Chapter 3 Belgium

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This chapter of the comparative study concerns the media sector in Belgium. It will describe and analyse the practice of the national competition authority and the Belgian courts of defining the relevant product and geographic markets and compare the results with the practice of the European Commission in media cases.

In a first step, both the Belgian legal framework, in particular the Belgian Competition Act, and the relevant authorities, in particular the Competition Council, will be presented (see hereto below A).

In a second step, the media cases so far handled under Belgian law will be described and analysed (see hereto below B). This is followed by a comparative analysis of the market definitions given under Belgian law on the one hand and by the European Commission on the other hand (see hereto below C).

Finally, the framework of the regulation of the media sector in Belgium will be presented. Although it does not provide any straightforward market definitions, some conclusions may nevertheless be indirectly drawn from it, which are of relevance for purposes of this study (see hereto below D).

A  Market definition in competition and media law in Belgium

I.  The relevant authorities in Belgium

The federal “Loi sur la protection de la concurrence économique” (in the following referred to as: “the Competition Act”) enacted on 5 August 1991 – in its current version of 1 September 1999 – foresees four different national Belgian (competition) authorities:

- the “Competition Service” (Service de la Concurrence; see hereto below 1),
- the ”Body of Reporters” (Corps des Rapporteurs; see hereto below 2),
- the “Competition Council” (Conseil de la Concurrence; see hereto below 3) as well as
- the “Competition Commission” (Commission de la Concurrence; see hereto below 4).

Articles 2 and 3 of the Competition Act literally follow the provision of Articles 81 and 82 of the Treaty and extend the latter’s application to the concerned Belgian market or a substantial part of it („sur le marché Belge concerné ou dans une partie substantielle de celui-ci“). The same applies to the provisions on merger control to be found in Articles 9 to 13 of the Competition Act, which again literally follow the provisions of Council Regulation 4064/89 on the control of concentrations between undertakings\(^1\).

1. **The Competition Service**

Contrary to the legal situation on the Community level, investigative and decision-making functions are separated under national Belgian law. It is the Competition Service that conducts – under the direction of the body of reporters – any sort of competition investigation including the ones necessary in merger cases\(^2\). Contrary to the European Commission’s competencies under the provisions of Regulation No. 17, the Belgian Competition Service is – in cases of cartel and abuse infringements – entitled to search not only the premises of the undertaking(s) concerned, but also the private residences of their management and staff, as well as the premises of their accountancy, financial and tax advisers with the “legal privilege” however self-evidently safeguarded\(^3\). After having terminated its investigation the Competition Service prepares the file for the Body of Reporters.

2. **The Body of Reporters**

The Body of Reporters leads and supervises the investigations and has certain powers to this end (like issuing search warrants for business premises). At the end of an investigation, it passes on its results (in the form of a report) to the Competition Council where the final decision-making powers lie.

3. **The Competition Council**

The Competition Council is an administrative tribunal exercising its jurisdiction to adopt the decisions foreseen under the Competition Act. Because of its decision-making powers it constitutes Belgium’s central competition authority.

Pursuant to Article 17 of the Competition Act the Competition Council consists of all in all 20 members, the president, the vice-president, 8 members drawn from the judiciary, the advocacy (with more than 10 years professional experience before the bar) and university professors as well as 10 members appointed due to their competence in competition matters. In order to avoid a situation, which could cause a serious, imminent or irreparable damage to the undertakings affected by practises restricting competition, or when the general economic interest requires it the president of the Council may order interim relief. The Council’s decisions may be appealed before the Brussels Court of Appeal (Cour d’Appel) within 30 days of them being published in the Belgian Official Gazette. Judgements by the Court of Appeal can be appealed to the Court de Cassation on points of law only. Where the Competition Council refuses a merger (or imposes conditions), the parties can also ask the Council of Ministers to set the decision aside and authorise the merger (or dispense with the conditions) on grounds of general economic interests; the legality of the decision of the Council of Ministers may then be reviewed by the Council of State (highest administrative court in Belgium) at the request of an interested party.

4. **The Competition Commission**

Finally, there is a Competition Commission exercising purely advisory functions pursuant to Article 21 of the Competition Act.

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\(^2\) See hereto Article 23(1) lit. b of the Competition Act.

\(^3\) See hereto Article 23(3) of the Competition Act; see as for the Community level the changes brought about in this respect by Article 21 of Council Regulation (EC) 1/2003 that will extend the Commission’s investigative powers considerably.
II. The general approach to market definition under Belgian competition law

The provisions of the Competition Act only apply when the relevant market includes in its geographic scope either the entirety of the territory of the State of Belgium or at least a substantial part of it. This applies both to agreements/concerted practices restrictive of competition (Article 2 of the Competition Act) as well as abusive practices (Article 3 of the Competition Act) and to national merger control; in the latter case the material analysis conducted by the Competition Council is whether or not a concentration leads to a dominant position or reinforces an existing dominant position as a result of which effective competition within the Belgian market or a substantial part of it would be significantly impeded (see hereto Article 10(4) of the Competition Act). So far, however, neither the Competition Council nor the Competition Service have defined the notion of “a substantial part of the Belgian market” in the abstract. Taking into account that Belgium is a very small country, this requirement seems not to be likely to exclude many cases from the application of the Competition Act. Moreover, competition effects felt only in one region or possibly only in one specific town still seem to be likely to be covered by that concept.

