw.ugent.be/dv/page.aspx?id=5&cms=cms_dirk_voorhoof>.
2. E.g., Pres. Court of First Instance Brussels (in summary proceedings) 20 Feb. 2008, *AM* 4 (2008): 325, Pres. Court of First Instance Brussels (in summary proceedings) 29 Feb. 2008, *AM* 4 (2008): 327.
 3. Dirk Voorhoof, De persvrijheid en hoe ze te schofferen, *De Morgen*, 14/15 Nov. 2009, <www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/DeMorgen_MediazakenEV.18.11.pdf>; Paul Martens, 'Un juge peut-il être un censeur?', *AM* 5 (2003): 343–346; Jacques Englebert & Benoit Frydman, 'Le contrôle judiciaire de la presse', *AM* 6 (2002): 485–503.

§4. SPECTRUM OF A POSTERIORI RESTRICTIVE MEASURES

61. The Constitution does not prevent the imposition of a posteriori restrictions on the freedom of expression. This has resulted in a very broad and fragmented array of restrictive measures, aiming to protect a wide range of public interests, such as:

- protection of honour, reputation and rights of others (e.g., Articles 443–444 Criminal Code);
- protection against hate speech, racism and negationism (e.g., Articles 10–11 Constitution, Act of 30 July 1981 on the punishment of certain acts incited by racism or xenophobia, Act of 10 May 2007 to fight certain forms of discrimination, Act of 23 March 1995 on the punishment of denying, minimalizing, justifying or approving the genocide committed by the German national-socialist regime during the Second World War);
- protection of public decency (e.g., Article 383 Criminal Code);
- protection of military secrets and public security (e.g., Act of 30 November 1998 regulating the intelligence and security service);
- protection of privacy (e.g., Article 22 Constitution, Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data);
- protection in the framework of court reporting (e.g., Article 1270 Penal Code; Article 433*bis* Criminal Code);
- protection of minors (e.g., Article 383*bis* Criminal Code; Broadcasting Acts: *infra*);
- protection of public health (e.g., Article 65 FIRTA: prohibition of advertising for tobacco products);
- protection of consumers (e.g., advertising rules in broadcasting acts: *infra*; Act of 14 July 1991 on trade practices and the information and protection of the consumer);
- protection of commercial interests (e.g., Act of 11 April 1994 regulating access to public information).¹

1. Dirk Voorhoof, *Handboek Mediarecht* (Brussel: Larcier, 2007), 64.

§5. NO PRIOR AUTHORIZATION FOR PUBLISHING

62. Resulting from the special status attributed to the print press in Article 25, there is no legal registration or notification obligation for publishing a newspaper in Belgium. Consequently, publishing newspapers, magazines and books is free. Article 299 Criminal Code does stipulate that publishing a printed matter without the name and the place of residence of the writer or the printer is punishable (the so-called ‘responsible editor’ principle). This, however, is not considered a major obstacle to free publishing.

63. In accordance with the e-Commerce Directive,¹ Article 4 of the Belgian e-Commerce Act stipulates that the start and practise of an information society activity is not subject to a preliminary authorization or a similar obligation. Hence, publishing on the Internet is also free.

1. Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun. 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ L 178*, 17 Jul. 2000, 1.

Part II. Regulation of Print Media

Chapter 1. The Journalists' Profession

§1. NOTION

64. There are no legal registration or notification obligations to work as a journalist in Belgium. Journalism is an open profession, there even is no specific education required. The Act of 30 December 1963 on the recognition and protection of the title of professional journalist attaches a number of conditions to the use of the title '*beroepsjournalist*'/'*journaliste professionel*' ('professional journalist'), but – as mentioned – this title is not necessary in order to exercise the profession (it mainly offers the journalist some practical advantages): (1) being 21 years or older; (2) not being deprived of political and civil rights; (3) taking part in the editing of general reports for newspapers, magazines, radio or television, etc. as main occupation and against salary; (4) having exercised this activity at least two years; (5) not being involved in any form of trade. A Royal Decree of 12 April 1965 regulating accreditations and identification documents for journalists describes similar conditions for journalists working for the specialized periodical press.¹

1. Details regarding accreditations and identification documents for professional journalists are laid down in the Royal Decree of 12 Apr. 1965 regulating accreditations and identification documents for professional journalists and press companies.

65. It can be noted that the Belgian Constitutional Court interprets the notion of journalist in a very broad manner. In a case related to the Act concerning the confidentiality of journalistic sources the Court considered '*everyone who directly contributes, edits, produces or disseminates information aimed at the public via a medium*' a journalist (cf. *infra*).

§2. SUBSIDIES TO THE PRESS

66. The government has established a number of measures to provide (financial) support to the press. Initially, the federal state was in charge of granting subsidies to the press. Since 1978, such a system of direct support to the written press existed with the aim of ensuring pluralism in the press (reflecting all opinions in society) and guaranteeing the viability of the newspapers.¹ During the state reform of 1988, powers over press subsidies were transferred to the Communities (Article 4, 6°bis BWHI), which have since then established their own systems and developed

their own policies. For instance, in the Flemish Community a first agreement to safeguard a pluralist and independent opinion press was reached in 1993; in 1998 the Flemish government restructured the system of direct support and replaced it by a programme concentrating on digital diversification, education, and the preservation of good, quality based and autonomous editorial staff teams.

1. Act of 19 Jul. 1979 on the preservation of diversity in the newspaper press and the Royal Decree of 20 Jul. 1979 establishing the criteria and the modalities for the implementation of the Act of 19 Jul. 1979 on the preservation of diversity in the newspaper press.

67. The Flemish Government grants annual subsidies (one million EUR) to the print press. A protocol has been established between the Government and the Flemish press sector in which the conditions for the support are outlined. The overall objective is to ensure a high quality, pluralist and objective press. Emphasis is put on education and training in order to guarantee editorial skills and expertise, and on foreign coverage.¹ In addition, the Fund Pascal Decroos for exceptional journalism (*'Fonds Pascal Decroos voor bijzondere journalistiek'*) aims to support high quality, exceptional journalism in and outside Flanders, both in the print and audiovisual press. It grants subsidies to individual journalists who would like to work on an exceptional journalistic project, the costs of which exceed the normal budgetary capacities of the newspaper, editor or broadcaster. The Fund is financed by an annual grant from the Flemish Government (usually EUR 250,000 per year; although in 2009 a one-off extra amount of EUR 250,000 was made available by the Minister for Media, Ingrid Lieten), fees for membership (currently around EUR 9,000) and gifts.²

1. More information: <<http://www2.vlaanderen.be/media/Media/steun/geschrevenpers.htm>>. The protocol, for the period 2008–2010, can be retrieved from <<http://www2.vlaanderen.be/media/Ondertekende%20versie%20protocol%202008.pdf>>.
2. More information: <www.fondspascaldecroos.org/>.

68. The Press Fund of the French Community (*'Centre de l'aide à la presse écrite'*) grants several types of subsidies: (1) support for the creation of new titles; (2) support for long-term employment of journalists and use of new technologies; (3) support for the preservation of the largest possible diversity in newspapers (giving priority to less profitable titles); (4) support for initiatives to distribute newspapers in schools.¹ The Centre receives an (indexed) annual subsidy of EUR 6,200,000.² In addition, from 2009 onwards, the French Community Government also attributes EUR 250,000 a year to the *'Fonds pour le journalisme'* which supports investigative journalism.³

1. Act of the French Community of 31 Mar. 2004 relating to subsidies granted to the French-speaking press and for the development of newspaper reading initiatives at schools.
2. Up until 2008, the RTBF and a number of private broadcasters also had to contribute to the fund. From 2008 onwards the French Community is the sole contributor to the fund.
3. Decree of 27 May 2009 of the French Community Government attributing a subsidy to the AJP in order to establish a system of support to investigative journalism in the French Community, not published. More information: <www.fondspourlejournalisme.be/>.

Chapter 2. Journalists' Rights

§1. ROLE OF JOURNALISTS AS WATCHDOGS OF SOCIETY

69. Journalists enjoy a broader freedom of expression than the majority of citizens, because of the particular responsibility of the press as a watchdog of society. Jurisprudence has emphasized the importance of press freedom for the correct and adequate functioning of the state.¹ This watchdog function also entails that journalists have the right to criticize public persons and to write polemic, critical and even provoking articles.² However, at the same time journalists' behaviour is carefully scrutinized. Critique needs to be well-founded and based on objective indications, and cannot go so far as to constitute defamation.

1. Court of First Instance, Brussels 30 May 2001.
2. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 134. Also: Court of First Instance, Brussels 21 Mar. 2000:
Attendu, cependant, que le demandeur, en intervenant volontairement et publiquement dans des affaires aussi controversées que les 'dossiers X', dans le climat passionnel déjà évoqué, devait nécessairement avoir conscience qu'il s'exposait à la critique; Que, recherchant la publicité et la médiatisation de sa cause et de son action, le demandeur est mal fondé à se plaindre des retombées personnelles, éventuellement désagréables, que cette recherche a pu entraîner; Attendu que, dans ce contexte, la légèreté de la défenderesse ne peut être assimilée à une faute, au sens de l'article 1382 du code civil.

70. The Belgian Ethical Code for Journalists of 1982¹ recognizes the important role of journalists. The code was agreed to between the Belgian Association of Newspaper Publishers (*Belgische Vereniging van de Dagbladuitgevers*, BVDU), the General AJP's of Belgium (*Association Générale des Journalistes Professionnels*, AGJPB) and the Federation of Belgian Magazine Editors (*Fédération Belge des Magazines*, FEBELMA) in 1982.

1. <www.rvdj.be/node/63>.

§2. JOURNALISTS' INDEPENDENCE

71. The Belgian Ethical Code for Journalists of 1982 states that '*[n]ewspapers and journalists should resist pressure of any kind*'.

I. Written Press

72. In contrast to radio and television organizations (*infra*), there are no legal obligations for newspapers to have an editorial statute. However, in Belgium there exists a tradition of foundations ('*stichtingen*') within the (Flemish) newspapers. These foundations are established in order to take care of the editorial principles and values (in relation to editorial texts and advertisements) of the newspapers and the statutes of the foundations contain explicit safeguards with regard to the editorial staff's independence (e.g., guaranteeing the autonomy of the editorial staff). For example: in case of a change in the editorial cooperation with other newspapers,

the preliminary approval of the foundation is required, and in case of a change in ownership (to a shareholder or to a third party), the vendor or liquidator has to impose on the stakeholder or the third party the obligation to respect the editorial principles and values as described in the statutes. If the buyer acquires the titles without respecting the editorial line, he has to pay damages. The statutes also confer special powers on the editorial staff e.g., a preliminary advice of the foundation regarding the appointment or dismissal of a chief editor; a preliminary approval of the foundation regarding the appointment or dismissal of a journalist, trainee journalist and chief editor. A substantial change in the task of a journalist (e.g., he would be no longer linked to the editorial staff), is equated with a dismissal and therefore a preliminary approval of the foundation may be required. Nevertheless, the Flemish AJPs has called for a formalization of safeguards for editorial independence by introducing editorial statutes in all news media; they are of the opinion that the Flemish government has an essential role to play in that regard, for instance, by making press subsidies dependent on the presence of an editorial statute.¹

1. Cf., for instance, 'De Journalist' of 23 Mar. 2006, magazine of the VVJ, the Flemish AJPs, <www.agjpb.be/vvj/dejournalist_detail.php?nummer=90&jaar=2006>.

