

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

THIRTEENTH EDITION

Editor
Matthew T Murchison

THE LAWREVIEWS

THE

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PREFACE

This 13th edition of *The Technology, Media and Telecommunications Review* provides updated overviews of legal and policy constructs and developments in the TMT arena across 18 jurisdictions around the world. As in years past, our goal with this publication is to provide a practical, business-focused survey of these issues, along with insights into how regulatory activity in this arena continues to evolve.

Policymakers in 2022 have continued to grapple with the impact of the covid-19 pandemic, which has focussed greater attention on the need for ubiquitous broadband internet connectivity and has hastened efforts to make broadband services more widely available. The height of the pandemic saw a significant rise in remote working, distance learning, tele-health visits, and similar broadband-enabled activities. And while more businesses and schools are now returning to an in-person environment, it remains the case that work, education, and other aspects of our daily lives are more reliant on broadband connectivity today than before the pandemic.

These developments have spurred numerous initiatives around the world to improve and expand broadband connectivity for consumers going forward. Governments in various jurisdictions are in the midst of implementing subsidy programmes and other efforts to speed the deployment of advanced networks in unserved and underserved areas. Regulators have also taken steps to preserve internet access where it already exists, including by exploring mandates requiring certain rates for low-income consumers. Such initiatives have sparked notable legal challenges and policy debates over whether government intervention, market-based solutions, or some combination of the two can be most effective at ensuring widespread broadband availability.

Regulators also are wrestling with how best to fund these ever-growing programmes to promote broadband deployment and availability. Recent years have seen the use of various paradigms, including direct appropriations from the government and funds fed by mandatory contributions from telecommunications service providers and their customers. At the same time, some jurisdictions are looking to other funding mechanisms, such as potentially requiring large online platform providers and streaming video services, whose content makes up a significant portion of internet traffic, to bear some responsibility for contributing to the deployment of networks that carry that traffic.

The relationship between these online content providers and the broadband providers delivering their content also remains the subject of wider policy debates. There continue to be long-simmering questions about ‘net neutrality,’ including whether ‘zero-rating’ and other kinds of network management practices by broadband providers benefit or harm consumers and online content providers, and whether efforts to promote a healthy internet ecosystem are best served by light-touch, market-based regimes or by more intrusive government regulations.

In the past year, Europe has been at the forefront of developments on these issues, while policymakers in the United States have faced obstacles to their anticipated re-evaluation of the light-touch approach reinstated in 2018. Debates about ‘neutrality’ have also carried over to the content side, where social media companies are facing ongoing scrutiny over claims of discriminatory practices in moderating third-party content on their platforms. Indeed, some jurisdictions are considering measures that not only would rescind immunities these platforms have traditionally enjoyed for their content moderation practices, but also would require increased transparency and potentially even impose anti-discrimination mandates or other consumer protections.

In addition, governments around the world continue to take steps to harness new communications technologies. The era of 5G wireless services is now in full swing, and regulators are exploring ways to facilitate further deployment of these services. These efforts include actions to free up more radiofrequency spectrum for these services, by reallocating spectrum from one use to another, auctioning off wireless licences in bands newly designated for 5G, and adopting new spectrum sharing rules. Deployments of new satellite broadband systems, including large systems in low Earth orbit, also are underway, raising fresh questions about how best to ensure space safety and mitigate new sources of radiofrequency interference.

This edition’s chapters for each country describe these and other developments, including updates on media ownership, privacy and data security, and efforts to combat fraudulent robocalling and the ‘spoofing’ of caller identification information. Our contributing authors have done tremendous work in preparing these updated overviews of TMT issues in their respective jurisdictions, and I hope this latest edition of *The Technology, Media and Telecommunications Review* will be a helpful resource to readers interested in the legal and policy developments in this sector.

Matthew T Murchison
Latham & Watkins LLP
Washington, DC
November 2022

FRANCE

*Myria Saarinen and Jean-Luc Juhan*¹

I OVERVIEW

The French regulatory framework is based on the historical distinction between telecoms and postal activities on the one hand, and radio and television activities on the other (the two sectors are still governed by separate legislation and separate regulators). Amendments in the past 20 years reflect the progress and the convergence of electronic communications, media and technologies, and the privatisation of the TMT sectors caused by the de facto competition between fixed telephony (a monopoly until 1998) and new technologies of terrestrial, satellite and internet networks. French law also mirrors the EU regulatory framework through the transposition of the three EU Telecoms Packages from 1996, 2002 and 2009 into French law. The latest reform of the Telecoms Package in 2018, which resulted in the adoption of the European Electronic Communications Code (EECC) and which amended and replaced the main directives that made up the Telecom Package, was only transposed into national law on 26 May 2021.² As for the audio-visual sector, the Audio-visual Media Services Directive (AMSD) was finally transposed into national law on 21 December 2020.³ Finally, the internet sector will soon witness the enactment of two major European regulations: the Digital

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- 1 Myria Saarinen and Jean-Luc Juhan are partners at Latham & Watkins LLP. This chapter was written with contributions from associates Floriane Cruchet and Leo Herrenschmidt as well as trainees Dalila Korchane, Leïla Admi and Ilyas Saheb.
 - 2 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) Text with EEA relevance; Law No. 2020-1508 of 3 December 2020 containing various provisions for the adaptation to the European Union law in economic and financial matters; Order No. 2021-650 of 26 May 2021 regarding the transposition of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code and relating to the measures adapting the powers of the Electronic Communications, Postal and Print media distribution Regulatory Authority.
 - 3 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive) in view of changing market realities; Law No. 2020-1508 of December 2020 *supra*; Order No. 2020-1642 of 21 December 2021 regarding the transposition of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services in view of changing market realities, and amending Law of 30 September 1986 of Freedom to Communicate, the Code of Cinema and Moving Image, and the time limits related to the exploitation of cinematographic works.

Markets Act (DMA) and the Digital Services Act (DSA).⁴ While the European Parliament and the Council of the European Union formally signed the DMA on 14 September 2022, the European Parliament voted the DSA on 5 July 2022 and the Council adopted it on 4 October 2022.

The TMT sectors in France have been fully open to competition since 1 January 1998 and are characterised by the interactions of mandatory provisions originating from various sources and the involvement of a diversity of actors (regulators, telecoms operators, and local, regional and national authorities). France's TMT sectors are key to the French economy, and 2022 was once again an important year in many respects for these sectors, in particular because of the evolution of European regulatory regimes and their transposition into national law.