When looking at agreements/concerted practices and abusive behaviour pursuant to Articles 2 and 3 of the Competition Act, the small size of the State of Belgium will simultaneously make these likely to affect trade between Member States within the meaning of the provisions of Community law, i.e. Articles 81 and 82 EC. For example, the region within which an individual cable operator was active was regarded to constitute a substantial part of the Belgian market within the meaning of Article 3 of the Competition Act. Both the Dutch-speaking territory of Belgium and the territory of the capital of Brussels were regarded to constitute substantial parts of the common market within the meaning of Article 82 EC each. This also shows why there have been unusually few notifications under Belgian national law, with the respective agreements being moreover filed directly to the European Commission under the provisions of Regulation No. 17.

1. The definition of the relevant product market

a) Demand-side substitution

A classical reference to the importance of demand-side substitution can be found in the judgement of the Cour de Cassation of 9 June 2000 where it reads as follows:

„Pour apprécier l’existence d’une position dominante, le juge doit déterminer avec précision le marché en cause; le marché à prendre en considération comprend l’ensemble des produits qui, en fonction de leurs caractéristiques, sont particulièrement aptes à satisfaire des besoins constants et sont peu interchangeables avec d’autres produits; il appartient ainsi au juge de vérifier si le marché de référence comportait ou non des produits interchangeables.“

In its last annual report published so far the Competition Council states that the degree of demand-side substitutability is crucial to the definition of the relevant product market. Whilst refraining from applying one key criterion as to establish whether such substitutability exists or not it refers to a

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4 See hereto in detail below B.I.2.
5 See hereto e.g. Conseil de la Concurrence, Rapport annuel 2001, 3.1.1.
The annual report 2001 further states as follows:

“Un certain nombre de tests quantitatifs a été conçu tout spécialement pour délimiter les marchés. Ils s'inscrivent dans le cadre de diverses approches économétriques et statistiques: estimations des elasticités et des elasticités croisées de la demande d'un produit, tests fondés sur la similitude des variations des prix au cours du temps, analyse des liens de causalité entre des séries de prix, similitudes voire convergence entre les niveaux de prix.”

The Competition Council points out that none of these different individual criteria is meant to play a leading or key role. Although the cross-price elasticity of demand is mentioned in the first place, the further explanations to be found in the Annual Report 2001 state that every decision has to be taken on the basis of a number of criteria (“sur la base d'un certain nombre de critères et d'éléments d'appréciation différents”) and is therefore different from one case to the next.

(b) Supply-side substitution

The Annual Report 2001 also mentions that supply-substitution needs to be taken into account without specifying any further how and to which extent exactly this should be done. Supply-side substitution has however constantly remained a criterion ancillary to demand-side substitutability.

c) Other criteria

When looking at the general approach of the Belgian competition authorities towards product market definitions, several aspects are particularly highlighted.

Firstly, the aspect of potential competition is expressly mentioned as a criterion, which gains effect only at a later stage of the competitive analysis and not in the initial stage of (product) market definition. This is in line with the European Commission’s Notice on the definition of the relevant market which states that potential competition is not taken into account when defining markets, “since the conditions under which potential competition will actually represent an effective competitive restraint depend on the analysis of specific factors and circumstances related to the conditions of entry.” It is therefore only considered at a subsequent stage, once the position of the parties involved in the relevant market has already been ascertained.

Secondly, the Annual Report 2001 states that the (investigating) Competition Service puts particular emphasis on contacts with the competent professional associations and with the undertakings concerned themselves in order to take into account their perception of who is competing with whom. The report stresses that the results of the enquiries conducted by the Competition Service will be an important part of the report made to the Competition Council.

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7 Conseil de la Concurrence, Rapport annuel 2001, 3.2.4, para. 31.
8 Conseil de la Concurrence, Rapport annuel 2001, 3.2.4, para. 31.
9 Conseil de la Concurrence, Rapport annuel 2001, 3.2.4, paragraph 31.
11 See also Decision No. 2001–C/C-01 of 3 January 2001, VZW en Fiscale Diensten voor Werkgevers e.a., Moniteur Belge (M.B.) of 14 September, p. 30.894.
2. **The definition of the relevant geographic market**

As for the maximum size of the geographical scope of the relevant market the Competition Act is applicable even if the (Belgian) market looked at is only a part of a relevant market, which is larger than the entirety of the territory of Belgium. In its Annual Report 2001 the Competition Council has listed a number of criteria, which it regards to be useful in order to define the geographic scope of the market. These are as follows:

- the fundamental characteristics of the demand such as the preference for certain brands, language and culture specific to a particular region as well as the lifestyle and importance to be present in a certain place;
- the viewpoint of clients and competitors;
- the place where the sales take place at the moment of an enquiry;
- the sales channels;
- the characteristics of delivering certain goods and/or services as well as
- the barriers and costs connected with the reorientation of sales to undertakings that are located elsewhere.\(^{12}\)

The Council states that a look at the first set of criteria, i.e. those mentioned in the first hyphen, is already capable of delimiting the area within which competition may be exercised\(^ {13}\). This means that brand loyalty, language, cultural preferences as well as the preference of customers “to shop nearby” are regarded to be the principal criteria to be looked at when defining the relevant geographical market.

B  **Repertoire of relevant product and geographic markets in the media sector in Belgium**

I. **The capacity markets**

Taking into account that in Belgium the transmission of television signals happens almost exclusively via broadband cables rather than via satellite or terrestrial means\(^ {14}\) this infrastructure gains particular importance for the media sector although, strictly spoken, the relevant networks may not only carry media contents, but all kinds of further (telecommunications) services. Nevertheless, in its important Telenet decision of 23 August

\(^{12}\)  Conseil de la Concurrence, Rapport annuel 2001, 3.2.4, paragraph 33.


