



Case study report

Does media policy promote media freedom and independence?
The case of Belgium

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Project profile

MEDIADEM is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It investigates the configuration of media policies in the aforementioned countries and examines the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, are thoroughly discussed and analysed.

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TABLE OF CONTENTS

Executive summary.....	5
1. Introduction.....	6
2. Actors and values of media policy.....	8
3. The structure of the media market	22
4. Composition and diversification of media content	28
5. The journalistic profession.....	36
6. Media literacy and transparency requirements	42
7. Conclusion	44
8. References.....	46
9. List of interviews	49

Executive summary

This report engages in the study of the institutional dynamics of media policy-making and media policy-implementation in Belgium. The focus of this report is on the policy processes and instruments that promote or constrain the development of free and independent media in Belgium, especially with regard to new technological developments and media convergence. This report examines the various policy participants, the interests they present and the ways they influence media policy. It also examines the various structural regulations (such as rules on media-ownership, competition, subsidies and licensing) and the rules on the composition and diversification of media content in Belgium. Finally, this report explores the ways the journalistic profession is organised and the various initiatives taken by Belgian authorities to promote media literacy and transparency.

Media policy in Belgium is focused on the audiovisual media, rather than on the written press or Internet media. The freedom and independence of the media, often under the general banner of freedom of expression, are systematic features of policy interventions, be it regularly only as background principles.

There have been discussions on the interpretation of specific provisions in the Belgian Constitution, especially with regard to the application of the principle of media freedom to media other than the written press. These discussions reveal problems with the application of the principle of media freedom by judges, rather than by parliaments, governments or individual politicians. Politicians generally seem to respect the freedom and independence of the media and to refrain from introducing specific legislation limiting the media's freedom and independence. In the same sense, there are no major incidents of changes to media legislation that are mainly inspired by specific commercial or economic interests.

There is a general practice of cooperation between policy makers and media stakeholders when it comes to making media policy in Belgium. Self-regulation has gained a central place in Belgian media policy. Self-regulation is, for instance, often deployed as a means to respond to problems and situations of media convergence and new technological developments in the media. Policy responses to technological convergence have to a large degree been formulated on a case-by-case basis. Independent media regulators supervising compliance with media regulations help to ensure a general legislative framework that protects the freedom and independence of the media. There is a wide variety of different state parties responsible for media policy in Belgium. Also, the EU and the ECHR increasingly influence media regulation at all levels.

1. Introduction¹

This report aims to study the formulation and implementation of media policy in Belgium and examine its contribution to media freedom and independence. For this purpose, the report identifies the various players who influence media policy in Belgium and the main values that they uphold. Special attention is paid to the impact of new technological developments on media regulations, self-regulatory instruments and the case law of the European Court of Human Rights (ECtHR). This report focuses on questions of structural and content-related media regulation, and particularly on the ways that these different types of regulation promote or hinder the establishment of free and independent media. The analysis of structural regulations primarily addresses the role of political and economic interests on policy formulation. The analysis of content regulation centres on positive measures and legal restraints on the diversification of media content, and the relationship between journalists, politicians and media owners (which can affect independent media reporting). Finally, this study also reports on media literacy and transparency initiatives in Belgian media policy.

The fact that Belgium usually scores well in freedom of expression indices indicates that the legal and regulatory framework is satisfactory with respect to the protection of media freedom and independence.² However, as will be shown below, some parties claim that the framework should be improved in specific areas. There is general consensus in Belgium that free and independent media are vital to effective democracy at all levels of government.

Media regulation in Belgium has mostly focused on audiovisual media, while leaving print media unregulated to a large degree. This focus on audiovisual media has historic reasons. On the one hand, the impact of these mass media on the general public was considered an element justifying more regulation. Additionally, the state itself was (and to a large degree still remains) a dominant provider of radio and television services through public service broadcasting. So far, no clear-cut media policies on Internet media have emerged.

Today, radio and television broadcasting are regulated by the Communities (the Flemish Community and the French Community).³ Other policy areas remain the responsibility of the federal state. In a complex institutional system, legislation adopted at European Union (EU) level serves as a common basis for all the parties who participate in media policy-making. Governments try to focus on some key elements that they consider important, while accepting that many policy choices have already been made at EU level.⁴

Most but not all media players are domestic. This is for instance true for the state players such as parliaments, governments, courts and regulators (with the important exception of influences from the levels of the European Union and the Council of Europe). This is also true for most media groups. Printed news media are almost exclusively Belgian.

¹ This report has been authored by Bart Van Besien under the scientific supervision of Dr. Pierre-François Docquir.

² Available at: <http://www.freedomhouse.org/template.cfm?page=251&year=2011> and <http://en.rsf.org/press-freedom-index-2010,1034.html> (date accessed 17 November 2011).

³ Given its small size, we exclude the situation in Belgium's German-speaking Community from this report. We also exclude the regulation for non-Dutch and non-French broadcasting in Brussels (which are the responsibility of the federal state).

⁴ However, governments have few personnel working on media policy files or following developments at the EU level (Interview with senior official at the French Community Cabinet of the Minister responsible for media policy, by Bart Van Besien and Pierre-François Docquir, Brussels, 17/5/2011; Interview with senior officials at the French Community Administration, General Service for Audiovisual and Multimedia, by Bart Van Besien and Pierre-François Docquir, Brussels, 31/5/2011; Interview with Johan Bouciqué, Head Legal Department for Media Affairs at the Flemish Community Administration, Department Culture, Youth, Sports and Media, by Bart Van Besien, Brussels, 22/6/2011).

For audiovisual media, public service broadcasters are well established players. Flemish commercial audiovisual media are to a large degree owned by domestic groups, whereas French-language radio and television is more strongly influenced by broadcasters from France and Luxembourg. The distribution sector is partly domestic, partly in foreign hands (such as cable distribution in Flanders). The arrival of Internet based media has introduced new, international players to the Belgian market. The question of whether the subjects of media policy are local or foreign players is relevant for media freedom and independence because foreign players are sometimes less willing to comply with local rules on media freedom and independence (for instance, see the example below of the (Luxembourg based) main French-language commercial broadcaster's refusal to comply with local rules on television broadcasting). Additionally, information from our interviews,⁵ suggests that policy makers are not always confident in the formulation and application of local regulations on international Internet media.

⁵ See below for a complete list of the interviews.

2. Actors and values of media policy

2.1 Overview of the various actors of media policy and their values

The main **legislatures** in the field of the media are the Community Parliaments, i.e. the Flemish Parliament and the Parliament of the French Community. The majority of media-related legislation concerns audiovisual media, rather than the written press or the Internet (Van Besien, 2010: 6). These rules on audiovisual media are passed by the Community Parliaments. The Federal Parliament remains responsible for indirect state subsidies, copyright legislation and telecommunications policy (including satellite reception and terrestrial networks). Generally speaking, politicians and legislators have the attitude to not intrude on the media's independence.⁶ As will be explained in detail below, legislation aims in particular at safeguarding the further existence of some media forms, to support diversity of outlets and content, to support local production, or to provide incentives for media players to establish self-regulatory instruments. Of particular interest to the legislatures (as well as to the governments), is the role of public service broadcasters.

The **executive** state powers for media policy rest with the Community Governments, i.e., on the Flemish side, the staff members of the personal cabinet of the responsible Minister and the 'Flemish Ministry for Culture, Youth, Sports and Media'; and, on the French-language side, the personal cabinet of the responsible Minister and the 'General Service for Audiovisual and Multimedia' of the 'Ministry of the French Community'. As mentioned above, some specific aspects of media policy rest with the federal government, for which mainly the 'Federal Public Service Economy' branch of the federal government is responsible. The values promoted by the different levels of Belgian government in media politics are similar to those described above for the legislatures. The general principle here is one of non-intervention, subject to exceptions that are largely meant to support pluralism of media types (which in practice often means sustaining existing media types) and to incite media players to cooperate (e.g. through self-regulation).⁷

Courts play a role in the implementation and interpretation of media regulations. Most legal proceedings on press matters are brought before civil courts, rather than criminal courts. Of particular importance are the decisions of the highest courts, such as the Constitutional Court or the Court of Cassation. Although its main mission is to ensure the uniformity and consistency of Belgian case law, the Court of Cassation does not always succeed in this. Notably, its restrictive interpretation of the concept of the 'press' in the Constitution has been resisted by some lower courts, leading to serious discrepancies in the case law (see *infra*). The Belgian Council of State, the highest administrative tribunal, is responsible for reviewing decisions of the media regulators. Another section of the Council of State serves as an advisory body when new legislation is drafted.

It is difficult to identify clear 'values' for the case law of the different Belgian courts on media affairs. In general, courts respect the freedom of the press and the freedom of

⁶ However, incidents do sometimes occur (e.g. it was mentioned during our interviews that a politician unsuccessfully tried to exclude a certain newspaper from a state aid program, because this paper had published some uncomplimentary articles about the politician).

⁷ During our interviews with representatives of the governments of the French Community and of the Flemish Community, representatives of both governments mainly stressed the importance of their policy programs for stimulating cinematographic production (for the French Community) and television productions (for the Flemish Community). Since these subjects do not have a direct impact on the independence and freedom of the (news) media, it suffices here to mention their existence and the importance given to them by the respective governments.

expression, and they accept EU law and the European Convention on Human Rights (ECHR) as a source of law. Courts may of course diverge in some instances, such as the application of constitutional safeguards for a free press to audiovisual and Internet media, the admissibility of preventive measures in urgent application procedures, or reporting on high profile court cases.⁸ The Court of Cassation in particular has been criticised by some for its restrictive interpretation of the constitutional safeguards for the press as applying to the ‘written press’ only. The Constitutional Court considerably enlarged the legal protection of the press when it decided that the protection of journalistic sources should cover non-professional as well as professional journalists.⁹

The main **regulatory bodies** responsible for monitoring compliance with audiovisual regulations are the ‘Conseil Supérieur de l’Audiovisuel’ (CSA) for the French Community and the ‘Vlaamse Regulator voor de Media’ (VRM) for the Flemish Community.¹⁰ They are to a large degree independent of the Community Governments. Although appointed by the governments,¹¹ exercising a mandate in the VRM and the CSA is incompatible with exercising certain political functions.¹² The Belgian Institute for Postal and Telecommunication Services (BIPT), at the federal level, is the regulator for telecommunications and postal services. As a result of the convergence of the telecommunications and audiovisual markets, the CSA and the VRM work together with the BIPT in a Conference of Regulators for the sector of Electronic Communications (CRC).¹³ The responsibilities of the regulators are mainly to monitor compliance with audiovisual media regulations, especially related to the rules on advertising,¹⁴ the protection of minors, the protection of consumers and the impartiality of information. The VRM and the CSA are especially responsible for making decisions in cases of conflicts and claims related to compliance with audiovisual media regulations. The CSA and the VRM also play a major role in monitoring the competition in the Belgian media market, for instance by publishing information on the ownership and the degree of concentration of the media. As far as the written press is concerned, they are only responsible for reporting on the degree of concentration in the market (incidentally), not for monitoring compliance with the regulations.¹⁵ Finally, they manage the process of granting licences for terrestrial audiovisual broadcasting. One should note that it is the governments that design the allocation schemes and open the calls for applicants. Before taking measures with a potential significant impact on the market, the VRM and the CSA usually organise sector and public consultation rounds to collect information from stakeholders.

The main **representative organisations for journalists** are AGJPB/AVBB (consisting of a French-German wing, AJP, and a Flemish wing, VVJ, who work independently from each other) and AJPP/VJPP. Journalists and their associations generally

⁸ See for example a recent incident where a judge refused journalists of the Flemish public broadcaster further access to the court sessions, because of their reporting on the ongoing process. This seems a disproportionate and improper sanction that is not in line with the freedom of the media.

⁹ Constitutional Court, no. 91/2006 of 7 June 2006.

¹⁰ ‘Medienrat’ is the regulator for the German-speaking Community.

¹¹ Art. 216 §4 FLBA; Art. 138-142 FRBA.

¹² Art. 21 Flemish Act of 18 July 2003 on Administrative Policies, *Moniteur belge*, 22 August 2003, 41659; Art. 138-142 FRBA.

¹³ See cooperation agreement of 17 November 2006, *Moniteur belge*, 28 December 2006, 75371.

¹⁴ To be noted that this touches at the core of the media groups’ independence since advertisement revenues constitute a major source of income for almost all media outlets.

¹⁵ Interview with Jean-François Furnémont, General Director CSA and President EPRA, and Marc Janssen, President CSA, by Bart Van Besien and Pierre-François Docquir, Brussels, 7/6/2011; Interview with Marc Chatelet, Head of Legal Department VRM administration, and Dieter Gillis, Legal Advisor VRM administration, by Bart Van Besien, Brussels, 9/6/2011.

seek to limit any state intervention that may have an impact on media content.¹⁶ However, when it comes to protecting their professional interests, journalists have solicited state intervention on various occasions: for instance, to protect the confidential nature of journalistic sources; to help with the establishment of structures for self-regulation; or to protect the professional and social status of journalists.¹⁷ The terms of professional and ethical rights and duties of journalists are largely left to self-regulation. Journalists often consider the protection of their social interests unsatisfying.¹⁸

The main media **industry organisations** are the organisations of newspaper publishers (JFB and VDP), the periodic press (THE PPRESS and UPP) and the advertising sector (UBA). Given the relative concentration of the media in Belgium, and the competition between the media groups, it is difficult to identify the policy values that the media industry pursues (let alone those of the industry's representative organisations, who often consist of relatively few members and who are in direct competition with one another). The media organisations are - with some exceptions such as the public service broadcasters - to a large degree commercial organisations, whose values often change according to their commercial interests.¹⁹ Media industry organisations lobby on particular issues that are beneficial to their members (such as various state aid programs, beneficial tariffs for postal delivery, the zero VAT tariff for newspapers, etc.). They are very keen to limit any possible state intervention in their affairs. Generally speaking, the French-language newspaper associations seem to be keener than their Flemish counterparts to bring proceedings before the courts.²⁰

The main **self-regulatory organisations** for the journalistic profession are the French-language *Conseil de Déontologie Journalistique* (Council for Journalistic Deontology) (CDJ) and the Dutch-language *Raad Voor De Journalistiek* (Council for Journalism) (RVDJ). Their main tasks are to formulate rules for journalism ethics and ensure their effective application. These organisations have a mixed character in the sense that they are common to all types of media outlets and that their members consist of both journalists and publishers (and to a limited degree, civil society).²¹ The policy of the CDJ and the RVDJ is to first try and settle disputes through mediation between the parties. If mediation is unsuccessful, they deliver a non-binding decision on the subject, but cannot compel parties to observe these decisions. Their power lies more in their pragmatism, in the publicity provided by their decisions and opinions and in their widely accepted moral authority.²² The CDJ and the RVDJ are co-financed by the publishers' and the journalists' associations. However, in reality, the Community governments sponsor the journalists' associations for their contribution to the CDJ and the RVDJ. According to the Secretary General of the CDJ,

¹⁶ Interview with Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011.

¹⁷ See for instance journalists' interventions during the 'States General of the Information Media' (see below): available at: <http://www.ajp.be/egmi> (date accessed 17 November 2011).

¹⁸ Interview with Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011.