II REGULATION

i The regulators

The regulation of the TMT sectors in France is characterised by a large number of regulatory authorities:

- a The Electronic Communications, Postal and Print media distribution Regulatory Authority (Arcep) is an independent government agency that oversees the electronic communications and postal services sector. It ensures the implementation of universal services, imposes requirements on operators exerting a significant influence on the market, participates in defining the regulatory framework, allocates finite resources (radio spectrum and numbers), imposes sanctions, resolves disputes and delivers authorisations for postal activities.
- b The Superior Audio-visual Council (CSA) was the regulatory authority responsible for the audio-visual sector. The CSA set rules on broadcasting content and allocated frequencies by granting licences to radio and television operators. It also settled disputes arising between TV channels and their distributors and was empowered to impose sanctions on operators in cases of regulatory breach. The national implementation of the AMSD expanded the competence of the CSA to on-demand video platforms and entrusted it with a mission to cooperate with other European Authorities, especially regarding service providers.⁵
- c The High Authority for the Distribution of Works and the Protection of Copyright on the Internet (Hadopi) was in charge of protecting intellectual property rights over works of art and literature on the internet.
- d On 1 January 2022,⁶ the CSA and the Hadopi merged into one regulatory authority: the Audio-visual and Digital Communication Regulatory Authority (ARCOM). The ARCOM is responsible for all missions formerly entrusted to the CSA and the Hadopi, with enlarged responsibilities and powers.⁷

4 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act – DMA) and Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act – DSA).

5 Order No. 2020-1642 of 21 December 2020 *supra*.

6 Law No. 2021-1382 of 25 October 2021 on the regulation and protection of access to cultural works in the digital age, Article 34.

7 Article L331-12 of the Intellectual Property Code.

- e* Finally, the Data Protection Authority (CNIL) and the French Competition Authority (FCA) exert a significant influence on the sector.

These authorities may deliver opinions upon request by the government, Parliament or other independent administrative authorities and publish recommendations or guidelines that may have a structural impact on these sectors. The National Frequency Agency (ANFR) is also an important agency in charge of spectrum management and allocation as well as supervision of radio frequency equipment (see Section IV). Unlike the other authorities in the TMT sectors, the ANFR does not have a consultative mission.

ii Main sources of law

The main pieces of legislation setting out the regulatory regimes for the TMT sectors are the following:

- a* the prevailing regulatory regime in France regarding electronic communications, which is contained primarily in the Post and Electronic Communications Code (CPCE);
- b* audio-visual communications are governed by Law No. 86-1067 of 30 September 1986 on Freedom to Communicate, as subsequently amended; and
- c* the main legislation governing the law applicable to data protection is the EU General Data Protection Regulation (GDPR)⁸ and Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties (1978 Data Protection Law), as subsequently amended, which supplements or derogates from the GDPR.

Finally, intellectual property rights and related aspects are governed by the Intellectual Property Code.

iii Regulated activities

Telecoms

Telecoms activities and related authorisations and licences are regulated under the CPCE.

No specific licences or authorisations are required to become a telecoms operator. Public networks and electronic communication services to the public can be freely established and provided, as long as the operators comply with the relevant regulatory obligations regarding, for example, security, confidentiality, interconnection and interoperability.⁹ Prior requirements regarding declarations to Arcep have been abrogated with the national transposition of the EECC, although the substantive regulatory obligations remain for the most part unchanged.

The use of radio spectrum, however, requires a licence granted by Arcep.¹⁰ Such licences must be granted according to objective, transparent and non-discriminatory criteria, and may only be refused for an enumerated list of limited reasons such as national security, effective competition, and lack of technical or financial capacities of the requester.¹¹

8 Regulation (EU) 2016/679 of the Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

9 Articles L32-1 and L33-1 of the French Post and Electronic Communications Code.

10 Article L42-1 of the French Post and Electronic Communications Code.

11 *ibid.*

Media

Authorisations and licensing in the media sector are regulated under Law No. 86-1067 of 30 September 1986 on Freedom to Communicate.

Authorisations for terrestrial television and radio broadcasting are granted by the ARCOM (former CSA) following bid tenders and subject to the conclusion of an agreement with the ARCOM, at the exception of the public national providers, France Télévisions and Radio France.¹² The term of authorisations cannot exceed 10 years in principle, but is subject to extensions and various derogations.¹³ Broadcasting services that are not subject to the ARCOM's authorisation – namely, those that are broadcasted or distributed through a network that does not use frequencies allocated by the ARCOM (cable, satellite, asymmetric digital subscriber line (ADSL), internet, telephony, etc.) – must nevertheless conclude a standard agreement or file a prior declaration with the ARCOM.¹⁴

iv Ownership and market access restrictions

General regulation of foreign investment

Since the entry into force of Law No. 2004-669 of 9 July 2004, discrimination of non-EU operators is prohibited, and they are subject to the same rights and obligations as EU and national operators.¹⁵ However, according to Article L151-1 et seq. of the French Monetary and Financial Code, foreign (EU or non-EU) investment in strategic sectors (such as security, public defence, cryptography or interception of correspondence)¹⁶ is subject to a prior authorisation by the French Ministry of Economy. Any transaction concluded without prior authorisation is null and void,¹⁷ and criminal sanctions including imprisonment of up to five years, and a fine of up to twice the amount of the transaction, 10 per cent of the annual turnover of the entity exercising the activities in said strategic sectors or €5 million – whichever is highest – are also applicable.¹⁸ Sectors subject to prior authorisation have been steadily expanding over the past few years and today include online general press services as well as the operation of electronic communications networks and services.¹⁹

Specific ownership restrictions applicable to the media sector

French regulations impose media ownership restrictions to preserve media pluralism and competition. Any single individual or legal entity cannot hold, directly or indirectly, more than 49 per cent of the capital or the voting rights of a company that has an authorisation to provide a national terrestrial television broadcasting service where the average audience for television services (either digital or analogue) exceeds 8 per cent of the total audience for television services.²⁰ In addition, any single individual or legal entity that already holds an authorisation to provide a national terrestrial television service of which the average

12 Article 28 of Law No. 86-1067 of 30 September 1986.

13 See Articles 28 to 32 of Law No. 86-1067 of 30 September 1986, which determine the ARCOM's radio spectrum allocation procedures.