II. Audiovisual Media

73. With respect to audiovisual media, specific provisions regarding independence are laid down in the broadcasting legislation (*infra*; FIRTA and FrAMSA: e.g., licensing requirements for private broadcasters, political independence of broadcasters, and requirements with regard to news and current affairs programmes).

§3. PROTECTION OF JOURNALISTIC SOURCES

74. In the *Goodwin* case,¹ the European Court of Human Rights clarified that the confidentiality of sources must be considered a cornerstone of press freedom.² Journalists must not be compelled to disclose the confidential sources upon which they based their article or report, for example by imposing a disclosure order on them. An adequate protection of this right to confidentiality is of the utmost importance to enable journalists to fulfil their role as watchdogs of society.

1. European Court of Human Rights, *Goodwin v. United Kingdom*, 27 Mar. 1996.
2. Amongst journalists this has always been considered the most sacrosanct obligation of all obligations prescribed in these codes. The Declaration of duties and rights of journalists (Munich, 24 and 25 Nov. 1971) also describes it as a right, <www.mmc2000.net/docs/leggi/EU.pdf>; see also the Belgian Code of Journalistic Principles.

75. Although from 1971 onwards the confidentiality of sources was included in several national and international journalistic deontological codes, in Belgium the legislator only started to develop national legislation on the protection of journalistic sources after the conviction of the Belgian state by the European Court of Human Rights in the *Ernst* case in 2003.¹

1. European Court of Human Rights, *Ernst and Others v. Belgium*, 15 Jul. 2003.

76. The Act on the confidentiality of journalistic sources of 7 April 2005 grants journalists the right not to disclose their sources and prohibits investigative measures (e.g., interception of communication, surveillance and judicial search and seizure) vis-à-vis journalists if this could lead to a breach of the secrecy of their sources.¹

1. For more information: cf. Eva Lievens, Evi Werkers & Peggy Valcke, 'Exploring the Legal Boundaries of Online Journalism', in *Communication Crossroads: Limits and Transgressions*, ed. Pere Masip & Josep Rom, IV International Conference Communication and Reality, Barcelona: Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007, vol. I, 457–469; Dirk Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld* (Brugge: die Keure, 2008), 172 p.; Koen Lemmens, 'La protection des sources journalistiques', *Journal des Tribunaux* (2005): 669–676.

77. Immediately after the implementation of the Act, three actions for annulment were brought before the Belgian Constitutional Court.¹ The facts of one of the actions were the following: the applicant occasionally wrote contributions for newspapers and texts on the Internet, which were sometimes based on information from sources who wished to remain anonymous. She drew attention to the fact that the restrictive definition of 'journalist' in the Act excluded her from the scope *in personae*, because she did not act as a 'professional' journalist on a 'regular' basis. Article 2, 1° of the Act reserved the right to '*journalists, meaning every employed or self-employed person and legal entity who regularly and directly contributes to the collection, edition, production or distribution of information to the public through a medium*'. According to the applicant this was an obvious discriminatory violation of the freedom of expression and press freedom, as guaranteed by Articles 19 and 25 of the Belgian Constitution and several international Human Rights Treaties. With reference to the *Goodwin* case (*supra*), the Belgian Constitutional Court decided that everyone undertaking journalistic activities could invoke the aforementioned rules, which aim to guarantee press freedom. Ultimately, the Constitutional Court decided that Article 2, 1° of the Act indeed violated the Constitution and Article 10 of the ECHR to the extent that it denies the right to confidentiality of sources to certain persons, namely those practising journalistic activities without being employed or self-employed and those that do not practise journalistic activities on a regular basis. As a result, the Constitutional Court annulled part of Article 2, 1° of the Act and hence extended the scope of application of the Act to '*everyone who directly contributes, edits, produces or disseminates information aimed at the public via a medium*'. This is a very broad description and could, for instance, imply that bloggers who often publish news facts and/or opinions on their web pages would also fall within that scope.

1. Constitutional Court, 7 Jun. 2006, n° 91/2006.

Chapter 3. Journalists' Liability

§1. CASCADE LIABILITY

78. Article 25 of the Constitution establishes a cascade liability system. This entails that when the author of a publication is known and resides in Belgium, neither the publisher, nor the printer, nor the distributor can be prosecuted. The aim of the constitutional legislator was to prevent that a publisher would exert pressure on an author if there was a chance that the publisher would be prosecuted, even in cases where the author is known and lives in Belgium.¹

1. Constitutional Court, 22 Mar. 2006, n° 47/2006 (with comment Koen Lemmens), *AM* 3 (2006): 290–295.

79. The cascade liability system only applies to press crimes.¹ Hence, with regard to crimes which cannot be classified as a 'press crime' (*supra*), for instance, broadcasting crimes, the cascade liability is not applicable and hence, other individuals might be prosecuted.² Following the current de facto criminal immunity of press crimes (*supra*), in reality the cascade system only applies to press crimes regarding racism and xenophobia. From this finding the question arises whether the cascade liability system also applies to civil claims. For a long time there was no consensus in the legal doctrine, until in 1996, the Belgian Supreme Court answered the question affirmatively.³

1. Dirk Voorhoof, *Handboek Mediarecht* (Brussel: Larcier, 2007), 66.
2. *Ibid.*
3. Cass. 31 May 1996, *AM* 3 (1996): 362; Constitutional Court, 22 Mar. 2006, n° 47/2006. See: Dirk Voorhoof, 'De regel van de getrapte verantwoordelijkheid van de 19de naar de 21ste eeuw?', *R. Cass.* (1996): 385–389; R. Pierre, 'La responsabilité civile du journaliste', *AM* 1–2 (2000): 18–26.

80. With regard to the liability of journalists who exercise their profession under an employment contract, the Belgian Supreme Court decided that Article 18 of the Act of 3 July 1978 regarding employment contracts (which states that an employee is not liable for damages to his employer or third parties caused by an accidental, slight mistake) is not applicable to such journalists as this article is contrary to the spirit of Article 25 of the Constitution.¹ Hence, in principle, it will be the journalist, and the journalist only, who will be held liable, and not his publisher, unless a separate fault of the publisher can be demonstrated (e.g., making special publicity for the article concerned).²

1. Constitutional Court, 22 Mar. 2006, n° 47/2006.
2. Court of First Instance Hasselt 4 Jan. 2010, *AM* 2 (2010): 215.

81. In addition, it can be mentioned that although editors-in-chief have in certain cases been held jointly liable with the author of an illegitimate article,¹ because the publication occurred under their supervision and with their approval, more recent jurisprudence has been more reluctant to do so. Most courts apply, by analogy, the cascade rule of Article 25 of the Constitution, implying that the

editor-in-chief will only be held liable, together with the journalist, if he can be qualified as co-author by demonstrating that he committed a separate fault (e.g., by selecting the headline or accompanying picture).²

1. Court of First Instance Brussels, 23 Mar. 1989.
2. E.g., Court of Appeal Antwerp 8 Feb. 1999 (with comment of Dirk Voorhoof), *AM* 1999: 241; Court of Appeal Liège 19 Mar. 2008 (with comment of Jacques Englebert), *AM* 5 (2008): 414; Court of First Instance Brussels 15 Oct. 2009, *AM* 2 (2010): 210 (condemning a journalist and his editor-in-chief to civil damages amounting to EUR 600.000 for unfoundedly accusing a famous cyclist and his doctor of dope abuse during races).

82. Individuals who suffer material or moral damage through the fault (Article 1382 Civil Code) or through negligence or imprudence (Article 1383 Civil Code) of another individual (for instance, a journalist) can claim damages if they can demonstrate the causal link between the fault and the damage.¹ In this context, jurisprudence developed the criterion that the unlawfulness of a public statement needs to be judged from the perspective of a '*normal, careful and prudent journalist*'.² Although, according to Voorhoof, strict correctness, scientific accuracy nor absolute reliability can be required from a journalist with respect to a publication, journalists may not base themselves on rumours or unreliable information.³ Furthermore, although a journalist has a certain duty to investigate the reliability of his or her sources and the veracity of facts, this duty does not entail that a journalist may be held liable simply because an article contains inaccuracies.⁴ The unlawfulness of a publication will be assessed on a case-by-case basis, taking for instance into account: the context of the publication, the characteristics of the newspapers or journals in which writings are published and the function of individuals who have been criticized.⁵

1. Evi Werkers & Peggy Valcke, FLEET – An interdisciplinary research project on Flemish E-publishing Trends: State of the Art E-journalist & E-user (WP 2 & 3: internal report for IWT), March 2008, Leuven, 115.
2. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 130.
3. *Ibid.*, 138.
4. *Ibid.*, 139.
5. *Ibid.*, 142.

§2. DEFAMATION AND LIBEL

83. Although journalists enjoy a far-reaching freedom of expression, this does not extend to defamatory or libellous publications:

Considering that the journalist, as a consequence of the press freedom guaranteed by the Constitution, has the right to inform the public at his discretion, without, however, harming the rights or honour of third parties.¹

However, it can be noted that there will be a higher degree of tolerance with regard to criticism and insults directed at certain categories of persons, such as politicians. This has repeatedly been emphasized by case law, which often refers to the watchdog function of journalists (*supra*) in this context. However, journalists cannot field

completely unfounded accusations at politicians. Allegations at least need to be based on a grain of truth or serious and objective indications.

1. Court of First Instance Antwerp 28 Oct. 1987 (author's translation from Dutch).

84. In Belgium, defamation and libel is criminalized by Articles 443 and 444 of the Belgian Criminal Code. Article 443 considers that a person who maliciously charges someone of a certain fact, which may offend his honour or may expose him to public contempt, and which is not legally proven, is guilty of libel ('*laster*'/'*calomnie*') if the charge is not proven, or defamation ('*eerroof*'/'*diffamation*') when the law does not allow this proof. Article 444 determines the punishment (imprisonment and fine) that can be applied when the charges are made:

- in public meetings or places; or
- in the presence of several individuals in a place which is not public, but nevertheless accessible to a number of individuals which have the right to meet or visit; or
- wherever, in the presence of the offended individual and witnesses; or
- by means of writings, printed or not, by means of pictures or symbols, which are posted, distributed or sold, being offered for sale or publicly exhibited; or
- by means of writings which have not been made public, but which have been sent or communicated to several individuals.

85. It has been argued that defamation and libel on the Internet may fall within the scope of Articles 443 and 444 Criminal Code¹ and several courts have accepted this reasoning.² It can be noted that due to the characteristics of the new information and communication networks, such as the permanent and worldwide availability of information – defamation and libel on such networks may have further-reaching consequences than in traditional media.

1. Caroline Uyttendaele, *Openbare informatie – Het juridisch statuut in een convergerende mediaomgeving* (Antwerpen: Maklu, 2002), 282.
2. E.g., Court of Appeal Brussels 19 Mar. 2010, *AM* 3 (2010) (forthcoming).

§3. PRIVACY

86. In certain instances, the right to privacy, laid down in Article 22 of the Belgian Constitution, may impose restrictions on the freedom of the press.¹ Certain restrictions, related to the processing of personal data, follow from the Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data. However, it can also be noted that under certain conditions a number of provisions of this Act are not applicable if the processing of data is only done for '*journalistic, artistic or literary purposes*' (Article 3).

1. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 142.