¹⁹ Even the public service broadcasters develop some commercial activities (largely related to advertisement).

²⁰ See below for more details on the legal proceedings of JFB against RTBF and against Google. Interview with Margaret Boribon, Secretary General JFB, by Bart Van Besien and Pierre-François Docquir, Brussels, 14/6/2011. Interview with Patrick Lacroix, Managing Director VDP, and Sandrien Mampaey, Legal and Administration Manager VDP, by Bart Van Besien, Brussels, 15/6/2011.

²¹ Although questions can be raised in how far CDJ and RVDJ really represent 'civil society', since this is a very broad concept.

²² Interview with Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, Brussels, 7/6/2010; Interview with Jacques Englebent, lawyer specialised in media law, by Bart Van Besien and Pierre-François Docquir, Brussels, 1/6/2011.

respect for journalism ethics is the best guarantee for the independence of the media and the main objective of the CDJ.²³

2.2 Importance of freedom of expression and freedom of information in the constitutional and legal system

The main rules on freedom of expression and information are enshrined in the Belgian Constitution. These articles (Articles 19, 25 and 150) of the Constitution have remained largely unchanged since their first drafting in 1831. This provides for a high degree of stability, but also raises problems with regard to their interpretation in the light of new technologies. Particularly problematic are Articles 25 and 150, which refer literally to the ‘press’ (i.e., ‘the press is free’²⁴ and ‘a jury will be installed for press offences’²⁵), and are, at least according to the Court of Cassation and some of the lower courts, not technology-neutral.

The technology dependency of Articles 25 and 150 is in sharp contrast with the more general Article 19 of the Constitution on freedom of expression and with Article 10 of the ECHR, which do not refer to a certain technology. Article 19 of the Constitution guarantees the freedom of expression, albeit that offences committed when using this freedom may be punished (e.g. cases of defamation, etc.).

2.2.1 The interpretation of the concept of the ‘press’ in the Constitution

The fact that Articles 25 and 150 of the Constitution refer to the ‘press’ has given rise to discussions in the case law and legal doctrine on the exact scope of these articles.²⁶ On the one hand, there are courts and authors who defend an extensive and evolving interpretation of the concept of the ‘press’ in the Constitution. The core of their argument is that, when the Constitution was drafted in 1831, the legislator could not have foreseen the emergence of new technologies of communication other than the printing press, and that, as a consequence, the concept of the ‘press’ in the Constitution should be interpreted in a contemporary sense to include modern communication media. Other courts and authors adhere to the case law of the Court of Cassation and argue that numerous other articles of the Constitution have been revised since 1831, but that the legislator has so far not broadened the scope of Articles 25 and 150. Opponents of an evolving interpretation also refer to the fact that, when the official Dutch translation of the Constitution was enacted in 1967,²⁷ the legislator translated the French term (‘presse’; ‘press’ in English) as ‘drukkers’ (‘printing press’ in English) rather than the broader term ‘pers’ (‘press’ in English). In other words, at a time when new communication media such as the radio and television already existed, the legislator chose a restrictive term (‘printing press’) rather than a broader and more technology-neutral term (‘press’).²⁸

²³ Interview with André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011.

²⁴ Article 25 Constitution.

²⁵ Article 150 Constitution.

²⁶ For a summary of the different positions, see Englebert, 2007: 229-288.

²⁷ Although in fact, the Dutch text goes back to a Royal Decree of 25 November 1925 (*Moniteur belge*, 19 December 1925).

²⁸ *A contrario*, the (also official) German version of the Constitution uses the term ‘Presse’ and not ‘Druckpresse’.

This discussion is important in so far that it touches the very core of the constitutional guarantees for media freedom in Belgium. At a time when the Internet and convergence of technologies are posing a number of new legal problems, judges and legal scholars are still discussing on the exact scope of the term ‘press’ and whether or not it comprises comparatively ‘old’ media such as radio and television. Both Article 25 and Article 150 of the Constitution have in the meantime been declared subject to revision, and their scope will probably be extended to other forms of media in the future.²⁹ However, such revision is yet to take place.

Meanwhile, the interpretation of the concept of the ‘press’ in Article 25 of the Constitution in relation to the possibility of preventive interference by courts, has been brought before the European Court of Human Rights (ECtHR), which delivered a judgment on 29 March 2011 (see below for more information).³⁰

Article 150 of the Constitution submits all ‘press offences’ to the jurisdiction of a jury (except when these press offences are inspired by racism or xenophobia),³¹ and thus installs a special judicial protection for authors, journalists and editors. In practice, this led criminal prosecutors to not bring criminal proceedings against the press,³² so that the press is de facto only subject to civil proceedings, and that the civil courts have become the central forums for discussions on the limits of press freedom (for a discussion on civil liability procedures against journalists, see below).³³

This *de facto* criminal immunity for press offences raises the practical question of whether Article 150 of the Constitution covers new technologies. The Court of Cassation interprets the concept ‘press offence’ in Article 150 of the Constitution so restrictively that it does not include audiovisual broadcasts (which means that the latter may be prosecuted before the ordinary criminal courts).³⁴ Although there is no unanimity on this point, there is an evolution in Belgian case law to treat abuses of freedom of expression on the Internet as press offences, thus giving them a de facto criminal immunity (since the Court of Cassation has not yet decided on the applicability of Articles 25 and 150 of the Constitution on Internet media, this remains subject to debate). According to a recent judgment of the Court of Appeals of Brussels, Article 150 of the Constitution applies to written expressions in Internet forums, even if made by non-journalists.³⁵

In the light of technical convergence and the integration of print, audiovisual and Internet media, it seems problematic to maintain a distinction between these different media types for the application of Article 150 of the Constitution. At this stage, it is unclear whether the recent judgment of the ECtHR in the case *RTBF v Belgium* (concerning Article 25 of the Constitution; see below) will have repercussions on the interpretation of Article 150 or whether any legislative initiative will be taken to clarify the exact scope of this article.

²⁹ Declaration of revision of the Constitution, *Moniteur belge*, 7 May 2010, 25762.

³⁰ ECtHR, *RTBF v Belgium* (no. 50084/06), 29 March 2011.

³¹ See Docquir, 2009: 105-127. For case law on this subject, see <http://www.diversite.be/?action=onderdeel&onderdeel=68&titel=Rechtspraak> (date accessed 17 November 2011).

³² The reason for this is that jury procedures are costly and time-consuming, and are extensively covered by the media (which makes such procedures counter-productive for prosecuting press offences).

³³ By submitting press offences inspired by racism or xenophobia to the jurisdiction of regular criminal courts, the legislator opted to exclude the expression of racist or xenophobic ideas from the *de facto* ‘decriminalisation’ offered to press offences, and to thus ensure their effective prosecution.

³⁴ In a decision of 1979, the Court of Cassation defined ‘press offences’ as ‘crimes infringing the rights of society or its citizens, by abusing the expression of an opinion through printed and divulged writings’ (Cassation, 11 December 1979). See also e.g. Cassation, 9 December 1981.

³⁵ See Court of Appeals Brussels, 19 March 2010, *Auteurs & Media*, 2010/3, 297.

2.2.2 The application of the principle of stepped liability

Article 25 of the Constitution does not only stipulate that the press is free and that (prior) censorship is not allowed; it also establishes a system of stepped liability for criminal prosecutions and civil liability.³⁶ Under this system, in principle only the author of a work, and not its publisher, printer or distributor can be prosecuted in Belgium. Only if the author is not known or not resident in Belgium, will the other players come into the picture (in the order listed above). This system is meant to prevent private censorship by publishers, printers or distributors (i.e. since in principle the author alone will be prosecuted for a published work, publishers, printers and distributors do not have to fear prosecution).³⁷ There is no scientific research on the impact of this system of stepped liability on freedom of expression.

Although the shelter offered to publishers, printers and distributors aims to prevent censorship 'from within', the practical effect is that individual journalists are largely unprotected from criminal and civil liability claims. In this sense, journalists, even if they work under a contract of employment, are worse off than other employees, because they cannot invoke protective legislation such as Article 1384 of the Civil Code or Article 18 of the Act on Employment Contracts,³⁸ which offer broad protection for employees against liability claims for damage which they cause to their employer or to others in the performance of their employment contract.³⁹ This seems at odds with the way most journalists work today (i.e. they are often employees who work in collaboration with other journalists and under the supervision of editors, etc.) and one may wonder whether it would not be better to shift the responsibility from the individual journalists to those who set the scene for the journalistic work. In practice, courts often seek to implicate the publishers indirectly by identifying a separate fault by the publisher (as independent from the fault committed by the journalist), such as in the choice of the title, format, placement of the article, etc.

There is no unanimity on the question of whether the system of stepped liability applies to audiovisual media.⁴⁰ If one accepts that the system should be limited to print media, this means that a breach of criminal legislation by audiovisual media can lead to a condemnation of the journalists and of the responsible editor in chief. In civil procedures, the liability will most often be situated at the level of the broadcast organisations, rather than the individual journalists or editors.

Furthermore, the application of the principle of stepped liability to Internet media raises the problem of how to translate the legal concepts of 'publisher', 'printer' and 'distributor' to Internet media such as forums, blogs or other Web 2.0 applications. In the context of the Internet, one must also take into account the provisions on the liability of intermediary service providers imposed by the European Directive on Electronic Commerce of 8 June 2000⁴¹ and the Belgian Act on Electronic Commerce of 11 March 2003,⁴² and in

³⁶ On the application of the principle of stepped liability to civil liability claims, see Cassation, 31 May 1996.

³⁷ For a confirmation of this underlying goal of the system of stepped liability, see Constitutional Court n°. 47/2006, 22 March 2006.

³⁸ Act of 3 July 1978 on Employment Contracts, *Moniteur belge*, 22 August 1978, 9277.

³⁹ See Constitutional Court no. 47/2006, 22 March 2006.

⁴⁰ Contrary to Voorhoof (Voorhoof, 2003: 160), Hoebeke and Mouffe consider that the principle of stepped liability also applies to audiovisual media (see Hoebeke and Mouffe, 2005: 650). The case law is divided on this issue as well.

⁴¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *Official Journal L 178* of 17 July 2000, p. 1-16.

⁴² Act of 11 March 2003 on certain legal aspects of information society services, *Moniteur belge*, 17 March 2003, p. 12962.

particular the exemptions of liability for services of ‘mere conduit’, ‘caching’ and ‘hosting’.⁴³ If one accepts that the system of stepped liability applies to Internet media,⁴⁴ the question which is then raised is how to treat, for instance, defamatory messages on an Internet forum of a newspaper. Under Article 25 of the Constitution, the newspaper publisher will normally be liable as a ‘publisher’ if the author of the messages cannot be found (which is often the case). However, the ‘publisher’ will often be exonerated as a ‘hosting provider’ under the legislation on electronic commerce. As yet, it is unclear how these different legislations should be brought in line with one another (for more information, see: Mampaey and Werkers, 2010: 150-153 and Van Besien, 2011: 562-568). Some authors see a trend in case law to treat operators of Web 2.0 platforms as hosting providers, rather than as publishers, provided that they do not actively select the users/authors and do not actively interfere with the content of the opinions published (e.g. Werkers, 2010: 21).

These issues have been covered by self-regulation as well. In 2009, the RVDJ published a recommendation on how the media should handle user-generated content.⁴⁵ In this recommendation, the RVDJ sees it as an ethical duty of the media to always clearly distinguish user-generated content from its own content and to limit the publication of anonymous contributions to exceptional circumstances.⁴⁶ The RVDJ distinguishes factual content provided by users from opinions provided by users. In the case of factual content, the RVDJ mentions that journalists have a duty to properly check their sources. For the publication of users’ opinions, the RVDJ on the one hand identifies the author as the first responsible person, but on the other hand adds that the medium that publishes the opinion has a responsibility to properly manage its forum. The RVDJ suggests that the media should for instance pre-monitor, actively moderate or post-monitor their discussion forums. This position is difficult to reconcile with the exonerations provided by Article 25 of the Constitution and by the legislation on electronic commerce, following which intermediaries are encouraged to take a neutral stance in order to benefit from exoneration. At the time of writing, the CDJ is finalising its own opinion on this issue.

2.3 Technical convergence and its effect on media regulation

Technical convergence has not seriously affected the institutional structures of media policy in Belgium, in the sense that legislation still makes a basic distinction between the written press and the audiovisual media and that different levels of the state are responsible for the regulation of these different forms of media.

2.3.1 The role of the courts

The medium-specific approach of Belgian legislation has come under increasing pressure with the introduction of each new technology. Solutions have sometimes been produced by the courts rather than by legislators, as the analysis regarding the interpretation of the concept of the ‘press’ in the Constitution shows.

⁴³ Respectively articles 12, 13 and 14 of the Directive 2000/31/EC and articles 18, 19 and 20 of the Belgian Act of 11 March 2003.

⁴⁴ The Court of Cassation has not yet decided on this matter (but it has in the past decided that Article 25 of the Constitution does not apply to audiovisual media – see above and below). Some authors see a trend in Belgian case law to apply the regime of stepped liability to Internet media (see Werkers, 2010: 10).

⁴⁵ Recommendation of 12 March 2009 on the use of user-generated content by the media, available at http://www.rvdj.be/sites/default/files/pdf/aanbeveling_gebruikersinhoud.pdf (date accessed 17 November 2011).

⁴⁶ The editors should always dispose of the personal data needed to identify the authors.

Other important questions in terms of technical convergence have also been left to the courts. For instance, it is the courts that were asked to judge on Google's use of Internet content created by newspapers. The Court of Appeals of Brussels recently condemned Google for violating Belgian copyright law by publishing links to and abstracts of articles from newspapers without permission of the publishers through its Google News and Google Cache functions.⁴⁷ Additionally, the courts have been asked to decide whether the public broadcaster RTBF's web activities constitute unfair competition vis-à-vis the newspaper publishers. Parliamentarians find it hard to formulate a position that is broadly accepted by the entire media sector and the public (see below). Another important example of the role that courts play in Belgian media policy is the decision of the Belgian Constitutional Court of 7 June 2006, following which the protection of journalistic sources covers all individuals that exercise an informative activity, whether or not they are professional journalists (see below).⁴⁸

2.3.2 The role of self-regulatory organisations

Other practical answers to technical convergence issues have been left to self-regulatory organisations such as the CDJ and the RVDJ. It is significant that the codes of journalistic ethics that they developed apply to all types of media. The CDJ recently published an opinion on rules of journalistic ethics applying to social media such as Twitter and Facebook.⁴⁹ In the same sense, the RVDJ recently updated its code of journalistic ethics to take into account the digitalisation of the media.⁵⁰ In fact, one can say that the principles of journalistic ethics largely remain the same, but are updated in the light of the increased tensions caused by digitisation and new media.

2.3.3 The role of regulators

Technical convergence has not led to the creation of unified communications regulators. In fact, it was only after a decision of the Constitutional Court of 14 July 2004⁵¹ that the CSA, the VRM and the telecom regulator (BIPT) entered into a cooperation agreement to work more closely together through the CRC.