14 Articles 33 to 34-5 of Law No. 86-1067 of 30 September 1986.

15 Article L33-1 III of the French Post and Electronic Communications Code.

16 Article R151-3 of the French Monetary and Financial Code.

17 Article L151-4 of the French Monetary and Financial Code.

18 Articles L151-3-2 and L165-1 of the French Monetary and Financial Code.

19 Article R151-3 of the French Monetary and Financial Code.

20 Article 39-I of Law No. 86-1067 of 30 September 1986.

audience exceeds 8 per cent of the total audience for television services may not, directly or indirectly, hold more than 33 per cent of the capital or voting rights of a company that has an authorisation to provide a local terrestrial television service.²¹ Finally, no single individual or legal entity may hold two authorisations relating to national terrestrial television services.²²

Regulation of the media sector has been evolving in reaction to increased investment by large industrial and financial groups into the media sector. For example, Law No. 2016-1524 of 14 November 2016 introduced a requirement that media outlets provide yearly information on their capital ownership and governing bodies,²³ and reinforced the powers of the ARCOM (former CSA) over French media governance through the imposition of an obligation to create committees relating to the honesty, independence and pluralism of information and programmes to all entities responsible for generalised national radio services and terrestrial television broadcasters providing general press services.²⁴

Regarding the radio sector, a single person may not retain networks for which the coverage exceeds 160 million inhabitants or 20 per cent of the aggregated potential audience.²⁵ This cap is reassessed every five years based upon the growth of the population.²⁶

Unless otherwise agreed in international agreements to which France is a party, a foreign national may not acquire shares in a company holding a licence for a terrestrial radio or television service in France if this acquisition has the effect of directly or indirectly raising the share of capital or voting rights owned by foreign nationals to more than 20 per cent.²⁷ In addition, such licence may not be granted to a company of which more than 20 per cent of the share capital or voting rights is directly or indirectly owned by foreign nationals.²⁸ These provisions do not apply to service providers of which at least 80 per cent of the capital or voting rights is held by public radio broadcasters belonging to Council of Europe Member States, and of which at least 20 per cent is owned by either Radio France or France Télévisions.²⁹ Specific rules restricting cross-media ownership also apply, prohibiting the concentration of ownership across terrestrial radio, television broadcasting services and general printed press services.³⁰

v Transfers of control and assignments

The general French merger control framework applies to the TMT sectors, without prejudice to the above-mentioned ownership restrictions specific to the media sector. Merger control rules are enforced by the FCA.

21 Article 39-III of Law No. 86-1067 of 30 September 1986.

22 Article 41 of Law No. 86-1067 of 30 September 1986.

23 Article 6 of Law No. 86-897 of 1 August 1986.

24 Article 30-8 of Law No. 86-1067 of 30 September 1986 as amended by Article 11 of Law No. 2016-1524 of 14 November 2016.

25 Article 41 of Law No. 86-1067 of 30 September 1986.

26 *ibid.*

27 Article 40 of Law No. 86-1067 of 30 September 1986.

28 *ibid.*

29 *ibid.*

30 Articles 41-1 to 41-2-1 of Law No. 86-1067 of 30 September 1986.

Regarding the telecoms and post sectors, the FCA must provide Arcep with any referrals regarding merger control, and Arcep can issue a non-binding opinion.³¹ Companies active in radio or TV are subject to merger control procedures before the FCA, in addition to a non-binding opinion from the ARCOM.³²

Finally, any modification of the capital of companies authorised by the ARCOM to broadcast TV or radio services on a frequency is subject to the approval of the ARCOM.³³

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Under the CPCE, electronic communications services (ECSs) other than public voice telephony may be provided freely.³⁴

Digital subscriber line networks are subject to asymmetrical regulation. Regarding ADSL networks, alternative operators must be provided with direct access to the copper pair infrastructure of France Télécom-Orange, the historical operator, following local loop unbundling.

Internet service providers (ISPs) can operate freely but must meet specific requirements listed under L33-1 of the CPCE.³⁵

More generally, ISPs must comply with the provisions of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy governing e-commerce, encryption and liability of technical service providers, as subsequently amended. A liability exemption regime for hosting service providers is also set out by the Law expressly excluding a general obligation to monitor the information they transmit or store or the obligation to look for facts or circumstances indicating illicit activity. Nevertheless, knowledge that obviously illicit content is stored will trigger the obligation to remove or render inaccessible such content. In that respect, the question of the qualification as a hosting service provider has been widely debated before French courts.³⁶ A hosting service provider will benefit from the liability

31 Article L36-10 of the French Post and Electronic Communications Code.

32 Article 41-4 of Law No. 86-1067 of 30 September 1986.

33 Article 42-3 of Law No. 86-1067 of 30 September 1986.

34 Article L32-1 of the French Post and Electronic Communications Code.

35 Article L33-1 of the French Post and Electronic Communications Code.

36 This issue now seems resolved regarding video-sharing sites: see, for instance, the judgment of the French Supreme Court (Cass., Civ. 1ère, 17 February 2011, No. 09-67.896) in which the Supreme Court recognised a simple hosting status for Dailymotion. The Supreme Court ruled that host websites did not have to control *a priori* the content they host but need to ensure the content is not accessible once it has been reported as illegal (Cass., Civ. 1ère, 12 July 2012, No. 11-15.165 and No. 11-15.188). This issue is still to be debated with respect to online marketplaces from which it follows that French courts, which are favouring a very factual analysis of the role of the services provider, will give significant importance to judges' discretion. In that respect, see Cass., Com., 3 May 2012, No. 11-10.507, No. 11-10.505 and No. 11-10.508 in which the Supreme Court confirmed an earlier decision of the Paris Court of Appeals that did not consider an online marketplace as a host provider and therefore refused to apply the liability exemption regime. See, in contrast, Paris Court of Appeals, Pôle 5, ch 1, 4 April 2012, No. 10-00.878, in which second-hand and antique dealers accused an online marketplace of encouraging illegal practices by providing individuals with the means to compete unfairly against professionals, and in which the Paris Court of Appeals considered an online marketplace as a host provider able to benefit from the liability exemption regime. The Court of Appeals based its decision on the fact that the online marketplace had no knowledge of or control over the adverts stored on its site. If the seller was asked to provide certain

exemption regime if its role is limited to a purely technical, neutral and passive service (e.g., structuring and classifying the content made available to the public to facilitate the use of its service). However, if it plays an active role providing the public with knowledge or control of content (e.g., determining, verifying, commenting, promoting or otherwise optimising published, broadcast or uploaded content), the provider will qualify as a website publisher and will be fully liable for any unlawful or harmful content published, broadcast or uploaded on its website.³⁷ An exception to the regime of non-liability has been introduced by the national implementation of the AMSD, expanding the scope of liabilities of online content sharing platforms.³⁸

ii Universal service

The EU framework for universal services obligations, which defines universal services as the 'minimum set of services of specified quality to which all end users have access, at an affordable price in the light of specific national conditions, without distorting competition',³⁹ has been implemented by Law No. 96-659 of 26 July 1996 and further strengthened by Law No. 2008-3 of 3 January 2008. Universal service is one of the three components of public service in the telecoms sector in France (the other two being the supply of mandatory services for electronic communications and general interest missions).

