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**Opinion 19-A-04 of 21 February 2019  
on a request from the Committee on Cultural Affairs and Education  
of the French National Assembly (*Assemblée nationale*) for an  
opinion on the audiovisual sector**

The *Autorité de la concurrence* (plenary hearing),

Considering the letter, registered on 15 June 2018 under number 18/0120 A, by which the Committee on Cultural Affairs and Education of the French National Assembly (*Assemblée nationale*) submitted a request for an opinion to the *Autorité de la concurrence* as part of its fact-finding mission to consider new regulation of audiovisual communication in the digital age;

Considering Book IV of the French Code of Commercial Law (*Code de commerce*);

Considering the questionnaires sent by the *Autorité de la concurrence* to operators in the sector;

Considering the contributions received until 25 January 2019;

Considering the other evidence of the case;

Representatives of the Directorate General for Media and Cultural Industries of the French Ministry of Culture, the French Broadcasting Regulator (*Conseil Supérieur de l'Audiovisuel*, CSA), French Telecommunications and Posts Regulator (*Autorité de Régulation des Communications Électroniques et des Postes*, ARCEP), French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés*, CNIL) and representatives from the *Bureau de Liaison des Organisations du Cinéma*, *Bureau de la Radio*, Médiamétrie, TF1, Bouygues Télécom, France Télévisions, M6, Groupe Canal Plus, Google, Orange, Netflix, Amazon, SFR Group, Molotov, Havas Media Group, Lagardère Active and Ms X..., heard at the hearings on 7 and 8 November 2018;

The *rapporteurs* (case officers), the Deputy General Rapporteur, the representatives of the Committee on Cultural Affairs and Education of the French National Assembly (*Assemblée nationale*), the representatives of the Ministry of Culture and Communication, the representative of the Minister of the Economy, heard at the meeting of 10 January 2019;

Takes the opinion that the reply to the request be in accord with the following observations:

## Overview

On 15 June 2018, the Committee on Cultural Affairs and Education of the *Assemblée nationale* wished to consult the *Autorité* in order to inform its work with a view to examining the upcoming government bill reforming the Law of 30 September 1986 on freedom of communication.

The sector is now facing a digital revolution that has already significantly changed consumer habits. Digital terrestrial television (DTT), which offers only 31 channels, exclusively on television, and without interactivity or on-demand services, is declining in favour of Internet protocol television (IPTV). IPTV is available in the form of “triple-play” bundle offers made available since 2005 by Internet service providers (ISPs) and, more recently and on a smaller scale, in the form of over-the-top (OTT) media services on the open Internet not controlled by ISPs.

These new forms of access have made it possible for new operators, both national and especially international, to enter the market. These are mainly subscription video-on-demand (SVOD) services, such as Netflix and Amazon, or free platforms, including YouTube. This non-linear content is available at any time, anywhere, and on any device.

The new services have met with rapid success with consumers. Netflix gained 1.5 million subscribers in France between April and December 2018, and now has 5 million subscribers nationwide, more than Canal Plus. YouTube's free content is widely seen by young viewers, and Amazon Prime Video is estimated to have 100 million subscribers worldwide. In addition, some studios, including the Disney-Fox ensemble, have announced the launch of SVOD services by 2019. Apple has also announced an Apple Video service that complements Apple Music for the same time frame. Competition from platforms will therefore increase in the short term.

SVOD offers have several common features: catalogues rich in thousands of very varied contents, with a particular emphasis on series, which are often produced in the English-speaking world with a large budget as well as elsewhere and offered to subscribers worldwide. The series are, for a growing part, produced directly without going through the intermediary of studios.

Although the SVOD offers are specific, they weaken the model of traditional operators:

- pay-TV subscriptions are subject to competition from inexpensive offers with a wide selection (€8-14 for Netflix);
- in many countries, Netflix's popularity is beginning to threaten free TV audiences, and therefore advertising revenues. In France, where Netflix's growth is more recent, these stagnant advertising revenues are also weakened by the success of digital programmatic advertising.

The foundations of competition between old and new stakeholders have been disrupted. Digitisation and new non-linear consumer uses are producing an increasing convergence of markets: borders are blurring and gateways are multiplying between linear pay-TV and SVOD, between linear and non-linear broadcasting, between pay-TV and free TV, and between television and online advertising markets. In addition, markets for the purchase of copyrights on works are becoming increasingly international.

In this context, operators operating within a national framework, who have for a long time in France based their market position on the holding of a terrestrial frequency giving them

a quasi-monopoly of access to television advertising, see these national barriers to entry weakened and bypassed by the entry on the market of powerful international stakeholders.

Traditional stakeholders are subject to the combined effect of stagnating advertising resources and subscription revenues on the one hand, and rising costs for access to the most attractive content, i.e., sports, films and series, on the other. This effect is accentuated by the divergence in the conditions of access to finance: the major international platforms have access, through investment funds, to debt or, for those with a conglomerate model, from their other businesses, to very significant resources enabling them to finance ambitious original content and increasingly efficient and costly technological platforms.

Under these conditions, the obligations of national regulations, which appeared justified when they were the counterpart to the granting of a rare public resource - broadcasting spectrum - are now proving to be a source of competitive asymmetry between old and new stakeholders.

In this respect, the regulation of terrestrial channels imposes very important obligations on operators, for reasons of cultural diversity, the protection of other media contributing to pluralism, and the promotion of national audiovisual production:

- generalist television channel operators must devote 3.2% and 15% of their turnover respectively to the production of film and audiovisual works;
- operators must generally devote between 60% and 75% of their turnover to the production of independent works, whereas for such works they may hold little or no exploitation rights, apart from the television broadcasting right, which is only open for a limited period (eighteen months to three years in most cases);
- operators are subject to the ban on advertising for promotional campaigns for the distribution and distribution of books and films, as well as to the ban on targeted advertising, which is that of the digital advertising model.

Insofar as they are not subject to this national regulation, the new SVOD platforms can invest the amounts they wish, possibly by becoming directly producers themselves, thus moving up the value chain, which allows them to retain all rights, on all media, in any territory and over a very long period. They can therefore benefit from a catalogue with a high asset value, which can be amortised over many years on a large subscriber base: 140 million subscribers (today) worldwide, in the case of Netflix.

Similarly, the ban on targeted advertising mainly, if not exclusively, favours Google and Facebook, to the detriment of conventional TV operators.

In these circumstances, the *Autorité* considers that the regulation should be amended to correct these asymmetries which disadvantage traditional linear operators in their adaptation to the new non-linear reception mode and the new advertising model.

First of all, it considers that the new Audiovisual Media Services Directive (AVMSD), which is undoubtedly a major step forward, will not in itself be sufficient to recreate a level playing field, since it will take time to produce effects, taking into account the time needed to coordinate the various regulatory authorities involved in the implementation of the AVMSD, and will in any event leave significant disparities between what is imposed on national operators and what is imposed on international stakeholders at the European level.

Therefore, the *Autorité* proposes:

- to strengthen access to advertising resources for free television, through targeted advertising and the removal of prohibited sectors. It is certainly up to the public

authorities to ensure pluralism, which has hitherto been ensured by the distribution of advertising revenues between those reserved for the press and those for television. It is however necessary to make a cost-benefit balance of a policy that has not prevented the decline in press advertising resources, while allowing new GAF A-type stakeholders to prosper on fast-growing advertising resources, and thus enable them to strengthen their position vis-à-vis all the traditional stakeholders contributing to audiovisual production. Similarly, it does not appear to be proven that the ban on television advertising for cinema and publishing still produces favourable effects justifying its continuation;

- to make film and audiovisual production obligations more flexible by pooling these obligations at the level of the television group and, at least partially, between cinema and audiovisual works, for more efficient investment and real-time adaptation to public tastes;
- to relax the obligations for independent production by limiting the definition of independent work to the criterion of the absence of significant ownership of the capital by the operator, without preventing the latter from accessing the rights to exploit the work. In particular, it appears that it should be possible to use digital broadcasting rights, which are now automatically granted for eight days for replay broadcasting, over a much longer period of time to enable television services to sustain their non-linear platform with the content they have very largely financed;
- finally, to review the now largely obsolete anti-concentration mechanism, in order to adapt it to the new challenges of pluralism, if this appears necessary, and in any case, to new economic conditions.

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1. By letter registered on 15 June 2018 under number 18/0120 A, the Committee on Cultural Affairs and Education of the *Assemblée nationale* submitted a request for an opinion to the *Autorité de la concurrence* (hereinafter referred to as the “*Autorité*”) as part of its fact-finding mission to consider new regulations for audiovisual communication in the digital age. On the basis of Article L. 462-1 of the French Code of Commercial Law (*Code de commerce*), the Committee wished to consult the *Autorité* in order to clarify its work and considerations when examining the upcoming government bill reforming the Law of 30 September 1986 on freedom of communication.
2. The *Autorité* would point out that the purpose of the analyses carried out in the context of a referral for an opinion cannot be to qualify conduct on a market in the light of Articles 101 and 102 of the TFEU and Articles L. 420-1 and L. 420-2 of the *Code de commerce*, nor to define the markets concerned, beyond the references in recent case law. Only the implementation of *Inter partes* proceedings within the framework provided by Article L. 463-1 of the *Code de commerce* may lead it to make such assessments. In this context, this opinion is a general and prospective analysis.

## INTRODUCTION

3. With 207,000 employees working at 9,816 companies in France in 2016, the audiovisual sector provides high added value, with approximately €12 billion in turnover. In addition to its economic weight, the audiovisual sector is also strategic due to its contribution to the French cultural exception, which resulted in 200 million admissions to cinemas in 2018, including a market share of nearly 40% for French cinema, which is a particularly high level compared to the film industry in other European countries.
4. The success of the sector is partly linked to the system of support for the creation of cinematographic and audiovisual works, set up by the Law of 30 September 1986, at a time when the number of television channels was limited, as they were national in nature and broadcast in terrestrial mode.
5. However, the sector is now facing a digital revolution that has, in a few years, profoundly changed the way audiovisual is used. No longer using terrestrial frequencies, a scarce public resource, but broadcasting over the Internet, new operators, sometimes active in other sectors, have invested in the audiovisual sector by offering new services at competitive prices. By allowing consumers to multiply the number of screens on which they watch content and through innovative investing in audiovisual programming, these new operators are competing significantly and rapidly with the incumbents.
6. This revolution is accompanied by a rapid evolution of the television advertising sector, faced with the very strong growth of online advertising, as analysed by the *Autorité* in a recent opinion<sup>1</sup>. The emergence of this new advertising medium weakens the revenues of free channels, financed by advertising.
7. In this context, the Committee on Cultural Affairs and Education of the *Assemblée nationale* questioned the existence of possible distortions in competition between operators in the sector, which would result not from corporate strategies or competition on merit but from a legislative framework that has become, in part, inadequate.

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<sup>1</sup> Opinion 18-A-03 of 6 March 2018 on the use of data in the Internet advertising sector.

8. In view of the consequences on competition of recent structural changes **(I)**, the Law of 30 September 1986 regulating the audiovisual sector does appear inadequate **(II)**. Possible developments to reduce competitive asymmetry in the sector have been identified in this respect **(III)**.
9. It should be made clear from the outset that, although the investigation in this opinion initially included the activities of the radio sector, it has emerged that they have so far been less directly impacted by the digital revolution than those involving television and cinema and, in particular, the activities of audiovisual service operators, or that they present distinct issues (including the format of radio advertising and constraints relating to legal notices). In view of the urgency of the opinion, the *Autorité* has therefore focused its analysis on the activities of television service providers.

# I. Recent structural developments and their impact on competition

## Introductory remarks on television media

### *Traditional television, a mass medium*

10. The referral to the Committee on Cultural Affairs and Education of the *Assemblée Nationale* is the occasion for the *Autorité* to consider the impact of the “digital revolution” on the audiovisual media.
11. The notion of television media has evolved considerably since its democratisation in the early 1950s. Initially conceived by public authorities as an educational and cultural tool, television has evolved as it has opened up with the emergence of new channels through advertising resources made possible by its massive audiences. As a result, the exclusive public service television model has partly given way to a business model whose financing is based mainly on advertising revenues.
12. At the end of the 1990s, the French television landscape included six terrestrial channels: three private (TF1, Canal+ and M6) and three public (three channels of France Télévisions)<sup>2</sup>. Unlike Italy or Germany, it was dominated by terrestrial broadcasting<sup>3</sup>, with cable and satellite broadcasting remaining quite marginal in France (4% of the total audience in 1997).
13. The supply of audiovisual content has increased significantly, in several phases, since the launch of DTT in 2005. It now includes 26 free channels and five pay-TV channels. The result has been a gradual fragmentation of audiences since the mid-2000s, leading to a decline in the price of advertising space, to which private audiovisual groups have sought to respond with a move towards concentration in the sector<sup>4</sup>.
14. This development has taken place exclusively within a national framework due to the predominance of terrestrial broadcasting. This framework has enabled public authorities to allocate frequencies according to a rent-sharing system: in exchange for their contribution to the financing of audiovisual production (based on their turnover), television channels benefit from a free temporary provision of the scarce resource of the most valuable frequencies<sup>5</sup> in the public domain of terrestrial frequencies<sup>6</sup>.

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<sup>2</sup> This does not include Arte.

<sup>3</sup> <https://www.inaglobal.fr/television/article/histoire-de-la-television-une-exception-francaise>.

<sup>4</sup> See, for example, Decisions 10-DCC-11 of 26 January 2010 on the acquisition of sole control by the TF1 group of NT1 and Monte-Carlo Participations (AB group) and 14-DCC-50 of 2 April 2014 on the acquisition of sole control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermedia by Vivendi SA and Canal Plus Group.

<sup>5</sup> The frequency band assigned to the audiovisual sector has the best propagation within the spectrum, which limits the investment costs required for broadcasting.

15. The development of new methods of distribution using the Internet has upset this balance by challenging the predominance of the national framework. The parliamentary report presented by M.P. Aurore Bergé thus observes that “The fragmentation of French operators, weakened by the emergence of super powerful global stakeholders, and the changes affecting the chain of artistic creation and value sharing, are entirely disproportionate with the effects brought on by the end of the ORTF monopoly, the liberalisation of the first channel, the arrival of cable and satellite, the advent of digital terrestrial television (DTT), ADSL or the development of video-on-demand services.”<sup>7</sup>

*The economy of the audiovisual sector*

16. The value chain of traditional television is organised as follows.
17. In order to fill their programme schedules, companies managing television channels (hereinafter referred to as “channel operators”) produce their own programmes internally or acquire broadcasting rights from third parties for content chosen according to the theme and editorial line of their channels (together, “television programmes or content”). These third-party content providers may be film or audiovisual production companies. Audiovisual content consists of “flow” or “stock” programmes:
- flow programmes correspond to programmes that are intended to be broadcast only once because they lose a significant proportion of their value after broadcasting (news, sports competitions, studio programming such as games, debates, entertainment, etc.);
  - the value of stock (or catalogue) programmes is less dependent on the number of broadcasts. This is primarily TV fiction (series, films, etc.) and documentaries. Film also falls into the category of stock programmes. When purchasing a stock programme, the operator may negotiate the number of broadcasts of the programme on his channel, or even on several of his channels if he belongs to an audiovisual group with several channels<sup>8</sup>.
18. In addition, as mentioned above, television channel operators are subject to obligations to finance the creation of cinematographic and audiovisual content.
19. Finally, the financial resources of free television channels come mainly from the revenues generated by television advertising, supplemented where necessary by certain additional activities (teleshopping, audiovisual and film production, DVD publishing, etc.).

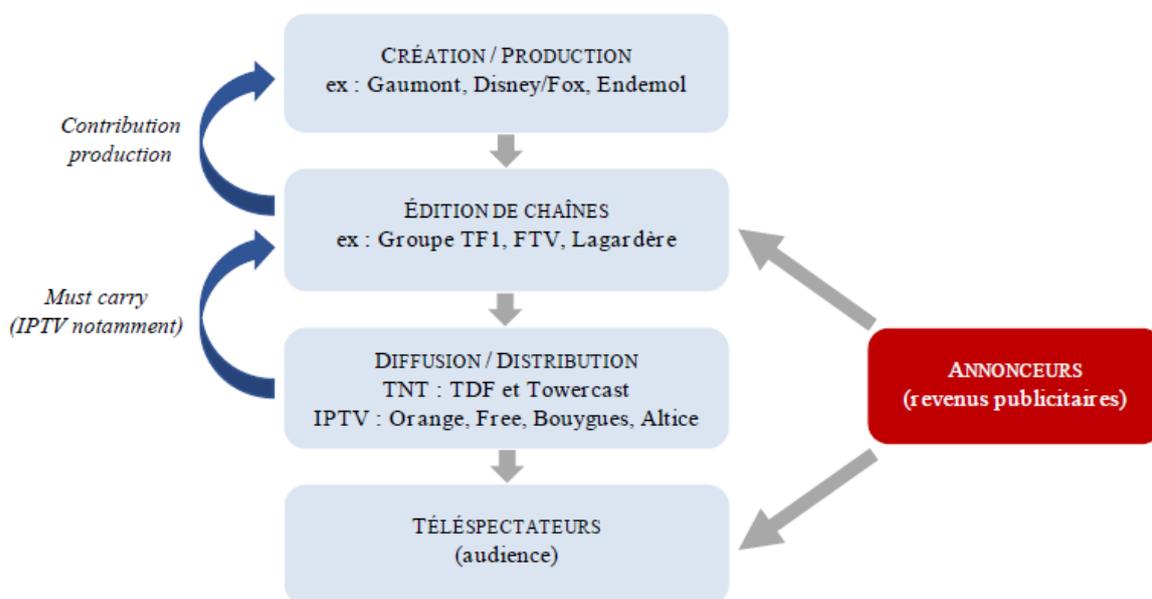
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<sup>6</sup> The allocation of frequencies is decided by the CSA, which assesses the public value of each project on a case-by-case basis “in the light of the priority imperatives of safeguarding the pluralism of socio-cultural currents of expression, the diversification of operators, and the need to avoid abuses of dominant positions and practices hindering the free exercise of competition” (Article 29 of the Law of 30 September 1986).

<sup>7</sup> Information report filed pursuant to Article 145 of the Rules of Procedure by the Committee on Cultural Affairs and Education at the end of the fact-finding mission on a new regulation of audiovisual communication in the digital age, and presented by Aurore Bergé, Rapporteur.

<sup>8</sup> <https://clesdelaudiovisuel.fr/Connaitre/Les-programmes-audiovisuels/Programmes-de-flux-et-programmes-de-stock>.

20. The value chain of free television can be summarised as follows:



CRÉATION / PRODUCTION	CREATION/PRODUCTION
Ex : Gaumont, Disney/Fox, Endemol	Example: Gaumont, Disney/Fox, Endemol
Contribution production	Production contribution
ÉDITION DE CHAÎNES	CHANNEL OPERATION
Ex : Groupe TF1, FTV, Lagardère	Example: TF1 Group, FTV, Lagardère
Must carry (IPTV notamment)	Must carry (IPTV in particular)
DIFFUSION / DISTRIBUTION	BROADCAST/DISTRIBUTION
TNT : TDF et Towercast	DTT : TDF and Towercast
IPTV : Orange, Free, Bouygues, Altice	IPTV: Orange, Free, Bouygues, Altice
TÉLÉSPECTATEURS (audience)	TELEVISION VIEWERS (audience)
ANNONCEURS (revenus publicitaires)	ADVERTISERS (advertising revenue)

21. The value chain of the pay-TV sector, financed primarily by subscriptions, includes an additional step. Operators offer for sale the right to market their channels to various distributors (such as Canal Plus Group and ISPs). The latter are responsible for setting up a pay-TV offer in the form of channel packages, accessible by subscription or “à la carte”, thus assuming the role of programme aggregator. Finally, the distributor (which may be different from the aggregator, as in the case of offering of Canal + on Free and Orange), is responsible for marketing the offer and managing the relationship with the subscriber.

## A. THE RAPID DEVELOPMENT OF NEW DIGITAL PLATFORMS AND NEW USES

22. The broadcasting revolution, in which terrestrial TV is increasingly replaced by triple-play bundles (providing Internet, fixed telephone and television channels via ISP boxes ) and OTT (1), has led to the explosion of new non-linear uses on new terminals (2).

### 1. THE BROADCASTING REVOLUTION

#### a) DTT and its limits

23. In France, DTT has been much more successful than elsewhere in Europe, due to the importance of France's frequency heritage and the low density of the territory, which favours this low-cost broadcasting mode compared to cable. More than 55% of French households currently receive television programmes by terrestrial means, including 23.5% without other reception modes<sup>9</sup>.
24. DTT in particular benefits from the quality of national coverage. Under Article 96-1 of the Law of 30 September 1986, as amended by Law 2007-309 of 5 March 2007 on the modernisation of audiovisual broadcasting and the television of the future, television channel operators must ensure that their DTT broadcasting covers almost the entire mainland population (95% under the law, more than 97% today in practice<sup>10</sup>).
25. In addition, the gradual improvement of DTT technical configurations<sup>11</sup> has made it possible for almost all television channels broadcast in this mode to be in high definition.
26. However, DTT suffers from the restrictions of terrestrial broadcasting, with a limited number of frequencies allocated to audiovisual broadcasting, and broadcasting being characterised by the existence of high barriers to entry which restrict the number of channels offered (currently 31 linear channels).
27. Linear terrestrial broadcasting means the simultaneous consumption by the same audience of programmes whose broadcasting takes place according to a schedule and a programme grid predetermined by the operators. A linear television channel can, by definition, offer only one programme at a time.
28. Under these conditions, the quantity and availability of DTT content is severely limited. The *Autorité de Régulation des Communications Électroniques et des Postes* (hereinafter ARCEP) states in Opinion 2018-1204, transmitted to the *Autorité* on these subjects, that “the audiovisual services available on DTT correspond mainly to linear services because this mode of broadcasting does not have a return channel, i.e. the end user cannot return a signal to the transmitting channel. Therefore, the end customer cannot use interactive or video-on-demand services via a simple DTT access without Internet access.”<sup>12</sup>

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<sup>9</sup> CSA Opinion 2018-04 of 7 November 2018 to the *Autorité de la concurrence* on the effect of the digital revolution on the competitive analysis of the audiovisual sector, page 7.

<sup>10</sup> <https://www.csa.fr/Informer/Comment-recevoir-la-television-et-la-radio/Comment-regarder-la-television/Regarder-la-television-par-l-antenne-rateau>.

<sup>11</sup> Including widespread use of the MPEG-4 compression standard.

<sup>12</sup> ARCEP Opinion 2018-1204 of 2 October 2018 on a request for an opinion from the *Autorité de la concurrence* on the impact of the digital revolution on the audiovisual sector, page 2.

29. However, ARCEP points out that while DTT is currently unable to offer non-linear and interactive services, two technical solutions are currently being studied to open up this possibility, “push” and hybrid broadcast broadband TV (HbbTV):
- The “push” solution consists in “pushing” content onto a storage terminal, which the user must first install. The latter will then be able to consume the stored content in a non-linear way. ARCEP points out that this technology does, however, contain an important limitation, namely that only previously stored content may be consumed, which *de facto* reduces the interactivity of this service for the consumer;
  - the HbbTV solution consists of the broadcasting of hybrid television services, combining content transmitted for some by terrestrial means (“broadcast”) and for others by Internet (“broadband”). It requires the television set to be connected to the Internet for the “broadband” part of the service (via the Internet), and therefore depends on the footprint of broadband and very high-speed deployments, as with other wired solutions. ARCEP points out that the HbbTV solution is particularly relevant for households eligible for an Internet offer but lacking enough bandwidth to receive optimised IPTV. According to ARCEP, this situation will disappear as broadband and very high-speed networks are deployed<sup>13</sup>.
30. Given these limitations, as well as the strong growth in the use of Internet access services in France through ISP triple-play bundles, internet streaming (IPTV), which offers a return channel and unlimited content, has grown significantly since its introduction in 2002.

## **b) Advantages of IPTV**

### ***Definition and coverage***

31. The gradual improvement in the quality of Internet connection through the deployment of ADSL, fibre and 4G networks has provided a technological framework conducive to the development of a new method of broadcasting audiovisual content beginning in the late 2000s.
32. IPTV appeared on the French market in 2002, with the launch by ISPs of triple and quadruple play offers (including Internet, fixed and mobile telephony and television channels via ISP boxes). These offers, whose exceptional success is a major feature of the French market, allow access to IPTV via a box provided by operators, who use a layer of bandwidth assigned exclusively for television use. This is a broadcasting mode corresponding to a closed connected environment accessible on the television set via the ISP’s box using their dedicated network. Currently in use in more than 60% of French households<sup>14</sup>, IPTV has become the main means of broadcasting television channels.
33. Besides the closed ISP network, Internet television has also developed more recently, on a still rather limited scale, via the accessible over-the-top (OTT) IP network, through which media is streamed without being subject to the intermediation of the ISP. The CSA defines OTT broadcasting as a “mode of distribution of content on the Internet without the

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<sup>13</sup> ARCEP Opinion 2018-1204, cited above, pages 2 and 3.

<sup>14</sup> CSA and CNC study, “La vidéo à la demande par abonnement en France : marché et stratégies des acteurs”, 12 April 2018, page 30. Data collected by the *Autorité* from ISPs in the context of this opinion.

intermediary of Internet access providers beyond data routing”<sup>15</sup> and specifies that OTT media streaming is defined “in contrast to traditional television service distribution networks,” such as the managed networks of Internet access providers, terrestrial networks, cable, etc.<sup>16</sup>

34. Content offers using OTT broadcasting are therefore marketed directly online and sent over the general Internet.
35. OTT's open connected environment (IP) can be accessed in two ways:
  - on various mobile terminals (today mainly computers, tablets, smartphones);
  - on the television directly (“Smart TV”, a television set that connects to the Internet either with Wi-Fi, or an Ethernet cable connected to the box to surf the Internet, access VOD or SVOD services, for example) or via a box specially designed for OTT use (Chromecast, Android box).
36. For both OTT and IPTV, the quality of service depends on the existence and performance of the Internet connection, which in turn depends on the deployment in France of ADSL and VDSL networks and, for mobile phones, on 4G network coverage. France’s plan for very high speed internet access launched in February 2013 aims to provide “very high speed” Internet access throughout the country by 2022. It is currently being deployed and, according to available public information, more than 51% of the country already had very high speed Internet access as at 31 March 2017.

#### *Offers available on all Internet-connected terminals*

37. Lastly, OTT has the advantage of reception on any terminal connected to the Internet.
38. Unlike DTT broadcasting, which is only accessible on the television set, OTT streaming allows the consumption of audiovisual content on all terminals connected to the Internet, including computers, tablets, mobile phones and connected televisions. This is also true to some extent with IPTV, since some ISPs offer the possibility of watching certain television channels on their customers' computer screens or tablets, in addition to the television (“multi-device” service), or on several television sets (“multi TV” service)<sup>17</sup>.
39. The possibility of watching video content on multiple screens depends on the penetration rate in France for Internet-connected terminals. The rate has steadily increased between 2012 and 2018, where the rate for television sets has slowly eroded over the same period, even though it remains the majority.

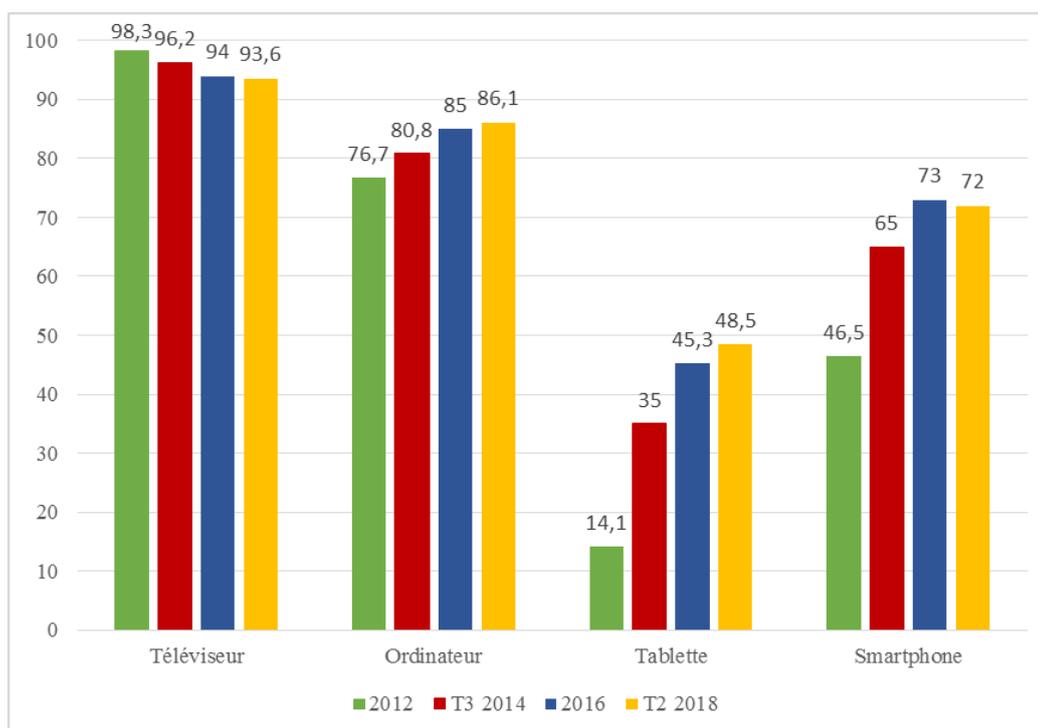
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<sup>15</sup> <https://www.csa.fr/Mes-services/Glossaire-du-CSA/De-E-a-P>.

<sup>16</sup> CSA Lab, “Le distributeur de services audiovisuels à l’ère numérique : statut juridique et activité économique”, report 2, 2017.

<sup>17</sup> ARCEP Opinion 2018-1204, cited above, page 3.

**Annual change in the penetration rate in France for four devices with screens  
between 2012 and the second quarter of 2018 (in %)<sup>18</sup>**



Téléviseur	Television set
Ordinateur	Computer
Tablette	Tablet
Smartphone	Smartphone
T3 2014	3Q2014
T2 2018	2Q2018

40. The number of screens available in French households has thus increased significantly during the 2010s, making it possible to watch different content on television and on the Internet simultaneously within the same family. On average, it is estimated that there are 6.4 screens per household in France<sup>19</sup>.

