



# The growing convergence of audiovisual markets

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**Resume:** *New technologies have changed the way we consume. "Faster, anytime, anywhere" could be the slogan of this new era. The audiovisual sector is no exception to this trend.*

*The historical model of media broadcasting rules and calendar has been abolished in favour of the consumption of content on all media by digital means at the time of one's choice (video on demand, VOD). In just a few years, digital platforms such as Netflix have imposed themselves on the audiovisual field, changing the balance and making the incumbents more fragile and less attractive on the advertising market. New rules of the game have been defined by the public authorities in order to draw a more balanced picture and allow the incumbent television channels to be more competitive.*

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For a long time, the French audiovisual sector remained under the supervision of the State. The RTF and then the ORTF were controlled by the Ministry of Information, formerly the Ministry of Propaganda, whose interventions after the war and until its disappearance in 1974 sometimes amounted to real censorship. The controversial control of the State over the sector led to the dismantling of ORTF in 1974 into seven different companies: Radio France for radio, three national television companies (TF1, A2 and FR3), and three public establishments: Télédiffusion de France (TDF), Société Française de Production (SFP) and Institut National de

l'Audiovisuel (INA). The State monopoly on audiovisual communication was effectively abolished actually by the law of 29 July 1982 on audiovisual communication, Article 1 of which states that "audiovisual communication is free". It is on this occasion that the High Authority for Audiovisual Communication "responsible for guaranteeing the independence of the public service of radio and television broadcasting" was created. It appoints the presidents of the national radio and television companies and ensures compliance with the regulation. The law of 30 September 1986 on communication (Loi Léotard) transforms the High Authority

into the National Commission for Communication and Freedoms (CNCL) and then into the Higher Audiovisual Council (CSA) since 17 January 1989<sup>1</sup>.

Although there is no longer a monopoly, the links between the audiovisual sector and the State have remained very close, in particular because of the abundant regulations in this field and the omnipresent role of the CSA.

The main ways of organising audiovisual broadcasting in France are governed by the above-mentioned law of 30 September 1986 on freedom of communication. This law defines the conditions for the granting of radio frequencies to television channels by the public authorities and gives the CSA the power to issue broadcasting licences and to assign frequencies to publishers and distributors wishing to broadcast programmes on frequencies allocated to broadcasting. At the end of the 1990s, the French television field comprised six terrestrial channels, three of which were private (TF1, Canal+ and M6) and three public (three France Télévisions channels). Unlike in Italy and Germany, it was dominated by terrestrial broadcasting, with cable and satellite broadcasting remaining a very small minority in France (4% of the total audience in 1997). The arrival of DTT in 2005

has multiplied the offer of content to reach about thirty channels today.

This framework is based on a system of exchanges: the temporary free provision of the scarce resource represented by the "golden" frequencies of the public domain to the channels in exchange for their contribution to the financing of audiovisual production.

Alongside an initial development leading to a distinction between free television and pay television (with the arrival of Canal + in 1987), digital technology has brought about a real revolution in the sector. New operators have come to compete with the historical players by proposing services allowing the consumer to access a wide range of content via a multitude of screens (computer, tablet, smartphone). Above all, there has been considerable development in the broadcasting of non-linear content (catch-up television and video on demand), mainly on screens other than the television set, while the linear broadcasting (paid or not) of content on the television set has stagnated. Operators such as Youtube or subscription video-on-demand (SVOD)<sup>2</sup> providers such as Netflix, Disney+ or Amazon Prime are now part of the audiovisual field, responding to new consumer uses, and SVOD has become "a

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<sup>1</sup> CSA and Hadopi will become "Autorité de régulation de la communication audiovisuelle et numérique", ARCOM (Projet de loi relatif à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique, 8 avril 2021).

<sup>2</sup> CSA et CNC, La vidéo à la demande par abonnement en France : marché et stratégie des acteurs : 2018.

preferred method of access to audiovisual content"<sup>3</sup>. In France, with an estimated turnover of around 740 million euros for 6.7 million subscribers in 2019, Netflix alone holds 90% of the VOD turnover, and is present in almost one out of four French households. The American player dominates the French market in terms of number of subscriptions, revenue and consumption: in September 2020, Netflix alone accounted for 67% of usage, followed by 13% for myCanal and Canal+ Séries, 12% for Prime Video and 6% for Disney+<sup>4</sup>. However, these services are not subject to the same obligations as television channels, the incumbent operators, thus giving them a competitive advantage.