Obligations of the operator in charge of universal service are listed in Article L35-1 of the CPCE and fall into two main categories of services:

- a voice communication services which must include filtering tools to avoid calls and messages invoices at higher rates; and
- b adequate high speed internet services:
 - access to email services and search engines, allowing users to search and find any type of information;
 - basic online tools for training and education;
 - periodicals or news websites;
 - online purchases or orders of goods and services;
 - job searches tools;
 - professional networking;
 - online banking services;
 - online administration services;
 - social media and instant messaging systems;

information, it was for the purpose of ensuring a more secure relationship between its users. Conversely, the French Supreme Court recently judged that an intermediary specialising in selling tickets for third-party events may not benefit from the liability exemption regime if it optimises and comments on the events and if it secures sales transactions. Such intermediary then plays an active role in providing the public with knowledge and control of content (Cass., Com., 1 June 2022, No. 20-21.744). The issue is also debated in the context of online forums. The Supreme Court ruled on 3 November 2015 that publishing directors are responsible for 'personal contribution spaces' from the moment they become aware of their content and must be held criminally liable for failing to take down defamatory comments (Cass., Crim., 3 November 2015, No. 13-82645).

37 Judgment of the High Court of Paris, 4 December 2015.

38 Order No. 2021-580 of 12 May 2021 transposing Articles 17 to 23 of the Directive on copyright and related rights in the digital age concerning the responsibility of large platforms for the content published by their users and the fair remuneration of authors and performers.

39 Article 1(2) of Directive No. 2002/22/EC.

- standard quality calls; and
- video calls.⁴⁰

These services must be provided under strictly defined pricing and technical conditions taking into consideration difficulties faced by certain categories of users, such as low-income populations, and provide equal access across geographical locations. Following calls for applications (one per category), the Minister in charge of electronic communications may appoint the operator or operators in charge of the universal service for a period of three years.

As a matter of principle, the universal services are expected to be covered by the offers available on the market and the Minister in charge of electronic communications will only appoint one or several operators if these services are not already available.⁴¹ Since 3 December 2020, no operator has been officially appointed by the Minister in charge of electronic communications.⁴² Due to the significant changes brought by the EECC, the concrete implementation of the new framework is still ongoing.⁴³

Arcep determines the cost of the universal service and the amount of the other operators' contributions to the financing of universal service obligations (USOs) through a sectoral fund when the provision of USOs represents an excessive burden for the operator in charge. In principle, every operator contributes to the financing, with each contribution being calculated on the basis of the turnover achieved by the operator in its electronic communications activities.⁴⁴

iii Restrictions on the provision of service

Net neutrality is a growing policy concern in France. From the electronic communications regulator's standpoint, which focuses on the technical and economic conditions of traffic conveyance on the internet, the key question is how much control internet stakeholders can rightfully exert over traffic. This implies examining operators' practices on their networks, as well as their relationships with some content and application providers.

The Digital Republic Law⁴⁵ introduced the principle of net neutrality into the national legal framework and granted Arcep with new investigatory and sanctioning powers to ensure compliance.⁴⁶ In particular, Arcep is now in charge of implementing net neutrality in accordance with Regulation No. 2015/2120 of 25 November 2015 establishing measures concerning open internet access.⁴⁷ When Arcep identifies a risk of infringement by an operator, it can require said operator to comply ahead of time. The Digital Republic Law also reinforces the conditions under which the Minister in charge of electronic communications and Arcep can conduct an investigation.⁴⁸

40 Articles L35-1, R20-30-1 and R20-33-1 II. of the French Post and Electronic Communications Code.

41 Article L35-3 of the French Post and Electronic Communications Code.

42 Communication from the Arcep on the universal service for electronic communications as lastly updated on 28 April 2022: <https://www.arcep.fr/la-regulation/grands-dossiers-reseaux-fixes/le-service-universel-des-communications-electroniques.html#c3392>.

43 *ibid.*

44 Article L35-3 and R20-39 of the French Post and Electronic Communications Code.

45 Law No. 2016-1321 of 7 October 2016 for a Digital Republic.

46 Articles 40 to 47 of Law No. 2016-1321 of 7 October 2016.

47 Article 40 of Law No. 2016-1321 of 7 October 2016.

48 Article 43 of Law No. 2016-1321 of 7 October 2016.

Arcep has been taking a more active role regarding net neutrality since the adoption of the Digital Republic Law. For example, Arcep publishes an annual report on the state of the internet in France, identifying various threats that could undermine the internet's proper functioning and neutrality, and setting out the regulator's actions to contain these threats. The most recent issue addresses data interconnection, transition to internet protocol version 6 (IPv6),⁴⁹ the quality of fixed internet access, net neutrality, neutrality and the role of gatekeepers' platforms,⁵⁰ and the environmental impact of networks.⁵¹

Pursuant to the Law of 21 June 2004, internet service providers have a purely technical role regarding content and do not have a general obligation to review the content they transmit or store. Nevertheless, when informed of unlawful information or activity, they must take prompt action to withdraw the relevant content, failing which their civil liability may be sought.