***Unlimited content***

41. IPTV streaming makes it possible to host video content that is not affected by the constraint of very limited broadcasting spectrum.
42. The content available as part of triple- and quadruple-play bundles on ISPs' dedicated networks is significantly larger than on DTT, since ISPs distribute, in addition to DTT

<sup>18</sup> Observatories for the audiovisual equipment of households between 2012 and 2018.

<sup>19</sup> CNC, *Observatoire de la V&D*, 25 November 2016, page 2.

channels, hundreds of channels accessible on pay-per-view, associated catch-up services for television channels as well as the offerings of OTT operator if a partnership has been signed<sup>20</sup>. The extent of content available nevertheless remains dependent on the choice of ISPs in setting up their offering, and on the partnerships they can enter into with operators or content providers.

43. OTT services, on the other hand, offer a theoretically unlimited variety of content, as they do not depend on the dedicated networks of ISPs, and also benefit from “net neutrality”, a principle protected at the European level, according to which ISPs are obliged to guarantee access to all Internet operators, with equal signal quality, on all types of media. No entry barriers or vertical restrictions on content operators' offerings, other than of a technical and temporary nature, can therefore be put in place by ISPs<sup>21</sup>.

### *Return channel*

44. Moreover, and above all, IPTV, unlike DTT, offers a return channel, as the end user can send a signal back to the ISP via the Internet connection<sup>22</sup>. This return channel supplies the interactivity needed to access on-demand content within OTT offers and IPTV triple- and quadruple-play bundles from ISPs. The audiovisual services in these offers therefore now include, in addition to access to linear free and pay-TV channels, video-on-demand, subscription or pay-per-view offers and catch-up television services.
45. All these characteristics - diversity of access terminals, abundance of unlimited content, and above all the possibility of a return channel and therefore availability of “on demand” content- are leading to a revolution in the habits as well as the stakeholders in the audiovisual field.

### *Note*

OTT services are characterised by the lack of constraints: technological (it is not necessary to have terrestrial frequencies to reach the consumer), temporal (the non-linear offer remains available to the consumer) and territorial (the content is often international and can be accessed from any portable terminal connected to the Internet). The OTT streaming mode is increasingly accessible thanks to the gradual improvement of ADSL and VDSL in France and the growing number of Internet-connected terminals found in households.

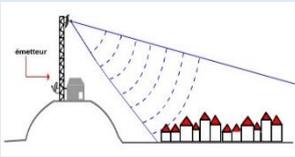
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<sup>20</sup> This partnership between ISPs and OTT operators can simply consist of the possibility of subscribing to the latter through an option offered by the ISP (invoicing is then carried out directly by the ISP with the Internet subscription). It can also go further by making these OTT services available directly on television through the FAI's box (ARCEP Opinion 2018-1204, cited above, page 5).

<sup>21</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 on provisions on open Internet access and amending Directive 2002/22/EC on universal service and users' rights on electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union.

<sup>22</sup> ARCEP Opinion 2018-1204, cited above, page 2.

## Summary of the main characteristics of the main streaming modes

	<b>OTT STREAMING</b>	<b>DTT STREAMING</b>	<b>IPTV STREAMING</b>
			
<b>TYPES OF STREAMING</b>	Linear Non-linear	Linear	Linear Non-linear
<b>AVAILABLE CONTENT OFFERINGS</b>	Unlimited Visibility guaranteed by “net neutrality”	Limit of available frequencies (26 free channels and 5 pay-TV channels)	DTT channels + Linear channels on pay-per-view option + Associated services (including catch-up) + Possible partnerships with OTT content suppliers
<b>COVERAGE AND SIGNAL QUALITY</b>	Depends on the existence and quality of the Internet connection > 50% of France covered by ADSL and VDSL	Coverage of at least 95% of the population in mainland France High definition for almost all channels	Depends on existence and quality of the wired network > 50% of France covered by ADSL and VDSL;
<b>VIEWING SCREENS</b>	All terminals connected to the Internet	Television set Future of HbbTV?	Television or even computer and tablet (“multi-device” service)

## 2. THE RAPID RISE OF NON-LINEAR TECHNOLOGY

46. The development of non-linear technology has introduced in a few years a revolution in consumer habits that is now weakening the operators' traditional economic models. Overview:

- new uses generated by non-linear technology;
- new international stakeholders behind these developments;
- success of these services;
- and finally the innovative features of SVOD services compared to similar pay-TV offers.

### a) Non-linear and linear

47. At the European level, a non-linear service is qualified by the Audiovisual Media Services Directive 2010/13/EU of 10 March 2010 (hereinafter referred to as the “AVMSD”) as an “on-demand audiovisual media service”, means “an audiovisual media service provided by a media service provider for the viewing of programmes at a moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.”<sup>23</sup> In France, the definition of these services adopted by Law 86-1067 of 30 September 1986, as amended by Law 2009-258 of 5 March 2009, is very similar to that adopted in the AVMSD. They are defined as “any communication service to the public by electronic means allowing users to view programmes at the time they have chosen and at their request, from a catalogue of programmes; the selection and organisation of which are controlled by the operator of this service.”
48. A non-linear service is thus a programme available on demand based on a choice from a catalogue. Such a service frees the consumer from the constraint of linear time - the programme is available at any time, and for the duration chosen by the consumer who is free, for example, to watch episode after episode of a series without limit. In addition, the consumer has the option of interrupting the program, i.e. viewing it in sequence, or watching the proposed content as he or she sees fit.
49. Moreover, as catalogues of content that can be used freely by consumers, non-linear services offer the simultaneous availability of a very large number of different programmes adapted to the very wide variety of consumer demands.
50. The example of the American YouTube platform for hosting free videos is a case in point. According to publicly available information, every minute, an average of more than 300 hours of videos are added to this platform and continuously enrich an estimated 1.3 billion videos in January 2019, all languages and geographical origins combined. For their part, the 26 free DTT channels stream just under 230,000 hours of programmes per year. It

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<sup>23</sup> 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 (known as the Audiovisual Media Services Directive or AVMSD)

therefore takes less than 13 hours to upload to YouTube the same amount of video content as all the programmes broadcast on free DTT channels over a full year.

51. These two characteristics largely explain the particularly rapid development of non-linear content.
52. With the development of these services, television channel operators have lost the exclusive right to broadcast video content on screens available in homes. Indeed, while television was the sole prescriber of video content for the public, the increased number of screens and the diversity of available content and uses are transforming access to content. An individual can now access video content in many ways: it can be viewed after reception as part of a communication (email, SMS, social networks), consumed incidentally, i.e. encountered when online (browsing, reading information), or deliberately sought<sup>24</sup>.
53. All these services, available on connected terminals, offer viewers the possibility to watch video content any time, anywhere, any device (ATAWAD).<sup>25</sup>.
54. The development of these services has led to the emergence of new uses, such as “binge watching”<sup>26</sup>, consisting in watching several programmes in succession over a long period of time and in a single session. According to a study conducted by Netflix in 2013, 61% of its subscribers reported regularly engaging in this practice<sup>27</sup>. In France, studies conducted by Médiamétrie seem to confirm this prolonged use, since more than a quarter of SVOD consumers use these services on average more than two hours a day<sup>28</sup>.
55. Finally, while content consumption tends to become more individual due to the multiplication of screens and connections, it can still be a group experience. For example, some popular series offered by non-linear services can be viewed by a significant part of the French and world population, sometimes within a short period of time after the date they become available. In this context, the event-driven nature of this content is essential to bring together as many spectators as possible. In addition, social networks and free video hosting platforms can serve both as a driver and a rapid means for extending the “buzz” of popular videos, widely viewed and shared, often across national borders.
56. A considerable amount of video content of a highly variable nature has appeared on the various screens found in France, from the highly valued exclusive content offered by a SVOD operator to amateur video that can be widely shared on a social network or hosting platform.
57. All the OTT services previously described do not include, in addition, practices involving content piracy, which in 2017 concerned approximately 12 million people out of an

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<sup>24</sup> Mme X..., “La télévision sur smartphone : ressorts et implication du renouvellement des modalités d'agrégation,” *Études de communication* [On line], 44 (2015), Groupe d'Études et de Recherche Interdisciplinaire en Information et Communication de l'Université Lille 3.

<sup>25</sup> Médiamétrie's response to the *Autorité's* questionnaire, page 10.

<sup>26</sup> Commission d'enrichissement de la langue française of the Académie française, “Vocabulaire de la culture et des médias (liste de termes, expressions et définitions adoptés),” Official Journal of the French Republic, 0084 of 8 April 2017.

<sup>27</sup> “Netflix declares binge watching is the new normal,” [Press Release] 13 December 2013, retrieved from <https://www.prnewswire.com/news-releases/netflix-declares-binge-watching-is-the-new-normal-235713431.html>.

<sup>28</sup> Médiamétrie, *Baromètre de la SVoD*, Vague 3, July 2018.

estimated total of 47 million Internet users in France. In particular, these piracy practices are of growing economic importance for sports content due to the short duration of the matches.

58. In conclusion, while the supply of content has increased considerably within the television medium itself since the 1980s, and led to a gradual fragmentation of audiences, the recent development of new OTT operators, accessible to an audience increasingly equipped with screens connected to the very high-speed Internet, constitutes a technological breakthrough and has led to a disruption in uses and a diversification of content of a new dimension for this medium, which has lost its place as a quasi-exclusive prescriber of video content.

#### **b) The typology of OTT stakeholders**

59. The absence of significant regulatory and technical barriers to entry in OTT streaming has allowed many content operators of various types to appear on dedicated sites and applications. All these operators are commonly referred to as online “platforms”. This concept is defined by French law.
60. Under Article L. 111-7 of the Consumer Code (*Code de la consommation*), “an online platform operator is any natural or legal person offering, on a professional basis, whether or not for a fee, an online public communication service based on:
- 1° The classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties;
  - 2° Or the linking of several parties with a view to the sale of a good, the provision of a service or the exchange or sharing of content, a good or a service.”
61. This very general definition is likely to include search engines, price comparison websites, marketplaces, content provision and sharing sites, classified ad sites and social networks. For the purposes of this opinion, this concept will include the following services, corresponding to the main categories of OTT operators offering video content:
- video-on-demand (VOD) services, such as those of iTunes or Orange, which offer a catalogue of content that the user can view in exchange for a fee for each programme chosen;
  - OTT services set up by television channel operators, such as “myCanal” and “myTF1”, which offer catch-up services in addition to simultaneous streaming of their linear channel programmes;
  - social network services such as Facebook or Twitter, which can offer to stream all or part of the television content. In addition to amateur videos, video sharing platforms (or video hosting platforms) such as YouTube stream television content previously broadcast on linear channels under agreements concluded with the latter. YouTube also offers a paid ad-free service providing the content available on its free video sharing platform, as well as original programs;
  - subscription video-on-demand (SVOD) services such as Netflix or Amazon Prime Video, which offer a catalogue of content freely accessible by paid subscription. The main SVOD operators, such as Netflix or Amazon Prime Video, are generalist in nature. Others offer specialised content, such as the TFOU MAX, which targets children, launched by TF1 group in February 2015.

### c) The growing success of online video viewing

62. As a preliminary point, it should be noted that the investigation for the opinion on current developments was made difficult by the absence of replies from certain American platforms, which have chosen to provide very little specific information on the audience of their services, particularly with regard to France. This retention of information makes it particularly difficult to assess their importance in the overall video viewing. However, the *Autorité* was able to observe that the figures circulating most frequently are often significantly below actual figures when compared with other sources such as studies carried out by certain institutions in the audiovisual sector, in particular the CSA, the *Centre National du Cinéma et de l'image animée* (hereinafter CNC) and Médiamétrie, as well as all the publicly available information.
63. The *Autorité's* analysis will focus on the evolution of paid online video services and free online option, with a particular focus on the YouTube platform.

#### *Paid online services*

64. Given the stagnation in French revenue from all video-on-demand pay-per-view services, which has stabilised at around €235 million since 2014<sup>29</sup>, the analysis will focus on SVOD services, which account for all the growth in the video-on-demand sector in France.
65. International SVOD operators have experienced significant growth over the past few years, both on their domestic and foreign markets. The number of subscribers with at least one SVOD service in the United States was estimated at 132 million for 2017<sup>30</sup>, with an estimated revenue of \$12.2 billion for the same year<sup>31</sup>. According to some analysts, the market has not yet reached maturity, as the number of American subscribers is expected to exceed 200 million in 2023<sup>32</sup>.
66. The extent of this growth is particularly remarkable for the Netflix platform, as shown in the graph below.

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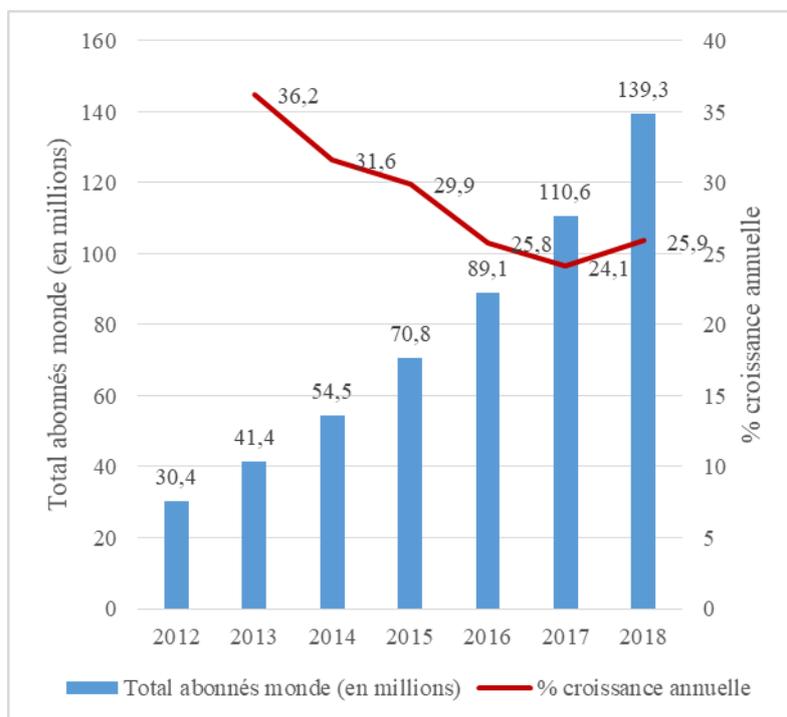
<sup>29</sup> CNC, *Results 2017*, page 147.

<sup>30</sup> Digital TV Research, Press release of 25 September 2018, "Global SVOD subscriptions to reach 777 million".

<sup>31</sup> Digital TV Research, Press release of 2 January 2019, "SVOD subscribers by operators". In their joint study on subscription video-on-demand, the CSA and the CNC indicated that the total revenue from SVOD services in the United States, which reached \$9.5 billion in 2017 (CSA and CNC study, *La vidéo à la demande par abonnement en France: marché et stratégies des acteurs*, cited above, page 28).

<sup>32</sup> Digital TV Research, Press release of 25 September 2018, "Global SVOD subscriptions to reach 777 million".

### Annual change in the number of Netflix subscribers worldwide between 2012 and 2018<sup>33</sup>



Total abonnés monde (en millions)	Total world subscribers (in millions)
% croissance annuelle	% annual growth

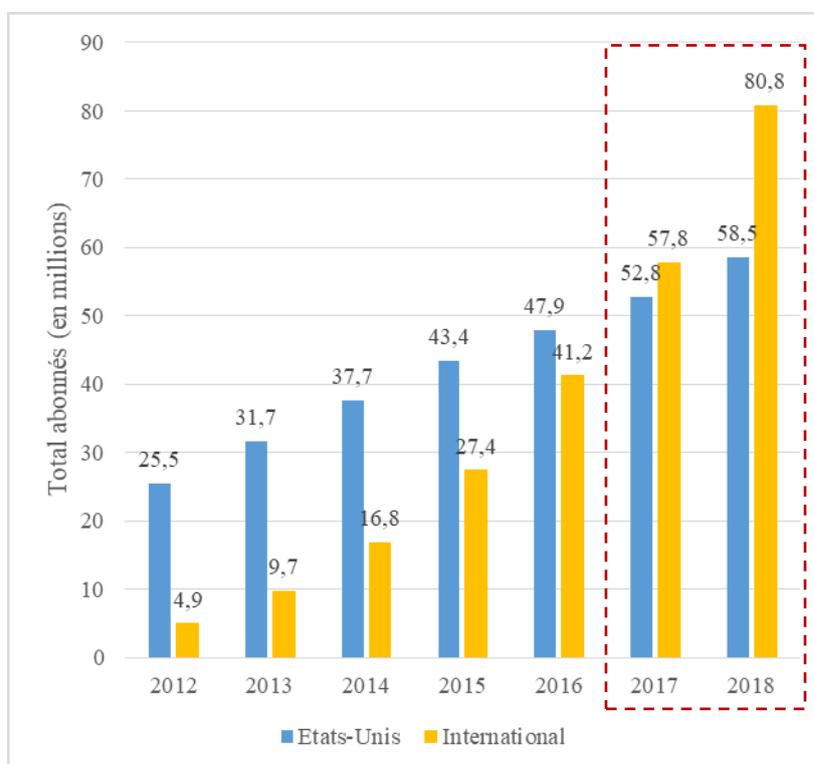
67. The platform experienced very strong global growth between end of 2012 and the end of 2018, rising from 30.4 million to 139.2 million subscribers over this period, an increase of 358% in 6 years.
68. In 2018 alone, Netflix gained nearly 29 million additional subscribers, an increase of nearly 26% on its customer base of 110.6 million at 31 December 2017<sup>34</sup>. Netflix also forecasts continued growth for early 2019, projecting a customer base of more than 148 million at the end of the first quarter<sup>35</sup>, representing 6.4% growth over the first three months of 2019 compared to the end of 2018.
69. This growth was driven mainly by subscriptions from outside the United States, which increased by 40% between 2017 and 2018, representing a net gain of 23 million subscribers, compared with 11% growth in the American market during the same period, the equivalent to 5.7 million additional subscribers.

<sup>33</sup> Netflix Fourth Quarter 2012, 2013, 2014, 2015, 2015, 2016, 2017 and 2018 Earnings Interview, “Letter to Shareholders” and Excel document “Financial Statements”, available on the Netflix institutional website.

<sup>34</sup> Netflix Fourth Quarter 2018 Earnings Interview, “Letter to Shareholders” and Excel document “Financial Statements”, available on the Netflix institutional website.

<sup>35</sup> “Letter to Shareholders” of 17 January 2019.

**Change in the number of Netflix subscribers in the United States and Abroad  
between 2012 and 2018<sup>36</sup>**



Total abonnés (en millions)	Total subscribers (in millions)
Etats-Unis	United States
International	International

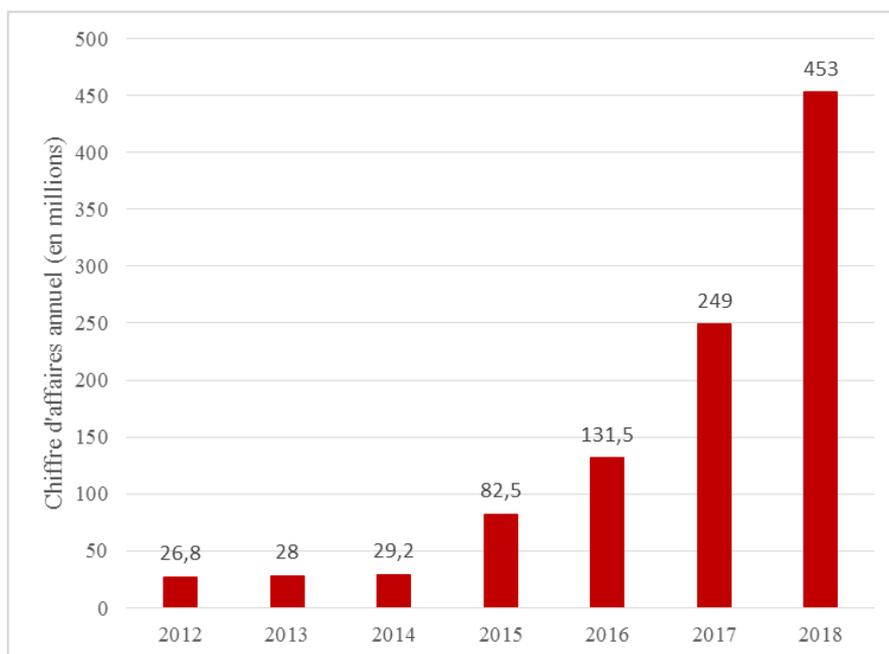
70. Besides Netflix, other SVOD platforms are also increasingly successful.
71. Amazon has launched Amazon Prime Video, which has been available to Amazon Prime subscribers or, as a standalone, since 2016. In France, this offer is linked to an Amazon Prime subscription (fast and unlimited delivery offer for €49 per year). It gives access to a catalogue of films and series, including original works. The company claimed to have 100 million subscribers worldwide in April 2018. In Europe, a Morgan Stanley study indicates that Amazon Prime Video's penetration rate is particularly high in Germany and the United Kingdom, estimated at 24% and 23% respectively within households, compared to 12% and 28% for Netflix in the first quarter of 2018<sup>37</sup>.

<sup>36</sup> Netflix Fourth Quarter 2012, 2013, 2014, 2015, 2015, 2016, 2017 and 2018 Earnings Interview, "Letter to Shareholders" and Excel document "Financial Statements", available on the Netflix institutional website.

<sup>37</sup> Morgan Stanley study of 29 June 2018, "European TV - Letter from America".

72. Another example is Hulu’s service, which at the end of 2018 had 25 million subscribers in the United States, an increase of 48% in its customer base (equivalent to 8 million additional subscribers) during the year<sup>38</sup>.
73. Finally, Google recently launched a paid, commercial-free YouTube subscription service, YouTube Premium, offering content available on its free video sharing platform as well as original programs. In France, the service is available at a rate of €11.99 per month<sup>39</sup>.
74. In France, while SVOD had until recently developed more modestly compared to the United States, Germany or the United Kingdom, particularly due to the penetration rate of IPTV reception, the latest information available shows a very strong acceleration in its growth over the past two years, particularly during 2018.
75. In this respect, the CNC estimates that the turnover from SVOD subscriptions for 2018 was €453 million, reflecting an 82% increase compared to the previous year<sup>40</sup>. In 2017, the CNC had already noted that the turnover generated by SVOD had increased by nearly 90% compared to 2016, and is estimated at around €249 million<sup>41</sup>. However, these data should be considered with caution given their possible underestimation.

**Evolution of turnover from SVOD on the French market between 2012 and 2018<sup>42</sup>**



Chiffre d'affaires annuel (en millions)	Annual turnover (in millions)
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<sup>38</sup> Hulu, press release of 8 January 2019, “Hulu tops 25 million total subscribers in 2018”.

<sup>39</sup> Google, Inc.'s response to the *Autorité*'s questionnaire.

<sup>40</sup> CNC, Observatoire de la vidéo à la demande, 14 December 2018.

<sup>41</sup> CNC, Results 2017, page 152.

<sup>42</sup> CNC data.

76. In terms of the number of individuals with access to these services, the information provided by Médiamétrie shows that the “SVOD subscription rate”, defined as the proportion of individuals aged 4 and over living in a household with access to a SVOD service<sup>43</sup>, almost doubled among the French population between April-June 2017 and April-June 2018, increasing from 12% to 21%. Compared to the number of individuals aged 4 and over in mainland France in 2018 (estimated at around 62 million<sup>44</sup>), the number of French people with access to a SVOD service in their homes rose from 7.4 million to around 13 million over the same period.
77. An analysis of the evolution of the number of subscribers to the various SVOD services available in France shows that this growth is almost entirely driven by Netflix. The Netflix subscription rate among the French population more than doubled in a single year, from 7.7% in April-June 2017 to 15.6% in April-June 2018, an increase of 8 points<sup>45</sup>. The number of individuals with access to the Netflix platform in their homes rose from 4.8 million to 9.7 million over the same period. According to statements made by the CEO of Netflix, which were reported in the press<sup>46</sup>, the total number of Netflix subscriptions in France at the beginning of 2019 reached 5 million. Such a figure attests to an acceleration in the monthly subscription figure closer to 150,000 than to the commonly accepted 100,000<sup>47</sup>. Moreover, these figures do not take into account the non-marginal practice of sharing accounts outside the home. According to Médiamétrie, 14% of Netflix users declare that they can access the platform without paying for it by using the account of another person residing outside the home<sup>48</sup>.
78. At the same time, the French SVOD operators have not experienced the same trajectory. As a result, the number of subscribers to CanalPlay, the SVOD platform of Canal Plus Group (hereinafter referred to as “GCP”) has decreased from 800,000 to 200,000 subscribers in two years<sup>49</sup>. SFR Play claimed 2 million subscribers in July 2017<sup>50</sup>, including subscribers to certain SFR paid or mobile phone offers giving access to SFR Play at no additional cost.
79. The expected continued growth of SVOD could be further strengthened in the future by the possible introduction on the French market of new offers from American operators with quite sizeable catalogues of attractive content, particularly Time Warner (including content from HBO) and Disney/Fox, which plan to launch their own SVOD services in 2019. According to publicly available information, Apple also plans to launch an exclusive video content service in the near future.

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<sup>43</sup> Excluding retirement homes, prisons, etc.

<sup>44</sup> 2019 Insee data.

<sup>45</sup> Médiamétrie data.

<sup>46</sup> *Les Echos*, 14 February 2019

<sup>47</sup> [https://www.liberation.fr/futurs/2018/04/06/netflix-tout-pres-des-35-millions-d-abonnes-en-france\\_1641327](https://www.liberation.fr/futurs/2018/04/06/netflix-tout-pres-des-35-millions-d-abonnes-en-france_1641327). In this article, the number of Netflix subscribers in France is estimated at nearly 3.5 million in April 2018.

<sup>48</sup> Médiamétrie, Baromètre de la SVoD, Vague 3, July 2018.

<sup>49</sup> Maxime Saada's hearing before the Senate, 27 June 2018.

<sup>50</sup> [https://www.lesechos.fr/11/07/2017/lesechos.fr/030441456108\\_sfr-lancera-sa-chaine-dediee-aux-series-et-au-cinema-le-22-aout.htm](https://www.lesechos.fr/11/07/2017/lesechos.fr/030441456108_sfr-lancera-sa-chaine-dediee-aux-series-et-au-cinema-le-22-aout.htm)

## Summary of rates for SVOD and Netflix offers in France, 2017-2018

SVOD	Subscription rate (% of individuals with access to the SVOD offer in their home)		Number of individuals with access to the SVOD offer in their home		Change 2018/2017
	April-June 2017	April-June 2018	April-June 2017	April-June 2018	
All operators	12%	21%	7.4 million	13 million	+75%
Netflix	7.7%	15.6%	4.8 million	9.7 million	+102%

### *Free online offers*

80. In addition to SVOD offers, the consumption of free video sharing platforms on the Internet is also enjoying significant success, especially among the younger generations. According to Médiamétrie, new Internet video sharing platforms such as YouTube or Dailymotion represented, in the second quarter of 2018, around 10% of total video content consumption, including nearly 30% among 15-24 year olds<sup>51</sup>.
81. For example, according to Médiamétrie surveys<sup>52</sup>, YouTube, with all screens combined (computer, mobile, tablet), had nearly 45.5 million unique visitors<sup>53</sup> in November 2018 in France with 16 million unique daily visitors<sup>54</sup>. According to the CSA, “The mobile device has become increasingly important in [online video] consumption. The proportion of the population consuming video content on the Internet from their mobile phones is 80% for those aged 12-17 and 18-24 compared to less than 30% for those aged 18 and over.”<sup>55</sup>
82. In conclusion, while the available data showed that the consumption of SVOD content was less developed in France than in other European countries or in the United States until recently, 2018 saw a sharp acceleration in the consumption of this type of service, driven mainly by Netflix, which saw its number of subscribers increase from 3.5 million in April 2018 to 5 million in 2019, exceeding the number of Canal+ subscriptions.

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<sup>51</sup> Listening time.

<sup>52</sup> Médiamétrie, Audience Internet Global en France en novembre 2018, 3 January 2019.

<sup>53</sup> Médiamétrie specifies that the term “unique visitors per month” refers to the number of Internet users who have visited a website at least once in the month in question, regardless of where they are connected: home, work, elsewhere. Internet users who have visited the same site several times are only counted once.

<sup>54</sup> Médiamétrie specifies that the expression “average unique visitors per day” refers to the number of Internet users who have visited a website at least once during the course of a day for the month concerned. Internet users who have visited the same site several times during the day are only counted once.

<sup>55</sup> Data for 2016. CSA, *Vidéos en ligne ou télévision chez les jeunes publics : étude économétrique*, January 2018.

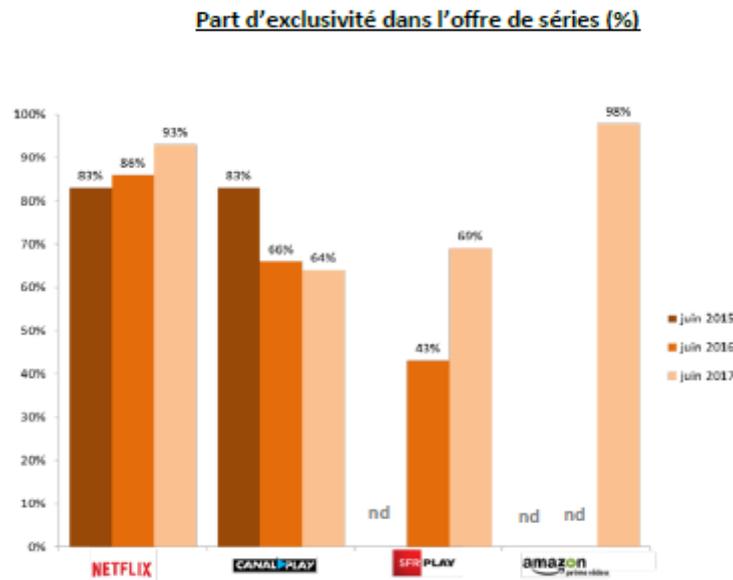
**d) Very innovative offers**

83. The rapidly developing SVOD services share with pay-TV services, also based on subscriptions, the goal of providing a large amount of premium and exclusive content. But in the case of SVOD services, exclusivity and premium take on a whole new dimension as a result of the globalisation of their market. In addition, these offers have other particularities: they are essentially based on fictional content and above all series, provide both global and localised content, and, finally, they are currently particularly cheap compared to traditional pay-TV services.