\(^{14}\)  See as to a detailed description of the Belgian cable sector Valcke, Fernsehen im Breitbandkabel – Länderbericht Belgien, Gutachten im Auftrag der Kommission zur Ermittlung der Konzentration im Medienbereich (KEK), February 2002 (manuscript), pp. 20 et seq.
2001 the Competition Council has distinguished between on the one hand the capacity market for the transmission of voice telephony and internet access and on the other hand the capacity market for the transmission of broadcasting services. As for the capacity market for the transmission of voice telephony and internet access the Competition Council found that both the broadband cable networks and the Public Switched Telephony Network (= PSTN) of the Belgian telecommunications incumbent Belgacom compete with each other. These capacity markets were clearly distinguished from those for offering specific services themselves. The Competition Council didn’t pronounce about the precise market delimitation for the capacity market for the transmission of broadcasting services.

In the abovementioned Telenet decision two main services markets were distinguished:

- on the one hand the market for voice and data telecommunications services that again could be broken down into the market for voice telephony services and the one for internet access and
- on the other hand the market for broadcasting services that was again sub-divided into the market for free-to-air services and that for pay-TV services (as for the television and internet markets see also below II and III).

1. **The product dimension**

When looking at the definition of capacity markets, capacity markets, in particular the capacity market of broadcasting services as suggested by the Competition Council’s Telenet decision one also has to refer to the explanations given by the Brussels Court of Appeal that held the programme offerings made via the broadband cables to be considerably different from those available via DTH transmission. In its two judgments of 28 January 1999 the Brussels Court of Appeal made an express reference to the European Commission’s prohibition decision in the merger control case of MSG Media and held that the transmission via the cable-TV networks on the one and the transmission via satellite and terrestrial means on the other hand constituted respectively different product markets. The reasons given for this were the considerable differences in both technical and financial terms that prevented cable, satellite and terrestrial frequencies to be freely substitutable transmission systems from the consumers’ point of view. The same lack of substitutability of the different means of transmission existed – in the Court of Appeal’s view – from the point of view of the TV operator.

2. **The geographic dimension**

In the late 1990s TNCC (The Narrow Casting Company), a Flemish TV operator that did not benefit from a must-carry status complained to the Competition Council concerning the refusal by the cable operator Interelectra to carry its contents and alleged the abuse of a dominant position. As TNCC eventually had to file for bankruptcy and lost its licence in...
September 1999 the Competition Council was not able to adopt a final decision on the complaint\(^{19}\). The factual situation that exists in almost the entirety of Belgium is that each cable operator serves a specific area exclusively. There is one exception as for the city of Leuven where since 1997 two cable operators, i.e. the private corporation UPC, formally known as TVD/Radio Public and the public operator Iverlek have been competing with each other\(^{20}\). Apart from this unusual situation existing in Leuven the geographic scope of the market for cable transmission was therefore defined as the area in which a cable operator was (exclusively) active. Other cable operators, even those that serve an area immediately bordering the one looked at were not regarded to be even (potential) competitors\(^{21}\). Each individual area where a cable operator was active in was also regarded to be a substantial part of the relevant Belgian market within the meaning of Article 3 of the Belgian Competition Act ("sur le marché Belge concerné ou dans une partie substantielle de celui-ci").

In its judgements of 19 November 1997 and 28 January 1999 the Court of Appeal regarded the geographic scope of the relevant (product) market to be even wider than just the area served by one individual cable operator. Here the Flemish part of Belgium – in the case of Iverlek v. TF1\(^{22}\) – and the entirety of the Brussels’ communes – in the cases of Canal+ Belgique v. Wolu TV and Radio Public as well as Canal+ Belgique v. Coditel\(^{23}\) – were seen to be the relevant geographic territory. Consequently, the collective dominance of the cable operators serving these territories was discussed and confirmed. The interesting aspect of the two judgments delivered on 28 January 1999 was that the Court of Appeal did not look at national Belgian law, but moreover applied Article 82 of the Treaty. Hereby it accepted that both the Flemish territory and the Brussels’ communes each constituted a substantial part of the common market within the meaning of this provision.

II. The television markets

The abovementioned Telenet decision followed the analysis conducted by the European Commission in its constant practice and held that there existed separate product markets for free-to-air broadcasting services and for pay-TV services\(^{24}\). Whereas in the case of pay-TV there is a direct trade relationship between the programme supplier on the one and of the viewer or subscriber on the other hand, such does not exist in the area of free-TV.

\(^{19}\) Footnote deleted.

\(^{20}\) Valcke (supra note 14), pp. 24 et seq.


III. The internet markets

1. The wholesome market for internet access

The Telenet decision of the Competition Council regarded the provision of internet access to be a relevant product market. However it did not divide this market into further sub-markets distinguishing between the usual dial-up access/ISDN-dial-up access on the one and fast access via cable or ADSL on the other hand. This suggests some degree of deviation from the European Commission’s practice that – in its Telia/Telenor decision of 30 October 1999 – has indicated a separate market for the provision of internet access via the so-called local loop of the PSTN. The geographic dimension of this wholesome internet access market was regarded to be the Flemish territory and not the entirety of the Kingdom of Belgium taking into account that Telenet entered into competition with Belgacom’s internet access services only in that part of the country.

2. The markets for toplevel domain names

In a judgment of 27 November 1997 the Brussels Commercial Court regarded the toplevel domain name “.com” to constitute a separate product market. It explained that the name “.com” was the only means to show the commercial character of its bearers’ activities. The same court regarded in a further judgment of 8 November 2000 the toplevel domain name “.be” to form a separate market as well. It was held that the name of “.be” constituted the only means from the point of view of its (commercial) user to show that he was active in the State of Belgium; the court held that for the plaintiff of this case who was confronted with a refusal to be granted the “.be” suffix the impossibility to obtain this toplevel domain name could prove extremely detrimental in commercial terms.