87. Public figures may also invoke a right to privacy, for instance with regard to sensitive information, such as an individual's sexual inclination. In Belgium, a well-known case dealt with the outing of the homosexual nature of the members of

a famous pop group by a magazine.¹ The Court of First Instance was of the opinion that disclosing this kind of information can only be done by the person in question and, furthermore, that a homosexual person has the right to conceal this information. This was confirmed by the Court of Appeal. This Court was of the opinion that media figures may maintain a distinction between their stage persona and their own, real persona, and may cultivate a consciously designed image. In addition, the Court agreed with the Court of First Instance that it is not up to the media to reveal information about an individual's love life and sexual behaviour. The fact that the media disclosed this information caused a violation of the right to privacy and was considered by the Court to be a deliberate fault, which resulted in damage that needed to be indemnified on the basis of Article 1382 Civil Code.

1. Court of First Instance Ghent 22 Nov. 1999, confirmed in appeal: Court of Appeal Ghent 12 Jun. 2001.

88. In this context, we can also refer to the right to image (*'recht op afbeelding/droit à l'image'*), laid down in Article 10 of the Belgian Copyright Act.¹ According to this article an author or owner of a portrait as well as any other person who has a portrait in his possession, does not have the right to reproduce it nor distribute it to the public without the consent of the person portrayed (or the consent of his heirs for the duration of twenty years after his death).² The publication of an image without a person's consent may also be considered an infringement of a person's privacy.³ Although in some instances the publication of an image may be allowed (for instance, when private persons are recognizable in images of public demonstrations or in the framework of coverage of current events),⁴ strict conditions will need to be adhered to in order to prevent infringements on the right to privacy.

1. For more information on the right of image: Linde Dierickx, *Het recht op afbeelding* (Antwerpen: Intersentia, 2005), 345.
2. On the characteristics and the interpretation of the required consent, cf. Linde Dierickx, *Het recht op afbeelding* (Mortsel: Intersentia, 2005), 96–198.
3. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 145.
4. *Ibid.*, 148.

89. Certain persons, such as politicians, CEOs, judges, artists, sports people, etc. may also need to tolerate the publication of an image without their consent, in the context of the coverage of current events or with the aim to inform the public.¹ Yet, this does not entail that public figures should endure infringements on their right to privacy,² or that their images may be used for commercial reasons.³ In this context, we can refer to the 'Kim Clijsters' case. Following the 2003 US Open Final in which Kim Clijsters played Justine Henin, a magazine distributed a poster with a picture of both players taken at the prize ceremony. The Court of First Instance of Ghent decided that the photographer who took the picture – obviously taken with the consent of Clijsters, according to the Court – had the right to sell this picture even for a commercial publication.⁴ However, the Court of Appeal disagreed with this point of view and was of the opinion that although it may be accepted that a public person, such as a top sportswoman, tacitly consents to having her picture taken, this does not entail that such pictures may be commercialized, for instance in the form of merchandising products, such as a poster.⁵

1. Linde Dierickx, *Het recht op afbeelding* (Mortsel: Intersentia, 2005), 172.
2. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 146.
3. Cf. Dirk Voorhoof, 'Commercieel portretrecht in België', in *Commercieel Portretrecht*, ed. D.J.G. Visser (Amsterdam: Uitgeverij deLex, 2009, 302 p., 145–165.
4. Court of First Instance, Ghent 18 May 2005, *AM* 2005, 453.
5. Court of Appeal Ghent 21 Feb. 2008, *AM* 2008, 318.

90. In addition, in certain circumstances individuals may refuse having their image broadcasted in television reports or films, invoking their right to privacy.¹ Voorhoof also notes that conversations with persons who have clearly indicated that the conversation in question could not be broadcast, hidden camera images and images obtained by so-called 'raid' television, cannot be broadcast.²

1. Dirk Voorhoof, *Handboek Mediarecht* (Brussels: Larcier, 2007), 150.
2. *Ibid.*, 150–151.

Chapter 4. Right to Reply

91. The right of reply can be described as a non-pecuniary remedy attributed to a person, whose rights have been harmed by a publication based on erroneous facts, to obtain the publication of a reply, under the conditions provided for by law.¹ Victims of press crimes often choose to submit a claim for damages against the journalist, editor(-in-chief) or publisher. However, these claims often have the counterproductive effect of putting the contested information even more in the spotlight, which – in most cases – is exactly what the victim wants to avoid. In such circumstances, the right of reply seems to be an ideal solution.

1. In this respect the concept can be regarded as a restriction of the freedom of expression of publishers (who have to decide whether they grant a reply or not) and implicitly of the original author (often a journalist) whose statements were the cause of the request in the first place.

92. In Belgium, the Act of 23 June 1961 on the right of reply installs a very broad right of reply in the area of print media.¹ According to Article 1 everyone who is – explicitly or implicitly – mentioned in a newspaper article has the right to react to correct errors or defend his or her reputation. The Act contains detailed provisions regarding the formalities for the right to reply, the reasons why the insertion of a right of reply can be refused (e.g., because it is defamatory or violates public decency), and the penal sanctions to which an illegitimate refusal of the right of reply by newspapers may lead.

1. The right to reply in audiovisual media is discussed *infra*.

93. The Act on the right of reply of 1961 does not apply to electronic versions of newspapers. However, the lowered threshold to content production, exemplified by emergence of the Internet, has led to the delicate situation where anyone can make – founded or unfounded – statements about persons or businesses on a worldwide scale. This has given rise to the question of extending the right of reply, currently applicable mostly to traditional media, to all media.¹ Various legislative proposals aiming at harmonizing the rules for print and audiovisual and at stipulating similar rules for the Internet have been introduced in the Belgian federal parliament in previous years, but none of them has been adopted so far.^{2,3}

1. Cf. also Council of Europe (Committee of Ministers), Recommendation Rec (2004) 161 of the Committee of Ministers to Member States on the right of reply in the new media environment; European Parliament and Council Recommendation of the European Parliament and Council of 20 Dec. 2006 on the protection of minors and human dignity and on the right of reply, *OJ L* 378, 27 Dec. 2007, 72.
2. For more information, cf. Dirk Voorhoof, 'Het recht van antwoord in België: een inspirerend voorbeeld voor Nederland? Deel II', *Mediaforum* 5 (2001): 152–160; Internet Observatory, Recommendation on the right of reply in the media, 2006, <www.internet-observatory.be/internet_observatory/pdf/advice/advice_nl_005.pdf>.
3. For an analysis with respect to practical issues regarding the introduction of a right to reply in online media: Eva Lievens, Evi Werkers & Peggy Valcke, 'Exploring the Legal Boundaries of Online Journalism', in *Communication Crossroads: Limits and Transgressions*, IV International Conference Communication and Reality, ed. Pere Masip & Josep Rom (Barcelona: Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007), vol. I, 457–469; Evi Werkers, Eva Lievens & Peggy Valcke, 'A Critical Analysis of the Right of Reply in Online

Media', in *Proceedings of the 3rd International Conference on Automated Production of Cross Media Content for Multi-Channel Distribution ('Axmedis 2007')*, ed. Jaime Delgado, Kia Ng, Paolo Nesi & Pierfrancesco Bellini (Los Alamitos (California)-Washington-Tokyo: IEEE Computer Society, 2007).

94. However, to a certain extent, self-regulation has been adopted by newspaper publishers in the field of the right of reply in an online environment. Usually, when someone asks for a right of reply (e.g., someone is sentenced to imprisonment but cleared of charges in appeal), the newspaper will put a note under the article in the online archive, saying this person is cleared of charges in appeal.

Part III. Regulation of Audiovisual Media (Broadcasting)

110. The EU Audiovisual Media Services Directive (hereinafter: AVMS Directive), adopted at the end of 2007,¹ was implemented by the Flemish and French Community in the first half of 2009, several months before the deadline. One of the most important innovations, imposed by the Directive, is the extension of the scope of application from ‘television broadcasting’ to ‘audiovisual media services’. This broad category of services envelops both linear and non-linear (or on-demand) services. Whereas a set of basic obligations is imposed on non-linear services, linear services are subject to a number of more detailed requirements. Both the Flemish and the French Community Broadcasting Acts were revised in order to take these changes at European level into account.²

1. Directive 2007/65/EC of the European Parliament and of the Council of 11 Dec. 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJ L* 332, 18 Dec. 2007, 27. For more information on the Audiovisual Media Services Directive, cf. IEL Media Law – European Union (forthcoming); Peggy Valcke & Eva Lievens, ‘Rethinking European Broadcasting Regulation’, in *Rethinking European Media and Communications Policies*, ed. Caroline Pauwels, Harri Kalimo, Karen Donders & Ben van Rompuy (Brussels: VUB Press, 2009), 127–164; Peggy Valcke, David Stevens, Evi Werkers et al., ‘Audiovisual Media Services in the EU: Next Generation Approach or Old Wine in New Barrels?’, *Communications & Strategies* 71 (2008): 103–118.
2. The 2005 German-speaking Community Broadcasting and Cinema Act was amended in December 2009.

111. Furthermore, going one step further than the European legislator, both Communities considered it necessary to not only impose obligations on content providers and network operators (following the classic division between *content* and *transmission* regulation in the European legislative framework) but also on a third category of actors, i.e., the distributors.

112. To be more precise, the 2003 reform of the Broadcasting Act in the French Community already led to the introduction of new classifications of the different players in the broadcasting value chain: ‘*éditeurs de services*’,¹ ‘*distributeurs de services*’,² and ‘*opérateurs de réseau*’.³ This threefold classification was maintained in the 2009 French Community Audiovisual Media Services Act of 2009 (FrAMSA).⁴ When implementing the Audiovisual Media Services Directive, the Flemish legislator also was of the opinion that the category of distributors gained in importance in the audiovisual media landscape over the past decade.⁵ The example of its southern counterpart was followed and, hence, the 2009 Flemish Community Radio and

Television Broadcasting Act (FIRTA) now also applies to the three above-mentioned categories of actors:

- the ‘*editors of broadcasting services*’ (or ‘content providers’): those who produce (and have the editorial responsibility over) radio or television channels or other information services; this category of market players is subject to advertising rules, content regulations (protection of minors, prohibition of hate speech and racism), etc. Depending on whether they use scarce resources (*in casu* frequencies) or not, they will have to apply for a license or submit a notification (*infra*);
 - the ‘*distributors of broadcasting services*’ (or ‘service providers’): those who aggregate or package channels and services (either their own productions or acquired from third parties) into various bundles and offer these to end-users; they have to submit a prior notification or declaration to the respective media regulators (*infra*);
 - the ‘*network operators*’ (or ‘network providers’): those who control the technical exploitation of broadcasting networks and provide transmission capacity for the delivery of audiovisual media services. Operators of cable networks are subject to prior notification, operators of terrestrial networks have to apply for an individual authorization linked to a specific frequency (*infra*).
1. Editeur de services: ‘*la personne physique ou morale qui assume la responsabilité éditoriale du choix du contenu du service de médias audiovisuels et qui détermine la manière dont il est organisé*’; Art. 1, 16° FrAMSA.
 2. Distributeur de services: ‘*toute personne morale qui met à disposition du public un ou des services de médias audiovisuels de quelle que manière que ce soit et notamment par voie hertzienne terrestre, par satellite ou par le biais d’un réseau de télédistribution. L’offre de services peut comprendre des services édités par la personne elle-même et des services édités par des tiers avec lesquels elle établit des relations contractuelles. Est également considérée comme distributeur de services, toute personne morale qui constitue une offre de services en établissant des relations contractuelles avec d’autres distributeurs*’; Art. 1, 15° FrAMSA.
 3. Opérateur de réseau: ‘*toute personne morale qui assure les opérations techniques d’un réseau de communications électroniques nécessaires à la transmission et la diffusion auprès du public de services de médias audiovisuels*’; Art. 1, 28° FrAMSA.
 4. Article 2, §2 FrAMSA.
 5. In Flanders, for instance, Belgacom, Telenet and TV Vlaanderen can be considered to fall within this category of actors.