This regulatory asymmetry has been denounced for several years. In its opinion No. 19-A-04 the French Competition Authority<sup>5</sup> emphasised the inadequacy of the

1986 law to changes in the audiovisual sector and proposed two series of reforms aimed at reducing the competitive asymmetry, some of which have been followed up<sup>6</sup>. For their part, the CSA and Hadopi published a joint study on the multiplication of subscription video-on-demand services (VOD) in March 2021 in which they draw up an inventory of the sector and the main changes in usage<sup>7</sup>. The latest version of the AVMS Directive<sup>8</sup> and its transposition into domestic law by Order No. 2020-1642 of 21 December 2020<sup>9</sup> also contribute to the adjustment of the sector to "changing market realities"<sup>10</sup> (I). But without waiting for the intervention of the public authorities, the incumbent operators have adapted themselves both by proposing new content close to the new competitors and by associating themselves in various ways (II). However, there is still a long way to go before perfect convergence is achieved...

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<sup>3</sup> CSA et Hadopi, La multiplication des services de vidéo à la demande par abonnement. Stratégies de développement et impact sur les usages, 9 mars 2021.

<sup>4</sup> Of course, the effect of confinements related to the covid 2019 health crisis must be taken into account.

<sup>5</sup> Avis n° 19-A-04 du 21 février 2019.

<sup>6</sup> V. In the same way, Inspection générale de finances et Cour des comptes, Publicité en ligne : Pour un marché à armes égales, novembre 2020.

<sup>7</sup> CSA et Hadopi, La multiplication des services de vidéo à la demande par abonnement. Stratégies de développement et impact sur les usages, 9 mars 2021.

<sup>8</sup> Directive (UE) 2018/1808 du Parlement européen et du Conseil du 14 novembre 2018 modifiant la directive 2010/13/UE visant à la coordination de certaines dispositions législatives, réglementaires et administratives de Etats membres relatives à la fourniture de services de médias audiovisuels. V. aussi, CSA, avis n° 2020-09 du 27 novembre 2020 relatif à l'ordonnance portant transposition de la directive

(UE) 2018/1808 du Parlement européen et du Conseil du 14 novembre 2018 modifiant la directive 2010/13/UE visant à la coordination de certaines dispositions législatives, réglementaires et administratives de Etats membres relatives à la fourniture de services de médias audiovisuels, compte tenu de l'évolution des réalités du marché.

<sup>9</sup> Order No. 2020-1642 of 21 December 2020 transposing Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, taking account of changes in the realities of the market, and amending the Act of 30 September 1986 on freedom of communication, the Code of Cinema and the Moving Image and the time limits relating to the exploitation of cinematographic works.

<sup>10</sup> See title of the 2020 Ordinance.

## I. Regulatory adjustment to "changing market realities"

To solve the regulatory asymmetry penalizing the incumbents, it was planned to standardize the obligations imposed to all operators (A) and, conversely, to enable channels to be more competitive by allowing them to develop their advertising resources (B).

### A. Towards the standardization of regulatory constraints

In order to bring the various operators closer together, the public authorities have focused on the obligations to finance works (1) and on the methods of distributing them (2). However, the European Commission may question the French draft regulation<sup>11</sup>.

#### 1. Financial contribution to the production of the works

The law of 30 September 1986 was based on a balance between the privileges granted and the obligations imposed on television service providers. In exchange for granting rare terrestrial frequencies to private operators free of charge, the latter were required to fulfil obligations relating to national cultural policy, such as the financing and broadcasting of

European and original French-language works (EOF), as well as contributions to the Moovie National Center (Centre national du cinéma CNC) support fund, and the preservation of the interests of other media sectors, notably the press.

