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The application of competition rules in the audiovisual communication sector

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List of abbreviations

ADLC	*Autorité de la concurrence* (French competition authority)
ARCEP	*Autorité de régulation des communications électroniques* (Electronic Communications Regulatory Authority)
ARCOM	Autorité de régulation de la communication audiovisuelle (Audiovisual Communication Regulatory Authority)
Art. cit.	Aforementioned article
C.A.	*Cour d'appel* (Court of appeal)
CJEC	Court of justice of the European Communities
CJUE	Court of justice of the European Union
Coll.	Collection
CSA	*Conseil supérieur de l'audiovisuel* (Superior Council of the Audiovisual)
CPCE	*Code des postes et des communications électroniques* (French Post and Electronic Communications Code)
Dir.	Direction
DMA	Digital markets act
DSA	Digital services act
EC	European Commission
EU	European Union
HACA	*Haute Autorité de la Communication Audiovisuelle* (High Authority for Audiovisual Communication)
LFP	*Ligue de Football Professionnel* (Professional Football League)
Op. cit.	Book cited above
ORTF	*Office de radiodiffusion-télévision française* (French Radio and Television Office)

Summary

General introduction

1. Recent developments in the application of competition law to the audiovisual media - The issue of the relationship between competition law and the audiovisual media sector has become very topical in recent months. One of the major events in this field was the announcement made by Bouygues to withdraw its plan to acquire exclusive control of the *Métropole Télévision* group[1]. This decision follows the investigation carried out by the French Competition Authority with regards to the rules on merger control. However, the notion of abuse of dominant position also bears high stakes. Indeed, this anti-competitive practice is at the heart of yet another dispute about the reallocation of television broadcasting rights of the Ligue 1, the annual French soccer competition[2].

This news highlights the general interest of the present study on the application of competition rules in the audiovisual communications sector. Such sector is of particular importance to contemporary society, and also presents many technical aspects. As a result, the state intervention needed to adapt to these particular challenges, through a variety of measures.

2. The constant search for ways to communicate between people – The importance of audiovisual communication is particularly striking when considering the countless research projects undertaken by mankind. Techniques and technologies used in this sector are the result of a long research process, based on people's need to communicate with each other.

The notion of communication encompasses a wide variety of means and content. Initially, communication refers to the sharing of information[3], which is gradually being replaced by the transmission of information[4]. Communication implies first and foremost the use of signs, the invention of sign systems, enabling a common representation of information[5]. The nature of these signs is plural. It includes in particular writing, language, image and sound.

The next issue is the transmission of these signs over long distances. Such transmission is impossible to achieve through the human body. However, it is necessary for the evolution of societies. The first attempts at long-distance communication led to the invention of the optical

[1] ADLC, "TF1/M6: The Autorité de la concurrence takes note of the decision to withdraw its planned acquisition", Press release, September 16, 2022.
[2] C.A. Paris, 30 June 2022, n°21/13216, Soc. Groupe Canal + SA.
[3] A. Rey, *Dictionnaire culturel en langue française*, 2006. The term "communicate" comes from the latin word *communicare*, translating the idea of participation and communion.
[4] E. Maigret, *Sociologie de la communication et des médias*, Armand Colin, Coll. U, 4th edition, 2022, p.24.
[5] O. Aïm et S. Billiet, *Communication*, Dunod, Coll. Openbook, 2020, p.14.

telegraph, followed by the electric telegraph. At that stage of the research, information was transmitted in Morse code. The next invention has enabled voice to be transmitted over cables, thanks to the vibrations of its sound waves. Thus, the telephone was born in 1876, thanks to scientist Alexander Graham Bell. This was followed by the discovery of electromagnetic waves, enabling wireless voice transmission. The process was used for mobile telephony, but also for radio. These same waves were then used to transmit moving images, giving rise to television. As a result, both voice and moving images are transmitted remotely in the form of waves, also known as Hertzian waves, or in the form of electrical signals through cables. Numerous improvements to these techniques, the linking of communication networks and the creation of communication protocols then led to the discovery of an extremely powerful new means of communication: the global computer network known as the Internet.

All the developments described above revolutionized the contemporary society, allowing for a variety of communication forms, including audiovisual communication.

3. Definition of audiovisual communication - In order to study its frameworks, we first need to define the term audiovisual communication. From a sociological point of view, communication can be defined as the transmission of a message from a sender to a receiver[6]. The breakdown of the term "audiovisual" reflects the simultaneous use of sound and visual elements. However, contemporary understanding of this notion has been broadened, by taking into account the media that broadcast either one of these elements independently[7].

The *Létotard* law[8], a major text in audiovisual communication law, also provides a definition of this notion. Article 2 defines it as "any communication to the public of radio or television services, regardless of how they are made available to the public, […] as well as any communication to the public of on-demand audiovisual media services"[9]. In addition, the law includes online communications to the public, while excluding some of them[10]. This definition therefore excludes online communication to the public "enabling a reciprocal exchange of

[6] L. René, *Sociologie. Théorie et analyse*, Ellipses, Coll. Optimum, 2nd edition, 2018, p.492 : « processus de transmission d'un message, d'un émetteur à un récepteur, par l'intermédiaire d'un moyen ».
[7] S. Hoebeke et B. Mouffle, *Le droit de la presse*, Anthémis, 3rd edition, 2012, §40.
[8] Loi n°86-1067 du 30 septembre 1986 relative à la liberté de communication, dite Léotard.
[9] *Ibid*., art. 2, free translation, « toute communication au public de services de radio ou de télévision, quelles que soient les modalités de mise à disposition auprès du public, […] ainsi que toute communication au public de services de médias audiovisuels à la demande. ».
[10] *Ibid*., « toute communication au public par voie électronique de services autres que de radio et de télévision et ne relevant pas de la communication au public en ligne telle que définie à l'article 1er de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique ».

information between the sender and the receiver"[11], such as a merchant website[12]. Audiovisual communication is also no intended to cover private correspondence.

The *Léotard* law then identifies the various services subject to specific rules[13]. These include television and radio services, as well as on-demand audiovisual media services. The latter, which have only recently been included in the scope of application of the law[14], are said to be "non-linear", meaning that the user can choose the viewing time of a program. A recent amendment to the *Léotard* law also covers video-sharing platforms[15]. Those plateforms are responsible for organizing the content posted by users but have no editorial responsibility for it. These include platforms like YouTube or Dailymotion.

Finally, the *Léotard* law distinguishes between service distributors and service publishers. Service distributor is defined as "any person who establishes contractual relations with service publishers with a view to offering audiovisual communication services"[16]. Service publishers, for their part, are not defined in the law, but can be identified in that they exercise editorial responsibility for the content provided[17].

4. The specific framework for audiovisual communication - Beyond simple communication between individuals, audiovisual communication implies communication towards people, as an indefinite group. This is also called mass communication. Yet audiovisual communications are also services, valuables and subjects of commercial exchanges. That observation led to the identification of the audiovisual communication sector, made up of markets on which services are exchanged. However, the commercial objects we are talking about here are singular: it refers to providing information to society. The very special nature of these services has therefore been the subject of various regulations, deviating from the classic, general framework applied to trade.

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[11] Loi n°204-575 du 21 juin 2004 pour la confiance dans l'économie numérique, art. 1, free translation « permettant un échange réciproque d'informations entre l'émetteur et le récepteur ».
[12] C. Broyenne et L. Franceschini, *Droit de la régulation audiovisuelle*, LGDL, Coll. Systèmes, 1st edition, 2020, §33.
[13] *Ibid*.
[14] See *Infra*, §46.
[15] See *Infra*, §47.
[16] Loi Léotard (note n°8), art. 2-1, free translation « toute personne qui établit avec des éditeurs de services des relations contractuelles en vue de constituer une offre de services de communication audiovisuelle ».
[17] A.M Oliva, *L'essentiel du droit de la communication audiovisuel*, Gualino, Coll. Les Carrés Rouge, 1st edition, 2022, p.20.

This framework can take several forms, the most extreme being public monopolization. Like other communication inventions, television and radio have been subject to a state monopoly since they first appeared in French society. Management of this monopoly was initially entrusted to *Radiodiffusion française*. (RTF), a public industrial and commercial establishment under the authority of the Minister of Information. The latter was replaced by the *Office de la radiotélévision française* (ORTF) in 1964[18]. Market logic was gradually introduced into this sector. Advertising financing first appeared in 1968[19]. Then, the ORTF was then broken up into several companies, some of which have private-law status[20]. Full liberalization of the audiovisual communication sector only came in 1982[21]. The end of the public monopoly was accompanied by the creation of the *Haute Autorité de la communication audiovisuelle* (HACA), whose mission includes "guaranteeing the independence of public service radio and television broadcasting"[22]. The same authority issues prior authorizations for the operation of an audiovisual communication service for the public[23]. The current authority in charge of the audiovisual communication sector is the *Autorité de regulation de la communication audiovisuelle et du numérique* (ARCOM).

In light of the above, the audiovisual communication sector is not freed from all state intervention. Rather, it appears to have a far less far-reaching. State intervention turns into a form of regulatory law. According to Professor Gerard Farjat, state intervention by regulatory law represents the last of the three identified phases of public intervention in the market: interventionism by a state-entrepreneur in certain sectors organized as public monopolies, liberalization of those same sectors, and then more moderate intervention by a state-regulator[24]. Thus, sectoral regulatory law was born in this context of liberalization. Its aim is to build the competitive structure of the market, but also to ensure a balance between competition and the protection of non-economic values specific to the sector in question.

Some authors also use the term “Regulation”. However, the latter can be understood very broadly, as “an official rule or order”[25]. Thus, for the purposes of this study, the more restrictive

[18] Loi n° 64-621 du 27 juin 1964 Radio-télévision.
[19] D. De Bellescize et L. Franceschini, *Droit de la communication*, Puf, Coll. Thémis, 2nd edition, 2011.
[20] A.M Oliva, *op. cit*, p.56.
[21] Loi n° 82-652 du 29 juillet 1982 sur la communication audiovisuelle, art.12, free translation « garantir l’indépendance du service public de la radiodiffusion sonore et de la télévision ».
[22] *Ibid*. art 12.
[23] *Ibid*. art. 77.
[24] G. Farjat, La notion de droit économique, *in Droit et économie*, Archives phil. droit, Sirey, 1992, n° 37, cité par L. Boy, « Réflexions sur "le droit de la régulation" », *D. 2001*, p. 3031.
[25] *Dictionary of Contemporary English*, Longman, 2009, see “Regulation”.

term “Regulatory law” will be used[26]. The definition and limits of regulatory law are the subject of numerous debates, which will be discussed in the first chapter of this study[27]. In any event, this is a specific framework, justified by the particularities of the sector in question. However, specific sectors such as audiovisual communication are not exempt from compliance with the pre-established common legal framework.

5. The application of competition law to the audiovisual communication sector – Like other regulated sectors, the audiovisual communication sector is therefore subject to ordinary law, which includes competition law.

This study concentrates solely on competition rules relating to the protection of the market and its proper functioning, and not on the relationships established between companies acting on this market. In addition, competition rules applicable to States, also known as "State aids", are excluded from this study.

Competition law, as understood in this study, aims to ensure free competition and the proper functioning of the market, through abstract and general rules. These rules target the abstract concept of "undertaking". Thus, it prohibits behavior likely to prevent free competition, but the concept does not know variations according to the different sectors to which it is applied. In this respect, Professor Nicolas Petit points out that competition law provides "abstract, general and vague" instructions[28]. This can be seen from its short legal basis[29]. However, competition law also includes a number of other texts designed to clarify these basic principles. These include Commission notices, guidelines and block exemption regulations. Competition law can also be adapted at the litigation stage, through the concrete assessment of the practices in question by the competition authorities. Nevertheless, competition law and its foundations remain general and abstract by nature. Moreover, these characteristics enable it to adapt to the behavior of companies, which cannot be fully anticipated at the standard-setting stage.

