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A. Market definition in Luxembourg competition and media law

I. Introduction

This part of the study attempts to present the way national authorities define the relevant markets under general competition and media law in Luxembourg. This task does not go without an appraisal of the decisional practice of the authorities responsible for the implementation of the relevant regulations. Gaining an insight into original national authorities' decisions will be considered a prerequisite for fulfilment of this task. However, in the case of Luxembourg, due to lack of documental sources being publicly available this could not be achieved, because the decisions of the Minister for Economic Affairs are not published¹. All requests with the Competition and Consumer Protection Service of the Luxembourg Ministry for Economic Affairs to consult the decisions of the Minister or at least the motivated opinions of the advisory commission (CPCR) have not been successful, probably with reference to Article 7 of the competition law². Already in the past, similar difficulties emerged when trying to appraise the policy followed by the Luxembourg competition authority³.

As far as administrative jurisdiction is concerned, the problem is quite another one. One can hardly find decisions in the field of competition law. This situation is attributable to the fact that until the end of 1996, national jurisdictions were not empowered to apply national competition law. Only with the reorganisation of administrative jurisdiction, which became effective in January 1997⁴, national competition law became an area of responsibility of the administrative tribunal and the administrative court. Moreover, and according to information from executives of the competition authority and the information service of the administrative tribunal of Luxembourg, parties usually settle disputes amicably. Therefore, the tribunal has hardly been caused to adjudicate in cases involving competition law. The only relevant case the information service of the administrative tribunal brought to the knowledge of the study

¹ As for the role of the Minister of Economic Affairs in the competition environment, see marginal note 8.19.
² The relevant stipulation of Article 7 of the competition law reads as follows: “The decisions of the Minister for Economics following numbers 1, 2 and 3 are brought to the knowledge of the interested parties, including the plaintiff, through registered letter”. One might question whether this stipulation only requires for the decision to be announced to the parties to the litigation and remains silent as to whether also third parties may consult the decisions. Although, Article 7 is not formulated in a way as to expressly exclude thirds from obtaining knowledge of the decisions' content, however, the Study team faced considerable obstacles towards accessing the information.
³ Cathérine Noirfalisse addressed this problem concerning information about the decisional practice of Luxembourg Competition Authority; see Cathérine Noirfalisse, Luxembourg, p.226, in: EEC Competition Rules in National Courts (II), Vol. 4, 1994, Behrens (Ed.). In the following referred to as “Cathérine Noirfalisse”.
⁴ For more details, see marginal note 8.24.
group is the so-called “Lamesch case”. Unfortunately, neither the tribunal nor the court dealt in their respective judgements with the issue of market definition.

However, these difficulties seem to be restricted only to the field of general competition law. The situation is presented differently in other fields. The field of telecommunications law for instance is more transparent. Many of the documents, including decisions of the competent authority in Luxembourg, are accessible. So there is a contrast with respect to the way the different authorities handle access to their information.

The present contribution is therefore to be seen against the background of these conditions, which affected the handling of the issue of market definition in Luxembourg to a considerable extent. Nevertheless, the reader will find in this section the same thematic steps as performed in the precedent sections, even if many parts of this section will remain largely vague or even unable to present analysis. For these reasons, it should not come as a surprise that great emphasis is laid on the legal and institutional framework of competition and media law in Luxembourg. Moreover, a brief description of the legislative reforms underway is also offered.

The first part of the present section will deal with the issue of market definition in Luxembourg competition and media law (A). As an introduction, the legal and institutional framework for competition and media will be presented (I), then the general approach to market definition in Luxembourg competition law will be discussed (II). Given the fact that the overall competition environment is currently undergoing an intensive legislative overhaul, a section will be devoted to the reform scheme. The second part (B) is devoted to a descriptive account of the repertoire of the relevant markets in the Luxembourg media sector – e.g. Publishing (I), Music copyright (II), Broadcasting TV (III), Film sector (IV) and Internet (V). Then part three (C) is reserved for a comparative analysis of the decisional practices of the EC Commission and the Luxembourg competition authorities in terms of

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5 On 2 April 1996, the Lamesch Company seized the Minister for Economic Affairs, accusing the Oeko Services Luxembourg S.A. (OSL s.a.) of abuse of dominant position and a creation or at least an attempt to create a cartel in contravention of the 1970 Competition Law.

The Minister referred the case to the CPCR on 6 May 1996. In its motivated opinion of 6 November 1996, the CPCR held that the OSL S.A. did not violate the 1970 Competition Law. The Minister for Economic Affairs followed this view and decided to close the file on the case on 11 November 1996. The Minister then informed the complaining party on 28 November 1996 about the possibilities and modalities to appeal the decision.

After an appeal had been lodged to the administrative tribunal (first instance), the latter adjudicated on the case on 4 October 1999 and approved the Minister’s decision of 11 November 1996, but based on different grounds.

While the Minister dismissed the case in application of the 1970 Competition Law just because he could not establish any abuse of dominant position, the tribunal’s decision was based on the fact that the Minister could not scrutinize a measure (the agreement in the case at issue) that the Government Council had previously agreed upon. The Lamesch Company also appealed the judgement on 12 November 1999 with the administrative court (second instance). The administrative court confirmed on 23 November 2000 the legal finding of the administrative tribunal. See the public trial of 23 November 2000 before the administrative Court, N° 11662C.

6 To the extent possible.

7 The sector specific approach carried out in the field of telecommunications law by the competent authority will be considered to some extent, since the study group found at least one decision dealing with market definition.

8 The bill is still to pass the chamber of deputies. For more details see Chapter A.I.4.
market definition. After the insights gained in the previous parts have been summarised, the last section will provide a detailed analysis of all markets defined in the media sector in Luxembourg, followed by an analysis of differences between the Luxembourg approach and the approach at the EC level.

According to information from diverse authorities and lawyers in Luxembourg, the competition authority follows the methodological pattern of the EC Commission when defining the relevant market and also applies the Commission’s Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law.

1. Legal framework for competition in Luxembourg

The competition policy is currently based, though not for much longer, on the modified law of 17 June 1970 on restrictive commercial practices. The 1970 Competition Law was amended by the law of 20 April 1989. Luxembourg competition law is modelled on Art 81(1) of the EC Treaty, since it takes up some concepts of Community competition law. Thus, the Grand Duchy numbers among those Member States in which cartels are generally prohibited as a matter of principle.

The law penalises agreements between undertakings, decisions of groups of undertakings and concerted practices having as their purpose and effect the prevention, the restriction and the distortion of competition on the market and the nature of which is to affect public interest.

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9 However, the persons or institutions contacted were not in a position to provide factual evidences in support of this statement.

10 Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, [1997] OJ C 372/5. It would have been very helpful if the study group could have been allowed to consult at least one decision giving evidence of this view. It is therefore not possible to verify if the Luxembourg Competition Authority really succeeds in this way. However, in its reaction to the draft 1997 notice on Market definition, the Ministry for Economic Affairs of Luxembourg congratulated the EC Commission for rendering the appraisal of the relevant market more transparent with the notice. Nevertheless, the Ministry stressed that despite the precious contribution of the notice, “market definition remains an exercise with an uncertain outcome”. See the “Reaction of the government of the Grand Duchy of Luxembourg to Commission’s proposals concerning vertical restraints”, of 10 July 1998.


13 Academy of European Law Trier (Europäische Rechtsakademie Trier – ERA) : “Study report on the policy of MS competition authorities towards horizontal cooperation agreements between companies”, Project n° IV/97/ETD/13. The study was carried out at the request of DG IV – Competition of the EC Commission. In this study, the authors rely on information provided by the Competition Department of the Ministry for Economic Affairs dated 27 January 1998 according to which Article 1 of the 1970 Competition Law in conjunction with Articles 2 and 3 contains a prohibition in principle of horizontal restrictions on competition. See also Françoise Gillen, “A new system of competition law for Luxembourg?” Report of the internship with the Ministry of Economic Affairs, June 1996, hereafter referred to as “Françoise Gillen”; Xavier Nevez, Synthesis of opinions of the Commission on Restrictive Trade Practices, study commissioned by the Ministry of Economics and tabled on 6 September 1997 (hereafter referred to as “Xavier Nevez, Synthesis”, p.16; André Prüm, Hugues Dewolf and Xavier Nevez: „For a reform of Competition law”, a research project realised to the account of the Ministry for Economic Affairs, February 1999, p. 53., hereafter referred to as “The Prüm Report”.

14 Article 1 (1).
All activities of one or more enterprises abusing a dominant position on the market and affecting public interest are targeted as well by the law. The application of the 1970 Competition Law presupposes two cumulative conditions: the practice under investigation should affect both the competition – understandings, abusive use of a dominant position – and the public interest. The operation under control must have affected competition, notably through the creation and reinforcement of a dominant position.

By contrast, the law leaves out of its scope of application agreements between undertakings, decisions of groups of undertakings and concerted practices resulting from the application of a legal or regulatory text and those where the parties thereto can prove that they contribute to improving the production and distribution of goods or to promoting technical or economic progress, while respecting consumers’ interests. These exemptions are deemed to be incontestably inspired from general Community competition law. But unlike Community competition law that has a legal exemption system a priori, the exemptions provided for in Article 2 of the 1970 Competition Law are to be decided on a case-by-case basis by the Competition Authority.

While the law defines the elements constituting an understanding, this is not the case for abusive exploitation of a dominant position. In fact “the law defines neither what a dominant position is nor the criteria for appraising the existence or absence of such a position”.

The 1970 Competition Law on restrictive trade practices does not provide for any national control for concentrations in the Grand Duchy of Luxembourg. The “old character” of this text might be explicative in this respect. Traditionally, it was admitted both by Member States of the EC and EC institutions that the control of concentrations eventually exerted through the rules governing understandings and abuse of dominant position could be considered sufficient. The wording of the 1970 Competition Law remained at this stage and therefore does not concern concentrations not falling within the scope of application of the Community regulation. Given the thresholds required in Community competition law, it seems not to be the case that many economic sectors are concerned by the application of the Community regulation in the territory of the Grand Duchy. However this does not mean that to date Luxembourg is without any control on concentrations, since the competition authority could adopt an approach on the basis of the rules governing understandings and the abuse of a dominant position. So did the EC Commission and the ECJ prior to the adoption of the merger regulation in 1989.

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15 Article 1 (2).
17 Article 2 of the 1970 Competition Law; compare Cathérine Noirfalisse, p. 225
18 Françoise Gillen.
19 Defined in accordance with Community competition law as agreements, decisions of undertakings and concerted practices. See Article 1 (1) of the 1970 Competition Law; compare also the Prüm Report, p. 53
20 So the CPCR in the Sodalux case, p. 20, 4.2.2, quoted by Xavier Nevez, Synthesis, p. 22
21 Françoise Gillen; Xavier Nevez, Synthesis, p.16
22 Until the drawing up of her report in 1996, Françoise Gillen held that no case involving concentrations was presented to the CPCR, see Françoise Gillen.
Substantively, the 1970 Competition Law is designed to apply in all sectors of economic activity\(^{23}\). Though, some economic sectors enjoy a particular status by virtue of technical, structural particularities and others. They are under a particular professional surveillance from the State. It is important for the purpose of this part of the work to note that none of these special professional control systems does contain any provision with respect to competition within the meaning of the 1970 Competition Law. These domains are subject on the one hand to control by the competition authority in application of the 1970 Competition Law and on the other hand partially to an additional professional control from the State. This is for example the case for the financial sector\(^{24}\) and the media and audiovisual sector\(^{25}\).

Some other sectors are endowed with an additional sector-specific control of abuse of dominant position, even if their sector-specific competition regulation does not affect the enforcement of the 1970 Competition Law by the general competition authority\(^{26}\). This is e.g. the case for the telecommunications sector\(^{27}\) and the sector for energy supply\(^{28}\).

Under the current competition law in Luxembourg, there is no possibility for the national competition authority to apply EC competition rules. The law of 2 September 1993\(^{29}\) only entrusts to the competition authority the responsibility to receive notices and assume the rights laid down in certain articles of the Council Regulations 17/62\(^{30}\) and 4064/89\(^{31}\). But none of these duties involves the application of Articles 81 and 82 EC Treaty. The new competition bill being finalised provides for the Competition Authority to apply Articles 81 and 82\(^{32}\). Unlike the competition authority, Luxembourg judges are empowered to apply Community

\(^{23}\) Xavier Nevez, Synthesis, p.16.


\(^{26}\) The estimation relates to the interpretation applied by the Study group. See marginal note 8.21 and 8.22 for more details.

\(^{27}\) The Law of 21 March 1997 on Telecommunications is published in: Memorial A N°18, of 21 March 1997


\(^{29}\) Law creating the conditions required for the application of the 1970 Competition Law, the Council Regulation 17/62 and the Merger Regulation 4064/89.


competition rules, even if the volume of cases dealt with remains extremely low, due to the reasons elaborated above\textsuperscript{33}.