Subsequently, television services not using terrestrial frequencies (cable and satellite) were also included in the scope of the law and were subject to such cultural policy obligations. Thus, according to Decree No. 2010-747 of 2 July 2010<sup>12</sup>, all channels, regardless of their medium (terrestrial, cable or satellite), whose main purpose is not the broadcasting of cinematographic works and which broadcast at least 52 feature-length cinematographic works per year must invest a minimum of 3.2% of their net turnover for the previous year in European films. 2.5% of turnover must be devoted to original French-language films. As regards cable, satellite and digital terrestrial television film channels, their acquisitions of broadcasting rights must represent the following proportions of their total annual resources for the current financial year: 21% for European works (26% if it is a first-run film service) and 17% for EOF works (22% if it is a first-run film service). Their agreement must, like that of Canal+, contain a diversity clause.

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<sup>11</sup> Avis du 19 mars, V. La Commission européenne sensible aux arguments de Netflix : Le Monde 17 avril 2021.

<sup>12</sup> Decree on the contribution to the production of cinematographic and audiovisual works by terrestrial television services.

Decree No. 2010-1379 of 12 November 2010<sup>13</sup> extended the financing obligations to French on-demand audiovisual media services by making the percentage of the contribution dependent on the media chronology criterion<sup>14</sup>. On the one hand, catch-up television services devote each year a share of their net annual turnover of the previous financial year to expenditure contributing to the development of the production of European cinematographic works and EOF, the rate of which is identical to that to which the service publisher is subject in respect of the operation of the television service from which the catch-up television service originates. Subscription services shall devote each year a share of their net annual turnover for the previous financial year to expenditure contributing to the development of the production of European cinematographic and audiovisual works and EOF respectively at least equal to:

1° 26% and 22% when they offer at least 10 feature films annually within a period of less than 22 months after their theatrical release in France;

2° 21% and 17% when they offer annually at least 10 feature films within a period of less than 36 months and equal to or more than 22 months after their theatrical release in France;

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<sup>13</sup> Decree on on-demand audiovisual media services.

<sup>14</sup> That is to say, the schedule for the distribution of films on television screens and platforms after their release in the cinema and according to the contributions of each party in the pre-financing of the works.

3° 15% and 12% in other cases.

Three quarters of this expenditure is devoted to independent production, understood according to criteria relating to the methods of exploitation of the work and the capital links between the channel and the production company.

Arrival of foreign operators such as Netflix or Amazon Prime has disturbed this funding scheme in that these VaDA providers are not subject to the same financial constraints. Following tough negotiations by the French authorities in defense of the "cultural exception", the AVMS Directive of 14 November 2018 recognized the possibility for Member States to apply their own production contribution regime to foreign video-on-demand channels and platforms that offer a service in France. The transposition order of December 2020 confirms these objectives of ensuring the sustainability of the system for financing production, particularly independent production, and guaranteeing fairness between French broadcasters and global platforms. In application of this order, the

Not to be confused with the timing of the release of films when cinemas reopen after the Covid crisis, which is being considered by distributors and which may be an anti-competitive agreement (ADLC, Avis 21-A-03 du 16 avril 2021 relatif à une demande d'avis du Médiateur du cinéma sur les modalités de sortie des films en salle).

draft decree unveiled in December 2020<sup>15</sup> applies to "any publisher of an on-demand audiovisual media service established in France whose annual net turnover is greater than 1 million euros" but also to "publishers of services not established in France and not under the jurisdiction of France within the meaning of Article 43-2 of the Act of 30 September 1986" whose turnover is taken into account as being that achieved on French territory (Article 2). The system, now uniformly applicable to French and foreign SMADs, mixes the media chronology rule with the degrees of contribution, which are now only two. Thus, each year, subscription services devote a share of their net annual turnover for the previous financial year to expenditure contributing to the development of the production of European or original French cinematographic and audiovisual works, at least equal to (art. 5):

1° 25% when they offer annually at least one feature film within a period of less than twelve months after its theatrical release in France;

2° 20% in other cases.