However, the general, abstract nature of competition law contrasts with sector-specific regulatory law, whose very purpose is to adapt to the sector in question. The idea that

[26] *Ibid*., defines “regulatory” as “a regulatory authority has the official power to control an activity and to make sure that it is done in a satisfactory way”.
[27] See *Infra* Part. 1 – Chapter 1.
[28] N. Petit, « Epistémologie du droit de la concurrence », in *Laurence Idot Libert Amicorum, Concurrence et Europe*, Volume I., Concurrences, 2022, p.560, free translation « « abstraites, générales et vagues ».
[29] Art. 101 et 102 TFEU ; Council regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

competition law is ill-suited to regulate a sector such as audiovisual communication may therefore arise.

6. The coexistence of competition law and audiovisual communication sectoral regulatory law – Therefore, the two sets of rules described above apply in the audiovisual communication sector. The boundaries between the two are sometimes blurred, due to the evolution and expansion of each of these concepts. In this regard, competition law and sectoral regulatory are sometimes applied concomitantly to the same situation.

Beyond the potential for legal duplication, there is also a risk of contradiction. The two sets of rules do not pursue the same objectives, nor do they follow the same logic. It is therefore necessary to establish rules for their articulation. In this respect, we can illustrate our remarks with an example of comparative law from the United States. American courts take a particular stance on the relationship between competition law and sectoral regulatory law.

7. Presentation of the study – The aim of this study is to understand the dynamics of the relationship between competition law and sectoral regulatory law following the liberalization of the audiovisual communication sector.

In order to provide an answer to this question, we first need to observe and analyze the coexistence of competition law and regulatory law in the audiovisual communication sector (Part 1). This first part will enable us to establish the necessity and justifications for such coexistence. This dual application, however necessary it may be, raises problems of articulation at the litigation stage. It is therefore necessary to analyze the legal issues that are frequently the subject of this dual application, and thus require a specific balance to be struck (Part 2).

Part 1. The coexistence of competition law and regulatory law in the audiovisual communication sector

8. The complex identification of a coexistence – The coexistence of competition law and regulatory law within the same sector requires us to distinguish between the two concepts (Chapter 1). Indeed, their definitions and distinctions are debated. After having distinguish both concepts, we will examine their concomitant application in the audiovisual communication sector, and more specifically the reasons for such cohabitation (Chapter 2).

Chapter 1. The distinction between competition law and regulatory law: a trend towards permeable boundaries

9. A debated distinction – The distinction between competition law and regulatory law may seem clear if we look at the classic criteria put forward in the first attempts to define regulatory law (Section 1). However, debates soon arise that call into question the relevance of this distinction (Section 2).

Section 1. Classic distinction criteria

10. A plural definition of regulatory law – The notion of regulatory law has several meanings, depending on the parameters used to define its contours. Nevertheless, there are two main ways in which it can be distinguished from competition law. These are considerations specific to its objective of constructing a balance (I), and the use of specific instruments (II).

I. Regulatory law, governed by the goal of achieving an equilibrium

11. A dual balance – While regulatory law implies the construction of an equilibrium, the latter can be further broken down. It involves the construction of a sectoral equilibrium (A), as well as an equilibrium between competition and non-competitive principles (B).

A. The achievement of a competitive equilibrium

12. The need for construction in formerly monopolistic sectors – An expansive conception of regulatory law sees it as the expression of a "new relationship between law and economics"[30].

It represents the last of the three identified phases of public intervention in the market: the interventionism of an entrepreneurial state in certain sectors organized as public monopolies, the liberalization of those same sectors, and then the intervention of a regulatory state[31].

From the outset, the audiovisual communication sector has been subject to strong state intervention, resulting in a public monopoly. This state control can be explained by the high stakes involved. The audiovisual media play a role in internal security, and can also have a strong political influence[32].

This state monopoly was abolished in the audiovisual sector by the Audiovisual Communication Act of July 29, 1982[33].

Nevertheless, there is still a great control. Sectoral regulatory law was born in this context of liberalization. Its role is to shape the competitive structure of these particular markets.

13. The role of regulatory law in building sectoral competition - This first objective is specific to sectoral regulatory law[34]. The monopolistic structure of the sectors we mentioned makes it inevitable. In the absence of competition, it is impossible to establish rules to punish deviant behavior on a case-by-case basis.

In contrast to regulatory law, competition law aims to preserve the market. The market already has been built up by the dynamism of competition between operators, and is taken over by the competition authorities in its current state. Thus, competition law intervenes when competition is already "up and running"[35], to punish occasionally deviant behavior.

However, the notion of balance also implies other values and interests outside the economic sphere.

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[30] M.A. Frison Roche, « Le droit de la régulation », *D. 2001*, p. 610, free translation « nouveau rapport entre droit et économie ».
[31] G. Farjat, La notion de droit économique, *in Droit et économie*, Archives phil. droit, Sirey, 1992, n° 37, cité par L. Boy, « Réflexions sur "le droit de la régulation" », *D. 2001*, p. 3031.
[32] A.M. Oliva, *op. cit.*
[33] Loi n° 82-652 (note n°21).
[34] M.A. Frison Roche, *art. cit.* ; L. Boy, *art. cit.*
[35] M.A Frison Roche et J.C Roda, *Droit de la concurrence*, Dalloz, 2ème édition, 2022, §42, free translation, « en état de marche ».

B. The achievement of an equilibrium involving the protection of heterogeneous non-economic interests

14. Sector-specific interests – Professor Frison-Roche, in defining the object of regulatory law, does not limit herself to formerly monopolistic sectors, but also refers to sectors "in which the balance between competition and something other than competition must be forcibly maintained"[36]. However, the sectors frequently cited as being subject to regulatory law are often characterized, beyond the particular interests to be protected, by having been governed by a monopolistic structure. That is so in the case of the audiovisual communications sector.

There are many interests to protect in this sector, besides the technical constraints associated with the use of radio frequencies, which are a rare resource. These include the independence and pluralism of the media[37], but also provisions specific to the content broadcast[38].

15. The role of regulatory law in balancing heterogeneous interests - The various interests described above can be described as "economically non-spontaneous rules"[39]. This means that the audiovisual communication sector cannot generate its own equilibrium, which implies that the State must take over this equilibrium.

An alternative state intervention to monopolization is the regulatory state. Indeed, one of the missions assigned to sectoral regulatory law is to seek a balance between free, fair and effective competition, and the different values permeating the sector in question[40].

Competition law, on the other hand, seems to be limited to purely economic objectives. Professor Nicolas Petit describes it as "amoral" law[41], which distinguishes it from regulatory law. However, a possible extension of these objectives may be considered at later[42]. In any case, regulatory law can be defined more concretely in terms of how it is implemented.

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[36] M.A Frison Roche, *art. cit.*, free translation « dont il faut maintenir de force les équilibres entre la concurrence et autre chose que la concurrence ».
[37] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), art. 3-1.
[38] *Ibid*., not. art. 15.
[39] M.A Frison Roche, *art. cit.*, free translation, « règles économiquement non spontanées ».
[40] *L. Boy, art. cit.*
[41] N. Petit, « Epistémologie du droit de la concurrence », in *Laurence Idot Libert Amicorum, Concurrence et Europe,* Volume I., Concurrences, 2022, p.564, free translation « amoral ».
[42] See *Infra*, §30-33.

II. The goal of achieving an equilibrium involving the use of specific instruments

16. The existence of characteristic instruments - The institutional aspect is of crucial importance, since it ensures "internal coherence" and "overall balance"[43] (A). Then, these institutions have precise tools to achieve the objectives described above (B).

A. The implementation of regulatory instruments by specific institutions

17. The legal status of regulatory authorities - The notion of regulatory authority is enshrined at legislative level by the law of August 10, 2018 for a State at the service of a society of trust[44]. However, this law does not provide for a definition. It is therefore left to the courts to decide on a case-by-case basis whether a regulatory authority[45]. The notion of regulatory authority could then be likened to a functional notion[46], which is defined by its sole regulatory mission.

As far as their institutional status is concerned, it should be noted that the vast majority use the forms of independent administrative authority or independent public authority. The ARCOM, for example, is set up as an independent public authority. The use of this form is easily explained by the importance of the independence of regulatory authorities. Indeed, regulatory authorities are created in order to accompany the liberalization of a sector. It is therefore essential that the functions of operator and regulator do not overlap[47].

18. The powers of regulatory authorities – Which is common to all regulatory authorities is their specialization. In order to take charge of the sector in question, they have different powers. Many regulatory authorities have similar powers. Only ARCOM, the subject of this study, will be taken as an example here. ARCOM has regulatory and consultative powers, as well as the power to settle disputes and impose penalties[48].

[43] M.A Frison Roche, *art. cit*., free translation, « cohérence interne », « équilibre global ».
[44] Loi n°2018-727 du 10 août 2018 pour un Etat au service d'une société de confiance.
[45] L. Rapp et alii, *Le Lamy Droit public des affaires*, §525.
[46] *Ibid*., §523.
[47] M.A Frison Roche, *art. cit*.
[48] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), art. 4 à 20-8.

These powers are exercised through an empirical method, common to regulatory authorities. This can be defined as "discovering the elements of a legal solution" through an "analysis of the facts"[49].

These different powers are implemented by regulatory authorities through the use of specific instruments.

B. The identification of specific regulatory instruments

19. The temporal nature of regulatory intervention - The question of the temporality of interventions is frequently used to explain the difference between competition law and regulatory law[50]. By its very nature, sectoral regulatory law intervenes *ex ante*, in order to structure a market and build a balance. For example, ARCOM is responsible for allocating frequencies for broadcasting audiovisual media over the air[51], or the conclusion of agreements authorizing a television service or on-demand media service to access the market[52].

Unlike regulatory law, competition law intervenes *ex post*, when the market has already been built and competition is already effective[53].

20. The practicalities of regulatory intervention - Beyond the temporality of its intervention, regulatory law is distinguished by its concrete and asymmetrical aspect. Indeed, the law *Léotard*[54] does not impose the same obligations on terrestrial audiovisual services, on-demand audiovisual media services or video-sharing platforms.

Moreover, regulatory law is characterized by its flexibility. Although some regulatory authorities, such as ARCOM, have binding powers, flexible law instruments are still used in particular by these authorities as part of their regulatory mission[55].

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[49] G. Farjat, *Pour un droit économique*, Presses universitaires de France, 2004, p.111, free translation, « découvrir les éléments d'une solution juridique » à travers une « analyse des faits ».
[50] P. Choné, « Droit de la concurrence et régulation sectorielle. Entre ex ante et ex post », *in Droit et économie de la régulation*. 4, p.49 à 72 ; P. Ibáñez Colomo, "On the Application of Competition Law as Regulation: Element for a Theory", *Yearbook of European Law*, Volume 29, Issue 29, 2010, p.263 ; N. Dunne, "Between competition law and regulation: hybridized approaches to market control", *Journal of Antitrust Enforcement*, Volume 2, 2014, p.229.
[51] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), art. 22.
[52] *Ibid*., art. 33-1.
[53] J.C. Roda et M.A. Frison Roche, *op. cit*., §42 ; A. Perrot, « Régulation et politique de concurrence dans les réseaux électriques », *Economie publique*, 14 | 2004/1, p.5. .
[54] Loi Léotard (note n°8).
[55] G. Farjat, *op. cit*., p.112 ; L. Boy, *art. cit.*

Regulatory authorities such as ARCOM therefore have the instruments they need to achieve the objectives described above. These two elements distinguish regulatory law from competition law. However, certain nuances appear in this distinction, due to the evolution of the two bodies of rules.

Section 2. The alteration of the distinction between competition law and regulatory law

21. Challenging the classic distinction - The relevance of previously established criteria is frequently called into question. The term regulatory law is frequently used to describe the innovative role of competition law[56]. First of all, the notion of regulatory law comes up against a number of definitions that depart from the strict conception previously adopted[57] (I), when competition law adopts so-called "hybrid" instruments[58], of a regulatory nature (II).

I. Trends towards a broader conception of sector regulatory law

22. Dual extension – The trend towards a broader conception of sectoral regulatory law can be seen first and foremost in its very purpose (A). Moreover, its interventions appear to be varied (B).

A. The object of sectoral regulatory law in motion

23. The application of regulatory law after the sector has been fully liberalized - The traditional role of sectoral regulatory law is to accompany the liberalization of a sector by building a competitive market that has hitherto been non-existent[59]. To adhere to this functional definition means define regulatory law as a transitory body of rules, which is exhausted when the sector in question is liberalized. Yet regulatory law can often be durable. The audiovisual communications sector can be cited as an example. Indeed, ARCOM's action is still obvious.