***Traditional features: Premium and exclusive content***

*An emphasis on exclusivity*

84. The SVOD model is based, like pay-TV, on exclusivity, insofar as each platform must, in order to build customer loyalty, differentiate itself from its competitors by offering its subscribers attractive content that they cannot find elsewhere. This requirement is all the more pronounced for SVOD platforms as the model is, for the most part, without any time commitment for subscribers.



Part d'exclusivité dans l'offre de séries (%)	Exclusivity share in the series offering (%)
Juin 2015	June 2015
Juin 2016	June 2016
Juin 2017	June 2017
nd	No data

*Source: CNC and CSA*

85. But the exclusivity found on SVOD platforms has a completely different dimension than the national exclusive practices, limited in number of broadcasts and duration, as practised by traditional operators. The platforms buy the widest possible range of rights in terms of

medium (SVOD as well television rights), exclusive multi-region rights, and for the longest possible duration.

86. This extended exclusivity is justified both by the characteristics of the catalogues, which have no physical storage constraints (other than those of their exposure to the public), and can therefore preserve the works available without time limitation; by the geographical coverage of the platforms, which are present in numerous countries; and finally by the need to “block” linear television windows as much as possible, to obtain total exclusivity, without rival streaming. These extended exclusions make it possible, finally, to reduce the transactional costs of buying rights for both the seller and the buyer, and to reduce the risk of an incomplete sale for the seller.
87. In the case of films, this policy of exclusivity now threatens the release schedule in France. The economics of film, like that of books, is based on release cycles that precisely segment each presentation of the work to the public over time, valuing it differently according to its novelty. The latter determines the viewer's willingness to pay, and the more or less significant contribution of the service to the financing of French and European cinema. The release schedule therefore protects the windows of pay and free television theatres and channels.
88. In this context, the release of the film in cinemas starts the release cycle. Four months after the start of the theatrical release, the film is available in physical video and on-demand on a pay-per-view basis. The new release cycle signed by operators in the sector in December 2018 now provides that cinema pay-TV channels will be able to broadcast the film 8 to 17 months after its release in theatres (corresponding to the first and second release windows)<sup>56</sup>. Free-to-air television services and pay-TV services other than cinema services have access to films 30 months after their release in cinemas, or even 22 months if the channel invests 3.2% of its turnover in the financing of European works. This period may be reduced to 19 months for films not purchased from pay-TV for a second operating window or by the SVOD. Finally, SVOD platforms are now subject to three different regimes. While the previous regime provided for a single window of 36 months, the new agreement allows these services to make a film available 17 months after its theatrical release, provided in particular that they conclude a film financing agreement with professional film organisations, conclude an agreement with the CSA and pay the video tax to the CNC. A second regime is applicable for platforms that have concluded an agreement with professional organisations and if they comply with certain quotas for providing and investing in French and European works. Apart from these cases, the previous 36-month regime remains applicable<sup>57</sup>.
89. Regardless of this release schedule, SVOD platforms, such as Netflix, have begun to produce films directly as delegated producers, which are not screened in cinemas, and therefore not subject to the different release cycles. In this way, reversing a tradition that qualified a film on the basis of a theatrical release, they were able to retain all rights and immediately stream the work to their subscribers, in order to commercialise their investments through the distribution of new films. The financing of upcoming films of

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<sup>56</sup> Provided that they comply with a certain number of conditions for distribution and investment in French cinema.

<sup>57</sup> The durations presented do not take into account the cases of derogations provided for films that have had limited success at the box office.

Scorsese and the Coen brothers, or the film *Roma*, winner of the Golden Lion at the Venice Mostra, has, in this sense, marked the rupture of a model.

90. In the case of series, which are made for television and are not exploited in cinemas, and for which there is therefore no release schedule, exclusivity is quite common, especially since the image of the platforms is largely identified with their flagship series. The model is even more that of full financing (or even 130%, according to the statements of the president of Netflix) of an original series, in return for control of all the associated rights or, failing that, the exclusive purchase of long-term global rights. Thus, very quickly after launching, in 2011, a SVOD service competing with its main DVD rental business, Netflix produced its first “Netflix Originals” series *House of Cards* and *Orange is the New Black* in 2013.
91. The platforms also try to secure this model by attracting the most promising talent, through a policy of exclusivity very similar to that implemented by the major American film studios in the 1930s: thus, while TF1 was able to sign an agreement with the American novelist Harlan Coben for the adaptation of one of his novels and its broadcast on TF1, Netflix, following the success of this operation, signed an exclusive agreement with the same author, but for the adaptation of 14 works.

#### *Premium content at increasingly high prices*

92. SVOD operators have been increasing their spending on content for several years. The budget for some self-produced programs can reach a very significant level, such as for the series *The Crown* or *Stranger Things* (respectively \$13 million and \$8 million per episode) or “Netflix Originals” films such as *Bright* or *The Irishman* (respectively \$90 million and \$100 million)<sup>58</sup>.
93. More recently on the SVOD market, Amazon also offers, in addition to films and catalogue series, its own content with, for example, the production of the series *The Man in the High Castle*, whose cost per episode is estimated at nearly €11 million (for Season 2) or the upcoming series derived from the *Lord of the Rings*, whose production budget for the first season will largely exceed \$100 million, excluding the acquisition of the rights to the work.
94. The investments made by these operators to replenish their catalogue are subject to very significant inflation each year. After \$5 billion in 2016 and \$6 billion in 2017, Netflix's investments would be, according to *Wired* magazine, between \$10 and \$13 billion in 2018 to produce more than 550 new films and creations, up 88% from 2017 according to *Les Echos*. Amazon is reported to have invested €4.5 billion in 2017<sup>59</sup>. For its part, Hulu has declared an investment of \$2.5 billion for 2017<sup>60</sup>.
95. These figures should be compared with the investments made by the main linear pay-TV channels located in the United States.

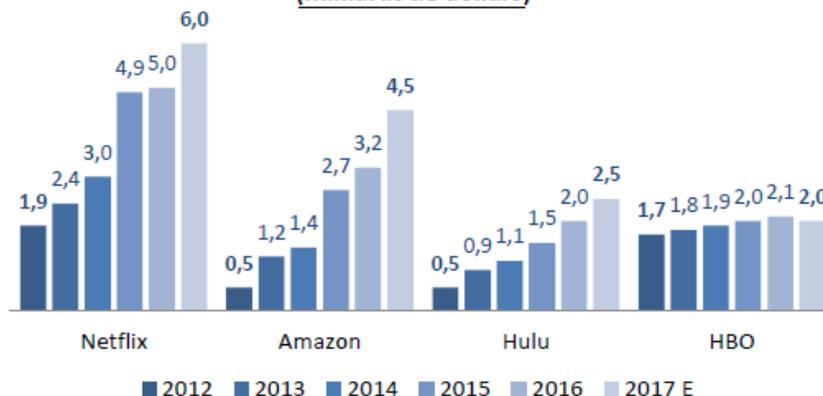
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<sup>58</sup>[https://www.lesechos.fr/17/10/2017/lesechos.fr/030734606414\\_netflix-devient-le-studio-de-films-le-plus-prolifere-au-monde.htm](https://www.lesechos.fr/17/10/2017/lesechos.fr/030734606414_netflix-devient-le-studio-de-films-le-plus-prolifere-au-monde.htm).

<sup>59</sup>[https://www.lesechos.fr/14/11/2017/lesechos.fr/030809544588\\_pourquoi-amazon-mise-des-millions-de-dollars-sur-le-seigneur-des-anneaux-.htm](https://www.lesechos.fr/14/11/2017/lesechos.fr/030809544588_pourquoi-amazon-mise-des-millions-de-dollars-sur-le-seigneur-des-anneaux-.htm).

<sup>60</sup> CNC and CSA study, *La vidéo par abonnement en France*, p. 51.

**Évolution des investissements dans les contenus des trois premières plateformes américaines de VàDA et de HBO (milliards de dollars)**



Évolution des investissements dans les contenus des trois premières plateformes américaines de VàDA et de HBO (milliards de dollars)	Investment in content by the top three US SVOD platforms and HBO (billions of dollars)
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*Source: CNC and CSA*

96. If we limit ourselves to the same base as the SVODs, i.e. national film and audiovisual production, France Télévisions allocated around €482 million to it in 2016, which represents about half of the total investment of terrestrial channels in this area.
97. In addition, the pace of investment by these operators is expected to continue to increase. Indeed, unlike national audiovisual services, SVOD operators have a global subscriber base that ensures better programme profitability, and the amount of expenditure per subscriber remains limited compared to pay-TV channels. Netflix is expected to have nearly 150 million subscribers worldwide in the first quarter of 2019;<sup>61</sup> the Amazon Prime subscriber base is estimated at 100 million. Thus, in 2016, Netflix's annual investments represented approximately €50 per subscriber, while those of GCP were twice or even three times this amount if we consider only subscribers in France<sup>62</sup>.

***Original aspects of the SVOD platforms***

*Pre-eminence of the series format*

98. SVOD platforms offer almost exclusively all types of stock programs, particularly series, as well as documentaries, films and live shows. On the other hand, they hardly broadcast any flow programmes at the moment, such as studio programmes, news, sports, major federative events. These programmes are intended to bring together a mass clientele, and therefore seem less adapted to platforms, whose comparative advantage favours individual consumption, as indicated above, at any time and on any personal support, such as a mobile phone.

<sup>61</sup> Netflix, Letter to Shareholders, 16 October 2018.

<sup>62</sup> CNC and CSA study, *La vidéo par abonnement en France*, p. 53.

99. There have been limited forays into the sports arena. Amazon Prime Video has acquired the world rights to Thursday night US National Football League games and some tournaments of the Association of Volleyball Professionals. In the United Kingdom and Ireland, Amazon Prime Video also offers a range of tennis tournaments and the platform will broadcast several English Premier League football matches in the United Kingdom beginning in 2019. In addition, Facebook, after acquiring the rights to broadcast the Champions League in Latin America, has now begun broadcasting Spanish football league matches in South East Asia in the 2018-2019 season and YouTube streams the matches of the second division of the Spanish league abroad free of charge to over 150 countries.
100. As can be seen from the attempts observed in the field of sports broadcasting, there is nothing to prevent SVOD platforms from eventually including linear competitions in their programmes, in particular by focusing on the skills of recognised animators. Netflix has thus initiated “talent competition” programmes (for example, *The Final Table*), typical of free-to-air linear television.
101. At the moment, therefore, the platforms' offering consists primarily of fiction. According to the CNC's Video on Demand Observatory (*Observatoire de la vidéo à la demande*), 4,027 films were counted over the 2018 period on all platforms, 74% of which were exclusively on a single platform. Netflix's offering remains the largest, with 3,478 films, compared with 1,519 titles for Canal Play and 1,323 for Amazon Prime, up 137% year-on-year.
102. However, television series remain the top genre in terms of audience size. In September 2018, 58% of SVOD consumption was captured by television series, compared to 27% by cinema, even though series represent only 12% of the content offered. The platforms are conducive to “binge watching”, which is quite compatible with the addictive nature of a certain number of series.

*Simultaneously global and local programs*

103. These services are able to offer content that caters to the top-notch “global” market, often English-speaking, very attractive to all subscribers worldwide, with series such as *House of Cards* or *Stranger Things*. But they also offer local, original language productions, to satisfy the tastes of the various countries in which the service is available. Netflix claims to have, thanks to its extremely vast and rich databases on the consumption habits of its subscribers, cutting-edge predictive tools for the success of a work with identified “segments” of audiences sharing the same tastes present in all countries.
104. For example, Netflix produced the series *Marseille* in France with Gérard Depardieu and had exclusive streaming rights for the Spanish series *La Casa de Papel*. However, these series, adapted to local tastes, make it possible to consolidate a subscriber base in a territory, but can also be profitable at an international level. Thus, *La Casa de Papel* was a worldwide success on Netflix, becoming the most watched non-English series on this platform, even outside Spanish-speaking countries. Similarly, *Marseille* has been more successful in Latin America than in France. Netflix has recently indicated that it will continue the pace of its “local” investments by launching 221 projects in Europe in 2019, 153 of which will be “Netflix Originals”, compared to 141 in 2018, which already totalled \$2 billion in investment. These projects focus on content created for each European country, which will then be streamed worldwide through the OTT platform.

### *“Low cost” subscriptions*

105. Compared to pay-TV services, SVOD platforms - it is true that until now they have included little sport, by far the most expensive content - may appear to be particularly cheap. The price of Netflix offers in France ranges from €8-14 per month; Amazon Prime is a delivery related service, and the associated video offer may therefore appear to some as a free or at least inexpensive “bonus” (the price of Amazon Prime is currently €50 per year). The YouTube platform is almost completely free, while offering a wealth of extremely popular video content.
106. These prices should be compared to the very high prices of pay-TV abroad: quite commonly from \$65 to more than \$100 per month, in Great Britain and the USA. In France, Canal Plus's basic offer with premium content is €20, and the average price is €40.

### **3. SERVICES THAT WEAKEN THE ECONOMIC MODEL OF TRADITIONAL STAKEHOLDERS**

107. SVOD services are increasingly popular with consumers. This development is likely to eventually call into question the economic model of pay and free television operators, even if the model now seems solid. What is at stake in the audiovisual offer, whether free or paid, linear or non-linear, is holding consumers' attention. This attention is used to measure the revenues from subscriptions (a) or advertising (b).

#### **a) The impact of the development of non-linear OTT offers on pay TV**

108. American pay-TV operators have experienced a decrease in the number of subscribers in their home territory for several years. As shown by data from the market research company eMarketer, the number of individuals who cancelled any pay-TV offer rose from 17 million to 33 million between 2016 and 2018, representing a loss of 16 million subscribers<sup>63</sup>. This same company anticipates the continuation of this so-called “cord-cutting” movement in the coming years, with the total number of “cord-cutters” in the United States estimated at 55 million in 2022<sup>64</sup>.
109. In their joint study on SVOD, the CSA and the CNC establish a correlation between cord-cutting and the increase in the subscription rate for SVOD services in the United States. Several reasons explain the observed correlation. The US SVOD market is more mature than in most other countries, with an estimated 112 million individuals subscribing to at least one SVOD offer in 2017. In addition, the price of linear pay-TV offers in the United States is high (on average \$65 per month for a package of top-tier channels). According to the CSA and the CNC, this rate can “encourage consumers to unsubscribe from the traditional offers in favour of cheaper SVOD offers.”<sup>65</sup> Finally, SVOD platforms are investing more and more intensively in order to offer programmes that are attractive to consumers.

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<sup>63</sup> Emarketer, “Lowers US TV Ad Spend Estimate as Cord-Cutting Accelerates”, 13 September 2017 and “Exodus from Pay TV Accelerates Despite OTT Partnerships”, 24 July 2018.

<sup>64</sup> Emarketer, “Exodus from Pay TV Accelerates Despite OTT Partnerships”, July 24, 2018.

<sup>65</sup> CSA and CNC study, *La vidéo à la demande par abonnement en France : marché et stratégies des acteurs*, page 28.

110. The impact of SVOD offers on pay-TV subscriptions is, at first glance, less clear-cut in Europe. European countries are not currently experiencing the same level of erosion of pay-TV subscriptions seen in the United States.
111. Indeed, available data show that the number of European subscribers to pay-TV offers has increased from around 178 million in 2015 to around 186 million in 2018<sup>66</sup>. At the same time, however, pay-TV revenues in Europe declined by 3.5%, from \$204 billion in 2015 to an estimated \$197 billion in 2018<sup>67</sup>.
112. This increase in the number of subscribers can also be observed in France, where information collected by the *Autorité* shows that the number of subscribers to premium pay-TV channels offering film and series content (Canal+, OCS, Altice Studio) has increased overall since 2013.
113. In addition, the joint study by the CSA and the CNC notes that in France, three-quarters of subscribers to a SVOD service also subscribe to a pay-TV offer, whereas they are only 33% in the general population, which could show that SVOD offers do not necessarily exclude pay-TV offers<sup>68</sup>.
114. However, the *Autorité* notes several indications that pay-TV operators are facing increasing competitive pressure from SVOD offers.
115. First, the increase in the number of subscribers to pay-TV offers must be put into perspective. The observation on the absolute number of subscribers does not take into account the characteristics of pay-TV offers in France and especially recent changes.
116. In 2016, GCP, the French market leader, undertook a major change in its offers and distribution model, which reduced the base price of its subscription plans. It is now close to the prices of SVOD platforms in France.
117. As the *Autorité* noted in Decision 17-DCC-92 of 22 June 2017<sup>69</sup>, the restructuring of GCP's plans concerned in particular its historical self-distributed offer. The new plan consisted in offering subscribers a choice of two bases:
  - “Essentiel”, composed of the premium channel Canal+ and the channel Canal+ Décalé, at a price of €24.90 per month with a 12-month commitment or €19.90 per month with a 24-month commitment; and
  - “Essentiel Famille”, composed of the Essentiel base described above, plus the Canal+ Family offer and around fifty thematic channels corresponding to the CanalSat package, at a price of €34.90 per month with a 12-month commitment or €29.90 per month with a 24-month commitment.

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<sup>66</sup> Digital TV Research, press release of 2 January 2019, "SVOD subscribers by operators". See also Dataxis' study of June 2018 "European Pay TV market reached 185 million subs in Q1 2018".

<sup>67</sup> Digital TV Research, press release of 2 January 2019, "SVOD subscribers by operators".

<sup>68</sup> CSA and CNC study, *La vidéo à la demande par abonnement en France : marché et stratégies des acteurs*, page 40. This proportion is also found in the United Kingdom, which has led Ofcom to consider that the two types of subscriptions serve more to complement each other than to replace one another.

<sup>69</sup> *Autorité* Decision 17-DCC-92 of 22 June 2017 reviewing the injunctions of Decision 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi SA and Canal Plus Group, paragraphs 67 et seq.

118. In addition, thematic packs of additional offers are also available, with separate pricing for each of them.
119. With a new, more segmented breakdown of its offers, GCP abandoned its old Canal+ plans, whose base price was more than €40 per month with a 12-month commitment.
120. GCP also offers these plans in OTT only through “myCanal”. The model of the new plans is similar to that of the SVOD platforms, insofar as they are available without commitment, at prices of €19.90 per month for the “Essential 100% digital” plan and €29.90 per month for the “Essential Family 100% digital” plan<sup>70</sup>. In addition, in 2018, GCP launched an OTT plan for 26-year-olds at €9.95 per month without commitment.
121. Finally, in October 2016, GCP changed its distribution policy by abandoning the single self-distribution model. It has entered into partnerships with the Free and Orange ISPs providing, according to a wholesale model, for the provision to the ISPs concerned of all or part of its package of channels formerly grouped under the “CanalSat” offer. These offers are directly marketed in the name and on behalf of ISPs, at a price of €2 per month for Free (integrated by default into the subscription price, except opt-out) and €5 per month for Orange. Previously, CanalSat offers ranged from €20 to €65 with a 12-month commitment. A comparable contract was signed with Bouygues Télécom in August 2017. In total, these offers have enabled GCP to expand its customer base by several million subscribers.
122. Thus, most of the gain in GCP subscribers since 2013 has been achieved through new, less expensive offers, as the number of subscribers to the historical self-distributed offers has continued to decline over the 2013-2018 period<sup>71</sup>. Vivendi's 2018 accounts show a 230,000 decrease in the number of subscribers to the operator's own offers.
123. In addition, in 2017, the Altice group launched its own channel, Altice Studio, offering series and cinema content. This launch increased the number of French subscribers to a pay-TV offer, particularly since this channel was included by default in the group's ADSL and fibre subscription for an additional monthly fee of €3 to €5.
124. Although the diversification of offers and the relatively low level of pricing have made it possible to maintain a high number of pay-TV subscribers, operators in the sector have nevertheless experienced a steady decline in their revenues, on the order of 7.5% since 2014. For 2018, Canal Plus France's revenues declined by 3.4%.
125. Secondly, the *Autorité* notes that access to a subscription to a SVOD service seems to encourage some subscribers to a pay-TV offer to unsubscribe from it. As shown by Médiamétrie data, 21% of subscribers to a SVOD service declare that they have abandoned their pre-existing subscription to a pay-TV offer since they have had access to their SVOD plan<sup>72</sup>. This rate is higher than the average termination rate for all Canal+ subscribers, for example, which was less than 15% in June 2018<sup>73</sup>. In addition, Médiamétrie specifies that 15% of people who continue to subscribe to both a pay-TV offer and a SVOD offer declare

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<sup>70</sup> Ibid, paragraph 69.

<sup>71</sup> Annual reports - Vivendi Group registration document for 2014, 2015, 2016, 2017 and Vivendi Group's 2018 half-year financial report.

<sup>72</sup> Médiamétrie, Baromètre de la SVoD, Vague 3, July 2018.

<sup>73</sup> Vivendi Group Half-Year Financial Report 2018.

that they intend to unsubscribe from their pay-TV offer as a result of their use of a SVOD service<sup>74</sup>.

126. In conclusion, while the number of subscribers to pay-TV offers has increased overall for several years in France, the latter have been extensively restructured or integrated into a global subscription offer by some major operators in the sector, making it possible to substantially reduce the basic price.

**b) Advertising revenues weakened by the decrease in time spent listening (TSL) or watching free television**

*Analysis of the consumption of free television*

127. As the CSA and the CNC indicate in their joint study, the time allocated by a consumer to the consumption of audiovisual programmes cannot be extended indefinitely. Consumers must therefore make trade-offs between the various available audiovisual services<sup>75</sup>.
128. The choice by consumers of SVOD services or other online video services may lead them to reduce their consumption of free linear television.
129. The above-mentioned study of 29 June 2018 by Morgan Stanley highlights a link between the development of SVOD platforms and the reduction in individual viewing time on linear television, which in turn affects the amount of advertising investment. In this respect, it notes that the consumption of linear television by French and American households with a Netflix subscription is, on average, 10% lower than those without a subscription. It also observes that when Netflix reached a 20% penetration rate in American households, this constituted a tipping point, leading to a decrease in consumption of free linear television and a slowdown in advertising revenue growth.
130. Such a correlation had already been noted by the CSA, both in terms of Internet content consumption in general and Netflix content consumption in particular.
131. The econometric analysis conducted by the CSA in its study *Vidéos en ligne ou télévision chez les jeunes publics : étude économétrique* shows that the consumption of video content on the Internet, and more broadly all the activities to which a mobile or fixed Internet offer gives access, “has a downward impact on the television consumption of the entire population.”<sup>76</sup> This correlation appears to be particularly strong among 4 to 14-year-olds, for whom the CSA notes that between 2012 and 2016, each increase of one million subscriptions to a fixed or mobile Internet offer led to a decrease in television viewing time of around 4 minutes on average. However, the CSA specifies that this analysis covers only the consumption of audiovisual programmes on the television set and excludes the consumption of these same programmes on other screens<sup>77</sup>. Therefore, the decrease in the consumption of these programs could be overestimated.

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<sup>74</sup> Médiamétrie, Baromètre de la SVoD, Vague 3, July 2018.

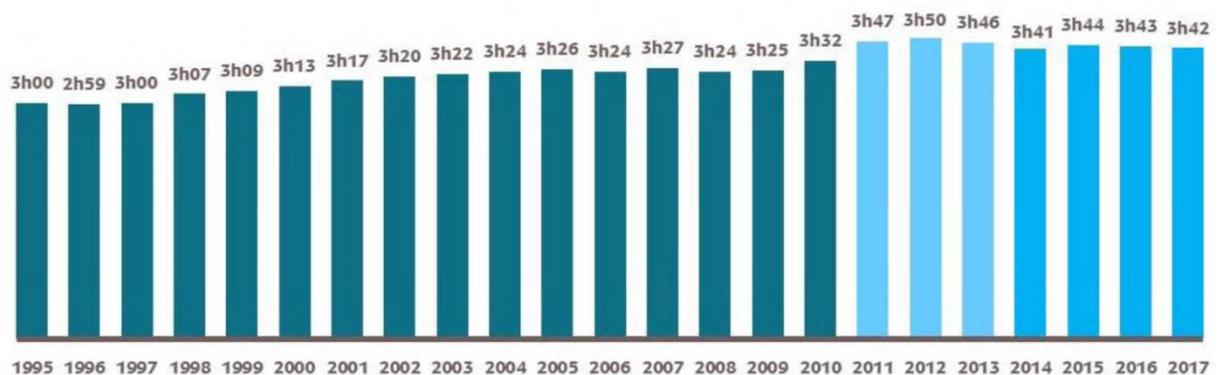
<sup>75</sup> CSA and CNC study, *La vidéo à la demande par abonnement en France : marché et stratégies des acteurs*, page 42.

<sup>76</sup> CSA, *Vidéos en ligne ou télévision chez les jeunes publics : étude économétrique*, January 2018, page 16.

<sup>77</sup> Ibid, page 17.

132. In addition, Médiamétrie's surveys on SVOD confirm the negative impact of a SVOD subscription on television viewing, with nearly half of respondents reporting less frequent over-the-air television viewing after subscribing to such a service<sup>78</sup>.
133. Specifically with regard to Netflix, the CNC and CSA noted in their joint study that one third of the platform's subscribers in France reported watching less television. This decrease in the duration of television viewing time would be even greater among those under 35 years of age, for whom this percentage rises to 45%<sup>79</sup>.
134. Analysis of the duration of individual viewing to free television in France shows that, although it was maintained until 2017, 2018 marked a break, with a significant drop in the time spent in front of the programmes of the television channels, as detailed below.
135. According to data provided by Médiamétrie, time spent listening to TV per individual on the television set increased by 42 minutes between 1995 and 2017 in France<sup>80</sup>.

**Change in time spent listening (TSL) or watching the television<sup>81</sup>**



136. Médiamétrie attributes the increase in viewing time to the deployment of DTT channels from 2005, as well as the growth in non-linear consumption (deferred and catch-up television) since 2011<sup>82</sup>. A further explanation provided by the CSA and CNC in their study<sup>83</sup> would be the success of the triple play and quadruple play bundles offered by ISPs in France, which market so-called “first level of service” offers, available at no additional cost to subscribers, and so-called “second level” offers, which require an additional

<sup>78</sup> Médiamétrie, Baromètre de la SVoD, Vague 3, July 2018.

<sup>79</sup> CSA and CNC study, *La vidéo à la demande par abonnement en France: marché et stratégies des acteurs*, cited above, based on a study conducted by IFOP in February 2015, page 42.

<sup>80</sup> The data used in this section include the viewing time of some pay-TV channels. However, given their limited audience (estimated at 11.2% for all local and foreign pay-TV channels in 2017 - CNC Results 2017, page 94), these figures remain valid for analysing the TSL for free television.

<sup>81</sup> Médiamétrie's response to the *Autorité's* questionnaire.

<sup>82</sup> *Ibid.*

<sup>83</sup> CSA and CNC study, “*La vidéo à la demande par abonnement en France : marché et stratégies des acteurs*”, cited above, page 30.

subscription<sup>84</sup>. As previously mentioned, triple and quadruple play offers are available in more than 60% of French households.

137. All these elements explain the relative stability of television viewing time on television in France from 2010, even if there has been an 8-minute decline since 2012, i.e. a decrease in TSL of just over one minute per year between 2012 and 2017.
138. The relative stability of the TSL on the French market also appears atypical compared to developments in other comparable countries, which, according to available information, have seen a significant reduction in viewing time from 2016 onwards. For example, this decrease was 15 minutes in the United States (4:15) and 9 minutes in the United Kingdom (3:23) between 2016 and 2017<sup>85</sup>.
139. However, Médiamétrie's data show that, even before 2018, TSL tended to decrease significantly among the youngest categories of the population. As shown in the following table, even taking into account the consumption of television programmes on four screens (television, computer, tablet, smartphone) and new uses (including catch-up television and deferred viewing), the TSL underwent a very significant decrease among 15-24 year-olds and 25-49 year-olds between 2011 and 2017.

**Change in TSL between 2011 and 2017 (all screens, live and replay)<sup>86</sup>**

Change in TSL 2011/2017		15 years and older	15-24 years old	25-49 years old	50 years and older
TSL (4 screens - live + + delayed recorded + replay)	2011	3:57	01:59	03:45	04:56
	2017	- 1.3% (3:54)	-23.5% (1:31)	- 12.5 % (03:17)	+ 3% (5:05)

140. In parallel with the decrease in the TSL among 15 to 24-year-olds and 25 to 49-year-olds, Médiamétrie notes that the main free television channels<sup>87</sup> have experienced an ageing of around 2 to 4 years in the average age of their viewers since 2013 (with the exception of France 4). The average age of viewers of these channels on television was 46.5 years in 2017.
141. In addition, Médiamétrie notes a marked acceleration in the erosion of viewing time for linear television programme consumption since the beginning of 2018. This decrease is observed when analysing consumption on the television set alone or on all four screens (television, computer, tablet and smartphones).

<sup>84</sup> *Autorité* Decision 17-DCC-92 of 22 June 2017, cited above, paragraph 29.

<sup>85</sup> Médiamétrie's response to the *Autorité*'s questionnaire.

<sup>86</sup> Médiamétrie's reply to the *Autorité*'s questionnaire and Médiamétrie's hearing before the Board of the *Autorité* on 8 November 2018.

<sup>87</sup> TF1, France 2, France 3, France 4, France 5, M6, and France Ô.