Luxembourg also maintains an extensive system of price regulation that is unique within the EC\textsuperscript{34}. The purpose of this system is to help reduce pressures on wage levels, which are indexed to the rate of inflation.

2. Sector specific competition law in the telecommunications sector

The telecommunications legal environment in Luxembourg is governed by the Telecommunications Law from 21 March 1997, last amended in 2001\textsuperscript{35}. In its Articles 21 (network access), 25 (interconnection) and 27, the Telecommunications Act ensures fair competition between the historical telecommunications operator and alternative operators. Articles 21 and 25 contain obligations for the operator considered to having a prevailing position on the relevant market\textsuperscript{36}. According to Article 27, the telecommunications regulatory authority\textsuperscript{37} is entitled to take measures against anti-competitive practices of the dominant operator\textsuperscript{38}. Therefore, the Telecommunications Law 1997 provides for a sector specific regulation for competition in the telecommunications sector\textsuperscript{39}.

In addition, the behaviour of a telecommunications operator can also entail a procedure before the general competition authority, which then appraises the case from the point of view of Article 1 of the 1970 Competition Law. This presupposes a close cooperation between the telecommunications regulation authority and the general competition authority, most notably with respect to the market definitions they might respectively explore. But to date, cooperation between both authorities is quite inexistent. Though, this situation is expected to be improved with the reforms that will take place soon\textsuperscript{40}.

\textsuperscript{33} See marginal note 8.2 above. Compare Cathérine Noirfalisse, p. 255-227.


\textsuperscript{36} Article 21 requires the Minister to establish a list with operators that have been deemed to have a prevailing position on the market. The list is contained in the ministerial decree of 21 June 2000, published in: Memorial A, N°54 from 10 July 2000. See also p. 5 of the 1997 annual report of the Telecommunications Authority, retrievable under http://www.etat.lu/ILR/content.html.

\textsuperscript{37} See in the following chapter “institutional framework”.

\textsuperscript{38} For example, Article 27 was the basis in the case Tele2 Luxembourg S.A. versus the “Entreprise de Postes et Télécommunications (EPT)” concerning interconnection. The decision of the telecommunications authority from 19 September 2002 will be indicated later in this part.

\textsuperscript{39} The telecommunications regulatory authority underlines this view in its 1997 annual report, when it holds that one of its missions is to make sure that the telecommunications sector be open to competition (see p. 7 of the 1997 annual report, retrievable under: http://www.etat.lu/ILR/content.html). This applies also to the sector for energy supply. According to Article 27 of the “law of 24 July 2000 organising the electricity market” (Memorial A n°79 of 21 August 2000, p. 1896), the telecommunications regulatory authority has mission to avoid any abuse of dominant position in the electricity market. A similar stipulation also exists for the gas sector in Article 29 of the “law of 6 April 2001 organising the gas market” (Memorial A n°57 of 7 May 2001, p. 1142).

\textsuperscript{40} This report relies on information from executives from the telecommunications regulation authority.
In fact, as representatives from the telecommunications regulation authority reported to the study group, the process of transposing the new Community telecommunications package into national law is still underway in Luxembourg. The 8th report on the implementation of the telecommunications package dated 2002 stresses that the Luxembourg government is planning to transpose the new telecommunications framework in four steps:

- A “Law on Communications” designed to transpose the Framework, the Authorisations and the Universal Services Directives was being elaborated;
- Another law is expected to address implementation of the Spectrum Decision, together with certain aspects of the Framework and Authorisation Directive linked to frequency management;
- A further law will address the reorganisation of the telecommunications regulatory authority and
- A bill that will ultimately transpose the new Communications Data Protection Directive has been prepared by the Ministry and was at the time of the report being examined by the State Council.

The Minister delegated to Communications is finalising a preliminary draft law that will then be tabled to the Government Council for deliberation.

3. The institutional framework

There is to date no independent competition authority in Luxembourg due to insufficient legal basis for its creation. This situation is according to many sources due to constitutional problems. The competition authority responsible for all sectors of the economic activity is the Minister for Economic Affairs.

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41 See also number 2 (national legislation on telecommunications), under: http://www.eluxembourg.lu/L__gislation/vigueur/index.html

42 This is expected to be done maybe in late June, according to executives from the Telecommunications Regulator. See also under: http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm.

43 According to the authors of the Prüm report, the combination of Articles 84, 85, 86 and 94 of the constitution of the Grand Duchy reveals that jurisdictional power can be entrusted to judges only. They deduce from this that the constitution is an obstacle to the establishment of a separate body endowed with jurisdictional power, unless it provides for such a derogation supposed to be carried out by law. The authors maintain that this is not the case for the creation of an independent competition authority, given that the authority will undoubtedly exert jurisdictional function in the field of competition law. Therefore, the report did not opt for the creation of an administrative authority isolated from the executive power, albeit also from the point of view of its authors, an authority with jurisdictional power would be the most easy and effective solution. See the Prüm Report, p. 243-244; compare also European Economy: Report on the implementation of the 2000 BEPG, Luxembourg, hereafter referred to as “Implementation BEPG 2000”, P. 101 (103-104).

44 If one shares the view upheld above (see marginal notes 8.16 and 8.17), there are two authorities responsible for guaranteeing competition in the telecommunications and energy sector. There is the Minister for Economics as far as the 1970 Competition Law is concerned, and the telecommunications regulatory authority within the scope of the Telecommunications Law 1997, the Electricity Law 2000 and the Gas Law 2001.
A Commission on Restrictive Business Practices (CPCR) was instituted within the Ministry for Economic Affairs in order to scrutinise all cases falling within the scope of the law. The CPCR is the body entrusted with the evaluation of cartels and/or abuse of a dominant position. It is composed of independent experts and government representatives. The CPCR is an administrative advisory authority, but its opinion influences the binding decisions the Minister of Economics might take against enterprises found responsible of understandings or an abuse of a dominant position. The CPCR delivers a motivated and not publicly available opinion on any case to the Minister, who alone has the power to take a decision.

According to Article 4 of the 1970 Competition Law there are two ways cases can be brought before the CPCR. The first way consists in an official appeal. On the request of the State prosecutor, the Minister of Economic Affairs is obliged to refer the case to the CPCR. In his synthesis of the practice of the CPCR dated 1997, Xavier Nevez held that during the period he reviewed, this way of appeal had never been made use of in practice. The second way is that of an appeal through a complaint. According to Xavier Nevez, this was the method used in all cases brought before the CPCR. A party lodges a dispute with the Minister of Economics. After the Minister has examined it, he decides whether he would refer the case to the CPCR or not.

The Minister of Economics renders a motivated decision, which is subject to appeal by the parties to the litigation. But decisions pronounced against a party found guilty of a breach of the 1970 Competition Law remain relatively lenient. In fact the Minister orders the parties to put an end to the contravention on the basis of Article 7 (2) – warnings or recommendations – or Article 7 (3) – prohibition, but without imposing any sanction (e.g. fine). In cases the Minister has been induced to pronounce a penalty, he has virtually always founded the decision on Article 7 (2) – warning or recommendation subject to appeal before the State Council. Until 1997 the Minister had pronounced only one prohibitive decision in the “Coditel case”.

The Minister’s decisions are not published. The law only provides for decisions being brought to the knowledge of interested parties via registered letter.

There are two ways to appeal the Minister’s decision pronounced on the basis of Article 7 of the 1970 Competition Law:

It is possible on the one hand to institute administrative proceedings reviewing an objection to an administrative act, or to lodge a litigious appeal on the other hand. In the first case, an

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45 Article 3 of the 1970 Competition Law. See also the Cardiff Progress Report 2001, p. 9.
47 Article 3 of the 1970 Competition Law.
48 Xavier Nevez, Synthesis, p. 3. The author studied 15 cases (12 containing complete information) brought to the knowledge of the CPCR pursuant to the 1970 Competition Law.
49 Article 7 of the 1970 Competition Law.
50 Ibid.
51 Compare Xavier Nevez, Synthesis, p.11.
52 Article 7 of the 1970 Competition Law.
objection can be filed to the Ministry for re-examination of the file\(^{53}\). The Minister refers the case once more to the CPCR, which notifies its new position on the matter to the Minister. The latter then renders the definitive decision. The Minister’s definitive decision is subject to appeal. Since the inception of the law of 7 November 1996\(^{54}\), the appellate jurisdiction lies with the administrative tribunal\(^{55}\).

The second way is the litigious procedure, where appeals against Minister’s decisions in the field of competition law can be brought directly before the administrative tribunal. Only little use – if any – has been made of this possibility in the past\(^{56}\).

While the first procedure – administrative proceedings – can be initiated against all possible decisions the Minister can take pursuant to Article 7 – i.e. warnings, recommendations, prohibitions, the contentious appeal before administrative courts is possible only against prohibitive decisions of the Minister in application of Article 7 (3). The 1970 Competition Law therefore does not allow any right of appeal against decisions in terms of warnings and recommendations mentioned in Article 7 (2). According to Xavier Nevez, this position was underlined by the State Council\(^{57}\) in the “Eurochèque case”, where it held: “Under the three possibilities of action offered to the Minister by Article 7 (…) the Minister has chosen the way of warning. Though, according to Article 7, an appeal is open only against a partial or total prohibition – provided for in para. 3 – pronounced by the Minister. The appeal is not possible in case the Minister just restricts himself to a warning or recommendation to the interested parties”\(^{58}\).

If the responsible entity or person infringes a prohibitive decision or an injunction of the Minister, the public prosecutor of the arrondissement in which the author has its head office seizes the case in order to institute proceedings. The defaulting enterprise can be imposed penalties in terms of either fines running from 10,000 (247,89 €) to 1 million LUF (24789,35 €), or imprisonment between 8 days and one year\(^{59}\).

\(^{53}\) This procedure is not provided for by the 1970 Competition Law and is only founded on the practice of the competition authority. See Xavier Nevez, Synthesis, p. 13, who reports that this procedure was applied in the case “OGB-L c versus Luxemburger Wort” and the CPCR re-examined the dossier in the same formation.


\(^{55}\) Xavier Nevez, Synthesis, 14. According to the Articles 2 and 3 of the law of 7 November 1996, the administrative tribunal and the administrative court have jurisdiction on appeal against the Minister’s decisions on competition matter. Prior to the procedural amendments brought about by the law of 7 November 1996, an appeal was to be lodged to the Dispute Committee of the State Council (Article 7 of the 1970 Competition Law).

\(^{56}\) Cathérine Noirfalisse found no case until the time she drew up her study on Luxembourg, compare Cathérine Noirfalisse, p. 226; Xavier Nevez, Synthesis, p. 14, found only four cases that were the object of litigious appeal before the State Council: Eurochèque, OGB-L, Coditel and Lamesch.

\(^{57}\) The State Council was the former appeal instance, supra note 55.

\(^{58}\) Reported by Xavier Nevez, Synthesis, p. 14. The legal remedy was rejected since the Dispute Committee of the State Council could only scrutinise appeals presented against a Minister’s decision taken on the basis of Article 7 (3). In the case at issue, however, the Minister based the decision on Article 7 (2). Therefore, an appeal against that decision was not eligible. The text has been translated by the study group.

\(^{59}\) Article 8 of the 1970 Competition Law.
4. **The reform scheme in Luxembourg Competition Law**

Since Luxembourg is under intense pressure from cross-border competition resulting in private consumption price levels that are close to Community average, its competition policy does not assume the urgency that it does in other Member States characterised by a strong internal market and having business purely national in nature. Its economy stands out due to its extremely open nature that stimulates competition on the product markets, which results in very high productivity and prices below the Community average. There is no branch that is unaffected by strong competitive pressure from regions outside the country or even from the internal market as a whole. Product markets are contestable and competition has been generally sufficient in the past.

Nevertheless, different policies enshrined in the competition framework currently in force, including the intensive price regulation and regional aids, continue to limit the degree of competition in product markets. Moreover, the lack of empowerment of the competition authority with respect to Articles 81 and 82 EC Treaty makes it difficult to ensure effective enforcement of both national and EC competition rules.

In fact, even the 1999 Broad Economic Policy Guidelines (BEPG) recognised that the extensive system of price regulation and regional aid maintained by Luxembourg was unique within the EC. In the country-specific part of the BEPG 1999, the EC Commission recommended Luxembourg to consider abolishing the price regulation system that is deemed to be obsolete.

The BEPG 2000 then pointed out to the fact that quite a lot was underway and welcomed particularly the efforts already initiated in this respect. In this context Luxembourg was recommended to go ahead with the reform steps and give high priority to adopting a new competition law permitting a more active and efficient competition policy by the authorities, giving them the power to enforce EC Articles 81 and 82.