[56] D. Bosco, C. Prietot, *Droit européen de la concurrence, ententes et abus de position dominante,* Bruylant, Coll. Droit de l'Union européenne, 2013, §245 et s. ; D. Briand-Meledo, « Autorités sectorielles et autorités de concurrence : acteurs de la régulation », *Revue internationale de droit économique*, 2007, p.345 à 371.
[57] See *Supra*, Part. 1 – Chapter 1 – Section 1.
[58] N. Dunne, *art. cit*.
[59] See *Supra*, §12-13.

This sustainability is a factor of confusion with competition law. Indeed, if the objective of building competition necessarily implies an ephemeral intervention, the distinction made between the objective of building competition and maintaining competition as it stands could be undermined by the durability of regulatory law.

24. The application of regulatory law in a variety of sectors - As we saw earlier, the sectors frequently cited as regulate are those that were formerly subject to a state monopoly[60]. These have even been defined as characterizing the object of regulatory law[61]**.** However, it is possible to observe that the term "regulatory law" or "regulated" is also used to designate sectors that deviate from these characteristics.

The notion of regulatory law is frequently used in the digital sector. That is the case for new texts adopted by the European Union, such as the DMA[62], or the DSA[63]. The latter are described as hybrid instruments between competition law and regulatory law. However, they do not follow on from the liberalization of a sector formerly subject to a state monopoly. They thus contribute to altering the traditional definition of sectoral regulatory law.

In the case of the present study, which is limited to the audiovisual communication sector, this extension of the scope of regulatory law has no impact, as the market studied was previously subject to a state monopoly.

In addition to the purpose and objective of regulatory law, it differs from competition law in the nature of its interventions. Here again, certain regulatory instruments lead to a broadening of this notion.

B. The varied nature of regulatory intervention

25. Competence of regulatory authorities to settle disputes – Article L17-1 of the *Léotard* Law[64] entrusts ARCOM with the competence to settle any dispute relating to the distribution of a radio, television or on-demand audiovisual media service.

[60] *Ibid*.
[61] M.A. Frison Roche, *art. cit*.
[62] Regulation (EU) 2022/1925 of the European parliament and of the council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
[63] Regulation (EU) 2022/2065 of the European parliament and of the council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).
[64] Loi Léotard (note n°8).

This is an *ex post* power, arising as a result of litigious conduct. Such a power departs from the instruments of regulatory law previously described as essentially *ex ante*[65]. However, ARCOM is not the only regulatory authority to have such powers. ARCEP, for example, is empowered to settle disputes concerning access and interconnection[66].

26. Competence of regulatory authorities to impose penalties – ARCOM also has the power to impose penalties, particularly for failure to comply with contractual obligations[67]. Once again, other regulatory authorities have such powers. The same applies to ARCEP in particular[68].

Such powers to settle disputes and impose sanctions are part of an *ex post* logic. However, the identification of regulatory law does not imply the exclusive, but rather the majority, use of *ex ante* instruments. The granting of *ex post* powers to regulatory authorities in no way detracts from the very essence of regulatory law, which is to intervene upstream of contentious behavior, in order to bring about a genuine a priori construction of the market. *Ex post* powers are even necessary to ensure compliance with the a priori obligations imposed on operators.

However, the blurring of the distinction between competition law and regulatory law is also the result of changes in competition law itself.

II. Regulatory trends in competition law

27. The emergence of regulatory law in competition law – Many authors use the term regulatory law to refer to competition law[69]. This can be explained by the strong appeal of competition law for the construction of the competitive structure (A), but also by the extension of the objectives of competition law to a non-economic sphere (B).

[65] See *Supra*, §19.
[66] Art. 36-8 CPCE.
[67] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), art. 28.
[68] Art. L36-7 CPCE.
[69] D. Bosco et C. Prietot, *op. cit.*, §245 et s. ; D. Briand-Meledo, « Autorités sectorielles et autorités de concurrence : acteurs de la régulation », *Revue internationale de droit économique*, 2007, p.345 à 371.

A. The appeal of competition law for the construction of a competitive structure

28. A logic of regulatory law through the adoption of original instruments – First of all, we need to look at the merger control mechanism[70], which provides for *ex ante* control of mergers through a system of prior notification requiring companies to declare their merger plans to the European Commission or the relevant national competition authority. In addition to being an *ex ante* mechanism, akin to regulatory law, merger control can also be seen as a means of building the market[71]. Indeed, such control makes it possible to control the players present on a market, as well as their size. It is thus an original mechanism, coming very close to a regulatory logic, which has the effect of altering the boundaries traditionally drawn between the two bodies of rules.

In addition, hybrid instruments have appeared in the digital field. The texts in question here are the DMA and DSA. Their nature could be debated. In fact, these are instruments that complement competition law while borrowing from the logic of regulatory law. They are similar to sectoral regulatory law in that they impose specific *ex ante* obligations on the platforms and operators they regulate. Moreover, the DMA and DSA apply asymmetrically, depending on the size of the operator concerned. So, while the DMA and DSA are seen as part of competition law, they also highlight the evolution of the latter towards a more regulatory nature.

29. The regulatory role of competition authorities – First and foremost, the essential infrastructure theory has the characteristics of a mechanism akin to regulatory law. This theory was accepted by the European authorities in the Magill[72] and Bronner[73] decisions. According to the Court, the dominant operator has to contract with a third-party operator if refusal to contract has no objective justification and has the effect of eliminating competition on the derived market. In addition, access to the infrastructure in question must be indispensable for a company to operate on the market. There must be no actual or potential substitutes for the good in question. By granting or denying one operator access to another's infrastructure, competition

[70] Council regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).
[71] M.A Frison Roche, « Définition du droit de la régulation économique », *D. 2004*, p.126. ; P. Ibáñez Colomo, *art. cit*., p.265.
[72] CJEC, 6 apr. 1995, C-241/91 P et C-242/91 P, Magill.
[73] CJEC, 26 nov. 1998, C-7/97, Bronner.

law contributes through this theory, to shaping the structure of the market, which is normally the role of regulatory law. Thus, the theory of essential infrastructures represents according to some authors a hybrid instrument[74].

In addition, competition authorities regularly intervene *a priori* by issuing future injunctions, commitments or interim measures. They also have powers of sector inquiry and consultative powers, in the same way as regulatory authorities.

The proliferation of competition law mechanisms that are closer to a regulatory logic is thus likely to alter the distinction previously established between regulatory law and competition law. This same distinction is further undermined by the debates surrounding the extension of competition law objectives to a non-economic sphere.

B. The extension of the objectives of competition law to a non-economic sphere

30. Objectives initially restricted to the economic sphere - It has already been explained that, in principle, competition law only takes into account objectives of a purely economic nature[75].

However, some authors also report on the debates surrounding the identification of the objectives of competition law and their possible extension.

31. A debated extension of the objectives of competition law - Professors Jean-Christophe Roda and Marie-Anne Frison Roche refer in this respect to "the strong temptation to assign to competition law a multiplicity of diverse and varied aims"[76]. Professor Konstantinos Stylianou identifies three emerging objectives of competition law: protection of the environment, privacy and workers' rights[77].

Moreover, in recent years, the European Union has demonstrated an increased control of the digital sector, with the adoption of new texts such as the DMA and the DSA. According to Professors Jean-Christophe Roda and Marie-Anne Frison Roche, such regulatory law reflects "The evolution of a multi-tasking competition law [...] that pursues very multiple goals in order

[74] N. Dunne, *art. cit.*, p.249.
[75] See *Supra*, §15.
[76] J.C. Roda et M.A. Frison Roche, *art. cit.*, §38, free translation « la forte tentation d'affecter au droit de la concurrence une multiplicité de buts, divers et variés ».
[77] K. Stylianou et M. Iacovides, "The goals of EU competition law: a comprehensive empirical investigation", Legal Studies, 2022, p.647.

to hold platforms to account."[78]. In this respect, the same author refers to "the strong temptation to assign to competition law a multiplicity of diverse and varied aims"[79].

32. Implications for the distinction between competition law and regulatory law - As mentioned above, the specific objectives of competition law and regulatory law make it possible to draw a clear distinction between the two sets of rules[80]. The objectives of regulatory law appear broader, taking into account a diversity of interests and values specific to the sector in question.

Thus, the extension of the objectives of competition law can alter the distinction previously established.

33. The definition of regulatory law - There are many definitions of regulatory law, but for the purposes of this study, it will be defined as the body of rules designed to build a competitive market and a balance between competition and other specific interests, in sectors such as audiovisual communication, which for the most part represent former state monopolies, by means of essentially *ex ante* instruments.

This definition distinguishes competition law from regulatory law, particularly in the audiovisual communications sector. These two sets of rules coexist in this sector, and it would seem necessary to apply them concurrently.

[78] J.C. Roda et M.A. Frison Roche, *art. cit.*, §39, free translation, « L'évolution d'un droit de la concurrence multi-tâches […] qui poursuit de très multiples buts afin de demander des comptes aux plateformes ».
[79] *Ibid*., free translation, « la forte tentation d'affecter au droit de la concurrence une multiplicité de buts, divers et variés ».
[80] See *Supra,* Part. 1 – Chapter 1 – Section 1.

Chapter 2. The need for coexistence between competition law and regulatory law in the audiovisual communication sector

34. A mutual complementarity – The need for these two sets of rules to coexist can be examined in the light of the contributions of sectoral regulatory law (Section 1) and competition law (Section 2).

Section 1. Sectoral regulatory law in support of competition law

35. A lasting necessity – According to its primary objectives, sectoral regulatory law supports competition law at the stage of liberalization of the audiovisual communication sector (I). However, this need does not seem to have diminished over time (II).

I. Regulatory law, essential to the process of liberalizing the audiovisual communication sector

36. Regulatory law meets the challenges of liberalization – Sectoral regulatory law ensures gradual liberalization of the sector (A) while building the market structure (B).

A. Regulatory law allowing a gradual liberalization

37. The gradual emergence of private initiative - The primary purpose of regulatory law is to accompany the gradual opening up of the audiovisual communications sector to competition. Indeed, such a transformation implies numerous changes in a market whose stability was ensured by the monopolistic structure. Sudden liberalization could thus have led to the creation of structural imbalances.

In this way, market logic is gradually being introduced into the sector[81]. Advertising-based financing first appeared in 1968. The public service was then broken up with the creation of several television channels, some of which have private-law status. In the field of radio, the law of November 9, 1981[82] authorizes private radio stations under certain conditions.

[81] A.M. Oliva, *op. cit.*, p.56.
[82] Loi n°81-994 du 9 novembre 1981 portant dérogation au monopole d'état de la radiodiffusion (radios privées locales).

Full liberalization of the audiovisual communication sector only came in 1982, the result of a "slow movement of liberalization and privatization"[83].

38. An evolving framework – This same law provides a strict framework for the sector, which will also evolve. This evolution of the legislative framework in line with the market's level of maturity is also made possible by regulatory law, and would not have been possible if the sector had been governed solely by competition law.

In the case of over-the-air general-interest television services, the 1982 law provides for a public service concession system without prior competitive bidding[84]. This system was modified by the law of September 30, 1986[85], which provides for a tendering procedure.

The possibility of changing the legislative framework thus makes it possible to gradually structure the audiovisual communication sector. Regulatory law also provides specific instruments for shaping the structure of the market.

B. Specific regulatory instruments allowing the shaping of the market structure

39. *Ex ante* frequencies allocation – Since the liberalization of the audiovisual communications sector in 1982, a mechanism for the allocation of frequencies by the State has been in place[86]. As these are scarce resources, it is unthinkable not to exercise upstream control over their allocation. The aim of such control is to structure the market by designating the new operators with access to these resources.

This structuring would not have been possible using competition law alone, which intervenes *ex post* to punish anti-competitive behavior by companies.

40. *Ex ante* determination of public service obligations – Similarly, radio and television broadcasting are public services, serving the general interest. This mission implies taking into account several objectives, including the independence and pluralism of information, the educational needs of the population, and social communication[87].