The VRM considers itself responsible for Internet-based activities to the extent that the websites contain mainly audiovisual content. In practice, this means that the websites of audiovisual broadcasters fall under the jurisdiction of the media regulator (even if these websites also contain written content). Likewise, the VRM does not actively monitor the websites of journals and magazines for compliance with audiovisual regulations, since these websites mainly have written content (even if they also contain some audiovisual content).⁵² The CSA has launched a public consultation initiative on the interpretation of the notion of 'audiovisual media service' with regard to new media technologies.⁵³ Through this consultation, the CSA looks for the input of the media players and the public for the

⁴⁷ Court of First Instance of Brussels of 13 February 2001 and Court of Appeals of Brussels of 5 May 2011, *Google, Inc. v SCRL Copiepresse*.

⁴⁸ Constitutional Court, no. 91/2006 of 7 June 2006.

⁴⁹ Available at: <http://www.deontologiejournalistique.be/telechargements/10%2010%2013%20Avis%20sur%20la%20deontologie%20et%20les%20reseaux%20sociaux.pdf> (date accessed 17 November 2011).

⁵⁰ Available at: <http://www.rvdj.be/sites/default/files/pdf/code2010.pdf> (date accessed 17 November 2011).

⁵¹ Constitutional Court, no. 132/2004, 14 July 2004.

⁵² This is in line with the AVMS Directive (see 21 of the preamble).

⁵³ Available at: <http://www.csa.be/consultations/16> (date accessed 17 November 2011).

establishment of a regulatory framework that is supportive of new media forms and offers sufficient protection to its users.

2.3.4 The role of the legislative and executive branches of state

Politicians' approach to technical convergence has mainly centred on the role of public broadcasting in the digital age (to a large degree because of conflicts between the print media and public service broadcasters (PSBs)). Politicians are inclined to preserve PSBs' presence on all possible relevant platforms, including the Internet.⁵⁴ Private media players are not asking for the abolition of public service broadcasting, and are accepting of a dual (private-public) broadcasting landscape, be it on the condition that PSBs restrict themselves to their public mission and do not engage in commercial advertising. The newspapers in particular are opposed to PSBs' online 'written press activities' and related advertising income.⁵⁵ The French-language newspapers summoned RTBF to court, claiming a breach of its management contract, the RTBF-Act, and European legislation on state aid and competition.⁵⁶ The Dutch language newspapers have similar concerns about VRT's online written press activities, but have not started judicial procedures so far (mainly because VRT's online advertisement income is rather limited). All in all, it seems that a final decision on the scope of the PSBs' Internet activities and the implications for Internet advertising is to be taken by politicians in parliament and government (as has, to some degree, already been done on the Flemish side with regard to the new management contract for the VRT).

Generally speaking, the approach of parliaments and governments (and consequently also of regulators) with regard to Internet television and Internet radio consists of applying softer rules on these media forms than on audiovisual media (i.e. a notification regime rather than an authorisation regime). This policy is in line with the AVMS Directive, and is inspired by the fact that there is no scarcity of resources for these new forms of broadcasting.

Also of importance is the approach of the Flemish government to no longer limit state aid to classic media alone (i.e. state aid is granted to the digital-only 'news lab' Apache.be). The Flemish government has plans for the creation of a 'Media Innovation Centre' ('MIC') in 2012, which is supposed to help media organisations to develop a digital download platform and payment system, in order to lessen the hold of international companies such as Apple and Google on the local market. At this stage, it is unclear what the impact of this initiative on the local media market will be, but if it is successfully carried out, it will be an example of state support for local publishers in maintaining their independence from international distribution companies.

⁵⁴ See for instance, article 6.1.5 of the new management contract for VRT, available at <http://www.vrt.be/opdracht/de-beheersovereenkomst> (date accessed 17 November 2011). See also the addendum to this management contract, listing the different activities that are covered by the management contract, available at http://www.vrt.be/sites/default/files/attachments/Verklarend_addendum_Beheersovereenkomst_2007-2011_0.pdf (date accessed 17 November 2011).

⁵⁵ Interview with Margaret Boribon, Secretary General JFB, by Bart Van Besien and Pierre-François Docquir, Brussels, 14/6/2011; Interview with Patrick Lacroix, Managing Director VDP, and Sandrien Mampaey, Legal and Administration Manager VDP, by Bart Van Besien, Brussels, 15/6/2011.

⁵⁶ A definitive judgment has not yet been rendered, and the court seems to propose parties to start an arbitration procedure.

2.4 The impact of the ECHR on media policy

Article 10 of the European Convention on Human Rights (ECHR) (and Article 19 of the International Covenant on Civil and Political Rights (ICCPR)) and the decisions of the ECtHR exert direct effect on the Belgian legal system. There seem to be no major problems with the implementation of ECtHR case law, and even ECtHR decisions against other countries are generally followed by Belgian case law.⁵⁷

2.4.1 The prohibition of prior censorship and the distinction between the written press and audiovisual media

The case law of the ECtHR has had an important influence on the debate in Belgium on the scope of the prohibition of censorship as mentioned in Article 25 of the Belgian Constitution. The Belgian Court of Cassation has since long interpreted Article 25 of the Constitution on the freedom of the press and the prohibition of censorship restrictively as applying only to the written press, and not to radio or television, for example (see also above).⁵⁸ Furthermore, the Belgian Court of Cassation interprets Article 25 of the Constitution as applying only to prior censorship, which means in practice that the prohibition of censorship applies only if there has not yet been any dissemination; this prohibition does not apply from the moment there has been some kind of dissemination (it is yet unclear how this criterion would be applied to the Internet).⁵⁹

Although all scholars and courts do not share these interpretations, some Belgian courts⁶⁰ have granted injunctions for taking newspapers or magazines out of distribution, based on the argument that, since the papers and magazines were already available for sale, their judicial ruling did not constitute prior censorship. The situation was even more problematic for television and radio broadcasts. Based on the case law of the Court of Cassation that such broadcasts do not fall under the constitutional prohibition of censorship, in several instances Belgian urgent-application judges have prohibited the broadcasting of programs, even before any dissemination had taken place.⁶¹

These cases covered a range of different facts and allegations, ranging from defamation to breach of privacy, breach of the presumption of innocence and breach of confidentiality of parliamentary inquiries. In scholarly literature, one of the recurring issues is the unilateral character of some of the judicial decisions in urgent procedures, where the judge ‘provisionally’ (i.e. pending a definitive decision) orders the paper or magazine to be taken out of circulation, in order to prevent further harm to the claimant, without hearing the publisher (Voorhoof, 2003: 63-75).

Two of these cases have been brought before the ECtHR, one involving a magazine (written press), and another one involving a television broadcast. In the first of these cases, *Leempoel & Ciné Revue v Belgium*,⁶² the ECtHR found no violation of freedom of expression in the way that a Belgian urgent-applications judge had ordered a magazine to be withdrawn

⁵⁷ For instance, when the Belgian Constitutional Court annulled the prohibition on political advertising on radio as contained in Art. 12 FRBA (Constitutional Court, no. 161/2010 of 22 December 2010), it expressly based its decision on a previous decision of the ECtHR against Norway (ECtHR, *TV Vest AS & Rogaland PensjonistParti v Norway* (no. 21132/05), 11 December 2008); For commentaries on this decision, see Docquir, 2011a: 505-511.

⁵⁸ Cassation, 9 December 1981.

⁵⁹ Cassation, 29 June 2000 (see Frydman and Englebort, 2002: 485).

⁶⁰ See case law cited by Voorhoof, 2003: 63-75.

⁶¹ See case law listed by ECtHR, *RTBF v Belgium* (no. 50084/06), 29 March 2011, par. 39-60.

⁶² ECtHR, *Leempoel & S.A. Ed. Ciné Revue v Belgium* (no. 64772/01), 9 November 2006.

from sale and banned from further distribution. The ECtHR accepted that the publication of an article in the magazine (which comprised confidential correspondence of a judge) breached the private life and the defence rights of the judge, while not contributing to the public interest. The ECtHR ruled that the grounds given by the Belgian judge to justify the provisional ban on further sale and distribution (i.e. limitation of damage caused to a person's private life and defence rights) were relevant and sufficient and that the limitation of the publisher's right to freedom of expression could *in casu* be seen as necessary in a democratic society and proportionate to the aim pursued.

In a second case, *RTBF v Belgium*,⁶³ the ECtHR did condemn Belgium for an injunction ordered by an urgent-applications judge against RTBF, preventing the broadcast of a program until a decision on the merits was rendered between RTBF and a person named in the program, who claimed that the program impugned his honour and reputation and interfered with his private life. The Court of Cassation had decided that Article 25 of the Constitution on the prohibition of censorship did not apply to the case, since it was only applicable to print media, and that the restriction on freedom of expression was legitimate, as it was based on legislation allowing preventive restrictions on freedom of expression in flagrant cases of violation of the rights of others.⁶⁴

The ECtHR had to determine whether the interference with RTBF's freedom of expression had a legal basis and it reiterated that a norm can only be regarded as a 'law' within the meaning of Article 10 § 2 ECHR if formulated with sufficient precision to enable the citizen to foresee the consequences of a given action. Although Article 10 does not prohibit prior restraints on broadcasting as such, any such restraints require a particularly strict legal framework to ensure a tight control over the scope of the ban and an effective judicial review to prevent abuse. The ECtHR considered that the vague legislative framework in Belgium (with no specification of the type of restrictions authorised, nor their purpose, duration, scope or control), together with the discrepancies in case law on the possibility of preventive intervention by urgent-application judges (the ECtHR listed examples of contradicting Belgian case law and stressed the differences in approach between Belgium's highest courts⁶⁵), did not fulfil the condition of foreseeability under Article 10. The ECtHR particularly denounced that, at least in this case, the distinction made by the Court of Cassation between print and audiovisual media did not provide a strict legal framework for prior restraints on broadcasting.

A request for referral to the Grand Chamber of the Court was refused. As a final decision, this judgment has direct effect in domestic Belgian law. It is in our view correct to say that, in the current state of the law, the prohibition of prior censorship is no longer limited to print media but also applies to audiovisual media.

2.4.2 Conviction of journalists for critical remarks towards magistrates

Another important case is the ECtHR's decision *De Haes and Gijssels v. Belgium*.⁶⁶ This case concerned a defamation procedure brought on behalf of members of the Belgian judiciary against two journalists who had made allegations against the magistrates of bias, affiliation with extreme-right-wing political groups and miscarriage of justice. The Brussels Court of

⁶³ ECtHR, *RTBF v Belgium* (no. 50084/06), 29 March 2011.

⁶⁴ Cassation, 2 June 2006.

⁶⁵ The Belgian Constitutional Court and the Council of State had a different view than that of the Court of Cassation, and clearly opposed any form of preventive censorship by courts.

⁶⁶ ECtHR, *De Haes and Gijssels v Belgium* (no. 7/1996/626/809), 24 February 1997.

Appeals had sentenced the two journalists to pay a symbolic sum of 1 Belgian Franc to each judge for defamation. Contrary to the Belgian courts, the ECtHR was of the opinion that the journalists had relied on detailed factual information in support of their claims, and had not breached their professional obligations. According to the ECtHR, the accusations made by the journalists amounted to an opinion, which was not excessive but proportionate to the stir and indignation caused by the matters alleged in their articles. Although the ECtHR conceded that the tone of the articles had been at times openly aggressive, it confirmed that Article 10 ECHR protects not only ideas and information, but also the form in which these are conveyed.

2.4.3 Protection of journalistic sources

Some other cases that were brought before the ECtHR against the Belgian state concerned the protection of journalists' sources. In its judgment in *Ernst and others v Belgium*,⁶⁷ the ECtHR concluded that the searches and seizures by the Belgian judicial authorities at the homes of four journalists, their newspapers and RTBF constituted a breach of the journalists' freedom of expression under Article 10 ECHR and a violation of their right to privacy under Article 8 ECHR. The searches were performed in connection with the prosecution of members of the judiciary for breach of confidence following leaks in sensitive criminal cases. The ECtHR stressed the large scale of the searches and the fact that the Belgian Government had not stated in what way the applicants were alleged to have been involved in the offences (it had not been alleged that they had written articles based on the confidential information). The Court questioned whether other means could not have been employed to identify those responsible for the breaches of confidence. In its judgment, the ECtHR found that the means employed had not been reasonably proportionate to the legitimate aims pursued, and concluded that a violation of Article 10 ECHR had taken place.

Despite of the direct effect of the *Ernst* decision, legislators took their time to enact new legislation, and in the meantime other similar problems occurred.⁶⁸ In 2004, a German reporter (Mr Tillack) wrote a story on irregularities in the European institutions, based on confidential documents from the EU's Anti-Fraud Agency (OLAF). OLAF lodged a complaint against Mr Tillack with the Belgian judicial authorities, which opened an investigation for breach of professional confidence and bribery of civil servants and searched the home and workplace of the journalist, while placing his papers under seal. The Court of Cassation judged that the searches and seizures were not illegal and did not violate Article 10 ECHR.⁶⁹ The ECtHR, in its judgment *Tillack v Belgium*,⁷⁰ did not agree and found a violation of Article 10 ECHR. Importantly, this decision was issued after new legislation on the protection of journalistic sources had been enacted in Belgium. The ECtHR considered, on the one hand, that the interference with the journalist's right to freedom of expression was based on Belgian law and pursued the legitimate aims of protecting the reputation of others and preventing disorder, crime and the disclosure of confidential information. On the other hand, the ECtHR emphasised that a journalist's right not to reveal his sources was part and parcel of the right to information, to be treated with the utmost care. This was even more so

⁶⁷ ECtHR, *Ernst and others v Belgium* (no. 33400/96), 15 July 2003.

⁶⁸ Various magistrates were opposed to the recognition of the protection of journalistic sources (e.g. out of fear that this would impede the effectiveness of criminal investigations). See for instance the examples of the Court of Cassation, the Council of State and the public prosecutor in Brussels, cited by Voorhoof, 2008: 7.

⁶⁹ Court of Cassation, 1 December 2004.

⁷⁰ ECtHR, *Tillack v Belgium* (no. 20477/05), 27 November 2007.

since the journalist had been under suspicion because of vague rumours, and had subsequently not been charged.

Another incident that led to the enactment of legislation on the protection of journalistic sources was the revelation that the telephone traffic of a journalist had been monitored to identify her sources after she had written a story on police fears of a terrorist attack. The Court of First Instance of Brussels, in its judgment of 29 June 2007, convicted the Belgian state for breach of Article 19 of the Constitution and Article 10 ECHR.⁷¹

The new Act on the Protection of Journalistic Sources was finally enacted on 7 April 2005 (by unanimous vote in the Chamber of Representatives).⁷² The Act took into account the relevant ECtHR case law (although it did not prevent subsequent condemnations of Belgium by the ECtHR based on facts committed under the old legislation). The Act substantially reduces the risk of journalists seeing their sources disclosed. Under Article 4 of the Act, journalists and editorial staff can only be forced by a judge to disclose information sources if these are of a nature to prevent crimes that pose a serious threat to the physical integrity of one or more persons, and if the following two conditions are cumulatively fulfilled: (1) the information is of crucial importance for preventing such crimes and (2) the information cannot be obtained by any other means. Under Article 5, the same conditions apply to investigative measures (searches, seizures, telephone tapping, etc.) taken with respect to journalistic sources. The Act gives a broad definition of the journalists and editorial staff who are protected by it, and an equally broad definition of the type of information it protects.⁷³ Following a decision of the Constitutional Court, the Act covers all individuals who exercise an informative activity, whether or not they are professional journalists.⁷⁴ The AGJPB/AVBB, the main representative organisation of professional journalists, and the associations of the written press publishers were some of the main pressure groups that lobbied for the enactment of this act.⁷⁵ The Act has received international praise, for instance from Privacy International, which considers it the most comprehensive law in Europe on the protection of sources.⁷⁶ Given the fact that this Act also applies to many international journalists based in Brussels (who report on bodies such as EU institutions or NATO), the importance of this Act surpasses the Belgian context.

