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Concentration in the media sector in the digital era : from legal rules to regulation (Executive summary)

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EXECUTIVE SUMMARY¹

By letter of September 8th, 2021, the Minister of Economy, Finance and Recovery and the Minister of Culture entrusted a mission to the General Inspectorate of Cultural Affairs (IGAC) and the General Inspectorate of Finance (IGF) on the anti-concentration rules specific to the press, audiovisual and multimedia group sectors. The following elements summarize the main findings and orientations of the mission.

The media sector is characterized by a heterogeneous level of concentration as well as by a high level of pluralism.

Concentration in the media sector is high on average but heterogeneous depending on the sub-sector: high and decreasing for television between 2005 and 2016; high and stable for radio over the same period; high for the national daily press and very high for the local daily press. Multimedia diversification by groups remains limited in France, with the exception of the Vivendi group. It is therefore difficult to establish an unequivocal evaluation of concentration for the sector as a whole. In any case, the level of pluralism of content appears to be much higher today than it was at the beginning of the 2000s, and even more so in 1986, due to the multiplication of distribution channels, digitization and the arrival of new players (such as "pure digital players" media outlets). Economic theory also stipulates that there is no mechanical correlation between concentration and pluralism, especially since anti-concentration is only one of the levers of public policy in favor of pluralism, alongside, for example, the existence of a strong public audiovisual sector whose independence and pluralism are, in France, protected by law.

Economic health is the first condition of media pluralism and it requires a fair competitive environment with new operators and digital platforms.

In a context marked by rapid technological breakthroughs and a transformation of consumer usages, competition from new audiovisual operators in video and audio-on-demand, and the incursion of major digital platforms such as Google and Facebook in the media value chain, have, over two decades, significantly weakened the economic model of traditional media, and particularly of the press. These platforms have become, in particular, an essential intermediary in the contact with final consumers and have captured the online advertising market. In this context, the creation of national or European "champions" capable of competing with these platforms is a long-standing issue, which has become even more acute as a result of the mergers and acquisitions undertaken by certain media corporations in the recent period. This ambition is, in the opinion of other operators, unrealistic, given the difference in scale with the American digital giants.

For public authorities, this situation calls for the re-establishment of fair and open digital markets, which is the aim of two regulations currently being examined at the European level, the "Digital Markets Act" (DMA) and the "Digital Services Act" (DSA). Beyond that, it requires a fair regulatory environment: while the 2018 Audiovisual Media Services Directive (AMSD) has extended broadcasting and production support obligations for television services to on-demand audiovisual media services, there are still regulatory asymmetries between traditional audiovisual operators and digital players, particularly with regard to funding obligations for independent production, which limit in particular their vertical integration possibilities.

¹ Traduction pour information, seule la version française du rapport engage la mission.

The legal framework for mergers control in the media sector is obsolete, both in its tools and in its approach.

Mergers control in the media sector is twofold: on the one hand, transactions exceeding certain revenue thresholds are subject to ordinary law control by the Competition Authority ("*Autorité de la concurrence*"), which pursues the objective of well-functioning markets; on the other hand, a sectoral mergers control system was set up in 1986 in compliance with the constitutional objective of pluralism. This sectoral system is schematically based upon three components: first, single and multimedia thresholds at the national and local levels set by law prohibiting a certain level of broadcasting, population coverage or capital ownership; second, an approval procedure that any television or radio service holding a broadcasting authorization must obtain from the Regulatory Authority for Audiovisual and Digital Communication ("*Autorité de régulation de la communication audiovisuelle et numérique*" – ARCOM) in the event of a change in control of the company holding the authorization; and third, single-media capital ownership thresholds applicable only to non-European legal entities and individuals.

In this institutional scheme, the risk of a separate assessment of the same merger by the Competition Authority and ARCOM exists with respect to the second component, in which ARCOM has a margin of appreciation, but this has never materialized to this day.