**Change in TSL among those 4 years old and older in 2016, April-June 2017 and April-June 2018<sup>88</sup>**

4 years and older	2017/2016	2018/2017
<b>TSL on the television set (live and replay and recorded delayed)</b>	<b>-1 minute<sup>89</sup></b>	<b>- 6 minutes, 30 seconds</b>  (- 7 minutes, 30 seconds live; + 1 minute replay and delayed)
<b>TSL all screens (live and replay)</b>	<b>- 1 minute</b>	<b>- 5 minute, 30 seconds</b>  (- 6 minutes live; + 30 sec. replay and delayed)

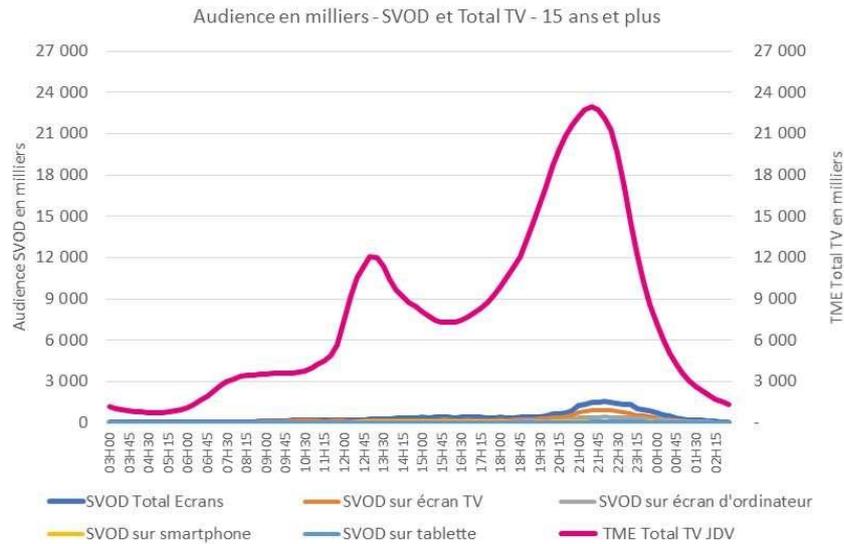
142. The consumption of television programmes on the television set decreased by 6 minutes and 30 seconds between 2017 and 2018. Across all screens, the decrease is only slightly less pronounced, at 5 minutes and 30 seconds. In both cases, catch-up television consumption is far from sufficient to compensate for the decrease in linear consumption. This trend is also accelerating, with the TSL decreasing by only one minute in 2017 compared to 2016.
143. According to Médiamétrie, the decrease in the TSL is the result of a decrease in the number of daily viewers in front of the television set<sup>90</sup>, which can be explained by certain cyclical factors such as weather, programming or news, but also by the structural impact of SVOD services.
144. In this respect, while the number of individuals using SVOD services during the day, all screens combined, remains low (411,000 SVOD consumers on average over the whole day) compared to the number of viewers, it is more marked during the strategic prime time hours, when it accumulates more than 1.5 million consumers.

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<sup>88</sup> Médiamétrie data.

<sup>89</sup> Decrease observed on the basis of the graph presenting the change in TSL since 1995, integrating the use of non-linear consumption (Médiamétrie contribution, page 7).

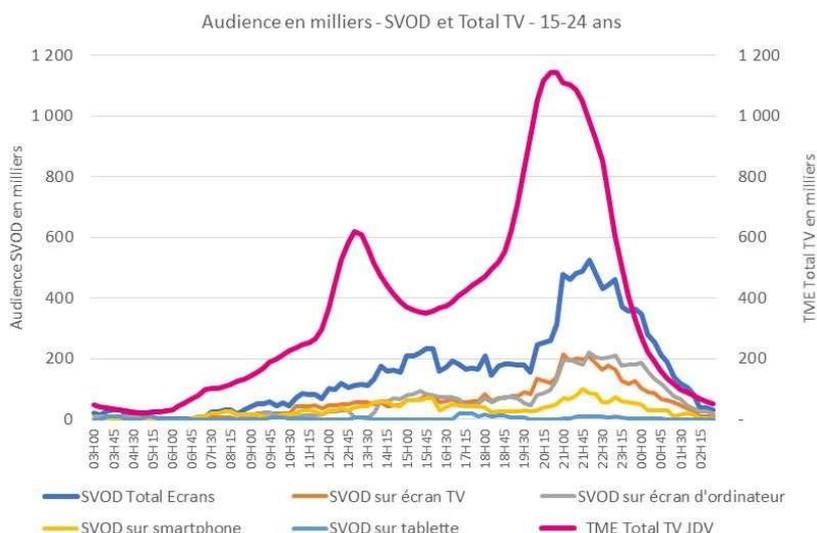
<sup>90</sup> Médiamétrie's hearing before the Board of the *Autorité* on 8 November 2018.



Audience en milliers – SVOD et Total TV – 15 ans et plus	Audience in thousands - SVOD and total TV - 15 years and over
Audience SVOD en milliers	SVOD audience in thousands
TME Total TV en milliers	Extrapolated average total TV audience in thousands
SVOD Total Écrans	SVOD All Screens
SVOD sur écran TV	SVOD on TV screen
SVOD sur écran d'ordinateur	SVOD on computer screen
SVOD sur smartphone	SVOD on smartphone
SVOD sur tablette	SVOD on tablet
TME Total TV JDV	Extrapolated average combined total TV audience

*Source: Médiamétrie, April-June 2018*

145. The situation is much more clear-cut if we consider individuals between 15 and 24 years of age. SVOD services occupy a much larger share of the audience in this category of the population, not only during prime time hours but also throughout the day.



Audience en milliers – SVOD et Total TV – 15-24 ans	Audience in thousands - SVOD and Total TV - 15-24 years
Audience SVOD en milliers	SVOD audience in thousands
TME Total TV en milliers	Extrapolated average total TV audience in thousands
SVOD Total Écrans	SVOD All Screens
SVOD sur écran TV	SVOD on TV screen
SVOD sur écran d’ordinateur	SVOD on computer screen
SVOD sur smartphone	SVOD on smartphone
SVOD sur tablette	SVOD on tablet
TME Total TV JDV	Extrapolated average combined total TV audience

Source: Médiamétrie, April-June 2018

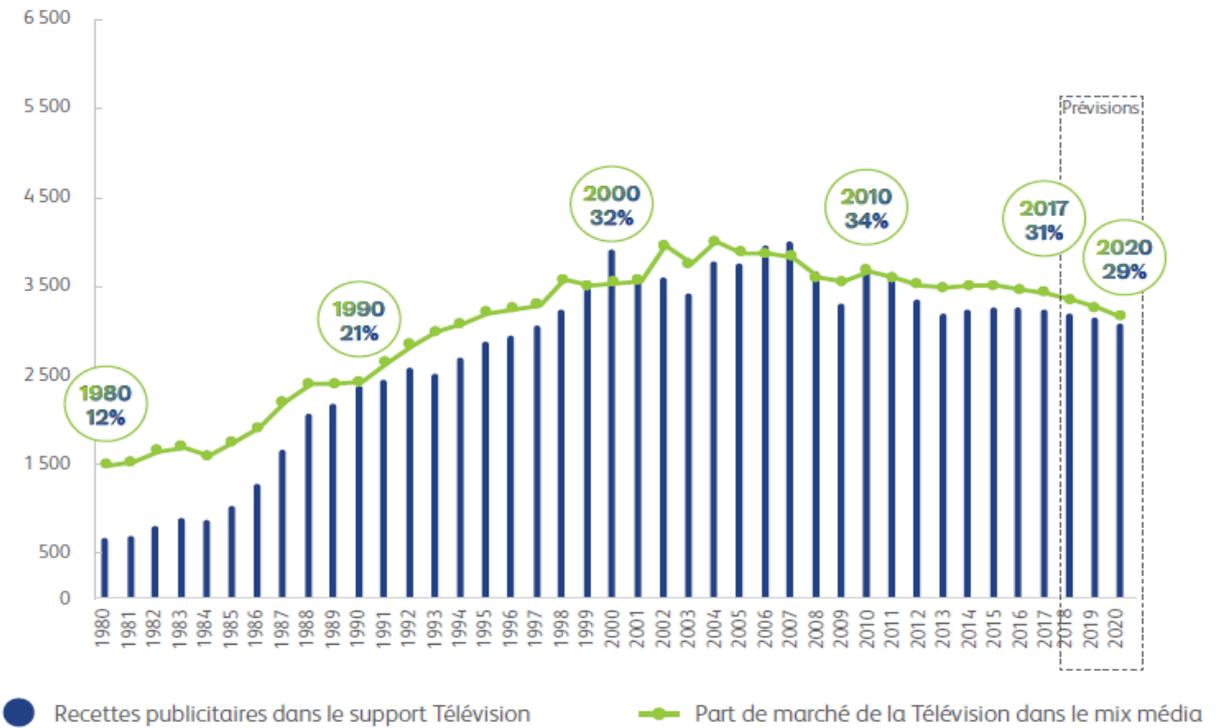
\* \* \*

146. In conclusion, recent developments in the TSL show a significant acceleration in the overall decline in television channel consumption, particularly since 2018, which is far from being offset by the increase in catch-up television. While the overall audience among children aged 4 and over seemed to be more stable than among young audiences, the latest available data show a significant erosion of the channels' overall audience.
147. While, as Médiamétrie points out, this trend can be explained by a multitude of cyclical factors, it is in any case consistent with the reduction in individual viewing time observed abroad, resulting from the structural impact of SVOD offers and online video sharing platforms on the audience for free television channels.
148. The *Autorité* notes a correlation between the increase in the penetration rate of SVOD services and the importance of free online videos with the decrease in the consumption of free television. This correlation seems particularly marked among young audiences who, because of the attractiveness of SVOD services and online video sharing platforms, are partly turning away from linear television, which is also leading to a rapid increase in the average age of viewers.

**Pressure on advertising revenues**

149. Already stagnant for several years, the advertising revenues of free linear television operators, the amount of which depends on the level of audience, are also affected by the decline in individual viewing time.

**Television advertising revenues (in millions of euros) and television’s market share<sup>91</sup>**



● Recettes publicitaires dans le support Télévision	— Part de marché de la Télévision dans le mix média
Recettes publicitaires dans le support Télévision	Television advertising revenues
Part de marché de la Télévision dans le mix média	Television’s market share in the media mix
Prévisions	Forecasts

150. This trend is not specific to television advertising revenues but reflects a trend in the sector as a whole, since in 2017, the level of advertising revenues for all media combined was very slightly lower than in 2007<sup>92</sup>. Television advertising revenues have held steady since 2014, while radio advertising revenues have fallen slightly (down 1.3% on average since 2012)<sup>93</sup>.

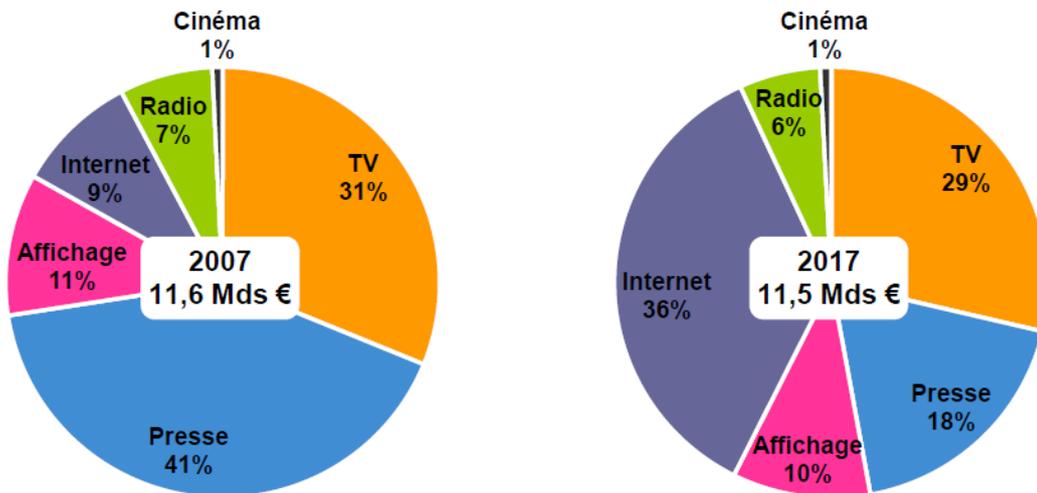
<sup>91</sup> BearingPoint analysis - Zenith and IREP data.

<sup>92</sup> CSA, Analysis related to the request for non-renewal of competitive commitments made by the TF1 Group when the LCI channel was unencrypted, page 19.

<sup>93</sup> IREP, Net Media Advertising Income, 2017.

151. Compared to other media, television and radio now occupy a slightly lower but still comparable position to what they held 10 years ago, with about 29% of revenues compared to 31% in 2007 for the former and 6% compared to 7% for the latter. The press, for its part, lost 23 points over the same period while the Internet gained 27 points.

**Comparison of the distribution of multi-media advertising revenues between 2007 and 2017<sup>94</sup>**



Cinéma	Cinema
TV	TV
Presse	Print Media
Affichage	Display
Internet	Internet
Radio	Radio
11,6 Mds €	€11.6 billion

152. Although lower than search-related advertising in terms of market share, display advertising on the Internet experienced very strong growth (up 20% in 2017 compared to 2016 and up nearly 30% in the first half of 2018 compared to the first half of 2017<sup>95</sup>), largely driven by traditional display advertising and video advertising which, according to the E-pub Observatory, grew by 45% between the first half of 2017 and the first half of 2018<sup>96</sup>.

153. The majority of online advertising revenues are captured by search engines and social networks, primarily Google and Facebook, while traditional audiovisual stakeholders have

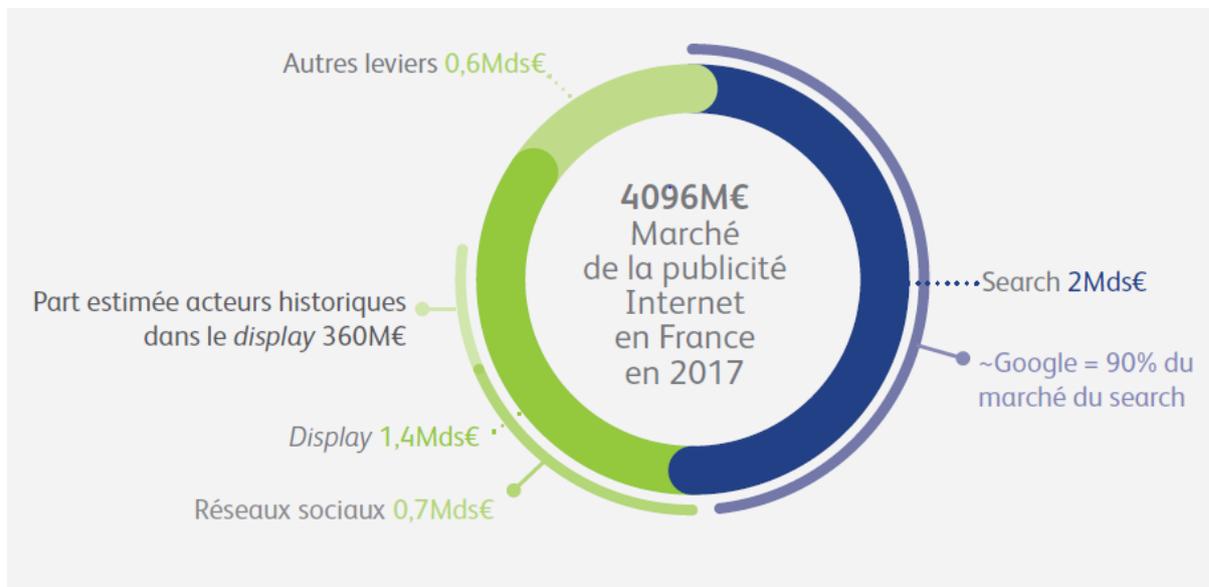
<sup>94</sup> Source: Analysis related to the request for non-renewal of the competitive commitments made by the TF1 Group when the LCI channel was unencrypted, page 20.

<sup>95</sup> See the study “Le marché publicitaire 2017, L’activité reprend doucement” published jointly by France Pub, IREP, and Kantar Media, page 1; E-pub Observatory, July 2018, page 14.

<sup>96</sup> E-pub Observatory, 20th edition, produced by PWC in partnership with UDECAM, July 2018, slide 16.

a very low share of this market (around 9% in 2017), and enjoy more limited growth prospects.

**Distribution of advertising revenues from agencies for a television channel operator in 2017 as part of total Internet advertising investment (in billions of euros)<sup>97</sup>**



4096 M€ Marché de la publicité Internet en France en 2017	€4.096 billion Internet advertising market in France in 2017
Search 2 Mds€	Search €2 billion
Google = 90% du marché du search	Google = 90% of the search market
Réseaux sociaux 0,7 Mds€	Social networks €0.7 billion
Display 1,4Mds€	Display €1.4 billion
Part estimée acteurs historiques dans le display 360 M€	Estimated share of historical stakeholders in the display €360 million
Autres leviers 0,6Mds€	Other levers €0.6 billion

*Note*

With revenues exceeding €4 billion in 2017, or about 36% of all advertising revenues in all media combined, the Internet is now the medium of preference for advertisers. Online advertising also experienced a very high growth rate, of 12% in 2017 and 15.5% in the first half of 2018, well above the sector's average growth rate of 1.2% in 2017. Compared to print advertising revenues, television advertising revenues are moderately eroding, but several factors (international comparisons, changes in usage by age group) and studies make it plausible that this erosion will increase in the coming years.

<sup>97</sup> BearingPoint analysis - SRI 2017 data.

## B. CONSEQUENCES ON THE COMPETITIVE LANDSCAPE

### 1. THE GROWING CONVERGENCE OF MARKETS

154. The definitions of the markets for the audiovisual and advertising sectors have been the subject of extensive decision-making practice by the *Autorité*, particularly with regard to the company merger control<sup>98</sup>. Information describing the functioning of advertising markets are also included in its Opinion 18-A-03 of 6 March 2018 on online advertising.
155. The analysis carried out by the *Autorité* in the context of an opinion is not intended to review the market definitions established by decision-making practice.
156. However, the request for an opinion that the Committee on Cultural Affairs and Education submitted to the *Autorité* explicitly refers to “foreseeable market developments” in the sector. The *Autorité* is therefore requested to carry out a prospective analysis in the light of developments since its previous decisions and opinions. The elements developed below are intended as benchmarks to highlight the changes currently under way. Some of these elements could, in the long term, be likely to change market definitions in cases that the *Autorité* will have to consider in the future.
157. In this respect, the digital revolution is defined by two interdependent elements that evolve in parallel: new uses and new offers. Taking into account these two developments in the audiovisual sector shows the major changes that are at work. While the traditional television model is that of “push”, i.e. exposure to content as proposed by operators, which leads to an analysis of markets from the supply side, digital models are more associated with “pull”, i.e. the search for content, free or pay, linear or non-linear, by the user, which makes it necessary to take usage into account in market analyses. Qualitative studies on the evolution of uses<sup>99</sup> show that there is a phenomenon of hybridisation between linear flow programs and content available in the form of stock, catch-up, SVOD or on video platforms. Catch-up contents, although non-linear, can be chosen on the recommendation of linear programs. SVOD content or content available on video platforms can be consumed in streaming. From now on, just as in the past and today with linear programmes, non-linear content can appear as “common cultural references” by being viewed as part of a form of “social synchronisation”. This development is important in a sector that ultimately depends on the time spent in front of the screen and the ability to attract the consumer’s attention. This in turn determines the value of advertising screens, justifies the investments made to purchase content and increases the number of subscriptions.

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<sup>98</sup> See, for example, *Autorité* decision 17-DCC-92 of 22 June 2017, cited above; decision 17-DCC-93 of 22 June 2017 reviewing the commitments in decision 14-DCC-50 of 2 April 2014 on the acquisition of sole control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Canal Plus Group; and decision 10-DCC-11 of 26 January 2010, cited above.

<sup>99</sup> Mme X..., "La télévision sur smartphone : ressorts et implication du renouvellement des modalités d'agrégation", *Études de communication* [On line], 44 (2015), Groupe d'Études et de Recherche Interdisciplinaire en Information et Communication de l'Université Lille 3.

158. The *Autorité* notes that the success of new services based on an open technological offer and investing heavily in content, as well as the strategies of traditional operators offering an increasingly non-linear offer, are leading to convergence in the audiovisual and advertising sectors (a and b). This trend toward convergence is also accompanied by a geographical expansion of markets (c).

**a) Various types of services that tend to respond to the diversity of uses**

*The ongoing convergence between linear pay-TV and SVOD offers*

159. In Decision 17-DCC-92, the *Autorité* considered that the substitutability between the market for the distribution of SVOD offers to final consumers and the market for the distribution of pay-TV services was imperfect. It also considered that SVOD services were likely to grow<sup>100</sup>.
160. Today, the *Autorité* notes that the convergence phenomenon already identified in 2017 between the two types of services is tending to accelerate, suggesting a significant change in the competitive landscape in the future.
161. It has already been pointed out in the first part of the opinion that the number of subscribers to SVOD services in France has grown significantly and steadily, particularly since 2018. At least 21% of individuals aged 4 and over, or 13 million people, have access to a SVOD offer in their homes in 2018, including nearly 10 million for Netflix. In addition, major media and digital groups such as Amazon, Hulu, Disney and HBO have launched or are preparing to launch their own SVOD services and contribute to gradually greatly enriching the existing non-linear audiovisual service offering. As for pay-TV operators, the overhaul of GCP's offers and the pricing level of all operators in the sector, while they have made it possible to increase the subscriber base, are not sufficient to offset the steady decline in their overall revenues since 2013. In this respect, in order to establish the correlation between these opposing movements, it has previously been noted that access to an SVOD service seems to make some pay-TV subscribers more likely to unsubscribe.
162. In addition, the *Autorité* notes that the qualitative differentiation between pay-TV and SVOD plans is to some extent becoming blurred.
163. Thus, some SVOD operators are beginning to invest in foreign sports programmes that were previously broadcast by traditional stakeholders in linear mode. As stated by the CSA in its Opinion 2018-04 of 7 November 2018<sup>101</sup>, the development of a sports rights acquisition activity by OTT platforms contributes to bringing them closer to pay-TV offers.
164. This is the case with Amazon Prime Video, which has acquired the world rights to the Thursday night football games of the U.S. National Football League and some tournaments of the Volleyball Professionals Association. In the United Kingdom and Ireland, Amazon Prime Video also offers a range of tennis tournaments, including the US Open in 2018. Finally, the platform will broadcast several matches of the English Premier Football League in the UK beginning in 2019. Another sign of Amazon's interest in sports content

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<sup>100</sup> *Autorité* Decision 17-DCC-92 of 22 June 2017, cited above, paragraphs 285-289.

<sup>101</sup> CSA Opinion 2018-04 of 7 November 2018, cited above, page 13.

is that it has applied to acquire some 20 local American sports channels sold by Disney as part of the merger with the Fox group. Facebook, for its part, after acquiring the rights to broadcast the Champions League in Latin America, is now streaming Spanish football league matches in southeast Asia beginning with the 2018-2019 season, and YouTube is streaming the matches of the second division of the Spanish league abroad free of charge in more than 150 countries.

165. SVOD operators remain subject to the release schedule for films, so that they can make films available on their platforms only 36 months after their release in cinemas, compared to 10 to 12 months for the first window in pay-TV. However, under the new inter-professional agreement proposing a new release schedule, digital stakeholders will have access to a much more favourable new window provided that they invest sufficiently in national film production and contribute to the CNC budget. In this hypothesis, the time difference between the streaming of films by pay-TV services and by SVOD services would be significantly reduced, since SVOD operators would have a window equivalent to the second pay-TV window.
166. In addition, the *Autorité* notes that some SVOD operators have undertaken a very significant upscaling of their self-produced film offer. These films, which are not released in cinemas, are not subject to the release schedule. Netflix planned to offer 80 “Netflix Originals” films in 2018, some of which, as already mentioned, had a significant budget. For example, the release at the end of December 2018 of the “Netflix Originals” film *Bird Box*, which, according to Netflix, was seen by more than 45 million subscribers in a few weeks, demonstrates the platform's intent to promote its own feature films. Netflix has also turned to some renowned directors, including Martin Scorsese, Steven Soderbergh and Michael Bay.

***Service offers from television channel operators combining linear and non-linear streaming***

167. The progressive non-linear nature of audiovisual content viewing is leading linear television operators to set up combined linear and non-linear services. These services include the essential functionalities of the SVOD offers.
168. Pay-TV operators thus offer additional non-linear programme services (catch-up television services, such as “myCanal” for GCP and “OCS” for Orange) in their linear television subscription<sup>102</sup>. Programmes broadcast on linear channels are made available on catch-up services for a fixed period of time after each of their linear broadcasts. Since these programmes are broadcast several times on linear pay-TV channels, their availability can be extended over several weeks or even months. In addition, “myCanal” or Molotov-type services make it possible for users not only to consume content available on demand and on a catch-up basis, but also to view the live content of the channels included in the services to which they have subscribed. With these applications, the user can choose between linear and non-linear content.
169. In general, the trend towards a shift in usage from linear to non-linear viewing appears to be a fundamental trend, which is also evident in the interfaces currently used in OTT Android boxes. Netflix's “puzzle” presentation has been adopted, with no difference and no

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<sup>102</sup> These services can also provide access to live content and temporary downloads of content for offline viewing.

boundaries in the presentation between the non-linear and linear programmes of television channels, except for a discreet “live” mention in a corner of the icon.

170. In addition to existing partnerships with ISPs for the non-linear provision of their content, free TV operators have also set up their own OTT services, which offer catch-up services in addition to the simultaneous streaming of the programmes on their linear channels. These services have been increasingly popular since their launch, as evidenced by the evolution of the TSL for catch-up television, which has tripled between 2011 and 2017<sup>103</sup>. In addition, the amount of content available on these OTT catch-up services is also growing steadily, from about 6,000 hours of content available in December 2010 to nearly 23,000 hours in June 2018<sup>104</sup>.
171. While these types of services had already been introduced by television station operators before the entry of American SVOD operators into the French market, the *Autorité* underscores that they are now of increasing strategic importance. In order to satisfy new consumer habits, particularly among younger consumers who are increasingly abandoning linear viewing, pay-TV operators have continued since 2017 to launch offers that are fully broadcast in OTT, following the example of Canal+'s offer for viewers under 26. This offer, available on computers, tablets, smartphones and television via Airplay and Chromecast, gives access through “myCanal” to certain content from the operator. It is offered without a time commitment for a price comparable to that of SVOD platforms (€9.95 per month).
172. The diversification of the content distribution models of French audiovisual groups has gone even further with the launch, by some operators of free television channels, of SVOD services, instead of linear services. For the time being, these initiatives remain limited to the target audience of very young people, such as the launch by the TF1 Group in February 2015 of the TFOU MAX service, available on a dedicated website and on the boxes of some ISPs<sup>105</sup>.
173. Finally, some foreign television channel operators, whose content was traditionally reserved for linear television, are also starting to launch non-linear services on the Internet. This is the case, for example, of Fox News, one of the leading news channels in the United States, which recently launched a pay platform called “OTT Fox Nation” to view some of the channel's archived content, special programs and documentaries.

#### *A convergence of free and paid content offers*

174. The distinction between the business model of free television channels and that of pay-TV channels also appears to be less strict than before.

##### *From free to paid*

175. The stagnation of turnover in the television advertising market is leading operators of free television channels to seek new sources of revenue by increasing the value of their content. This desire to diversify and increase revenues thus requires additional remuneration for their content from distributors and viewers.

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<sup>103</sup> TSL for catch-up television for children aged 15 and over, Médiamétrie data.

<sup>104</sup> CNC, *Télévision de rattrapage*, 17 April 2018 and *Baromètre de la télévision de rattrapage*, 2 July 2018. The 2010 data include pay-TV catch-up services.

<sup>105</sup> Another example is the Lagardère Group's Gulli Max service, which was terminated in January 2018.

176. The TF1 group has recently renegotiated the contractual conditions for the streaming of its programmes with ISPs, which offer in their triple and quadruple play bundles the services of the group's channels in linear and non-linear streaming. In return for an increase in the remuneration paid by ISPs to the TF1 group, the latter provides them with new associated services related in particular to the quality and functionalities of the non-linear streaming of its programmes (image quality, start over functions, multi-screen, cast to TV, etc.).
177. After reaching an agreement with Bouygues and Altice in 2017, TF1 concluded new agreements during the year with Orange, Free and finally GCP. While the exact amounts that distributors must now pay to broadcast the TF1 group's channels are confidential, they have been substantially increased compared to previous contracts. Other operators such as the M6 group have signed comparable agreements with distributors.
178. In order to strengthen their direct distribution to OTT viewers, the TF1, France Télévisions and M6 groups have announced the creation of a joint platform, called Salto, jointly controlled by each of them. Salto is expected to be a platform for aggregating the content offered by shareholder operators on their free linear television channels, enriched with previews and certain services such as catch-up, start over, cast to TV, etc. According to the information provided to the *Autorité*, access to Salto will be provided in return for a monthly subscription fee, the amount of which will vary according to the options chosen. However, the now free catch-up television services would become paying in this model.
179. Such a shift towards pay-TV should continue to increase with the inevitable decline of terrestrial television in favour of triple play bundles and non-linear services.
180. Conversely, GCP modified the CanalSat offer in October 2016, making all or part of its package of channels formerly grouped under the “CanalSat” offer available at prices of €2 to €5 per month, compared with over €30 previously. If, as the *Autorité* has pointed out<sup>106</sup>, these offers are considered to belong to the second level of service of ISPs (channels or channel packages obtained by consumers in return for payment in addition to their triple or quadruple play subscription), their low access price, on the one hand, and the fact that they are included in Free's basic offer (subject to a very rarely used option to opt out), on the other hand, also contribute to blurring the distinction between pay and free television.
181. The whole landscape shows that the boundaries between linear and non-linear and, to a certain extent, between paid and free offers, are now tending to become porous. At this stage, this porosity is mainly reflected in France by the launch of non-linear services by television channel operators. However, it is also noted that some non-linear OTT operators are beginning to offer live content.

#### ***Possible future aggregation of content offers***

182. The development of offers aggregating different types of content could further increase the porosity of the boundaries of audiovisual markets. Examples of such aggregators have tended to multiply over the past few months.
183. For example, the OTT operator Molotov offers 35 channels in its free version, including 25 from French DTT. Its various paid versions also include additional cinema or sports channels, as well as programme recording features. In addition, the TF1 group and GCP very recently signed an agreement providing for the integration into the “myCanal” offer of replay programmes from the free channels TF1, TMC, TFX and TF1 Séries Films.

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<sup>106</sup> *Autorité* Decision 17-DCC-92 of 22 June 2017, cited above, paragraphs 275-278.