However, platforms cannot totally choose the allocation of these expenses since they

must reserve at least 20% of the sums for cinema (or 30% in case 1), which reduces the omnipresence of series. This clearly points the finger at Netflix's business model, which is mainly based on series. 85% of this expenditure must still be reserved for original French-language works (art. 6). The media chronology rule is largely relaxed in favour of more funding. If the platform contributes 25%, it will be able to broadcast films before one year. It is difficult to define the distribution gaps after the film's release in cinemas: either we are approaching the Canal + model, which is under threat, or that of free channels, which cannot compete with platforms and their financial resources. Negotiations on the film chronology are proving to be delicate and should have been concluded by 31 March<sup>16</sup>. In the absence of an agreement, it is up to the government to determine by decree in the Council of State, on a temporary basis and pending the conclusion of an agreement, the duration and terms of the exploitation windows for works.

## 2. Dissemination of artworks

This movement of equivalent constraints between publishers and relaxation of the

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<sup>15</sup> The decree received a favourable opinion from the CSA (Avis du 17 mars 2021 relatif au projet de décret relatif aux services de médias audiovisuels à la demande).

<sup>16</sup> Decree No. 2021-73 of 26 January 2021 setting the deadline provided for in Article 28 of Order No. 2020-

1642 of 21 December 2020 for the conclusion of a new compulsory agreement on the deadlines applicable to the various modes of exploitation of cinematographic works (art. 1). CE, ord. 31 mars 2021, n° 450638, n° 450645.

obligations of historical operators is also taking shape in the broadcasting of artworks. Both France and the European Union have imposed obligations on television channels and VOD services to broadcast a quota of European and French works. The channels must therefore devote at least 60% of the total annual time devoted to the broadcasting of audiovisual works to the broadcasting of European works and at least 40% to the broadcasting of original French works. The catalogue made available by the Video-on-Demand service must comply with the same quotas as linear services, i.e. offer 60% European works and 40% works of original French expression. These quotas apply respectively to audiovisual works and cinematographic works. The future implementing decree of the 2020 ordinance will unify the system by subjecting all audiovisual media service<sup>17</sup> publishers to the same quotas (art. 16).

In order to respond to new practices and put publishers on an equal footing, the rules on the times and days of broadcasting of films have been reviewed. Decree No. 90-66 of 17 January 1990 set the rules for the broadcasting of cinematographic works with protective measures for cinematographic works and a ban on the broadcasting of cinematographic works on certain days during certain time slots in order to protect

theatrical exhibition. In application of this text, no cinematographic works could be broadcast:

- Wednesday evenings, except for services meeting certain conditions (with the exception of art house films broadcast after 22:30);
- Friday evenings (except for art house works broadcast after 22:30);
- Saturday all day;
- Sundays before 8.30 pm.

Decree No. 2020-984 of 5 August 2020 amended the decree of 17 January 1990 and the regime for broadcasting cinematographic works on television services in order to make the channels' program schedules more attractive and to compete with home shopping platforms. Thus, television channels will be able to broadcast 244 films per year instead of 192, of which a maximum of 196 in "prime time" (between 8.30 pm and 10.30 pm) compared to 144 (art. 8 of the decree of 17 January 1990). Furthermore, all bans on Wednesday, Friday and Sunday are removed and only the broadcasting of films on Saturday after 8.30 pm is regulated. Thus, on Saturday evenings, the broadcasting of a film is only possible if the broadcaster has financed its production or if the film is an art house work (art. 10). The constraints on publishers of cinema or pay-per-view services are also eased, as they are only restricted on

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<sup>17</sup> Subject to meeting the thresholds set out in Article 15.

Saturday evenings to the broadcasting of certain films.

#### B. Towards sharing advertising resources

Over the last twenty years, television channels have lost a large part of their advertising resources. There are several reasons for this phenomenon.

First of all, the arrival of DTT has gradually fragmented advertising audiences, leading to a drop in the price of advertising space and therefore in advertising revenue.

Secondly and most importantly, Internet advertising has supplanted television advertising<sup>18</sup>. Advertisers may perceive TV and Internet advertising as complementary (cross-media), but the figures clearly show a shift towards digital advertising<sup>19</sup>.

This loss of financial resources has a significant impact on competition with VOD platforms that have not based their business model on advertising but on the debt market and on raising funds from shareholders, such as Netflix. Indeed, the drop in advertising resources leads to a decrease in investment in

audiovisual production and difficulties in accessing premium content with continuously rising prices<sup>20</sup> to the benefit of their competitors, especially foreign ones.