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60 Cardiff Progress Report 2001, p. 5
65 See also Implementation BEPG 2000, Luxembourg, p. 101 (104-104) P. 104, which acknowledged that some change was being prepared in the law on prices, competition and consumer protection and would consist of three main elements:
- Abolition of the system of fixed and monitored prices (nevertheless, to avoid sharp movements in prices in specific cases, the government would in exceptional cases be allowed to temporarily control prices);
- Establishment of a new independent competition authority with powers in terms of inquiries and sanctions, which has been delayed due to internal constitutional problems (for more about this, see marginal note 8.19 above); and
- More price and market transparency through better informed consumers.
In its reports on the implementation of the BEPG 2000 and 2002 the EC Commission drew attention to the fact that Luxembourg has in the past lagged behind in transposing internal market directives and in implementing competition reforms\(^\text{67}\).

In 2000, the internal market transpositions were indeed significantly reduced. Until 2002, the EC Commission claimed in its report on the implementation of the BEPG 2002 that Luxembourg had not yet taken the necessary legislative measures to adapt the competition framework\(^\text{68}\). The report notes that limited progress was made in implementing the 2002 product market recommendations consisting of the reform of the competition legislation, including the abolition of fixed or monitored prices, the empowerment of the competition authority to apply EC competition law, and the reform of public-procurement legislation.

The Government Council has now approved\(^\text{69}\) a draft competition law\(^\text{70}\), which reportedly intends to abrogate the old pricing policy instruments in place since the end of the Second World War under State’s control on pricing and to reform the competition authority. The project is to be seen in the context of the Government programme and the “Broad Economic Policy Guidelines”\(^\text{71}\). The new competition framework is still to be adopted by parliament.

That global reform project completely overhauling the national legislation on competition\(^\text{72}\) was laid out by the Ministry of Economic Affairs and announced in the progress report on structural reforms of December 2000. The work on reforming price and competition policy started largely in line with the BEPG recommendations. The Direction for Competition and the Protection of Consumers (DCP) of the Ministry for Economic Affairs finalised the preliminary draft law in the course of the year 2002. The Minister for Economics presented it to the Government Council in September 2002\(^\text{73}\). The proposed regulation will require major changes to Luxembourg law, which explains why the draft reform has somewhat fallen behind schedule\(^\text{74}\).

The modernisation of Luxembourg competition law should enable Community competition law to be fully applied by the new competition authority\(^\text{75}\), and will take account of the decentralisation reflected in the proposal for a Council regulation on implementing the

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\(^{67}\) Implementation BEPG 2000, p. 101 (104-104) p. 103; Report on the implementation of the 2002 BEPG, Luxembourg, p. 81; See also the Report on the implementation of the 2001 BEPG; Luxembourg, p. 105-106: http://europa.eu.int/comm/economy_finance/index_en.htm, which held that over the most recent period, developments in the application of single-market rules have slowed down and announced reforms within the competition framework were not yet achieved. The report registered no new measures so far.

\(^{68}\) Implementation BEPG 2002, p. 81

\(^{69}\) In September 2002, compare: Implementation BEPG 2002, p. 82.

\(^{70}\) Not publicly available.


\(^{72}\) Above all the 1970 Competition law.

\(^{73}\) Activity Report 2002 of the Luxembourg Ministry for Economic Affairs, p. 142


\(^{75}\) Implementation BEPG 2000, p. 101 (104-104).
competition rules laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1917/68, 2988/74, 4056/86 and 3975/87. This structural reform will synchronise with a perceptible increase in severity of sanctions against anti-competitive behaviour. Procedural rules will also be profoundly modified in order to permit effective and efficient control of the functioning of the markets by reinforcing, notably, powers of inquiry invested in the competition authority.

This new legislation is supposed to be modelled on Articles 81 and 82 of the EC Treaty and takes into account the new regulation on the application of Articles 81 and 82 EC Treaty, which will take effect from 1st May 2004 on\(^8\). In fact, certain behaviours will be prohibited as far as undertakings are concerned: abuse of dominant position and agreements aiming at restricting and distorting competition. While the abuse of dominant position will be absolutely forbidden, the prohibition principle concerning understandings will enjoy an exemption provided a profit share thereof benefits consumers\(^7\).

The draft law provides for the creation of an “Independent Competition Council” as well as a “Competition Inspection Authority” – as the investigation body – that will replace the present CPCR. Both new organs are planned to be administratively attached to the Minister of Economic Affairs\(^8\). While the agents of the Competition Inspection Authority will be in charge of scrutinising cases, it will be up to the “Independent Competition Council” to take the final decision in terms of the interdiction of an anti-competitive practice\(^9\). The establishment of an independent competition authority is associated with the current move towards a more decentralised European competition policy. The “Independent Competition Council” will be part of the European network of national competition authorities that will be established by the new Community regulation on the application of Articles 81 and 82 EC Treaty coming into force on 1st May 2004\(^8\).

The new competition council will be in charge of applying not only the stipulations of national competition law, but also the Community regulations. It will also be empowered to impose administrative fines. Moreover, the new law introduces rules of leniency that could lead to a remission or reduction of fines\(^8\).

Strengthening of the competition rules will be accompanied by a reform of the pricing legislation that will promote liberalisation of pricing. The new legislation on prices will reduce the scope of public intervention on prices in order to improve effective competition. Though, the envisaged option of free pricing will not be absolute for the draft provides for

\(^7\) Activity Report 2002 of the Luxembourg Ministry for Economic Affairs, p. 142


\(^9\) Implementation BEPG 2002, p. 82

\(^8\) It seems to be that following the new bill yet to be passed the Minister for Economics is no longer the competent competition authority, but rather the Independent Competition Council. This new option entails of course the abolition of the CPCR whose duties of investigation are to be taken over by the Competition Inspection Authority.


\(^8\) For all this, see the Activity Report 2002 of the Luxembourg Ministry for Economic Affairs, p. 142.
some exceptions\textsuperscript{82} allowing executives to monitor prices on certain markets whenever the conditions required for a sound competition are not met, either for structural reasons or for those associated with the economic situation.

II. The general approach to market definition in Luxembourg competition law

1. The approach by the Competition Authority

As was already pointed out earlier in this study\textsuperscript{83}, neither the decisions of the Minister for Economic Affairs – as the Luxembourg competition authority – nor the motivated advises of the CPCR – as the advisory instance – are publicly available. Therefore it is not possible to assess the criteria the Ministry applies when delineating the relevant market in cases involving competition law and the policy it follows in this matter\textsuperscript{84}.

Each assessment as to whether competition is affected or not must necessarily be performed with respect to a relevant market. It is well known that the definition of the relevant market is a very delicate task that is subject to controversies and does not always give economic players the legal security they need. The criteria for evaluating the market are not legally enshrined in the 1970 Competition Law and must always be clearly defined by the case law of Luxembourg authorities. From this point of view the Luxembourg legal requirements, by referring only to a restraint of competition “on the market” (without giving any precision), are sufficient only upon the condition that the case law succeeds and adopts a clear position in the choice of the method for market assessment. Though, scholarly work stresses that this is not the case in the Grand-Duchy of Luxembourg\textsuperscript{85}.

Secondary sources admit that under Luxembourg competition law, the delineation of a relevant market is always done through the combination of many parameters. Two series of criteria are essential: The first one is linked to the geographical dimension of the market and the second is attributable to products and services considered\textsuperscript{86}. Therefore, the main difficulty in the application of the 1970 Competition Law lies in the definition of the relevant market\textsuperscript{87}.

In contrast to the conditions required to establish an abuse of dominant position, the definition of the relevant market is not a constitutive element of the violation of Article 1 (1) of the 1970 Competition Law within the framework of an understanding. Nevertheless, one could not be able to continue without differentiating the market in question. It is always indispensable to define the product or service affected by an agreement or the competition situation between the undertakings involved. Even if market definition is not formulated as a prerequisite to assessing an understanding, this criterion cannot be ignored, not only in order to establish an understanding, but also to appraise its harmfulness and assess the amount of the fine to be

\textsuperscript{82} Government Council, Summary of activities of 13.September 2002
http://www.gouvernement.lu/salle_presse/conseils_de_gouvernement/2002/09/13conseil/index.html#1
Last update: 05.11.2002; Compare Implementation 2000, P. 104

\textsuperscript{83} Marginal notes 8.20 and 8.23.

\textsuperscript{84} Cathérine Noirfalisse, p. 226.

\textsuperscript{85} The Prüm Report, p. 55.

\textsuperscript{86} The Prüm Report, p. 55.

\textsuperscript{87} The Prüm Report, pp. 61 - 62.
imposed. Moreover, the definition becomes unavoidable if a rule is to be applied and the application or not thereof is subject to the establishment of a market share\textsuperscript{88}.

It is argued that the CPCR hardly defines the relevant market as such. Executives from the Competition and Consumer Protection Service (DCP) of the Luxembourg Ministry for Economic Affairs confirmed this view by saying that the CPCR faces great difficulties as regards this issue and sometimes it is even not able to seriously carry out the task of defining the relevant market. Some of the reasons given are the geographical particularities of Luxembourg on the one hand, and the lack of necessary data concerning the supply and demand structure on the other hand\textsuperscript{89}. Therefore, the question as to whether competition is affected or not is in most of the cases the object of a rather subjective assessment\textsuperscript{90}. According to Xavier Nevez, the CPCR defined the relevant market in the “\textit{Lamesch case}” as follows:

- **Geographical market**: The territory of the Grand Duchy;
- **Product market**: The disposal of waste – toxic and hazardous and being of no economic interest for the authorised waste collectors – produced by undertakings recorded with the Chamber of Handicrafts\textsuperscript{91}.

\textbf{a)} \ 
**Perfect substitutability test**

As some scholarly work shows, the principal element to be considered when delineating the relevant market under Article 1 of the 1970 Competition Law is the one of the substitutability of demand. According to André Prüm in the research project realised by the “Laboratoire de Droit Economique” to the account of the Ministry for Economic Affairs\textsuperscript{92}, the substitutability test will be assessed under Article 1 of the 1970 Competition Law by determining whether there are any reasonable alternative solutions that users can perceive. The realisation of this assessment makes it indispensable to put in place a reliable system of measurement capable of recognising in real time the evolution of the structure of supply and consumers’ expectations. Though, Luxembourg lacks such instruments of measurement, and this impedes the elaboration of any coherent strategy concerning the delineation of the relevant market\textsuperscript{93}.

\textbf{b)} \ 
**Geographic dimension of the market**

As far as Luxembourg is concerned, some secondary sources hold that the geographical market can be easily identified as the territory of the Grand Duchy\textsuperscript{94}.

\textsuperscript{88} The Prüm Report, p. 55.
\textsuperscript{89} The Prüm Report, p. 61 - 62.
\textsuperscript{90} The Prüm Report, p. 56, 62.
\textsuperscript{91} Xavier Nevez, Synthesis, p. 23.
\textsuperscript{92} The Prüm Report. The project was carried out in the process of the reform of the Luxembourg Competition Regulation, which remains unfinalised (for more details about the reform see Chapter A. I.4).
\textsuperscript{93} The Prüm Report, p. 55.
\textsuperscript{94} Xavier Nevez, Synthesis, p. 22. It is important to note that the author scrutinised the decisional practice of the CPCR according to Art 82 EC Treaty. Therefore it is understandable that the relevant geographical market covers the overall State territory of Luxembourg, since it is a small sized country.
2. The approach of sector specific authorities (e.g. Telecommunications)

In its decision of 17 December 1999\(^\text{95}\), the Luxembourg telecommunications regulatory authority (ILR) dealt with the criteria permitting to appraise the importance of a telecommunications operator on a defined market, this in application of Article 21 of the Telecommunications Act 1997. Within the framework of this decision, the ILR identified four telecommunications markets:

- The market for fixed public telecommunications networks and/or voice telephony services;
- The market for fixed connections (leased lines);
- The market for mobile telephony networks and services; and
- The market for interconnection.

Moreover, the ministerial decree from 21 June 2000 listed in implementation of Article 21 of the Telecommunications Act 1997 the operators with a dominant position in the four relevant markets as indicated above. It follows from the list that apart from the market for mobile telephony networks and services, the former monopoly operator “Entreprise des Postes et Télécommunications” (EPT) prevails in the overall telecommunication sector. For the market for mobile telephony, it shares the leading role with the operator Millicom Luxembourg S.A.\(^{96}\)

Unfortunately, the decision of the ILR did not contain any indications as to how it came to such a result. Therefore, it is not possible to assess the criteria it applied and to consider whether some generally applicable statements could be drawn from it. According to interviews the study group had with executives of the ILR, the regulatory authority, for the purpose of market definition, just took up the principles laid down in the EC Directive 97/33/EC\(^{97}\).

Another decision of the ILR issued on 19 September 2002 in a dispute opposing the operator “Tele2 Luxembourg S.A.”\(^{98}\) to the EPT dealt with the obligation for interconnection laid down in Article 25 of the Telecommunications Law 1997. Tele2 challenged the price list of international and regional interconnection services charged by EPT. As EPT did not give way, Tele2 seized the ILR and requested it to amend the interconnection agreement particularly with regard to the financial conditions thereof. In addition, Tele2 found that EPT was selling its telecommunications services at a loss.