184. Moreover, in the near future, Salto's offer could include, on a shared OTT platform, the television content of the three main French audiovisual groups.
185. Another example abroad is Amazon Prime Video, which offers the distribution of optional pay-TV channels in the United States, the United Kingdom and Germany via the Amazon Channels service. In the United States, Amazon Channels provides access to highly valued content, such as HBO channel programmes, including for example the Game of Thrones series<sup>107</sup>.
186. The model for aggregating content offerings from content operators on their different platforms could take on an even greater dimension with the development of global aggregation services such as Apple TV or Apple TV 4K. This type of service provides a global “store front” of all the content, both paid and free, to which the user has access. Content that meets the user's search criteria is then “sucked” from the content operators' platforms to the aggregator interface.
187. For example, Apple TV allows you to search for content (such as films or series), based on search criteria such as title, genre, actor or others, on multiple simultaneous platforms. Once the search is launched, the Apple application scans the content on all these available platforms in order to present the content that meets the required criteria on the Apple TV interface. In France, according to Apple, nearly twenty platforms from different content providers can potentially be used by its aggregation service, namely iTunes, Amazon Prime Video, Apple Music, Arte, blackpills, Canal+, Classix, e-cinema, Garage, Hopster, Love Nature, Molotov, MUBI, Netflix, OCS, Red Bull TV and TFOU MAX<sup>108</sup>.
188. This “store front aggregation” model seems to be highly attractive to the consumer. It erases the linear/non-linear and free/paid distinction as soon as the aggregation platform becomes the only point of contact with the user. All the content is mixed together in a global offer that is directly accessible on a single interface. In such a system, the linear/non-linear or free/paid distinction is heavily blurred from the point of view of consumer use.

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<sup>107</sup> <https://www.capital.fr/entreprises-marches/amazon-prepare-la-distribution-de-chaines-de-tele-en-france-voici-pourquoi-cest-un-pari-risque-1279846>.

<sup>108</sup> <https://support.apple.com/fr-fr/HT205321#france>.

*Note*

The market balance is undergoing a disruption; while this is only just beginning, it heralds major changes in the coming years. Given the technological revolution and the increasing availability of audiovisual content, it is likely that the increasing availability of varied content accessible at any time and in any place will gradually lead consumers to choose between many types of content, whether broadcast in linear or non-linear mode. This choice is an element of market analysis. New uses have led to a growing convergence of markets, at least for pay-TV and SVOD offers.

**(b) Convergence between the television and online advertising markets**

189. National and European decision-making practice draws a distinction between the television advertising market and other advertising markets<sup>109</sup>, as well as the online and offline advertising markets<sup>110</sup>. The distinction between the television and online advertising markets results not only from differences in pricing methods<sup>111</sup>, targeting<sup>112</sup>, interactivity, entry costs and campaign tracking tools<sup>113</sup>, but also from the complementary characteristics of the two types of advertising. Indeed, through its ability to fine-tune targeting, optimise coverage and distribute contacts, online advertising offers advertisers the opportunity to complement a television advertising campaign that simultaneously reaches broad socio-demographic targets and increases product awareness and brand image.
190. The investigation shows that audience measurement tools are tending to evolve towards a homogeneous video measurement regardless of the screen. In 2015, Médiamétrie and Integral Ad Science launched the “video gross rating point” or “video GRP” to measure the impact of online video advertising campaigns using criteria comparable to those used in

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<sup>109</sup> See in particular Decision 14-DCC-50 of the *Autorité de la concurrence* of 2 April 2014, cited above, paragraphs 105 to 108; Opinion 10-A-29 of the *Autorité de la concurrence* of 14 December 2010 on the competitive functioning of online advertising, paragraphs 111 to 136; Decisions of the European Commission in Cases M.7288 Viacom/Channel 5 and M.7217 Facebook/WhatsApp of 9 September and 3 October 2014, paragraphs 34 to 40 and 74 to 79.

<sup>110</sup> See in particular the European Commission's decision of 15 June 2018 in Case M.8861 Comcast/Sky, paragraphs 64 *et seq.* and Opinion 18-A-03 of the *Autorité de la concurrence* of 6 March 2018 on data processing in the online advertising sector, paragraph 171.

<sup>111</sup> GRP (gross rating point) cost, on the one hand, for television advertising, which is calculated for a given advertising space by dividing the price by the number of GRPs obtained (i.e. the rate of coverage of the target), and CPM (cost per thousand), the price of which is fixed according to the number of displays of the advertisement, or CPC (cost per click), on the other hand, for online advertising.

<sup>112</sup> See the definition in Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, page 121: “Advertising technique that consists of customising promotional content delivered to users on the basis of criteria such as their browsing behaviour or interests (behavioural targeting), the theme and content of a website (contextual targeting), the geographical location of an individual (geographical targeting), their social, demographic and economic characteristics, such as age, gender, income, etc. (socio-demographic targeting) or the time, day or week (time targeting).”

<sup>113</sup> Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraph 171.

television<sup>114</sup>. In 2017, Médiamétrie also launched “four screens per channel” audience measurement, allowing channels to find out about their audiences on both television and Internet screens.

191. This phenomenon is also visible in some media agencies, which are developing global performance tools to automatically optimise media schedules between linear television channels, catch-up television and online video platforms.
192. Some of them also have multi-screen departments that manage advertisers' investments in all video media (online TV/video and even sometimes cinema), with display budgets managed by third-party teams. This change reflects the fact that negotiations between media agencies and advertising agencies are increasingly focused on multi-media video budgets, rather than separate budgets for each type of medium.
193. The way television advertising spaces are purchased is also tending to converge in part with digital advertising. In this respect, it can be noted that the purchase of inventories for television advertising is also beginning to evolve, to allow a more programmatic mode of purchase via electronic platforms, following the example of what is being done on the Internet. One example is the automated purchase process “*Achat Express*” (express purchase) launched by TF1 on its box at the end of 2017/early 2018<sup>115</sup>, or “*Adspace*” launched by France Télévisions<sup>116</sup>, which will allow the purchase of advertising screens in real time via the platform, both on conventional television and in the digital domain. In addition, in September 2018, the France Télévisions, M6 and TF1 groups launched a new technological standard called “*Syigma data video access*”, allowing buyers of advertising inventories to access logged-in data in programmatic mode via a dedicated interface<sup>117</sup>.
194. In addition, the objectives of promoting the brand image (reserved for television) and encouraging immediate purchasing (specific to digital) are sought by advertisers, and proposed to them on both media. Advertising agencies now offer, thanks to OTT streaming of their content, resources that meet these two objectives. For several years, they have been offering “cross-media” services combining the two types of advertising<sup>118</sup> and developing services aimed at meeting the objective of providing an immediate incentive to buy. In this respect, TF1 can provide, for example, an offer where the price of the television advertising campaign is indexed to the performance of the campaign, i.e. to the sales it generates of the advertiser's products (“*MPI Performance*”)<sup>119</sup>.
195. In addition, television channels are developing targeted OTT advertising on their catch-up programmes, which is much easier in logged-in environments, i.e. those accessed by the user via a user name and password (myTF1, France.tv, 6play etc.). This allows access, subject to user approval, to certain data, thereby enabling more precise advertising targeting. According to the investigation, advertising on catch-up services is sold at a cost

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<sup>114</sup> <http://ad-exchange.fr/le-grp-video-explique-par-mediаметrie-interview-de-bertrand-krug-25569/>.

<sup>115</sup> <http://www.cbnews.fr/medias/tf1-publicite-simplifie-et-fluidifie-l-achat-media-a1037566>.

<sup>116</sup> <https://www.snptv.org/cgv/france-tv-publicite/>.

<sup>117</sup> See <https://www.tf1pub.fr/actualites/lancement-de-syigma-data-video-access>.

<sup>118</sup> CSA's response to the *Autorité de la concurrence*'s public consultation on the functioning of competition in the Internet advertising sector, October 2017, page 19.

<sup>119</sup> See TF1's response to the *Autorité*'s questionnaire, page 42; <https://www.tf1pub.fr/actualites/conditions-commerciales-2018-tf1-publicite-accelere-sur-la-data-la-convergence-et-la>.

per thousand, the preferred pricing method for display advertising, and this type of advertising is generally marketed by the “digital advertising” teams of advertising agencies<sup>120</sup>.

196. On the other hand, Facebook and YouTube are likely to highlight to advertisers the ability of their platforms to improve brand image and awareness<sup>121</sup>. These platforms seek to create events that will gather high audience numbers.
197. As a result, porosity between the two markets tends to increase, as each medium is increasingly required to offer types of advertising traditionally offered by the other in order to better meet the specific objectives of advertisers.
198. However, while it is very likely that this convergence trend will intensify in the coming years, television advertising and Internet advertising in video format remain complementary in terms of objectives.
199. In this respect, the *Autorité* notes that the regulatory framework for television advertising laid down by Decree 92-280 of 27 March 1992 constitutes a structuring element in the delimitation of markets. The rules governing television advertising activity largely determine the objectives pursued in terms of advertising broadcasting.
200. On the one hand, Article 13 of the Decree of 27 March 1992, which provides that “advertising messages must be broadcast simultaneously throughout the service area”, therefore prevents television channels from carrying out segmented advertising<sup>122</sup> on the linear flow. This inability of television channels to offer fine-tuned targeting to advertisers is a major constraint that does not exist for online advertising stakeholders.
201. On the other hand, Article 8 of the same decree prohibits the broadcasting of advertising messages in a number of economic sectors (the so-called “prohibited” sectors).
202. This inability of advertising agencies to market advertising space in the sectors concerned constitutes a major, specific constraint for broadcasting companies, as it does not exist in the case of advertising on other media, in particular on the Internet.
203. It is likely, in view of developments in the sector, that, in the future, online and television advertising will increasingly become alternative choices for advertisers. Today, however, the regulatory framework for television advertising does not allow this choice, particularly because it prevents broadcasting companies from offering advertisers targeted advertising.

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<sup>120</sup> See in particular M6's reply to the *Autorité*'s questionnaire, page 27.

<sup>121</sup> CSA, Analysis related to the request for the non-renewal of competitive commitments made by the TF1 group for the free-to-air broadcast of the LCI channel, page 20; see also the hearing of the French Union of Media Consultancy and Purchasing Companies (*Union des entreprises de conseil et achat média*) of 12 July 2018 before the Committee on Cultural Affairs and Education of the *Assemblée nationale*.

<sup>122</sup> Segmented advertising consists in broadcasting different advertising messages to target segments identified according to viewers' membership of these different segments based on socio-demographic or geographical criteria, etc. It differs from targeted or addressed advertising in that it is not based on the identity or data of individuals.

*Note*

Although the distinction between the television advertising market and the online advertising market continues to exist today, in particular due to the regulatory framework, **there is nevertheless a growing convergence between the two markets**, notably illustrated by the marked development of online video advertising and the broadcasting, on channels' websites, of advertisements as part of catch-up television services, which have similar characteristics to online advertising in terms of format, pricing and regulation.

**c) Gradual internationalisation of markets**

204. In its recent decision-making practice, the *Autorité* has considered that all markets for the purchase of rights to films and series have a national dimension, taking into account the regulations (release schedule mechanism and broadcasting quotas), and insofar as the rights are in principle acquired for the national territory or a single linguistic area. However, it has noted that international non-linear operators are exerting increasing competitive pressure for the acquisition of rights to recent US series<sup>123</sup>.
205. During the investigation, the operators interviewed confirmed the relevance of a national delineation for upstream markets for the purchase of rights, in particular with regard to recent films subject to the release schedule. For other types of programmes, the national dimension of the market results mainly from the territoriality of the rights negotiated within the Union, either by Member State or by linguistic area. In addition, there are regulatory constraints such as broadcasting quotas.
206. However, the investigation highlighted a distinction between SVOD operators, which are able to conclude purchase contracts for large geographical areas, and the incumbent operators, which contract mainly on a national basis. This phenomenon is seen particularly with foreign programs, and especially American series. As regards sports content, the *Autorité* considers in its decision-making practice that all markets relating to these rights are national in scope, with the vast majority of rights being sold on a country-by-country basis and being purchased exclusively for the national territory<sup>124</sup>. This assessment is supported by the investigation. However, there is now an “internationalisation” of the buyers of these rights who, until recently, were almost always traditional operators.
207. Thus, the rights to the French football league Ligue 1 were transferred to Mediapro, which would have to share them with BeIN Sports, as no French operator had acquired live broadcasting rights to Ligue 1. Similarly, new digital operators have also begun to invest in sports rights for international broadcasts. Examples include Amazon, which acquired the rights to 20 matches of the English Premier League in 2018, and Facebook, which acquired the rights to the Spanish football league La Liga for broadcasting from its platform for Asia.

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<sup>123</sup> *Autorité* Decision 17-DCC-92 of 22 June 2017, cited above, pages 34-36, and 17-DCC-93 of 22 June 2017, cited above, pages 25-27.

<sup>124</sup> Decision 17-DCC-93 of 22 June 2017 cited above, page 30.

208. The *Autorité* therefore notes the internationalisation of the stakeholders that buy the broadcasting rights for films and series, as well as top premium sports rights. In the absence of the territoriality of rights, an operator could acquire broadcasting rights to a programme without territorial limitations on broadcasting, which would immediately broaden the geographical dimension of the markets concerned, and facilitate the purchase of rights for digital operators with a global presence. Indeed, this situation would make it easier for them to offer their entire catalogue to all their subscribers, which would make these platforms more attractive and allow them, as described above, to better amortise their purchases.
209. However, the principle of the territoriality of rights is regularly challenged at the European level.
210. Thus, in the Sky/Paramount decision<sup>125</sup>, the European Commission accepted commitments from Paramount, facilitating the cross-border trade in rights for US films and series, to address its competition concerns regarding the elimination of competition between service operators due to the impossibility of passive sales within the Union.
211. Similar commitments have been made very recently by Disney Studios<sup>126</sup>, it being understood that other US studios could do the same in the future, expanding the rights market and thus increasing competition in the upstream market, to the detriment of the incumbent stakeholders.
212. Similarly, there is a tendency for sports rights holders to market rights on an essentially national basis, but reserve the possibility of OTT streaming on their own platform, without necessarily making provision for a territorial limit.
213. There is therefore a trend towards the gradual expansion of content acquisition markets, particularly through the weakening of the territoriality of rights.

## 2. DISRUPTION OF ECONOMIC MODELS AND MARKET POSITIONS

214. In the traditional economic model of audiovisual service operators, several factors are considered to favour the creation of strong market positions and oligopolistic structures, which are frequently observed as a result of:
- the size of barriers to entry, both technical (platform ownership) and regulatory;
  - possible economies of scale in a fixed cost industry;
  - the phenomenon of the broadcasting spiral (reciprocal relationship between advertising resources and programme attractiveness);
  - and in the pay-TV market, exclusivity practices and the incentive to lock down content upstream.
215. These traditional phenomena are losing importance in the new market configuration described above, and the following is observed:
- on the one hand, the weakening of old barriers to entry and the emergence of new ones;

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<sup>125</sup> European Commission, AT.40023, Cross-border access to pay-TV, 27 July 2016.

<sup>126</sup> European Commission, AT.40023, Cross-border access to pay-TV, November 2018.

- on the other hand, the development of new financing models on an international basis and new vertical relationships have changed the game for stakeholders.

#### **a) Old and new barriers to entry**

216. The ownership of a broadcasting platform is traditionally a barrier to entry for both service operators and distributors, but this barrier to entry is losing some of its value for the incumbent operators, while new barriers are appearing that benefit new entrants.

##### ***Weakening of barriers to entry due to ownership of a broadcasting and distribution platform***

217. As mentioned above, the major linear television groups traditionally control their transmission and broadcasting through the granting of free audiovisual frequencies. The granting, free of charge, of these rare and precious public resources to television groups does not take place without compensation; the income thus accorded comes with heavy obligations in favour of film and audiovisual production, particularly independent production, which in France has imposed the model of strict separation between the upstream (production) and downstream (operation) elements of the audiovisual sector.
218. At a time when broadcasting was exclusively or mainly terrestrial, terrestrial frequencies represented both a major asset, even if that was burdened with the liabilities of the sector's production and financing obligations, and an effective barrier to market entry, reserving the income from television advertising for the holders of those frequencies. The latter therefore enjoyed a considerable advantage over other television channel operators, which had to negotiate their acquisition conditions on cable, ADSL, fibre or satellite with a stakeholder that owned a broadcasting platform and was often also a competitor on the operation market. These channels therefore depend on their competitors for the essential conditions of their marketing: place and numbering in the service plan, access to subscribers' viewing data and emphasis in the promotional campaigns launched by the distributor.
219. For service providers, the possession of a distribution platform is the condition for subscriber access. No pay-TV distributor has been able to develop in France without having a distribution platform with sufficient coverage. For example, since GCP does not own a network on cable and ADSL, it had to agree to abandon the principle of self-distribution, abandoning the role of final distributor and limiting itself to the role of aggregator of upstream packages, as in the case of its wholesale offers on Orange and Free: the aggregation of the channels in the package is the responsibility of Canal, but the ISP ensures the transmission of the channels and their final marketing to users.
220. It is therefore the management of a platform for transmitting and marketing the pay-TV package to the consumer, by controlling the customer relationship to the end, which traditionally gives the distributor the power to foreclose access to the market for the distribution of audiovisual services, linear channels or non-linear services, the marketing of which it can promote or restrict on its subscriber base.
221. But the value of these assets, which constitute a barrier to entry, is now being questioned for both service operators and distributors.
222. For major terrestrial operators, as we have seen, the importance of terrestrial frequencies is declining with the decline in terrestrial consumption in favour of ADSL. In the short and medium term, terrestrial television, like satellite, is increasingly handicapped by the lack of a return channel to access non-linear services, which will become the usual mode of programme consumption. Moreover, the question of maintaining the allocation of

terrestrial frequencies to audiovisual broadcasting is not, to date, “guaranteed” beyond 2025, as it must be the subject of international negotiations and, at the internal level, a parliamentary evaluation report. Terrestrial TV is therefore increasingly being replaced by IPTV, via the managed network of ISPs, and by the open Internet, which will promote the expansion of very high-speed access via fibre and the widespread use of connected TV sets.

223. Even more so than the development of triple play, the forthcoming normalisation of OTT services is changing the rules of the game. OTT use remains highly marginal, particularly in France, due to the popularity of triple play, but it is becoming increasingly accessible on the television set itself, thanks to the growing range of connected TV sets (smart TVs) and other devices.
224. OTT services introduce a dual revolution for service operators and ISPs alike.
225. *From the point of view of audiovisual service operators* , OTT firstly disintermediates the distributor by allowing service operators – both French and foreign, linear and non-linear – to free themselves from the mandatory entry point represented by this distributor. The channels thus regain the possibility of freely deciding on their broadcasting, without going through a contractual agreement with an ISP, while controlling their marketing conditions, and recovering customer and consumption data. It is significant in this sense that the RMC Sports channel, for which the Altice group acquired the Champions League competition for €1 billion for the period 2018-2021, was able to make this content available to the widest possible audience by making the channel accessible via OTT to customers of other ISPs, without considering it necessary to conclude an acquisition agreement with the other distributors. Altice's ongoing acquisition of the distributor Molotov, which uses innovative technology to make channels available to consumers via OTT, confirms the importance of this alternative distribution mode.
226. The disappearance of the distributor barrier has first and foremost benefited new entrants such as SVOD services. For foreign service operators such as Amazon or Netflix, which had no hope of development in a country like France where market entry was foreclosed by the holding of public resources (terrestrial frequency) or a highly regulated national fixed network (ISPs), only the development of OTT could popularise the service, firstly via other terminals represented by tablets and smartphones, and also via connected television.
227. *From the point of view of the distributors*, OTT weakens the power of ISPs to lock audiovisual content.
228. The consumption of OTT programmes certainly represents only a small proportion of linear or non-linear television consumption in France, given consumers' attachment to the simplicity and ergonomics of the ISPs' managed network interfaces. The infrequent use of OTT services on the domestic market could therefore have maintained the locking position of ISPs. But the mere existence of the possibility of circumvention via OTT forced ISPs to accept the inclusion of Netflix in their interface, in exchange for a commission on subscriptions, in order to avoid reducing the attractiveness of their offer and prevent the development of OTT services that threatened their role as pay-TV distributors, and the share of the ARPU (average revenue per user) that it represents, estimated at between €5 and €10. Based on the American experience<sup>127</sup>, ISPs have found it preferable to integrate

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<sup>127</sup> The extremely rapid development of Roku TV OTT service in the USA was due to the fact that it was initially the only one to agree to include Netflix in its offer.

new SVOD services into the box interface, rather than pushing consumers away from triple play offers and towards less profitable double-play bundles.

229. In addition, OTT called into question the principle, fundamental to the attractiveness of pay-TV offers, of exclusive broadcasting of channels by pay-TV packages. Indeed, even when a channel agrees to sign an exclusivity agreement with a distributor, it now most often demands the retention of the right to broadcast simultaneously in OTT. This is the case for BeIN Sports and many other sports channels. Even if the distributor buys the channel exclusively for its package, this exclusivity is now only relative and limited to non-OTT channels, thus weakening the role of exclusive subscription “drivers”, which traditionally brought less popular channels along with them.
230. Finally, the development of OTT has another paradoxical and damaging consequence for ISPs: they find themselves forced to devote increasing investment to the development of those that are, in part, their competitors. Given their obligations under the principle of technological neutrality, they have no choice but to constantly increase their investment in bandwidth capacity in the network to allow the flow of a video stream, which no longer passes through managed networks but is increasingly bandwidth-intensive, without these investments generating additional revenue for them. At certain peak times, OTT platforms consume 70% of available pipe capacity, and consumer expectations in terms of flow quality do not allow operators to slow their investment pace. Any speed restrictions are immediately reported on platforms that benefit from the principle of Internet neutrality and can influence consumers' commercial choices when selecting their access provider.
231. In conclusion, the technical and regulatory barriers to market access represented by the possession of a terrestrial frequency for operators, and by the managed ISP network for distributors, are weakened by current developments. With regard to terrestrial frequencies, the asset value represented by frequencies decreases as the use of non-linear uses increases. However, the “liabilities” attached to the holding of these frequencies, in the form of regulatory obligations and contributions imposed on the holders of these frequencies, remain in full force.
232. For distributors, the popularity of triple play in France, a phenomenon unique in Europe, remains a strong asset, justifying the commissions paid by new on-demand services wishing to benefit from this wide access to consumers, with commissions representing a possible substitute for the erosion of pay-TV distribution revenues. However, the development of OTT services, which would represent a more economical way of providing access to consumers for these on-demand services than the use of gatekeepers, represents a long-term threat that is currently very difficult to assess, particularly in the absence of measures on the penetration and actual use of connected terminals in households equipped with a triple play offer.

#### ***Transition from linear to non-linear: the new barriers to entry***

233. All the contributions from service operators stress the need for the fastest and broadest possible transition to the integration of linear and non-linear services within new platforms. Replay consumption represents an increasingly large share of a programme's audience, while competition in terms of viewing time for SVOD services has become an indisputable reality<sup>128</sup>. Arte believes that non-linear will eventually become the entry point for all its

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<sup>128</sup> NPA study: on 7 January, SVOD services represented the fourth biggest audience, with 2.2 million viewers, behind TF1 (4.95 million) and M6 (3 million), and almost on par with France 2 (2.22 million).

programmes. In a public consultation held in February 2019, the BBC stated that it intends to make its BBC iPlayer service a “destination in its own right” offering live programmes, so that the service becomes the front door for watching the BBC, “as is already the case for many young audiences”. To this end, the BBC wishes to increase the duration of non-linear access to its programmes to “at least twelve months after they are first shown”<sup>129</sup>.

234. This desire to integrate linear into non-linear can be based on the strong brands available to incumbent operators, as well as the trust placed in them by consumers. On the other hand, it must overcome new barriers to entry:
- the technological and financial barriers to entry of the construction of a non-linear platform;
  - the risks of cannibalisation between old and new activities;
  - risks related to the development of new terminals.

*Financial and technological requirements of the platforms*

235. The first job of a television service operator is to assemble programmes into a coherent whole, capable of bringing together, at every hour of the day, the widest possible audience for advertisers by differentiating itself from competing channels. The talent of building a schedule testifies to “craft” know-how based on experience and flair.
236. However, increasingly fierce competition from the consumption of non-linear programmes is completely changing the situation. Indeed, the presentation to the public of an SVOD offer does not seek to gather the largest audiences in the same way as linear television, but rather to satisfy audiences, who will be offered a service that is not yet “one-to-one”, but which is still very precisely differentiated according to segment, based on past viewing.
237. Such an offer is based not so much on know-how alone, but also on considerable financial and technological investment in data collection and artificial intelligence, both on the “programme” side, in order to be able to analyse these programmes, group them by criteria and select them according to the tastes of the different audience segments, and on the user side, by defining the groups likely to share the same tastes and expectations. According to some analysts, Netflix has thus divided its global audience into some 2000 “virtual tribes” in the form of cross-border communities of taste<sup>130</sup> to which the recommendation algorithm will make the same recommendations. These data also apparently guide Netflix's choices in terms of content acquisition and the production of original works.
238. The transition from a model based on the talent of a small team of linear schedule programmers to a model that requires the construction and daily improvement of a programme data platform, a recommendation algorithm, and a user-friendly interface that facilitates navigation within a deep and constantly renewed catalogue requires considerable investment in both financial resources and the skills of data scientists and engineers that are rare on the market. Participants in the interviews mentioned a Netflix platform maintenance cost of \$1.5 billion per year; Netflix employs 900 engineers on a full-time basis. Such investments, which must be constantly renewed and increased, are not necessarily part of the culture, and are rarely within the means, of the incumbent stakeholders in the sector.

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<sup>129</sup> Correspondence from the press, 14 January 2019.

<sup>130</sup> Challenges, 30 August 2018.

239. Even though investments on this scale do not necessarily seem to be required for the SVOD platform as a complement to a linear television channel operator, in their most recent study, analysts at Morgan Stanley nevertheless suggest that the large linear television companies should provide for a short-term investment of €80 to €150 million for the construction of their SVOD platform<sup>131</sup>, and they have therefore correspondingly reduced the revenue growth prospects for these groups. In any case, such investments do not appear to be envisaged at present by the French operators, as the promoters of the Salto project have announced an investment of €5 million from each participant in the coming years for the operation of the platform.
240. In conclusion, the investment and search for the rare and costly skills required to create and maintain a non-linear technical platform create a new barrier to entry into the non-linear markets for free and pay television.

*The risks of cannibalisation of old business by new*

241. Any operator of the “old economy” wishing to develop in the same field as the new stakeholders, which are evolving on the global market by introducing a different economic model and digital uses that revolutionise the user experience, must face the risk of cannibalisation of their old activity, which is now less attractive to consumers. The same applies to incumbent television operators.
242. For free linear television operators, their business model based on bringing together large audiences, the target of mass television advertising, is not the same as that of SVOD, which is based on individual consumption. Switching the same programme from a linear to non-linear mode of consumption is costly, because advertising on replay programmes is much less remunerative than that on linear programmes. As the CSA study notes<sup>132</sup>, “the value of a programme broadcast on the Internet does not equal that of television.” Channels therefore favour programmes intended for their channel and thus the short “serialised” early evening offerings that gather audiences and build loyalty, rather than the big international series (8 x 1 hours), which are addictive and adapted to the “binge watching” demanded by the platforms.
243. Moreover, operators are not currently ready to give their platform the first or even exclusive broadcasting of their flagship programmes, as Netflix does. Even after a linear broadcast on their channel, they have to decide, for the SVOD rights, between exclusivity on their platform, which is essential to its attractiveness, and the resale of the series to Netflix or Amazon, which is much more profitable. For a stakeholder like Disney, analysts estimate that failing to resell the SVOD rights to Netflix will cost the company \$1 billion a year.
244. For linear pay-TV, for which the model is closer to SVOD services, the risk of cannibalisation of their current business model is even greater. Any first or exclusivity granted to the non-linear platform devalues the paid subscription to the linear channel. The current choice, after the abandonment of CanalPlay's SVOD service, is a “quasi-SVOD” with MyCanal in the form of a highly extensive replay offer of all the programmes presented on the various channels. This model, also used by Sky, does not seem to have

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<sup>131</sup> TradingSat, 4 January 2019, “*TF1: la riposte contre Netflix coutera cher à M6 et TF1, selon Morgan Stanley.*”

<sup>132</sup> *Étude sur la production de programmes audiovisuels pour internet*, January 2019.

provided a definitive answer to the group's challenges, judging by GCP's recent announcement of the upcoming launch of a new SVOD service specialising in series. But the economic balance to be found between the quality and exclusivity of the SVOD service expected by consumers accustomed to Netflix's international standard, and maintaining the attractiveness of linear pay-TV channels, is difficult to establish.

245. With regard to ISP distributors, facilitating access to their subscribers for new stakeholders, particularly Netflix, exposes them to the same phenomenon of cannibalization of their offer. They have effectively relinquished their foreclosure power, thereby favouring consumer access to offers that compete with their own: in the case of Orange, Netflix (or other future SVOD services) exerts competitive pressure on the first and second levels of pay-TV (OCS). According to Free (during its contribution to the market consultation), the consumption of all services – linear, non-linear and VOD – is declining on its boxes; user consumption is shifting to SVOD, to the almost exclusive benefit of Netflix's offers. The development of very cheap premium competing offers, and the increasingly relative exclusivity of the channels included in the distributor's triple play offer, taking into account parallel streaming on OTT services, weakens the attractiveness of triple play television offers.

*New access terminals and aggregators*

246. As seen above, if consumers wish to access OTT services on their television screen, without going through an operator's dedicated network, they have several other devices at their disposal:
- connected television, which is becoming more and more widespread in households, even if is not systematically used in its connected mode. This is equipped with an operating system and an application store, which offers applications for the channels provided as an OTT service, offers such as Molotov, or platforms like Netflix or Amazon;
  - a more complex option, which may be based on the purchase of additional equipment such as a multimedia stream playback device: Apple TV, the new terminal chosen by Canal for the streaming of its OTT channels rather than its own equipment; an Android Chromecast box; a games console; or, in the future, connected speakers and virtual assistants, which are under development.
247. All these alternatives to the managed network of ISPs, which can transform channels into simple applications, raise a number of questions. First of all, they do not have the status of distributor regulated by the CSA. As such, they are not subject to the principle of net neutrality, which guarantees neutral signal transmission by ISPs. Moreover, as ARCEP points out, they can, in a way, limit viewers' choices because of their ability to promote or block content. These connected speakers and virtual assistants could also have some form of “locking” capability via the programme recommendation system.
248. By 2020, and beyond, the multiplication of non-linear services offered to the public (Disney +, Apple, Hulu, HBO, etc.) may lead to the question of the “ultimate aggregator”, the one that can offer consumers a fluid and intuitive navigation between the many options, linear and non-linear, of an exhaustive offer. Could such an operator be in a position to foreclose the market? This issue should be examined in the light of market developments.
249. In conclusion, the emergence of OTT services has shattered the national framework, which provides regulations that “protected”, to a certain extent, the acquired positions and the

economic ecosystem of the incumbent operators. Adapting to the new paradigm brings new barriers to entry, which represent a new challenge for them.