Consequently, the rules on TV advertising have been relaxed in order to allow TV channels to regain their media attractiveness.

#### 1. Balance of the TV advertising regime

In order to protect or even favour the press sector or to protect public health, television advertising has been restricted. The decree of 27 March 1992 thus excludes certain sectors:

- Beverages containing more than 1.2 degrees of alcohol;
- Literary publishing;
- Cinema;
- Distribution when it concerns promotional operations taking place at least partially on the national territory.

With the exception of the one relating to alcoholic beverages, these restrictions now seem obsolete and above all privilege digital platforms which are not subject to them. The objective of protecting cultural diversity

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<sup>18</sup> "In 2018, digital advertising accounted for 34% of the global advertising market, compared with 27% for television" (Inspection générale de finances and Cour des comptes, *Publicité en ligne : Pour un marché à armes égales*, op. cit. p. 13).

<sup>19</sup> See in this sense the conclusions of Advocate General Szpunar, 15 October 2020, Case C-555/19, *Fussl Modestraße Mayr GmbH v. SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH, ProSiebenSat.1 Media SE*: "Whilst the advent of the internet has not caused television to disappear, as some

were predicting, it has certainly undermined its position, in particular from an economic and financial point of view. It is not just a question of the competition to television programmes from the material available on the internet, but also, if not primarily, the capacity of the internet to compete with 'traditional' media, in particular television broadcasters, on the advertising market, and the resulting loss of revenue for those broadcasters" (pt. 1).

<sup>20</sup> ADLC, avis n° 19-A-04, op. cit. n° 259 et s.

pursued by the ban on advertising for cinema and literary publishing has not been achieved. As M6 pointed out, "on the contrary, the current situation favours big productions. The latter use television for its sole power effect: promotion of films on TV shows with well-known actors, sponsorship of shows by the films' websites, advertising for DVD releases, sale of derivative products or partnerships with major brands"<sup>21</sup>. The public authorities have partially heard the remark and have authorized - on an experimental basis - cinema advertising messages for a period of 18 months, with a report to be submitted afterwards to verify the appropriateness of making the provision permanent<sup>22</sup>.

At the same time, in order to attract advertisers back to television, the public authorities have authorised channels to broadcast segmented advertising. Indeed, advertising addressed to a well-targeted audience is more effective. Thanks to the various data collected on the internet (social networks, search engines, shopping carts, etc.), it is possible to refine digital advertising and reach the target consumer<sup>23</sup>.

Decree No. 2020-983 of 5 August 2020 amending the television advertising regime authorizes segmented advertising on television, i.e. advertising that is geographically adapted. Article 13 of the 1992 decree provided for the general principle (with exceptions for the broadcasting of regional programs) that "advertising messages must be broadcast simultaneously throughout the service area". From now on, the principle is reversed (with some exceptions). Local or national advertisers can therefore display advertising aimed at local consumers, just as regionalized advertising should be able to be broadcast on national channels<sup>24</sup>. But they still need to have access to viewer data.

## 2. Access to data

It is often said that data is fundamental to the digital economy<sup>25</sup>. The audiovisual sector cannot escape it either. Indeed, the new regulation can only be effective if operators have access to the data needed to target viewers. Several means are possible, more or less directly.

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<sup>21</sup> ADLC, déc. n° 19-A-04, op. cit. pt. 394.

<sup>22</sup> Le décret n° 2020-983 du 5 août 2020 portant modification du régime de publicité télévisée.

<sup>23</sup> L. Arcelin, Données personnelles : sésame déterminant sur le marché de la publicité digitale : RLDI 142/2017, p. 49.

<sup>24</sup> CJUE, 3 février 2021, aff. C-555/19, Fussl Modestraße Mayr GmbH c/ SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH, ProSiebenSat.1 Media SE.

<sup>25</sup> L. Arcelin et J.-L. Fourgoux, Droit du marché numérique : Coll. Les intégrales, LGDJ-Lextenso, 2021, n° 101 et s. p. 63 et s.

This segmented advertising is done either via TV boxes, in which case the telecom operators are involved, or directly on a Smart TV set (connected to the Internet). These two methods call for a few comments respectively.