2.5 Private regulation and judicial review

In case of disputes between parties before self-regulatory or co-regulatory organisations, the parties retain their right to submit the same case before the regular courts. For instance, if parties submit a case to the RVDJ or the CDJ, they remain entitled to start a separate court proceeding. The relationship between self-regulatory organisations and courts is one of parallel but not unrelated processes. According to some authors, the RVDJ was established with the explicit ambition to reduce the number of lawsuits against journalists, or at least to inspire judges in a positive manner.⁷⁷ In some circumstances, parties may be more inclined to start a proceeding before the RVDJ or the CDJ, rather than to start legal proceedings before a

⁷¹ Note that this judgment dates from after the enactment of the new act, but is applied to facts that occurred prior to its coming into force.

⁷² Act of 7 April 2005 on the Protection of Journalistic Sources, *Moniteur belge*, 27 April 2005, 19522.

⁷³ See Art. 2 and 3 of the Act of 7 April 2007.

⁷⁴ Constitutional Court, no. 91/2006 of 7 June 2006.

⁷⁵ Deltour, 2008: 40-41.

⁷⁶ Available at: <https://www.privacyinternational.org/article/model-brief-protection-journalists-sources> (date accessed 17 November 2011).

⁷⁷ Verdoodt, 2006-2007: 628.

court, for instance if their main objective is to obtain public recognition that a journalist has committed a fault,⁷⁸ rather than to be awarded a compensation for damages. Also, the RVDJ and the CDJ can publish general opinions on specific issues, which they often do on the occasion of a particular case that is brought before them. As such, they are often well placed to provide clear guidelines to journalists and surpass the specific circumstances of a case. On the other hand, the RVDJ and the CDJ are only responsible for giving non-binding decisions (sanctioning individual journalists or editors does not fall within their remit). Parties who are not satisfied with the decision handed down, or who want to obtain compensation or a legal reassurance that certain practices will not be repeated, are always entitled to seek recourse before a judge.⁷⁹ However, this does not constitute a judicial review by the courts of the decisions handed down by the self-regulatory organisations.

Decisions of the regulators CSA and VRM are subject to judicial review by the Council of State. The regulators themselves sometimes explicitly refer to internal codes of journalistic ethics of certain media groups when giving a decision. For instance, in 2007, the CSA condemned the RTBF for not respecting its internal regulations when broadcasting the controversial fake news bulletin that announced the independence of Flanders: ‘Bye Bye Belgium’ (in particular, the RTBF did not sufficiently clarify to the public that the program was fiction and did not take all necessary measures to prevent public confusion).⁸⁰

Rules of journalistic ethics and criminal legislation often cover the same problems and topics. For instance, the ethical rule not to use unfair methods to gather information, has its counterpart in criminal legislation on residence violation, use of fake names, receiving or being in possession of stolen goods, criminal eavesdropping, etc. Although criminal offences by journalists are very rarely brought before criminal courts (see above), rules of journalistic ethics are often invoked before civil courts in order to assess the ‘fault’ committed by journalists, which may lead to a liability on the part of the journalist to compensate for the damage caused by his or her reporting. In that sense, it is not uncommon that self-regulatory instruments on journalism ethics are invoked before Belgian courts (see below for more details).

Finally, it cannot be excluded that a specific issue may be handled both by the regulators VRM or CSA and the self-regulatory organisations RVDJ or CSJ. This risk is in particular present concerning the competence of the regulators to judge on the impartiality of media content (i.e. towards political parties or political ideas) or the protection of minors, which may be covered by journalism ethics as well.

⁷⁸ Publication in principle includes the names of the parties, except when a claimant asks not to do so.

⁷⁹ Interview with André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011; Interview with Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, 7/6/2010.

⁸⁰ Decision available at: http://csa.be/system/documents_files/653/original/CAC_20070704_decision_Bye_Bye_Belgium.pdf?1299596370 (date accessed 17 November 2011). CSA considered that RTBF breached Article 42 of its internal regulations and also Article 7§7 of the Act of 14 July 1997 (see Docquir, 2007: 443-443).

3. The structure of the media market

3.1 Focus on audiovisual media

Structural regulations almost exclusively target audiovisual broadcasting. The main broadcasting acts for the French Community are the Act of 27 February 2003 on audiovisual media services (as modified by the Act of 5 February 2009; hereafter ‘FRBA’)⁸¹ and the Act of 14 July 1997 on the Belgian radio and television of the French Community (hereafter ‘RTBF Act’).⁸² The main broadcasting act for the Flemish Community is the Act of 27 March 2009 on radio and television broadcasting (hereafter ‘FLBA’).⁸³

In the French Community, editors of terrestrial radio services need to obtain a licence, which entitles them to broadcast using a designated frequency. It is the government that designs the allocation scheme and opens calls for applications. Operators that provide radio services transmitted by other means (cable or Internet) are only required to make a declaration to the CSA. This is also the case for editors of television services that intend to broadcast in the French Community.⁸⁴ In Flanders, terrestrial radio broadcasters also need to obtain a licence in order to broadcast (Art. 134 FLBA). If radio broadcasters only transmit via cable or Internet, they simply need to make a declaration to the VRM (Art. 147 FLBA). Television broadcasters need to obtain a licence only if they broadcast regional television (Art. 166 FLBA); for all other types of television broadcasting, broadcasters are only required to make a declaration to the VRM (Art. 161 FLBA).⁸⁵ Broadcasters in both Communities need to comply with a set of rules that are applicable to their broadcasting activities.

3.2 Media ownership structures favoured by domestic media policy

The general Competition Act of 10 June 2006⁸⁶ and relevant EU laws apply to the media sector. There are no special competition rules for the written press. For radio and television, the broadcasting acts do contain specific competition and ownership rules.⁸⁷ For the French Community, the FRBA contains in its Articles 6 and 7 some conditions meant to guarantee a plurality of media players and a pluralistic offer of media content, which are considered relevant for the protection of media independence. Flemish legislation does not contain specific safeguards for media pluralism. There have been no special tendencies towards deregulation of the media sector.

The regulators have a central role in mapping the levels of competition in the media. The VRM has only limited powers to act directly against concentration. The CSA is responsible for negotiating with or imposing sanctions on editors with a dominant position if that position threatens pluralism.⁸⁸ Sanctioning powers lie mostly with the federal Competition Council. This Council is obliged to approve mergers unless there are serious doubts suggesting that effective competition on the Belgian market or a substantial

⁸¹ Coordinated by Decision of the French Government of 26 March 2009, *Moniteur belge*, 24 July 2009.

⁸² *Moniteur belge*, 28 August 1997.

⁸³ *Moniteur belge*, 30 April 2009.

⁸⁴ If operators wish to use terrestrial broadcasting methods (either analogue or digital), they still need to apply for authorisation.

⁸⁵ Interview with Johan Bouciqué, Head Legal Department for Media Affairs at the Flemish Community Administration, Department Culture, Youth, Sports and Media, by Bart Van Besien, Brussels, 22/6/2011.

⁸⁶ *Moniteur belge*, 29 June 2006.

⁸⁷ Articles 6 - 7 FRBA and 190 – 192 FLBA.

⁸⁸ Art. 7 FRBA.

part thereof will significantly be obstructed.⁸⁹ The Council does not take into account specific concerns about plurality of opinions. So far, the Council has prohibited no merger of media companies.⁹⁰

3.3 The implications of media concentration and foreign ownership on media freedom and independence

Belgium has relatively small media markets and its economy is open, with no specific restrictions on foreign media ownership. It follows that a certain degree of media concentration is probably inevitable. It is unclear how far this can go. Both the French-language and the Dutch-language media are characterised by a limited number of players in each of the different types of media outlets (these players are often the same players for the different types of media outlets). However, at present, no media group dominates all different types of media.

In the past, there was more competition in the newspaper market,⁹¹ but newspapers depended much more on political parties ('pillarisation'). Now, there are fewer direct links with political parties, but more dependence on the market, which brings with it an increased need to sell 'media products' to the public and to find advertisers and sponsors. This implies that certain media may be less inclined to bring news that is contrary to the interests of their advertisers or that contradicts the views of their audience.⁹²

Where news agencies are concerned, it must be noted that Belga News Agency ('Belga') is the only big Belgian news agency, but that international news agencies also play a considerable role in the Belgian market. There is a lack of scientific data on the extent to which the Belgian media rely on information from Belga. On the one hand, it seems that other sources of information such as social networks and specific press databases⁹³ gain importance. According to other sources, newspapers (and especially the online editions of newspapers) are still largely based on sources from Belga.⁹⁴ This seems in particular the case for reporting of new facts, but less or not at all for the explanation of news and background information. It is unclear to what extent there is a problem with the implication of the major media organisations in the ownership of Belga (i.e. Belga's main clients are at the same time its main shareholders, and it is uncertain whether and to what extent this influences the independence of Belga; see Cochez, 2010a).

Where foreign ownership is concerned, relatively few of the Flemish media are foreign owned (the Finnish Sanoma controls part of the magazine sector but mainly not information-focused magazines). The German ProSiebenSat1 group recently sold its Flemish SBS channels to a Flemish consortium of Woestijnvis, Corelio and Sanoma. At the French-language side, the German Bertelsmann indirectly holds the majority of the shares of the main television and radio broadcaster RTL. RTL is based in Luxembourg and refuses to

⁸⁹ Art. 9 §3 Competition Act.

⁹⁰ But certain conditions were imposed to safeguard pluralism e.g. when Tecteo acquired BeTV (available at: http://economie.fgov.be/nl/binaries/press_release_TecteoBeTVACML_31102008_fr_tcm325-28694.pdf (date accessed 17 November 2011)).

⁹¹ But there was less competition in the radio and television broadcasting market.

⁹² Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011.

⁹³ Such as the databases Mediargus and Pressbanking, available at: www.mediargus.be and www.pressbanking.be (date accessed 17 November 2011).

⁹⁴ Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011.

comply with Belgian rules on television broadcasting (it does not accept the authority of the Belgian CSA neither, yet accepts Belgian legislation as regards its radio services).

As far as the distribution sector is concerned, the Flemish broadband cable services provider Telenet was sold by the Flemish communities to the American investment fund Liberty Global Consortium. The fact that Telenet evolved from a (semi-) public company to a private and foreign owned company has had unintended consequences. For instance, the company recently announced that it would lower the amount of money for copyrighted materials it pays to regional television broadcasters, thereby threatening the further existence of certain regional television broadcasters (Van Baelen, 2011: 22-23). One could ask whether Telenet would have acted like this if it were still owned by the local communities.

Several regulators in Belgium (BIPT, CSA, VRM and Medienrat) have recently adopted four decisions aiming at opening the market for television broadcasting (e.g. by forcing the cable operators to give competitors access to their cable network for digital television, and by forcing them to offer their competitors access to resale of analogue television services and resale of Internet access services). The BIPT also adopted a decision imposing local loop unbundling, provision of bitstream access and access to multi-cast functionalities, etc. Together, these five decisions aim at regulating the various commercial activities known as 'triple play' services. They are important for media freedom in so far as they are meant to improve the offer, price and quality of services for consumers by taking away constraints for access to distribution networks.

3.4 New technological developments

Recently, a bill has been introduced before Parliament to guarantee net neutrality in Belgium. Net neutrality is important for media freedom and independence in so far that it secures equal access for all to make use of or offer Internet media services. The bill focuses on two policy goals: on the one hand, it aims to secure freedom of Internet traffic (no discrimination between users or services); on the other hand, it aims to address problems of traffic overload (e.g. an Internet provider may block or slow down traffic if this traffic negatively affects the overall consumer satisfaction or jeopardises the security of a user or his hardware; in such case, the provider must communicate this openly to the users and the BIPT). In certain cases (e.g. blocking of illegal sites), Internet sites may be blocked based on court decisions. This bill would apply to both fixed and mobile networks.⁹⁵ It is to be noted that, at the time of writing, the bill has not yet been voted on. Also, telecom companies have voiced opposition against its enactment (mainly because they want to prioritise some Internet traffic streams for technical and commercial reasons).⁹⁶

New technological possibilities and developments have left the position of existing media operators to a large degree untouched, in so far as it is mostly the same traditional media players that are active online. On the other hand, digital convergence and the fragmentation of audiences and advertisement budgets have left some traditional media players in bad financial shape, placing their market presence at risk. The French-language written press sector in particular is seeking additional direct state aid.⁹⁷ Radio broadcasters,

⁹⁵ Available at:

<http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&rightmenu=right&cfm=flwbn.cfm> (date accessed 17 November 2011).

⁹⁶ Available at: <http://www.kpnbasefacts.be/tarieven-en-keuze/net-neutrality-standpunt-van-de-belgische-operatoren/?lang=nl> (date accessed 17 November 2011).

⁹⁷ La Libre Belgique, 2011.

and particularly the ‘independent’ local radio broadcasters, would find it difficult to digest digital switchover financially.⁹⁸ On the other hand, new technologies such as ‘streaming’ and ‘podcasts’ open new possibilities as well and may in the future lead to more diversification and a broader public for local radio broadcasters. Furthermore, digitisation opened the door for new initiatives such as *Apache.be* and *De Wereld Morgen*, which sometimes cover news that traditional players do not cover easily. There are no specific ownership rules for new media services.

Initiatives were taken to create (semi-) public service Internet providers (currently triple play providers), in order to promote technological innovation and to mitigate undue market power of the ability to provide access to network services (i.e. a means to promote media freedom). These providers evolved to the current dominant cable service providers Telenet and Tecteo. Whereas Tecteo is still owned by the French-language local communities, the Flemish Telenet has been sold to an American investment fund (see above). It is hard to see in what ways these original (semi-) public ISPs differ from their non-public competitors (in practice, they act as commercial companies).

3.5 State intervention through subsidies and other support tools

All in all, the total amount of direct subsidies to the Belgian media is relatively small. This is especially the case on the Flemish side. Direct state aid from the Flemish Community regarding broadcasting is organised around specific projects such as training programs for journalists, technological innovation projects and subtitling of news programs.⁹⁹ Direct state aid from the Flemish Community regarding print media is based on agreements signed between the Flemish government and representatives of the newspaper and magazine publishers (generally, for a duration of three years).¹⁰⁰ The Flemish government tries to use direct subsidies as leverage (e.g. they intend to link aid to safeguards for the independence of the editorial staff), but since the amounts are relatively small, it is unclear whether this is effective. This form of aid is mostly directed to the traditional media (i.e. printed daily press), but recently also to online media (such as *Apache.be*). For the French Community, Article 7 §1 of the Act of 31 March 2004 stipulates that media organisations can only benefit from financial state aid if they comply with the Belgian Ethical Code for Journalists.¹⁰¹ However, the Act does not clarify how such compliance is to be monitored. State aid from the French Community is more substantial than on the Flemish side, and in practice provides a substantive source of income for the newspapers. These subsidies are more concerned with the promotion of particular media outlets (i.e. to a large degree the survival of existing outlets such as newspapers) – a structural feature – rather than the diversification of media content.