#### **b) Questioning of market positions due to new economic models**

250. The classic linear television model is that of a mature national geographic market that is highly regulated and lacking integration between content production and service operation, notably due to these regulations. The schedule cost and new investments are self-financed.
251. This model has been highly destabilised (i) by the rise of globalised platforms, which have access to completely different resources, while the incumbent operators are suffering the combined effects of lower revenues and higher costs for the purchase of content; and (ii) by the shift towards vertical integration and disintermediation, which is seeing content operators and distributors worldwide move up and down the value chain, thus threatening the value chain as a whole.

#### ***The questioning of traditional revenues and the combined effect of lower revenues and higher costs***

##### *Free television and the broadcasting spiral*

252. In its Decision 10-DCC-11<sup>133</sup>, the *Autorité de la concurrence* defined the phenomenon of the broadcasting spiral. Any increase in advertising revenues strengthens the ability to purchase attractive programmes that maintain audience levels, which attracts even more advertising investment.
253. As mentioned above, television advertising revenues are now stagnant or in structural decline, threatened by both the rapid growth of programmatic advertising on displays and, to an even greater extent, video advertising on social networks. The power of large television advertising agencies decreases with the growth of programmatic advertising, which can be addressed to a well-identified target audience and is also developing based on a model that differs from “power” advertising to the broad audience that television represents. In fact, online advertising, which makes targeted advertising possible, has surpassed advertising in traditional media.
254. At the same time, the revenues of advertising agencies are affected by the increasingly high commissions collected by intermediaries, as shown by the *Autorité* in Opinion 18-A-03 on data processing in the online advertising sector. The major television operator advertising agencies estimate that they only receive 30 to 40% of the revenues they received from the same sale of space before the digital advertising revolution. Finally, recent changes in individual viewing time (less than 6 minutes per day in 2018) seem to justify the above-mentioned studies, which reveal a strong correlation, when SVOD services reach more than 20% of the population, between the growth of SVOD and the decline in the duration of free television viewing.
255. Under these circumstances, at least while the capacity of free television to access targeted advertising is so limited, it is unlikely that advertising resources will increase, regardless of the quality of the programmes. The press has reported on the observations of analysts (Merrill Lynch and Morgan Stanley), which anticipate an annual decline of 3% in

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<sup>133</sup> Decision 10-DCC-11 of 26 January 2010 on the acquisition of sole control of NT1 and Monte-Carlo Participations by the TF1 group.

advertising resources, representing a 20 to 30% reduction in market share by 2025<sup>134</sup>. In any case, these forecasts do not seem to be contradicted by the markets, as the stock market value of M6 and TF1 has fallen by 35% to 50% in a single year despite their good results. The advertising component of the positive broadcasting spiral on linear television is therefore under threat.

256. It is not just the advertising revenues of private television stations that are at risk: public television effectively sees a drop in its allocated public resources each year.

*Pay TV and the evolution of ARPU*

257. Increasing competition from platform services offering premium content at a lower price than the average subscription offered by linear channel distributors is putting deflationary pressure on the price of pay-TV distributors' packages. The new stakeholders, with Netflix in first place, have an economic model aimed at quickly building up the largest possible and fastest growing subscriber base in order to favour market interest, on which a large proportion of their access to the necessary financing is based. The price of subscriptions (in a first phase in any case, prices rising on a "mature" market like the USA) is therefore set very low compared to the wide choice include in the service: less than €11 on average in France, €6 according to certain statements by the managers for the future SVOD Disney + offer. In addition, the wide circulation of Netflix access codes among the friends and family of subscribers increases the number of consumers while further lowering the actual subscription price paid.
258. Under these conditions, national pay-TV services have no choice but to also lower the cost of access to their service, and therefore their ARPU. This is reflected in the recent price redesign of the premium packages offered by Canal Plus, whose basic package is now a €20 subscription as opposed to one costing around €40 previously, and which has just launched a "youth" offer at around €10.

*Combined effect of lower revenues and higher costs*

259. Faced with the expected expansion of SVOD offers by 2020-2021, the decline in incumbent operators' resources is creating the combined effect of lower revenues and higher costs linked to the inevitable increase in the purchase price of rights to works and sports competitions, thereby reducing their long-term capacity to access premium content.
260. The costs of purchasing premium rights, primarily for patrimonial works, have been systematically and necessarily increasing for several years, due to competition from new stakeholders, which must very quickly build their image and their subscriber base. Attracting the attention of viewers in a period of declining individual viewing time and the expansion of free or nearly-free alternatives (such as YouTube) makes it necessary to obtain – at all costs – the talents that promise the biggest audiences, and thus leads to an inflation in their cost, which becomes difficult to bear for stakeholders with declining or stagnant resources.
261. One option could be to develop more "low-cost" national series by playing on a sense of local pride and affinity. However, this strategy is limited because the production prices of a series cannot significantly deviate over the long term based on whether it is intended for the domestic or international market. Currently, the market price of a series episode,

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<sup>134</sup> Le Figaro, 21/01/2019.

excluding major prestige series, varies from one to three (\$800,000 to \$2.5 million) depending on whether the series is intended for the domestic or international market. If such a funding gap persists, there is a risk that the supply of series not intended for the international market will no longer meet, at a sufficiently rapid pace, the level of quality to which the audience has become accustomed due to blockbuster series intended for the global market.

262. However, it is clear that making a profit from a \$15 million series on the French market alone, on the basis of advertising resources generated by audiences that can be disappointing, and with three television broadcasting windows, is a completely different economic equation from broadcasting on a global market with 150 million subscribers, for an unlimited number of broadcasts, and with the possibility (confirmed several times over) that another national market is offering a programme a real "second chance", such as the Netflix series "Marseille", which was a failure in France but a success in Latin America. The audiovisual industry is a fixed-cost industry, where economies of scale are fully realised. The globalisation of platforms offers an exceptional opportunity to develop such economies of scale.
263. Nowhere is the increase in the cost of purchasing premium programmes more apparent than in relation to sports rights. The recent competition for Ligue 1 rights has resulted in an annual retransmission cost that has risen from €726 million to €1,153 billion. The winner of the competition, Mediapro, announces that it wants to launch a sports channel entirely dedicated to Football League competitions for a monthly subscription fee of €25.
264. In conclusion, the old models for financing national linear television, whether free or paid, stagnant or (more often) declining, no longer allow a certain number of stakeholders to pursue the upwards inflationary race for the purchase of rights to audience-generating content in a world where competition is now globalised. The traditional advertising resource model of linear television, locked into a national market, as well as the growth prospects in terms of ARPU and linear pay television subscribers, seem to have reached their limits, and the broadcasting spiral could become a negative spiral. In any case, it no longer encourages television channel operators to invest in content, as can be seen through the recent increase in the investments made by these channels in cinematographic and audiovisual works.

### *New economic models*

#### *Diversification of financing models*

265. The traditional landscape is changing. The incumbent stakeholders, weakened by the downward trend in their revenues (resulting in part from changes in consumer usage) affecting advertising resources and ARPU, are faced with platform stakeholders that implement a wide variety of business models based on large-scale technological and marketing innovations, and partly based on network effects, development on the global market and very favourable access – for the time being – to major sources of financing through the financial markets.
266. The business models of these platforms are highly diverse, but have been extremely successful thus far in terms of content, user numbers and, in some cases, revenues.
267. YouTube offers free content financed by digital advertising, which is undergoing constant, rapid growth. However, Google is remunerated on another market again, that of the acquisition and use of data obtained from the profiles of Internet users and their

consumption data. Google actually uses user data to develop its services, beyond selling banners and videos on the service itself.

268. Unlike other platform stakeholders, Google, which owns YouTube, is already extremely profitable, benefiting from a global strategy based first and foremost on the key position of its search engine and the advertising revenues generated by the Android service, combined with favourable access to financial resources to ensure its rapid development.
269. Amazon Prime Video sells an SVOD service coupled with 24-hour delivery and a video service. The development of the service, offered to Prime subscribers without any additional fees, is part of a much broader strategy to attract Internet users and keep them on its platform as long as possible, now via a connected enclosure (Alexa), where possible, for both their purchases and leisure consumption. The Amazon Channels project also forms part of this approach and is intended to "retain" subscribers to the various paid channels distributed by the new service on the platform. As Jeff Bezos says: "We are able to monetise (Prime Video) in a very unusual way. When we win a Golden Globe, it helps us sell more shoes [...] Prime members buy more than non-Prime members [...] once they pay their annual fee, they are looking around to see, 'How can I get more value out of the programme?' And so they shop more." The model implemented by Amazon is radically different from that of the incumbent stakeholders.
270. Apple's future SVOD service is part of Apple's new business model, which aims to capture an ever-increasing share of its turnover from the services thriving in its ecosystem of 1.4 billion terminals, based on Apple Music's development model (50 million subscribers in three years). The commercial strategy is once again different and is based this time as much on technological innovation and expertise in online services as on the advantage conferred by access to a very large global user base, in this case the owners of the various devices marketed by Apple.
271. The Netflix model may seem more traditional, as it is a subscription to a paid streaming service, and similar in this sense to pay-TV offers. But the dynamics of its offer (platforms that are highly innovative in technological terms, the massive use of user data to promote products adapted to their expectations, the race for subscriptions on the basis of "winner takes all", the value of the service provided in response to the low price charged, the role of the markets in financing development based on debt, total vertical integration, etc.) clearly result from a model other than that of traditional pay-TV.
272. In general, most of the platforms mentioned were able to benefit from favourable access to very large sources of funding, even though, for some, they had not yet achieved positive results.
273. This is notably the case for Netflix, which has financed its enormous and rapid growth on the debt market and through fundraising from shareholders, most often large investment funds. In the case of Netflix, the annual report puts total commitments at \$28 billion as at 31 December 2017, including \$10 billion off the balance sheet. After posting a negative free cash flow of \$2 billion in 2017, Netflix increased its losses in 2018 to €3 billion according to the group's autumn statements<sup>135</sup>. These high losses are justified by the group due by the long amortisation period of the programmes.

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<sup>135</sup> *Les Echos*, 14 February 2019.

274. Beyond the very different economic models, in a “winner takes all” model, financing for market conquest is perfectly suited to particularly low prices and massive and prolonged operating deficits, based on Amazon's growth model. In addition, banks and shareholders also take into account the amortisation possibilities of programmes that are incomparably more extensive than those available to the incumbent stakeholders, as seen above, and the expected revenues from subscriber bases that are growing very rapidly. According to Reed Hasting, “When you produce an incredible show like *Stranger Things*, it's a lot of capital at first with profits over several years.”
275. In conclusion, the very different business models and possibilities of access to finance have enabled the deployment of SVOD platform services, including by avoiding the profitability requirements usually demanded of the incumbent stakeholders by the financial markets.

*Disintermediation and vertical integration*

276. The traditional television model, especially in France due to regulatory provisions, has a very high level of vertical disintegration: television channel operators focus on their scheduling know-how and partially on the production of flow programmes, but buy patrimonial stock works upstream from a powerful, independent national and international audiovisual and film production sector. The cases of "moving up the value chain" observed since the early 2000s involve distributors moving up to operation, in particular ISPs (Orange operating and distributing the OCS channels, and Altice the Nextradio channels), but never the move up from channel operation to the production of stock works, notably due to regulatory barriers. GCP has developed a production studio (Studio Canal Plus), but it is an independent subsidiary of the channel and cannot develop synergies with the service operator. This strict separation of upstream and downstream is a vulnerability, as access to content can be a bottleneck factor.
277. As a result of this disintermediation, for pay-TV – whose viability depends on the willingness to pay of consumers attracted by both premium and exclusive content – secure access to the catalogues and original films and series from American studios is vital. In the event of loss of access to this premium supply, subscriber flight can threaten the survival of these channels by threatening their capacity to reach their "break-even point", which is fundamental in a fixed-cost model. To protect themselves, these channels try to lock their access to this content by concluding long-term contracts to buy "blind" the future production of American studios, or at least that of the very biggest studios.
278. This strategy of controlling access to content, which is common to all pay-TV platforms, is now being challenged by the increasingly vertical integration of the major American audiovisual operators, currently under development, in the form of:
- a move upstream for SVOD services such as Netflix or Amazon, through the integration of direct production of films and series;
  - a move downstream for American studios, through the creation of SVOD platforms exclusively running their own content.

*The move upstream for SVOD platforms*

279. The strategy developed by certain platforms, primarily Netflix and Amazon, but also Facebook, is that they have, since the development of their SVOD service, aimed to move up the value chain and create original productions. While still buying the rights to most of their supply on the market, these platforms are increasingly assuming the role of "delegated producer", by directly recruiting artistic talent, giving up any external co-

financing and paying 130% of the costs of the work. Netflix is simultaneously the sponsor for the content supply for the platform, the sole funder, the sole manufacturer and the sole operator.

280. Although other SVOD channels or services have been able to invest in programmes that they have produced and financed (for example HBO with *Game of Thrones*), a stakeholder like Netflix stands out due to the scale of its investments, characterised by both the number of series produced and the amounts invested in the biggest series, such as *The Crown*, which is a multiple-award-winning series with a considerable cost per episode.
281. While this strategy requires significant financial resources, such a move up the value chain brings multiple benefits, as discussed above: Netflix is in complete control of its editorial line, which is particularly interesting given the power of the algorithms it has at its disposal regarding the tastes and expectations of its subscribers; Netflix can maintain exclusive distribution on its own medium, "throughout the whole universe and until the end of the world", as it does not have to share the rights with co-producers or distributors, exempting itself if it so wishes from the release schedule in order to broadcast the work as soon as it is completed, which means that the service can then offer the very first showing of the work.
282. Finally, its industrial production system, with its own studios in the United States and Spain as well as a very rich database of production service providers, enables it to control production costs.
283. Among Netflix's huge competitive advantages, according to most of the stakeholders that participated in the consultation, are the specific terms and conditions under which Netflix enters into rights acquisition contracts with its talents (authors, directors and producers). Indeed, it would appear, from several testimonies collected by the *Autorité*, that stakeholders do not have access to information regarding the viewing of their works in terms of the number of subscribers. This system actually seems to hinder the application of the principle of proportional remuneration, which is the basis of the system for remunerating rights holders in France. In return, Netflix offers significant remuneration to certain talents, apparently in addition to the remuneration usually applied by the incumbent operators.
284. Through this strategy of developing self-produced content, Netflix is free, to a certain extent, from upstream constraints and the risk of its supply of films and series being cut off by American studios or any dominant producer wishing to resist its purchasing power. It thus removes the "bottleneck" of studios that has always weighed on the profitability, or even the survival, of pay-TV channels. It is to avoid this threat that Netflix has announced that it wants to ensure half of its supply by 2020 in the form of original Netflix products.
285. This new strategy of removing the studio intermediary has two consequences:
  - first, it reduces the most attractive available rights available on the purchase market for audiovisual streaming windows, with Netflix or Amazon retaining all the rights to the works they produce;
  - secondly, it forces the integrated American studios to adopt a defensive downstream deployment strategy, which could in turn threaten the security of supply for operators of foreign linear and non-linear services that obtain their supply from them.

*Vertical integration downstream of the studios: from B to B to B to C*

286. American studios have, for a very long time, chosen to sell the television rights to film and series projects abroad – even before production – in the form of framework agreements (known as multi-year "output deals") on a national territorial basis, strictly respecting the exclusive windows of the release schedule, and by selling, at the end of the release schedule, the SVOD rights to the platforms, with Netflix first in line. This is a "B to B" model, which does not include the direct use of content within the company.
287. This strategy is threatened by the upstream shift towards original production that Netflix and Amazon are implementing, which removes producers and studios as intermediaries. The exponential success of SVOD platforms in the United States has highlighted the weaknesses of the disintegrated model of studios that sell to operators of B to B channels, in contrast to the success of "direct to consumer" B to C offers on major SVOD platforms. Downstream, studios are faced with the risk of Netflix having a buyer's monopoly on streaming rights for SVOD services, even though it is increasingly giving itself the means to do without studios by acquiring increasing autonomy thanks to its original content.
288. At the same time, Netflix is becoming their direct competitor, due to the increasing tendency of American viewers to be satisfied with OTT services, and in particular the increasingly popular SVOD services, which offer them original and high-quality content at low prices, without the need to subscribe to expensive packages of linear television services via cable or satellite. To avoid depreciating their most attractive content through a much cheaper service that has become their direct competitor, the studios have recently decided to also consider entering the SVOD B-to-C market.
289. This new strategy is being deployed through vertical concentration movements of an unprecedented scale. In this spirit that we have recently witnessed:
- the ATT TimeWarner merger: which brings together the Warner Bros. studio, the cable channel HBO, and the Turner Broadcasting group, as well as an interest in the Hulu streaming site;
  - the Disney and Fox merger which has just been approved by decision of the European Commission;
  - and the NBCU Comcast Sky merger.
290. These groupings lead to a major reshuffle of the cards, with the formation of extremely powerful groups. Operating in defensive mode, they are announcing the upcoming entry of American studios into the SVOD market. Disney Fox has announced the launch of its OTT SVOD service for the second half of 2019. Similarly, WarnerMedia, an ATT subsidiary, has announced three SVOD services for the end of the year, the latest of which will include Warner's film offering, its original series productions and licensed content, with the aim of compensating for the loss of 360,000 subscribers to the DirectTV linear satellite television platform last quarter. The market entry of Starz, via Amazon, which is linked to Lionsgate studio and the Apple service, has also been announced.
291. These entries will significantly increase competition on the SVOD market in the USA and Europe, and is also likely to increase pressure on linear operators.
292. The creation by some studios of their own SVOD platforms – in particular the biggest, Disney Fox – will certainly deprive competing SVOD platforms of their most attractive products. Disney has indicated that its next *Star Wars* series will not be available on SVOD.

293. Beyond SVOD services, the question being asked by the incumbent stakeholders in the linear sector, both free and above all paid, is how far studios will go to preserve exclusivity in favour of their platform, and whether some of the biggest studios will give up, at least for their most attractive products, their policy – consistently held since the development from cinema to television – of reselling their television broadcasting rights for France. Such a withdrawal by studios from the territorial resale market for some of their broadcasting rights could deprive free and, above all, paid linear television stations of a significant proportion of the film supply essential for building their schedules. For example, if OCS could no longer rely on HBO series, such as Game of Thrones, this would probably seriously affect its model and sustainability. Similarly, Disney Fox represents between 40% and 50% of Canal Plus's supply. However, such a development seems doubtful in the short term, given the scale of the revenue loss it would entail for the studios.
294. In conclusion, the ability of SVOD platforms, on the one hand, to directly create works by disintermediating the delegated producer, and, on the other hand, to retain all rights across all territories by skipping the various television broadcasting windows of service operators, risks impoverishing the market for the purchase of broadcasting rights for linear television operators. Combined with the difficulty they face in financing works with the same efficiency as platforms, the risk that they will gradually find themselves marginalized on their national market in terms of the quality and ambition of their programme schedule and SVOD offer does not seem negligible, if they fail to find a new position on the market.
295. Incumbent operators can certainly count on the strength of their brand on the national market, which is reassuring for the viewer in the face of abundant supply, and even more so on maintaining, for a few years, national reception infrastructure: terrestrial and triple play. But given the rapid growth of the platforms, there seems to be an urgent need – for the sustainability of the incumbent stakeholders – to rapidly modify national regulations, which date from the 1980s and are now largely unsuited to the competitive developments described above. These regulations hinder the ability of incumbent operators to adapt, while they face a major strategic challenge in competing with new stakeholders based on the non-linear model.

## **II. The Law of 30 September 1986 appears to be profoundly inadequate to meet the changes in the audiovisual sector**

296. The disruptions in the competitive landscape mentioned above are exacerbated by the fact that France has much stricter and more detailed sectoral regulations than elsewhere in Europe (A), to which new stakeholders are not subject, and whose effectiveness seems, moreover, to be weak for the sectors that are meant to benefit from them (B). However, it has not been established whether the transcription into French law of the new AVMSD – within the framework of the future law – is sufficient, over the short or even medium term, to remedy the regulatory asymmetries identified between the stakeholders (C).

### **A. A FRENCH REGULATORY FRAMEWORK DEFINED FOR TERRESTRIAL BROADCASTING**

297. From 1986 onwards, as mentioned above, the liberalisation of the audiovisual sector was based on a balance between the privileges granted and the obligations imposed on the operators of television services. The State chose to grant rare broadcasting frequencies free of charge to private operators in return for obligations under national cultural policy, such as the financing and broadcasting of European and French works<sup>136</sup>, as well as contributions to funds supporting the CNC, and in return for safeguarding the interests of other media sectors, in particular the press. Later on, television services not using terrestrial frequencies (cable and satellite) were also included in the scope of the law and were also made subject to similar cultural policy obligations<sup>137</sup>.

298. These were chiefly set out in the Law of 30 September 1986 and specified by implementing decrees, notably Decrees 90-66 of 17 January 1990<sup>138</sup> and 2010-747 of 27 April 2010<sup>139</sup>, partly supplemented by agreements between the CSA and service operators and trade agreements between service operators and professionals.

299. The following will be discussed in turn:

- broadcasting obligations;
- production obligations;

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<sup>136</sup> In particular Articles 27 and 33 as well as 70 and 71-1 of Law 86-1067 of 30 September 1986.

<sup>137</sup> Decree 2010-416 of 27 April 2010 on the cinematographic and audiovisual contribution of operators of television and radio services distributed by networks not using frequencies assigned by the CSA.

<sup>138</sup> Decree 90-66 of 17 January 1990 implementing Law 86-1067 of 30 September 1986 and establishing the general principles governing the broadcasting of cinematographic and audiovisual works by television service operators.

<sup>139</sup> Decree 2010-747 of 2 July 2010 on the contribution to the production of cinematographic and audiovisual works of television services broadcast by terrestrial Hertzian means.

- measures relating to support for independent production;
- CNC contributions and other taxes;
- limitations on television advertising.

## 1. BROADCASTING OBLIGATIONS

300. To combat the omnipresence on the air in the 1980s of programmes of American origin, which were both cheap and well received by viewers, the legislator wanted to rebalance the cultural offer by enshrining in the Law of 30 September 1986 the principle of an obligation to broadcast a quota of French and European works.
301. This principle of a quota for the broadcasting of works according to their origin was adopted in 1989 in the European “Television without Frontiers” Directive and, finally, in the recently revised AVMSD, which states in Article 16 that “Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. In particular with regard to SVOD services, the AVMSD provides that “Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of those works.”
302. French law, going further than the AVMSD and the regulations applicable in other European countries, provides that television services must reserve, out of the total annual number of broadcasts and reruns of cinematographic works, at least 60% for European works and 40% for French works (but 70% and 60% for FTV group channels), except for first-run cinema services which have quotas set at 50% for European works and 35% for French works. These quotas must also be respected during prime time.
303. The texts also specify the maximum and minimum number of films to be broadcast, as well as their schedule. In order to preserve cinema attendance, film programming is prohibited for a general service on:
- Wednesday evenings, except for art and documentary films after 10:30 pm;
  - Friday evenings;
  - Saturdays;
  - Sundays before 8:30 pm.
304. In addition, the maximum number of cinematographic works that can be broadcast per year is limited according to the nature of the service.
305. In addition to audiovisual works, there are also constraints – depending on the service – in terms of the nature of the programme: original programming, music programmes, documentaries or retransmissions of live performances; these are intended to preserve or develop the audiovisual heritage<sup>140</sup>.

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<sup>140</sup> Response from France Télévision of 5 October 2018, classification mark 2882.

## 2. PRODUCTION OBLIGATIONS

306. European regulations do not place production obligations on operators (apart from obligations in favour of independent operators, see below). These are specific to France. The Law of 30 September 1986 makes provision – for each audiovisual service – for mandatory levels of funding for European and French film and audiovisual production, mainly expressed as a percentage of the turnover of the audiovisual service to be devoted to the commissioning of original French-language and European works.
307. In both the film and audiovisual sectors, these regulations seem unusually complex and are extremely difficult to adapt to the rapid changes in the sector. Each modification requires not only a review of the applicable texts, but also lengthy negotiations with each stakeholder in the sector, the producers first and foremost. FTV notes that it took more than three years to complete the process to establish the October 2013 Law in the regulations (with the Law itself having required several years of professional consultations), making it possible to open up – to a limited extent – the possibility of the group's channels obtaining a co-production share in works for which they had provided more than 70% of the financing.
308. In view of this complexity, the descriptions below only cover part of the applicable obligations.
309. *As regards cinematographic obligations*, free-to-air terrestrial channels must devote 3.2% of their net turnover in the previous year to expenditure contributing to the development of the production of European cinematographic works, including 2.5% for French works. For FTV, this percentage is 3.5%. For these channels, expenses may consist of the purchase or pre-purchase of exclusive broadcasting rights or co-production shares.
310. For example, with regard to TF1, the obligations, which are not shared within the group and are therefore appreciable channel by channel, are as follows.

OBLIGATIONS DE PRODUCTION D'ŒUVRES CINÉMATOGRAPHIQUES CEE et EOF (Contribution chaîne par chaîne)		
Obligations		
CEE		3,2% du CA n-1
<i>Obligation globale</i>		
Dont EOF		2,5% du CA n-1
Préachat	TF1	100% de l'obligation globale (car CA n-1 supérieur à 150M€) dont 75% d'indépendant
		20% si CA n-1 compris entre 75 et 90M€
		30% " " " " 90 et 110M€
	TMC	40% " " " " 110 et 120M€
		50% " " " " 120 et 130M€ dont 75% d'indépendant

OBLIGATIONS DE PRODUCTION D'ŒUVRES CINEMATOGRAPHIQUES CEE et EOF	PRODUCTION OBLIGATIONS FOR EEC and FRENCH CINEMATOGRAPHIC WORKS
(Contribution chaîne par chaîne)	(Channel by channel contribution)
Obligations	Obligations
<b>CEE</b>	<b>EEC</b>
<i>Obligation globale</i>	<i>Overall obligation</i>
<b>3,2%</b> du CA n-1	<b>3.2%</b> of n-1 turnover
Dont <b>EOF</b>	Of which <b>French</b>
<b>2,5%</b> du CA n-1	<b>2.5%</b> of n-1 turnover
Préachat	Pre-purchase
<b>100%</b> de l'obligation globale ( <i>car CA n-1 supérieur à 150M€</i> ) dont <b>75%</b> <i>d'indépendant</i>	<b>100%</b> of the overall obligation ( <i>as n-1 turnover greater than €150 million</i> ) of <i>which 75% is independent</i>
20% si CA n-1 compris entre 75 et 90M€	20% if n-1 turnover between €75 million and €90 million
30% " " " "90 et 110M€	30% " " " €90 and 110 million
40% " " " "110 et 120M€	40% " " " €110 and €120 million
<b>50%</b> " " " " <b>120 et 130M€</b>	<b>50%</b> " " " <b>€120 and 130 million</b>
Dont 75% d'indépendant	75% of which are independent

311. Film channels have a different regime. Depending on the operator's resources and the number of films it broadcasts, the service must therefore devote between 26% and 12.5% of its total resources for the current financial year to the purchase of rights to European works and between 22% and 9.5% of these resources to the purchase of rights to French works. Co-production expenses are not taken into account in these percentages.
312. *In the audiovisual sector*, the principle is the same, with part of the turnover to be devoted to the purchase of rights to European or French works. According to the law, part of this obligation must relate to "patrimonial" works as defined in Article 27(3) of the 1986 Law, namely "works of fiction, animation, creative documentaries, including those inserted in a programme other than a television news programme or an entertainment programme, music videos and the recording or recreation of live performances."
313. Terrestrial channels must therefore devote at least 15% of their annual turnover to the production of European or French works, with quotas reserved for the production of patrimonial works depending on the turnover achieved, ranging from 10.5% if the turnover is over €350 million to 8.5% if the turnover is under €100 million. For cinema services, the share of annual resources devoted to European or French audiovisual production varies between at least 3.6% and at least 4.8%, with a proportion of at least 85% devoted to patrimonial works. However, in this context, co-production expenses may be taken into account.
314. For example, in the case of TF1, the obligations are as follows.