IV. The markets for film/movie distribution

1. The product dimension

In its 1997 Kinepolis merger decision the Competition Council distinguished the showing of movies in a cinema from other means of exploiting a film such as rental or sale of video cassettes, television, pay-per-view television, “home-cinema”, internet and cyber theatres. The further issue of whether the arrival of so-called “megaplexes” could lead to a further distinction to be made between cinema complexes in or around larger population centres and

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27 See Brussels Commercial Court, Judgment of 27 November 1997 – N.V. Cockerill-Sambre v. L.C.P. en Capricom Inc. where it reads as follows: “Le marché concerné est celui des entreprises qui doivent être déterminées sur base de leur nature générique et commerciale, c'est-à-dire le marché des noms du site toplevel : .com”.
cinemas in smaller cities was however not discussed in this decision. The Brussels Court of Appeal further on identified a separate market for blockbuster movies as well as respectively distinct markets for English and Dutch versions of one and the same film\textsuperscript{30}. A further distinction was made between the first national release of a film in the major centres and subsequent releases (weeks or months later) in smaller towns\textsuperscript{31}.

2. The geographic dimension

With respect to film distribution the Brussels Court of Appeal has accepted a geographic scope of the relevant (product) market as tiny as a medium-sized city\textsuperscript{32}.

V. The markets for the exercise of copyrights

In the case of Interest and Intermosane v. SABAM and AGICOA the Competition Council held on 27 March 1995 that both the Belgian Association de Gestion Internationale Collective des Œuvres Audiovisuelles (AGICOA) and the Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) held each single dominant positions on two different markets for the exercise of copyrights. This case was concerned with a complaint lodged by a TV operator against the commercial practices of both collecting societies. The Competition Council stated that for purposes of having its contents transmitted via cable to the individual households the TV operator depended on both AGICOA’s permission – concerning the audio rights – and SABAM’s permission – concerning the visual rights. Consequently, it regarded both the exercise of audiphonic and the one of televusual copyrights to form respectively different product markets\textsuperscript{33}. This viewpoint was confirmed by the Brussels Court of Appeal by its judgment of 4 September 1996\textsuperscript{34}.

VI. The publishing markets

In a judgment of 5 May 1997 the Brussels Commercial Court held that there existed a separate market for French-speaking TV and cinema magazines\textsuperscript{35}. The Commercial Court of Antwerp reached at a similar conclusion assuming that popular magazines containing information on television and women’s magazines would appear to be “\textit{peu substituables}” and therefore constituted a market of their own\textsuperscript{36}.

A more elaborate discussion why magazines constitute a separate product market in Belgium can be found in a judgment of the Brussels Court of Appeal of 21 June 1995. Here it was held that there existed a clear distinction between the market for newspapers on the one and the

\textsuperscript{33} Competition Council, Decision No. 95-C/C-1 of 27 March 1995, Interest and Intermosane v. SABAM and AGICOA.
\textsuperscript{34} Court of Appeal, Judgment of 4 September 1996, AGICOA and SABAM v. State of Belgium, Concurrence Economique 1997, 740 et seq.
market for periodicals/magazines on the other hand. The reason given for this was that a journal had a very specific character that made it very hard to have it substituted by something else from the customer’s point of view. The unique character was seen to be the result of the fact that a journal did not merely content itself with presenting objective information, but moreover represented a political or ideological viewpoint. This was – in the Court of Appeal’s view – illustrated by the fact that there was a clear distinction between the editor and the publisher of a newspaper. As a consequence of that readers would stay with one and the same newspaper closest to their political or ideological thinking and would not be likely to exchange it for another newspaper representing a different political or ideological background. Contrary to that magazines contained – in the court’s view – only general information on different subjects without representing any sort of ideological or political opinion. Therefore readers would be more likely to switch from one magazine to another.  

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<th>Main Markets</th>
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<td>Market of broadcasting services</td>
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<td><strong>Print Media</strong></td>
<td>Market of newspapers</td>
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<td><strong>Printed Press</strong></td>
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<td>Market Category</td>
<td>Main Markets</td>
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<td><strong>Services</strong></td>
<td>Market of voice and data telecommunications services (broadband cable networks / Public Switched Telephony Network)</td>
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<tr>
<td>Market of other means exploiting (rental / sale of video cassettes / televison / pay-per-view television / &quot;home cinema / Internet / cyber theatres)</td>
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</tbody>
</table>

### Exercise of Copyrights

<table>
<thead>
<tr>
<th>Market Category</th>
<th>Main Markets</th>
<th>Submarkets (1st Level)</th>
<th>Submarkets (2nd Level)</th>
<th>Submarkets (3rd Level)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collecting Societies</td>
<td>Market of exercising audiophonic copyrights</td>
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<td></td>
<td>Market of exercising televisual copyrights</td>
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</tbody>
</table>
C Comparative analysis of market definitions adopted by the European Commission and those adopted under Belgian national law

Both when looking at the general principles employed for market definition and when looking at the results produced by individual decisions or judgements there is a high degree of similarity, if not identity between the European Commission’s practice and the practice/jurisprudence of Belgian competition authorities and courts. With putting the criterion of demand substitutability in the very forefront, leaving supply substitutability to play an ancillary role and with totally excluding the issue of potential competition, the Cour de Cassation, the Cour d’Appel and the Competition Council are entirely in line with the European Commission’s practice as best shown by the latter’s 1997 notice on market definition.