113. It can be noted that, in practice, market players will often perform several functions simultaneously; hence, they could fall under more than one of the above categories. A radio station transmitting over the air, for instance, acts at the same time as content provider (editing its own radio programme), service provider (offering its programme to the listener) and network provider (operating its own broadcasting equipment). The Flemish commercial television broadcaster, VMMA, is both editor and provider of broadcasting services, but is not a network operator (since it has no transmission facilities of its own; its channels are only distributed via the cable networks of other companies). However, maintaining the network and offering programme packages to end-users are different operations, which could also be performed by separate entities.

For an overview of Flemish Community legislation with regard to audiovisual media: cf. <www.vlaamseregulatormedia.be/nl/regelgeving.aspx>.

For an overview of French Community legislation with regard to audiovisual media: cf. <www.audiovisuel.cfwb.be/index.php?id=avm_regl_radiodif>.

Chapter 1. Public Service Broadcasting

§1. THE CONCEPT AND MISSION OF PUBLIC SERVICE BROADCASTING

I. History and Evolution

114. Although the public service broadcasting (PSB) organization – the NIR-INR, established in 1930 – was originally conceived as a countrywide organization, steps towards regionalization were taken in 1960, when its successors, the BRT (Flemish Community) and RTB¹ (French Community) were established.² Both public service broadcasters were subject to similar evolutions: the dissolution of the monopoly of the public broadcaster – in Flanders in 1989, in the French Community ten years earlier – the introduction of limited advertising as an additional means of financing, decreasing audiences due to competition, the reform of public service broadcasting and the challenges linked to the introduction of new technologies in the media landscape.³ The French Community public service broadcaster (RTBF, *infra*), however, has a significantly lower market share in comparison to its Flemish counterpart (VRT, *infra*), due, among other reasons, to the considerable popularity of French television channels.

1. RTB was renamed RTBF (*Radio-télévision belge de la Communauté française*) in 1978; BRT was renamed BRTN in 1991 and VRT (*Vlaamse Radio- en Televisieomroep*) in 1998. For more information: Frederic Antoine, *Les radios et les télévisions de Belgique* (Brussel: Editions Kluwer, 2000), 27–29.
2. Thomas Coppens, *Oprichting volbracht? Een studie naar de taken van de VRT (in opdracht van de Vlaamse Mediaraad)*, 2005, <http://publicaties.vlaanderen.be/docfolder/2623/Oprichting_volbracht_studie_taken_VRT_2005.pdf>, 19.
3. Thomas Coppens, *Oprichting volbracht? Een studie naar de taken van de VRT (in opdracht van de Vlaamse Mediaraad)*, 2005, <http://publicaties.vlaanderen.be/docfolder/2623/Oprichting_volbracht_studie_taken_VRT_2005.pdf>, 20.

II. Mission

A. Flemish Community

115. According to Article 6 FIRTA the mission of the Flemish PSB is to reach as many media users as possible with a diversity of high quality programmes which are of interest to these users. The VRT needs to provide a varied offer of high quality programmes in the fields of information, culture, education and entertainment (including sports and original fiction). Quality, professionalism, creativity and originality are of the utmost importance. There is an explicit mission to bring children's programmes. The programmes should contribute to the development of the identity and diversity of the Flemish culture and of a democratic and tolerant society. Through its programmes the VRT has to contribute to the formation of an independent, objective and pluralistic public opinion in Flanders. Importantly, Article 6 also states that the VRT should closely follow technological developments in order to offer, if necessary and desirable, its programmes via new media applications to its viewers and listeners.

116. The current management contract (*infra*) describes the PSB mission in detail. In addition to its core tasks which relate to a number of ‘public service domains’ (such as news and information, culture, sports, knowledge and science, Flemish identity, and entertainment: Article 4),¹ this mission also includes tasks in the field of media research and innovation, conservation and digitalization of the VRT archive, and the renovation of the VRT building (Article 1 VRT management contract). Through the fulfilment of its PSB task, the VRT must provide an added value to the Flemish society in the cultural, societal, democratic, social and economic sphere. The VRT must also support the Flemish media and image industry by means of (co-)productions and research projects concerning innovation. In addition, the VRT should be an ambassador of Flanders abroad. In the management contract, particular emphasis is put on the importance of a digital offer (Article 2 VRT management contract). The VRT must develop into a digital broadcasting organization, both with regard to its offer, production and distribution. Content must be offered via all relevant media: radio, television, Internet, mobile and all relevant analogue and digital networks.

1. With regard to these domains, the VRT must structure its offer on the basis of a three-track-policy: (1) a domain may be addressed through a subject in a programme on its general radio or television channels; (2) specific programmes may be made about the domains on its general radio and television channels; (3) a specific domain may be addressed by means of a specialized thematic offer (for instance, *Sporza* for sports) (Art. 4 VRT management contract).

B. French Community

117. According to Article 3 of the Act regulating the public service broadcaster of the French Community, RTBF, of 1997 (hereinafter: RTBF Act), the mission of the French Community, i.e., the RTBF, is to offer television and radio programmes to the French-speaking citizens of Belgium by various means. The RTBF must provide a diverse, varied offer, in different genres (information, entertainment, education, culture, youth, etc.), attracting for the widest possible audience, catering for both wide and narrow interests. Moreover, the RTBF must also promote social cohesion, while reflecting the different ideological, philosophical, religious, cultural opinions and ideas (also of social-cultural minorities) in society, contribute to a democratic and tolerant society and stimulate communication and public debate. In addition, the RTBF should make significant efforts in creating, and favouring original productions and in valorizing the French Community patrimony.

118. The current RTBF management contract (*infra*) specifies that the RTBF must also act as a driving force in promoting the cultural identity of the French Community in the domain of new media and has a major role to play in the digital switchover (Articles 33 and 35 RTBF management contract).

§2. THE ORGANIZATION OF PUBLIC SERVICE BROADCASTING

I. Flemish Community

119. In Flanders, the transformation of the BRTN into VRT, a company of public law,¹ signalled the separation between the public service broadcaster and politics. The management of the PSB was entrusted to an independent executive director, and his board of directors, who have a significant autonomy and decision-making power.² The VRT is currently governed by the general assembly of stakeholders, the board of governors and the executive director (Article 9 FIRTA). A Good Governance Charter (as required by Article 10 FIRTA) has been established.³

1. Article 3 FIRTA.
2. Thomas Coppens, *Oprichting volbracht? Een studie naar de taken van de VRT (in opdracht van de Vlaamse Mediaraad)*, 2005, <http://publicaties.vlaanderen.be/docfolder/2623/Oprichting_volbracht_studie_taken_VRT_2005.pdf>, 20.
3. <www.vrt.be/extra/Chart.pdf>.

120. The board of governors (*'raad van bestuur'*) is composed of minimum twelve and maximum fifteen members (Article 12, §1 FIRTA). The members of the board are appointed, for five years (Article 12, §4 FIRTA), by the Flemish government, taking the proportional representation of political parties in the Flemish Parliament into account (Article 12, §1 FIRTA and Article 19 Culture Pact Act).¹ A number of incompatibilities for members of the board are listed in Article 12 FIRTA (*infra*, rules on political independence of broadcasters). Competences of the board of governors include: the establishing the general strategy of the VRT and taking decisions regarding matters of strategic importance, approving of the management charter (*infra*), approving the business plan, drafting the annual accounts, approving rules regarding the hiring and legal status of personnel, appointing and firing members of the board of directors (on the recommendation of the executive director), supervising the executive director, drafting the framework within which the VRT implements merchandising and other side activities, etc. (Article 13 FIRTA).

1. All political parties represented in the Flemish Parliament propose candidates for the board, from which the Flemish Government has to choose.

121. The executive director (*'gedelegeerd bestuurder'*) is appointed as well as dismissed by the general assembly of shareholders (Article 14, §1 FIRTA). He is responsible for the operational management of the VRT. His competences are broad and include: preparing and implementing the yearly business plan as well as the long-term strategic business plan, developing new and improving existing services, products and processes, pursuing a coherent personnel policy, carrying out budget and accountancy transactions, managing the infrastructure, pursuing a contemporary communications and public relations policy, and determining the programme offer and the broadcasting schedule (Article 14, §2 FIRTA). The executive director is assisted by the board of directors, composed of a minimum of two members (Article 14, §3 FIRTA).

122. The relationship between the political shareholder, the Flemish Community, and the VRT, is formalized in the management contract (*'beheersovereenkomst'*) (Articles 16–21 FIRTA), which is renewable every five years (Article 19 FIRTA).¹ This management contract regulates in particular:

- (a) the quantifiable objectives with regard to the broadcasting offer in relation to the PSB task and strategy (e.g. quality control, audience ratings);
- (b) the objectives regarding the research and innovation tasks of the VRT in relation to the PSB task and strategy;
- (c) the objectives with respect to human resources management, financial management, technology and transmission;
- (d) the calculation of the financial means that are necessary to provide the public radio and television broadcasting offer, as well as the terms of payment;
- (e) the calculation of the financial means for the added task for research and innovation;
- (f) the provision of a yearly report regarding the execution of the management contract; and
- (g) the measures that will be applied in case of non-compliance by a party with the obligations laid down in the management contract (Article 17 FIRTA).

1. Management contract between the VRT and the Flemish Community Government 2007–2011, <www.vrt.be/extra/beheersovereenkomst_2007-2011.pdf> (hereinafter: VRT management contract).

II. French Community

123. The RTBF is an autonomous public undertaking with a cultural character and is established as a legal entity (Article 1 RTBF Act).

124. The RTBF is also governed by a board of governors (*'conseil d'administration'*) (Article 10 RTBF Act). This board may take all actions which are necessary to achieve the mission of the undertaking, and is composed of thirteen members, chosen by the Council of the French Community with respect for the proportional representation of political groupings (Article 11 RTBF Act). A number of incompatibilities for members of the board are listed in Article 12 RTBF Act (e.g., membership of the executive or legislative power at European, federal, community, regional and local level, a position in a minister's cabinet, membership of an organization which does not respect the democratic principles and any function which could create a conflict of interest). Members of the board can be dismissed by the Council of the French Community in case of a grave error, serious negligence or behaviour which is incompatible with their mandate. A president and three vice-presidents are chosen from the different political groupings (Article 15 RTBF Act). Together with the administrator-general (*infra*), the president and the vice-presidents of the board constitute the permanent committee (Article 16 RTBF Act). They are in charge of examining the dossiers that need to be submitted to the board of governors and other tasks that are delegated to this committee by the board.

125. The daily management, the representation in the context of this management and the execution of the decisions of the board of governors are entrusted to the administrator-general (under the supervision of the board of governors) (Article 17, §1 RTBF Act). The administrator-general (*'administrateur general'*) is appointed by the French Community Government, on the basis of a specific procedure (Article 17, §2bis RTBF Act) for a period of six years (Article 17, §2ter RTBF Act). An evaluation occurs halfway through and at the end of the mandate by external experts. A negative evaluation may in certain instances lead to dismissal; a positive end evaluation may lead to a renewal of the mandate (Article 17, §2ter RTBF Act). In addition to the administrator-general, a number of directors-general (*'directeurs généraux'*) are appointed (Article 17, 3–6 RTBF Act), also for a duration of six years. To each director-general, a number of directors (*'directeurs'*) are assigned (Article 17bis RTBF Act). A number of incompatibilities are listed with regard to the mandates of the administrator-general, directors-general and directors (Article 17, §6 RTBF Act; Article 17bis, §5 RTBF Act). The appointment of other directors, heads of the editorial staff, and editors-in-chief is regulated in Article 17ter RTBF Act.