OBLIGATIONS DE PRODUCTION D'ŒUVRES AUDIOVISUELLES EUR et EOF  
(Contribution globale des services du groupe TF1)

Obligations	
OEuvres patrimoniales <i>Obligation globale</i>	12,5% du CA n-1
OEuvres patrimoniales indépendantes	70 % minimum de l'obligation globale 8,75 % du CA n-1
OEuvres patrimoniales dépendantes	30 % maximum de l'obligation globale 3,75 % du CA n-1
OEuvres patrimoniales inédites	3/4 de l'obligation globale 9,375% du CA n-1
OEuvres produites en HD réelle	100% de l'obligation inédite
OEuvres d'animation inédites	4,8% de l'obligation globale 0,6% du CA n-1
OEuvres d'animation inédites indépendantes*	3,6% de l'obligation globale 0,45% du CA n-1 et 75% de l'obligation d'animation
Œuvres patrimoniales EOF	90% minimum de l'obligation globale

OBLIGATIONS DE PRODUCTION D'ŒUVRES AUDIOVISUELLES EUR et EOF	PRODUCTION OBLIGATIONS FOR EUR and FRENCH AUDIOVISUAL WORKS
(Contribution globale des services du groupe TF1)	(Total contribution from TF1 Group services)
Obligations	Obligations
<b>Œuvres patrimoniales</b>	<b>Patrimonial works</b>
<i>Obligation globale</i>	<i>Overall obligation</i>
<b>12,5%</b> du CA n-1	<b>12.5%</b> of n-1 turnover
<b>Œuvres patrimoniales indépendantes</b>	<b>Independent patrimonial works</b>
<b>70%</b> minimum de l'obligation globale	Minimum 70% of the <b>overall</b> obligation
<i>8,75% du CA n-1</i>	<i>8.75% of n-1 turnover</i>
<b>Œuvres patrimoniales dépendantes</b>	<b>Dependent patrimonial works</b>
<b>30%</b> maximum de l'obligation globale	Maximum 30% of the <b>overall</b> obligation
<i>3,75% du CA n-1</i>	<i>3.75% of n-1 turnover</i>
<b>Œuvres patrimoniales inédites</b>	<b>Original patrimonial works</b>
<b>3/4</b> de l'obligation globale	<b>3/4</b> of the <b>overall</b> obligation
<i>9,375% du CA n-1</i>	<i>9.375% of n-1 turnover</i>
Œuvres produites en <b>HD</b> réelle	Works produced in real <b>HD</b>
<b>100%</b> de l'obligation inédite	<b>100%</b> of the <b>original</b> obligation
<b>Œuvres d'animation inédites</b>	<b>Original animated works</b>
<b>4,8%</b> de l'obligation globale	<b>4.8%</b> of the <b>overall</b> obligation
<i>0,6% du CA n-1</i>	<i>0.6% of n-1 turnover</i>
<b>Œuvres d'animation inédites indépendantes*</b>	<b>Independent original animated* works</b>
<b>3,6%</b> de l'obligation globale	<b>3.6%</b> of the overall obligation
<i>0,45% du CA n-1 et 75% de l'obligation d'animation</i>	<i>0.45% of n-1 turnover and 75% of the animation obligation</i>
Œuvres patrimoniales <b>EOF</b>	<b>French patrimonial works</b>
<b>90%</b> minimum de l'offre globale	Minimum <b>90%</b> of the <b>overall</b> offer

### 3. OBLIGATIONS RELATING TO INDEPENDENT PRODUCTION

315. As early as 1989, the first European directive made provision for part of the commissioning by service operators to be reserved for independent production. The aim was to promote the development in Europe of a diversified network of independent producers, a factor for innovation, and cultural diversity. This requirement required 10% of the air time or programming budget to be reserved for independent productions.
316. This obligation left a wide margin for national transposition, as it was a minimum, and as 10% of air time (including the night) is not equal to 10% of the programming budget. It was transposed almost everywhere as a minimum, as shown in the following table:

Country	Investment quota	Investment criterion
Spain	1% of turnover to independent audiovisual (1.5% to independent cinema)	Independent producer in terms of capital
Italy	10% of turnover to independent audiovisual and/or cinema	Independent producer (no more than 90% for a single channel over a three-year period)
United Kingdom	10% independent based on total programme air time excluding that for sports, games and information	Independent producer in terms of capital
Sweden and Denmark	10% independent based on air time or total programme budget excluding that for sports, games and information	Independent producer in terms of capital

317. In France, the transposition was much more ambitious in order to promote a value share that favoured producers. The French definitions therefore differ significantly from European practice, both in terms of the definition of the notion of independence, which is much more protective for the producer, and in terms of the amount of the share reserved for independents, which is usually set at 75%, rather than 10% as provided for in the directive.
318. *As regards the definition of independence:* although this varies significantly between the film and audiovisual sector, as well as according to the nature of the service operator (free or paid, terrestrial or non-terrestrial channel; cinema service; on-demand service, etc.), this definition must be assessed in France from a dual point of view: in terms of capital, i.e. the independence of the production company from the operator, and commercially, i.e. the independence of the work, the income from which cannot be pre-empted by the operator that commissions and finances it.
319. Firstly, the criterion of independent capital, which is the only criterion used by the other European countries, with the exception of Italy, is understood in terms of the service

operator's investment in the capital of the production company. For example, in the case of free terrestrial channels, the service operator and the production company must not respectively hold more than 15% of the share capital and voting rights, or be controlled by a single shareholder or group of shareholders.

320. As a result, the status of "independent producer" varies depending on the service operator that finances the work. The regulations do not prohibit the production company in question from being controlled, directly or indirectly, by a television service operator other than the one commissioning and financing the work. Thus, Newen, controlled by TF1, is an independent company for France Télévisions.
321. Secondly, France, alone in Europe, has added an additional criterion no longer linked to the company but to the work financed. Independence in this context corresponds to the independence of the work from the service operator, which can normally only claim an exclusive right to distribute the work on its service for a limited period of time, even if it finances almost all of it. The notion of independence therefore severely limits any economic right to exploit the work, or exploit it on media other than its channel.
322. As a guide (the conditions negotiated by each channel being highly complex and diverse), in the case of free terrestrial channels and film production, a work is considered to be an independent production if the broadcasting rights purchased do not cover more than two broadcasts and if the exclusivity period does not exceed 18 months for each broadcast. In addition, for cinematographic works, the service operator may not hold – for the portion of the financing paid for co-production – secondary rights or marketing agreements for more than two types of exploitation (in the form of a videogram in cinemas or on a television service other than the one it operates, in France and abroad).
323. In the case of free terrestrial channels and audiovisual production, the operator may not hold producer shares (and must therefore be content with the exclusive broadcasting rights), unless it has financed at least 70% of the work. In this case, the producer shares do not represent more than half the service operator's investment, and the secondary rights to works and marketing agreements are governed by the specific provisions of inter-professional agreements. The service operator undertakes to exploit the rights acquired within 18 months.
324. As a result, once the work is broadcast on its channel under the terms of the contract, the television service operator, unless it has financed more than 70% of the work, loses all rights to it. All other rights related to the work remain the property of the producer, which may freely dispose of them, in particular by reselling the work to another service operator in France or abroad.
325. The combination of these two independence criteria therefore makes recourse to independent production particularly restrictive, insofar as it prohibits service operators from building up an asset in the form of a catalogue of rights to works that they have, however, commissioned and majority financed.
326. Yet recourse to independent production is set at a very high level in France: the regulations provide for a share of independent production in production obligations of at least 75% for cinematographic works, and between 60% and 100% for audiovisual works.

#### 4. CONTRIBUTIONS TO CNC AND OTHER TAXES

327. Finally, in addition to production obligations, there are a number of mandatory taxes specific to the audiovisual sector. In particular, private channels pay a 5.5% tax to the CNC and a 0.5% tax to finance the partial ban on advertising for public television. TF1, for example, paid €91 million to the French Public Treasury in 2017 in various taxes.

#### 5. OBLIGATIONS REGARDING TELEVISION ADVERTISING

328. At the same time, the legislator has sought to protect other cultural industries by prohibiting certain economic sectors from using television advertising ("prohibited sectors").

329. The regulations regarding the prohibited sectors and the obligation to simultaneously broadcast advertising messages provided for in Articles 8 and 13 of the Decree of 27 March 1992 were intended to "maintain a share of advertising resources favourable to the viability of competing media."<sup>141</sup>

330. In this way, television advertising in the cinema sector has been prohibited to avoid giving film distributors in American studios – which have very large advertising budgets – a decisive advantage over French film distributors, which are rarely able to cover the cost of television campaigns<sup>142</sup>. A similar rationale has also led to a ban on television advertising in the literary publishing sector, in order to enable all operators, including the smallest, to benefit from equivalent means of advertising, and thus to guarantee cultural diversity in the book sector.

331. In addition, advertising for promotional operations in the distribution sector has been prohibited on television, in order to preserve local trade and advertising revenues for the regional daily press and local radio stations.

332. Finally, the obligation to simultaneously broadcast advertising messages to the public as a whole, which prohibits targeted and geographically segmented television advertising, reserves geographically targeted advertising revenues for local media, notably radio stations and regional daily newspapers.

333. In conclusion, the Law of 30 September 1986 and its implementing decrees have had the effect of creating an audiovisual sector that:

- is very tightly regulated by complex, detailed regulations and rules that are not easy to adapt to the rapid changes observed in this sector in terms of public tastes and economic developments;
- is almost completely "disintegrated" between the production and operation of television services, preventing operators moving upstream, via the obligation of 75% independent production;

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<sup>141</sup> Information report annexed to the minutes of the hearing of 21 June 2005 on behalf of the French Senate planning delegation on the assessment of the impact of the liberalisation of television advertising and the resulting prospects for all stakeholders concerned, by Mr Philippe Leroy, Senator, page 61.

<sup>142</sup> [https://www.lesechos.fr/13/05/2002/LesEchos/18652-149-ECH\\_la-publicite-televisee-pour-le-cinema---vers-un-assouplissement-du-decret-de-1992---.htm](https://www.lesechos.fr/13/05/2002/LesEchos/18652-149-ECH_la-publicite-televisee-pour-le-cinema---vers-un-assouplissement-du-decret-de-1992---.htm).

- benefits from a highly protected regime for the production sector in terms of production and broadcasting obligations, on an exclusively national basis, given the divergence between the minimal transposition of the European directive among our partners, in comparison to its very ambitious transposition in France;
- has limited access to advertising resources under regulations to protect the resources of other media.

334. It used to be possible to justify these characteristics based on the aim of sharing the value of terrestrial income nationally among all stakeholders in the industrial sector, for both cultural and economic purposes. However, the destabilisation of the national regulatory framework due to the weakening of the terrestrial sector and the rise of OTT services transforms these provisions into highly disadvantageous handicaps for the incumbent stakeholders, while new international stakeholders such as platforms are in no way subject to similar constraints.

## **B. AN UNFAIR AND INEFFICIENT COMPETITIVE PLAYING FIELD**

335. New SVOD stakeholders are not subject to the production and broadcasting obligations, independent production obligations, state contributions or advertising regulations (1). Moreover, the effectiveness of these regulations now seems questionable, including for the stakeholders they were supposed to protect (2).

### **1. REGULATORY ASYMMETRY**

336. The OTT streaming of SVOD services such as Netflix or Amazon Prime Video allows those services to sidestep the Law of 30 September 1986, these regulations being founded on broadcasting infrastructure and the stakeholders being based in France. As a result, there is strong regulatory asymmetry between the incumbent operators and international digital platforms.

337. *With regard to financing and broadcasting obligations*, French service operators have been subject to specific obligations regarding the amounts they must invest each year in both cinematographic and audiovisual works, in terms of origin, language and genre, according to the characteristics of the service. Their editorial freedom and their ability to provide the public with the content the latter demands are therefore strongly regulated.

338. A particularly stark example is major international series. As mentioned above, according to the CNC Observatory, in September 2018, 58% of SVOD consumption was of television series, although they represented just 12% of the content offered. These series are therefore popular with viewers. However, the setting of separate quotas for cinematographic and audiovisual content, to the detriment of the latter, prohibits a service such as Canal Plus from satisfying the public's expectations by readjusting its commissioning to the public's expectations. Yet the development of international series of high quality – in terms of production budget as well as script and casting – is reducing the status of such series as a minor genre in comparison to film production, given that series such as *Game of Thrones* are now able to create a strong sense of anticipation, or even "myths" in the collective imagination, on the same level as major literary works.

339. New operators are not subject to these national constraints and may freely choose the size of their investments, the origin of the works they commission, the original language and the share of each genre: series, films, documentaries, music programmes or the retransmission of live shows. They can therefore offer their favourite content on an unlimited basis to consumers who enjoy series, thereby promoting unbalanced competition between French and national platforms. In addition, these operators can react very quickly to any changes in the tastes of their audience, and immediately change both the target of their investments and the editorial content of their services.
340. *With regard to independent production*, incumbent operators, already constrained by their financing obligations based on content type, are also limited in the scope, duration and territoriality of the rights they can acquire. As a result, the revenues generated in the event of success are negligible, while the consequences of commercial failure are more significant: the broadcaster will immediately "take on" the loss in the form of disappointed pay-TV subscribers or insufficient advertising resources during free television broadcasting, without the possibility of exploiting the work over time, in other territories or on other media in order to mitigate the losses, as Netflix does.
341. This limitation of the access to rights for the operator that finances the work is particularly disadvantageous with regard to the digital rights to rebroadcasting on the replay or SVOD service of an incumbent stakeholder.
342. An SVOD digital platform that broadcasts the last season of a series can offer the entire season on its platform as well as all of the previous seasons. This service effectively responds to the demands of consumers, who are attracted by binge watching.
343. However, unless a specific inter-professional agreement is in place, an operator based in France may not offer works for catch-up after a period of seven days. If it has, like Canal Plus, a digital on-demand platform, the time limit on holding digital rebroadcasting rights may force it to acquire again, by outbidding its competitors, the broadcasting rights for previous seasons of a series that it has already shown on its channel, and majority financed. Moreover, there is nothing to prevent the producer from selling the exclusive right to broadcast the previous seasons of the series to a competing digital platform, even though exclusivity is a key driver of subscription to platforms and the image of these platforms is closely linked to the flagship series they offer.
344. For example, one film service operator indicated during the interview that it had provided 92% of the private funding for a successful series with several seasons, but had only obtained three and a half years of exclusive distribution for each season. When the last season was released, this operator was therefore forced to enter into negotiations with the producer of the series to try to purchase new broadcasting rights for the earlier seasons, in order to be in a position to offer all seasons to viewers.
345. In conclusion, the obligation to use independent production places broadcasters at a significant disadvantage by severely limiting the rights they hold, while one of the major challenges of the competitive playing field is the acquisition and control, over time and in the different geographical areas, of quality content. It also makes it more difficult to develop new on-demand audiovisual media services, since the ownership of long-term rights by the broadcaster is partly prohibited by regulation. This asymmetry therefore limits the ability of incumbent operators to adapt and thus react to the new competitive environment.
346. This situation is also a handicap in relation to foreign linear stakeholders, which are subject to much less restrictive national sectoral regulations. In the United Kingdom, for example,

the BBC produces between 60% and 70% of its programmes in house and has co-production shares of between 40% and 30% in works co-produced with independent producers. As a result, 75% of the BBC's revenue comes from the rights held in its catalogue of works, 40% of which is for distribution alone. More specifically, the BBC derives about 25% of its turnover from its programme sales activities worldwide (270 million compared with 47 million for FTV for the same activity)<sup>143</sup>. The BBC therefore has the opportunity to generate significant revenue from works it has commissioned. It also has artistic and financial control of these works, which it exploits on its television services and markets on other services in the United Kingdom and worldwide.

347. With regard to non-linear exploitation, the BBC recently announced that it was seeking to rebuild its BBC iPlayer OTT offer by creating a platform offering its content for a longer period (12 months for films), together with all the seasons of the series it has financed, in addition to its documentaries and archives.
348. As regards the above-mentioned taxes paid to the French Public Treasury, only Netflix is subject to them, as part of the CNC tax on on-demand services, for an annual total of approximately €7 million. In addition, among the specific advantages currently enjoyed by a large number of platform stakeholders is the implementation, on a large scale, of tax optimisation mechanisms enabling them to have their income taxed at much lower rates than those applicable in France.
349. Finally, *as regards audiovisual advertising*, Internet advertising is not subject to the same regulatory constraints as television advertising, and is not subject to the limits on advertising volume, the segmentation of advertising messages and the rules regarding prohibited sectors provided for by the Decree of 27 March 1992. As a result, with regard to targeting, it is possible to carry out addressed advertising on the Internet by combining several types of data that advertisers may have (socio-demographic, temporal, geographical, behavioural, etc.) or data collected on the Internet by stakeholders such as Facebook and Google (navigation data, search data, transactional data, etc.). In addition, these stakeholders have access to advertising inventories that can be constantly extended, and they use high-performance marketing tools to automatically purchase advertising space.
350. The GAFA tech companies thus benefit from very large databases, for example through their logged-in environments – which are the source of a large amount of socio-demographic and behavioural data (Google, Facebook) – or via access to consumer data (Amazon), and have massively developed their capacity to make use of data. In terms of advertising targeting, Google and Facebook, which are international operators, therefore currently have major competitive advantages linked to the volume and variety of the data they collect, as well as the size of the advertising inventories they hold, and their audience.
351. This asymmetry with regard to targeted advertising is highly detrimental to services subject to French regulations, as programmatic video advertising is gaining market share each year. The lack of access of linear services to any form of targeted advertising leads to a significant imbalance in the conditions of competition today, without there being clear justification for these differences in situation. We can therefore identify a risk of “ghettoisation” of television advertising.

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<sup>143</sup> Information report of the French Senate, Committee on Culture, Education, Communication, 30 May 2013, p. 49-50.

352. In conclusion, particularly stringent and detailed regulations have been in place in France since the 1980s to promote the national audiovisual industry and cultural diversity. These regulations now seem highly atypical; if a comparison may be drawn, they are equivalent to setting, by decree for an industrial sector, the authorised level of vertical integration, the number and type of products this sector must offer its customers, the level and detailed list of products it must order from its subcontractors, and the contractual conditions of these orders to those subcontractors, among other things. Such a degree of planning is obviously difficult for service operators to cope with at a time when a new generation of particularly innovative competitors – which are not subject to any of these regulations – is emerging on the market.

## 2. QUESTIONABLE REGULATORY EFFECTIVENESS

353. Even with regard to the sectors that these regulations are supposed to protect, the effectiveness of such a system seems questionable today, both in terms of promoting the national audiovisual industry and in cultural terms.

354. Despite regulations favourable to domestic producers, the volume of French fiction produced, after peaking at 912 hours in 2008, has only decreased, falling to 871 hours in 2017, a slight decline of 2.9% compared to 2016. In 2017, the contribution of broadcasters reached €491 million, down 8% compared to 2016, at a level similar to 2009. The decrease in production volume seems to result from a general decrease in investment per fiction hour (€564,000 in 2017 compared to €580,000 in 2008), reflecting a decrease in average investment for each work. Similarly, the volume of fiction hours whose hourly cost exceeds €1.2 million is down sharply, from 348 hours in 2016 to 295 hours in 2017<sup>144</sup>.

355. In comparison, Germany produced 2,215 hours of fiction, followed by Spain, Portugal and the United Kingdom (1,077 hours)<sup>145</sup>.

356. French regulations, which are very favourable to the renewal of artistic creation, encourage the entry of young producers and promote a certain fragmentation of the production network. In France, there are 3,994 production companies. In contrast, both the United Kingdom and Italy have only 500 production companies.

357. The same applies to the concentration index. According to the CSA, 70% of the turnover in the French sector is generated by the top 200 producers. In contrast, the top 100 producers account for 92% of the sector's turnover in Germany and 74% in the United Kingdom, while in Italy, the top 50 producers account for 84% of the sector's turnover.

358. In 2017, TF1 Production produced 410 hours of programmes and M6 announced the production of 421 hours of original programmes via its subsidiary Studio 89. The Italian company Mediaset produced 18,096 hours of programming in 2017<sup>146</sup>.

359. French production therefore seems to be particularly fragmented. This particularity is often highlighted as a sign of diversity and quality. However, it should be noted that the lack of sufficiently large stakeholders may hinder producers' ability to finance the creation of

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<sup>144</sup> CNC, assisted audiovisual production, April 2018, pages 24 et seq.

<sup>145</sup> NPA Conseil study, classification mark 4040.

<sup>146</sup> Classification mark 4025.

ambitious works and/or a sufficient number of hours. Without such drivers, the sector is therefore handicapped in its capacity to export to the international market.

360. The situation seems to be truly favourable only for the very large production operators, which specialise in fiction. These producers, which are able to offer Netflix or Amazon the high-potential, high-budget series they are looking for, benefit from exceptional financial conditions on these platforms, with funding coverage at levels close to 130%, and enjoy complete artistic freedom. Unlike national linear services, which – not being financially interested in foreign sales and thus deprived of the stimulus of the international market – will concentrate their editorial demand only on what may suit their audience, which grows older each year, platforms encourage artistic risk-taking, given their wide possibilities for amortisation within their catalogue and their enormous financial resources, which allow trial and error.
361. In conclusion, while French regulations have often produced remarkable results in the field of cinema, particularly in terms of exports and international prestige, they have favoured an overly fragmented offer for audiovisual production, and have been condemned to merely respond to commissions from incumbent linear operators – which are also focused on the expectations of an audience whose average age is regularly rising, which can hinder the development of innovative, exportable productions.
362. Similar questions may arise notably with regard to the effectiveness of a mechanism such as "prohibited days" for the screening of films, which was originally designed to encourage cinema attendance. Digital platforms offer the possibility of watching a film at any time of the day or week, which facilitates transfer from the incumbent linear stakeholders subject to these constraints, to the platforms. However, cinemas continue to do well, despite the arrival of VOD and SVOD, with more than 200 million admissions each year since 2014. Consequently, it appears that the level of cinema attendance is not directly linked to whether consumers can watch a cinematographic work on an audiovisual service, and that the "prohibited days" regulation has not been shown to be effective or justifiable. A review of this regulation is therefore necessary.

## **C. THE CONTRIBUTIONS OF THE REVISION OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE**

### **1. NEW PROVISIONS**

363. In response to the regulatory divergences between old and new audiovisual stakeholders, the Council of the European Union adopted on 6 November 2018 the revised version of the AVMSD in the context of market developments<sup>147</sup>.
364. This new version of the Directive aims in particular to establish “*a fairer regulatory environment for the entire audiovisual sector, including on-demand services [...]*” and to

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<sup>147</sup> Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

“[promote] *European productions*”.<sup>148</sup> This new text modernises EU regulations by acknowledging the convergence of these markets.

365. To this end, the new text breaks with the distinction made in the previous version between "television broadcasting", i.e. linear audiovisual media services, and non-linear on-demand audiovisual media services. Unless otherwise provided, all the rules of the AVMSD are now commonly applicable to linear and non-linear “media service providers”.
366. One of the main amendments to the Directive concerns its new Article 13, according to which media service providers are subject to two new sets of obligations, with regard to the broadcasting and availability of content, on the one hand, and with regard to investment in content, on the other. A separate legal regime is applied to each of these series of obligations.
367. The rules on the broadcasting and availability of content remain subject to the regulations of the country of origin. Under this principle, it is the responsibility of media service providers under the jurisdiction of a Member State to comply with the latter's rules throughout the territory of the Union<sup>149</sup>. The revised AVMSD makes a significant change, since, under the new Article 13.1, audiovisual media service providers will have to demonstrate a quota of “*at least a 30 % share of European works in their catalogues*”<sup>150</sup>.
368. Thus, whatever the rules applicable in the Member State in which a media service provider is established, the latter must offer at least a 30 % share of European works on its channel or platform. The substantive notion of "work" is not defined in the Directive and therefore seems, at first analysis, to be applicable to all categories of programmes.
369. In addition to the introduction of this quota, the new AVMSD provides for the "prominence" of European works in the catalogue of media service providers. While this concept is not defined in Article 13 of the revised Directive, Recital 35 suggests several ways to overcome the barrier of algorithmic recommendations from non-linear audiovisual media providers. This recital indicates that the enhancement of works “*involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.*”
370. The second important change concerns the rules on investment in content that are applicable to audiovisual media providers. In this context, the country of destination principle applies, as indicated in Article 13(2) of the Directive: “*Where Member States require media service providers under their jurisdiction to contribute financially to the*

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<sup>148</sup> European Commission press release of 26 April 2018.

<sup>149</sup> In order to enable Member States to be aware of all media service providers present in the territory of the Union, it is their responsibility to communicate to the Commission the list of operators under their jurisdiction. The Commission will then draw up a consolidated list accessible on a centralised database made available to the regulatory authorities and the public at large (Article 5b of the revised Directive).

<sup>150</sup> The notion of “European works”, which remains unchanged from the previous version of the Directive, refers to works originating in a Member State, works from European third States party to the European Convention on Transfrontier Television of the Council of Europe, or works co-produced under agreements concerning the audiovisual sector concluded between the Union and third countries (Article 1(n) of the AVMSD).

*production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions [...]*<sup>151</sup>.

371. The Directive specifies that these financial contributions are governed by a principle of proportionality and non-discrimination. The contributions of audiovisual media service providers are thus governed by several rules:
- the financial contribution must be based on the revenues generated through the audience in the targeted Member State<sup>152</sup>,
  - neither the 30% quota nor the obligation to contribute to investment in Member States' national production applies to media service providers “*with a low turnover or a low audience*”. The revised directive also specifies that guidelines shall be issued regarding these notions<sup>153</sup>,
  - member States must avoid the risk of *double imposition* for media service providers, which means that the Member State in which an operator is established must take into account any contributions imposed on that operator by other targeted Member States.

## 2. LIMITS OF THE NEW DIRECTIVE

372. The *Autorité* notes that the adoption of this Directive is a first step towards a process of regulatory harmonisation applicable to all audiovisual operators implanted in Europe, and as such represents a major step forward.
373. However, the *Autorité* also notes that it is not certain – contrary to the expectations of a number of stakeholders in the sector, particularly within production – that these new provisions will really be sufficient, in the short or even medium term, to effectively eliminate the regulatory asymmetries highlighted, in the French case, between incumbent stakeholders and new platform-type stakeholders, for several reasons:
- coordination mechanisms between regulatory authorities in Europe, which are a prerequisite for the application of the Directive, may be delicate and time-consuming to set up;
  - regulatory gaps and asymmetries remain in the European mechanism;
  - finally, even if the gamble on rapid and satisfactory implementation pays off, the financial effect of the mechanism will not counteract the asymmetries noted above.
374. Firstly, the new Directive will require significant clarification work in the coming months and years in order to ensure that its objectives are implemented in a consistent way by Member States, as stated in the report on the implementation of the revised AVMSD

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<sup>151</sup> Emphasis added.

<sup>152</sup> Article 13.3 and Recital 36 of the Directive.

<sup>153</sup> Recital 39 of the revised directive.

adopted by the European Regulators Group for Audiovisual Media Services (ERGA) on 6 November 2018.<sup>154</sup>

375. The *Autorité* wishes to draw the legislator's attention in particular to certain elements of the Directive that require clarification. As the ERGA report points out, most of these issues will need to be addressed jointly by the Member States, which underlines the importance of collaboration between national regulatory authorities if this obligation is to be effectively implemented. In this context, it is essential that the ERGA has sufficient resources to carry out its mission.
376. The introduction of a 30% quota for European audiovisual works in the operators' catalogue should ensure that a significant amount of European content is available on digital platforms. However, it raises some new questions related to the particularities of SVOD catalogues in comparison to programme schedules broadcast on a linear basis. Insofar as they provide audiovisual content that increases in volume, the catalogues of SVOD services evolve, by definition. In this context, it is necessary to consider how this quota is calculated, which is not determined in the revised Directive. This first raises the question of the time basis that should be used for the quota to be deemed to have been met (weekly, monthly or annual basis). Similarly, the quantitative and qualitative parameters of the content to be selected should be defined. From a quantitative point of view, it should be determined whether the 30% share should be based solely on the number of units available, or whether it should also take into account the overall hourly volume of the proposed programmes. From a qualitative point of view, we may ask whether units should be considered equivalent to one another, which would involve, for example, asking whether an episode of a series is equivalent to a cinematographic work, or whether a film released in a cinema or a series already broadcast by another audiovisual operator is equivalent to a previously undistributed film or series exclusively offered by the platform concerned. In this respect, the ERGA announced in its report the forthcoming publication of guidelines for the implementation of the quota obligations (Proposal 19 of the ERGA report).
377. It is also necessary to consider the practical application of the "prominence" principle for European works. If the legislator considers the proposals in Recital 35 to be relevant, appropriate monitoring and control mechanisms should be implemented within the framework of the co-regulation system promoted by the Directive. Again, the ERGA announced that its future guidelines should make it possible, on the basis of concrete examples, to assess the extent of this obligation (Proposal 20).
378. The question of monitoring and control also raises the issue of the sanctions that would be applied in the event of non-compliance with the stated obligations, which are not determined in the revised Directive. It is therefore for the French legislator to determine the type of sanction applicable in the event of non-compliance with the obligations laid down in Article 13. In addition, the Directive does not specify whether the country of origin principle or the country of destination principle applies in the event of non-compliance by an operator with the obligation to contribute to the financing of the production of works implemented by a targeted Member State (Article 13(2) of the revised Directive). This amounts to determining whether – in the event that a Member State in which the operator in question is not established requires the latter to contribute to national

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<sup>154</sup> ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, Towards the application of the revised Directive by National Regulatory Authorities (NRAs), ERGA, 6 November 2018.

production – it is that State of destination that should have jurisdiction to rule on any non-compliance with this obligation, or whether this dispute falls within the jurisdiction of the Member State of establishment, which obviously risks making the procedures much more cumbersome and complex.

379. In addition, the prohibition of "double imposition" applied to audiovisual media providers supplying their services in one or more Member States, in addition to their Member State of establishment, should be clarified and founded on clearly established criteria. Here again, cooperation between Member States appears to be essential to ensure the consistent development and effective implementation of such an obligation (ERGA Proposals 22 and 23).
380. In conclusion, the assessment of the implementation of the previous Directive, which had provided for a procedure to avoid any "circumvention" of the regulation by a country of destination, calls for caution, since this mechanism has never been applied at any time during the existence of the Directive, despite cases where the question could have been raised.
381. Secondly, the *Autorité* wishes to draw the legislator's attention to the regulatory gaps and asymmetries that will persist, even after the full transposition of the Directive.
382. First of all, the question of the applicability of the Directive to operators that establish their registered office outside the EU remains unresolved. Indeed, an SVOD operator could be tempted to establish its registered office outside the territory of the Union to avoid the application of the text. In such a case, the report adopted by the ERGA proposes that audiovisual regulatory authorities in the Member States should strive to contact the authorities of the non-European countries concerned with a view to finding a provisional arrangement (proposal 40). In the same case, moreover, if the revised AVMSD were to be inapplicable to certain operators not established within the European Union, the *Autorité* notes that the scope of French legislation is limited, in its current wording, to on-demand audiovisual media services "established in France"<sup>155</sup>, thus excluding the main stakeholders in the sector from the scope of application. In this context, the *Autorité* notes that, in the event of the applicability of the revised AVMSD, it is necessary to consider the lack of legal tools to sanction any non-compliance with the European or French rules to which French operators are subject.
383. Moreover, the revised Directive does not remove all asymmetry of competition between audiovisual operators. The 30% quota for European works remains significantly lower than the broadcasting quotas applicable to television operators (60%). In addition, while the Directive provides for the possibility of imposing obligations on SVOD operators active in the territory of a Member State to finance the production of works in that Member State, it does not impose the same obligations as regards the share reserved for independent production in particular.
384. Finally, and this point deserves to be further developed, the financial scope of the Directive, even if fully applied, should not be overestimated. If France were to succeed in imposing on Netflix a financial contribution to production of 15% (i.e. the rate imposed on terrestrial operators for audiovisual works) on the basis of its 5 million subscribers, for an average subscription of €100 per year, i.e. €500 million per year, the mandatory

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<sup>155</sup> Article 43-2 of the Law of 30 September 1986. The criteria for establishment are defined in Articles 43-3 and 43-4 of the same text.

contribution would amount to a total of €75 million, i.e. the price of five to seven international series or films. This number of productions is not very far off what Netflix claims it wants to produce in France.