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\(^96\) Ministerial decree of 21 June 2000 is published in Memorial A, N°54 from 10 June 2000; see also p.7 of the 2000 annual report of the Regulatory Authority (ILR), available under http://www.etat.lu/ILR/content.html. The “Entreprise des Postes et Télécommunications” is referred to in the following as “EPT”.

\(^97\) Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP). It should be noted, however, that the Directive only provides for a 25 percent threshold in order to establish the dominant position of an operator.

\(^98\) In the following referred to as “Tele2”.
The ILR established that the practice of the EPT constituted an infringement of the guarantee of fair competition laid down in Article 25 of the Telecommunications Act 1997. As for the second issue raised by Tele2 in its application, the ILR concluded that the prices the EPT offered to the end-users was irrationally low in comparison to the price for interconnection paid by Tele2. The ILR therefore held that this would have the effect of preventing new telecommunications operators from entering the Luxembourg market and eliminating the existing operators.

3. The approach in the Luxembourg case law

As already stated above, the number of cases brought before Luxembourg jurisdictions and involving the application of national and EC competition law is very low. Talking about the 1970 Competition Law, this is not surprising, given that the implementation of this law has in the past not been entrusted to courts of law. Administrative jurisdictions (tribunal and court) have appellate jurisdiction in cases involving the application of the 1970 Competition Law only since the beginning of 1997.

As far as the application of Articles 85 and 86 (now Articles 81 and 82) EC Treaty is concerned, Cathérine Noirfalisse came in her analysis published in 1995 to the finding that there was only one decision in the case law available to the public applying Community competition law, Article 86 (now Article 82 EC Treaty) in the case at issue. Moreover, that decision did not deal with the very core of Article 86 but mooted the direct applicability of the stipulation.

B Repertoire of relevant product and geographic market in media sector in Luxembourg

As it has already been stated above, the 1970 Competition Law is designed to find application in all sectors of economic activity. It is therefore supposed to be applied to the media sector as well, with the Minister for Economic Affairs as the competition authority. The purpose of this part was to give a descriptive account of the different markets delineated by the practice of the Minister of Economic Affairs. But the lack of data concerning the decisional practice of the Minister experienced under general competition law goes also for...
the media sector. Therefore, it is not possible to answer the question as to which media market sectors exist and how the Minister or the CPCR defines them.

Despite all the attempts towards liberalisation made by the 1991 Media Law\textsuperscript{105}, the Compagnie Luxembourgeoise de Télédiffusion (CLT) remains the kingpin of the audiovisual landscape, with an audience share going beyond the 50 per cent threshold. Until the advent of the 1991 Media Law, CLT enjoyed a monopoly on a contractual basis\textsuperscript{106}.

**C Comparative Analysis of Market Definitions Adopted by the European Commission and those Adopted by Competition Authorities in Luxembourg**

Because of the very reasons reiterated before no comparative analysis could have been accomplished. The analysis of reasons for divergent results has also to remain undone. The lack of documents concerning the decisional practice of the Luxembourg Ministry for Economic Affairs makes it impossible to draw a comparison between its practice of market definition and that of the EC Commission.

**Conclusions**

It was impossible to assess the decisional practice and the policy followed in the field of competition law. Though, there is general agreement that under the 1970 Competition Law, the assessment as to whether competition is affected or not must necessarily be performed with respect to a relevant market, rendering a market definition unavoidable. The secondary information sources the study group consulted give evidence that also the Commission on Restrictive Trade Practices (CPCR) do consider the issue of market definition as indispensable when appraising the competitive behaviour of market players. But it is argued that the CPCR is confronted with considerable difficulties in this respect. In many cases, it has been unable to carry out this task seriously, and where it tried to do so, the decisions were not motivated enough to enable the identification of the strategy applied\textsuperscript{107}.

It should be noted that all the explanations in this section of the work concerning the competition law in force in Luxembourg can become obsolete in a foreseeable future, for the Luxembourg government is finalising a new bill completely overhauling the current competition framework\textsuperscript{108}. According to information the study group received in the course of the researches, the draft law is still under consideration by the Chamber of Deputies.

\textsuperscript{105} See supra note 25.
\textsuperscript{106} See n°2 under: http://www.ejc.nl/jr/emland/luxembourg.html.
\textsuperscript{107} The Prüm Report, p. 62
\textsuperscript{108} See chapter A.I.4 for more details.
D Impact of Different Regulatory Frameworks on Market Definition in Luxembourg

I. The regulatory framework for the media sector in Luxembourg

1. Introduction

a) Sociological characteristics of the Grand-Duchy of Luxembourg

With its 440,000 inhabitants living in a territory of 2,586 square kilometres, Luxembourg is one of the smallest countries of the European Union, but has a very cosmopolitan population, as nearly 37% of the residents are foreigners (out of which 58% are Portuguese, 20% French, 19% Italian, 10% German, and many other nationalities). Such characteristics of the Grand-Duchy of Luxembourg show the relatively small size of its marketplace (which is overall practically a national one) and explain the multicultural and multilingual configuration of the media market in this country of consensus and compromise rather than of confrontation.

b) Main specificity of the Luxembourg media landscape

Despite its small dimensions in size and population, Luxembourg has a relatively large number of diversified and dynamic media in all main sectors.

The written press is typically multilingual in content and close to political parties or trade unions in terms of ownership and/or editorial policy. The publishers of (significant) newspapers receive public subsidies and benefit furthermore from (legal and/or contractual) limitations in advertising imposed upon audiovisual media targeting the resident public.

Six daily newspapers are published and circulated in Luxembourg, with articles written in French, German, Luxembourgish and sometimes English: Luxemburger Wort, Tageblatt, Lëtzebuerger Journal, Zeitung vum Lëtzebuerger Vollek, and since more recently La Voix du Luxembourg and Le Quotidien targeting the French speaking community. Such papers cover international news as well as national and local events. Furthermore there are twelve weekly magazines (of general interest: Revue, Télécran, Le Jeudi, D'Lëtzebuerger Land, Woxx; of satirical nature: De Neie Feierkrop; targeting the Portuguese community: Contacto, Correio; of specific professional interest: De Lëtzebuerger Bauer; “toutes-boîtes” advertising publications: Luxpost, LuxBazar; entertainment news oriented: Nico) and a lot of periodical publications (mostly of social, professional, associative and/or specialist interest, like automobile for instance). Such offer is competing with numerous foreign newspapers and magazines also available on the market (mainly through distribution by “Les Messageries du Livre”) and which are also quite successful in readership in this territory.

The largest daily newspaper, Luxemburger Wort, belongs to the Catholic Church of Luxembourg and has close links with the Christian Social Party (CSV). Its publisher controls also one of the largest weekly’s, Télécran, as well as the commercial radio station DNR,
and has extensive book publishing activities. It also publishes a weekly, *Contacto*, in Portuguese\(^{112}\).

In terms of advertising\(^{113}\), the press sector holds the largest market share (67%) out of which the *Luxemburger Wort* alone gets a stake of around 70%. Thus this press title and its publisher have (historically) a dominant position in the Luxembourg media landscape, forming the characteristic **duopoly** on the Luxembourg media marketplace with the other dominant player in the sector of audiovisual media, namely the radio station *RTL Radio Lëtzebuerg* and the television channel *RTL Télé Lëtzebuerg* operated by CLT-UFA (RTL Group), which hold together a stake of about 80% in the total advertising market share of the radio sector (19% of the whole advertising market) and the television sector (10% of the whole advertising market).\(^{114}\)

The **audiovisual media** “made in Luxembourg” are based on a (more or less) dual organisation (an important private sector and a rather marginal public sector limited to radio) and are dominated by the *RTL* programs, as mentioned above. Except for the “socio-cultural” radio station 100,7 (named after its FM broadcasting frequency) which is operated by an organisation of public law (“établissement public”) with a “public mission” being financed by public funding only, there is no real “public service broadcaster” as such in Luxembourg. However, the private broadcasting organisation CLT-UFA (RTL Group), holder of several commercial radio and television licences from the Luxembourg Government, has committed – as a counterpart for the grant of such licences – to provide for certain performances of Luxembourg public service in radio and television. Thus, both *RTL Radio Lëtzebuerg* and *RTL Télé Lëtzebuerg* must broadcast – for a certain minimum of time within their regular schedule – programs devoted to news, culture, sports, foreign speaking communities and transmit a number of events of national interest. By virtue of the licence agreement, *RTL*’s income from advertising in the Luxembourg territory has been limited – in television – to an annual maximum amount having reached 5,275,000 Euro in 2002. For the surplus, CLT-UFA has to cover the costs of the national TV program by itself with income from other sources (e.g. profits from its international channels). In radio, the costs for *RTL Radio Lëtzebuerg* are to be covered by advertising revenue (limited in daily time) and to be fully borne by the broadcaster CLT-UFA, provided however that the possible losses of such radio exploitation are contractually limited to a certain annual amount, the excess of which would entitle the broadcaster to get a compensation from the Government.

In the field of **radio**, CLT-UFA had from 1930 till 1991 – on a contractual basis – the monopoly for broadcasting in and from Luxembourg, building up i.a. the still existing RTL radio programs having a substantial audience in France and Germany, and operating since the late fifties also “the” national radio program in Luxembourg language, now known as *RTL Radio Lëtzebuerg*. The media law of 1991 opened the way for granting radio broadcasting licences also to other operators in Luxembourg. Thus, besides the two nationwide receivable stations, the commercial program *RTL Radio Lëtzebuerg* (still the absolute leader with an audience share of about 70%) and the newly created (1993) socio-cultural, public and non-commercial 100,7 (with an audience share of approx. 5%), four medium range radio networks have been licensed to groups where mostly press publishers are involved:

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112 Circulation approx. 16,000.
113 Around 85 million Euro invested in 2002.
• **Eldoradio**, a music radio station targeting the younger public with an estimated audience share of approx. 10%, is held by the publishers of the newspapers and magazines *Tageblatt, Lëtzebourger Journal, Revue* and *d'Lëtzebourger Land*, and indirectly by CLT-UFA.

• **DNR (Den Neie Radio)**, a general interest program with an estimated audience share of approx. 8%, has among its shareholders Luxembourg’s leading press group, publisher of the *Luxemburger Wort*.

• **Radio Latina**, with an estimated audience share of approx. 3%, targets primarily the foreigners residing in Luxembourg. Its shareholders are mainly associations of immigrants.

• **Radio Ara**, with an estimated audience share of less than 1%, is owned by organisations of the so-called associative stream, offering alternative programming tailored to all kinds of more marginal groups.

The Luxembourg radio landscape is completed by about 15 local stations, which are bound by strict structural and technical limitations, and restrictions in advertising revenue.

In the fields of **television**, the Luxembourg marketplace is less “crowded” in terms of operators targeting the domestic population. But still, there exist for the time being four channels besides the national and dominant “incumbent” player **RTL Télé Lëtzebuerg**, which enjoys an estimated audience share above 70% during prime-time for its daily one-hour broadcast (re-run several times during the evening). All such new TV stations *Nordliicht TV, Uelzechtkanal, Tango TV, and Chamber en direct*, are broadcast by cable (and some by satellite, too).

More than 90% of the population of the Grand-Duchy of Luxembourg are connected to a cable network and mostly watch television by such means of reception, while 15,5% of the households have individual dishes for satellite reception, and 2,5% are on terrestrial reception only. Furthermore, the households connected to a cable network can receive – in addition to the Luxembourgish stations – an average of more than 40 foreign television programs, of which the German channels RTL Television, ARD, PRO7, and the French channel TF1 are the most popular. But **RTL Télé Lëtzebuerg** is not directly competing with such foreign channels, as it targets more the Luxembourg specific national, regional and local news of prime interest for the resident population.

As in radio, Luxembourg is historically also an important place for transnational and international television broadcasting, through terrestrial, cable and/or satellite licences granted to CLT-UFA which presently runs the following commercial television programs enjoying high popularity in their respective countries of reception: RTL Television (Germany), RTL TVi and Club RTL (Belgium), RTL4 and RTL5 (Netherlands), RTL9 and RTL Shopping (France). On such international grounds, SES Global (with its Astra satellite system) is the other important player in the Luxembourg media scene, but involved only in signal distribution, not in production or programming.
2. **Legal framework**

a) **The Law of 27 July 1991 on electronic media, amended on 2 April 2001**

The law of 27 July 1991 on electronic media, as amended\(^{115}\), has liberalised the Luxembourg media landscape after a period of more than 60 years of broadcasting monopoly of CLT-UFA with its RTL programs, with the objectives i.a. to:

- grant the right for a free and pluralist audiovisual communication,
- assure independence and pluralism in information,
- safeguard the existence and the pluralism of the written press.