Since 2009, the ARCOM (former Hadopi) has been competent to address theft and piracy matters, intervening when requested to by regularly constituted bodies for professional defence that are entitled to institute legal proceedings to defend the interests entrusted to them under their statutes (e.g., Sacem, the Society of Authors, Composers and Publishers of Music) or by the public prosecutor. After several formal notices to an offender, the procedure may result in a €1,500 fine.⁵²

French e-consumers benefit from consumer law provisions and specific regulations. In particular, they are protected against certain unsolicited communications via email if their consent has not been obtained prior to the use of their personal data.⁵³ Moreover, consumers must be provided with effective means for requesting the cessation of unsolicited communications.⁵⁴ In addition, Article L223-1 of the French Consumer Code provides for the implementation of an opposition list on which any consumer can add his or her name to refuse advertising material.⁵⁵ All telephone operators also have the obligation to offer their users the possibility to register on an opposition list.⁵⁶ With regard to phone-based advertising, the Bloctel service has been implemented since 1 June 2016 to prevent unsolicited

49 IPv6 is the most recent version of the Internet Protocol, the communications protocol that provides an identification and location system for computers on networks and routes traffic across the internet. IPv6 has been developed to deal with the issue of IPv4 address exhaustion and is intended to replace IPv4.

50 ARCEP intends to contribute to the implementation of the DMA. The Digital Markets Act defines gatekeepers as companies (1) having a significant impact on the internal market; (2) operating a core platform service which serves as an important gateway for business users to reach end users; and (3) enjoying an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

51 2022 report: 'The state of internet in France', Arcep report, June 2022, https://www.arcep.fr/uploads/tx_gspublication/rapport-etat-internet-2022-300622.pdf.

52 Articles L331-20, L336-3 and R335-5 of the French Intellectual Property Code.

53 Article L34-5 of the French Post and Electronic Communications Code.

54 Article L34-5 of the French Post and Electronic Communications Code.

55 www.bloctel.gouv.fr.

56 The red list service ensures that contact information will not be mentioned on user lists. The orange list service ensures that contact information will not be communicated to corporate entities with the goal of advertisement. The contact information remains available on universal directories made available to the public.

communications to consumers registered on an opposition list.⁵⁷ A new prohibition regarding the blocking of access to online interface as a result of the user's geographic location or residence was adopted in December 2020.⁵⁸

Finally, on 19 October 2020, a new law regarding the commercial exploitation of the image of children under the age of 16 on online platforms was adopted.⁵⁹ This law was adopted with the aim of protecting, in particular, 'child influencers' present on video platforms. The law extends the protections under the French Labour Code to children's activities on online platforms and imposes an obligation on platforms to adopt a charter regarding the protection of minors. Children under the age of 16 will also be able to exercise the right to be forgotten without the consent of their parents.⁶⁰

iv Privacy and data security

The French privacy and security rules stem from the GDPR, 1978 Data Protection Law as well as Decree No. 2019-536 of 29 May 2019 and other sectorial rules as interpreted by the CNIL guidance but also case law from the CNIL and the French Council of State.

The CPCE also provides for specific rules in relation to processing activities carried out in the context of the provision of electronic communication services to the public.⁶¹ As part of these specific rules, electronic communication operators must delete or anonymise the data pertaining to an electronic communication.⁶² Nonetheless, there are a few exceptions to the foregoing. In particular, electronic communication operators must retain traffic data for a one-year period as of the connecting or the use of the terminal equipment for the purpose of answering to law enforcement authorities' requests in view of combating crime and serious delinquency, preventing serious threats to public security and safeguarding national security.⁶³ Indeed, French law also organises the possibility for the French law enforcement authorities and intelligence services to gain access to data concerning users under certain circumstances to which the concerned providers must defer when the relevant conditions are met.

Among these French law provisions, Article L851-1 of the National Security Code permits the administrative access to information or documents processed or kept by providers of electronic communication, including data relating to numbers, identifiers, localisation and communications of subscribers. Article L851-2 of the National Security Code provides that the administration is authorised, for prevention of terrorism, to collect real-time connection data concerning pre-identified individuals likely to be connected to a terrorist threat and their relatives.⁶⁴ In addition, pursuant to Article L851-3 of the National Security Code and only for the purpose of preventing terrorism, the Prime Minister may impose on providers of electronic

57 Ministerial Order of 25 February 2016 designating SA Opposetel (JORF No. 0050 of 28 February 2016).

58 Article L132-24-1 of the French Consumer Code.

59 Law No. 2020-1266 of 19 October 2020 aiming to regulate the commercial exploitation of the image of children under the age of 16 on online platforms.

60 *ibid.* Articles 1, 5 and 6.

61 Articles L34-1 and D98-5 of the French Post and Electronic Communications Code.

62 Articles L34-1(II) of the French Post and Electronic Communications Code.

63 Article L34-1 (II *bis* 3°) of the French Postal and Electronic Communication Code.

64 Article 851-2 I. provides that the collection may be authorised against an individual's relatives. The French Constitutional Court ruled that 'in failing to provide that the number of authorizations in force at the same time should be limited, the legislator did not reach a balance between, on the one hand, public order and offences and, on the other, the right to privacy'. The second sentence of Article 851-2 I. of the National Security Code was therefore declared unconstitutional and was repealed on 1 November 2017. However,

communication services the obligation to implement an automated data-processing system for a maximum period of two months (renewable only upon a new decision) with the aim of detecting connections likely to reveal a terrorist threat. Implementation of such measures are subject to a prior authorisation from the Prime Minister delivered after an opinion from the National Commission for the Control of Intelligence Techniques (CNTCR).⁶⁵ Requests for implementing any of these aforementioned measures are submitted by the Minister of Defence, the Minister for National Security, the Minister of Justice, the Minister of Economy, Budget or Customs or by collaborators cleared to keep defence secrets and to whom these Ministers have delegated this task. If the Prime Minister decides to grant their authorisation in spite of an unfavourable opinion issued by the CNTCR, the Administrative Supreme Court must issue a ruling within 24 hours to decide whether the authorisation may be enforced.⁶⁶ The authorisation may only be granted for a maximum period of four months (renewable only upon a new decision).⁶⁷

Law No. 2014-1353 of 13 November 2014, implemented by Decree No. 2015-174 of 13 February 2015, also entitles the administrative authorities to request internet service providers to prevent access to websites supporting terrorist ideologies or projects.⁶⁸ Additionally, laws linked to the state of emergency created extraordinary means of data search and seizure and expanded the provisions of Law No. 2014-1353.