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[83] D. Truchet, « Communication audiovisuelle – Régulation et secteur public », *JCI. Administratif*, Fasc. 273-10, §3, free translation, « lent mouvement de libéralisation et de privatisation ».
[84] Loi n° 82-652 (note n°21), art. 79.
[85] Loi Léotard (Note n°8)
[86] Loi n° 82-652 (note n°21), art. 7.
[87] Loi Léotard, (note n°8), art. 5.

In order to provide such a service, it is necessary to define in advance the related obligations in the specifications of the operator entrusted with this mission[88]. The regulatory authority then monitors compliance with these obligations on an ongoing basis[89]. The task of the regulator is also to specify the methods of financing this public service, in particular by determining the annual royalty rate[90].

41. Content control – Finally, the existence of sector-specific regulatory law is justified by the need to control the content broadcast by the audiovisual media. Thus, the regulatory authority ensures "respect for pluralism and balance in programming; respect for human dignity and equality between men and women"[91].

The presence of regulatory law accompanying the liberalization of a sector is therefore justified by the fragility of its structure due to its profound transformation. However, regulatory laws often persist. That is the case in the audiovisual communication sector.

II. The continuing usefulness of regulatory law following the liberalization of the audiovisual communication sector

42. Various justifications – The justifications for the persistence of regulatory law differ for classic technologies (A) and new technologies (B).

A. The need for ongoing regulatory law of conventional technologies

43. The continuing need for *ex ante* allocation of hertzian frequencies – The current version of the law of September 30, 1986 still provides for a specific system of frequencies allocation[92]. Indeed, the scarcity of these resources will not disappear with the liberalization of the market. This allocation is entrusted to ARCOM. A one-off regulatory intervention would mean allocating these frequencies upstream, with no further intervention thereafter. In this hypothesis, regulatory law would build closed market, leaving no new operator to penetrate it.

[88] *Ibid*., art. 32.
[89] *Ibid*., art. 13.
[90] *Ibid*., art. 61 à L69.
[91] *Ibid*., art. 14, free translation, « au respect du pluralisme et de l'équilibre dans les programmes ; au respect de la personne humaine et de sa dignité, de l'égalité entre les hommes et les femmes ».
[92] *Ibid*., art. 21 et 22.

The use of frequencies by audiovisual services is on the decline, thanks to the emergence of new channels. However, traditional channels are still present, and require *ex ante* regulatory law.

44. The continuing need to provide a public service – The the importance of audiovisual media in contemporary society have not disappeared with the liberalization of the sector. Thus, the obligations described above[93] must always be completed by a designated operator. These obligations evolved with the arrival of new challenges, such as the need for quality and innovation[94].

The operator in charge of the public service is therefore assigned a set of specifications laid down by decree and submitted to ARCOM for approval[95]. The regulatory authority is also responsible for monitoring public service obligations[96].

45. The continuing need for content control – Like public service, the control of content broadcast by the audiovisual media is still a topical issue, and still requires the intervention of the regulator[97]. In order to specify the obligations of audiovisual media services not subject to public service obligations, ARCOM also concludes agreements with these services[98]. In fact, according to many authors, they act as market access authorizations[99].

Thus, the specific features of the audiovisual communication sector justify the long-term presence of regulatory law. Other arguments can also be put forward concerning the need to adapt this framework to new technologies.

B. The need for ongoing regulatory law of new technologies

46. The extension of the scope of audiovisual regulatory law to on-demand audiovisual media services – An on-demand audiovisual media services is defined as a "service of communication to the public by electronic means allowing the viewing of programs at the time chosen by the user and on his request, from a catalog of programs whose selection and

[93] See *Supra*, §40.
[94] Loi Léotard (note n°8), art. 43-11.
[95] *Ibid*., art. 48.
[96] *Ibid*, art. 48-1.
[97] *Ibid*., art. 14.
[98] *Ibid*., art. 16-1.
[99] C. Broyelle, « La régulation audiovisuelle, une police administrative honteuse ? », *AJDA, 2003,* p.486.

organization are controlled by the publisher of this service"[100]. Unlike television, these are non-linear services, allowing the user to choose the timing of program viewing. Thanks to new broadcasting channels, these services are very important in the French and global audiovisual landscape. These include Netflix, Amazon Prime and Salto. However, until 2010, they do not fall within the scope of audiovisual regulatory law, and are therefore not subject to the same obligations as traditional operators.

The 2010 « Audiovisual Media Services Directive »[101] remedies this situation by including these services within the scope of regulatory law. In this regard, audiovisual content on these platforms must not be secondary content. In particular, video must not be an accessory to an article[102].

As a result, these new services may be subject to the financial contribution obligations set out in the French legislative framework[103]. Their access to the market is also subject to the conclusion of an agreement with ARCOM[104].

47. The extension of the scope of audiovisual regulatory law to video-sharing platforms – The French and global audiovisual landscape has also seen the advent of video-sharing platforms. Such a platform is defined as a service "provided by means of an electronic communications network", primarily providing "programs or videos created by the user"[105]. Video-sharing platforms are in charge of organizing the content posted by users, but have no editorial responsibility over it[106]. These platforms include Youtube and Dailymotion. They are included in the scope of audiovisual regulatory law by a 2018 revision of the Audiovisual Media Services Directive.[107].

[100] Loi Léotard (note n°8), art. 2 al. 6, « service de communication au public par voie électronique permettant le visionnage de programmes au moment choisi par l'utilisateur et sur sa demande, à partir d'un catalogue de programmes dont la sélection et l'organisation sont contrôlées par l'éditeur de ce service ».
[101] Directive 2010/13/EU of the european parliament and of the council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)
[102] A.M. Oliva, « Audiovisuel », *Répertoire IP/IT et Communication*, janv. 2020, §104.
[103] C. Broyelle, « Les nouvelles frontières de la régulation audiovisuelle », *Legipresse, 2022*, p.119.
[104] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), art. Art 33-3 et 43-7.
[105] Loi Léotard (note n°8), art. 2 al. 7, free translation « fourni au moyen d'un réseau de communications électroniques », fournissant de manière principale « des programmes ou des vidéos créées par l'utilisateur ».
[106] A.M. Oliva, *art. cit.*, §107.
[107] Directive 2010/13/EU (note n°100).

However, video-sharing platforms are subject to less stringent regulatory law than traditional services, due to their particular nature. Moreover, their obligations are implemented through a co-regulatory model[108].

The new audiovisual services thus partly justify the existence and continued relevance of sector-specific regulatory law. However, these rules are always complemented by competition law.

Section 2. Competition law in support of sectoral regulatory law

48. The application of competition law in regulated – In order to support sectoral regulatory law, competition law must first be applied to the regulated sectors (I). Then, it is necessary to verify the usefulness of competition law in addition to sectoral regulatory law (II).

I. The submission of regulated sectors to competition law

49. Comparative approach – The principle that regulated sectors are subject to competition law has been affirmed by the European Union (A), whose approach differs from that of American courts (B).

A. European affirmation of the submission of regulated to competition law

50. Affirmation of the principle in the electronic communications sector - The general principle that regulated sectors are subject to competition law was first asserted by the European competition authorities in the electronic communications sector. In its 2003 *Deutsche Telekom* decision, the European Commission relied on the established case of the CJEU to assert that the applicability of competition rules is not precluded by the mere existence of sector-specific regulatory law[109].

The European Commission does, however, have one reservation, namely that the sector-specific rules in question must leave "companies subject to them the possibility of autonomous behavior likely to prevent, restrict or distort competition"[110]. In the absence of autonomous behavior on

[108] C. Broyelle, *art. cit.*
[109] EC., 21 may 2003, COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, pt.54.
[110] *Ibid.*, free translation « aux entreprises qui y sont soumises la possibilité d'un comportement autonome susceptible d'empêcher, de restreindre ou de fausser la concurrence ».

the part of the companies concerned, the practice in question would be imputed to the State, which would be held liable.

51. Confirmation of the principle in the audiovisual communication sector – In the audiovisual communications sector, regulatory law is no obstacle to the application of competition law either. The *Léotard* law even obliges ARCOM to refer to the French competition authority if it has knowledge of facts likely to constitute an anti-competitive infringement[111].

However, the Competition Authority must take account of the rules specific to the sector in which the practice is taking place, which it must assess[112].

However, this principle of subjecting regulated sectors to competition rules does not seem to be shared unanimously by all legal systems.

B. The American trend towards exemption for regulated sectors

52. The Trinko case - In this respect, the United States has adopted a different solution from the European Union, notably through the Trinko decision[113]. This concerns the mobile telephony sector, in which the practices of Verizon, the telephone operator, are at issue. However, this company is subject to upstream sectoral regulatory law, and more specifically to the Telecomunication Act[114]. While this decision focuses on the telecoms sector, the Supreme Court also took a general view of the relationship between competition law and sector regulatory law.

In this ruling, the Supreme Court is reluctant to apply the former rules in regulated sectors. It begins by recalling the distinct objectives of these two bodies of rules: regulatory law adopts a voluntarist logic, aiming to eliminate monopolies, while competition law prohibits illicit attempts at monopolization[115]. The Supreme Court drew the consequences of this observation by affirming that it is only implausible that the application of competition law would be useful in a regulated sector[116]. The American court even goes so far as to expose the risks of such an application, as the technical specificities of the sector in question could result in

[111] Loi Léotard, art. 17-1.
[112] D. Truchet, *art. cit.*, §94.
[113] U.S. Supreme court, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398 (2003).
[114] Public Law 104 - 104 - Telecommunications Act of 1996.
[115] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, (note n°112), p.415.
[116] *Ibid.*, p.399.

misinterpretation on the part of the competition authorities[117]. The solution adopted therefore appears to be opposed to that of the European Union, which also recognizes the distinct objectives of the two sets of rules, but does not draw the same conclusions from them.

53. An attenuated distinction with European jurisprudence - However, in the Trinko decision, the Supreme Court did not clearly and unconditionally prohibit the application of competition rules to regulated sectors. Thus, according to Sabine Naugès, this case law has only "curbed attempts by competition law to interfere in sectoral regulatory law"[118]. The Supreme Court thus simply enshrined the autonomy of the two bodies of rules, rejecting the possibility of condemning anti-competitive behavior solely on the basis of a breach of an obligation deriving from sectoral regulatory law[119]. In practice, therefore, the Trinko case law would not result in a radically different solution from that adopted by the European Union, which reserves the application of competition law to the existence of an anti-competitive infringement.

This autonomous application can be justified in a number of ways, particularly in the audiovisual communication sector.

II. Justifications for applying competition law to regulated sectors

54. The sources of these justifications – The justifications for applying competition law to regulated sectors are rooted in the specific features of competition law (A), but also in the particularities of the audiovisual communication sector (B).

A. The benefits of applying competition law to regulated sectors

55. Complementarity between competition law and sectoral regulatory law - Many authors advocate that the coexistence of competition law and sectoral regulatory law results in genuine complementarity[120]. Such complementarity can be explained in several ways.

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[117] *Ibid.*

[118] S. Naugès, « L'articulation entre droit commun de la concurrence et droit de la régulation sectorielle », *AJDA* 2007, p.672, free translation « freiné les tentatives d'ingérence du droit comment de la concurrence dans la régulation sectorielle ».

[119] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, (note n°112) p.399, "But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards".

[120] P. Choné, *art. cit.*

56. Competition authorities' understanding of competition issues - Generally speaking, through their jurisprudence, the competition authorities have developed real expertise in anti-competitive practices and their harmful effects on the market.

Moreover, the competition authorities' broad scope of intervention enables them to take into account the cross-effects of the practices in question on related markets.

57. Regulatory authorities plagued by information asymmetry – Because of its *ex-ante* intervention logic, the regulatory authority suffers from an asymmetry of information, inherent in any *a priori* intervention. Such a timeframe means that the regulator is unable to assess market conditions in real time. Numerous uncertainties remain regarding its operation[121].

On the contrary, at the a posteriori intervention stage, competition authorities are able to assess the market and any recent changes it may have undergone.

58. The deterrent effect of competition law - Compared with sector-based regulatory law, which often follows an incentive-based logic, competition law also benefits from "an unequalled dissuasive effect"[122].

On the other hand, regulatory law is more a matter of supporting the operator, so that sanctions remain "exceptional", if not "pathological"[123].