Some specific projects also receive direct state funding, such as projects supporting newspapers in schools (for both Communities). The Flemish Community grants funds for journalistic research to a private foundation that was created to support investigative journalistic research (Fonds Pascal Decroos; this is independent from the type of media

⁹⁸ CSA is currently holding a public consultation on the matter: available at: <http://www.csa.be/consultations/17> (date accessed 17 November 2011).

⁹⁹ Interview with Johan Bouciqué, Head Legal Department for Media Affairs at the Flemish Community Administration, Department Culture, Youth, Sports and Media, by Bart Van Besien, Brussels, 22/6/2011.

¹⁰⁰ See the protocol between the Flemish Government and the Flemish written press of 2008 concerning safeguards for a pluralistic, independent and efficient Flemish opinion press. At the time of writing, a new protocol is being developed, with possible different focus points (it is unclear which).

¹⁰¹ Act of 31 March 2004 concerning aid to the French-language written daily press, *Moniteur belge*, 13 May 2004, p. 38482. See also decision of the French Community Government of 1 July 2010 on aid to the written press.

outlet). The French Community grants some funding for investigative journalism directly to the journalists' association AJP. Both Communities grant direct subsidies to the self-regulatory organisations CDJ and RVDJ (through the journalists' associations; this does not seem to create serious implications for their independent performance).

Another form of direct state intervention is the public funding of public service broadcasters (see below) and of private regional television broadcasters¹⁰² and private non-commercial local radios. Based on Article 161 FRBA, the French Community's authorities force their radiobroadcasters to contribute part of their revenues to a fund supporting radio broadcasting.

The figures for indirect state aid are larger than those for direct state aid, but there is a lack of transparency with regard to these figures. Indirect state aid remains mostly a federal responsibility: e.g. the zero VAT tariff for newspapers; reduced postal tariffs for newspapers; amounts spent on government advertisements (though these are not only federal); free train and bus tickets for journalists; etc. According to a CSEM publication, the Belgian state is the third largest advertiser in the Belgian media (as such, direct financial state support through advertisements is an important source of revenue for some media outlets, helping them to guarantee their further existence).¹⁰³ Some authors from Internet-based media are critical of the lack of transparency and the absence of conditions and efficiency assessments for these forms of state aid (see Callewaert, 2010 and Cochez, 2010b). However, it does not seem that these opinions will change anything in practice.

3.6 Public service media

There is clear interdependency between politicians and the public service broadcasters, whereby different political parties have a proportionate representation in the public broadcasters' governing bodies.¹⁰⁴ This system is tempered with legal safeguards regarding the content of the public broadcasters' programming (see below). The underlying rationale for this system is aimed at safeguarding a sufficient degree of internal pluralism within the public broadcasters. For example, the board of directors of the RTBF must be composed, in a proportionate manner, of representatives of the political parties in the Parliament of the French Community.¹⁰⁵ Similarly, the directors of the VRT are appointed by the Flemish government, in proportion to their representation in the Flemish Parliament.¹⁰⁶ In both Communities, the position of director at the public broadcaster is incompatible with several political mandates (e.g. in a government or in a parliament).¹⁰⁷

As mentioned above, there is an ongoing discussion on the possibility of public service broadcasters undertaking new activities, in particular on the Internet. This discussion is also influenced by EU law on structural regulation (e.g. the European Commission's state aid assessment). For instance, Article 18 FLBA mentions that, if a new service or activity is not included in the management contract between the VRT and the Flemish government, the VRT needs the explicit permission of the Flemish government. Before making a decision, the government should ask the advice of the independent advisory council 'Sector Council

¹⁰² See for instance the decision of the Flemish Government of 23 July 2010 on subsidies to certain private regional television broadcasters.

¹⁰³ CSEM, 2007: 16 (figures for 2005).

¹⁰⁴ For political influences on other levels, in particular towards journalists, see below.

¹⁰⁵ Art. 11, § 1 RTBF-Act and Art. 19 Act of 16 July 1973 on the protection of ideological and philosophical convictions (hereafter 'Culture Pact Act').

¹⁰⁶ Art. 12, §1 FLBA and Art. 19 Culture Pact Act.

¹⁰⁷ Art. 12 RTBF-Act and Art. 12 § 2 FLBA.

Media’ of the ‘Council for Culture, Youth, Sports and Media’ (which consists of independent ‘experts’ and representatives of the media sector and which takes into account the opinions of third parties).

The public service interest goals are similar in the two main Communities, with a focus on informational and cultural programs, and on the PSBs contribution to a diverse, democratic and tolerant society.¹⁰⁸

3.7 Structural policy formulation and the role of political, corporate and economic interests

All in all, it can be said that parliaments and governments in Belgium have not adopted significant structural regulation in order to pursue specific interests that are beneficial to the political castes themselves (such as gaining favourable coverage by the media or mitigating or eliminating unfavourable coverage, etc.).

The Parliament of the French Community is currently holding its ‘States General of the Information Media’ (*‘Etats généraux des medias d’information’*),¹⁰⁹ during which the various players in the media come together with politicians and policy makers, in order to identify the most urgent questions for the French-language media, and to formulate possible recommendations to policy makers. The discussions focus on (i) possible strategies to improve the economic situation of the media; (ii) the education, training and working conditions of journalists; and (iii) the regulatory framework on freedom of expression and freedom of the press. The concluding report of the first thematic workshop has been published.¹¹⁰ Its recommendations focus on (i) economic strategies for media players in the light of media convergence; (ii) improvements to state aid programs; and (iii) other changes to media regulation such as better coordination of media policy between the different levels of state and an interdiction or at least limitation of advertisements on the websites of PSBs.

Overall, there is no overwhelming pressure from political, corporate and economic lobby groups on structural regulation. Nevertheless, it is clear that the politicians’ concern to safeguard the existence of the written press (because of its central role in a democratic society) is combined with lobbying by the written press to have legislation enacted to their benefit. Reference can be made to the zero VAT tariff and advantageous postal tariffs (see below) and to various measures that were taken at the time of the arrival of commercial television to safeguard the written press from income losses. Without entering into the details, this took place in essentially two ways: through the grant of subsidies to newspapers; and by forcing the private television broadcasters to open their shareholding to editors of the written press.¹¹¹ Also, in specific instances, such as granting of radio frequencies, there is considerable lobbying by media groups to defend their corporate interests. Other pressure groups and civil society players have a rather limited influence on structural media regulation.

¹⁰⁸ Art. 6 FLBA and Art. 3 RTBF-Act.

¹⁰⁹ Available at: <http://egmedia.pcf.be> (date accessed 17 November 2011).

¹¹⁰ Available at: <http://egmedia.pcf.be/wp-content/uploads/2011/03/Rapport-atelier-1.pdf> (date accessed 17 November 2011).

¹¹¹ See Decision of the Government of the French Community of 21 December 1987 and Art. 8 Act of the Flemish Community of 28 January 1987.

4. Composition and diversification of media content

This section focuses on the formulation and implementation of legal norms and incentive measures regarding the composition and diversification of media content, in so far that they have a direct impact on media freedom and independence, such as rules on impartial, accurate and balanced reporting, rules promoting content diversity or rules countering pressures on media content by advertisers or politicians.

4.1 Positive measures encouraging the diversification of media content

4.1.1 Constitutional safeguards to diversification of media content

As mentioned above, the Belgian Constitution protects the freedom of speech and the freedom of the press (Articles 19, 25 and 150). In addition, Article 32 of the Constitution states that everyone has the right to consult any administrative document and to have a copy made of such a document, except in limited cases as specified by secondary legislation. The exception referred to in Article 32 has been laid out in different legislative acts, such as the Act of 11 April 1994 (federal level), the Decree of 26 March 2004 (Flemish level) and the Act of 12 November 1997 (provincial and municipal level). Exceptions mainly relate to sensitive personal information, public security or abusive requests. In practice, concerns are raised with regard to the enforceability of Article 32 of the Constitution and related laws on open government. Journalists are largely unaware of the laws on open government, and the appeals procedure of the federal law on open government is considered inadequate (i.e. if access to documents is refused by the administration, the Council of State can only nullify the decision, following which the journalist/citizen has to renew his/her demand for access to the same administrative body).¹¹²

4.1.2 Focus on audiovisual media, rather than on written press or Internet media

The vast majority of content regulations focus on audiovisual broadcasting. The Communities have issued specific and detailed legislation on cultural matters (for instance, in order to promote their own language). They have also laid down specific requirements for news programs (for example, in order to ensure their quality and impartiality),¹¹³ advertising¹¹⁴ and access to airtime for various philosophical or religious associations,¹¹⁵ as well as restrictions on politicians' control over broadcasters.¹¹⁶ Additionally, specific rules and quotas exist on compulsory investment in content production. Although most of these rules are a mere translation into Belgian law of the EU Directives, some of them go further than the European minima (such as those on advertising) or are specific to Belgium (for example, the rules on the use of languages).¹¹⁷

¹¹² Interview with Ides Debruyne, Director Foundation Pascal Decroos, by Bart Van Besien, Brussels, 27/6/2011. More information available at: <http://www.wobbing.eu/country/1-belgium> (date accessed 17 November 2011).

¹¹³ Art. 39 FLBA.

¹¹⁴ See below.

¹¹⁵ Art. 7, § 3-4 RTBF-Act and Art. 35-36 FLBA.

¹¹⁶ Art. 36, § 1, 5° FRBA; Art. 130, 138, 141, 163, 3°, 169, 4°, 174, 2° FLBA.

¹¹⁷ E.g. Art. 43, 3°, 53, 61 FRBA; Art. 129, 138, 154-157, 163, 169, 174, 186 FLBA.

4.1.3 Content policy formulation and the role of political and commercial interests

There is no overwhelming pressure from political, corporate and economic lobby groups on content regulation. Nevertheless, it is common practice for parliamentarians to invite representative organisations and other media players to present their point of view on certain legislative proposals. For example, when parliamentarians discussed the various aspects and consequences of the bill on the protection of journalistic sources (which subsequently became the Act on the Protection of Journalistic Sources of 7 April 2005; see below), representatives of the journalists' associations AGJPB/AVBB and AJPP/VJPP were invited. More precisely, during the discussion at the Chamber of Representatives, the following 'experts' were heard: representatives of AGJPB/AVBB and AJPP/VJPP, a representative of a local television broadcaster (who is also a member of RVDJ) and various university law professors.¹¹⁸ During the discussion at the Senate, the following experts were heard: representatives of AGJPB/AVBB (but not of AJPP/VJPP), representatives of JFB and VDP, representatives of Febelmag (which is a part of THE PPRESS), the editor-in-chief of a local television broadcaster, a journalist of a newspaper and various university law professors.¹¹⁹

Similarly, when the AVMS Directive was adopted in domestic law, members of the Flemish Parliament invited representatives of various interest groups. For example, the Flemish Parliament invited university law professors, representatives of various industry associations, media groups, civil society organisations and a representative of the regulator VRM.¹²⁰ In the French Community, a different procedure was adopted: experts were not invited in the Parliament of the French Community, but had the opportunity to influence legislative work during the preparatory meetings of the advisory committee (*'Collège d'avis'*) of the regulator CSA. This advisory committee consists of representatives of different sectors of the audiovisual media (broadcasters, distributors, network operators, producers, the advertising sector, consumer organisations, journalists, etc.) and gives advice to the Government and/or Parliament of the French Community on all types of audiovisual matters, and in particular on changes to legislation or regulation, the respect for democratic rules and the protection of children in audiovisual broadcasts.

Audiovisual media are bound by a duty of neutrality. They may not discriminate against political, social, cultural or other currents in society. This respect for pluralism is imposed by Flemish and French Community legislation for all public and private broadcasters, whether they broadcast at a national, regional or local level.¹²¹ Especially during election periods, the broadcasters are bound to treat all political parties and currents equally. In practice, this means that each party should be accorded broadcast time according to its electoral weight.

In an attempt to limit election expenses, and fearing the impact of radio and television on voters, legislation was adopted to ban political party advertising on radio and television. Until recently, French Community law contained a general prohibition on political advertising, which applied both during and outside election periods.¹²² The Constitutional Court considered this general prohibition an unreasonable restriction on the freedom of

¹¹⁸ Available at: <http://www.dekamer.be/doc/FLWB/pdf/51/0024/51K0024010.pdf> (date accessed 17 November 2011).

¹¹⁹ Available at: http://senaat.be/www/?MIval=/index_senate&MENUID=22101&LANG=nl (date accessed 17 November 2011).

¹²⁰ Available at: <http://docs.vlaamsparlement.be/docs/stukken/2008-2009/g2014-3.pdf> (date accessed 17 November 2011).

¹²¹ Art. 9 FRBA. Art. 29 FLBA.

¹²² Art. 27bis FRBA.

expression and nullified it.¹²³ Since 2009, Flemish Community law allows political advertising during election periods only,¹²⁴ but federal law on the limitation of election expenses continues to forbid it.¹²⁵ It is as yet unclear which level of state is responsible for regulating political advertising. For the time being, the prohibition of political advertising during election periods as contained in federal law seems to prevail. Outside election periods, political advertising seems to be allowed in the French Community, but uncertainty reigns in the Flemish Community.¹²⁶

Commercial advertising in general is largely regulated by the Act on Market Practices and Consumer Protection of 6 April 2010.¹²⁷ Article 91, 11° of this Act stipulates that the use of editorial content in the media, for which the advertiser has paid, to advertise a product, when this is not made clear to the consumer, constitutes illegal misleading advertising.¹²⁸

Other legislation on commercial advertising in the media almost exclusively focuses on audiovisual media. The FLBA and FRBA contain specific regulations for advertising on radio and television,¹²⁹ where the ‘golden rule’ is that advertising should be clearly identifiable as commercial information and distinguishable from news information.¹³⁰ This rule is also the basic rule in most ethical codes and internal operational charters (Hoebeke and Mouffe, 2005: 787). There are special rules for commercial communication directed at minors¹³¹ and for certain products¹³² and types of advertising.¹³³

In particular, there is specific legislation with regard to those forms of advertisement that can cause confusion based on the commercial character of the information or its origin, such as with regard to ‘product placement’¹³⁴ and ‘sponsorship’.¹³⁵

Where ‘product placement’ is concerned, Flemish broadcasters are bound by law to show a logo (‘PP’) on the television screen to indicate that a program is financed with product placement.¹³⁶ Later, the CSA convened a seminar with the media in order to cooperatively draft some guidelines on the use of product placement for French-language broadcasters. The CSA also recommends the use of a ‘PP’ logo on the screen to indicate the use of product placement to the public (though this recommendation does not have the force of law).¹³⁷ Regulation of product placement is relevant for media independence in so far as it deals with content pressures stemming from advertisers.

¹²³ Constitutional Court, no. 161/2010 of 22 December 2010 (see Docquir, 2011b: 505-511).