The existing sectoral mergers control appears to be inadequate and complex in more than one aspect. First, it is inappropriate to the digital revolution, taking into account only the broadcast media and the print media, in a silo approach to the media sector that no longer corresponds to the ongoing media convergence phenomena. In addition, the thresholds set in the law apply automatically and do not allow for "fine-tuning" of the sector, as the Competition Authority can operate when it authorizes a transaction subject to compliance with structural or behavioral commitments. Finally, the rise of certain thresholds by the Parliament to expressly facilitate certain specific transactions undermines the main advantage of a threshold-based approach, namely its predictability and stability. The need for reshaping this system is therefore a long-standing and shared observation, confirmed by the mission's work.

A specific mergers control for the media sector remains necessary, but the current approach based on thresholds set in the law is no longer appropriate.

The need for a specific mergers control for the media sector can be questioned. Indeed, competition law also pursues the objective of a greater diversity of products and services and has, in fact, increasingly protected the diversity of players and content in the media sector, going so far as to take into account the diversity of editorial lines in transactions concerning press titles and to impose the maintenance of separate editorial offices as a condition for the completion of the transaction. In addition, contrary to the previous situation, the control of mergers under ordinary law is no longer the responsibility of the Government but, since 2009, of an independent administrative authority. In light of the above, some stakeholders argue that all or part of the sectoral anti-concentration mechanism could be eliminated, as the Competition Authority is able to ensure both well-functioning markets and pluralism.

Nevertheless, the mission considers that there are arguments justifying the maintenance of a specific mergers control system for the media sector with regard to the objective of preserving pluralism, alongside the ordinary control by the Competition Authority. As a matter of fact, a merger operation authorized from a competition point of view may be problematic with regard to pluralism: for example, while the European Commission had authorized the proposed acquisition of Twenty-First Century Fox by Sky plc in 2017 with regard to competition law, it was finally prohibited by the British authorities with regard to pluralism. Moreover, the segmentation of the competitive analysis by relevant markets does not allow for an assessment of the concentration of information production within a multimedia group and, above all, the constitutional rank of the principle of pluralism might not be compatible with the possibility of balancing this objective with other factors, such as the efficiency gains generated by a merger.

In this context, the mission considers that a specific mergers control system for the media sector remains necessary, with the objective of avoiding that a single corporation or individual detains a disproportionate influence in shaping public opinion. Given the inadequacy of the current system, it must be recast in the context of a renewed approach.

The mission recommends that sectoral merger controls be reorganized with an approach characterized by its plasticity and focused on the news media.

The system proposed by the mission would not be based, as it is today, on thresholds set by law, but on a more flexible approach allowing ARCOM to assess the impact of transactions on pluralism on a case-by-case basis, using a transversal analysis including all the news media owned by the notifying parties. This assessment would be based on a multifactorial analysis grid including both qualitative indicators (diversity of content, independence of information with respect to past behaviours, etc.) and quantitative indicators (actual audience, coverage, economic viability of the operators, "attention shares", etc.), as it is currently practiced by the British communications regulator (Ofcom). The methodology used to assess the impact of the transactions on pluralism should be transparent in order to guarantee a form of predictability for the economic players, as the French Competition Authority practices with its guidelines regarding merger control.

From an institutional point of view, the Competition Authority and ARCOM would therefore be responsible for two separate controls, as it is currently the case with the approval procedure mentioned above. Thus, as soon as a transaction falls within the regulatory scope of the two authorities, each of them would have the option of authorizing or refusing it after an analysis that could, depending on the complexity of the transaction, require an in-depth examination phase; in the event of a discrepancy, i.e., authorization by one authority and refusal by the other, the transaction would therefore be blocked. Finally, this new mission of ARCOM should be exercised, as it is the case today, under the control of the administrative judge and with accountability to the Parliament.

This new mergers control system represents a twofold break.

On the one hand, from a conceptual point of view, the proposed system marks the transition from a rigid mergers control, based on thresholds set in the law, to a real sectoral regulation. It should allow for "fine-tuning" of the sector, for example by authorizing a transaction subject to commitments, which may be behavioural (e.g. maintaining separate editorial offices) or structural (e.g. the sale of a news media). This new approach, characterized by its flexibility, is inspired by the system in force in the United Kingdom, where it has already proved its worth; it is also the guarantee of a sustainable system, adapted to future technological breakthroughs.