In the individual decisions and judgements made under Belgian law the same high degree of similarity with the Commission’s practice can be identified. This is well illustrated by the Brussels Court of Appeal’s express quotation of the European Commission’s MSG Media Service decision for purposes of distinguishing a separate market for cable transmission. The Competition Council’s Telenet decision follows the classical distinction made by the European Commission between pay-TV and free-TV services\(^\text{38}\). The same applies to film/movie distribution\(^\text{39}\), the exercise of copyrights\(^\text{40}\) and finally the distinction made between newspapers on the one and magazines on the other hand in the area of publishing\(^\text{41}\). As already pointed out above (see B III.1), there is however some deviation of the Belgian Competition Council’s practice from the approach followed by the European Commission in the area of internet access. Whereas the European Commission observed evidence for the existence of a developing demand for the provision of residential broadband internet access\(^\text{42}\) the Competition Council decided in the Telenet case that both dial-up and broadband internet access belonged to one and the same market.

Most of the cases referred to in this study pertain to allegations of the abuse of a dominant position and not to merger control. Furtheron, there are no market studies covering either the entirety of the media sector or even only a part of it. As a result of this, the market definitions reached at under Belgian law deal with individual scenarios and do not provide a wholesome analysis.

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38 See e.g. Commission Decision of 21 March 2000, Case COMP/JV.37, paragraphs 28 et seq. – BSkyB/KirchPayTV.


D The Impact of different regulatory frameworks on market definitions

I. Constitutional issues

As a consequence of the first Belgian State reform in 1970 three (language) communities, i.e. the German-speaking community, the Dutch-speaking community (now called “Flemish Community”) and the French-speaking community (now simply “French Community”), and three regions, Wallonia, Flanders and Brussels, were created. The allocation of competences between the Federal State on the one hand and the regions and communities on the other hand is such that the latter are both ratiocina materiae and ratiocina loci only competent if they have been assigned specific tasks by the Belgian constitution in conjunction with respective legislation based upon the constitution. Since the first State reform in 1970 broadcasting and television have been assigned to the competence of the communities.\(^43\) However, neither the Belgian constitution of the 17 February 1994 nor the Act on Institutional Reforms of 8 August 1980 has defined the term of “broadcasting” and “television”. By avoiding such a positive definition the legislator wanted to prevent the danger of restrictive interpretations and consequently of unjustified limitations of the cultural autonomy of the communities. Otherwise the legislator would have had to step in at any occasion where new forms of broadcasting had developed in order to state expressly that they were (still) covered by the original definition employed\(^44\).

Firstly, the competence of the communities was seen to be limited to the decision-making of whether or not a specific service was to be regarded as broadcasting or not and to the setting of rules pertaining to programming. Contrary to that, all technical aspects of broadcasting, such as frequency allocation and the drafting of technical norms, were regarded to stay within the competencies of the Federal authority. The same applied to telecommunications. As a consequence broadcasting activities became subject to a double authorisation: the communities were responsible for the authorisation of a broadcasting service as a cultural activity whereas the same service was additionally subject to a technical authorisation issued by the Federal authority. Two judgements of the Cour d’Arbitrage of 25 January 1990 and 7 February 1991 finally put an end to this system of double authorisation\(^45\). In these judgements the Cour d’Arbitrage took the view that the communities had been assigned the competence for regulating broadcasting in its entirety. It was held that this competence included the regulation of the technical aspects of broadcasting as well as the allocation of frequencies. So it has since been only the communities that are responsible for issuing a broadcasting licence. The Federal authority has been limited to guaranteeing a general supervision over the system of frequency allocation and the system of double authorisation for one and the same service was abolished. Consequently, the Federal authority was regarded to be competent only for safeguarding that the technical norms for the allocation of frequencies and for the operation of transmission devices were adhered to, whereas the communities took

\(^{43}\) Strictly spoken, only the Dutch and the French-speaking community were granted these competences as early as in 1970. The German-speaking community was granted analogous competences only within the framework of the second Belgian State reform in 1980 to 1983.

\(^{44}\) See hereto Valcke (supra note 14), p. 7.

the full responsibility for all technical aspects specific to the area of broadcasting. This jurisprudence was restated by the Cour d’Arbitrage’s ruling of 31 October 2000 by which the general competence of the communities for broadcasting regulation was confirmed regardless of the means of transmission employed, that is to say regardless of whether the broadcasting takes place via cable, satellite or terrestrial means.

II. The regulatory framework for the media sector in Belgium

Following the split competences for broadcasting regulation for each of the three communities in Belgium there are three separate laws. These are

- for the Flemish community in Flanders and Brussels the “Decreten betreffende de radio-omroep en de televisie” enacted by the Flemish Government on 25 January 1995 and as last amended by Decree of 18 May 1999,
- for the French-speaking community in Wallonia and Brussels the “Décret sur l’audiovisuel” of 17 July 1987, as last amended by the Decree of 13 December 2001 and
- for the German-speaking community the “Dekret über das belgische Rundfunk- und Fernsehzentrum der deutschsprachigen Gemeinschaft” of 27 June 1986, as last amended by Decree of 23 October 2000.

In the bilingual territory of Brussels broadcasting, everything that is not covered by the Flemish or French Community legislation is regulated by the Federal “Wet betreffende de netten voor distributie voor omroepuitzendingen en de uitoefening van omroepactiviteiten in het tweetalig gebied Brussel Hoofdstad” of 30 March 1995.