385. The transposition of the Directive will not therefore avoid the need to adapt our regulations in order to put the incumbent stakeholders on an equal competitive footing with the new entrants.
386. While incumbent operators have recently begun to rethink their model by developing new broadcasting services that are more in line with new consumer uses, national regulations impose constraints on these operators alone – in terms of investment, broadcasting and revenue sources – that are unknown to digital operators. In view of the new competitive landscape emerging at an accelerated pace, these rules do not put all operators on an equal footing and must therefore be rapidly reconsidered through an ambitious and wide-ranging review. Otherwise, it is investment in French production that will be put at risk over the short term, making French audiovisual regulations protective on paper only, contrary to the desired objective of defending the cultural exception.

### **III. Possible developments to reduce competitive asymmetry in the audiovisual sector**

387. At the end of the analysis, developments likely to restore competitive symmetry seem necessary in four areas:

- television advertising;
- investment obligations;
- programming obligations;
- anti-concentration measures.

388. In terms of timetable, the *Autorité* also considers it desirable, given the urgency of the issues at stake, for the government to very rapidly amend the most punishing measures, which are the direct result of decrees and can be amended without waiting for the new legislative framework, which would require at least several months of parliamentary drafting and discussion.

#### **A. ENCOURAGE COMPETITION BETWEEN TELEVISION AND DIGITAL ADVERTISING: PROHIBITED SECTORS AND SEGMENTED ADVERTISING**

389. The economic and technological developments described above make it necessary to review the existing regulations on television advertising, which are much more restrictive than those that currently apply to Internet stakeholders in terms of both prohibited sectors and targeted advertising. Indeed, as the TF1 group points out, “these bans create an unjustifiable asymmetry between television operators and digital service operators”<sup>156</sup>.

#### **1. PROHIBITED SECTORS**

390. The *Autorité* recommends that all obligations on television channel operators under Articles 8 and 13 of the 1992 Decree should be reviewed, with the exception of the prohibition of advertising for drinks with an alcohol content of more than 1.2%, which raises public health issues. Indeed, the current regulations no longer seem to be adapted to market conditions, notably insofar as they prevent television channels from competing effectively with GAFA-type platforms in several advertising categories.

391. The *Autorité* notes first of all that the constraint on television channel operators under Article 8 of the Prohibited Sectors Decree now appears obsolete, whereas digital media are not subject to it.

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<sup>156</sup> TF1 Group's response to the *Autorité*'s questionnaire, page 84.

392. France Télévisions points out, with regard to the prohibition of television advertising for commercial promotional operations in the distribution sector, that “the current context of media convergence first of all generates particularly significant upheavals for communication in the distribution sector by facilitating real-time access to information on commercial promotional operations for consumers. *Insofar as the restriction on these operations concerns only the TV media, it is truly incongruous that it cannot be the vehicle for such comprehensive communication as that allowed on digital media (and more specifically YouTube and Facebook), or even on the distributors' proprietary media* ”.<sup>157</sup>
393. A lifting of the ban on commercial operations in the distribution sector, for cinema and literary publishing, would offer advertisers in these sectors additional choice, allowing them to benefit from the specific advantages of the television medium as a mass medium (development of product awareness and image) and thereby to distribute their advertising investments between the various media in a more discriminating way, according to their needs and the objective pursued.
394. With regard to restrictions on cinema and literary publishing, the television channels consider that Article 8 of the Decree has not led to the achievement of the initial objective of protecting cultural diversity. Thus, according to M6, “it is, on the contrary, the current situation that favours large productions. The latter use television solely for its power: the promotion of films in studio programming in the presence of well-known actors, the sponsorship of programmes by film websites, advertising for DVD releases, the sale of derivative products or partnerships with major brands”<sup>158</sup>.
395. According to the stakeholders interviewed, the opening up of television advertising to the literary publishing and cinema sectors, and to commercial promotional operations in the distribution sector could generate additional annual turnover of between €150 million and around €400 million by 2022 at the latest, with most of this increase coming from the distribution sector.
396. The responses of the stakeholders interviewed during the preparation of this opinion vary, as they are forecasts, in terms of the share that could correspond to new expenditure and the share that would come from expenditure transferred from other media. Similarly, opinions differ considerably on the distribution of these transfers among other media.
397. Some of the stakeholders interviewed plan a major redeployment of investments towards the television medium, which could be to the detriment of the regional daily press, the radio and billboard advertising, based in particular on the conclusions of a recent France Pub study “*Impact sur les secteurs de la presse, de la radio et de la publicité extérieure, de l'ouverture au bénéfice de la télévision des secteurs interdits et de la publicité segmentée*”, commissioned by several companies and professional organisations in the print, radio and billboard sectors.
398. France’s advertising association, the *Union des annonceurs* (UDA), interviewed during the investigation, itself concedes that “the impact of legislative reforms on the advertising market and the media economy is very difficult to measure because economic factors play a major, even predominant role (economic crisis, emergence of new stakeholders, new communication formats etc.). The predictive studies that have been included in the debate

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<sup>157</sup> Response of the France Télévisions Group to the *Autorité*'s questionnaire, page 40.

<sup>158</sup> M6 Group's response to the *Autorité*'s questionnaire, pages 47-48.

announcing transfers of quantified investments between media are controversial and should therefore be taken with great caution”<sup>159</sup>.

399. On this point, the *Autorité* notes that the defence of general interests, such as the protection of media pluralism, is the responsibility of the government and Parliament, which must determine the right balance in this area, and not of competitive analysis. The *Autorité* will not therefore rule on the issue of the distribution of value between the various media of the income generated by a possible amendment to Article 8.
400. However, it is important that the choices made be based on serious and reliable studies, of non-professional origin, in order to allow a detailed assessment of the cost-benefit balance of such a measure in terms of balance between the media. In other words, if the ban on television advertising in these sectors benefited platforms such as Google and Facebook first and foremost, with traditional media gradually being sidelined, then the damage resulting from such a ban for linear television would merit being taken into account.
401. Subject to such an examination, in conclusion, it appears that the competitive imbalance resulting from the regulatory asymmetry mentioned above calls for a rapid review of the constraints resulting from Article 8 of the Decree of 27 March 1992 on commercial promotional operations in the distribution, cinema and literary publishing sector.

## 2. TARGETED ADVERTISING

402. The *Autorité* also recommends that the obligation on television channel operators to broadcast identical advertising messages simultaneously throughout the national territory in terms of linear broadcasting under Article 13 of the 1992 Decree be reviewed and that television channels should therefore be allowed to develop all types of targeted advertising<sup>160</sup>. As TF1 points out, “the possibility of offering targeted advertising would be a major step forward for television channels in improving their ability to compete with the major stakeholders in digital advertising”<sup>161</sup>, which are not subject to such constraints and also have competitive advantages linked to the volume and variety of personal data to which they have access.
403. Removing this constraint would also provide new opportunities for advertisers, which are increasingly interested in the effectiveness of targeted advertising.
404. As the UDA points out, “in recent years, advertisers have therefore allocated an increasing proportion of their investments to digital advertising to benefit from effective targeting”<sup>162</sup>. The UDA notes in particular two positive consequences for advertisers of a repeal of Article 13 of the 1992 Decree applicable to television channels: on the one hand, advertisers “could thus benefit from both the advantages of the power of this mass medium, which offers the possibility of reaching a large number of viewers simultaneously, while allowing them to send a more personalised message depending on

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<sup>159</sup> UDA’s response to the *Autorité*’s questionnaire, classification mark 4530.

<sup>160</sup> Segmented or addressed advertising for example.

<sup>161</sup> TF1 Group’s response to the *Autorité*’s questionnaire, page 86.

<sup>162</sup> The UDA’s response to the public consultation by the Directorate General for Media and Cultural Industries of the French Ministry of Culture on simplifying television advertising rules, page 8.

the constitution of households and their location”<sup>163</sup>. On the other hand, they “could broadcast personalised messages in the secure and controlled environment that audiovisual has always offered, which is likely to attract advertising investments”<sup>164</sup>, in a context where some advertisers have had to suspend their digital advertising investments following an association of their brand with illegal broadcasting environments or the insufficient visibility of advertising messages.

405. Finally, a review of Article 13 of the 1992 Decree would promote greater coherence in the sector, leading to an alignment of the existing legal framework for advertising between linear television broadcasting and replay broadcasting, where targeted advertising is not prohibited.
406. According to the investigation, in terrestrial broadcasting, television channels intend to develop regionalised advertising targeting, making it possible to supplement a national advertising message with additional local or regional information or to offer specific advertising to the population of a geographical area<sup>165</sup>. They also plan to broadcast segmented and/or addressed advertising using Hybrid Broadband TV (HbbTV) technology<sup>166</sup>.
407. Television channels are also very interested in the prospects for developing targeted advertising via IPTV broadcasting using personal data collected from viewers by ISPs through their connected "Distributor TV" environment. Such use would require two conditions to be met: the compatibility of such data collection and use with the GDPR as interpreted by the CNIL and the agreement of the ISPs.
408. The transfer of these data by ISPs would take place notably within the legal framework set by Article L. 34-1 of the French code of postal and electronic communications (*Code des postes et communications électroniques*)<sup>167</sup>. As Orange points out, “the code of postal and electronic communications provides a very precise framework for the conditions under which we can process customer data, particularly traffic data”<sup>168</sup>. According to the investigation, experiments have already been carried out for IPTV, between television channels and ISPs, on the broadcasting of segmented advertising.

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<sup>163</sup> The UDA’s response to the public consultation by the Directorate General for Media and Cultural Industries of the French Ministry of Culture on simplifying television advertising rules, page 8.

<sup>164</sup> The UDA’s response to the public consultation by the Directorate General for Media and Cultural Industries of the French Ministry of Culture on simplifying television advertising rules, page 8.

<sup>165</sup> According to the investigation, France Télévisions carried out experiments of this type with TDF in 2018. TDF’s reply to the *Autorité*’s questionnaire, page 7.

<sup>166</sup> This technology, which uses the Internet for the broadband part of the service, would enable them to interact directly with viewers and collect their usage data in order to offer them both tailor-made on-demand services and addressed advertising, after obtaining their consent in compliance with the provisions of Article 3 of French Law 86-1067 of 30 September 1986 on freedom of communication in relation to the privacy of choices made by individuals with respect to electronic communication services and the European General Data Protection Regulation.

<sup>167</sup> Article L. 34-1 of the French code of postal and electronic communications (*Code des postes et communications électroniques*) notably states that the data stored and processed by ISPs may under no circumstances relate to the content of the correspondence exchanged or the information consulted. It also provides that in the event of transmission to third parties of data concerning the location of terminal equipment, the subscriber must give his or her prior consent.

<sup>168</sup> Orange’s response to the *Autorité*’s questionnaire, pages 10-11.

409. In order to develop targeted advertising on IPTV, television channels will have to agree with ISPs in advance how the value of the data transmitted will be shared. Negotiations on these subjects could also extend to the many issues pending between ISPs and television channel operators, in particular the conditions for the acquisition, paid or otherwise, of linear terrestrial channels, as well as the conditions for the acquisition of non-linear services under the conditions set by the operators.
410. According to the stakeholders interviewed, a repeal of Article 13 could generate investments of around €200 million in the television medium by 2022<sup>169</sup>. The stakeholders interviewed on this subject seem to believe that most of these investments could result from redeployment from other media, and, to a lesser extent, from an increase in advertisers' budgets, linked for example to the arrival on the market of new advertisers that were not previously present on television, in particular regional advertisers or pure play companies<sup>170</sup>.
411. Most media agencies, as well as the UDA, plan a major redeployment of investments towards the television medium from the Internet<sup>171</sup>, while the France Pub study "*Impact sur les secteurs de la presse, de la radio et de la publicité extérieure, de l'ouverture au bénéfice de la télévision des secteurs interdits et de la publicité segmentée*", commissioned by several companies and professional organisations in the print, radio and billboard sectors, highlights the risk of investment redeployment to the detriment of the regional daily press, radio and billboard advertising.
412. As mentioned above with regard to the opening up of television advertising to the so-called prohibited sectors, economic forecasts vary depending on the stakeholders interviewed, and the theories and conclusions of predictive studies should be approached with caution.
413. Nevertheless, foreign examples, particularly that of the United States, suggest that targeted advertising on linear television offers television channels major economic opportunities. The *Autorité* therefore concludes that the competitive imbalance resulting from the regulatory asymmetry referred to above calls for a rapid review of the constraints set out in Article 13 of the Decree of 27 March 1992.

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<sup>169</sup> See SNPTV's study on the risks and opportunities of segmented advertising, April 2017 – according to this study, the gains would be between €33 million and €400 million depending on the level of geographic targeting allowed, the share of the addressable audience and the performance of addressed TV advertising.

<sup>170</sup> On the example of the United Kingdom, UDA's reply to the *Autorité*'s questionnaire, classification mark 4531.

<sup>171</sup> See the responses to the *Autorité*'s supplementary questionnaires from Publicis (page 2), UDA (classification mark 4531), Omnicom (page 1), Havas Media Group (page 1) and Group M (page 1).

**B. STRENGTHEN THE RIGHTS OF TELEVISION STATION OPERATORS BY SIMPLIFYING THE CONDITIONS FOR INVESTMENT IN PRODUCTION**

414. As detailed above, French regulations require television operators to contribute to the financing of film and audiovisual production, some of which must qualify as “independent production”<sup>172</sup>.
415. They therefore establish a financing system in which producers and television channel operators share the rights to exploit a work that has been co-financed, with the bulk of the rights accruing to producers, while television channel operators are mainly satisfied with time-limited broadcasting rights. The operators therefore appear disadvantaged in that, on the one hand, it is difficult for them to integrate upstream as do digital platforms that buy production studios and, on the other hand, they cannot acquire exclusive long-term rights to exploit a work through various services in France and/or abroad and thus create the audiovisual services that are popular with viewers.
416. In the absence of any changes, French audiovisual media services could be weakened by competition from digital platforms and become unable to continue financing French production, independent or otherwise, at significant levels. Digital platforms, which are essentially demanding productions with international potential and a large budget, would not be capable of taking over the financial contributions of French television channel operators, with the exception of a tiny minority. Therefore, the production sector also has a strong interest in allowing incumbent television channel operators to invest in content and exert competitive pressure on international digital platforms.
417. It therefore seems essential to enable television channel operators to make their content investments more profitable by giving them the opportunity to exploit them on an equal footing on their non-linear media services. From this point of view, it has been accepted by the market in recent years that broadcasting rights automatically include, for audiovisual rights, replay rights for eight days. It has become necessary to consider that non-linear broadcasting rights should be aligned as much as possible with linear broadcasting rights, for example over a period of one year, as requested by the BBC for its BBC iPlayer. The rapidly increasing convergence between linear and non-linear services in consumer usage is likely to make it impossible to maintain the distinction between replay and SVOD in the long term, to the extent that platforms offer all content with no time limit.
418. Similarly, the possibility of pooling the strengths of European television operators to create platforms that achieve the necessary "critical mass" requires the option of maintaining international sales agreements.
419. In this way, television channel operators that have financed the work should be able to negotiate broadcasting rights and marketing agreements directly with the producer in order to adapt to new uses and changes in the competitive context. In this way, the television channel operator could, depending on the content and its editorial strategy, decide on the rights it wished to acquire over the work and thus build up the catalogue of content necessary for the creation of attractive on-demand audiovisual services.

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<sup>172</sup> Notably Articles 27 and 33, as well as Articles 70 and 71-1 of the Law of 30 September 1986 and Decree 2010-747 of 2 July 2010 on the contribution to the production of cinematographic and audiovisual works of television services broadcast by terrestrial Hertzian means.

420. The current levels of independent production, imposed in France, could, if necessary, be gradually reviewed in order to bring them closer to the standards of competing European television channel operators in an increasingly international market.
421. Moreover, and above all, as proposed in the information report of the fact-finding mission of the Committee on Cultural Affairs and Education of the *Assemblée nationale* on a new regulation of audiovisual communication in the digital age, the qualification of independence should be based solely on a capitalist criterion, as elsewhere in Europe.
422. As regards European and French production obligations, the operators interviewed during the investigations did not criticise this principle, nor the amounts of their obligations or the French and European production quotas.
423. Thus, with the legislator's objectives achieved in terms of production, it seems appropriate to revise the regulatory framework to adapt it to the reality of the market, in particular by allowing a certain pooling of obligations at group level between cinema and audiovisual in order to allow a better allocation of the contribution of incumbent operators to production through the partial redirection of their investments to the types of content most in demand from viewers.
424. For example, some operators pointed out that television series are particularly appreciated by the public and that their cost had recently increased substantially (the last season of the *Game of Thrones* has a budget of \$15 million per episode for six 80-minute episodes<sup>173</sup>), nearly that of cinematographic works. Therefore, it could be beneficial for operators to be able to carry forward part of the investments dedicated to film production to audiovisual production when a particular project so requires. In this context, and in order to maintain a high level of investment in French cinema and audiovisual production, some of the obligations for these two sectors could be pooled in order to enable operators to better adapt investments to actual demand. This partial pooling could stimulate investment in ambitious projects that could be marketed abroad and on various media, which would also benefit producers.
425. This type of pooling could also be carried out for all the services of a single group in order, once again, to allow more flexibility in the creation of services for certain types of viewer and improve the circulation of works within a group. This is already a possibility for audiovisual services and could therefore be extended to cinematographic works, as proposed by the report of the fact-finding mission of the Committee on Cultural Affairs and Education of the *Assemblée nationale*. Such a reduction would thus make it possible to bring the obligations of regulated operators closer to those of platforms that are only subject to the new AVSMD, while maintaining significant levels of French production.

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<sup>173</sup> “*Game of Thrones* expose son budget pour la saison 8”, *Le Figaro*, 28 September 2017.

### C. MAKE PROGRAMMING CONDITIONS MORE FLEXIBLE

426. The regulations state that the financing obligations relate to European and French works that must be broadcast during prime time, but that the broadcasting of cinematographic works is prohibited at certain days and times in order to protect cinemas<sup>174</sup>.
427. In order to enable television operators to offer services that correspond to consumer usage, they should be allowed to regain control of their broadcasting schedule to allow them, for example, to offer cinematographic works more frequently, following the example of digital platforms. Furthermore, the greater range of cinematographic content available on SVOD and VOD platforms has not reduced cinema attendance.
428. As a result, the so-called "prohibited days" regulation could be removed. If it were to be maintained, it could be made more flexible, while retaining the possibility for film services (such as Canal Plus) to benefit from greater flexibility than generalist channels, given their greater investment in film production.

### D. EXAMINE POSSIBLE ALTERNATIVE ANTI-CONCENTRATION MEASURES

429. The so-called "anti-concentration" measures provided for in Articles 39 et seq. of the Law of 30 September 1986 were established within the closed, national framework for terrestrial broadcasting, which was then the almost exclusive means of broadcasting audiovisual content on French territory. In this context, the legislator chose to guarantee a certain spread of capital among television channel operators, in order to promote the diversity of sources of information and of the expression of currents of thought and opinion.
430. In this respect, the current measures limit the scope for the internal and external growth of incumbent audiovisual groups through three sets of restrictions, the main elements of which are set out below:
- restrictions on the composition of the share capital of television services (Articles 39 and 40 of the 1986 Law): the principal restriction concerns the prohibition on the same person holding, directly or indirectly, more than 49% of the share capital or voting rights of a company holding a licence for a national television service broadcast by DTT ("DTT licence") and whose average annual audience exceeds 8%. Non-European companies are also prohibited from holding more than 20% of the capital or voting rights of a company holding a DTT or radio licence. Similarly, no DTT or radio licence may be granted to a company in which more than 20% of the capital or voting rights are held by foreign persons. This last provision has appeared, over time, to be difficult to implement, given the floating and fragmented nature of the body of shareholders, whose nationality is sometimes difficult to know;

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<sup>174</sup> Decree 90-66 of 17 January 1990 implementing Law 86-1067 of 30 September 1986 and establishing the general principles governing the broadcasting of cinematographic and audiovisual works by television service operators.

- restrictions on the accumulation of television service licences (Article 41 of the 1986 Law): under these provisions, the same person may hold, directly or indirectly, a maximum of seven DTT licences. In addition, local television operators may not hold more than two licences in the same area and may not combine licences in different areas for a service of more than 12 million inhabitants;
- restrictions on multimedia concentrations (Articles 41-1-1 and 41-2-1 of the 1986 Law): under the applicable provisions, for a DTT licence to be issued by the CSA to a national television channel operator, it must comply with the so-called “two out of three” rule, which means that it may not do more than two of the following three things:
  - operate one or more terrestrial channels to at least 4 million inhabitants;
  - operate one or more radio stations serving at least 30 million inhabitants;
  - operate or control political and general information dailies representing more than 20% of the total national circulation.

A similar rule is also planned at the local level.

431. Finally, Article 42-3 of the Law of 30 September 1986 gives the CSA the power to withdraw a DTT licence, without prior formal notice, “in the event of a substantial change in the data on the basis of which the licence was issued, in particular changes in the composition of the capital or management bodies, or in the financing arrangements.”
432. The anti-concentration measures were partly analysed by the French Constitutional Council (*Conseil constitutionnel*) in 2000. The latter deemed them compliant with the Constitution, taking into account the constitutional objective of pluralism<sup>175</sup>. It thus considered that the measures provided, within the technically limited framework of terrestrial broadcasting, appropriate and justified mechanisms to limit the size of audiovisual groups<sup>176</sup>.
433. Since the implementation of these measures and their analysis by the Constitutional Council, the competitive landscape of the audiovisual sector has progressively been disrupted by several waves of technological development. New OTT operators sometimes belong to large groups developing conglomerate strategies and, in any case, which have very significant financial capacities that allow them to make major investments in attractive exclusive content and platforms. However, as stated by the CSA in its Opinion 2018-04 of 7 November 2018<sup>177</sup>, the system “does not take into account the other links in

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<sup>175</sup> Decision of the *Conseil constitutionnel* 2000-433 DC of 27 July 2000: “the free communication of ideas and opinions, guaranteed by Article 11 of the 1789 Declaration of Human and Civic Rights, would not be effective if the public to whom the audiovisual media are addressed was not able to access, both in the private and public sectors, programmes that guarantee the expression of views of a different nature while respecting the imperative of honesty of the information” (Paragraph 9).

<sup>176</sup> In this respect, the *Conseil constitutionnel* approved the revision of the anti-concentration measures submitted for examination in 2000: “Whereas it was nevertheless the legislator's responsibility, in a technical context where radio resources remain limited, to prevent, through appropriate mechanisms, control by a dominant shareholder of a too large part of the audiovisual landscape” (Decision 2000-433 DC of 27 July 2000, paragraph 43, emphasis added).

<sup>177</sup> CSA Opinion 2018-04 of 7 November 2018, cited above, page 13.

the value chain” such as digital platforms, which nevertheless “have very high levels of concentration.”

434. The *Autorité* notes that several elements of the measures seem to be seriously out of step with the new context of the broader competitive landscape in which television channel operators operate, where the size of audiovisual groups becomes a determining factor in their competitiveness. They also seem to be largely outdated with regard to the multimedia system, as the situation of pluralism in the media has undergone many changes since 1994.
435. According to some operators interviewed, the provisions limiting share capital ownership or voting rights to 49% have certainly made it possible to avoid takeover bids qualified as “hostile” on audiovisual groups present in France. However, they have not completely prevented the formation of groups, including channels with a large national audience, from undergoing a certain degree of integration, whether vertical (such as the Bouygues/TF1 group) or on a conglomerate basis (such as the Bertelsmann/M6/RTL group).
436. Foreign OTT operators, particularly American ones, are able to develop their presence throughout the value chain, without territorial limits. Since these provisions restrict the ability of television channel operators to form fully integrated, larger audiovisual groups at national and European level, the question of whether they should be maintained or adapted should be raised before the legislator. If they were to be relaxed or even lifted, the analysis of concentrations in the sector would in any event remain subject to the ordinary merger control procedure implemented by the *Autorité* and, more generally, to the prohibition of anti-competitive practices provided for in the Commercial Code. It will also be up to the legislator to decide whether, in view of anti-competitive requirements, the 20% ownership limit by non-European companies should be maintained.
437. As regards the provisions on the limitation of DTT licences, the contributions communicated to the *Autorité* under the investigation did not reveal any major difficulties. However, the *Autorité* notes that, in a context where content broadcasting modes other than DTT are growing, and insofar as it can be observed that non-incumbent DTT channels are often unprofitable, the holding of a large number of DTT licences is no longer as strategic an element for audiovisual groups as it once was. In this new context, the question of the relevance of this provision may be raised before the legislator. In addition, the reduced importance of DTT broadcasting, even if it remains essential for channels in the coming years, could gradually reduce the dissuasive force of the CSA's power to withdraw DTT licences in the event of a change in the capital of television companies. In order to guarantee the objective of pluralism among all operators offering video content of all kinds, new powers guaranteeing plurality in the media and better adapted to the wider competitive landscape could therefore be entrusted to the CSA.
438. Finally, some operators interviewed were in favour of relaxing the provisions on the limitation of multimedia activities. Others underlined the guarantee that this mechanism offers in terms of pluralism. To date, no major OTT platform has acquired one or more French media. However, there are foreign counter-examples, such as the 2013 acquisition of the American daily *The Washington Post* by Jeff Bezos, President and CEO of Amazon. The *Autorité* recalls that its role is not to rule on the legitimacy of acquisitions of this type for reasons other than competitive ones. In this respect, it notes that, in view of their current wording, the provisions of the Law of 30 September 1986 on multimedia restrictions apply only to television companies holding a DTT licence. The legislator could therefore usefully adapt the measures in order to ensure a fair balance between the need for pluralism and the need for greater competitive equity between all operators.

439. In conclusion, the new competitive landscape calls for an overhaul of the anti-concentration measures. While safeguards guaranteeing pluralism remain necessary, the current provisions apply only to television operators and therefore exclude an increasingly significant proportion of content providers.

## CONCLUSION

440. While incumbent operators have recently begun to rethink their model by developing new broadcasting services that are more in line with new consumer uses, national regulations impose constraints on these operators alone – in terms of investment, broadcasting and advertising revenues – that are unknown to digital operators. In view of the new competitive landscape emerging at an accelerated pace, these rules do not put all operators on an equal footing and must therefore be rapidly reformed.
441. The *Autorité* therefore recommends that all rules imposing asymmetric constraints in the field of advertising, production, distribution and anti-concentration mechanisms be amended in the short term.
442. *In terms of advertising*, the first step should be to allow a transition from television advertising to segmented advertising.
443. As far as targeted advertising is concerned, only Internet stakeholders – above all Google and Facebook, which are capturing most of the very rapid growth of this form of advertising, whose effectiveness is increasingly sought by advertisers – are currently benefiting from this. Therefore, the provision in Article 13 of the Decree of 27 March 1992 should be quickly reviewed to give linear operators access to it.
444. Moreover, for the prohibited sectors (commercial promotional operations in distribution, cinema and literary publishing), it is certainly up to the public authorities to ensure that the general interests of pluralism, balance between the media and cultural diversity prevail in the conditions for the distribution of cultural goods. However, in the absence of a reliable and impartial study documenting the cost-benefit balance of opening up these sectors, the *Autorité* notes that Internet advertising currently appears to be the main beneficiary of these bans. It therefore invites the public authorities to review these constraints, and as a minimum carry out tests to assess the real effects of lifting these bans on the sectors that are being protected.
445. Secondly, in terms of *investment in production*, it is necessary to enable operators to make their content investments more profitable by giving them the opportunity to exploit them on their non-linear services, by obtaining the necessary digital exploitation rights. To this end, the definition of independent work must be reviewed and limited to the notion of independence in terms of capital, in order to allow the operators financing the work to negotiate all broadcasting rights and agreements for exploitation directly with the producer, particularly for foreign countries. The 75% independence requirement could also be progressively reviewed in order to avoid too great a disparity with European competitors, all of whom are now competing in an increasingly international content production market.
446. Without calling into question the obligations to produce French and European works, the *Autorité* notes that the setting of highly segmented obligations, between cinematographic and audiovisual works, and between the different channels of the same group, hinders operators' editorial room for manoeuvre and their ability to adapt to market developments. The *Autorité* therefore proposes opening up the possibility of pooling obligations between channels within the same group. This type of pooling should also be partially implemented in the form of a common "corridor", likely to evolve in line with economic and editorial developments, between audiovisual and film production obligations.

447. As regards *programming conditions*, the *Autorité* notes that the current changes in usage, and the fact that films can be viewed at any time on SVOD platforms, remove any justification for the “prohibited days” for films, which should be removed or largely relaxed.
448. The *Autorité* also considers that the current *anti-concentration measures*, which are largely obsolete in many of their provisions, should be substantially overhauled. Although it appears necessary to have measures justifying the existence of a mechanism to protect pluralism that is exempt from the normal law on mergers, these should be based on an analysis that includes all current content providers.
449. Lastly, the *Autorité* considers that all these regulatory changes are urgent, given the speed of growth in the use of platforms and the difficulty that former operators face in adapting their model under economic and regulatory conditions that are currently unfavourable. It therefore proposes adapting, in line with the above observations and without waiting for the law to intervene, the provisions of the Decree of 27 March 1992 and Decree 2010-747 of 2 July 2010 on the contribution of terrestrial Hertzian television services to the production of cinematographic and audiovisual works.

Deliberation on the oral report by Ms Laura Souty, Mr David Dubois, Mr Jérôme d'Huart and Mr Benjamin Record, rapporteurs, and the intervention of Ms Juliette Théry-Schultz, Deputy Rapporteur General, by Ms Isabelle de Silva, President; Ms Élisabeth Flüry-Hérard, Ms Fabienne Siredey-Garnier, Mr Thierry Dahan and Mr. Emmanuel Combe, Vice-Presidents; Ms. Chantal Chomel, Ms. Séverine Larere, Ms. Pierrette Pinot, Ms. Carol Xueref, Mr. Noël Diricq and Mr. Olivier d'Ormesson, Members.

Hearing Secretary,

Chair,

Caroline Orsel

Isabelle de Silva

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