¹²⁴ Art. 49 FLBA. This legislation does not seem in line with the case law of the ECtHR (ECtHR, *TV Vest AS and Rogaland Pensjonistparti v Norway*, no. 21132/05, 11 December 2008).

¹²⁵ Act of 4 July 1989 (*Moniteur belge*, 20 July 1989, 12715) and Acts of 19 May 1994 (*Moniteur belge*, 25 May 1994, 14101 and 14105).

¹²⁶ Moonen, 2011: 1767 and 1771.

¹²⁷ *Moniteur belge*, 12 April 2010, 20803.

¹²⁸ This is relevant for media independence in so far as it deals with advertising pressures on media content.

¹²⁹ See, in general, Articles 47-101 FLBA and Articles 10-33 FRBA.

¹³⁰ See, in particular, Article 53 FLBA and Article 14 FRBA.

¹³¹ Articles 70-77 FLBA and Articles 9 and 13 FRBA.

¹³² Such as a general prohibition on advertisements for tobacco, weapons, etc. Also, special rules on advertisements for alcohol and certain medicines.

¹³³ Such as teleshopping (Articles 78-84 FLBA and Articles 31-31 FRBA).

¹³⁴ See Articles 98-101 FLBA and Article 21 FRBA.

¹³⁵ Articles 90-97 FLBA and Articles 24-27 FRBA.

¹³⁶ Decision of the Flemish Government of 10 September 2010, *Moniteur belge*, 6 October 2010, at p. 60293.

¹³⁷ Recommendation of the CSA regarding product placement of 17 December 2009 (available at: http://www.csa.be/system/documents_files/1143/original/CAC_20091217_recommandation_placement_produit.pdf?1299596425 (date accessed 17 November 2011)).

Legislation on ‘sponsorship’ stresses in particular that the content and programming should not be influenced by the sponsor so that responsibility and editorial independence should not be affected.¹³⁸ Viewers and listeners should be clearly informed of the sponsorship, by indicating the name, logo or symbol of the sponsor at the start, during and/or at the end of the program.¹³⁹ There is a general prohibition against sponsoring news bulletins and other information-related programs.¹⁴⁰

It must be noted that the VRM and the CSA have, in recent years, been called upon frequently to decide on the legality of commercial practices such as ‘product placement’ and ‘sponsorship’ and have developed their own case law on these topics.¹⁴¹ In their case law, the VRM and the CSA take as main criterion the principle of strict separation between editorial content and commercial information, which is laid down in the FLBA and FRBA. In practice, it is not always easy to classify an advertisement in one or another legal category (e.g. the line between product placement or sponsorship on the one hand and surreptitious advertising on the other hand is not always easy to draw; this is relevant for media independence because, even though all these practices constitute a risk of influence on media content, product placement and sponsorship are regulated practices that are in principle clear to the public, whereas surreptitious advertising is prohibited by law and concealed from the public).

Although various people that we interviewed stressed the importance of commercial influence on news reporting (rather than political influence),¹⁴² the RVDJ has not yet received a complaint about commercial interference with news reporting.¹⁴³

Commercial influences on reporting depend on the type of news outlet. For instance, this influence is likely to be more present in lifestyle journalism than in news reporting.¹⁴⁴ According to some sources, self-censorship is a problem with regard to commercial interests, in the sense that critical articles about big advertisers (such as banks, telecom firms and energy providers) are virtually impossible.¹⁴⁵

4.1.4 The right of reply

The right of reply is covered by the Act of 23 June 1961 on the Right of Reply. This Act grants - under certain conditions - a right of reply to any individual or corporation named or implicitly referred to in a newspaper, magazine or audiovisual broadcasting.

The Act of 23 June 1961 was originally only applicable to the written press. In 1977, the Act was complemented with a separate heading on the right of reply in the audiovisual media (and the Flemish Parliament also voted for distinct legislation on the right of reply in

¹³⁸ Article 91, 2° FLBA and Article 42, 1° FRBA.

¹³⁹ Article 91, 3° FLBA and Article 24, 2° FRBA.

¹⁴⁰ Article 96 FLBA and Article 24, 6° FRBA.

¹⁴¹ See annual report of VRM for 2010, available at: <http://www.vlaamseregulatormedia.be/media/15798/jaarverslag2010.pdf> (at pages 21-23) (date accessed 17 November 2011).

¹⁴² For instance: Interview with senior staff at RTBF, by Bart Van Besien and Pierre-François Docquir, Brussels, 3/6/2011; Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011.

¹⁴³ Interview Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, Brussels, 7/6/2010.

¹⁴⁴ Interview Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, Brussels, 7/6/2010.

¹⁴⁵ Interview with Ides Debruyne, Director Foundation Pascal Decroos, by Bart Van Besien, Brussels, 27/6/2011; Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011.

audiovisual media).¹⁴⁶ As such, there are distinct rules applicable to the right of reply depending on the type of media outlet. However, the Act of 23 June 1961 does not apply to Internet-based media. There were some attempts to unify the system of the right of reply and make it applicable to all media types, but these attempts were unsuccessful, to a large degree because of conflicting jurisdictions between the different levels of government (see Verdoodt, 2006-2007: 452).

In theory, the right of reply as protected by Belgian law offers one the possibility to react within a short timeframe to an article or program, in the same media outlet that published the first article or program, without costs and without the need to start a legal procedure in court. In practice, a request to publish a reply is sometimes met with reluctance on the part of the publishers. In case a right of reply is refused or is published in a way that does not conform to the legislation, a publisher may be sentenced to payment of a fine, of an indemnification for damages, and/or of non-compliance penalties (which are often much higher than the fines, and in practice are the most convincing tool to ensure compliance). The right of reply is also meant to stimulate pluralism in the media and has a role to play in improving the accountability of journalism. For instance, when Flemish parliamentarians discussed proposals on a distinct right of reply for audiovisual broadcasts, the hope was voiced that this instrument would restore the waning trust in the media (Verdoodt, 2006-2007: 451).

The right of reply is also covered by journalistic self-regulation (including a right of reply for electronic media). However, individuals named in an article or program always remain entitled to submit a conflict on the right of reply to a judge.

4.1.5 The role of state subsidies to promote content diversification

State subsidies are mainly related to structural policy goals (see above; this mainly concerns ensuring the survival of existing media types), rather than to content diversification. Attempts to influence content diversification have, so far, not been very successful. For instance, the intention voiced by the Flemish government to make press subsidies dependent on factors ensuring the independence of the editorial staff (Lieten, 2009: 14) has not yet been put into practice, to a large degree because the publishing sector considers this unwelcome government interference in the media.¹⁴⁷

The Flemish and the French Community governments have identified diversity within the media as a policy goal. The Flemish government intends to sponsor projects that stimulate diversity in programming, staff policy and broadcast coverage, and opened a call for media players to submit project proposals.¹⁴⁸ Diversity is also part of the public mission of the public service broadcasters. Various studies have been made on diversity of minority groups in Belgian television and in the written press.¹⁴⁹ From these studies, it follows that the media

¹⁴⁶ This is now covered in Articles 103-112 FLBA. In practice, this means that the articles on the right of reply in the (federal) Act of 23 June 1961 are no longer applicable in Flanders. They remain applicable in the French Community and in the German-speaking Community.

¹⁴⁷ Interview with Patrick Lacroix, Managing Director VDP, and Sandrien Mampaey, Legal and Administration Manager VDP), by Bart Van Besien, Brussels, 15/6/2011.

¹⁴⁸ Information available at: <http://www.cjsm.vlaanderen.be/media/steun> (date accessed 17 November 2011).

¹⁴⁹ See for French-language television: information available at: http://www.csa.be/system/documents_files/1490/original/CSA_BAROMETRE2011_PUBLICATION_OK.pdf?1301640240 (date accessed 17 November 2011). For French-language written press: information available at: http://www.ajp.be/librairie/produit.php?ref=div2011&id_rubrique=5 (date accessed 17 November 2011). For Flemish television: information available at:

are still to a large degree male and white, and that concrete initiatives have to be taken to improve the diversity of the Belgian media.

4.1.6 The importance of self-regulation

Rules of journalism ethics are to a large degree covered by self-regulation. As such, the Belgian Ethical Code for Journalists of 1982 is the most important code of conduct for journalists. On the Flemish side, the RVDJ updated this Code in September 2010 to take into account new technological developments and their influence on journalism. On both the Flemish and French-language sides, the self-regulatory organisations have published various opinions and guidelines on the use of the Internet media by journalists (see above).

In some circumstances, the public authorities need to deploy efforts to encourage private players to enter into self-regulation schemes. For instance, while the RVDJ has been in operation in Flanders since 2002, the French Community government had to actively sponsor the media to set up CDJ.

Journalists, publishers and policy makers generally have a favourable opinion on the workings of the RVDJ and the CDJ. A possible reason for the success of this type of self-regulation in Belgium is the difference in jurisdiction between the various levels of state, where the federal level is largely responsible for the written press and the Communities for the audiovisual media, and where both levels lack the jurisdiction to enact legislation covering the entire media sector. According to Verdoodt, this problem of jurisdiction was an important argument (at least in Flanders) against the establishment of a legal framework for ethical monitoring of journalism. Both the Flemish politicians and the professional association for journalists preferred an initiative that covered the entire media sector, and which therefore had to be organised through self-regulation rather than government regulation (Verdoodt, 2006-2007: 425).

4.1.7 Competing interests and legal restraints on content diversification

Belgian courts have quite often been called upon to judge whether an article or program breached particular rights of third parties, such as in defamation cases and cases where the privacy of third parties was at stake. The way in which domestic judges treat these cases has been discussed under section 2 above (see in particular, the case *RTBF v Belgium* of the ECtHR), as is also the case concerning the policy of the public prosecutors to not bring criminal proceedings against the press. As applied to the civil liability of journalists, courts construct the duty of care of journalists to imply that a journalist should pursue the truth, should not use unnecessarily or excessively hurtful words and should respect personal rights such as the right to privacy (Vandenberghe, 1984: 9). As such, the general lines in case law show that civil courts tend to condemn inaccurate or incorrect imputations where there is an obvious lack of evidence; unnecessarily or excessively hurtful words with the sole intention to damage; and breaches to the privacy or other personal rights of individuals (Voorhoof, 2003: 135).

In cases where the honour or reputation of people is at stake (such as in defamation and libel cases), the burden of proof to substantiate the veracity of facts reported often rests with the journalists (Velaers, 1991: 398). Defamation is a criminal offence in Belgium, but is

http://www.vrt.be/sites/default/files/attachments/Monitor_Diversiteit_2011.pdf (date accessed 17 November 2011).

rarely brought before a criminal court.¹⁵⁰ In exceptional cases where a defamation case is brought before a criminal court, the burden of proof of the veracity of the imputations will rest with the journalist, but the burden of proof of the ‘intentional’ element will rest with the claimant, not the journalist (i.e. the claimant will have to prove that the journalist had the intention to damage). Before a civil court, the burden of proof in cases where people’s honour or reputation have been damaged will rest with the journalist. Journalists are not allowed to use the secrecy of their sources as an argument to limit their liability in this regard (Voorhoof, 2003: 144).

Contrary to factual information, the truth of an opinion is in principle not susceptible to proof. It may, however, be considered excessive, in particular in the absence of any factual basis.¹⁵¹ In practice, civil proceedings against the press will often be based on opinions that have been published, rather than on factual reporting. When judging the civil liability of journalists in such cases, courts seem to deal with a criterion of ‘carefulness’ rather than of ‘truth’.

Courts often take into account rules of journalism ethics to concretise the concept of ‘fault’ which may lead to liability. The reasoning behind this is that respect for one’s own rules is considered an important element under the general standard of care concept of a ‘*bonus pater familias*’ and under the specific standard of care concept of a ‘normally careful and observant journalist’ (Velaers, 1991: 211).

In practice, courts will quite easily accept a fault of a journalist when a victim is able to prove that a journalist manifestly violated journalism ethics (for instance, in cases where a journalist did not properly check his sources, did not hear all parties concerned, etc.) (Verdoodt, 2006-2007: 471). However, a court will always have to check whether a legal rule (rather than - or in addition to - an ethical rule) has been violated and it does not suffice to state that a journalist committed a fault against journalism ethics or to refer to a decision of a self-regulatory organisation. A breach of ethical rules will often be a criterion amongst other criterions taken into account by a civil court when deciding on whether a journalist has committed a fault, and whether he or she needs to compensate for damages caused by this fault.

Courts will also take into account the specific circumstances of a case, such as the context of the news reporting, the public position of the persons that are named, the features of the media type and the normal expectations of the targeted public (which may vary according to the type of media used). The Belgian case law seems to offer a particular tolerance for journalistic practices towards politicians (and to a lesser degree, towards other public officials), especially during election periods (Hoebeke and Mouffe, 2005: 666; Voorhoof, 2003: 136; and Velaers, 1991: 428).

Given the difficulties for a restoration in kind or even for an adequate assessment in financial terms of the damage caused, compensation granted by civil courts is often symbolic.¹⁵² In theory, compensation should be proportionate to the damage and may not take a punitive character (Lemmens, 2005: 40). However, some authors detect a trend towards increased amounts of damages and fear that these are in fact taking a punitive character (Jongen, 2000: 8). It is mostly in defamation cases that compensation is made in financial terms (Voorhoof, 2003: 161). Courts regularly also order the judgment to be published in the

¹⁵⁰ Article 443 of the Criminal Code.

¹⁵¹ See ECtHR, *Lingens v Austria* (no. 9815/82), 8 July 1986 and ECtHR, *De Haes and Gijssels v Belgium* (no. 7/1996/626/809), 24 February 1997 (confirmed by various other judgments of the ECtHR).

¹⁵² Another element explaining the success of mere symbolic compensations is the difficulty to substantiate a causal link between the journalistic fault and the damage caused.

media that was at the basis of the condemned practice, with or without a non-compliance penalty. Within self-regulatory systems, sanctions are often limited to a moral condemnation and the (non-binding) obligation to publish the decision (Verdoodt, 2006-2007: 472).

In Belgium, abuses of civil proceedings against journalists (for instance, in the hope to silence them) have in the past led to condemnations of the claimants themselves for ‘frivolous and vexatious proceedings’. This can give rise to claimants being required to pay substantial damages to the defendants.¹⁵³

In specific circumstances, the ECtHR in cases concerning Belgium, has also taken the respect by journalists of their professional ethical codes as a criterion. In the case *De Haes and Gijssels v Belgium* (see above), the ECtHR explicitly referred to the (ethical) obligations and responsibilities of the press. In paragraph 37, the ECtHR states ‘that the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart - *in a manner consistent with its obligations and responsibilities* - information and ideas on all matters of public interest, including those relating to the functioning of the judiciary’ (emphasis added).¹⁵⁴ In the specific circumstances of the case, the ECtHR judged that the information ‘was based on thorough research’ and that ‘the applicants cannot be accused of having failed in their professional obligations’ (paragraph 39). The ECtHR has in various other judgments repeated the reference to the obligations and responsibilities of the press.¹⁵⁵

Another field in which Belgian courts and the ECtHR have explicitly taken account of the respect of journalists for their professional ethical codes is the question of whether journalists may commit (minor) offences in order to gather information and report on issues that are of major public interest. The ECtHR, under certain specific circumstances (which mainly boil down to the principles of proportionality and subsidiarity), has accepted that journalists may commit minor offences.¹⁵⁶ The ECtHR in particular takes into consideration whether or not journalists comply with their codes of journalism ethics. For example, in the ECtHR decision *Masschelin v Belgium* of 20 November 2007, the ECtHR took into account the fact that the journalist had provoked a criminal offence, by inciting the civil parties to copy a criminal file and hand this copy over to him (abuse of right of access to a criminal file is punishable under Article 460ter Criminal Code; the ECtHR stressed that the journalist’s behaviour did not conform to journalism ethics).¹⁵⁷

¹⁵³ See for instance Court of Appeals Antwerp, 14 May 2001, *Auteurs & Media* 2002/3, 281.