III. Media regulators

1. “Het Vlaams Commissariaat voor de Media” of the Dutch-speaking community

The abovementioned Decree of the Flemish community of 25 January 1995 provides the regulatory framework within which both public and private broadcasting takes place in the Dutch-speaking territory of Belgium. This 1995 Decree assigns certain functions, in particular the supervision of commercial broadcasting and the allocation of the cable-TV capacities to individual operators to the authority of “Het Vlaams Commissariaat voor de Media”.

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46 However, it has been criticised whether the distinction drawn by the Cour d’Arbitrage really provided a clear-cut separation between the competences on the federal and on the communities’ level (see Peeters, Tijdschrift voor Bestuurswetenschappen en Publiek Recht 1991, 410 et seq.).
48 All Acts of Parliament enacted in Belgium by either the communities or the regions are referred to as “Decree” (“Décret”, “Decreet” or “Dekret” - with the exception of the Region Brussels-Capital, which adopts “ordonnances”/”ordonnanties”). Federal Acts of Parliament are referred to as “Loi”, “Wet” or “Gesetz”.
49 See in particular Articles 28 et seq. as for radio broadcasting and Articles 39 et seq. as for TV-broadcasting; as to the competences in the area of cable-TV allocation compare Articles 105 et seq. of the 1995 Decree.
a) Legal basis

Functions and competences including the internal organisational structure of the “Vlaams Commissariaat voor de Media” are laid down by the Decree of 17 December 1997.  

b) Functions and competences

The functions and competencies of the “Vlaamse Commissariaat voor de Media” have already been briefly explained above. The Flemish Decree of 25 January 1995 contains in its title I general definitions, which may be useful when looking at the links between sector-specific terminology and market definitions relevant under competition law (see hereto below IV). Title II of this Decree refers to “Vlaamse Radio en televisie omroep” (in short: “VRT”), i.e. the public broadcasting station charged by virtue of Article 8 of the 1995 Decree with the fulfilment of the specific public remit for the Dutch-speaking part of Belgium. Title III of the 1995 Decree is primarily concerned with the licensing functions of the Flemish media authority. As for radio broadcasting the licensing regime distinguishes between

• broadcasting within the entirety of the Dutch-speaking community,
• broadcasting within only one province and
• broadcasting within a town, a part of a town, a municipal, a small group of municipals or a specific target group.

As for television different licenses are required for

• broadcasting within the entirety of the Dutch-speaking community of Belgium,
• broadcasting within a particular region,
• broadcasting within the entirety of the Dutch-speaking community, but with a programme addressed to one specific target group or dealing with one specific subject,
• pay-TV broadcasting and
• broadcasting delivering other kinds of broadcasting services to the Dutch-speaking community or a part of it.

Title IV of the 1995 Decree contains regulations on content, in particular advertising, teleshopping, sponsoring etc.; as far as commercial/private television is concerned the “Vlaamse Commissariaat voor de Media” sees to that individual operators comply with these provisions. Title V of the 1995 Decree gives the functions of cable-TV capacity allocation to the Flemish media authority. Taking into account that 92% of the entirety of the Belgian households receive broadcasting signals via cable marginalizing DTH transmission to only 3% and adding that 95% of the entirety of the Belgian households have access to cable

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51 See Article 28 of the 1995 Decree.
52 See Article 41 of the 1995 Decree.
53 See Articles 78 et seq. of the 1995 Decree.
stresses the enormous importance of these competencies of the “Vlaamse Commissariaat voor de Media”.

2. The “Conseil Supérieur de l’audiovisuel” of the French-speaking community

a) Legal basis

In the French-speaking community of Belgium it is this community’s government that is responsible for taking all relevant decisions foreseen by the “Décret sur l’audiovisuel” of 17 July 1987. The Conseil Supérieur de l’Audiovisuel (in the following referred to as “CSA”) consists of three different colleges, i.e. the “Collège d’avis” that prepares opinions on general questions of media regulation, the “Collège d’autorisation et de contrôle” that prepares evaluations on the grant or renewal of broadcasting licenses and cable allocation and on infringements of regulatory provisions and finally the “Collège de la publicité” that is responsible for questions of advertising and sponsoring. Formally spoken, it is the Government of the French-speaking community which stays responsible to adopt decisions foreseen in the 1987 Decree; in reality it is however the opinions prepared by the CSA that are decisive for the final outcome.

b) Functions and competencies

Firstly, the Government of the French community, respectively the CSA is responsible for the licensing of private broadcasting stations. Special provisions are foreseen for the licensing of pay-television including the operation of conditional access systems. Finally, the CSA is responsible for safeguarding that the provisions on advertising, sponsoring, etc. are followed by the individual operators and is also competent to draw up a list of events of major public interest that must not be subjected to rights of exclusivity of one individual broadcaster.

3. The “Medienrat” of the German-speaking Community

a) Legal basis

The legal basis for the work of the “Medienrat”, the media authority responsible for the German-speaking community of Belgium is to be found in the “Mediendekret” of 26 April 1999 as well as in the “Erlass der Regierung der deutschsprachigen Gemeinschaft zur Ausführung des Mediendekretes vom 26. April 1999” of 7 September 2000.

b) Functions and competencies

The functions and competencies of the “Medienrat” correspond to those of the “Vlaamse Commissariaat voor de Media” and the “Conseil de l’audiovisuel”. Besides the licensing of broadcasters the Medienrat exercises supervisory functions over broadcasters’ compliance

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54 See as to an overview of the Belgian cable-TV market Valcke (supra note 14), pp. 20 et seq.
55 See Articles 15 et seq. of the 1987 Decree.
56 See hereto Chapter V of the 1987 Decree.
57 See Chapter VII of the 1987 Decree.
58 See Chapter VIII of the 1987 Decree.
59 Chapter IX of the 1987 Decree.
with the provisions of the Medienlekt und is furtheron responsible for the allocation of the capacities of the cable-TV networks.