59. The risk of regulator capture - Some authors then highlight the risk of regulator capture, which refers to the potential loss of independence of the regulator due to the influence exerted by companies operating within the sector it regulates[124]. The proximity between the regulator and these same operators could make the former "more vulnerable to the risk of capture"[125]. Conversely, the occasional intervention of the competition authorities could keep them away from such a risk[126].

In addition to the complementarities inherent in the way competition law and sectoral regulatory law operate, some of the advantages of their coexistence are linked to the specific features of the audiovisual communication sector.

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[121] M. Bacache-Beauvallet et A. Perrot, « Régulation économique : quels secteurs réguler et comment ? », *Les notes du conseil d'analyse économique,* nov. 2017, n°44, p.8.
[122] F. Fontaine, « Régulation et droit de la concurrence. Regards croisés sur la décision Deutsche Telekom. », *Revue Lamy Droit de l'Immatériel*, n°41, 1er août 2008, free translation « d'un effet dissuasif inégalable ».
[123] *Ibid*., free translation, « exceptionnelle », voire « pathologique ».
[124] *Ibid.* ; A. Perrot, *art. cit.*
[125] F. Fontaine, *art. cit.*
[126] *Ibid*., « plus vulnérable au risque de capture ».

B. The benefits of applying competition law to the audiovisual communication sector

60. Fear of anti-competitive behavior due to the structure of audiovisual communications companies – One of the distinctive features of the audiovisual communications sector is the emergence of large-scale players. Professor Emmanuel Dreyer points to the "investments required to operate a radio or television service", which can only be made "by major companies or groups of companies"[127].

The same author establishes the consequence that the fear of anti-competitive behavior likely to undermine the diversity of supply is greater.

61. The fear of anti-competitive behavior due to the importance of innovation in the audiovisual communication sector – The audiovisual communication sector is in the throes of major innovations, which have prompted sector regulatory law to adapt itself.

This trend towards innovation also has repercussions for the application of competition law. In this respect, Anne-Marie Oliva highlights "competition from powerful American groups, followed by the development of new broadcasting techniques". According to the same author, these trends are prompting companies "to develop reinforcement strategies that require control on the basis of competition rules."[128].

62. Conclusion of the part – In spite of today's tempering of the distinction between competition law and regulatory law, certain differentiating criteria can still be highlighted. The existence of these two bodies of rules and their concomitant application in the audiovisual communication sector are clear. If the latter is necessary, it also implies a coherent articulation between the interventions of the different authorities.

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[127] E. Dreyer, *Droit de la communication*, Lexisnexis, 2e édition, 2022, §425, free translation « investissements requis pour l'exploitation d'un service de radio ou de télévision », qui ne peuvent être consentis que « par des entreprises, ou groupes d'entreprises, importants ».

[128] A.M. Oliva, *art. cit.*, §41, free translation, « la concurrence de puissants groupes américains, puis le développement de nouvelles techniques de diffusion », « à développer des stratégies de renforcement qui nécessitent un contrôle sur le fondement des règles de concurrence. »

Part 2. The search for a balance between competition law and regulatory law in the audiovisual communication sector

63. Recurring interventions by competition law – It has already been explained that the application of competition law is necessary in the audiovisual communications sector[129]. Competition law's interventions focuse in particular on merger control (Chapter 1) and the assessment of marketing conditions for television broadcasting rights (Chapter 2).

Chapter 1. The dual nature of merger control

64. The coexistence of two sets of merger rules - Merger control is a particularly revealing example of the interplay between competition law and sector regulatory law. Indeed, the unsuitability of the former for the audiovisual communication sector (Section 1) has led to the emergence of specific rules implemented by regulatory law (Section 2).

Section 1. The unsuitability of ordinary merger control for the audiovisual communications sector

65. The importance of media pluralism – Among the various interests protected by audiovisual media regulatory law, the objective of pluralism is of particular importance. It is mentioned in the very first article of the law of September 30, 1986[130]. However, doubts have arisen as to whether ordinary competition law takes this objective into account (I). This has led to a European will to adopt specific rules for the sector in question (II).

I. Insufficient consideration of media pluralism

66. The objectives of merger control – Common competition law, through merger control, is not totally impervious to media pluralism (A). However, this objective is not systematically taken into account (B).

[129] See *Supra*, §48-62.
[130] Loi Léotard (note n°8).

A. The incursion of media pluralism into ordinary merger control

67. Pluralism through the preservation of competition – Common competition law provides for *ex ante* merger control, implemented through a system of prior notification requiring companies to declare their merger plans to the European Commission or the relevant national competition authority. These are then analyzed and either prohibited, authorized or made subject to certain commitments on the part of the companies concerned. Such control makes it possible to control the players present on a market, as well as their size. In this way, the competition authorities act to preserve the competitive structure.

This objective of preserving competition therefore implies controlling the plurality of offers on the market. Some authors have argued that joint merger control necessarily helps to protect media pluralism[131].

68. Pluralism through the specific actions of competition authorities – Nor is competition law impervious to this objective of pluralism. Professor Emmanuel Dreyer points out that "the competition authority is not content with a purely economic assessment of the situations examined"[132]. The author goes on to assert that the Authority "integrates cultural concerns" including the pluralism of currents of thought and the diversity of players[133].

For example, the authority sometimes takes into account "the effects of the proposed transaction on the pluralism of information", or proposes commitments to "guarantee access to both content and content"[134].

When it authorized the creation of the Salto video-on-demand service, the Authority prohibited the coupled purchase of broadcasting rights[135]. Indeed, this practice could have an effect on competitors and consumers alike. With regard to the merger of TF1 and M6, the ADLC emphasized the "unavoidable nature" of the new structure, which would enable it to raise prices[136].

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[131] A.M. Oliva, *art. cit.*, §45.
[132] E. Dreyer, op. cit., §428, free translation, « l'Autorité de la concurrence ne se contente pas d'une appréciation purement économique des situations examinées ».
[133] Ibid., free translation, « intègre des préoccupations culturelles ».
[134] A.M. Oliva, *art. cit.*, §49, free translation, « les effets de l'opération envisagée sur le pluralisme de l'information », « garantir l'accès tant aux contenants qu'aux contenus ».
[135] Décision 19-DCC-157 du 12 août 2019 relative à la création d'une entreprise commune par les sociétés France Télévisions, TF1 et Métropole Télévision.
[136] ADLC, « TF1/M6 : l'Autorité de la concurrence prend acte de la décision de Bouygues de retirer son projet d'acquisition », Press realease, 16 sept. 2022, free translation, « caractère incontournable ».

According to these findings, the objective of media pluralism could be achieved by competition law alone. However, certain inadequacies may appear.

B. Incomplete consideration of media pluralism

69. Distinct objectives – Common merger law aims above all to maintain competition on the market. Although it can sometimes work in the direction of pluralism, the two objectives are not the same.

Indeed, competition authorities do not always take pluralism issues into account[137]. At first glance, the logics of preserving competition and media pluralism appear to be linked, but this is not always the case. Indeed, analyzing the structure of competition is not necessarily the same as looking at cultural pluralism and the content broadcast. The CSA thus specifies that "an operator may contravene competition law while offering a pluralistic range of programs to the viewer. Conversely, perfect competition between operators will not necessarily guarantee a pluralistic range of programs"[138].

70. The strictly economic analysis of competition authorities – The criteria for analyzing a merger are specific to ordinary competition law, and therefore do not take into account the specific features of the audiovisual communications sector.

Criticism has thus been levelled at competition authorities for basing themselves on a "strictly economic, competitive logic [...] without introducing criteria of a cultural nature, without reflecting on pluralism"[139].

71. Segmentation of relevant markets – When analyzing a merger, the competition authorities' reason in terms of relevant markets, in order to assess the position of the new entity would have on that market.

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[137] A.M. Oliva, art. cit., §49.

[138] CSA, rapport, août 1997, « La télévision à péage en France, les risques de position dominante », p. 90, « un opérateur pourra contrevenir au droit de la concurrence tout en offrant une offre pluraliste de programmes au téléspectateur. À l'inverse, une parfaite concurrence entre opérateurs ne garantira pas nécessairement une offre pluraliste de programmes ».

[139] A.M. Oliva, *art. cit.*, §49, « strictement économique, une logique concurrentielle […] sans introduire de critères en quelque sorte d'ordre culturel, sans mener une réflexion autour du pluralisme ».

According to the recent report by the Inspectorate General of Cultural Affairs, such reasoning does not seem appropriate for examining pluralism.[140]. This means taking into account the diversity of offers, regardless of whether or not they belong to a particular market.

72. A merger law ill-suited to the audiovisual communication sector – Based on these findings, several European reports have highlighted the inadequacies of ordinary merger law in governing the audiovisual communications sector alone[141]. As a result, several reform projects have been launched.

II. The European will to create specific rules for the audiovisual communication sector

73. European impetus - Plans to reform merger control were initiated at European level (A). However, they were abandoned to leave room for the freedom of Member States (B).

A. The failures of European initiatives

74. The 1992 Green Paper, the first stage in the Community's thinking process - The Green Paper "Pluralism and media concentration in the internal market. Assessing the need for Community action"[142] was the first step in this thinking process.

At the time, the Economic and Social Committee issued an opinion on the subject, stating that "the need for EU media legislation can no longer be disputed"[143]. However, this first attempt was unsuccessful.

75. High-level reflection group on audiovisual policy – Reflections continued in 1998, leading to similar conclusions. Indeed, the high-level reflection group on audiovisual policy asserted that "ideally, this issue should be dealt with at European level, but the practical difficulties to be overcome are enormous"[144]. The difficulty lies in the impossibility of reaching

[140] A. Requin et *alii*, « La concentration dans le secteur des médias à l'ère numérique : de la réglementation à la régulation », mars 2022, p.34.
[141] A.M. Oliva, *art. cit.*, §49.
[142] COM [1992] 480 final, 23 déc. 1992.
[143] Economic and Social Committee, "Opinion on the communication from the Commission to the Council and the European Parliament follow-up to the consultation process relating to the Green Paper on pluralism and media concentration in the internal market", 95/C 110/13, §4.1.
[144] A.M. Oliva, *art. cit.*, §46, free translation, « idéalement, cette question devrait être traitée au niveau européen mais les difficultés pratiques à surmonter sont énormes ».

agreement between the various member states, which often already have their own mechanisms in place.

The aim of the European authorities is to "define the principles to be respected by both States and operators"[145].

76. Charter of Fundamental Rights of the European Union – Even so, the principle of media pluralism has been accepted in primary EU law. The Charter of Fundamental Rights of the European Union enshrines respect for media pluralism[146].

Despite all these considerations, the European Union has failed to adopt specific merger regulations for the audiovisual communications sector. And yet, such regulation is necessary to preserve media pluralism, a principle enshrined by the Union. The Member States therefore find themselves in charge of establishing such specific regulations.

B. A competence left to member states

77. The provisions of regulation 139/2004– As it does not contain specific rules for the audiovisual communication sector, Regulation 139/2004 leaves it up to the Member States to adopt "appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law" [147].

This notion of legitimate interest could then relate to media pluralism[148], and invite member states to adopt specific regulatory law in this area.

This freedom left to national legislations does not seem compatible with the aforementioned need for European regulation. Indeed, the absence of a European framework implies national divergences and a potential lack of coherence. Moreover, technological developments in the audiovisual communications sector have led to larger-scale operations in the market, which could involve European control. However, the European authorities have no specific framework for assessing the particular requirements of this sector.

[145] *Ibid.*, free translation, « définir des principes que doivent respecter et les Etats et les opérateurs ».
[146] Charter of fundamental rights of the European union, 2012/C 326/02, art. 11 §2.
[147] Council regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, art. 21-4.
[148] A.M. Oliva, *art. cit.*, §50.

78. National legislations – Before the revision of Regulation 139/2004, certain Member States, such as France, already had so-called "anti-concentration" rules specific to the audiovisual communication sector.

However, according to some authors, these rules are ill-suited to the current context. Professor Emmanuel Dreyer highlights the contrast between French rules and the emergence of many "other ways of exchanging thoughts and opinions"[149]. Anne-Marie Oliva takes a general view of the different national legislations in the member states. She points out that the latter are outdated "at a time when audiovisual content providers are multiplying and diversifying"[150]. Thus, we need to look at the legal framework specific to French sectoral regulatory law.