126. According to Article 8 FrAMSA, the board of governors of the RTBF establishes five regional production centres (*'centres régionaux de production'*) (of which at least one is based in Brussels), whose main purpose is the production of programmes that are broadcast by the RTBF. A regional committee (*'commissions régionales'*) is established for each regional production centre to issue recommendations with regard to the functioning and production of the centre (Article 21 RTBF Act). Each committee is composed of twelve members, who are representing political, economic, social and cultural interests in the area of the regional production centre in question.

127. Within the RTBF a 'journalists' association' (*'société de journalistes'*) must be established (Article 19bis RTBF Act). This association must be composed of more than half of the professional journalists that work for the RTBF. They must be consulted with respect to significant changes in the editorial line, deontology, organization of the editorial staff and the appointment of the editor-in-chief.

128. The permanent advisory committee for radio and television (*'commission consultative permanente de la radio et télévision'*) provides advice (of its own accord or upon request) with regard to programme schedules and the general content of broadcasts (Article 20 RTBF Act). Members include for instance representatives of the ministers competent for culture and education, representatives of the regional committees and representatives of the personnel.

129. As is the case of the Flemish Community, a management contract (*'contrat de gestion'*) establishes the modalities under which the PSB fulfils its mission (Article 8 RTBF Act).¹ The management contract establishes the general principles

on which the execution of the public service tasks is based, and the measures that need to be taken with respect to:

- (a) determining the programming policy;
- (b) executing the tasks in the field of information, and the continuity of the public service in this respect;
- (c) realizing the development of culture, including the revaluation and promotion of the cultural activities of the French Community, of its patrimony in the Walloon region, Brussels and abroad, as well as the appropriate revaluation of the regional specificities;
- (d) promoting broadcasts in the field of permanent education;
- (e) ensuring the programming of qualitative entertainment broadcasts; and
- (f) considering and dealing with remarks and complaints of viewers and listeners (Article 8, §2 RTBF Act).

In addition, the management contract also specifies the allocation, calculation and terms of payment of subsidies; the sanctions in case of non-compliance with the obligations imposed in the management contract; and detailed rules regarding the calculation of and threshold for own production.

1. Management contract RTBF – Government of the French Community (2007–2011) (*Official Gazette* 4 Dec. 2006) (hereinafter: RTBF management contract).

§3. THE FINANCING OF PUBLIC SERVICE BROADCASTING

130. The public service broadcasters in Belgium are funded on a ‘dual funding’ basis. This entails that the major part of the financial resources originates from state funding (tax money), and that the other part is derived from commercial revenues (merchandising, advertising on radio, sponsoring on television and radio). Details of the state funding are included in the respective management contracts.

I. Flemish Community

131. According to Article 22 FIRTA, the VRT has the following resources: the financial means negotiated in the management contract, and the revenue from activities which the VRT may carry out, including the earnings from any form of distribution of the programme offer or parts of it to the public. The ratio between government funding and other resources is approximately 65%–35% (Chapter 7 VRT management contract).

132. With a number of European decisions regarding PSB and state aid in mind,¹ special safeguards and control mechanisms regarding advertising and merchandising activities have been included in the FIRTA and the VRT management contract

in order to respect the state aid rules, and avoid the distortion of competition (e.g., in the form of cross-subsidization). Article 8 FIRTA, for instance, determines that the VRT may carry out merchandising and side activities, connected or related to its public service mission:

- (a) if these activities occur within a framework approved by the board of governors;
- (b) if the activities aim to support, facilitate the distribution of or mitigate the costs of the programmes from the VRT offer;
- (c) if the activities are self-sufficient and the transparency of expenses and revenue is ensured via separate accounts; and
- (d) if the activities are carried out in accordance with market conditions and do not entail significant distortions of competition.

In addition, in the management contract certain ceilings are established with regard to advertising revenue (e.g., a maximum of EUR 40.9 million from radio advertising and a maximum of EUR 10 million from television sponsoring: Article 36 VRT management contract).

1. Including a case concerning VRT itself (case E 8/2006, decision of 27 Feb. 2008), *OJ C* 143, 10 Jun. 2008, 7. For more information: cf. <http://ec.europa.eu/avpolicy/reg/psb/index_en.htm>; Karen Donders & Caroline Pauwels, 'Does EU Policy Challenge the Digital Future of Public Service Broadcasting? An Analysis of the Commission's State Aid Approach to Digitization and the Public Service Remit of Public Broadcasting Organizations', *Convergence: The International Journal of Research into New Media Technologies* 14, no. 3 (2008): 295–311.

II. French Community

133. According to Article 27 RTBF Act, the resources of the RTBF include:

- (a) the French Community Government's subsidy, which is allocated in return for the execution of the management contract;
- (b) the revenue from non-commercial advertising, sponsoring, commercial advertising and other advertising and commercial transactions;
- (c) the earnings from the broadcasting of certain programmes stipulated in the management contract;
- (d) donations and bequests;
- (e) dividends and revenue from companies or institutions in which it participates; and
- (f) revenue of all sorts, which is compatible with the society's goal.

134. The ratio between government funding and other resources is approximately 70%–30% (Title 9 RTBF management contract). Article 55 RTBF management contract stipulates that revenue from advertising cannot exceed 27% in 2007, 28% in 2008, 29% in 2009 and 30% in 2010.

Chapter 2. Private broadcasting

§1. DIFFERENT CATEGORIES OF PRIVATE BROADCASTERS

I. Flemish Community

135. The following categories of private radio broadcasters are distinguished in Flanders:

- (1) Private *linear* radio broadcasters (Article 127 FIRTA):
 - (a) *National or communitywide* radio broadcasters: their task is to offer a range of programmes (including information and entertainment) to the whole of the Flemish Community (Article 137 FIRTA).
 - (b) *Regional* radio broadcasters: their task is to offer a variety of programmes (including regional information; regional cultural, sports and other events; and entertainment) to (a maximum of) one province (Article 140 FIRTA).
 - (c) *Local* radio broadcasters: their task is to provide a range of programmes (including local information and entertainment) to a city, municipality, a limited number of joined municipalities or a particular target group (Article 144 FIRTA).
 - (d) *Other* radio broadcasters: are broadcasters that transmit their programmes solely via a cable network, digital terrestrial network or via the Internet (i.e., all broadcasters who do not use FM frequencies) (Article 147 FIRTA).
- (2) Private *non-linear* radio broadcasters (Article 150 FIRTA): their task is to offer non-linear radio services on demand.

136. Different categories of private *television* broadcasters are listed in the FIRTA:

- (1) Private *linear* television broadcasters (Article 159 FIRTA):
 - (a) *Private commercial* television broadcasters: their task is to offer programmes; they may carry out activities that directly or indirectly contribute to the achievement of their goal (Article 160 FIRTA).
 - (b) *(Non-profit) Regional* television broadcasters: their task is to offer regional information (including news casts, background information, debates, election programmes and service programmes (Article 165 FIRTA).
- (2) Private *non-linear* television broadcasters (Articles 174–176 FIRTA): their task is to offer non-linear television broadcasting services, including in a digital manner.

II. French Community

137. Private *radio* broadcasting in the French Community is structured as follows:

- (1) *Analogue terrestrial* radio (Article 52 FrAMSA):
 - (a) *Network* radios (private radio broadcasting service using a network of frequencies)

- (b) *Independent* radios (private radio broadcasting service using one single frequency)

It can be noted that the French Community inserted several provisions in its broadcasting legislation dealing with ‘*radios associatives et d’expression à vocation culturelle ou d’éducation permanente*’ (‘*community radios*’). These are independent radios mainly staffed by volunteers with programmes focused either on information, education, cultural development and citizen’s participation, or on musical genres that do not belong to the most popular ones (Article 1, 42° FrAMSA).

- (2) *Other* private radios (Articles 59 et seq. FrAMSA)
 (3) *School* radios (Article 63 FrAMSA).¹

1. For more information: CRISP (Philippe Caufriez et Evelyne Lentzen), *Trente ans de radio en Communauté française (1978–2008)*, Courrier hebdomadaire 2009, n° 2033–2034.

138. The structure of *television* broadcasting in the French Community is as follows:

- (1) *Public* television broadcaster (RTBF, *supra*)
 (2) *Non-profit local* television broadcasters (‘*télévisions locales*’) (Articles 64–75 FrAMSA): a separate category of editors of broadcasting services with a specific authorization regime and a special public mission (*infra*)
 (3) *Private commercial* television broadcasters (not actually mentioned as such;¹ no further distinctions are made).

1. Except in the subtitles of Title VI (Network operators), Ch. III (Terrestrial networks), s. 1 (Awarding of frequencies): ‘IV: *Les services télévisuels privés en mode numérique*’ and ‘V: *Les services télévisuels privés en mode analogique*’; and in Art. 138 §2 7° FrAMSA regarding the composition of the *Collège d’avis* of the CSA.

§2. LICENSING REQUIREMENTS

I. Flemish Community

A. Radio Broadcasters

139. *Communitywide* radio broadcasters, *regional* radio broadcasters as well as *local* radio broadcasters must be awarded an authorization by the Flemish government (on the basis of the frequency plans) in order to dispose of one or more FM or AM frequencies (Articles 128 and 132 FIRTA). Their broadcasting programmes may be transmitted via cable networks, digitally via terrestrial networks, via satellite networks or via the Internet (Article 133 FIRTA). The VRM awards broadcasting licenses to authorized communitywide, regional and local radio broadcasters.¹

1. More details on the procedure and criteria are stipulated in the Decree of the Flemish Government of 30 Mar. 2007 on the procedure and criteria for the authorization of communitywide, regional and local FM radio stations.

140. The authorizations are awarded for a duration of nine years (Article 134 FIRTA). If a broadcasting organization is not broadcasting nine months after the authorization decision, the authorization may be revoked (Article 134 FIRTA). At least one year before the expiry date a new authorization request must be submitted (Article 134 FIRTA). If the Flemish government has not reached a decision six months before that date, the authorization will be extended tacitly for one year.

141. The transmission equipment of the communitywide, regional and local broadcasters must be situated in the Dutch-speaking region or in the bilingual region of Brussels-Capital, and in the service area of the communitywide, regional or local broadcaster (Article 135 FIRTA). The broadcasters must use technical equipment which is in conformity with the requirements determined by laws and decrees, and must adhere to the provisions of their broadcasting license (Article 135 FIRTA).

142. In order to be awarded an authorization the communitywide, regional and local radio broadcasting organizations must adhere to certain requirements.

143. The *communitywide* radio broadcaster must (according to Article 138, §1 FIRTA):

- (a) adhere to the requirements laid down in Articles 129 (broadcast in Dutch), 130 (be independent from a political party), 131 (newscasts must be produced under the direction and responsibility of an editor-in-chief, according to an editorial charter which guarantees editorial independence) and 135 (*supra*, paragraph 141);
- (b) be established as a legal entity; the entity's goal is to produce radio programmes. The communitywide broadcasters may perform all acts which contribute directly or indirectly to this goal, insofar as these activities coincide with or are linked to the broadcasting activities. The members of the board of governors cannot have a political mandate, and cannot be a governor of the public broadcaster or of another legal entity which manages a communitywide radio broadcaster;
- (c) (the legal entity) must not exploit more than two communitywide radio broadcasters;
- (d) must broadcast at least four newscasts a day which cover a range of subjects. Newscasts and informative programmes must be produced by the broadcaster's own editorial staff, composed of a majority of professional journalists, under the responsibility of an editor-in-chief;
- (e) must guarantee a Dutch language music offer in its programme schedule.