Besides transposing the provisions of the Directive “Television without frontiers” 89/552/EEC as amended by the Directive 97/36 EC, concerning i.a. the criteria for determining the establishment of a broadcaster, the rules for advertising, the protection of minors and the right of reply, the media law laid down the basis for two markets of audiovisual communication, (i) by creating the possibility for operators established in Luxembourg to get a licence ("concession") for broadcasting television or radio programs of international range destined to reach audiences beyond the domestic population in Luxembourg\(^{116}\) and (ii) by providing for the grant of authorisations ("permissions") for sound and/or visual programs targeting the domestic public only\(^{117}\). The first category comprises the international broadcasts of CLT-UFA mentioned above, some of which are transmitted by terrestrial frequency whilst others are distributed by satellite. On the other hand, the domestic programs for the resident audience are divided into television programs, high power radio programs and low power radio programs, which are again divided into radio transmitting networks and local radio stations.

**aa. High power radio programs**

The Luxembourgish speaking radio station "RTL Radio Lëtzebuerg" is based upon a permission granted by the Government upon the provisions of article 13 of the law of 27 July 1991 for a high power commercial radio program, using two terrestrial FM frequencies covering the whole territory of the Grand-Duchy of Luxembourg. As mentioned above, a schedule of obligations has been imposed on the operator of such national general interest radio program, more specifically as concerns compulsory programming and advertising rules.

The radio station “100,7” is operated by a public organisation ("établissement public") funded by the Luxembourg State, which has been granted by law (article 14 of the media law) a licence for a high power non-commercial radio program, using one high power terrestrial FM frequency. The mission and financing of the station are defined in multi-annual agreements between the Government and the broadcaster.

**bb. Low power radio transmitting networks**\(^{118}\)

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\(^{115}\) Published in Mémorial A 1991 page 972, and Mémorial A 2001 page 924.

\(^{116}\) So-called "programmes à rayonnement international".

\(^{117}\) So-called "programmes visant un public résident".

\(^{118}\) So-called “programmes à réseau d’émission”.

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The legislator created four such networks, each disposing of normally two low power frequencies to be operated at several locations on the Luxembourg territory. Licences for such programs have to be applied for with the Independent Broadcasting Commission (“Commission Indépendante de la Radiodiffusion”) organised by the media law (as detailed hereafter). Article 18 of the media law of 1991 sets the basic terms and conditions for qualifying for such a licence and enumerates the main items to be addressed in the schedule of obligations to be attached to the licence:

- A permission for a “programme à réseau d’émission” can only be granted to a limited liability corporation (“S.à.r.l.”) for a – renewable – duration of 10 years.

- Nobody (either natural person or corporation) may have a participation in more than one company holding a licence for a radio transmitting network nor may anybody hold more than 25% of the shares and voting rights in such a company, including the indirect participation (we will see hereafter that such provision has been interpreted in a decision of the Council of State).

- The programs broadcast by such a network may contain commercial messages, subject to not exceeding 6 minutes per hour on a daily average nor 8 minutes within any scheduled hour.

cc. **Low power local radio stations**

The legislator created also the possibility for granting licences for up to 40 local radio programs, but reality has shown that in a country of the size of Luxembourg only about 15 stations came up in this area. As for the radio networks mentioned above, licences for such local programs have to be applied for with the Independent Broadcasting Commission. Article 17 of the media law sets the basic terms and conditions for being eligible for such a licence and enumerates the main items to be addressed in the schedule of obligations to be attached to the licence:

- A permission for a local radio program can only be granted to a non-profit association (“Asbl”) for a – renewable – duration of 5 years

- No association may hold more than one permission for a local radio program

- The licence must be exploited by the association itself and cannot be sub-let to a third party

- Technical interconnection and grouping between two or more transmitters of local radio programs are prohibited

- The local radio programs may contain commercial messages in the limits presently fixed by a decree of 13 February 1992 (advertising revenue limited to a maximum of 12,395 Euro per year) which provides furthermore (i) that one single advertiser may not be allocated more than 10% of the total air time devoted to advertisement, (ii) that the commercial messages may not exceed 6 minutes per hour on a daily average nor 8 minutes within any scheduled hour, and (iii) that the acquisition of advertising revenue must be made directly by the beneficiary association without any intermediary third party.
dd. Other programs (i.a. television)

Besides the rather diversified sector of terrestrial radio (to which an amending law of 2 April 2001 has added the possibilities for admitting digital radio\textsuperscript{119}), the media law provides for a mechanism of “permission” for television programs targeted at the domestic public only\textsuperscript{120} and a system of “concession” for television programs of international range and for programs by satellite\textsuperscript{121} or by cable\textsuperscript{122}. As mentioned above, the only permission for a television program aimed at the domestic audience and using terrestrial frequencies has been granted to CLT-UFA, with particular programming obligations and a limitation of income from advertising. The other Luxembourg television organisations licensed more recently have been granted “concessions” for programs by cable (and some also by satellite). They target also the domestic public but on specific segments and/or certain parts of the territory only. Until recently advertising income was prohibited for such channels, but the Government decided end of last year (2002) to grant also such TV operators the same rights to collect advertising income as RTL Télé Lëtzebuerg.

b) Basic orientations of a reform of the legislation on electronic media

In March 2002, the Luxembourg Government published a policy paper “Orientations pour une nouvelle législation sur la radio et la télévision” outlining its intentions for the upcoming reform of the existing legislation on electronic media. The paper announces the Government's plan to simplify the legislation and to streamline administrative process. Development of digital broadcasting would make it possible to abandon or at least soften the current restrictive legislation requiring television and radio stations to apply for complex broadcasting licences. Restrictions on the use of frequencies would be maintained only where they are necessary because of technical bottlenecks.

Future legislation could also draw a clearer distinction between technical regulations and their monitoring (falling within the framework of telecommunications legislation) and rules relating to the content of the broadcast (to be dealt with under the new radio and television legislation). The objectives of general interest should be achieved by the selection of programs having priority access to certain networks and frequencies and by missions of public service to be conferred by the Government.

An important section of the policy paper sets out proposals for a new regulatory framework that would involve the creation a new Independent Regulatory Authority (“Autorité de Régulation Indépendante – ARF”), which would be in charge of both the authorisation process and the monitoring of authorised activities, including the power to impose sanctions. Following the Government's plans, the powers of this body would be vested in a directorate of three permanent members, supervised by a supervisory board.


\textsuperscript{120} Article 12 of the law of 1991, as amended.

\textsuperscript{121} Article 21 of the law of 1991, as amended.

\textsuperscript{122} Article 23 of the law of 1991, as amended.
c) Legislation on telecommunications

aa. *The Law of 21 March 1997 on telecommunications, as amended*

The legislation on telecommunications, as presently in force, is largely inspired by the sector specific European Community law, and based upon the preoccupation that on the Luxembourg telecommunications market (i) the functions of regulation of the telecom sector be independent from the functions of exploiting networks and performing telecom services, (ii) the telecommunication services be offered by the operators in conditions of fair competition, (iii) the principle of equal treatment of the users be respected by all operators of networks and telecommunication service providers, and (iv) the access to networks and the interconnections between telecom networks be assured in an objective, transparent and non-discriminatory manner. According to article 3 of the law, the Minister in charge of telecommunications and the Luxembourg Regulatory Institute (“Institut Luxembourgeois de Régulation - ILR”) have to ensure that such objectives are permanently achieved.

In this spirit, the law determines the terms and conditions and organises the structures and procedures (i) for the exploitation of telecommunication networks crossing the public domain of the State and/or services in the area of fixed or mobile vocal telephony or radio-messaging, which need to be licensed\(^{123}\), and (ii) for the performance of telecommunication services other than those related to telephony and radio-messaging, which need only to be registered\(^ {124}\).

At present, eleven operators hold a so-called “A”-licence for the exploitation of telecommunications networks with telephony services (the dominant players in this area being the Luxembourg P&T and Télé 2 Luxembourg S.A.), nine operators hold a “B”-licence for the exploitation of telecommunications networks without offering telephony services (among which one can find BCE, a subsidiary of RTL Group, and the cable operator Coditel), and two operators hold a “C”-licence for the exploitation of telephony services. 26 operators have declared their non-vocal (data) services and 32 operators have registered their activities as access providers to non-vocal (data) services. Furthermore three licences for UMTS have recently been delivered to the Luxembourg P&T (“Entreprise des Postes et Télécommunications”), Tango S.A. and Orange Communications Luxembourg S.A.\(^ {125}\)

The law furthermore provides that the “important operators” on the Luxembourg telecommunication market, as shown on a list established by the Minister for Communications, must grant access to their networks and/or services and allow and facilitate the interconnection of their networks with others, at general terms and conditions based upon criteria of objectivity, transparency, non-discrimination and equal treatment\(^ {126}\). It will be reported hereafter on a decision of the ILR having set the criteria for determining the “importance” of an operator on such markets, and the consequential listing made by the Minister.

Finally, the telecommunications law governs also two areas more closely related to the (audiovisual) media scene and concerning signal transportation.

\(^{123}\) Art. 7 of the law of 1997, as amended.

\(^{124}\) Art. 12 of the law, as amended.

\(^{125}\) Source: [http://www.etat.lu/ILR/](http://www.etat.lu/ILR/)

\(^{126}\) Art. 21 and 25 of law of 1997, as amended.
According to article 29 of the law of 1997, the Minister of Communications is in charge of the spectrum of frequencies, which he establishes upon proposal of the Luxembourg Institute of Regulation (ILR) in conformity with the international treaties, being understood however that according to article 32 of the telecommunications law, the allocation of frequencies for radio and television purposes is governed by the provisions of the law of 27 July 1991 on electronic media, which provides that such allocation is made as a consequence of the grant of a broadcasting licence, by way of an authorisation to transmit (“autorisation d’émettre”), issued by the Government, upon proposal of the Minister of Communications.

In the fields of cable distribution, article 71 of the law on telecommunications provides for the need for operators of cable networks to apply for a licence with the ILR. However, up to now the licence model has not yet been submitted. Thus existing cable networks still operate on the basis of “authorisations” delivered by the former “Administration des Postes et Télécommunications” upon the “old” telecommunication law of 1884. The new law of 1997 provides that, while awaiting the delivery of the licences, all works, extensions, modifications and transformations beyond the normal framework of maintenance on the cable networks for TV distribution, as well as any sale, transfer or assignment of such a network are subject to notification to the Minister and the ILR.

bb. Developments of the telecom legislation

Luxemburg is still lacking behind the schedule imposed by the EC law to adopt the new regulatory package for electronic communications networks and services of the EC. Steps have been taken to comply with the obligation to apply the new European Framework from 24 July 2003 on, but the legislative measures are yet to pass the Luxembourg assembly.

According to a decree of the Grand Duke dated 30 June 2003127, draft laws have been submitted to the Luxemburg Chamber of Deputies, aiming at transposing the new European telecommunications framework into Luxemburg telecommunication legislation. The draft Luxemburg package comprises four separate laws:

1. A draft law on electronic communications networks and services;
2. A draft law organising the management of radio-electric frequencies;
3. A draft law re-organising the Institut Luxembourgeois de Régulation (ILR) and
4. A draft law concerning data protection in the electronic communications sector.

It is important to note that most of the elements of the new European regulatory framework for telecommunications are tackled in the draft law on electronic communications networks and services. According to the explanatory statements in the draft law, Luxembourg opted to repeal the existing national telecommunications framework and replace it with completely new texts127a. It is reported that this solution was thought advisable in light of the fundamental differences at EC level between the old and new regulatory framework.

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127 To be found in the parliamentary document n° 5178 of the Luxemburg Chamber of Deputies from 7.8.2003, ordinary session 2002-2003 (in the following referred to as “Parliamentary document”), p. 1.
127a See p. 17, in: parliamentary document
Following the explanatory statements in this draft law, it intends to transform into Luxemburg law the following EC Directives:

a. The framework directive EC/2002/21 (apart from stipulations concerning radio-electric frequencies and numbering, which are dealt with in a separate law, see Nr.2 above);

b. The access directive EC/2002/19;

c. The authorisation directive EC/2002/20 (apart from aspects concerning radio-electric frequencies and numbering, which are subject to a separate law, see Nr. 2 above);

d. The universal services directive EC/2002/22;

e. The competition directive EC/2002/77 of the EC Commission and

f. The joint spectrum decision Nr. EC/676/2002 of EP and EC Council of 7 March 2002, as far as procedural elements are concerned

Nine titles of the draft law attempt to bring together in a logical order several stipulations scattered in the five directives (framework, access, authorisation, universal services and competition). The draft law will mark the end of the present framework of individual licensing. It provides for a regime of general authorisation with preliminary notification for all supplies of networks and performances of services in the field of electronic communication127b. It is intended to increase the means of intervention of the ILR, the analysis of the markets and of the behaviour of the operators being made according to provisions on competition of the EC Treaty 127c.

Even the explanatory statements in the draft law also point out to the fact that the draft law on electronic communications networks and services is restricted to electronic communications networks and services only127d. It does not deal with

- the administration of radio-electrical frequencies,

- the handling of personal data and the protection of privacy in the electronic communications sector and

- the institutional framework of the ILR.

These issues are subject to separate and specific draft legislation127e.