On the other hand, concerning its scope, the proposed mechanism would apply only to news media, whereas the thresholds currently in force apply to all traditional media. This refocusing of the system is justified by the objective pursued, namely to prevent any corporation or individual from exercising a disproportionate influence in shaping public opinion. Defining the scope of news media is a delicate exercise, but one that can be overcome, for example by entrusting ARCOM with the task of assessing, on the basis of consumer panels, which media should be considered as such. Not all operations in this field would be subject to in-depth control, but only those that risk significantly affecting pluralism; by way of comparison, Ofcom carried out seven such reviews between 2006 and 2020. In practice, a revenue threshold could be defined in the law, above which an operation would have to be declared to ARCOM beforehand; in addition, ARCOM could also be given the power, with a time limit, to make self-referrals.

The implementation of the proposed mechanism requires a legislative framework for the new powers entrusted to ARCOM and implies a delayed entry into force.

Since the rules concerning media pluralism are the responsibility of the legislator, the proposed system must necessarily be provided for in legislative provisions, especially since pluralism is a constitutional requirement. In order to preserve the flexibility of regulation, the legislative framework would define only the main principles and objectives of regulation, while giving the regulator sufficiently broad powers to effectively and proportionately implement the principles thus established. Further legal work will be needed to clarify the division between law, decree and sectoral regulation. This system would replace the existing mono and multimedia thresholds but, given the scarcity of the terrestrial spectrum, the approval provided for in Article 42-3 §5 of Law n° 86-1067 of September 30th, 1986, applicable to authorized over-the-air broadcasting services, should be preserved.

Considering the time needed to prepare such a reform, the next audiovisual law could establish the creation of this system while providing for a deferred entry into force for its application; in the meantime, in order to preserve visibility for the economic operators, the current regulation would be kept as it is. Given the still predominant role of information via television, this delay in the implementation of the new legal framework does not seem problematic. However, in view of the speed at which consumer usages are shifting, particularly among the younger generations, it would be preferable that the new legal framework be effective at the end of the next legislature.

The thresholds applicable to non-Europeans should also be revised and coordinated with foreign direct investment in France screening regulation.

The specific thresholds for non-Europeans must be preserved because they pursue an objective of sovereignty as well as pluralism. They should, however, be extended to online press services.

Moreover, in the context of media convergence, the regulation of foreign direct investment in France screening could be extended in the medium term, as elsewhere in Europe, to all news media and not just the press sector as it is the case today.

The reshaping of media-specific mergers control will achieve its objective under three conditions:

- ◆ ensuring the independence and honesty of information²: economic theory suggests that the risk of "capture" of a media outlet by individual interests, for example political or industrial, increases as the sector becomes more concentrated, particularly in an environment where media outlets are owned by companies whose initial core business is not media, which fuels questions in some parts of public opinion about the reasons for this interest in the media sector. The mission suggests, in this regard, to carry out and publish an evaluation of the provisions protecting the independence and honesty of information, and in particular those introduced by the law of November 14th, 2016;
- ◆ ensuring pluralism of exposure: beyond the diversity of content, the issue in terms of pluralism is shifting, in the digital era, to the exposure of consumers to these contents, which can be biased by recommendation algorithms or dedicated electronic equipment (for example, the "Netflix" button on the TV remote control or a "Spotify" car radio button). The ongoing European initiatives on this subject (the DSA in particular) as well as recent works, such as the January 2022 report of the commission chaired by Mr. Gérald Bronner on the fight against disinformation, are intended to respond to these issues. In this context, the mission recommends supporting the amendments introduced to the DSA aimed at regulating the recommendation algorithms of digital platforms in a logic of transparency and pluralism;

² Phrasing resulting from the constitutional jurisprudence.

- ◆ finally, coordinating the French system with European initiatives: the European Commission is currently conducting a consultation in view of the "Media Freedom Act", which will be presented in the summer of 2022. The text could include proposals on the control of media mergers; total harmonization of this control in Europe seems difficult with regard to the Union's competencies and the diversity of national situations, but the strengthening of the dialogue between European regulators seems relevant, in particular within the framework of the European Regulators Group for Audiovisual Media Services (ERGA).