In the context of the terrorism threat, the French legislator has amended the Criminal Proceedings Code to tackle organised crimes such as terrorism acts.⁶⁹ Law No. 2016-731 of 3 June 2016⁷⁰ allows police officers, with the authorisation and under the control of a judge, to access, remotely and without consent, correspondences stored in electronic communications available through identification.⁷¹ This Law and subsequent amendments also extended the existing investigating powers to include the real-time collection of computer data without consent, in the context of both preliminary investigations and investigations of flagrancy.⁷²

Article 15 of Law No 2017-1510 of 30 October 2017 maintained this provision by reinserting it as it was in the code and adding, as suggested by the Constitutional Court, a limitation on the simultaneous authorisations allowed.

65 Article L821-1 of the French National Security Code.

66 As an exception, the authorisation may be enforced before the Administrative Supreme Court issues its decision (1) in case of justified emergency and (2) only if the Prime Minister ordered that the authorisation be enforced immediately (Article L821-1, French National Security Code).

67 Article L821-4 of the French National Security Code.

68 See Article 6-1 of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy as introduced by Article 12 of Law No. 2014-1353 of 13 November 2014 reinforcing regulations relating to the fight against terrorism.

69 However, the Constitutional Council has established boundaries in the fight against terrorism regarding infringements of the freedom of communication. In Decision No. 2016-611 QPC of 10 February 2017, the Council considered as unconstitutional Article 421-2-5-2 of the French Criminal Code introduced by Law No. 2016-731 of 3 June 2016, which punishes any person who frequently accesses online public communication services conveying messages, images or representations that directly encourage the commission of terrorist acts or defend these acts when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life.

70 Law No. 2016-731 of 3 June 2016 reinforcing the fight against organised crime and terrorism and their funding, and improving the efficiency and the protection of guarantees of criminal proceedings.

71 Articles 706-95-1 to 706-95-3 of the French Criminal Proceedings Code added by Article 2 of Law No. 2016-731 of 3 June 2016.

72 Article 706-102-1 of the French Criminal Proceedings Code.

Unauthorised access to automated data-processing systems is prohibited by Articles 323-1 to 323-7 of the French Penal Code. In addition, with regard to cyberattacks, Law No. 2011-267 on Performance Guidance for the Police and Security Services (LOPPSI 2) introduced a new offence of online identity theft in Article 226-4-1 of the French Penal Code and empowers police officers, upon judicial authorisation and only for a limited period, to install software to observe, collect, record, save and transmit all the content displayed on a computer's screen. This facilitates the detection of infringements, the collection of evidence and the search for criminal activities by facilitating the creation of police files and coordination. The National Agency for the Security of Information Systems (ANSSI), a branch of the Secretariat-General for Defence and National Security created in 2009, is in charge of cybersecurity threats.⁷³

Moreover, LOPPSI 2 increases the instances where authorities may set up, transfer and record images on public roads, premises or facilities open to the public to protect the rights and freedom of individuals,⁷⁴ and recognises that the CNIL has jurisdiction over the control of video protection systems.⁷⁵

With regard to the detection of cyberattacks, Law No. 2018-607 of 13 July 2018⁷⁶ created Article L33-14 of the CPCE, which involves operators in the detection of cyberattacks. Pursuant to this Article, electronic communications operators are entitled to use technical markers such as IP addresses to detect or prevent any potential threat that may affect the security of information systems of their subscribers. If such a threat is detected, operators must inform the ANSSI without delay.

With regard to the protection of children online, Article 45 of the 1978 Data Protection Law requires that clear information be provided to minors using terms that are adapted to their age. Adequate vigilance and warning systems shall also be implemented (e.g., awareness messages, age gates with reliable controls, possibility of parental supervision). Regarding consent, specific rules apply in France. The age of a child's consent in relation to the offer of information society services is 15 years old (whereas it is, by default, 16 years old under Article 8 of the GDPR). Children under 15 years old may only give their consent after being duly authorised to do so by the holder of parental rights. The lawfulness of the processing activity, therefore, requires a double consent: that of the minor as well as that of the holder of parental rights.⁷⁷ Additional protection regarding children's data was added in relation to advertising: children's data collected through the technical processes put in place to ensure that harmful content does not reach children may never be used for advertising purposes, even after the concerned child reaches majority.⁷⁸

In terms of personal data protection, obligations were reinforced with the entry into application of the GDPR.⁷⁹ The CNIL published in 2018 a new guide on the security of personal data, recalling basic precautions to be implemented systematically and providing risk management methodologies.⁸⁰

73 See Decree No. 2009-834 of 7 July 2009 as modified by Decree No. 2011-170 of 11 February 2011.

74 See Article L251-2 of the French National Security Code.

75 See Articles L253-2 and L. 253-3 of the French National Security Code.

76 Law No. 2018-607 of 13 July 2018, Military Planning Law 2019–2025.

77 Article 45 of Law 78-17 of 6 January 1978.

78 Article 15 of Law No. 86-1067 of 30 September 1986.

79 See Article 32 of the GDPR.

80 Available at https://www.cnil.fr/sites/default/files/atoms/files/guide_security-personal-data_en.pdf.

v The implementation of the Network and Information Security Directive

With regard to cybersecurity, the Network and Information Security Directive (NISD)⁸¹ was implemented into French law by Law No. 2018-133 of 26 February 2018 and Decree No. 2018-384 of 23 May 2018. This framework imposes an obligation in terms of security of network and information systems on two categories of entities: operators of essential services (OESs) and digital service providers (DSPs).

The categories of services considered as essential services are listed in the appendix of Decree No. 2018-384 (e.g., payment services, insurance, services involving preventive medicine, diagnosis and healthcare, distribution of electricity and gas). The Prime Minister can designate operators as an OES if they provide at least one of the enumerated services.⁸² The operator is notified of the Prime Minister's intent to designate it as an OES and can formulate observations.⁸³

DSPs are providers of cloud, online marketplace and search engine services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.⁸⁴

Nevertheless, the French implementing law excludes from its scope certain types of entities already subject to information system security regulations, such as operators for their activities related to the operation of electronic communications networks or the provision of ECSs and providers of trust services for electronic transactions subject to Article 19 of Regulation 910/2014 dated 23 July 2014.⁸⁵

Both OESs and DSPs shall appoint a representative in charge of the contact with the ANSSI.⁸⁶ For DSPs, this representative acts in the name of the provider regarding compliance with its obligations set forth in the NSID framework.⁸⁷ DSPs shall keep an updated list of all networks and information systems necessary for the provision of their services within the European Union.⁸⁸