¹⁵⁴ ECtHR, *De Haes and Gijssels v Belgium* (no. 7/1996/626/809), 24 February 1997.

¹⁵⁵ Between others, ECtHR (Grand Chamber), *Pedersen and Baadsgaard v Denmark* (no. 49017/99), 17 December 2004; ECtHR (Grand Chamber), *Fressoz and Roire v France* (no. 29183/95), 21 January 1999; ECtHR (Grand Chamber), *Perna v Italy* (48898/99), 6 May 2003.

¹⁵⁶ See for instance, ECtHR, *Fressoz and Roire v France* (no. 29183/95), 21 January 1999 and ECtHR, *Stoll v Switzerland* (no. 69698/01), 10 December 2007.

¹⁵⁷ ECtHR, *Masschelin v Belgium* (no. 20528/05), 20 November 2007.

5. The journalistic profession

5.1 The relationship between journalists and politicians

Generally speaking, the Belgian media do not openly support specific politicians or political parties. This was different in the past, when newspapers were often linked to political parties. Nowadays links between media and politicians have atrophied to a significant degree. However, this does not mean that newspapers are always neutral and do not take positions in specific political or cultural discussions. For instance, according to a study of the University of Ghent, the newspaper *Le Soir* (which is widely considered a neutral paper), ceases to be neutral when it reports on the problems between Belgium's language communities (Raeymaeckers and Debroey, 2008; see also De Bens and Raeymaeckers, 2010: 423-424). This seems to be confirmed by a quote of the paper's chief-editor: 'A newspaper such as *Le Soir* can not be satisfied with a neutral line of communication. In many areas (now and in the past) such as the Jewish-Palestinian conflict or the problems between the Communities in Belgium, to name but a few, *Le Soir* has developed an engaged approach (...)'¹⁵⁸

Furthermore, in reality, even if politicians are not dependent on explicit support from media outlets in election campaigns, there is still quite some reluctance from politicians to implement media policies that contradict the interests of specific media groups. For instance, so far, no effective legal or political pressure has been exercised on RTL, the Luxembourg based main commercial broadcaster for French-speaking Belgium, to accept the authority of the Belgian CSA and to comply with all aspects of Belgian audiovisual media regulations.¹⁵⁹

Apart from the PSBs, politicians do not have a major stake in media organisations at the ownership, management or directorship levels of these organisations. It is to be noted, however, that there are often links between the commercial media organisations and politicians. For instance, the CEO of RTL, the main French-language commercial broadcaster, is often linked to the biggest political party in French-speaking Belgium (see e.g. Letist, 2002). Also, the CEO of RTBF, the French-language PSB, served as a *Chef de Cabinet* for the Minister-President of the Brussels-Capital Region and is often linked to the same political party (see e.g. Brébant, 2011). It should also be noted that the '*Raad Het Laatste Nieuws*', the foundation that looks after the ideological tenor of Flanders' most popular newspaper, counts among its eight members a former president of the Chamber of Representatives and a former Chef de Cabinet of the Prime Minister and current Governor of the National Bank. Both people belong to the same political party, and thus at least give the appearance that this foundation is not politically neutral or independent (see also Vyverman, 2010-2011: 19). This is not unimportant, since this foundation defines the general lines of the political direction of the newspaper, and since the appointment of new journalists and editors of the paper are subject to prior approval from the foundation.¹⁶⁰ However, some are of the opinion that the foundation has distanced itself from the political party in recent years and cannot be seen as its 'mouthpiece' (De Bens and Raeymaeckers, 2010: 350).

According to its Secretary General, the CDJ has so far received almost no complaints rising from concerns about the relationship between journalists and politicians.¹⁶¹ However, this does not mean that there is no problem in this regard. In Flanders, there has recently been

¹⁵⁸ Available at: http://www.csem.cfwb.be/index.php?id=rencontre_2011-1 (date accessed 17 November 2011).

¹⁵⁹ For more details, see Sibony and Piront, 2010: 113-120.

¹⁶⁰ Available at: <http://www.raadhetaatstenieuws.be> (date accessed 17 November 2011).

¹⁶¹ Interview André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011.

quite some commotion about the revelation that a journalist of the public broadcaster rendered certain services to a political party.¹⁶² It is unclear whether this journalist's involvement with a political party was exceptional or symptomatic. Most authors and people that we interviewed were surprised by this case. There is a general impression that up to the 1960s and perhaps the 1970s, most Flemish journalists employed with the public broadcaster had a political affiliation, but this system was to a large degree abolished in the 1980s (not in the sense that no journalists had a political affiliation, but in the sense that this affiliation was no longer necessary to achieve a promotion). According to our interviewees, this system was totally abolished during the 1990s, after the advent of a competing commercial broadcaster and with the nomination of a new CEO in the public service broadcaster who came from the private sector.¹⁶³ Under the old system, the understanding between political parties represented in parliament was that each party should have a proportionate 'representation' among the journalists working for the public broadcaster, and that the balance between political affiliations would neutralise possible political influences on news reporting and guarantee its objectivity.¹⁶⁴ Journalists were not considered to openly voice their political affiliation in their news reporting or to allow their reporting to be influenced by it. It is unclear, however, whether or not this system was successful, and it seems that it was abolished under pressure from the journalists themselves (Deckmyn, 2011).

This system of the political affiliation of journalists, where possible excessive political influences are supposed to be neutralised by the proportionate representation of the different political parties among journalists (described as a system of 'mutual surveillance'), still seems to be present at the French-language public broadcaster. However, it supposedly operates to a more limited degree than in the past, and only applies to the higher levels of journalistic personnel, such as the editors-in-chief.¹⁶⁵ It is difficult to assess to what degree this political affiliation of journalists influences the content of news reporting, and to what degree influences are neutralised (or not) by journalists of other political persuasions.

It is clear, however, that such dependencies may prompt self-censorship or affect reporting. During our interviews, it was mentioned that self-censorship happens on a daily basis, but that this should not necessarily be seen in a negative way, in the sense that self-censorship is limited to 'strategic calculations' and does not concern issues that are of public importance. These 'strategic calculations' melt down to the argument that journalists prefer to not report on certain topics, because they need access to politicians in the future to obtain information. Self-censorship is also particularly persistent in sports journalism, even when fair play and the health of the sportspeople are at stake (e.g. reference was made to sports journalists who are so close to sportspeople that they refuse to report on illegal doping).¹⁶⁶ In our opinion, it is clear that the practices of political affiliation of journalists and self-censorship contain serious risks for journalistic independence. Since these practices work in subtle ways, it remains difficult to assess their seriousness.

¹⁶² The journalist supposedly wrote articles (under a pseudonym) for the magazine of a political party of which he was a member.

¹⁶³ Interview with senior staff at RTBF, by Bart Van Besien and Pierre-François Docquir, Brussels, 3/6/2011; Interview Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011.

¹⁶⁴ The system is supposed to be a reaction to the internal organisation of the first Belgian public broadcaster INR/NIR, which was considered to be dominated by the Christian-Democrat party (Deckmyn, 2011).

¹⁶⁵ Interview with senior staff at RTBF, by Bart Van Besien and Pierre-François Docquir, Brussels, 3/6/2011.

¹⁶⁶ Interview with senior staff at RTBF, by Bart Van Besien and Pierre-François Docquir, Brussels, 3/6/2011.

External political (or commercial) pressure on the content of the news seems to be more widespread within local media outlets with small editorial boards. A possible reason is that local journalists in general are often closer to their sources.¹⁶⁷

It is worthwhile mentioning that the state sponsors journalists' associations, so that these can co-finance (together with the publishing sector) the workings of the CDJ and the RVDJ. However, this seems not to imply that the state has any impact on the content of the decisions given by these organisations.

5.2 The relationship between journalists, management and media owners

Belgian media groups are only active in the media sector, and do not have major stakes in other industry sectors. However, there is interdependency between the Belgian commercial media and other industry sectors, in the sense that the members of the board of directors of the media organisations often combine their mandate with directorships in corporations in other industries. There is no scientific research available on possible conflicts of interest, undue influences on news reporting or attempts to abuse their media power to defend their interests in other industry sectors. So far, no such incidents have become known to the public, but it cannot *a priori* be excluded that this interrelationship can lead to problems.

Codes of journalism ethics are widely seen as the most important tool to guarantee the independence of Belgian journalists, in particular because they can be used as a tool for journalists to defend their autonomy towards their own management.¹⁶⁸ The codes of the CDJ and the RVDJ are widely adopted. Some media players have their own internal codes of journalism ethics, such as the public broadcasters RTBF and VRT.¹⁶⁹

Editorial statutes are also a tool to safeguard journalistic independence (although codes of journalism ethics are seen as more effective).¹⁷⁰ Editorial statutes deal with the relationship between journalists, the editorial board and the management. They also contain guarantees for the independence of the journalists from internal and external pressures and for the editorial line of the news outlet. The public broadcasters have their own specific editorial statutes.¹⁷¹ In Flanders, this is in fact a requirement imposed by law: the FLBA provides that, for all its informative programs, the VRT must respect a code of journalism ethics and an editorial statute that safeguards the independence of the editorial staff.¹⁷² A legal requirement to have an editorial statute with safeguards for the independence of the editorial staff also exists for private television and radio broadcasters that broadcast news bulletins and other informative programmes in Flanders (although the FLBA does not oblige

¹⁶⁷ Interview with André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011.

¹⁶⁸ Interview with Jacques Englebert, lawyer specialising in media law, by Bart Van Besien and Pierre-François Docquir, Brussels, 1/6/2011; Interview with Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011.

¹⁶⁹ See RTBF's code, available at: http://ds.static.rtbf.be/article/pdf/rtbf_code-deontologie_08_2-1260802056.pdf (date accessed 17 November 2011) and VRT's code, available at: http://www.vrt.be/sites/default/files/attachments/Deontologischecode_en_redactiestatuut.pdf (date accessed 17 November 2011).

¹⁷⁰ Interview with Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011; Interview with senior staff at VRT, by Bart Van Besien, Brussels, 30/6/2011.

¹⁷¹ Available at the same links as mentioned in footnote 168.

¹⁷² Art. 29, §1 FLBA.

the private broadcasters to have a code of journalism ethics).¹⁷³ However, the obligation to have an editorial statute is not always complied with. For instance, the main private television broadcasters VTM and SBS do not have an editorial statute (even though they are legally bound to have one).¹⁷⁴ In French-speaking Belgium, there is a legal obligation for the RTBF, audiovisual service providers using a closed distribution platform and local television broadcasters to recognise a ‘committee of journalists’ which they should consult for all decisions that fundamentally change the editorial line or the organisation of news reporting (for instance, the committee of journalists need to be consulted when an editor-in-chief is appointed or dismissed).¹⁷⁵ The question raised, again, is to what extent this obligation is complied with, or to what extent the consultations change a decision taken by management.

Newspapers and magazines do not have such legal obligations to have a code of journalism ethics, an editorial statute or a committee of journalists that need to be consulted. However, various newspapers and magazines have their own codes of journalism ethics¹⁷⁶ or editorial statutes.¹⁷⁷ The French language newspapers are encouraged to comply with the Belgian Ethical Code for Journalists, since this is a requirement for benefiting from the state aid program of the French Community.¹⁷⁸ Other newspapers have a ‘foundation’ that takes care of the editorial principles and the values of the newspapers.¹⁷⁹ However, these foundations do not always consist of journalists.¹⁸⁰ These editorial statutes and the statutes of the foundations mostly contain specific safeguards with regard to the editorial staff’s independence (e.g. in case of take-overs or in case an editor-in-chief is appointed or dismissed) and the respect for the editorial line. Sometimes, the foundations or committees of journalists are also useful in improving discussions between the journalists, the editorial board and the management. Also, the newspaper *De Standaard* has recently appointed an independent ombudsman to improve its accountability towards its readers.

In practice, the impact of editorial statutes and foundations is rather limited. Additionally, the participation of journalists (or at least their consultation) in decisions that affect the organisation of news reporting in Belgium is rather limited (De Bens and Raeymaeckers, 2010: 234-237). Publishers are often not in favour of journalists’ participation or consultation. As mentioned above, even if private broadcasters in Belgium are legally bound to have an editorial statute, the main broadcasters VTM and SBS do not comply with the law and are not punished for it. Regional broadcasters mostly do have an editorial statute (at least in Flanders), but these often remain a dead letter (Vyverman, 2010-2011: 29-30). It is rather exceptional that journalists are heard when an editor-in-chief is appointed or dismissed (Ibid.: 36). A committee of journalists can, however, be helpful to improve communication with management in turbulent times such as during a reorganisation (e.g. to limit the impact

¹⁷³ For private television broadcasters: see Art. 164 FLBA. Specifically for regional television broadcasters: Art. 169, 9° FLBA. For private radio broadcasters: Art. 131 FLBA. Specifically, for the different subcategories of radio-broadcasters: Art. 138, 141 and 145 FLBA.

¹⁷⁴ According to some sources, VTM is currently in the process of drafting an editorial statute (e.g. Vyverman, 2010-2011: 19). For SBS, it is unclear whether they will adopt an editorial statute now that they have been taken over by De Vijver.

¹⁷⁵ Art. 19bis RTBF-Act and Art. 36 §1 4° and 67 §1 7° FRBA.

¹⁷⁶ Such as the newspapers of Corelio (information available at: <http://www.standaard.be/info.aspx?topic=info.code> (date accessed 17 November 2011)).

¹⁷⁷ Such as the newspapers *De Morgen*, *De Tijd* and *Le Soir*.

¹⁷⁸ Article 7 §1 of the Act of 31 March 2004. See also above footnote 101.

¹⁷⁹ Such as the foundation ‘*Redactie vzw*’ for Corelio and the foundation ‘*Raad Het Laatste Nieuws*’ for the newspaper of the same name.

¹⁸⁰ See above for more information on the foundation ‘*Raad Het Laatste Nieuws*’.

of a collective dismissal).¹⁸¹ Journalists and their associations remain convinced of the importance of editorial statutes (Deltour and Van de Looverbosch, 2006: 9).

The position of a strong independent editor-in-chief or editorial board who can serve as a barrier between the journalists and the management, was mentioned at various occasions as an important condition for safeguarding the independence of journalism.¹⁸² It seems, however, that editors-in-chief (and other members of the editorial board) are increasingly dealing with commercial aspects and other 'non-journalistic' activities that were traditionally only dealt with by management. It is not uncommon that editors are paid bonuses based on increased sales figures (which brings a risk that commercial interests might prevail over journalistic interests). In other words, the separation between journalistic activities and commercial strategies seems to be dismantled at the level of the editorial board (See also Cochez, 2011). Figures show that editors-in-chief in the Flemish media remain on post for an average duration of only two years and that increased pressure by sales figures is the main reason for this phenomenon (Deckmyn and De Kock, 2011).