4. **Institut Belge des Services Postaux et de Télécommunications / Belgisch Instituut voor Postdiensten en Telecommunicatie**

a) Legal basis

By virtue of the “Loi portant réforme de certaines entreprises publiques économiques” of 21 March 1991 the Federal Belgian authority for postal services and telecommunications was created that became operational only in 1993. Alike in other Member States the “Institut Belge des Services Postaux et de Télécommunications / Belgisch Instituut voor Postdiensten en Telecommunicatie” has been assigned the task of supervising and regulating the transition from a monopolistic structure of the postal and telecommunications markets to a competitive environment. The Act of 21 March 1991 transposes the so-called (old) ONP Community Framework into national federal Belgian law and is due to transpose the provisions of the (new) regulatory framework adopted by the Community in 2001 up to 25 July 2003.

b) Functions and competencies

The most important competence assigned to the regulatory authority is the arbitration of interconnection disputes, which falls in the special responsibility of the authority’s Interconnection Chamber. This has so far primarily dealt with complaints of new market entrants against the Belgian telecommunication incumbent Belgacom. The very broad definition of the term “interconnection” that is defined as the “combination of telecommunications networks that are used by one and the same or by another person in order to enable the users of the services or of the network of one person to communicate with the users of the services or the network of the same or another person or to facilitate the access to these services offered by another person” has raised the question of whether the Interconnection Chamber might also have to settle a conflict arising from a broadcaster’s claim to access the cable-TV networks of a specific operator. This might however lead to accusations formulated by the language communities that the Federal authority has usurped competencies of broadcasting regulation.

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60 See as to an overview of both the old and the new regulatory framework Koenig/Bartosch/Braun, EC Competition and Telecommunications Law (2002), Chapters 7 to 15.
62 See as to such an argument in particular Valse (supra note 14), p. 47 who also hints at the “Décret autorisant l’interconnection des réseaux de radiodistribution ou de télédistribution” by the French-speaking community of 26 September 1995. See as to the problems of competencies related to the access of broadcasters to cable-TV networks also Bartosch, in: Koenig/Bartosch/Braun (supra note 60), pp. 806 et seq.
IV. Market definitions and/or criteria upheld for market perception in the relevant sector-focused legislation

1. Broadcasting

a) Television

aa. Product market

The 1995 Decree of the Dutch-speaking community defines broadcasting as the “primary emission, by cable or without it, by terrestrial means or by a satellite, in encoded or non-encoded form, of programmes directed to the general public. These programmes may comprise radio programmes, television or other kinds of programmes. The term also includes the communication of programmes between undertakings with a view to these being re-directed to the general public. It does not comprise communications services rendered on individual demand, specific information or other services like for example telescopy, electronic banking or other similar services.”

This very broad definition of broadcasting is likewise to be found in the “Mediendekret” of the German-speaking community where the term “Rundfunkdienst” comprises all sorts of emissions regardless of the technical means (cable, DTH, terrestrial) they are transmitted by. The “Mediendekret” also contains a definition of the term “Fernsehsendung” that likewise comprises all technical means of transmission, but does not include point-to-point communications services. The neutrality of the term broadcasting in respect of the technical means of transmission is also reflected by the definition of the “service de radiodiffusion” of the “Décret sur l’audiovisuel” of the French-speaking community.

None of the communities’ media decrees contains any separate definition of subscriber-, respectively pay-television. However, the 1987 “Décret sur l’audiovisuel” foresees specific provisions for the licensing of pay-TV operators. This does however not apply to either the German or the Dutch-speaking community. All three decrees yet foresee different licences depending on whether a broadcasting service is local, regional or covers the entirety of the specific language community.

The abovementioned provisions suggest that there are different product markets for television broadcasting on the one and point-to-point services on the other hand. However, it remains unclear whether free-TV and pay-TV would be regarded as to belong to one and the same or to different product markets. If different licensing procedures are to suggest respectively different market definitions only the 1987 “Décret sur l’audiovisuel” suggests the existence of different markets for free- and pay-TV.

bb. Geographic market

Firstly, licences for television broadcasting are not granted for the entirety of the Belgian territory, but moreover only for a specific language area. Secondly, different licences are

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64 See Article 1 No. 2, Decree of 26 April 1999.
65 See 1987 Decree, Article 1 No. 6.
66 1987 Decree, Article 19.
granted by the responsible media authorities of each community depending on whether a television broadcasting service is local, regional or covers the entirety of the language community. This suggests that the geographic scope of the television broadcasting markets does not comprise the entire territory of the Kingdom of Belgium, but moreover only a respective language area. However, depending on whether a specific television broadcasting service has only a local or a regional dimension, the geographic scope may be even narrower.

b) Sound broadcasting (radio)

All of the three different media laws enacted by the language communities contain different licensing regimes for sound broadcasting/radio. Licensing depends on whether a radio is of local character, i.e. covering just one town or even only an area of a specific town, or whether the sound broadcasting is meant to cover an agglomeration, i.e. a number of neighbouring towns.

c) Advertising

The broadcasting decrees of the different language communities contain more or less similar definitions of broadcasting advertising. The 1987 “Décret sur l’audiovisuel” defines the term of “publicité commerciale” as “toute forme de message radio-diffusé contre rémunération ou paiement similaire par une institution ou une entreprise publique ou privée dans le cadre d’une activité commerciale, industrielle, artisanale ou de profession libérale dans le but de promouvoir la fourniture contre paiement de biens ou de services y compris les biens immeubles, les droits et les obligations.” Analogous definitions can be found in the 1999 “Mediendekret” and in the 1995 Decree of the Flemish-speaking community. These definitions do not distinguish between television and radio advertising. Therefore the conclusion may be drawn that at least from the point of view of the regulatory framework for advertising in Belgium it would not be inevitable to define separate product markets for television advertising and radio advertising.