Talking about the ILR, the draft law on electronic communications networks and services only lays down the core procedures the ILR would need to observe under Title X 127f. In this connection, the draft law recognises that the fact that the new regulation on electronic communications relies on general competition law to a greater extent would require a close

127b Title II, p. 18, in: parliamentary document
127c See Title III, p. 18, in: parliamentary document.
127d See p. 2 and 17, in: parliamentary document.
127e See n° 2, 3 and 4 above.
127f P. 21 in: parliamentary document
cooperation between the ILR and the authorities in charge of the enforcement of general competition law and consumers’ protection\textsuperscript{127g}. It is stressed in the parliamentary document that as far as the market for electronic communications is concerned, many decisions are expected to be taken jointly by the three authorities: ILR, competition authority and the consumers’ protection authority.

As already pointed out earlier in this part, the new draft package is still under consideration by the Luxembourg Chamber of deputies, although according to title XII of the draft law on electronic communications networks and services, the new legislation was supposed to enter into force at 24 July 2003. It is difficult to say how long the chamber of deputies will need to conclude the procedure. In any case, taking into account the growing pressures from European institutions, the Chamber of Deputies would need to hasten to fulfil the Community obligations, so as to avoid legal steps from the EC Commission. Therefore, the Luxembourg chamber of deputies is likely to pass the new laws in a foreseeable future.

d) Press law

aa. Basic legislation

The Constitution of the Grand-Duchy of Luxembourg guaranties, in its article 24, the freedom of expression and the freedom of the press, subject to repression of criminal offences committed while exercising such liberties.

- The Law of 20 July 1869 on the press and on criminal offences committed by the different means of publication

The “(very) old” press legislation of 1869 (still in force) is essentially a criminal law, sanctioning offences committed by way of written publications. It organises also the right of reply, which is however applicable only to printed publications, as the legislator could not have in mind regulating electronic media in the 19\textsuperscript{th} century. Such right of reply towards the audiovisual press is presently governed by articles 36 and 37 of the law of 27 July 1991 on electronic media. In the absence of specific legal provisions, the press is subject to general legislation and litigation before ordinary courts. Most trials against the press are based on damage suits for defamation or violation of privacy, upon articles 1382 and 1383 of the civil code.

- The reform of press legislation: draft law No. 4910 on freedom of expression in the media

The draft law 4910 on freedom of expression in the media, presented to Parliament in the beginning of 2002, is meant to replace the 1869 press legislation. It aims at a balance between the fundamental human right of freedom of expression, on the one hand, and of protection of privacy, reputation and dignity, on the other hand.

The future law is meant to apply in all cases when a publication (defined as an overall presentation of information structured by a publisher) is communicated to the public by way of a media, the latter being defined as any technical vector used for dispatching content to the public, irrespective of the technology applied.

\textsuperscript{127g} According to the legislation in force, even though not for longer, since the MINECO already launched a complete overhaul of the legislation on competition.
bb. **Organisation of the press**

The **law of 20 December 1979 concerning the acknowledgement and the protection of the professional title of journalist**, followed by several application decrees, has organised the profession by regulating the issuance of press cards and setting the basis for establishing a Press Council, formed by representatives of the journalists and of the publishers, which is competent for appreciating if a given person qualifies for bearing the professional title of a journalist according to the legal standards. Furthermore the Press Council has issued a (voluntary) code of conduct combining rules of responsibility and independence for both journalists and publishers\(^{128}\) and is consulted by the Government for opinions on legislative issues regarding matters of the press.

cc. **Legislative measures for the protection of freedom and diversity of the written press**

The **law of 3 August 1998 on promotion of the written press\(^ {129}\)** ("Loi sur la promotion de la presse écrite") has abrogated and replaced the law of 11 March 1976 which had introduced direct subsidies in favour of the written press ("Aide directe à la presse écrite").

In order to promote the diversity of the Luxembourg opinion press, the law of 1998 installed a mechanism of promotion of the written press in the form of an annual financial aid to be borne by the State budget. The law defines the notion of beneficiary and sets a certain number of criteria for qualifying for such aid, which will be detailed hereafter in chapter IV. Presently six daily newspapers *Luxemburger Wort*, *La Voix du Luxembourg*, *Tageblatt*, *Le Quotidien*, *Letzebuerger Journal*, and *Zeitung vum Lëtzebuerg Vollek* and five weekly magazines *Télécran*, *Revue*, *D'Lëtzebuerger Land*, *Le Jeudi* and *Woxx* benefit from such aid.

Another mechanism for preventing economic destabilisation of the written press is to be found in the **law of 27 July 1991 on electronic media**, article 34 of which has set up a special commission (formed by delegates of the Government, representatives of the publishers of papers benefitting from the press promotion regime and by jointly appointed experts) to monitor and assess the consequences of the introduction of new radio and television programs on the advertising income of the written press and, if appropriate, to propose compensation from the State budget. Until today there has apparently been no need for such a compensation (additional to the "standard" financial aid mentioned above), which means that the newcomers on the Luxembourg media market have not specifically created substantial disruptions.

e) **Legislation about financial incentives for the audiovisual production**

In order to promote audiovisual creativeness in Luxembourg and its widest possible distribution, the Grand-Duchy has adopted a law dated 11 April 1990, which sets up a national fund for the support of audiovisual production ("Fonds National de Soutien à la Production Audiovisuelle"). Such legislation has been reviewed and amended by a law of 21 December 1998.

The financial intervention of this Fund implies **selective financial aid** for production or co-production, for distribution as well as for script writing and development of cinematographic or audiovisual projects. Such subventions are to be considered as an advance on income and are in principle fully reimbursable on the revenue of the subsidised audiovisual work. The

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\(^{129}\) Published in Mémorial A 1998 page 1592.
terms and conditions of the allocation of a given aid under such subvention scheme are normally defined through agreements made between the Fund and the beneficiaries of the financial aid.

In 2002, the Fund has received 36 applications for such selective financial aid, out of which 11 related to script writing and development, 24 related to production and 1 to distribution. 22 applications have been retained and granted reimbursable aids for a total amount of Euro 3,881,591,04.\textsuperscript{130}

Furthermore a law dated 13 December 1988, destined to favour investments of venture capital in the production of audiovisual works to be made in whole or in part in Luxembourg, provides for a temporary special fiscal treatment of so-called “audiovisual investment certificates” tradable by assignment to companies which are subject to corporate tax in Luxembourg. Such mechanism provides for “gap financing” by allowing producers to recoup about 25% of the production budget actually spent in Luxembourg. Such legislation has been renewed in 1993 and in the beginning of 1998 and is presently extended in an amended version until the end of 2008 by virtue of a law dated 21 December 1998.

In 2002, thirty-nine applications for audiovisual investment certificates have been filed for a total value of Euro 41,887,432 calculated upon a total production budget of Euro 104,122,354 of which the Luxembourg (co-)producers part has amounted to Euro 36,016,202\textsuperscript{131}.

f) Copyright law

The law of 18 April 2001 on copyright, neighbouring rights and data bases determines the rights of authors, performing artists, broadcasters, phonogram and data bases producers, in the territory of Luxembourg, and the exceptions thereto. Such legislation is currently under review for being brought into conformity with the EC Directive 2001/29 on harmonisation of certain aspects of copyright and neighbouring rights in the information society.

This law affects the media market in the sense that it sets the framework of legal protection of main contributors or even active players in such market. The management of such rights shows some particularities in Luxembourg, where there is no really “national” copyright collecting society, but a certain number of foreign authors’ societies (like the French SACEM or SACD, or the film producers’ organisation AGICOA, an association of Swiss law) having gathered worldwide repertoire representation for the Grand-Duchy of Luxembourg. This historical situation, where copyright is represented and managed in Luxembourg mostly by “foreign” societies, has led to the introduction into the copyright legislation of a provision (being article 66 in the new law of April 2001) by which any organisation managing copyrights or neighbouring rights in the Luxembourg territory for more than one author or rightholder, needs to get an authorisation from the competent Minister (presently being the Minister of Economy). If such organisation is established abroad, it needs – in addition – to have a generally empowered representative residing or established in Luxembourg, who needs to be approved by the same Minister. For music rights, the only collecting society in Luxembourg is the French SACEM (with its subsidiary SDRM for the mechanical reproduction rights). It has been duly authorised for a long time and its representative is usually a Luxembourg citizen approved by the competent Minister. Recently SACEM

\textsuperscript{130} Source: Annual Report 2002 of the "Service des Médias et des Communications", Ministry of State.

\textsuperscript{131} Source: Annual Report 2002 of the "Service des Médias et des Communications", Ministry of State.
established with SDRM a formal subsidiary in Luxembourg in the form of a civil company of Luxembourg law, Sacem Luxembourg (thus becoming formally a “national” organisation), as did before AGICOA in creating a Luxembourg subsidiary association, ALGOA.

Together with the film producers’ organisation AGICOA, and the individual broadcasters involved, SACEM (taking the lead for all copyright societies involved) has entered into a global copyright authorisation deal with the cable operators in Luxembourg for the distribution of television and radio programs by cable in the Grand-Duchy of Luxembourg.

The activities of the authorised copyright collecting societies and their approved representatives are monitored by a Government Commissioner appointed by the competent Minister, assisted by a Commission, which has the task i.a. to give opinions on the tariffs and tables of remuneration practised by collecting societies in Luxembourg.

According to article 66 paragraph 3 of the copyright law of 2001, any contract relating to copyright or neighbouring rights entered into with a user of such rights established in the Grand-Duchy of Luxembourg is deemed to be passed in Luxembourg under Luxembourg law, irrespective of any possible contractual provision to the contrary, which is null and void by law.

3. Other provisions

Nothing known or available in particular, apart from certain provisions of the CLT-UFA concession agreement about the Luxembourg radio and television programs (as mentioned above).

II. Media regulators

Under Luxembourg law, the regulation of the media is presently still largely vested with the Government, acting through and/or upon proposal of its Prime Minister and its delegate Minister for Communications. On the administrative level, media matters are handled by the so-called Media and Communications Service (“Service des Médias et des Communications”) functioning as a department of the Ministry of State (under the competence of the Prime Minister and the delegate Minister for Communications). Such department has been created by the law of 27 July 1991 (article 29) and has been assigned administrative missions in the field of advising the Prime Minister in matters of media policy, representing the country in international committees dealing with media matters, assuming, or assisting respectively, the functions of Government commissioner for monitoring the broadcasting licences execution by CLT-UFA, SES and the public radio station 100,7. Furthermore, such “Service des Médias et des Communications” administratively assists the supervising commissions mentioned hereafter in their tasks of radio and television licensing or monitoring, and has co-operative connections with the Luxembourg Regulation Institute (ILR), which is the competent regulator for telecommunications. Apart from said “communications” regulator ILR, Luxembourg law has determined one or the other body in the field of media, which might be considered to some extent as being vested with functions of a media regulator.
1. The Independent Broadcasting Commission ("Commission Indépendante de la Radiodiffusion")

a) Legal basis

The Independent Broadcasting Commission has been created by virtue of article 30 of the law of 27 July 1991 on electronic media. It is a collegial body of five members appointed for five years by grand-ducal decree, out of which one magistrate chairing the Commission and another member being appointed by the Press Council.

b) Functions; competence

The Independent Broadcasting Commission is in charge of:

- applying the provisions of the media law relating to the authorisation and the functioning of programs with low power transmitters;
- advising the Government for the authorisation and the functioning of the other programs to be licensed;
- settling possible disputes between the management of the socio-cultural radio and the National Program Council.

Thus, the Independent Broadcast Commission decides upon the grant and the withdrawal of the broadcasting licences for local radio stations and for radio transmitting networks ("programmes à réseau d'émission"), independently from the Government, and monitors the compliance with the legal provisions and of the schedule of obligations of such stations.

Such Commission is presently the only "nearly real" regulator in the field of audiovisual media in Luxembourg (apart from the Government), insofar as it delivers domestic radio-broadcast licences and monitors their execution. The National Program Council ("Conseil National des Programmes") mentioned hereafter and to a lesser degree a third body created by the media law, the Advisory Media Commission ("Commission Consultative des Médias"), are not to be regarded media regulators as such.

As mentioned above, the Government has the intention to propose a merger of the present media commissions and to set up a real regulatory body for the media in the form of a new Independent Regulatory Authority ("ARI"), which would be in charge of both the authorisation process and the monitoring of authorised activities, including the power to impose sanctions.

c) Linkage with general competition authorities

The available information could not be construed so as to indicate that there would exist formal procedural links or, at least, informal exchanges of opinions being held on a frequent and regular basis.
2. National Program Council (“Conseil National des Programmes”)

a) Legal basis

The National Program Council has been created by virtue of article 31 of the law of 27 July 1991 on electronic media. It has a maximum of 25 members delegated for 5 years by the most representative organisations of the societal and cultural circles of the country, including recognised religions and political parliamentary groups, nationally representative trade unions and employers’ organisations, national federations of associations active in the field of culture, sports, family, charity, environmental protection, youth and immigration. A grand-ducal decree fixes the list of the representing organisations and the number of their delegates.

b) Functions / competencies

The National Program Council is in charge of:

- monitoring and advising the Government for the monitoring of all kinds of programs licensed, authorised or distributed in the Grand-Duchy of Luxembourg, as to their compliance with program content regulations;
- submitting proposals for a balanced content of the programs of the (public) socio-cultural radio station, and monitoring such programs;
- making proposals for increased and balanced choice of program content for the domestic audience.