The Flemish government may impose additional qualification criteria (Article 138, §2 FIRTA).

144. The *regional* radio broadcaster must (according to Article 141, §1 FIRTA):

- (a) adhere to the requirements laid down in Articles 129 (broadcast in Dutch), 130 (be independent from a political party), 131 (newscasts must be produced

under the direction and responsibility of an editor-in-chief, according to an editorial charter which guarantees editorial independence) and 135 (*supra*, paragraph 141);

- (b) be established as a legal entity; the entity's goal is to produce radio programmes. The regional broadcasters may perform all acts which contribute directly or indirectly to this goal, insofar as these activities coincide with or are linked to the broadcasting activities. The members of the board of governors cannot have a political mandate, and cannot be a governor of the public broadcaster or of another legal entity which manages a communitywide or regional radio broadcaster;
- (c) (the legal entity) must not exploit more than two regional radio broadcasters;
- (d) must broadcast at least four newscasts a day which cover a range of regional subjects. Newscasts and informative programmes must be produced by the broadcaster's own editorial staff under the responsibility of an editor-in-chief. For national and international news the broadcaster may rely on an editorial staff which, through its editorial charter, offers sufficient guarantees with regard to journalistic deontology, impartiality and editorial independence.

The Flemish government may impose additional qualification criteria (Article 141, §2 FIRTA).

145. The *local* broadcaster must (Article 145 FIRTA):

- (a) adhere to the requirements laid down in Articles 129 (broadcast in Dutch), 130 (be independent from a political party), 131 (newscasts must be produced under the direction and responsibility of an editor-in-chief, according to an editorial charter which guarantees editorial independence) and 135 (*supra*, paragraph 141);
- (b) be established as a legal entity; the entity's goal is to produce radio programmes; the local broadcasters may perform all acts which contribute directly or indirectly to this goal, insofar as these activities coincide with or are linked to the broadcasting activities;
- (c) (the legal entity) must not exploit more than one private radio broadcaster;
- (d) offer local information on a daily basis, with particular attention to the announcement and coverage of social-cultural, sportive, economic and political events in its service area; at least three newscasts, which include local subjects, must be produced on a daily basis under the responsibility of an editor-in-chief; cooperations with other broadcasters cannot have a negative impact on the independence of the coverage; for national and international news the broadcaster may rely on an editorial staff which, through its editorial charter, offers sufficient guarantees with regard to journalistic deontology, impartiality and editorial independence;
- (e) provide the following information: location of broadcasting, location of establishment, available infrastructure, articles of association, financial structure and financial plan, programme offer, editorial charter, broadcasting schedule, name of the editor-in-chief, contributors to the radio broadcaster (including their radio experience and their status).

The Flemish government awards the authorization on the basis of the concrete inclusion of information on the service area in the programme offer, and the connection that has been established with the local community (Article 146 FIRTA). Additional criteria may be imposed by the Flemish government.

146. According to Articles 147 and 149, §2 FIRTA *other* radio broadcasters have to submit a notification to the VRM, at least fourteen days before the start of the service (following the procedure described in Article 219 FIRTA), for each separate broadcasting programme. Such a notification is not required for authorized communitywide, regional and local radio broadcasters who transmit their programmes via a cable network, digital terrestrial network, satellite network, or via the Internet. It can be noted that according to Article 149, §1 FIRTA anyone can offer radio services insofar as the broadcasting organization is set up as a legal entity, falls within the competences of the Flemish Community and fulfils the conditions stipulated in Articles 129 (broadcast in Dutch), 130 (be independent from a political party), and 131 (newscasts must be produced under the direction and responsibility of an editor-in-chief, according to an editorial charter which guarantees editorial independence).

147. Furthermore, anyone can offer *non-linear* radio services insofar as the broadcasting organization is set up as a legal entity and falls within the competences of the Flemish Community (Article 150, §1 FIRTA). The VRM has to be notified at least fourteen days before the start of the service (following the procedure described in Article 219 FIRTA). The notification must contain at least the following information: location of broadcasting, location of establishment, manner of transmission and the articles of association.

B. Television Broadcasters

148. *Private* linear television broadcasting organizations must, for each broadcasting programme (Article 162 FIRTA), submit a notification to the VRM at least fourteen days before starting to offer linear television services, again in accordance with the procedure described in Article 219 FIRTA (Article 161 FIRTA). Information that needs to be included in the notification is: all information and facts that can be used to determine whether the Flemish Community is competent with regard to the television service in question, the articles of association, the financial structure and a clear description of the service. According to Article 163 FIRTA, anyone can offer private linear television services insofar as:

- (a) the provider is set up as a legal entity and falls within the competences of the Flemish Community;
- (b) the entity's goal is to offer linear television services (excluding regional television services, *infra*);
- (c) the private broadcasting organization is independent from a political party;
- (d) the broadcasts fall under the editorial responsibility of the staff;
- (e) the private broadcasting organization broadcasts in Dutch (excluding exceptions allowed by the Flemish Government).

149. Linear *regional* (non-profit) television broadcasting organizations must be awarded an authorization by the Flemish Government before they can start broadcasting (Article 166 FIRTA). In order to receive such an authorization the following information must be provided: all information and facts that can be used to establish whether the television service in question falls within the competences of the Flemish Community, the articles of association, the financial structure, the programme offer and the broadcasting schedule (Article 167 FIRTA). Maximum eleven broadcasting organizations can be authorized to broadcast regionally, each within a specific service area (Article 168 FIRTA). The criteria for being granted an authorization are stipulated in Article 169 FIRTA:

- (a) the broadcasting organization must be set up as a non-profit organization¹ (of which the director must not be a director of another organization that owns or manages a regional television broadcasting organization);
- (b) the registered as well as the exploitation office must be located in the Dutch-speaking region or in the bilingual region of Brussels-Capital, and more specifically within their service area;
- (c) the organization's goal is limited to the offering of regional programmes;
- (d) one organization does not exploit more than one regional broadcasting service;
- (e) the regional broadcasting organization is independent from a political party, a professional organization or an organization with a commercial goal;
- (f) the regional broadcasting organizations broadcast in Dutch (excluding exceptions allowed by the Flemish Government);
- (g) the regional broadcasting organizations broadcast own programmes (in which the organizations strive to develop opportunities for expression of the local population and encourage their participation);
- (h) the broadcasting programme concerns for at least 80% the own regional service area;
- (i) an editor-in-chief is responsible for the newscasts; editorial independence is guaranteed and laid down in an editorial charter;
- (j) the regional broadcasting organizations provides a yearly activity and financial report.

Authorizations are awarded for a duration of nine years, and may be renewed for another nine years upon request (at least six months before the authorization expires) (Article 170, §1 FIRTA). The VRM may – at any given moment – suspend or revoke the authorization if the authorization requirements are not fulfilled (Article 170, §2 FIRTA). However, the Flemish government may suspend the consideration of the suspension or cancellation of the authorization for three months in order to allow the broadcasting organization to meet the requirements. Additional stipulations relate to the composition of the general assembly (Article 171 FIRTA: representative composition, taking into account political, social, cultural, philosophical and regional criteria) and the executive board (Article 172 FIRTA: representative composition and incompatibilities regarding political mandates, and executive functions in professional associations, media companies or cable network operators).

1. The Flemish Government awards certain subsidies to regional television broadcasters, for instance with regard to digital and interactive developments, training for young journalists or subtitling of programmes. For more information: <<http://www2.vlaanderen.be/media/Media/regelgeving/index.htm>>.

150. With regard to private *non-linear* television services a notification must be submitted to the VRM at least fourteen days before the start of the service (Article 175 FIRTA). The notification must be submitted in accordance with the procedure in Article 219 FIRTA and must contain at least: all information or facts that help to determine whether the Flemish Community is competent with respect to the service in question, the articles of association as well as a clear description of the service. Non-linear television services can be offered insofar as:

- (a) the entity that offers the service is set up as a legal entity and falls within the competences of the Flemish Community;
- (b) the entity's goal is to offer non-linear television services, including in a digital manner (Article 174 FIRTA).

The non-linear television broadcasting organizations may broadcast entirely or partly in an encoded manner, must be independent from a political party and must broadcast in Dutch (excluding exceptions allowed by the Flemish Government).

II. French Community

151. First of all, it can be noted that, according to Article 36 FrAMSA, all editors of audiovisual media services that are distributed via a closed distribution platform¹ must fulfil a number of conditions:

- (a) they must be a commercial undertaking, with only nominative shares;
- (b) if they broadcast information, such programmes must be run by professional journalists who are bound by an employment contract; an internal charter must be established in order to guarantee impartiality; and an internal association of journalists must be set up in order to discuss significant changes in the editorial line, the organization of the editorial staff and the appointment of the editor-in-chief; and
- (c) they must be independent from government, political parties or representative organizations.

For editors of radio services that are distributed via a closed distribution platform, additional obligations are stipulated in Article 61 FrAMSA. Both these provisions were introduced in order to exclude services which are distributed via an open platform, such as the Internet, from such obligations.

1. The definition of such a platform is included in Art. 1, 31° FrAMSA.

152. Editors of *television* broadcasting services must submit a notification or declaration (*'déclaration'*) to the *Collège d'autorisation et de contrôle* of the CSA

for each of the services that they intend to edit (Article 38 FrAMSA). This notification must contain the following data:

- (a) name of the editor and the television services;
- (b) address of the registered and exploitation office of the editor;
- (c) articles of association of the editor (if set up as a legal entity);
- (d) data related to the shareholder status of the editor (if set up as a commercial undertaking);
- (e) a three-year financial plan;
- (f) the nature and description of the service;
- (g) the deadline for broadcasting;
- (h) information related to the distributors of the service; and
- (i) the commercial terms for the service, if the editor is also the distributor of the service.

The declaration is passed on to the Minister competent for audiovisual services, and to the General Secretariat of the French Community (Article 39 FrAMSA).

153. A similar declaration (and procedure) is required for editors of *radio* broadcasting services that are transmitted via other means than an analogue terrestrial network (Articles 59 and 60 FrAMSA).

154. Editors who wish to use *radio frequencies* to transmit radio or television services in an analogue or digital manner by means of a terrestrial network must obtain an authorization.

- (a) *Private* radio broadcasters (analogue): According to Articles 52 et seq. FrAMSA, editors of private radio broadcasting services must be awarded an authorization from the *Collège d'autorisation et de contrôle* of the CSA for each service, following an invitation to tender (described in Article 105 FrAMSA). A number of obligations are imposed in order to qualify for an authorization (in addition to Article 36 FrAMSA, *supra*): content obligations on the one hand (cultural promotion, 70% own programmes, broadcasting in French, quota for French music) and technical obligations on the other hand (conformity with technical norms, technical maintenance by qualified technicians) (Article 53, §2 FrAMSA).¹ The tendering procedure is described in Article 54 FrAMSA; the awarding procedure is detailed in Articles 55–57 FrAMSA. Authorizations² are awarded for nine years (Article 55 FrAMSA). The use of a frequency is subject to an annual remuneration (Article 100, §2 FrAMSA).
- (b) The *community* radios (*supra*, paragraph 137) can also apply for a frequency, in which case they are exempted from remuneration (Article 109, §2 FrAMSA). The CSA can approve voluntary exchange of frequencies amongst such radios or between those and other categories of radios (Article 57 FrAMSA). The French Community Government can also grant subsidies to this category of radios. The amount may vary on the basis of whether or not these radio stations rely on commercial communication and on the basis of the

distribution mode, but the total amount of subsidies cannot exceed EUR 100,000 (Article 166 FrAMSA).