Section 2. Sector-specific regulatory law in support of general competition law

79. The contours of French merger control rules for the audiovisual media – The *Léotard* law[151] provides very precise rules to anticipate mergers in the audiovisual communications sector (I). However, these rules are limited to traditional radio and television services.This specialized system raises the question of its relationship with competition law (II).

I. France's anti-concentration measures for audiovisual media

80. Rules to preserve pluralism – In contrast to ordinary competition law, the special anti-concentration provisions are designed primarily to preserve media pluralism. These measures fall into two categories: firstly, a ceiling on the number of shareholdings (A), and secondly, a ceiling on the number of authorizations (B).

A. Rules for capping equity investments

81. Concentration of capital within a single television broadcasting company - Article 39 of the law of September 30, 1986 stipulates that a natural person or legal entity "may not hold, directly or indirectly, more than 49% of the capital or voting rights of a company holding an

[149] E. Dreyer, *op. cit.*, §420., free translation, « autres façons d'échanger des pensées et des opinions ».
[150] A.M. Oliva, *art. cit.*, §51, free translation, « à l'heure de la multiplication et de la diversification des fournisseurs de contenus audiovisuels ».
[151] Loi Léotard (note n°8).

authorization for a national terrestrial television service"[152]. However, this first rule only applies to services whose average audience exceeds 8% of the total audience for television services.

The purpose of such a rule is to preserve the diversity of the capital of companies holding television broadcasting authorizations. Indeed, such diversity would be conducive to "diversifying sources of information and thus guaranteeing the pluralism of currents of thought and opinion"[153].

Originally, this ceiling was set at 25%. Raising the threshold ensures a balance between the preservation of pluralism and the economic development of these companies, which can be favored by a high concentration of capital. Indeed, pluralism also implies the sound economic health of television companies, so that they can withstand international competition[154].

ARCOM is responsible for monitoring compliance with this first provision. It thus has the power to issue a formal notice to any player failing to comply with the above provisions.

82. Concentration of capital between television broadcasting companies - Article 39 of the law of September 30, 1986 goes on to prohibit a legal or natural person from holding "more than 15% of the capital or voting rights of a company holding an authorization for a national terrestrial television service in analog mode", if it simultaneously holds "more than 15% of the capital or voting rights of another company holding such an authorization."[155].

Here again, such a provision is justified by the link previously established between capital diversity and content diversity[156]. The thresholds here are lower than those for capital concentration within a single company. Indeed, media pluralism is primarily ensured by a diversity of operators. Cross-shareholdings between different companies could significantly reduce this pluralism.

These initial rules on media ownership are therefore based on very precise criteria, with a view to preserving media pluralism. They demonstrate the usefulness of specific rules superimposed

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[152] *Ibid.*, free translation « ne peut détenir, directement ou indirectement, plus de 49 % du capital ou des droits de vote d'une société titulaire d'une autorisation relative à un service national de télévision diffusé par voie hertzienne terrestre ».
[153] E. Dreyer, *op. cit.*, §417, free translation, « une diversification des sources d'information et permettre ainsi de garantir le pluralisme des courant de pensée et d'opinion ».
[154] *Ibid.*
[155] Loi Léotard (note n°8), free translation, « plus de 15 % du capital ou des droits de vote d'une société titulaire d'une autorisation relative à un service national de télévision par voie hertzienne terrestre en mode analogique », « plus de 15 % du capital ou des droits de vote d'une autre société titulaire d'une telle autorisation. ».
[156] See *Supra*, §81.

on ordinary merger law. Moreover, they are supplemented by another set of rules, concerning operating licenses for digital television and radio services issued by ARCOM.

B. Rules for capping cumulative authorizations

83. Rules governing television and radio service – Unlike the former, the rules developed here apply equally to television and radio services.

84. Television service licenses - Article 41 of the law of September 30, 1986 prohibits an individual or legal entity from holding "two authorizations, each for a national terrestrial television service"[157]. However, a maximum of seven such authorizations is allowed for programs broadcast by digital means "when these services or programs are produced by separate companies"[158].

The proposed merger between TF1 and M6 does not meet these criteria. For example, such an operation would have required the sale of certain channels[159]. This question will not arise, as the project has been abandoned in response to competition concerns raised by the French Competition Authority[160].

With regard to the licensing of television services, the Act of September 30, 1986 also lays down specific rules for regional and local services[161].

Such provisions are also subject to ARCOM control. This is mainly *ex ante*, when authorizations are issued. However, ARCOM also plays an *ex post* role, particularly in the event of a merger between two previously independent entities.

85. Radio service operating licences – Article 41 paragraph 1 of the law of September 30 1986 lays down rules specific to radio services. These adopt a different logic from television services, notably by assessing the number of inhabitants in the areas served by the networks in question.

Article 41 provides that a natural or legal person may not, "on the basis of authorizations for the use of frequencies held by it for the broadcasting of one or more radio services [...] have de

[157] Loi Léotard (note n°8), free translation, « deux autorisations relatives chacune à un service national de télévision diffusé par voie hertzienne terrestre ».
[158] *Ibid.*, free translation, « lorsque ces services ou programmes sont édités par des sociétés distinctes ».
[159] A.M. Oliva, *op. cit.*, p.91.
[160] ADLC, « TF1/M6 : l'Autorité de la concurrence prend acte de la décision de Bouygues de retirer son projet d'acquisition », Press release, 16 sept. 2022.
[161] Loi Léotard (note n°8), art. 41-2-1.

jure or de facto control of several networks unless the sum of the populations counted in the areas served by these different networks does not exceed 160 million inhabitants"[162].

86. Assessment of anti-concentration system – The law of September 30, 1986 lays down very precise criteria specific to the audiovisual communication sector, both in terms of capital ceilings and the rules governing the accumulation of authorizations.

However, the latter have been criticized for their complexity and readability[163]. Moreover, they appear obsolete in some respects[164]. However, mergers in the audiovisual media are also governed by common competition law.

II. The relationship between special merger law and ordinary competition law

87. Complementary links – A coherent articulation between two bodies of rules not only limits the risk of contradictory decisions, but also reveals their complementarity. This articulation results first and foremost from the existing dialogue between the Competition Authority and the regulatory authority (A). In addition, ordinary competition law covers more services, filling the gaps left by special merger law (B).

A. Dialogue between authorities

88. Initial differences between the authorities – Joint merger control was introduced in France with the law of July 19, 1977[165], replaced a few years later by the Order of December 1, 1986[166]. However, these texts preserve the regulator's competence in merger control.

[162] Loi Léotard (note n°8), art. 41, free translation, « sur le fondement d'autorisations relatives à l'usage de fréquences dont elle est titulaire pour la diffusion d'un ou de plusieurs services de radio […] disposer en droit ou en fait de plusieurs réseaux que dans la mesure où la somme des populations recensées dans les zones desservies par ces différents réseaux n'excède pas 160 millions d'habitants. ».
[163] E. Derieux, *Droit des médias. Droit français, européen et international*, LGDJ, 8e édition, 2018, §707.
[164] E. Dreyer, *op. cit.*, §420.
[165] Loi n°77-806 du 19 juillet 1977 relative au contrôle de la concentration économique et à la répression des ententes illicites et des abus de position dominante.
[166] Ordonnance n° 86-1243 du 1 décembre 1986 relative à la liberté des prix et de la concurrence.

In 1999 the French government proposed to "put an end to the exclusion of the audiovisual communications sector from the jurisdiction of the competition authorities with regard to merger control"[167]. This major change has given rise to some debate.

With regard to dialogue between the two authorities, the government proposes firstly to oblige the Conseil de la concurrence to forward to the CSA its notification of grievances and the reports drawn up concerning merger cases[168]. This rule was criticized by the Conseil, which stated that the CSA's intervention "at a later stage of the procedure is not desirable because of the confusion and complications [...] it is likely to entail"[169].

The dialogue between the two authorities may therefore have evolved over time, with these changes resulting in the current structure of the relationship.

89. Referral to the competition authority by the sectoral regulator – Article 17 of the law of September 30, 1986 empowers ARCOM to refer matters to "the administrative or judicial authorities competent to deal with restrictive competition practices and economic concentrations"[170]. When it becomes aware of a transaction that could be considered a merger under competition law, it can refer the matter to French competition authority.

However, such referral is only an option open to the regulatory authority. This differs from the case of anti-competitive practices. In the latter case, the regulatory authority is obliged to refer to the competition authority the facts of which it is aware[171].

90. The French Competition Authority's request for an opinion from the sector regulator – The French Competition Authority is subject to certain obligations when analyzing a merger in the audiovisual media sector. Article 41-4 of the French law of September 30, 1986 requires it to obtain the opinion of ARCOM in such cases. This obligation does not apply to anti-competitive practices.[172].

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[167] T. Pez, « Régulateurs sectoriels et Autorité de la concurrence », Revue du droit public, n°2, 2014, p.358, §25, free translation, « mettre fin à l'exclusion du secteur de la communication audiovisuelle du champ de compétence des autorités de concurrence en matière de contrôle des concentrations ».

[168] . Genevois, « Les conflits de compétence concernant les autorités administratives indépendantes », *Mélanges Sabourin*, Bruylant, 2001, p. 138.

[169] *Ibid*. p.139, free translation, « à un stade ultérieur de la procédure n'est pas souhaitable en raison des confusions et complications […] qu'elle est susceptible d'entraîner ».

[170] Loi Léotard (note n°8), free translation, « les autorités administratives ou judiciaires compétentes pour connaitre des pratiques restrictives de concurrence et des concentrations économiques ».

[171] *Ibid*., art. 41-4 al 3.

[172] *Ibid*.

According to Professor Thomas Pez, the competition authority is subject to this obligation "only with regard to a limited number of sectoral regulators"[173]. The same author stresses that this obligation is present in sectors where competition is particularly developed. Another particularity of the audiovisual communications sector is that it has specific rules governing mergers. This obligation can be explained by the need to coordinate the two sets of rules. This articulation is also reflected in the use of competition law to fill the gaps left by special merger law.

B. Competition law to support the obsolescence of special merger law

91. The obsolescence of special merger law - As explained above, special merger law applies only to traditional, hertzian services[174]. This limited scope does not reflect the reality of the audiovisual communication sector. Indeed, the sector has undergone profound changes in recent years. These changes have been accompanied by an adaptation of regulatory law as a whole. Indeed, the definition of audiovisual communication has been modified to include on-demand audiovisual media services and video-sharing platforms. However, the latter are not services broadcast over the air. They are therefore not subject to the anti-concentration provisions of sectoral regulatory law. This creates inequality between the various regulated services.

Some authors have criticized the lack of updating of these rules. Professor Emmanuel Dreyer underlines the contrast between French rules and the emergence of many "other ways of exchanging thoughts and opinions"[175]. Anne-Marie Oliva points out that these rules are outdated "at a time when audiovisual content providers are multiplying and diversifying"[176].

92. Support from ordinary competition law – In this respect, the application of ordinary competition law in the audiovisual media sector may appear to support sectoral regulatory law.

Competition law, and more specifically common merger control, does not recognize the limits of sector-specific regulatory law. A merger that does not concern traditional terrestrial broadcasting services will nevertheless be notified to and analyzed by the competent competition authority. For example, the competition authority was able to review the creation

[173] T. Pez, *art. cit.*, §19, free translation, « qu'à l'égard d'un nombre restreint de régulateurs sectoriel ».
[174] See *Supra*, §79.
[175] E. Dreyer, *op. cit.*, §420, free translation, « autres façons d'échanger des pensées et des opinions ».
[176] A.M. Oliva, *art. cit.*, §51, free translation, « à l'heure de la multiplication et de la diversification des fournisseurs de contenus audiovisuels ».

of the video-on-demand platform Salto[177]. This control led to authorization for the creation of the platform, subject to certain commitments. In particular, the combined purchase of broadcasting rights was prohibited.

93. Support for new digital regulatory texts – The DMA[178] provides for specific rules relating to merger control. Article 14 stipulates that access controllers must inform the Commission of any proposed merger, even if it does not exceed the thresholds set out in Regulation 139/2004[179].