Such Council makes and delivers its opinions in independence towards the Government, but has no power to make decisions on its own with a direct impact on the media operators, such as the grant of licences or authorisations or the sanctioning of non-complying behaviours.

c) Linkage with general competition authorities

Here, nothing specific, at least on a formal or regular basis, according to the data obtained can be reported.

3. Luxembourg Institute of Regulation (“Institut Luxembourgeois de Régulation, ILR”)

a) Legal basis

The Luxembourg Institute of Regulation (“Institut Luxembourgeois de Régulation – ILR”) has been created by virtue of article 44 of the law of 21 March 1997 on telecommunications. It is an independent organisation of public law, having administrative and financial autonomy, monitored by the Minister for Communications and financed by the State budget.

b) Functions / competencies

As mentioned above, in general the Luxembourg Institute of Regulation (“ILR”) has to ensure (together with the competent Minister) that the objectives of transparency, fair competition, equal treatment and easy access set by the law on telecommunications are permanently achieved on the Luxembourg telecommunications market. The Institute handles the

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132 Formerly “Institut Luxembourgeois des Télécommunications”. 35
preparation and the procedure for the Minister for Communications who grants the licences for telecommunication networks and services and the Institute receives the declarations of other telecommunication services which are not subject to a licence. The ILR has the right to impose conditions upon an operator of such services submitted to declaration, or even oppose the exploitation of such a service the operator of which would not comply with applicable regulations. The ILR is furthermore in charge of monitoring the telecommunications operators as concerns their compliance with the law and the terms and conditions of their licence. The ILR is also entrusted with advisory tasks towards the competent Minister as well as with international representation in matters related to communications.

According to article 27 of the law on telecommunications, the Luxembourg Institute of Regulation is entitled to issue administrative decisions as to the procedure and even the terms and conditions (lacking friendly settlement of the parties involved) for the access to networks. The State is responsible for the decisions issued by the ILR, including possible consequences of civil liability.

Without prejudice to possible criminal prosecution, the operators (either natural persons or corporations) in the telecommunications sector falling under the monitoring competence of the ILR, may be fined by the Institute for any breach of the telecommunications law, decrees or its instructions. Furthermore the Luxembourg Institute of Regulation is entitled to decide upon disciplinary sanctions like warnings, blames, prohibition to perform certain operations or temporary suspension of one or more executives of an operator. It can not withdraw a licence by its own power, but in case of persistence of a proven and notified violation, the ILR furthers / forwards the case to the competent Minister who may decide on a suspension or withdrawal of a given licence.

Decisions taken by the Institute or the Minister are subject to appeal before the administrative court.

c) Linkage with general competition authorities

As indicated before, there seems not to exist any regulation with regard to the coordination of the activities of the relevant authorities.

4. National Accreditation and Monitoring Authority

It may also be mentioned that the law of 14 August 2000 relating to electronic commerce has created a National Accreditation and Monitoring Authority (“Office Luxembourgeois d’Accréditation et de Surveillance – OLAS”), with the mission to implement a “policy of high quality service” through the accreditation of i.a. certification-service providers delivering qualified certificates linked to electronic signatures. Article 2 para. 6 of the law provides that the National Accreditation and Monitoring Authority (being the Minister of Economy, who is authorised by law to assign a certain number of civil servants to this effect) may restrict the free movement of an information society service originating in another EU Member State when this service represents a real and serious risk affecting public policy (“ordre public”), public security, public health or consumer protection, subject to compliance with the requirements imposed by Community law for the exercise of such option.
III. Market definitions and criteria upheld for market perception in the relevant sector focused legislation

To our knowledge, there are no specific market definitions – as such – in the media sector focused legislation in Luxembourg, but some laws indicate certain criteria which might be helpful when determining the notion of market in a given case involving competition issues in the fields of the media.

1. Publishing

a) Books

According to article 8 of the law of 28 December 1988 having reorganised the public cultural institutions, the National Library (Bibliothèque Nationale) receives and preserves all documents submitted by virtue of the law on the filing of official copies of printed publications ("dépôt légal"), which article 9 of this act defines as any publication of any kind, printed or reproduced by other means, such as books, brochures, newspapers, maps, musical texts etc. which are published in the country and publicly offered on its territory for sale, distribution or lending. Books are not further defined in the law.

b) Newspapers and magazines

The law of 20 July 1869 on the press and on criminal offences committed by the different means of publication does not contain a definition of the “press”. The draft law 4910 on freedom of expression in the media, which will replace the present press legislation, will apply to all “publication”, this term being defined as a collection of news put at the disposal of the general public or certain categories of the public by a publisher using a media (the latter being defined as any technical mean, material or immaterial, – with the exception of the human body –, used for putting a publication at the disposal of the public).

Article 2 of the law of 3 August 1998 on promotion of the written press defines the beneficiary of the financial aid as any printed publication (i) published in the Grand-Duchy of Luxembourg and appearing at least once a week without interruption, (ii) published by a natural person or a corporation established in the Grand-Duchy of Luxembourg, and having as its declared purpose the trading of information, (iii) having an editorial team of a minimum of 5 full time journalists engaged by virtue of labour contract of undetermined duration by the publisher and admitted by the Press Council, (iv) likely to reach, though it being disseminated, the whole population and using principally the Luxembourg, French or German language, (v) offering general information on both national and international level and covering political, economic, social and cultural matters, (vi) financed essentially by income from its sales and possibly also from advertising revenue (commercial advertisements should however not exceed in average 50% of the total surface of the publication), (vii) the purchase or subscription which should not be exclusively bound to an affiliation to an association or organisation of any kind.

The law excludes from the benefit of the financial aid any Luxembourg issue of a foreign publication, except if such publication does not benefit abroad – directly or indirectly – from any press aid.

The amount of financial aid allocated to the qualifying press publishers is determined each year by reference to the annual cost of 5 full time journalists and to the price of 120 tons of newsprint paper. The annual amount has a fixed part allocated to all qualifying press
publishers, and a proportional part depending on the number of pages with editorial content. For the time being, a grand-ducal decree of 27 September 2002 has fixed the annual reference amount of such aid at Euro 353,550, which gives for each beneficiary a subsidy of Euro 117,850 plus a supplemental allocation of Euro 101,38 for each page with editorial content

2. Music-copyright

a) Music publishing

Article 14 of the copyright act of April 2001 defines the publishing agreement as being a contract by which an author entrusts a publisher to assure, under the publisher’s financial responsibility, the publication and public distribution of material copies of the author’s literary, musical or graphic work.

b) Music recording and distribution

Article 40 of the copyright act of April 2001 defines the producer of a phonogram as being the natural or legal person which takes the initiative and assumes the responsibility of the first recording of sounds from a performance or from other sounds or representations of sounds.

c) Music retailing

Neither the Copyright Act nor other regulatory documents deal with music retailing in a way that would be relevant for the present study.

3. Film

Film production and distribution are essentially dealt with in the framework of copyright and financial incentives for audiovisual production.

a) Article 20 of the copyright act of April 2001 defines an audiovisual work as a succession of sequences of animated pictures, with or without sound. Article 22 of this law defines the author of an audiovisual work as being the producer and the main director (“réalisateur”).

b) In order to qualify for selective aids from the Film Fund, the audiovisual works (i.e. works of fiction or animation or creative documentaries, except those made for commercial advertising purposes) and their producers have to fulfil certain conditions which are defined in a grand-ducal decree of 16 March 1999. Such regulation requires that the audiovisual work has to be made by Luxembourg producers or in co-production with foreign partners, provided that the Luxembourg co-producer holds a minimum share of 10% as well as a consequent proportional share in the negative film material and in the exploitation rights of the produced work, and that he is actually involved in the artistic or technical making of the subsidised work.

c) The benefit of the tax shelter provided for by the law of 21 December 1998 (mentioned above) is granted only on production costs actually incurred and spent in Luxembourg for audiovisual works (including films, cartoons, tv formats, multi-media products) which:

- contribute to the development of the sector of audiovisual production in the Grand-Duchy of Luxembourg, taking into account a reasonable proportionality between the advantage

granted and the long term economic, cultural and social spin-offs of the production of such works in this country;

- are conceived to be made mainly in the territory of the Grand-Duchy of Luxembourg;
- are exploited or co-exploited by a Luxembourg production company, more specifically through the effective and sustainable holding of a significant part of the rights in such audiovisual works;
- and offer reasonable perspectives of return on investment.

In order to qualify for the tax shelter, the applicant must be a corporation of Luxembourg law established and taxable in this country, specifically authorised by the Luxembourg authorities (for renewable periods of 2 years) and having stable administrative facilities and accurate means of accounting and controlling for fulfilling viable production purposes, in line with the objectives of the law. In practice, the Luxembourg co-producer in a given production may be used as the local authorised structure and play the role of the applicant of the audiovisual investment certificates.

There are about 30 audiovisual production companies established and operating in Luxembourg at present: AFO-Film, Audio-Pro Productions, Broadcasting Center Europe, The Carousel Picture Company, Classic Film Production, Delux Productions, Eifel Tech, Hemispheres Films, Invisible Films, Iris Productions, Les Films de l'Europe, Luxanimation, Lynx Productions, Melusine Productions, Minotaurus Film, Ni-Film, Nowhere land Productions, Oniria Production, Paoki Production, Profilm, PTD Studio (Monipoly Productions), Rattlesnake Productions, Red Lion, Samsa Film, Studio 352, T-Films, Tarantula Luxembourg, Telesparks, Videopress, Xenon Media.

d) In this context, it might be of interest to mention also that the law of 18 May 1989, which has created the National Audiovisual Centre (“Centre National de l’Audiovisuel – CNA”), entrusts this institution with the collection and preservation of all documents produced on the national territory by means of photographic, cinematographic, magnetic, radiophonic, televisual, videographic, phonographic, multi-media or high technology process, which are part of the national audiovisual heritage, to which audiovisual documents produced abroad may be added if they show to be of significant importance for such heritage.

4. Broadcasting (radio and television)

a) Upstream: content, channels, programs, rights

In the fields of radio or television content acquisition, there are no specific rules or definitions under Luxembourg law, besides the general provisions of copyright protection and fair competition.

There is no specific right of information granting free access to public events for short reporting and Luxembourg has not yet defined the sport events of major interest which should not be excluded from free TV.

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134 Source: Luxembourg Filmfund website filmfund.lu.
In the context of international dealing with rights (in audiovisual works or sport events, for instance) for radio or television programming, Luxembourg is in the unfortunate situation of being often excluded from the benefit of audiovisual offers, because of the unavailability or the lack of clearance of rights for this territory. Thus up to now the French and German pay-TV offers (Canal Plus, TPS, Premiere etc.) can still not be subscribed in Luxembourg, because the operators of such platforms do not have the transmission rights for the Grand-Duchy of Luxembourg for a large part of their program offer.

In the same vein, the German public channels ARD and ZDF required from the cable-operators in Luxembourg to refrain from distributing their programs during transmission of games of the 2002 Football World Cup, because the corresponding rights had not been acquired for Luxembourg. The authorities had to intervene with the rightholder KirchMedia to settle the situation and get the authorisation to transmit by cable in Luxembourg the games covered by the German channels.

Such kind of problems encountered in relation with the market of rights acquisition may be regarded as conflicting with the principles of free flow of information and, to some extent, the approach taken by the EC Directive “Television without frontiers” and is to be considered for better handling at community level, while reviewing the directive on cable and satellite.

b) Downstream: free TV, pay TV, platforms, interactive services

aa. Media law

The law of 27 July 1991 on electronic media does not provide for a specific definition of broadcasting, but organises and defines the Luxembourg audiovisual landscape through different forms of audiovisual communication by reference either to their target or their transmission, as mentioned above (programs for domestic audience vs. programs for international public; programs transmitted by terrestrial frequency, by cable or by satellite).