2. Music-copyright (collecting societies)

Status, obligations and rights of the collecting societies are laid down by the “Loi relatif aux droits d’auteurs et aux droits voisins” of 30 June 1994. As already explained above (see B.V), the collecting societies’ tasks consist of the granting of licences for the usage of works on their own behalf, but by virtue of exclusive rights of usage granted by the authors, to control the usage of works, to levy considerations for usage as a trustee of the author and proceed against violations of copyright. In the case SABAM and AGICOA both the Competition Council and the Court of Appeal took the view that each collecting society held a single dominant position on its respective market for the exercise of copyrights, the reason for this being the exclusivity granted to them by the authors. Taking into account this decisional

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67 See hereto e.g. the 1995 Decree of the Dutch-speaking community, Article 29.
68 1987 “Décret sur l’audiovisuel”, Article 1 No. 11.
69 1999 “Mediendekret”, Article 1 No. 12.
70 1995 Decree, Article 2 No. 14.
72 See Competition Council, Decision No. 95-C/C-1 of 27 March 1995, Interest and Intermosane v. SABAM and AGICOA as well as Court of Appeal, Judgment of 4 September 1996, AGICOA and SABAM v. State of Belgium.
practice, respectively jurisprudence each type of copyright exercised exclusively by a collecting society by virtue of its statutory definition constitutes a product market of its own. The geographical scope of these markets corresponds to the territory within which the respective collecting society is active in, i.e. the entirety of the territory of the Kingdom of Belgium taking into account that the Act of 30 June 1994 is a Federal one.

3. Film

Due to their competence in cultural matters it is again the language communities that are responsible for the funding of films. The possibly most important legal basis for the funding of films is the Decree of the French-speaking community of 22 June 1967 that has since been amended several times. The conditions for film funding are different depending on whether they apply to feature-length films or short films with the number of short films being funded having been considerably higher in recent years. Different rules apply depending on whether the production of the film is for cinematographic or for television use.

4. Internet

There is no indication as to market definitions in the Internet sector to be found in Belgian law. The “Loi sur certains aspects juridiques de services de la société de l’information” of 11 March 2003 governs the legal aspects of so-called information society services andtransposesthe European Parliament and Council Directive 2000/31/EC into national (federal) Belgian law. Article 4 of this 2003 Act foresees that information society services are not subject to any prior authorisation. Article 5 of the Act determines that information society services provided by an operator established within the territory of the Kingdom of Belgium are to comply with the Belgian national provisions. Nevertheless, these provisions must not restrict the freedom to provide information society services via an operator established in another Member State.

5. “General media market” in the media sector; diversity of media

Neither the (Federal) Competition Act nor the language communities’ media-specific decrees contain any provision relating to (media) sector-specific market definitions. Media pluralism (diversity) is primarily safeguarded by the rules on cable capacity allocation. Taking into account the specific importance of the cable-TV networks for broadcasting in Belgium media pluralism is regulated by the way the different media decrees of the language communities define so-called “must carry” programmes, i.e. those that cable operators are under an obligation to transmit and by which other programmes are classified as so-called “may carry” programmes, i.e. those that the cable operator may chose to transmit.

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73 See as to further details The Film Industry in Belgium, Annuaire de l’audiovisuel 1997, http://www.obs.coe.int/oea_publ/eurocine.
74 M.B. of the 17 March 2003.
76 See footnote 54.
77 See hereto as to the French-speaking community “Décret sur l’audiovisuel”, Articles 22 and 29, as for the German-speaking community “Mediendekret”, Articles 22 to 24 and as for the Dutch-speaking community the “Decreten betreffende de radio-omroep en de televisie”, Articles 112 to 113.
V. Market definitions in the media sector, as upheld in sector-specific practice of authorities and/or courts

There is no decisional practice of either the (Federal) regulator for telecommunications and postal services or of the communities’ media decrees that provide any help as to market definitions in the media sector. The reasons for this are two-fold: Firstly, the communities’ media regulators are responsible for licensing and cable capacity allocation. Furtheron they exercise supervisory functions over the individual operators’ compliance with the applicable regulatory framework, such as in particular advertising, sponsoring, etc. Secondly, the Belgian telecommunications and postal services regulator has so far refrained from getting involved into issues of TV operators’ access to the cable-TV network. Although, on the basis of the wide definition of the term “interconnection” contained in the respective 1991 Act the treatment of such cases by the authority’s “Interconnection Chamber” would be legally possible, it could be interpreted as an illicit usurpation of the constitutionally guaranteed competencies of the Belgian language communities.

VI. Common factors and differences between these market definitions and the market definitions used in application of the competition rules

There are no obvious differences between the case-specific market definitions employed by either the Competition Council’s decisional practice or by the courts’ jurisprudence on the one hand and the indications that might be drawn from the sector-specific framework on the other. However, certain definitions contained in the sector-specific frameworks, in particular the language communities’ media decrees provide helpful guidance as to the (likely) approach taken by a competition authority when confronted with market definition in the sector covered by this study.

The guidance provided by sector-specific media and telecommunications law however remains limited. Some help is provided by the rules on licensing employed by the various media decrees. Much less can be derived from studying the respective Belgian legislation on copyright, film promotion and the Internet. The respective acts provide no guidance as to market definitions likely to be adopted under (national) competition law.