(c) *School radios*: According to Article 63 FrAMSA primary or secondary school institutions organized or subsidized by the French Community may be authorized by the government to run a school radio. The allocation of radio frequencies for this purpose is described in Article 107 FrAMSA.

1. Additionally, network radios are obliged to contribute to the financing of the '*Fonds d'aide à la création radiophonique*' ('Fund to help radio creation') (Art. 53, §3 FrAMSA). This fund supports the development of radio productions in the French Community (cf. Art. 164 et seq. FrAMSA).
2. More details on the content of the authorization is included in Art. 58 FrAMSA.

155. As mentioned above, a separate title in the FrAMSA is dedicated to '*L'édition locale de service public télévisuel*' or *non-profit local* television broadcasters. Their mission is to produce and realize programmes containing information, animation, cultural development and permanent education, and to promote the active participation of the population in their service area (Article 65 FrAMSA). The French Community Government can award an authorization to such a broadcaster for a (renewable) period of nine years (Article 64 FrAMSA). An authorized organization receives, within certain limits, an annual subsidy (Article 75 FrAMSA).

156. In order to be granted an authorization, an extensive list of requirements must be fulfilled (for instance the broadcasting organization must be set up as a non-profit organization; must deposit a financial plan, which demonstrates that it is economically viable for a period of three years; must provide own productions; must establish an internal association of journalists; must be independent; and so on: Article 69 FrAMSA). In addition, a local broadcaster must guard the diversity and quality of its programmes, which should enable social cohesion while at the same time addressing the expectations of socio-cultural minorities, and should reflect different ideas in society without discrimination, except for non-democratic ideas. Such programmes must provoke a debate and clarify the democratic challenges, contribute to the strengthening of social values and encourage the integration and welcoming of foreign population groups in the French language region and the bilingual region of Brussels-Capital (Article 68, §1 FrAMSA). Local broadcasters must also valorize the cultural patrimony of the French Community and its local specificities (Article 68, §2 FrAMSA). Article 70, §1 FrAMSA stipulates that local television broadcasters must cooperate with the RTBF and its regional centres, for instance with regard to exchanging images and programmes, and to co-productions. Local television broadcasters may also set up an association (Article 70, §2 FrAMSA), which may be recognized and receive a subsidy by the Government (Article 70, §2 FrAMSA). A number of requirements regarding the organization of local television broadcasters have been stipulated in Article 71 FrAMSA. For instance: at least half of the members of the board of governors of such organizations should consist of representatives of the cultural sector; maximum half of the members of the board of governors of local television stations may consist of political representatives (i.e., persons with a political mandate); the members of the board of governors of local television stations who have a political mandate should

represent in a proportionate manner the political parties in the councils of the municipalities located within the service area of the local television (in Brussels-Capital: proportionate representation of the political parties in the Parliament of the French Community); etc.

N.B. Please note that the licensing and notification requirements for distributors and network operators are discussed *infra*, Chapter 7 'Access to networks and platforms'.

Part IV. Cross-Ownership regulation

§1. INTRODUCTION

262. Given the peculiarities of the Belgian federal state (dividing the powers for media between the federal State and the Communities, *supra*), no global act on media concentration can be enacted by either the federal State (competent for press, film, information society services) or by the Communities (competent for radio and television broadcasting). So far, there seems to be no willingness to cooperate for enacting such cross-ownership rules. To a large extent, this is due to the limited scale of the Flemish and Walloon media markets (in the light of the language differences, there is no single Belgian media market), refraining legislators from imposing stringent concentration rules.

§2. MONOMEDIA OWNERSHIP RESTRICTIONS

263. A limited number of ownership rules exist for specific categories of radio and television stations, based on the number of licenses (in Flanders) or capital or audience shares (in Wallonia). The FIRTA prescribes that one legal person cannot operate more than *two communitywide* (i.e. Flemish) FM radio stations; direct or indirect links cannot lead to the same undertaking or legal person controlling more than two communitywide FM radio stations¹ (Article 138, §1, 2°, b FIRTA). The same rule applies for *regional* FM radio stations (Article 141, §1, 2°, b FIRTA). For *local* radio stations, it is prohibited to operate another radio station (be it another local radio or another radio of a different type, including cable radios; Article 145, §1, 2°, b FIRTA). It is also forbidden to control more than one communitywide and one regional radio station at the same time (Article 141, §1, 2°, b FIRTA). It is also forbidden to operate two regional television stations with the same legal person (which should be a non-profit organization, in Dutch a '*vereniging zonder winstoogmerk*' or '*vzw*', in French '*association sans but lucratif*' or '*asbl*').

1. The latter phrase has been introduced by the Act of 2 Feb. 2007 which amended the 2005 Flemish Community Radio and Television Broadcasting Act, to address the concern about the ineffectiveness of the initial provision (in its Annual Report of 2006, the VRM had pointed out that the initial rule could not prohibit mergers or cooperation agreements giving one operator control over another licensee as long as the latter retained a distinct legal personality).

264. In the French Community, legal or natural persons that hold more than 24% of the capital of a radio or television broadcaster, cannot control, directly or

indirectly, more than 24% of the capital of another radio broadcaster, respectively another television broadcaster. If this should be the case, they may be designated by the CSA as having a significant position, which may result in sanctions (*infra*). The same goes for legal or natural persons controlling, directly or indirectly, several radio broadcasters, respectively television broadcasters, whose accumulated audience share exceeds 20% (Article 7 FrAMSA). Concentrations in the radio sector are subject to the approval of the CSA: it can approve the merger of community radios (literally ‘*radios associatives et d’expression à vocation culturelle ou d’éducation permanente*’, *supra*); of community radios with independent radio stations; of independent radio stations; of independent radio stations with network radios or of network radios, on the condition that the radios concerned use frequencies in different areas and that in cases where a community radio is concerned, the merger does not change the nature of that radio. The merger can only be allowed for reasons of economic feasibility of the radio(s) and is without prejudice to Article 7 (control of ‘significant position threatening media pluralism’; *infra*).

§3. CROSSMEDIA OWNERSHIP RESTRICTIONS

265. Apart from the general merger control rules, which are laid down in the federal Act on the protection of economic competition, coordinated on 15 September 2006,¹ there are virtually no crossmedia ownership restrictions in the media sector. This is mainly the result of the division of powers in Belgium between the federal state (press, film, etc.) and communities (radio and television), limiting each legislator’s scope for action to one of these media types (*supra*). In the French Community, however, there is a special rule for local television stations, prohibiting their control, directly or indirectly, by another radio or television broadcaster, a distributor of broadcasting services, an advertising agency or a holding company (*‘société à portefeuille’*) (Article 67, §1, 3° FrAMSA).

1. Interesting merger cases in the media sector include the takeover by cable operator Telenet of Canal+, the only pay TV operator active in Flanders, mentioned *supra*, para. 45, and the acquisition of both the Flemish and Walloon business newspapers, *De Tijd* and *L’Echo*, by *Mediafin* (controlled by De Persgroep and Rossel), mentioned *supra*, para. 38. In each of these cases, the Competition Council conditionally cleared the concentration.

§4. RESTRICTIONS OF BOARD MEMBER POSITIONS

266. It is typical for the Flemish broadcasting legislation to limit control over media companies, not via an ownership share model, but through limiting the number of executive boards of which a single person can be a member:

- one cannot be a member of the board of governors of more than one communitywide radio in Flanders, nor can a member of the board of governors of a communitywide radio also be a member of the executive board of the public service broadcaster (Article 138, §1, 2°, a FIRTA);

- one cannot be a member of the board of governors of more than one regional radio station in Flanders, nor can a member of the board of governors of a regional radio station also be a member of the executive board of a communitywide radio or of the public service broadcaster (Article 141, §1, 2°, a FIRTA);
- one cannot be a member of the board of governors of more than one regional television station (Article 169, 1° FIRTA).

267. There is only one similar restriction to combining positions in various executive boards of radio or television broadcasters in the French Community: one cannot combine membership of the board of governors of a local television station with holding a position at or being member of the executive board of other editors of broadcasting services or of press companies (Article 73 FrAMSA).

§5. RESTRICTIONS OF COOPERATION AGREEMENTS

268. In order to safeguard the specific character of each radio station, cooperation/networking/affiliation agreements between terrestrial radio stations (and with the public broadcaster of the Flemish Community) are restricted in Flanders. Radio stations may only cooperate in ‘ad hoc’ cases (for instance, at the occasion of a special event) and/or cooperation may not lead to ‘structural uniformity’ in the programming policy (for instance, cooperation for advertising purposes is allowed, but not for the production of programmes; see Articles 137 and 144 FIRTA). Affiliation agreements between local radio stations have to be limited to a maximum of sixty radios (Article 144, al.3 FIRTA).

§6. TRANSPARENCY OBLIGATIONS

269. The French broadcasting legislation imposes transparency obligations on radio and television broadcasters. *First*, they have to ensure transparency towards the public: all editors of broadcasting services have to make available ‘basic information’ to the public in order to allow it to form its opinion about the value of information and ideas distributed in the programs of that editor (Article 6, §1 FrAMSA). *Second*, in order to ensure transparency of ownership and control structures, as well as their level of independence, editors, distributors and network operators are obliged to send the regulator (CSA) the following information: the identification of shareholders (and percentage of shareholding), the interest of these shareholders in other broadcasting or media companies, and the identification of natural or legal persons active in programme supporting businesses, contributing to a substantial level to the production of programmes.

270. There are no special obligations for newspapers to identify their owners/shareholders (e.g., in their newspapers or on their website, or to a monitoring body) or provide transparency with regard to ownership/capital structure. But newspapers are subject to the competition rules in the same way as they apply to other sectors.

§7. MONITORING OF OWNERSHIP AND PLURALISM

271. The VRM has the task to ‘map’ (monitor) concentrations in the Flemish media sector and to report annually (Article 218, § 2, 8° FIRTA). In 2007 it developed a ‘media database’, which is used for its annual reports on media concentration¹ and for ad hoc reports in response to specific questions. The purpose is merely to enhance transparency; the regulator cannot take any action in case of increases in concentration which may endanger pluralism.

1. The first report on media concentration was published in 2008. It is available, together with the latest report from 2009, at <www.vlaamseregulatormedia.be/nl/documentatie.aspx>.

272. In its Broadcasting Act of 2003, the French Community introduced a monitoring system with a view to protecting media pluralism. But, as the scope of this mechanism is limited to the audiovisual sector, we cannot speak of a genuine ‘crossmedia’ ownership regulation. The monitoring system is installed in Article 7 FrAMSA. This article prohibits the exertion by an editor or a distributor of a *significant position* in the audiovisual sector *if this would harm people’s right to have access to a pluralist offer of broadcasting services*.

A ‘pluralist offer’ is described as a wide range of media products offered by a plurality of independent and autonomous players representing the widest diversity of opinions and ideas possible.