The amending law of 2 April 2001 has introduced into the media law of 1991 the possibility to grant licences for digital radio and television, the details of which are to be determined by grand-ducal decrees, which have not yet been developed up to now. In this respect, the law refers to digital multiplex transmission, without giving further definition of such concept.

bb. Legislation on conditional access

The law of 2 August 2002 on protection of services of conditional access has transposed into national law the corresponding EC directive 98/84/EC of 20 November 1998 protecting encrypted pay services against piracy. Such legislation prohibits the possession and the marketing for commercial purposes of decoders without the authorisation of the service provider. Referring to the notion of “protected services” the law defines television broadcasting as the transmission of origin, by wire or wireless, terrestrially or by satellite, encrypted or not, of programs destined to the public, including the communication of programs between undertakings for a retransmission to the public. Article 1 of the law defines also the concept of information society service as being any service performed normally against remuneration, on distance by electronic means and at the individual demand of the receiver of the service (which is identical with the definition to be found in the law of 14 August 2000 on e-commerce).
cc. Copyright law

Article 41 paragraph f) of the law of 18 April 2001 on copyright, neighbouring rights and data bases defines broadcasting ("radiodiffusion") as the wireless transmission of sounds or images and sounds, or representations thereof, for reception by the public. It specifies that such term also covers transmission by satellite and that the transmission of encrypted signals is assimilated to broadcasting in case the relevant decoders are put at the disposal of the public by the broadcaster or with his consent.

c) TV infrastructure markets (satellite dishes, cable etc.)

As mentioned above, more than 90% of the population of the Grand-Duchy of Luxembourg are connected to a cable network and mostly watch television by such means of reception, while 15,5% of the households have individual dishes for satellite reception, and 2,5% are on terrestrial reception only.

The cable market in Luxembourg shows a large number (83) of mostly small operators, out of which 3 commercial companies (Coditel, Eltrona, Siemens) have the largest share (about two third of the connected households), the others being split organisations (either municipalities or non-profit associations), gathered in the “Association des Antennes Collectives a.s.b.l.” (AAC).

aa. Media law

Article 1 paragraph 17 of the media law of 27 July 1991 defines a cable network ("réseau câblé") as any terrestrial network by wire used mainly for the transmission or the retransmission of television or radio programs destined to the public, as for instance the collective reception antennas and the cable television networks as defined by the law of 21 March 1997 on telecommunications, and any other telecommunications networks corresponding to the definition in the media law.

bb. Telecommunications law

Article 2 of the law of 21 March 1997 on telecommunications defines in its paragraph 2 a collective reception antenna ("antenne collective") as a network used exclusively for the non-commercial transportation of audiovisual signals, whereas its paragraph 19 defines a cable television network ("réseau de télévision par câble") as a network used exclusively for the commercial transportation of audiovisual signals.

cc. Copyright law

Article 60 of the law of 18th April 2001 on copyright, neighbouring rights and data bases refers to communication by cable as a simultaneous, unchanged and full retransmission by wire or by a system of microwaves for reception by the public of an initial transmission, wireless or wired, possibly by satellite, of television or radio broadcasts destined for reception by the public.

d) TV advertising market

As mentioned above, the television advertising market represents about 10% of the whole advertising market in Luxembourg and is dominated by the Luxembourg speaking television channel RTL Télé Lëtzebuerg operated by CLT-UFA (RTL Group), which holds the major
stake in the advertising market of the television sector, being understood that by virtue of its licence agreement, RTL’s income from advertising in the Luxembourg territory is limited – in television – to an annual maximum amount (5,275,000 Euro in 2002).

A special commission (comprising delegates of the Government, representatives of the publishers benefiting from the press promotion regime and by experts jointly appointed) has been set up by article 34 of the law of 27 July 1991 on electronic media, for monitoring the development of the advertising market and assessing the consequences of radio and television programs on the advertising income of the written press.

In article 2 paragraph 18 of the law of 27 July 1991 on electronic media, television advertising is defined as any form of televised message against remuneration or similar payment or for self-promotion by a public or private undertaking, in the framework of its commercial, industrial, handicraft or liberal profession activity, with the purpose of promoting the supply against payment of goods or services, including real estate, or of rights and obligations, while sponsoring is defined in article 2 paragraph 20 of the media law as any contribution of a public or private undertaking, which are not broadcasters or not involved in production of audiovisual works, for the financing of television programs, with the purpose of promoting its denomination, trademark, image, activity or performance.

5. Internet

a) Content

In the course of the procedure of examination (in 2001) of the application of the company Everyday Media S.A. for the grant of a licence to operate a Luxembourg radio station (Radio Tango) primarily on the Internet (and also by cable), the Independent Broadcasting Commission expressed the opinion that the transmission of data on a tele-computer network using the IP protocol is not subject to the law on electronic media and thus is not of the competence of the authorities put in place by this act, so that for a program distributed exclusively by Internet there is no need for a licence. Following this opinion, the Government granted to the applicant only a licence for distribution of its radio program by cable network strictu senso.

b) Access

Article 4 of the law of 14 August 2000 relating to e-commerce provides that, without prejudice to the provisions of the law relating to authorisation of businesses in general, access to the activity of a service provider on the Internet is not, in itself, subject to prior specific authorisation.

IV. Market definitions in the media sector, as upheld in sector specific practice of authorities and courts

1. In the fields of radio licensing and media concentration, the Luxembourg Council of State ("Conseil d’Etat"), formerly the supreme administrative court, had the occasion to interpret the concept of direct and indirect participation in a company holding a licence for running a
sound radio network, according to article 18 para. 2 of the law of 27 July 1991 on electronic media.\textsuperscript{135}

In a case brought before the Council of State against a decision of the Independent Broadcasting Commission (Commission Indépendante de la Radiodiffusion) having granted a permission for a radio transmitting network (radio à réseau d’émission) to a competitor, the Société de Communication Sociale s.à.r.l. (also a holder of such a permission, but for an allegedly less performant network) challenged the interpretation given by the Independent Broadcasting Commission of the legal limitations of participation in a company holding a licence for a radio transmitting network which had led the Commission to decide that the competitor of the plaintiff was eligible for being granted such a licence. Actually in this case a (non-licensed) company “A” had a direct participation in licence holder “B” and an indirect participation in licence holder “C”, but of no more than 25% in each case.

According to article 18 (2) of the media law, “nobody may hold shares in more than one company licensed for a radio network, nor hold more than 25% of the shares and voting rights in such a company, including the indirect participations”. The plaintiff was of the opinion that the wording “including the indirect participations” would mean that a holder of a direct participation in a licensed company is prohibited to hold an indirect participation in any other licensed company.

The Council of State rejected the complaint, in considering that it had been the intention of the legislator to limit the direct participation in one and only company licensed for operating a radio transmitting network, whilst limiting also the direct and indirect participation in such company as well as the indirect participation in other operators licensed for other networks to 25% of the shares and voting rights. Thus the administrative court concluded that a direct participation in one licensed company and an indirect participation in another licensed company, each time within the limits of 25%, does not infringe neither the spirit nor the text of the law quoted above.

2. In the fields of telecommunications, the Luxembourg Institute of Regulation (Institut Luxembourgois de Régulation – ILR) laid down the criteria for determining the importance of a given operator on the market, in application of article 21 of the law of 21 March 1997 on telecommunications.\textsuperscript{136}

According to article 21 of the law of 21 March 1997 on telecommunications, the operators appearing on a list issued by the Minister for Communications, upon proposal of the ILR, i.a. because of their “importance” on the market, have to grant access to their networks and/or telecommunication services to any applicant, at general terms and conditions of supply based on objective, transparent and non-discriminatory criteria.

For the application of such provision, the ILR identified four distinct telecommunication markets:

- the market for fixed public telecommunication networks and/or voice telephony services;
- the market for fixed connections (leased lines);


• the market for mobile telephony networks and services, and

• the market for interconnection.

The Institute ruled that an operator is deemed to have an important position on the market, justifying its appearance on the list provided for in article 21 of the telecommunication law, if the operator holds a share of at least 25% in a given market. The determination of such percentage is made by reference in principle to the total turnover on such given market and the turnover of the considered operator. However such criteria is not considered by the ILR as being absolute, so that certain operators exceeding the limit of 25% might possibly not be put on the list provided for in article 21 of the law, as well as some operators having less than 25% market share might be included. Actually there are other factors to be considered, in the opinion of the ILR, such as (i) the ability of an operator to influence the market conditions, (ii) the control exercised by an operator upon the means of access to the end user, (iii) the respective dimension of the operators at hand, and (iv) the experience of an operator in the supply of products and services on the market considered.

The most recent list of “important” operators has been issued by the Minister for Communications by ministerial decree of 21 June 2000, upon proposal of the ILR. It appears on such list that apart from the market for mobile telephony networks and services, the former monopoly operator “Entreprise des Postes et Télécommunications – EPT” prevails in the overall telecommunication sector. For the market for mobile telephony, EPT shares the leading role with the operator Millicom Luxembourg S.A.

3. In the fields of competition, the Luxembourg Council of State (“Conseil d’Etat”) had the occasion to determine the criteria of „dominant position” in the case of a cable-operator, according to article 1 par. 2) of the law of 17 June 1970 on restrictive commercial practices.

Article 1 of the law of 17 June 1970 on restrictive commercial practices as amended, sanctions activities of one or more undertakings abusively exploiting a dominant position on the market and thus negatively affecting the general public interest. The procedure is normally launched by a charge filed by an interested person with the Minister for Economy, who must first ask for the motivated opinion of a commission ("Commission des pratiques commerciales restrictives") before deciding if the charge is placed on file without other consequences, or sanctioned by a warning, a recommendation or a prohibition of the illegal practice. The law provides for criminal sanctions in case a prohibition or injunction of the Minister is not respected. The decisions of the Minister are subject to appeal before the administrative courts.

In this case, the cable operator Coditel had acquired a cable network from a competitor and imposed higher charges to the users of such network (especially in terms of connection and subscription fees), threatening the reluctant subscribers to be disconnected if they would not accept the new conditions. The Minister had first issued a warning and a recommendation (to review the fees imposed upon the network users) followed by a decision prohibiting the

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137 Published in Memorial A, No. 54 of 10 July 2000.
139 Published in Mémorial A 1970 page 892.
140 Published in Mémorial A 1989 page 504.
application of the tariffs still applied by Coditel despite the previous warning and recommendation. The cable operator appealed to the Council of State (“Conseil d’Etat”), formerly the competent administrative court, disputing the validity and justification of the ministerial prohibition and contesting the existence of a dominant position and - if any - of an abusive exploitation thereof.

In its decision of 18 November 1994, the Conseil d'Etat has rejected the appeal upon the following arguments. First the Council determined that a dominant position held by an undertaking distorts or even prevents, on a given market, the normal working of competition and creates a situation of economic unbalance and dependence in favour of such undertaking and to the prejudice of competitors or consumers of products or services supplied by such undertaking. The Council of State considered furthermore that there is an abusive exploitation of a dominant position when such position is used for imposing to the consumer prices and/or conditions which are less favourable than those which would be applied in a normal competitive situation in the market.

As to the factual situation of the market of cable distribution, the Council of State observed that in (more or less) small villages or municipalities, the technical and administrative constraints and the high costs for putting in place other cable networks prevented from establishing on short or medium term a competitive situation in the fields of cable distribution. On the other hand, the Council stated that the other technical means of reception of television programs, like individual antennas or dishes, could not question the exclusivity held by Coditel, so that the consumers concerned were in a state of economic dependence towards the cable-operator Coditel.

By threatening the subscribers to be disconnected from the cable television network if they would refuse to pay the new (increased) fees or to comply with the new terms and conditions, without justifying possible economic or legal reasons for this, Coditel showed evidently - in the opinion of the Council of State - a behaviour of abusive exploitation of its dominant position as sole distributor of television programs in the geographic area concerned. The Conseil d'Etat stated that, as such behaviour constituted a distortion of the normal competition, it was against general public interest, and found that the ministerial decision of prohibition of such behaviour was justified.

V. Common factors and differences between the media specific market definitions and the market definitions used in application of the competition rules

The attempt to elaborate a comparison between specific media market definitions and criteria 8.121 for market delineation applied in the context of competition legislation unavoidably will remain without effectuation, since, with regard to the potential for accessing relevant Luxembourg authority decisions in competition matters, any analysis could not be professionally grounded and, therefore, would be speculative.

VI. The impact of the non-competition framework and practice on the work of the competition regulator, in particular when defining the relevant markets

Another characteristic the situation in Luxembourg presents is the fact that both regulation of 8.122 the media and of competition are still mainly vested in the government, which is acting through and/or upon proposal of its Prime Minister and its delegated Minister for Communications in case of media and the Minister for Economics in case of competition
matters. This situation might be rooted in the small size of the country, where extensive administrative structures are presumably considered unnecessary. In contrast to the competition sector, where (as previously mentioned) no independent authority exists, there is at least one “media regulator”, the Independent Broadcasting Commission (which is responsible for the granting of broadcasting licences and for the monitoring of the compliance with the provisions to the pursuit of broadcasting).

In the media sector a reform is also planned. The new legislation is expected to draw a clearer distinction between technical regulations and their monitoring (which shall be included in the framework of telecommunications legislation) and rules relating to the content of the broadcast (to be dealt with under the new radio and television legislation). A new regulatory framework shall be established, including a new Independent Regulatory Authority (“Autorité de Régulation Indépendante – ARI), which shall replace the present media commissions. This reform is yet in an earlier stage as the reform of the competition law; regarding electronic media merely a policy paper was published 2002 by the Luxembourg Government.