These are therefore stricter rules imposed on access controllers, companies providing essential platform services, whose designation criteria are set out in Article 3 of the same regulation. Article 2 of the regulation also includes video-sharing platform services among access controllers. The latter represent a new service in the audiovisual communication sector, not subject to the special anti-concentration provisions. The DMA could therefore make it possible to impose special obligations on them, despite the absence of sector-specific regulatory law.

However, these obligations remain very different from those imposed by the regulatory law of audiovisual communication concerning traditional services. It may therefore still be necessary to modernize the specialized merger control rules. Such a review could give rise to new issues concerning the relationship between common merger control and the specific mechanism introduced by the *Léotard* law[180]. However, merger control is not the only field in which competition law intervenes in the audiovisual communication sector.

[177] Décision 19-DCC-157 du 12 août 2019 relative à la création d'une entreprise commune par les sociétés France Télévisions, TF1 et Métropole Télévision.
[178] Regulation (EU) 2022/1925 of the European parliament and of the council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
[179] Regulation No 139/2004 (note n°146).
[180] Loi Léotard (note n°8).

Chapter 2. A differentiated approach to the broadcasting rights market

94. The importance of acquiring broadcasting rights – The acquisition of broadcasting rights is the raw material of television service publishers. Obtaining the "most attractive of them all" is at the heart of their business model[181]. This acquisition is governed indirectly by sectoral regulatory law (Section 1), and more directly by competition law (Section 2).

Section 1. The protection of public information through sectoral regulatory law

95. Components of public information protection – According to Professor Emmanuel Dreyer, the protexction of "quality information" to the public is linked to information that is not only accessible, but also diversified and up to date[182]. The diversified nature of information is controlled by the sector regulator, through specific rules governing the pluralism of the programs and currents of thought represented[183]. In this respect, Union law specific to the audiovisual media guarantees access to events of major importance (I), but also to events of great interest to the public (II).

I. The protection of the access to events of major importance

96. European framework – The 1997 Directive of the European Parliament and of the Council[184] leaves it up to member states to determine which events are concerned (A), before issuing certain obligations (B).

[181] A.M. Oliva, *op. cit.*, p.105, free translation, « plus attractifs d'entre eux ».
[182] E. Dreyer, *op. cit.*, §626, free translation, « une information de qualité ».
[183] Loi Léotard, Art 3-.1.
[184] Directive 97/36/EC of the European parliament and of the council of 30 June 1997.

A. The identification of the events concerned

97. Freedom for member states - The 1997 directive begins by stating that "it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society"[185]. However, it only cites examples of such events, such as the Olympic Games or the World Cup.

The European legislator has not established a general definition of these events. It is up to the Member States to draw up a list of events which they consider to be of major importance for society. This list is then submitted to the Commission.

98. Events identified by French regulatory law – France established the aforementioned list with a decree dated December 22, 2004[186]. These are exclusively sporting events.

However, there is no such limit in European Union law. The restricted nature of the list has surprised some authors. Professor Emmanuel Dreyer describes the nature of these events as a "curious choice"[187].

A process to modernize the system, and more specifically this list, was launched in 2022[188]. However, this reflection does not call into question the purely sporting nature of these events. The modernization envisaged concerns "the diversity of practices and disciplines on display"[189]. This could include sporting events involving people with disabilities[190].

Once this list has been drawn up, we need to determine the obligations to which these different events are subject.

B. Conditions for broadcasting the events concerned

99. Controlled freedom for member states - As regards the conditions for broadcasting events of major importance, the directive does not strictly regulate member states.

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[185] *Ibid.*
[186] Décret n°2004-1392 du 22 décembre 2004 pris pour l'application de l'article 20-2 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.
[187] E. Dreyer, *op. cit.*, §645, free translation, « choix curieux ».
[188] Ministère de la culture, « Modernisation du dispositif de protection de l'accès télévisé aux évènements d'importance majeure », Press release, 28 janv. 2022.
[189] *Ibid.*, free translation, « la diversité des pratiques et des disciplines exposées ».
[190] A.M. Oliva, *op. cit.*, p.107.

Article 3a provides that States may take measures to ensure "that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society"[191]. Indeed, the text stresses that exclusive retransmission could deprive part of the public of free-access viewing of these events.

The European legislator does, however, provide guidance to member states. In particular, they are invited to decide whether the events concerned should be "transmitted wholly or partly live or, [...] transmitted wholly or partly deferred"[192].

In addition, measures taken by Member States are also notified to the Commission for verification of their compatibility with European Union law. These measures are also communicated to other member states.

100. Transposition into French law – The objectives set out in the 1997 directive are transposed into French law by articles 20-2 and 20-3 of the law of September 30, 1986[193].

Article 20-2 stipulates that "Events of major importance may not be broadcast exclusively in such a way as to deprive a significant proportion of the public of the possibility of following them live or deferred on a free-to-air television service"[194]. Control of such a provision is entrusted to the sector regulator, ARCOM.

Decree of December 22, 2004[195] goes on to specify the application of such a provision. In principle, the events concerned must be broadcast live, in full and without restrictions. Certain exceptions are permitted, depending on the specific nature of the events concerned.

These provisions have implications for the broadcasting rights held by a service publisher. If the latter holds exclusive broadcasting rights to such events and publishes restricted-access services, it must offer to transfer these rights to a free-access publisher[196].

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[191] Directive 97/36/EC (note n°183), art. 3a, free translation, « que les organismes de radiodiffusion télévisuelle relevant de sa compétence ne retransmettent pas d'une manière exclusive des événements qu'il juge d'une importance majeure pour la société ».
[192] Directive 97/36/EC of the European parliament and of the council of 30 June 1997, art. 3.
[193] Loi Léotard.
[194] *Ibid*., free translation, « Les événements d'importance majeure ne peuvent être retransmis en exclusivité d'une manière qui aboutit à priver une partie importante du public de la possibilité de les suivre en direct ou en différé sur un service de télévision à accès libre ».
[195] Décret n°2004-1392 du 22 décembre 2004 pris pour l'application de l'article 20-2 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, art. 4.
[196] A.M. Oliva, *op. cit*., p.107.

These rules ensure free access to events declared of major importance by France. However, the 1997 directive also provides for coordinated action between member states. Thus, article 20-2 of the *Léotard* law also stipulates that a television service may not exercise its exclusive rights in such a way as to deprive "a substantial proportion of the public in another Member State [...] of the possibility of following, on a free television service, events declared to be of major importance by that State"[197]. For this reason, the 1997 directive provides for a mechanism for communicating the above-mentioned lists between member states. Such provisions thus apply to French television services providing television retransmissions on the territory of another Member State[198].

There are therefore specific rules governing these sporting events, which influence the broadcasting rights of publishers. However, not all events of importance to society seem to be covered by these provisions. A second set of rules completes them.

II. The protection of the access to events of great public interest

101. The coexistence of two set of rules – The notion of an event of great interest to the public is initially found in a specialized way in the Code du sport (A), then in a generalized way in the *Léotard* law (B).

A. Specialized protection of access to events of great public interest

102. A jurisprudential initiative – On February 6, 1996, the French Supreme Court (*Cour de Cassation*) ruled on the audiovisual exploitation of the French Formula 1 *Grand Prix*[199]. In fact, the national television company France 3 asked the Court of Appeal to enjoin the holder of this right to allow its technical team access to the circuit in order to film extracts from the competition. This request was rejected by the Court of Appeal, on the grounds of the exclusivity enjoyed by the company holding the Grand Prix operating rights.

The French Supreme Court overturned this decision on the grounds of the public's right to information. The Court ruled that this right requires a broadcaster not to "hinder communication

[197] Loi Léotard (note n°8), free translation « une partie importante du public d'un autre Etat membre […] de la possibilité de suivre, sur un service de télévision à accès libre, les évènements déclarés d'importance majeure par cet Etat ».
[198] E. Dreyer, *op. cit.*, §645.
[199] Cour de Cassation, Chambre civile 1, du 6 février 1996, 93-17.670.

of the event to the public, in the form of brief extracts that do not infringe the right of exclusivity"[200].

103. A legislative consecration – This jurisprudential solution was subsequently enshrined in law. Article L333-7 of the French Sports Code stipulates that "the transfer of the right to exploit a sporting event or competition to an electronic public communication service may not hinder the provision of information to the public by other electronic public communication services"[201].

Thus, the Sports Code preserves the possibility of broadcasting brief excerpts free of charge, during news programs. The precise conditions of application of this rule are then determined by the sectoral regulator[202]. The CSA thus specifies, in a deliberation dated October 1, 2014, that the broadcasting of these excerpts must take place "after the first broadcast of the program."[203]. In addition, the identity of the initial distributor must be clearly indicated.

These rules restrict publishers' exclusive broadcasting rights, but remain limited to sporting events. Legislation governing the regulatory law of the audiovisual media then transposed these provisions in a general way.

B. Generalized protection of access to events of great interest to the public

104. European initiative – Once again, the extension of these provisions to general events comes from a European text. This is the so-called SMA directive of 2007[204].

In Recital 39, it states that " those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes". The sporting nature of these events is mentioned,

[200] Free translation, « faire obstacle à la communication de l'événement au public, sous la forme de brefs extraits ne portant pas atteinte au droit d'exclusivité ».
[201] Free translation, « La cession du droit d'exploitation d'une manifestation ou d'une compétition sportive à un service de communication au public par voie électronique ne peut faire obstacle à l'information du public par les autres services de communication au public par voie électronique ».
[202] *Ibid.* §642.
[203] Délibération n° 2014-43 du 1er octobre 2014 relative aux conditions de diffusion de brefs extraits de compétitions sportives et d'événements autres que sportifs d'un grand intérêt pour le public, free translation, « après la première diffusion du programme ».
[204] Directive 2007/65/EC of the European parliament and of the council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

without restricting the scope of these rules. The directive adds that this right of access should be cross-border in nature.

Member States are thus responsible for ensuring this right of access, under fair, reasonable and non-discriminatory conditions.

105. French transposition - Under the Act of March 5, 2009[205], Article 20-4 was introduced into the Léotard law. This article simply states that article L333-7 of the French Sports Code is applicable "to events of any kind that are of great interest to the public"[206].

Conditions defined by the regulator are therefore equally applicable to all events qualified as such.

106. Sectoral regulatory of television broadcasting rights – Sector regulatory law does not therefore intervene directly in television broadcasting rights. It only intervenes indirectly to ensure that the public is kept informed about certain major events, often of a sporting nature. Beyond these rules, the sector regulator has no direct jurisdiction over the TV rights markets[207].

The aforementioned rules therefore only concern the public's right to information, and not the conditions of competition between television service providers. They are thus usefully supplemented by competition law.

Section 2. The competition law framework for the marketing of broadcasting rights

107. Recurring interventions under competition law – Competition law regularly intervenes in the TV rights market, mainly in the field of sports competitions, which attract large audiences. These interventions are based as much on anti-competitive cartel practices (I) as on abuse of a dominant position (II).

[205] Loi n° 2009-258 du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision.
[206] Free translation, « aux évènements de toute nature qui présentent un grand intérêt pour le public ».
[207] P. Choné, *art. cit.*, p.60.

I. Assessment of the allocation of broadcasting rights with regard to anti-competitive agreements

108. Practices revealing common problems in distribution – Competitive disputes on the television rights market reveal practices that are frequently found in distribution networks in general. These are the joint sale or purchase of broadcasting rights (A) and exclusive territorial broadcasting rights (B).

A. The issue of the joint sale and purchase of broadcasting rights

109. Joint selling of broadcasting rights – The issue of joint selling of broadcasting rights came to the fore in 2003 in a case dealt with by the European Commission concerning the Union of European Football Associations (UEFA)[208].

The latter company carries out the centralized sale of television rights for the Champions League on behalf of the participating clubs. This agreement is considered by the Commission to restrict competition between clubs. Such coordinated rules "has the effect of coordinating the pricing policy and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content"[209].

This decision therefore discusses the exemption of this agreement, notified to the European Commission. The Commission considers that this method of selling TV rights contributes to efficient production and distribution, thanks to the presence of a single point of sale. This ultimately benefits the user. The agreement in question is therefore exempted by the Commission.