OESs must comply with security measures defined in the Order of 14 September 2018 adopted for its implementation.⁸⁹ DSPs shall ensure, based on the state of the art, a level of security for all networks and information systems necessary for the provision of their services within the European Union appropriate to the existing risks.⁹⁰ DSPs shall refer to Article 2 of the Commission Implementing Regulation of 30 January 2018 for the security measures that should be implemented.⁹¹ Documents attesting to this implementation should be made available to the ANSSI in cases of control.⁹²

81 Directive No. 2016/1148 of 6 July 2016.

82 Article 3 of Decree No. 2018-384 of 23 May 2018.

83 *ibid.*

84 Article 10 of Law No. 2018-133 of 26 February 2018.

85 Article 2 of Law No. 2018-133 of 26 February 2018.

86 Articles 5 and 16 of Decree No. 2018-384 of 23 May 2018.

87 Article 16 of Decree No. 2018-384 of 23 May 2018.

88 Article 17 of Decree No. 2018-384 of 23 May 2018.

89 Article 10 of Decree No. 2018-384 of 23 May 2018.

90 Article 12 of Law No. 2018-133 of 26 February 2018.

91 Article 18 of Decree No. 2018-384 of 23 May 2018.

92 Article 19 of Decree No. 2018-384 of 23 May 2018.

Both OESs and DSPs shall report to the ANSSI, without delay, if they become aware of any incident affecting networks and information systems that has or is likely to have a significant impact on the continuity of services.⁹³

Non-compliance with the obligations set forth in the NSID framework may be sanctioned with criminal fines ranging from €75,000 to €125,000 for OESs⁹⁴ and from €50,000 to €100,000 for DSPs.⁹⁵

IV SPECTRUM POLICY

i Development

The management of the entire French radio frequency (RF) spectrum is entrusted to a state agency, the ANFR, which apportions the available radio spectrum, while the allocation is administered by governmental administrations (e.g., civil aviation, defence, space, national security) and independent authorities (the Arcep and the ARCOM – formerly CSA) (see Section II).

ii Flexible spectrum use

The trend towards greater flexibility in spectrum use is facilitated in France by the ability of operators to trade frequency licences, as introduced by Law No. 2004-669 of 9 July 2004.⁹⁶

The general terms of spectrum licence trading are defined by Articles L42-3 and R20-44-9-1 et seq. of the French Post and Electronic Communications Code, and the list of frequency bands the licences of which could be traded are laid down by a Ministerial Order of 11 August 2006. A frequency database that provides information regarding the terms for spectrum trading in the different frequency bands open in the secondary market is publicly accessible. A spectrum licence holder may transfer all of its rights and obligations to a third party for the entire remainder of the licence (full transfer) or only a portion of its rights and obligations contained in the licence (e.g., geographical region or frequencies). The transfer of frequency licences is subject either to the prior approval of or notification to Arcep, which may refuse such assignment.⁹⁷ Another option available for operators is spectrum leasing, whereby the licence holder makes frequencies fully or partially available for a third party to operate. Unlike in a sale, the original licence holder remains entirely responsible for complying with the obligations attached to the frequency licence. As with the transfer of frequency licences, all frequency-leasing operations are subject either to the prior approval of or notification to Arcep.

iii Broadband and next-generation mobile spectrum use

Spectrum in the 800MHz and 2.6GHz bands was allocated for the deployment of the ultra-high-speed 4G mobile network: in that respect, licences for the 2.6GHz frequency were awarded to four mobile operators in September 2011,⁹⁸ and in December 2011, licences for

93 Articles 7 and 13 of Law No. 2018-133; Articles 11, 12, 20 and 21 of Decree No. 2018-384 of 23 May 2018.

94 Article 9 of Law No. 2018-133 of 26 February 2018.

95 Article 15 of Law No. 2018-133 of 26 February 2018.

96 Article L42-3 of the French Post and Electronic Communications Code.

97 Article R20-44-9-2 et seq. of the French Post and Electronic Communications Code.

98 Arcep, decision No. 2011-1080 of 22 September 2011.

the 800MHz were awarded to the same operators, except Free Mobile,⁹⁹ which has instead been granted roaming rights in priority roll-out areas. New spectrum in the 700MHz and 800MHz bands was transferred in December 2015 to promote better network capacities in areas with low population density. The government launched a call for applications, to be sent before 2 October 2018, to reassign the 900MHz, 1,800MHz and 2.1GHz bands, which authorisations will expire between 2021 and 2024.¹⁰⁰ As a result of an agreement reached between Arcep, the government and operators on 14 January 2018, the reassignment procedure will take into account operators' stated commitments to improve voice and data coverage in all territories, making regional development targets a priority.

On 16 June 2017, Arcep authorised two mobile operators to deploy 4G networks in the 2.1GHz band, historically used by French mobile operators' 3G networks, to improve 4G speeds.¹⁰¹

Additionally, under Arcep supervision, 5G deployment began in November 2020. On 15 July 2019, Arcep launched a public consultation in connection with its draft procedure for awarding licences to use frequencies in the 3.4–3.8GHz band, followed by the launch of the allocation procedure in late 2019.¹⁰² As of April 2020, four mobile operators had qualified to participate in the auction for allocation of frequencies.¹⁰³ The auction for the award of 3.5–3.8GHz band closed on 1 October 2020, and the band was allocated to the above-mentioned operators on 12 November 2020.¹⁰⁴ Commercial offers were launched starting in late November 2020, and 5G was available in more than 7,000 sites in France as of 15 December 2020.¹⁰⁵

The public consultation phase, which ended on 28 January 2022, showed that the consulted stakeholders did not oppose a power limitation to frequencies use.¹⁰⁶ On 24 May 2022, in accordance with these consultations, Arcep issued a series of decisions to modify its previous 2020 decisions and impose new power limitations to frequencies use. These limitations apply to both 3.4–3.8GHz and 2.6GHz frequencies.¹⁰⁷

iv Spectrum auctions and fees

Spectrum auctions in the case of scarce resources

Pursuant to Article L42-2 of the CPCE, when scarce resources such as RF are at stake, Arcep may decide to limit the number of licences, either through a call for applications or by auction. The government sets the terms and conditions governing the selection procedures, which to date have always been in the form of calls for applications.