An editor or distributor of broadcasting services is presumed to have a significant position in following situations:¹

- (1) the same person holds more than 24% of two (or more) editors of radio broadcasting services;
- (2) the same person holds more than 24% of two (or more) editors of television broadcasting services;
- (3) the accumulated audience share of two or more editors of radio broadcasting services reaches 20% or more of the total radio production market and lies in the hands of the same person;
- (4) the accumulated audience share of two or more editors of television broadcasting services reaches 20% or more of the total television production market and lies in the hands of the same person.

Should the case arise, the CSA will have to assess the possible repercussions that this position has for the diversity of broadcasting services being offered in the relevant market. If the CSA concludes that the concentration of ownership interests implies a threat to pluralism, it will start a procedure in order to negotiate possible remedies that could restore pluralism. If the editor or provider in question and the CSA do not reach a compromise within six months, the CSA can impose sanctions, such as fines or the withdrawal of the license. In October 2009, the CSA launched a special website dedicated to media pluralism: <www.csa.be/pluralisme>.

1. These conditions are explicitly listed in Art. 7 FrAMSA. The parliamentary documents (of the 2003 French Community Radio and Television Broadcasting Act, which originally introduced this article), however, stated that the CSA can develop other criteria to measure a significant position, such as the revenue share of an editor. So, the CSA could probably take into account – whenever relevant for its assessment – the editor’s/distributor’s links to other media, such as print media, or the degree of vertical integration. Cf. *Parliamentary proceedings*, French Community Parliament 2002–2003, 20 Dec. 2002, n° 357, 17–18.

Part V. Supervision: Media Regulator

273. The competent regulatory bodies in Belgium are the *Vlaamse Regulator voor de Media* (VRM) ('Flemish Regulator for the Media') in Flanders, the *Conseil supérieur de l'audiovisuel* (CSA) ('High Council for the Audiovisual Sector') in the French Community, and the *Medienrat* ('Media Council') in the German Community.¹

1. In this chapter, we focus on the Flemish and French Community regulator.

Chapter 1. Organization

§1. FLEMISH COMMUNITY

274. The VRM is composed of two chambers: the General Chamber and the Chamber for impartiality and protection of minors (Article 215, §2 FIRTA). The General Chamber is composed of five members: two magistrates (one of which is the president of the Chamber) and three media experts (Article 216, §1 FIRTA). The Chamber for impartiality and protection of minors is composed of nine members, of which four members are professional journalists; the other members are magistrates or academic or higher education experts (Article 216, §2 FIRTA). When complaints regarding Article 42 FIRTA (protection of minors) are addressed, two experts in child psychology, child psychiatry or pedagogy and two experts with regard to the interests of families and children are added to the Chamber for impartiality and protection of minors. The members of the VRM are appointed for a period of five years, and can be replaced in a number of situations (e.g., when they are physically or mentally unfit, in case of resignation or dismissal, etc.; Articles 216, §4 and 217 FIRTA).

275. Members of the VRM cannot have a political mandate nor have a position in a minister's or secretary of state's cabinet (Article 216, §1 and §2 FIRTA). They also cannot be linked professionally to (nor have economic interests in) a media or advertising company, or distributor of broadcasting signals (Article 216, §1 FIRTA). Although professional journalists may have link with a media or advertising company, they cannot be engaged in a management function in such a company, nor can they be employed by a broadcaster (Article 216, §2 FIRTA).

276. The VRM is governed by a board of governors and an executive director (Article 224 FIRTA). The board of governors and its president are appointed by the Flemish Government (Article 225 FIRTA). Tasks and competences of the board are: negotiating the management contract, approving the reporting on the execution of the management contract, drafting the budget, redistributing the budgetary credits, drawing up of the general accounts, reporting about the execution of the budget, and drafting the yearly activities report (Article 226 FIRTA). The executive director is charged with the daily management of the FIRTA and legally represents the FIRTA as regards the competences of the board of governors.

277. A management contract is agreed upon between the Flemish government and the VRM, in which the manner of cooperation with other entities within the Flemish administration and other governments is arranged (Article 231 FIRTA).

§2. FRENCH COMMUNITY

278. The CSA is composed of two committees (the advisory committee, the *Collège d'avis*, and the regulatory committee, the *Collège d'autorisation et de contrôle*), a *Bureau* and a *Sécrétariat d'instruction* (Article 134 FrAMSA).

279. The *Collège d'Avis* is composed of thirty-four members, the four members of the *Bureau* (i.e., the president and three vice-presidents, *infra*) and thirty effective members, appointed by the government for a (renewable) period of four years (Article 138, §1 FrAMSA). For each effective member, a substitute member is also designated. The members are appointed with respect for Article 7 Culture Pact Act (balanced participation of all ideological and philosophical groups), and chosen from a number of organizations (e.g., audiovisual professionals, producers, television broadcasters, the RTBF, advertising professionals, consumer organizations, or professional journalists). Being a member of the advisory committee is incompatible with membership of the executive or legislative power at European, federal, community, and regional level, with a position in a minister's cabinet, with membership of an organization which does not respect the democratic principles or with membership of the regulatory committee (Article 138, §4 FrAMSA). Membership can be revoked by the Government (Article 138, §1 FrAMSA).

280. The *Collège d'autorisation et de contrôle* is composed of ten members, the four members of the *Bureau* (i.e., the president and three vice-presidents, *infra*) and six members who are competent in the fields of law, audiovisual media or communication (Article 139 FrAMSA). They are appointed with respect for the proportional representation of all political groupings (Article 139, §1 FrAMSA *juncto* Article 9 Culture Pact Act). Three members are selected from the Parliament of the French Community and the other three are appointed by the government (Article 139, §1 FrAMSA). Membership of the regulatory committee is incompatible with membership of the executive or legislative power at European, federal, community, regional, provincial and local level, as well as with a position in a minister's cabinet (at European, federal, community or regional level). It is also incompatible with any function or position in another media company which would create a conflict of interest, membership of an organization which does not respect the democratic principles or with membership of the advisory committee. Membership can be revoked by the Parliament of the French Community, at the proposal of the Government (Article 139, §1 FrAMSA).

281. The CSA is governed by the *Bureau* (Articles 140–142 FrAMSA), which is composed of the president and three vice-presidents, who are appointed by the government for a (renewable) period of five years (Article 142 §1 FrAMSA). The appointment must respect Article 9 Culture Pact Act. Membership of the Bureau is subject to the same incompatibilities as membership of the regulatory committee (*supra*). The *Bureau* may carry out all acts necessary or useful to the competences of the CSA (Article 140, §1 FrAMSA). It coordinates and organizes the activities of the CSA, monitors the conformity of the advice with national, European and international law, resolves conflicts between the committees and contacts international and federal authorities when necessary (Article 140, §2 FrAMSA). The Bureau also hires personnel (Article 140, §3 FrAMSA) and issues recommendations to the government (Article 140, §4 FrAMSA).

282. Complaints are received by the *Sécrétariat d'instruction* ('Investigation Secretariat') (Article 143, §1 FrAMSA). The *Sécrétariat* can also take the initiative to open an investigation.

Chapter 2. Tasks

§1. FLEMISH COMMUNITY

283. The VRM is charged with the enforcement of Flemish media regulation, the settlement of disputes regarding media regulation and the granting of authorizations and licenses, in accordance with the regulation.

284. The Chamber for impartiality and the protection of minors issues decisions regarding disputes which arise from the application of Articles 38 (incitement to hatred and violence); 39 (non-discrimination); 42, 44, and 45 (protection of minors), 176, 1° (risk for public order, protection of minors, fight against incitement to hatred and human dignity) and 180 (protection of minors) FIRTA (Article 218, §3 FIRTA).

285. The General Chamber supervises the compliance with and sanctioning of infringements on other provisions of the FIRTA (Article 218, §2, 1° FIRTA). The majority of the decisions of the General Chamber relate to the non-observance of the rules regarding advertising. Other tasks of this Chamber are:

- issuing, changing, suspending and withdrawing broadcasting licenses;
- awarding, suspending or withdrawing licenses to offer a free-to-air broadcasting network;
- granting and revoking permission to distributors to transmit broadcasting programmes;
- receiving the different types of notification which are addressed to the VRM;
- defining the relevant markets and their geographical scope for products and services in the sector of electronic communication networks, analysing these markets in order to determine whether they are competitive;
- identifying undertakings with significant market power in the defined markets, and imposing, if necessary, certain requirements (mentioned in Article 192 FIRTA);
- mapping media concentration in the Flemish media sector;
- supervising the compliance of the public service broadcaster with the management contract with the Flemish government, and reporting about this on a yearly basis;
- performing special assignments which the Flemish government can assign to the VRM if required, insofar that these assignments are related to other tasks of the VRM (Article 218, §2, 2° to 9°).

§2. FRENCH COMMUNITY

286. According to Article 135 FrAMSA, the advisory committee of the CSA has the following tasks:

- advising, of its own accord, or upon the request of the Government or the Parliament of the French Community, on any matter related to audiovisual media,

including commercial communication (except for questions which fall within the competence of the regulatory committee);

- advising, of its own accord, or upon the request of the Government or the Parliament of the French Community, on modifications to the broadcasting act and regulations which are necessary due to technological, economic, social and cultural evolutions, as well as European or international legislation;
- advising, of its own accord, or upon the request of the Government or the Parliament of the French Community, on respecting democratic rules concerning fundamental rights and freedoms which are guaranteed by the Constitution, and in particular, the non-discrimination principle;
- advising, of its own accord, or upon the request of the Government or the Parliament of the French Community, on the protection of children and young people in audiovisual media services;
- formulating and updating the rules regarding commercial communication, the respect for human dignity, the protection of minors, the accessibility of programmes for people with sensory deficiencies, the broadcasting of short news reports and political broadcasts during electoral periods.

287. According to Article 136 FrAMSA, the regulatory committee of the CSA has the following tasks:

- taking note of the declarations of editors of services and award authorizations to certain editors of services (except for local television and the RTBF);
- granting authorizations for the use of radio frequencies;
- delivering a preliminary advice to the government regarding the authorization of local television;
- delivering a preliminary advice on each proposal for an agreement between the government and an editor or distributor of services;
- advising on the realization of the obligations laid down in the RTBF management contract;
- advising on the realization of the obligations of the local televisions;
- advising on the realization of the obligations laid down in Articles 41 (contribution to the production of audiovisual works, *supra*), 43, 44 and 46 (quota, *supra*) FrAMSA;
- advising on the obligations flowing from the agreements between the government and the editors of services who benefit from a must-carry obligation;
- advising on the realization of the obligations imposed on the distributors of services;
- regularly re-examining the obligations laid down in Articles 82, 83 and 87 FrAMSA (must-carry) and advising on whether these obligations must be maintained;
- issuing specific or general recommendations;
- establishing all violations of laws, decrees and regulations in the field of audiovisual media and all violations of agreements between the French Community and an editor or distributor of services, of the RTBF management contract, of the agreement between the government and the local televisions as well as the commitments entered into in the framework of tendering procedures in the FrAMSA;

- defining the relevant markets, the operators with significant market power, and the obligations imposed on such operators (Articles 90–96 FrAMSA).

The French Community Government may lodge an appeal with the Council of State against decisions of the regulatory committee related to authorizations (Article 137 FrAMSA).

Chapter 3. Sanctioning Powers

288. Both the VRM and the CSA have effective sanctioning powers. The VRM's sanctioning powers are limited to administrative sanctions, such as warnings, fines, suspensions or revocation of authorizations (Articles 228–239 FIRTA). The CSA may, in addition to administrative sanctions, also impose civil and penal sanctions (including imprisonment) (Articles 154–163 FrAMSA).

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