On the one hand, in order to target the audience and broadcast the spots, the advertising agencies must use the ISP technology. They make it possible to obtain information other than the viewer's geolocation: the number of mobile packages attached to the box (which will make it possible to know roughly the number of people in the household), subscriptions to youth or sports channels (which can indicate the age of the viewers), video-on-demand services, etc. This data can refine the profile of viewers, who will obviously have to have given their consent to this collection and processing.

France TV has signed an agreement with Orange and Bouygues Telecom to send advertisements using data from the boxes<sup>26</sup>. TF1 relies on the technological know-how of Orange, while M6 has joined forces with Bouygues Telecom. However, telecom operators and channel ad-servers must coordinate their offers through technological tools. Altice (SFR) has opted for Freewheel technology. Bouygues Telecom has aroused a

lot of reservations from the sector by choosing Google Ad Manager. Free has not yet made up its mind, but some of its boxes are equipped with Android, which may be a sign of its choice... Google will thus strengthen its hold in the digital advertising sector as well as in TV advertising.

On the other hand, segmented advertising will be able to go through the Connected TV (smart TV)<sup>27</sup>. Connected TV also collects data directly from screens and aggregates it for advertisers. The evolution of this mode will have to be checked to assess the positions: consumers are increasingly accessing connected TV without keys or dedicated boxes, so that equipment manufacturers (Samsung, etc.) can in turn generate data that can be used to address segmented advertising and thus position themselves on the advertising market. The connected TV is a real computer, capable of storing files, accessing online content, paying online... thanks to different operating systems, including Android TV, a subsidiary of Google, again...

Even more indirectly, TV channels can address segmented advertising through OTT platforms.

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<sup>26</sup> Telecom operators are currently renewing their boxes with compatible models.

<sup>27</sup> M.-A. Trojete, *La télévision connectée : Rapport au Ministre de la culture et de la communication et au*

Ministre chargé de l'industrie, de l'énergie et de l'économie numérique, novembre 2019.

The OTT services Netflix, Disney+ or Amazon's Prime Video use subscriber data to feed their recommendation algorithms. On the other hand, they do not show any advertising, which appeals to a large number of content consumers. Workarounds are possible, such as product placement or the use of automatic content recognition (ACR) data to deliver messages on ad-supported platforms, or lookalike models<sup>28</sup> and contextual targeting.

It is not clear how successful this new possibility will be and whether the announced end of third-party cookies on the internet will lead to a shift from digital to TV. The fact remains that the GAFAs are investing in the sector and that it will become increasingly difficult to isolate the digital advertising market from the TV advertising market.

As the CSA and the CNC noted in their 2018 study, "this rebalancing will have to continue at the national level, but it also depends on the strategies of the players themselves, whether they are public or private (partnerships, takeover policy, continued investment in programmes and services, etc.)"<sup>29</sup>.

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<sup>28</sup> Une audience ou une cible dite "look alike" est une cible publicitaire qui est déterminée par sa ressemblance avec la clientèle habituelle de l'annonceur.

<sup>29</sup> CSA et CNC, La vidéo à la demande par abonnement en France : marché et stratégie des acteurs : op. cit., p. 100.

## II. The adjustment of incumbents to "changing market realities"

Aware of the dangers of foreign platforms but also of the risks of cannibalization of their linear activities if they imagine too large a non-linear strategy, the incumbents have adapted themselves their offerings (A).

The players have not yet developed the project of a European platform in response to the domination of American, despite some attempts at rapprochement<sup>30</sup> (B).

### A. Enlargement of offers

The audiovisual sector is seeing an increasing number of hybrid audiovisual services offering VOD, transactional VOD, free-to-air VOD and linear television in a single interface. The historical channels have adapted to these schemes.

Faced with changes in the way content is consumed, the incumbent operators have developed non-linear broadcasting services, available on request by the viewer on the basis of a catalogue<sup>31</sup>. The decree of 12 November 2010 distinguishes, within SMAD, between

<sup>30</sup> CSA et CNC, La vidéo à la demande par abonnement en France : marché et stratégie des acteurs : op. cit., p. 100.