However, the Commission imposes conditions on the exemption. Rights sold must be divided into lots. This division makes it possible to sell to different publishers, ensuring that one does not have a monopoly. In addition, the period of exclusivity granted to broadcasters must be reduced to three years[210].

110. Centralized purchasing of broadcasting rights – There are also cases where broadcasters join forces to jointly purchase broadcasting rights. That was the case with the European Broadcasting Union, which brings together Europe's public broadcasters.

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[208] EC., 23 July 2003, 2003/778/EC, UEFA.
[209] *Ibid.* §1.
[210] A.M. Oliva, *art. cit.*, §56.

This case, dealt with by the Commission in 1993, involves an association of radio and television broadcasters, whose aims include “to support its active members in their task of serving the interests of the general public in the best possible manner”[211]. The association's bylaws govern the acquisition of television rights for its members, notably for sporting events.

First of all, the Commission notes that these rules “have as their object and effect the restriction of competition between the members” of the association[212]. However, it grants them an exemption. It considers that the joint acquisition and subsequent sharing of rights has the effect of improving purchase conditions. In the absence of these rules, the purchase of the same rights would be “very expensive, but also difficult to achieve”[213]. They also enable programs to be coordinated at national level. However, the exemption is granted on condition that the EBU and its members "give non-member commercial channels access to the rights in question (deferred retransmission, live retransmission if the channels holding the rights do not transmit live, etc.)"[214].

The conditions for the joint purchase and sale of TV rights have therefore been laid down by the Commission. However, the competition authorities also find themselves seized with disputes concerning territorial broadcasting exclusivities.

B. The issue of exclusive territorial distribution rights

111. The problem of territorial exclusivity in competition law – The issue of territorial exclusivity is a recurring one in traditional distribution networks. Competition law has therefore taken up the issue through regulation 2022/720, concerning the block exemption of vertical agreements[215].

The regulation begins by granting a general exemption to agreements containing vertical restraints[216]. This exemption applies, however, subject to compliance with the sales thresholds described in Article 3. In addition, the agreement in question must not include any of the hardcore restrictions listed in Article 4. Territorial exclusivity is a hardcore restriction, unless

[211] EC., 11 June 1993, 93/403/EEC, §2.
[212] *Ibid.* §47.
[213] *Ibid.,* §61.
[214] A.M. Oliva, art. cit., §57., free translation, « donner un accès aux droits en cause aux chaînes commerciales non membres (retransmission en différé, en direct si les chaînes titulaires des droits ne transmettent pas en direct...) ».
[215] Commission regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[216] *Ibid.* art 2.

it is limited to a restriction of active sales. Active sales are defined by the regulation as "actively targeting customers"[217]. On the contrary, passive sales must not be restricted by vertical agreements in order to benefit from the exemption. Passive sales are defined by the regulation as "sales made in response to unsolicited requests from individual customers"[218].

This distinction between passive and active sales has also been applied in the audiovisual sector.

112. Territorial exclusivity in the audiovisual communications sector – In 2011, the Court of Justice of the European Union handed down a ruling concerning the Football Association Premier League (FALP)[219]. The latter granted licences in respect of those broadcasting rights for live transmission, on a territorial basis and for three-year terms[220].

In this ruling, the Court condemns the absolute nature of territorial exclusivity, "which is such as to result in artificial price differences between the partitioned national markets"[221]. So the agreement in question is not exempt.

The competition authorities are therefore particularly active in the audiovisual communications sector with regard to anti-competitive agreements. However, the conditions under which broadcasting rights are allocated can also be analyzed in terms of abuse of dominant position.

II. Assessment of the allocation of broadcasting rights with regard to abuse of a dominant position

113. Intervention with different timeframes - With regard to abuse of a dominant position, competition authorities can intervene *ex ante* through precautionary measures (A), but also *ex post* (B).

A. *Ex ante* intervention to prevent a high concentration of broadcasting rights

114. *Ex ante* intervention to prevent the risk of concentration – In 2003, the French Competition Council was able to intervene in the market for League 1 broadcasting rights[222].

[217] *Ibid*. art. 1. 1.
[218] *Ibid*., art 1. 1 m.
[219] ECJ, 4 oct. 2011, joined cases C-403/08 AND C-429/08.
[220] *Ibid*., §32.
[221] *Ibid*., §115.
[222] Décision n° 03-MC-01 du 23 janvier 2003 relative à la saisine et à la demande de mesures conservatoires présentées par la société TPS.

They are distributed by the *Professional football league* (LFP). The LFP consults television channels and organizes the procedure for awarding the various lots. In 2002, the lot allocation procedure resulted in the award of all League 1 rights to Canal Plus. TPS challenged this decision. According to the applicant, the latter is abusive, resulting in "the allocation of all League 1 Championship rights on an exclusive basis to a single operator"[223].

The French competition council considers that discriminatory behaviour on the part of the LFP, favouring Canal Plus, cannot be ruled out[224]. Nor does it rule out the possibility that Canal Plus' offer constitutes an abuse of a dominant position[225]. The Council therefore enjoins the LFP and Canal Plus to suspend the effects of the decision to award the lots.

115. A decision based on the sector regulator's forward-looking analysis - In the course of this decision, the Conseil repeatedly cites the opinion issued by the CSA. This contains numerous indications on the future development of the soccer broadcasting rights market and the risks of concentration. Professor Philippe Choné points out that the Conseil justifies its decision on the basis of "a genuine forward-looking scenario" developed by the sector regulator[226].

The procedure for awarding lots by the LFP may also have been the subject of other disputes, in which the Autorité de la concurrence intervened *ex post*.

B. *Ex-post* intervention to assess the conditions under which broadcasting rights have been granted

116. Conflict on the reallocation of the football Ligue 1's TV rights - This refers to the recent case of the Ligue 1 television rights awarded by the LFP to Mediapro following a disputed procedure[227].

In this case, the professional football league (LFP) has an exclusive mandate to market the television broadcasting rights of the Ligue 1. The call for tenders for these rights, divided into several lots for the period 2020-2024, was launched in 2018. Lots 1 through 3 were the most attractive. In May 2018, the LFP announced in particular the award of lots 1 and 2 to Mediapro. The lot 3 was awarded to beIN Sports. Following the failure of Mediapro and the termination

[223] *Ibid*., §10., « l'attribution de l'ensemble des droits du Championnat de Ligue 1 en exclusivité à un même opérateur » ;
[224] *Ibid*., §55.
[225] *Ibid*., §65.
[226] P. Choné, *art. cit*., free translation, « un véritable scénario prospectif ».
[227] Paris Court of Appeal, pôle 5, chambre 5, June 30, 2022, n°21/13216.

of its contract with the LFP in 2020, the latter launched a new call for tenders for lots 1 and 2 in 2021. In the meantime, the French audiovisual group Canal + was appointed emergency broadcaster for the last matches of the 2020-2021 season included in the lot 3.

On January 29, 2021, Canal + filed a complaint with the French Competition Authority against the LFP's decision to organize a call for tenders excluding lot 3. Canal + claimed that this decision reflects an abuse of dominant position. On June 11, 2021, the Authority rejected the complaint on the grounds that it was not supported by sufficient evidence. Canal + filed an action for annulment of this decision and asked the Paris Court of Appeal to find that the LFP abused its dominant position by discriminating against purchasers of Ligue 1 rights and by imposing unfair trading conditions on the marketing of rights returned by Mediapro.

The Court is called upon to examine to what extent can the decision to exclude a lot in a call for tender constitutes an abuse of dominance.

On June 30, the Court responded unambiguously by rejecting the action for annulment filed by Canal+. In this case, the qualification of dominant position was not discussed, as the LFP had an exclusive mandate on the market defined as relevant. The debate then concerns the abusive nature of the LFP's behavior.

117. Discrimination practices - Canal + alleges a different treatment between buyers of Ligue 1 rights depending on whether the lots were marketed in 2018 or 2021. According to the group, the allocation procedures were different, and Mediapro's bidding led to an overvaluation of lot 3 in 2018. This is therefore an allegation of so-called "second-degree" discrimination, since it affects competition between the dominant company's customers. The Court held that Canal +'s claim was based on the indivisibility of the different lots. Indeed, applicant's arguments are based on a comparison between the 2018 and 2021 calls for tender, and on the LFP's decision not to include lot 3 in the latter. Following this finding, the Court relied on the Sports Code[228], which explicitly provides for the independence of these lots. Thus, Canal+'s arguments disregard the very mechanism of the call for tenders, as provided for by law. Therefore, the Court emphasizes the independence of lots in a call for tenders as an obstacle to the qualification of a discriminatory practice.

118. Practices that impose unfair trading conditions - Canal+'s second plea refers to the practice also mentioned in the non-exhaustive list in article 102: "directly or indirectly imposing

[228] Articles L.333-2, R.333-2 et R.333-3 code du sport

unfair purchase or selling prices or other unfair trading conditions". As far as the allegation of unfair trading conditions is concerned, the Court reaffirms the right to defend its interests for a company in a dominant position. Court of Appeal refers to the protection of LFP's commercial interests. Although the objective of maximizing profits is not included in the LFP's statutes, the league is responsible for defending the material interests of French professional soccer. Thus, the Court noted that it cannot be disputed that this objective also includes "*maximizing the revenues derived from the marketing of transmission rights for professional soccer competitions*"[229]. In this respect, it concludes that the LFP's decision to exclude lot 3, which constitutes its main source of revenue, from the 2021 tender was necessary and proportionate in light of the interests it was intended to preserve and protect.

[229] Paris Court of Appeal, pôle 5, chambre 5, June 30, 2022, n°21/13216, Point 116.

General conclusion

119. The complex search for a balance between competition law and sectoral regulatory law - The application of competition rules in the audiovisual communications sector can be studied from a variety of viewpoints. In the case of this study, we have chosen to approach it by observing the dynamics between competition law and the regulatory law applicable to this sector.

The first difficulty with such a subject is the understanding of the notion "regulatory law". Depending on the author, the term can have several meanings. In addition, we had to distinguish it from competition law. The classic criteria of distinction are of great use in understanding regulatory law in its original sense. First and foremost, regulatory law is characterized by *ex ante* intervention, designed to create an equilibrium in a sector that was often formerly monopolistic. However, this distinction is undermined by developments in competition law. Competition law is adopting an increasingly regulatory approach, through merger control and the theory of essential infrastructures.

However, it is still possible to distinguish between two sets of rules, which apply concurrently to the audiovisual communication sector. It was therefore necessary to study the reasons for such application. The reasons are to be found in the inadequacy of each of the two sets of rules alone to govern this very special sector.

While this coexistence is necessary, it can also give rise to problems of articulation, making it essential to strike a balance between competition law and sectoral regulatory law. In the audiovisual communications sector, competition law is heavily involved in merger control. This shows that dialogue between the authorities is essential. Competition law is also very present in the market for the allocation of television broadcasting rights. In this area, there are fewer problems of articulation with regulatory law. The latter is not directly competent to govern this downstream market. However, it does indirectly oversee it through its mission to protect the right to information.

120. Material extension of the field of research - Beyond the audiovisual communications sector, the search for a balance between competition law and sectoral regulatory law requires a broader study. This study can begin with the classic regulated sectors, which were subject to state monopolies. This applies not only to the audiovisual sector, but also to electronic

communications, postal services and energy. Such a study enables us to understand the dynamics traditionally observed between competition law and sectoral regulatory law.

These observations can then be used to study a new, more modern form of regulatory law, concerning digital services. These include specific texts such as the DMA, the DSA and the Data Act. These are presented as hybrid instruments between regulatory law and competition law, and may therefore reveal particular problems of articulation. In fact, the very term "sector-specific regulatory law" is debatable for these texts, which apply to a wide variety of fields.

121. Geographical extension of the research field - The search for a coherent articulation between competition law and sectoral regulatory law can also lead us to make a comparative study. Some countries, such as the United States, proclaim the independence of the two sets of rules, while others choose to "accept, or even encourage, overlapping jurisdiction"[230]. Another solution is to combine the two missions within a single authority[231]. This solution would require a profound institutional overhaul.

[230] E.g. The United Kingdom and Brazil, V. P. Choné, *Art. cit*, p.50, free translation « d'accepter, voire d'encourager, le chevauchement des compétence ».
[231] *Ibid.*

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