5.3 The Internet and its effect on journalistic practices

Generally speaking, new technologies have changed journalistic practices in three different ways. Firstly, they offer more possibilities for access to information, and thus broaden the plurality of sources. Secondly, new technologies offer new channels for the dissemination of news, often with a greater impact due to their free character and easy accessibility. Thirdly, they offer platforms for direct communication with the public, for instance through forums and social network sites. On the other hand, the main duties and responsibilities of journalists remain in essence the same (i.e. their duties are still to a large degree related to the obligation to properly check their sources). In a way, it is mainly the intensity and the extent of journalistic work that are different, in the sense that there is more pressure¹⁸³ and fewer means to properly check sources, and that the impact of journalistic faults is greater due to the accessibility of news sites and the velocity of news circulation.¹⁸⁴

The increasing workload in particular seems to be a problem for journalists. A research of 2008 of the University of Ghent shows that close to 80% of Flemish journalists are of the opinion that the workload of journalists has been increasing in recent years (Paulussen and Raeymaeckers, 2010: 34-37). On the other hand, close to 80% of Flemish journalists are content with their personal independence (Paulussen and Raeymaeckers, 2010: 102-104). Another study showed that no less than 10% of the Flemish journalists are fighting burnout.¹⁸⁵ Apparently, the main reasons behind these alarming figures are related to the increased commercialisation and digitisation (with increasingly short deadlines) of the journalistic profession.¹⁸⁶ A study conducted among French-speaking journalists shows that almost half of them are unhappy about their working conditions and almost 80% see a

¹⁸¹ This was for instance the case when the committee of journalists at the newspaper *De Morgen* could limit the number of redundancies in 2009.

¹⁸² For instance: Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011; Interview with Karl van den Broeck, editor-in-chief of Knack, by Bart Van Besien, Brussels, 21/6/2011.

¹⁸³ Both time pressure and commercial pressure because of increased competition and shrinking revenues.

¹⁸⁴ Interview with André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011.

¹⁸⁵ Available at:

http://www.arteveldehs.be/file.asp?filetype=doc/07/009/003/001/de_journalist_burnout_bij_vlaamse_journalisten.pdf (date accessed 17 November 2011).

¹⁸⁶ Available at: <http://www.arteveldehs.be/emc.asp?pageId=1848> (date accessed 17 November 2011).

negative evolution in recent years.¹⁸⁷ It should be noted that the ‘States General of the Information Media’ organised by the Parliament of the French Community (see above) is, at the time of writing, holding various discussion sessions between media players and politicians on questions such as the education, remuneration and working conditions of journalists.¹⁸⁸

The RVDJ and the CDJ have taken some initiatives to update rules of journalism ethics, taking into account new technological developments. For example, the CDJ has in the course of 2010 published a general opinion on journalism ethics with regard to social networks (stating, amongst other things, that news reporting via social networks to a non-defined and unlimited public exceeds the privacy of communication and falls under the ethical rules applicable to journalistic activities).¹⁸⁹ As mentioned above, the RVDJ has also issued guidelines on the use of user-generated content. In general, the RVDJ and the CDJ are of the opinion that journalistic ethics apply to all individuals who undertake journalistic activities, whether or not they are professional journalists, and whether or not they are members of the RVDJ or the CDJ.

According to the RVDJ, half of the complaints received by the RVDJ are in relation to the inaccurate character of reporting (including non-compliance with the right of reply). The second major basis for complaints is a breach of privacy. A substantial number of complaints are also related to the Internet.¹⁹⁰

¹⁸⁷ See Association Générale des Journalistes Professionnels de Belgique, ‘Dossier Enquête sur le moral des journalistes’, *La lettre de l’AJP*, September 2008, 96.

¹⁸⁸ Available at: http://egmedia.pcf.be/?page_id=137&event_id=7 (date accessed 17 November 2011).

¹⁸⁹ Available at: <http://www.deontologiejournalistique.be/index.php?la-deontologie-vaut-aussi-pour-les-reseaux-sociaux> (date accessed 17 November 2011).

¹⁹⁰ Interview with Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, Brussels, 7/6/2010.

6. Media literacy and transparency requirements

In French-language Belgium, there is a dedicated committee on media literacy ('High Council on Media Education'; hereafter 'CSEM').¹⁹¹ The Government of the French Community sponsors the CSEM and appoints its president and vice-president. Other members are representatives of different media players, journalists and civil society organisations. The CSEM is an advisory council, rather than a regulatory organisation. Even though its website stresses the importance of lifelong media literacy education, the council seems to focus mainly on media literacy education in schools (mainly focused on pupils, not so much on teachers).¹⁹² One of the main initiatives organised by the CSEM is the free distribution of newspapers in schools, and journalists' visits to schools. In December 2010, the CSEM organised an international conference with experts from more than 30 participant countries around the theme of 'Media Literacy for All'. The objective of the conference was to stimulate the implementation of lifelong media education. The conference resulted in the so-called 'Brussels Declaration on Lifelong Media Education', which offers a list of non-binding recommendations on media literacy.¹⁹³ The activities of the CSEM are not directly concerned with media freedom or independence, but more with the right to freedom of expression, the right of each citizen to be informed and the policy goal to stimulate consumers' abilities to critically judge news brought by the media. Indirectly, these initiatives do intend to stimulate media freedom and independence, by motivating youngsters to consume news media and thus ensuring current and future revenues for media outlets.

Flanders does not yet have a similar committee on media literacy, but the policy note of the Minister for Media 2009-2014 mentions the intention to establish such a 'media knowledge centre' (Lieten, 2009: 23). In Flanders, there are also initiatives to distribute free newspapers in schools, in order to make pupils familiar with newspapers. Another initiative is the compulsory integration since September 2010 of media education in the school curriculum in Flemish schools. This involves ensuring that all students graduating from secondary school are able to work with computers and the Internet, and to critically judge information to which they are exposed. Again, these initiatives are primarily concerned with promoting freedom of expression and the right to information, but also indirectly promote the freedom and independence of the media by stimulating young people to consume news media and thus ensure current and future sales.

Although media literacy initiatives have quite a modest role in Belgian media policy, Belgium has an average score when it comes to media literacy. A recent study commissioned by the European Commission estimates Belgium's media literacy level as the exact average level of the European Union as a whole.¹⁹⁴

Transparency requirements are generally not linked to media literacy in Belgium. There are no obligations for newspapers or magazines to provide transparency to the public about their capital structure, shareholders or owners. For the French Community, Article 6 FRBA contains certain specific requirements for audiovisual broadcasting companies to make some basic information about their companies available to the public. This article also contains some specific transparency requirements for media players in order to obtain a licence from the authorities (e.g. requirements to identify the persons or legal entities that

¹⁹¹ Available at: www.csem.cfwb.be (date accessed 17 November 2011).

¹⁹² Interview with Tanguy Roosen, President CSEM, by Bart Van Besien and Pierre-François Docquir, Brussels, 1/6/2011.

¹⁹³ Available at: http://www.declarationdebruxelles.be/en/accueil_site.php (date accessed 17 November 2011).

¹⁹⁴ European Commission, 'Study on assessment criteria for media literacy levels', 2009, available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (date accessed 17 November 2011).

participate in the company's capital, the amount of such participation, participations in other media players and service providers, etc). The CSA runs a website dedicated to all this transparency-related information (including lists of the various audiovisual broadcasters, network providers and written press publishers, their contact details, directorship information and shareholder information).¹⁹⁵ For the Flemish Community, there is no specific legal requirement for broadcasters to publicly publish information about their companies. VRM has the task to monitor concentrations in the Flemish media sector (Art. 218 FLBA) and publishes an annual report on competition in the market for different media sectors (including lists of the various audiovisual broadcasters, network providers and written press publishers, their contact details and shareholder information).¹⁹⁶

¹⁹⁵ Available at: <http://www.csa.be/pluralisme> (date accessed 17 November 2011).

¹⁹⁶ Available at: <http://www.vlaamseregulatormedia.be/media/14281/rapport%20mediaconcentratie%202010.pdf> (date accessed 17 November 2011).

7. Conclusion

In conclusion, one can say that media policy in Belgium is focused on audiovisual media, that the written press has been largely left untouched by media policy, and that policy makers are uncertain to what degree and in what sense they should regulate Internet-based media. So far, policy responses to technological convergence have been formulated on a case-by-case basis, the only general vision behind them being a desire to maintain pluralism and the further existence of existing media players. It remains unclear to what extent convergence should be treated as a threat or should be supported as an opportunity for the freedom and independence of the media. Freedom and independence of the media, often under the general banner of freedom of expression, are systematic features of policy interventions, be it regularly only as background principles.

There is a general practice of cooperation between policy makers and media stakeholders when it comes to making media policy in Belgium (for instance, through practices of public consultations; hearings with representatives of media actors before the introduction of new legislation; or the organisation of the so called 'States-General of the Media' where media players and policy makers meet to discuss certain aspects of media policy). Independent media regulators have been established to supervise compliance with media regulations. These regulators play their part in concerting with the public and other stakeholders affected by media policy, for instance through the organisation of public consultations on proposed regulatory changes. The existence of independent media regulators helps to ensure a general legislative framework protective of the freedom and independence of the media in Belgium. Self-regulation has gained a central place in Belgian media policy. Self-regulation is, for instance, often deployed as a means to respond to problems and situations of media convergence and new technological developments in the media. The state stimulates self-regulation, for instance by providing financial support for self-regulatory institutions.

There are a variety of different state parties responsible for media policy in Belgium. This separation of responsibilities is sometimes problematic, for instance for the formulation of clear policy objectives in the light of media convergence. This could potentially have a negative impact on the regulatory framework protecting the freedom and independence of the media. In order to cope with such situations, the responsible state parties are increasingly cooperating with one another to formulate common policies. This separation of responsibilities also has a number of advantages. For instance, it helps the Communities to provide their own emphases on specific areas of media policy that they consider important for their language community. Also, it seems that the absence of a single state power to regulate issues that are common to different types of media has sometimes led to the establishment of highly functional self-regulatory institutions, instead of the application of state-imposed regulations. Media regulation is to a large degree influenced by the relevant EU directives, especially as concerns audiovisual media. The ECHR and the case law of the ECtHR have also proven to be major sources of media law in Belgium.

There is a strong concentration in the Belgian media market, with a strong tendency towards cross-media activities, where the same few media groups dominate different types of media outlets. However, so far, no single group dominates the entire market and this concentration has not (yet) led to serious attacks on media freedom and independence. Policy makers seem to accept this limited level of competition as a necessary evil, which goes together with the relative small size of the media market(s). Legislation ensuring a diversified offer of media and of opinions is scarce. It remains to be seen whether Belgian legislation on competition will prove to be accurate and effective in cases of further consolidation of the

media sector. Desire for more competition seems in particular prevalent in the area of cable services distribution. It is in precisely this area that the regulators have recently undertaken some joint initiatives to break open the market for distribution of triple play services.

So far, the Belgian regulatory framework has been relatively well suited to safeguard media freedom and independence. There have been discussions on the interpretation of some specific provisions in the Belgian Constitution, especially with regard to the application of the principle of media freedom to media other than the written press. These discussions centre on problems with the application of the principle of media freedom to judges, rather than to parliaments, governments or individual politicians. The latter generally seem to respect the freedom and independence of the media and to refrain from introducing specific legislation limiting this freedom and independence. In the same sense, there are no major incidents of changes to media legislation that are mainly inspired by specific commercial interests. Tensions between media players seem to stay within the legal framework (no major incidents of illegal practices by media groups have occurred so far).

Finally, although the current state of media freedom and independence in Belgium does not immediately raise major issues, it is notable that several interviewees have stressed that media freedom and independence cannot be taken for granted, but will always remain issues to be fought for on a daily basis, both at the micro level of specific media outlets and at the macro level of the independent status of media regulatory organisations.

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9. List of interviews

1. Interview with senior official at the French Community Cabinet of the Minister responsible for media policy, by Bart Van Besien and Pierre-François Docquir, Brussels, 17/5/2011
2. Interview with André Linard, Secretary General CDJ, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011
3. Interview with Isabelle Meerhaeghe, Member of Parliament, French Community Parliament, by Bart Van Besien and Pierre-François Docquir, Brussels, 25/5/2011
4. Interview with Pierre De Jaegher, Coordinator Radio Panik, by Bart Van Besien and Pierre-François Docquir, Brussels, 26/5/2011
5. Interview with senior officials at the French Community Administration, General Service for Audiovisual and Multimedia, by Bart Van Besien and Pierre-François Docquir, Brussels, 31/5/2011
6. Interview with Tanguy Roosen, President CSEM, by Bart Van Besien and Pierre-François Docquir, Brussels, 1/6/2011
7. Interview with Jacques Englebert, lawyer specialised in media law, by Bart Van Besien and Pierre-François Docquir, Brussels, 1/6/2011
8. Interview with senior staff at RTBF, by Bart Van Besien and Pierre-François Docquir, Brussels, 3/6/2011
9. Interview with Georges Timmerman and Tom Cochez, journalists at Apache.be, by Bart Van Besien, Antwerp, 3/6/2011
10. Interview with Jean-François Furnémont, General Director CSA and President EPRA, and Marc Janssen, President CSA, by Bart Van Besien and Pierre-François Docquir, Brussels, 7/6/2011
11. Interview with Flip Voets, Ombudsman and Secretary General RVDJ, by Bart Van Besien, Brussels, 7/6/2010
12. Interview with Marc Chatelet, Head of Legal Department VRM administration, and Dieter Gillis, Legal Advisor VRM administration, by Bart Van Besien, Brussels, 9/6/2011
13. Interview with Margaret Boribon, Secretary General JFB, by Bart Van Besien and Pierre-François Docquir, Brussels, 14/6/2011
14. Interview with Patrick Lacroix, Managing Director VDP, and Sandrien Mampaey, Legal and Administration Manager VDP, by Bart Van Besien, Brussels, 15/6/2011
15. Interview with Philippe De Coene, Member of Parliament, Flemish Community Parliament, by Bart Van Besien, Brussels, 15/6/2011
16. Interview with Pol Deltour, Secretary General VVJ/AVBB, by Bart Van Besien, Brussels, 17/6/2011
17. Interview with Fabrice Grosfilley, Editor-in-Chief RTL-TVI, by Bart Van Besien and Pierre-François Docquir, Brussels, 21/6/2011
18. Interview with Karl van den Broeck, Editor-in-Chief Knack, by Bart Van Besien, Brussels, 21/6/2011

19. Interview with Johan Bouciqué, Head Legal Department for Media Affairs at the Flemish Community Administration, Department Culture, Youth, Sports and Media, by Bart Van Besien, Brussels, 22/6/2011

20. Interview with Ides Debruyne, Director Foundation Pascal Decroos, by Bart Van Besien, Brussels, 27/6/2011

21. Interview with senior staff at VRT, by Bart Van Besien, Brussels, 30/6/2011