<sup>31</sup> At European level, a non-linear service is qualified by Directive 2010/13/EU of 10 March 2010 (AVMS) as an "on-demand audiovisual media service", i.e. "an audiovisual media service provided by a media service provider for the viewing of programmes at a moment

VOD services, catch-up television services and other services (including pay-per-view services). TV channels have invested in these three categories, which is not without risk, as the Competition Authority has noted. The transition from linear to non-linear is encountering new barriers to entry, both technological and financial, supporting the risks of cannibalization between the old and new activities and the risks linked to the development of new terminals<sup>32</sup>.

As noted at the end of 2017, free TV channel publishers have little presence in VOD. Only the TF1 and M6 groups offer VOD services (TFOU MAX and GulliMax). Nevertheless, Salto, the joint V&A service of the France Télévisions, TF1 and M6 groups, was launched on 20 October 2020.

Unable to ignore the streaming platforms, the incumbent operators have also concluded agreements on content production or distribution. Thus, a few months after the launch of its own VOD service Canal+ Séries, the Canal Plus group announced its partnership with Netflix and then, more recently, with Disney+ in order to distribute

these services in a subscription offer bundled with its own linear and non-linear services.

Canal + is becoming a content aggregator thanks to its MyCANAL OTT platform, which aggregates the group's linear and non-linear services as well as those of third-party publishers<sup>33</sup>.

But, on their side, VOD platforms are moving into sectors previously occupied exclusively by traditional channels: sports. Amazon has started to develop an offensive strategy for the acquisition of TV rights to matches. The company has won the rights to broadcast the Champions League in Germany for three seasons starting in 2021, several English Premier League matches as well as the Champions League in Italy and even the French Open. Above all, Amazon has acquired the broadcasting rights in the United States for the American football championship for 2023 to 2033 and for 1 billion per season<sup>34</sup>.

The audiovisual strategies deployed by the GAFAs suggest that they will continue or even strengthen their investments in content and their presence in the audiovisual market at all levels of the value chain (production,

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chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider". At the French level, the definition of these services in Law No. 86-1067 of 30 September 1986, as amended by Law No. 2009-258 of 5 March 2009, is very close to the definition in the AVMS Directive. They are defined as "any electronic public communication service allowing the viewing of programmes at a time chosen by the user and on request, from a catalogue of programmes, the selection

and organisation of which are controlled by the publisher of the service".

<sup>32</sup> ADLC, Avis n° 19-A-04, pt. 233 et s.

<sup>33</sup> V. Hadopi et CSA, p. 37.

<sup>34</sup> Droits TV : un « deal » historique à plus de 100 milliards de dollars pour la NFL : Les Echos 19 mars 2021.

publishing, distribution, advertising). Their weight can only be mitigated by the strengthening of the offers of local audiovisual players but also by the emergence of more concentrated European operators.

#### B. The merging of operators

Audiovisual groups have sought to respond to competition from platforms through a concentration movement that is still causing a lot of commotion in the audiovisual field<sup>35</sup>. In 2019, the France Télévisions (FTV), TF1 and Métropole Télévision (M6) groups created a full-function joint venture called Salto, which will distribute television and audiovisual media services on demand and publish a subscription video-on-demand offering as part of its pay services<sup>36</sup>. These offers will be broadcast on OTT. The plan was for Salto to purchase non-linear broadcasting rights to audiovisual content in order to feed its VOD service and build up its catalogue mainly from television dramas, series, children's animation, documentaries and catalogue films, but not from recent cinema films because of media chronology.

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<sup>35</sup> V. L. Idot, *Les concentrations dans le secteur des médias : Business as usual ?* : RIDE 2005/1, p. 5.

<sup>36</sup> The OTT platform Molotov filed a complaint with the French Competition Authority alleging that TF1 and M6 had abruptly and abusively broken the distribution agreements for their channels in order to favour their platform Salto. The French Authority rejected the complaint for lack of sufficient evidence of the allegations (ADLC, decision No. 20-D-08, 30 April 2020 on practices implemented in the sector of publishing and marketing of television channels).

The Competition Authority has taken a rather favourable view of this concentration<sup>37</sup>.

Among other checks, the Authority examined whether there was a risk of the Mothers locking out access to non-linear broadcasting rights in order to favour Salto. Indeed, "the Mothers are active on the upstream markets, as sellers of non-linear broadcasting rights, and could as such favour the supply of their joint VOD platform, Salto, to the detriment of competing platforms"<sup>38</sup>. The Authority notes that the market shares of the Mothers do not exceed 20% individually or 25% in aggregate on the market for the acquisition of non-linear broadcasting rights. This is due to the specificity of French regulation. Indeed, despite the importance of the Mothers in pre-financing audiovisual and cinematographic production in France, their ownership rights are limited<sup>39</sup>, unlike streaming platforms such as Netflix<sup>40</sup>. In this respect, the Authority noted in its Opinion No. 19-A-04 that the French definition of the notion of participation in the financing of independent works, which uses a double criterion of independence, capital and commercial, leads to a "strong limitation of any property right

<sup>37</sup> ADLC, Avis n° 19-A-04 du 21 février 2019 relatif à une demande d'avis de la commission des Affaires culturelles et de l'Éducation de l'Assemblée nationale dans le secteur de l'audiovisuel.

<sup>38</sup> ADLC, déc. n° 19-DCC-157, op. cit. pt. 202.

<sup>39</sup> ADLC, déc. n° 19-A-04, op. cit., p. 340 et s.

<sup>40</sup> For channels, exclusivity is limited in number of broadcasts and in duration. For platforms, exclusivity (associated with their image) is for the longest possible period.

to exploit the work" of the channel taking part in the pre-financing (pt. 321). The position of the Mothers cannot therefore generate a competitive risk.

On the other hand, the insertion of holdback clauses<sup>41</sup> or the priority and pre-emption clauses raise some competitive concerns. The former could lead to a foreclosure of non-linear broadcasting rights through their exercise to the exclusive benefit of Salto. The latter would also be inserted in the co-production or pre-purchase contracts concluded by the Mothers for the benefit of Salto. Far from removing these clauses, the Mothers have undertaken to limit their play to the exclusive benefit of Salto. Thus, the non-linear broadcasting rights acquired exclusively by Salto following the Mothers' exercise of holdback to its exclusive benefit are subject to quotas. For EOF audiovisual works and flow programs, the quota is set at 50% of the total hourly volume subject to holdback for each of the Mothers. For cinematographic works, the quota is set at 50% of the total number of EOF cinematographic works subject to holdback of each of the Mothers<sup>42</sup>. The Mothers have also undertaken that Salto will not be able to

directly exercise any priority or pre-emptive right contained in a pre-purchase or co-production contract entered into by the Mothers<sup>43</sup>, just as the Mothers are not free to retrocede the rights they have acquired on an exclusive basis to Salto, but must respect the quotas<sup>44</sup>. The operation was therefore authorised by the Authority.

But the recent announcement of the sale of M6 by the German group Bertelsmann in January 2021 could reshuffle the cards if TF1 were to buy and win the tender. However, the path is full of pitfalls. Indeed, compliance with the constitutional objective of safeguarding pluralism means that the operation must be assessed both in terms of the law of 30 September 1986 and the competition rules. The anti-concentration mechanism put in place by the Léotard Act prevents the acquisition of shareholdings in certain audiovisual companies<sup>45</sup> and, by the same token, blocks the creation of audiovisual groups capable of effectively countering the global operators. For a long time now, some voices have been raised in favour of subjecting these concentrations to ordinary competition law or at least reforming the system<sup>46</sup>. The adjustment of

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<sup>41</sup> "These are contractual arrangements whereby a right-holder (producer or distributor) undertakes to a channel which has acquired a linear right not to market VOD rights to a third party for a limited period" (pt. 214).

<sup>42</sup> Commitment 9, pt. 462.

<sup>43</sup> Commitment 10, pt. 466.

<sup>44</sup> Commitments 7 and 8, pt. 444.

<sup>45</sup> See in particular Art. 39 I: "A single natural person or legal entity acting alone or in concert may not hold, directly or indirectly, more than 49% of the capital or voting rights of a company holding an authorisation for a national television service broadcast by terrestrial means...

<sup>46</sup> ADLC, déc. n° 19-A-04, op. cit. n° 429 et s.

the regulations to "the evolution of market realities" is far from over and will, in any case, have to be validated by the European Commission.

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