99 Arcep, decision No. 2011-1510 of 22 December 2011.

100 See Arcep press release of 2 August 2018.

101 Arcep, decisions No. 2017-0734 and No. 2017-0735 of 13 June 2017.

102 See Arcep, press release of 2 April 2020.

103 See Arcep, press release of October 2020.

104 Arcep, 5G Frequencies: Procedure for the allocation of the 3.4–3.8GHz band in the metropole.

105 Arcep, Observatory of 5G deployment, 16 December 2020.

106 Arcep, Public Consultation on the 'Evolution of the technical conditions of use of frequencies for terrestrial systems capable of providing electronic communications services'.

107 Arcep, decisions Nos 2022-1113, 2022-1114, 2022-1115, 2022-1116, 2022-1117 of 24 May 2022.

Fees

Licence-holding operators are subject to the payment of annual fees to contribute to the financing of the universal services and to the management of radio spectrum and frequency authorisations. The amount of the annual fee is determined in accordance with Chapter II of the Ministerial Order No. 2007-1532 of 27 October 2007.¹⁰⁸

In addition, all entities operating a mobile network open to the public are subject to the payment of annual fees, calculated with a mathematic formula available in Chapter III of the Ministerial Order No. 2007-1532 of 27 October 2007 and based upon both fixed amounts and frequencies use.¹⁰⁹

Finally, operators may agree to pay fees in the context of bid submissions. Payment is due as soon as the authorisation to use frequencies is granted and the amount that the operator agreed to pay is specified in the authorisation decision.¹¹⁰

V MEDIA

Media are, in particular, subject to certain content requirements and restrictions.

i Content requirements

At least 60 per cent of the audio-visual works and films broadcast by licensed television broadcasters must have been produced in the EU, and 40 per cent must have been produced originally in French.¹¹¹

Private radio broadcasters must, in principle, dedicate at least 40 per cent of their musical programmes to French music.¹¹²

In addition, pursuant to Law No. 2014-873 of 4 August 2014 for genuine equality between women and men, audio-visual programmes have the duty to ensure fair representation of both women and men. Furthermore, audio-visual programmes and radio broadcasters must combat sexism by broadcasting specific programmes in this respect.¹¹³

Law No. 2018-1202 of 22 December 2018¹¹⁴ with regard to fake news suggests several measures to limit the impact of false information during the public election process. For instance, Article 11 of the Law provides that certain operators of online platforms – in the context of public elections – should implement measures to combat the broadcasting of false information likely to disturb public order or alter polls' reliability. Operators must implement easily accessible and visible systems that will allow users to report such false information, including when they are financed by third parties. The ARCOM is entrusted with powers aimed at controlling fake news, and its mission includes controlling the diffusion

108 See Arcep decisions mentioned above and Ministerial Order No. 2007-1532 of 24 October 2007 on the fees for the use of radio frequencies payable by holders of authorisations for the use of frequencies issued by the Arcep, Article 2 and Chapter II.

109 Ministerial Order No. 2007-1532 of 24 October 2007 on the fees for the use of radio frequencies payable by holders of authorisations for the use of frequencies issued by the Arcep, Article 2 and Chapter III.

110 Ministerial Order No. 2007-1532 of 24 October 2007 on the fees for the use of radio frequencies payable by holders of authorisations for the use of frequencies issued by the Arcep, Article 2.

111 Articles 7 and 13 of Decree No. 90-66 of 17 January 1990.

112 Article 28 2° *bis* of Law No. 86-1067 of 30 September 1986.

113 Article 56 of Law No. 2014-873 of 4 August 2014.

114 Law No. 2018-1202 of 22 December 2018 regarding the fight against the manipulation of information.

of false information likely to impact public order or the reliability of public elections.¹¹⁵ This mission adds on to the other traditional functions of the ARCOM, which include the general regulation of the audio-visual sector and protection of copyrights.

Decree No. 2020-984 dated 5 August 2020 relaxed certain rules regarding the broadcast of films, increasing the maximum number of hours allotted per year.

ii Advertising

Advertising in television broadcasting is subject to strict regulations in France.¹¹⁶ In particular, advertising must not disrupt the integrity of a film or programme, with at least 20 minutes between two advertising slots. Films may not be interrupted by advertising lasting more than six minutes.

Rules governing advertisements are stricter on public channels. In particular, since 2009, advertising is banned on public service broadcasting channels from 8pm to 6am. This prohibition does not, however, concern general interest messages, generic advertising (for the consumption of fruits, dairy products, etc.) or sponsorships.

In addition, some products are prohibited from being advertised, such as alcoholic beverages above a certain level of alcohol or tobacco products.

Media owners are also subject to transparency requirements to protect advertisers of digital advertisement. According to Article 2 of the Decree No. 2017-159 dated 9 February 2017, media owners have to provide advertisers with the date and place of diffusion of advertisements, the global price of advertising campaigns and the unitary price charged for each advertising space.

Decree No. 2020-983 dated 5 August 2020 introduced a relaxation of certain rules regarding publicity by authorising segmented advertisements and advertisements for the film industry on television.

Advertising on on-demand platforms is now officially under the control of the ARCOM, which can prohibit the modification of content for advertising purposes or the display of a publicity banner without the consent of users of services provided on such platforms.¹¹⁷

iii Online representation of content

The Copyright Directive 2019/790 came into force on 7 June 2019. The Directive is part of a wider strategy to reform the laws relating to digital marketing, e-commerce and telecommunications to bring the EU into the digital age and achieve greater harmonisation of the laws governing these areas.

France became the first Member State to transpose Article 15 of the Copyright Directive through the Law of 24 July 2019, creating a neighbouring right to the benefit of press publishers and news agencies for the online reproduction and representation of their publications by an online communications service provider.¹¹⁸ Under the new regime, online communications service providers must obtain an authorisation from publishers of online news services or news agencies before any reproduction or communication to the public of all or part of their press publications in a digital form.¹¹⁹

115 Article 17-2 of Law No. 86-1067 of 30 September 1986.

116 Decree No. 92-280 of 27 March 1992.

117 Article 20-5 of Law No. 86-1067 of 30 September 1986.

118 Law No. 2019-775 of 24 July 2019.

119 Article L219-2 of the Intellectual Property Code.

Press publishers and news agencies shall be granted compensation by online communications service providers using all or part of a press publication based on the exploitation revenues of any kind, direct or indirect, of the said communications service provider and, if not possible, on a flat-rate basis.¹²⁰ The Law specifies that such compensation shall take into account quantitative and qualitative elements such as ‘human, material and financial investments made by publishers and news agencies’, as well as ‘the contribution of press publications to political and general information and the importance of the use of press publications by an online communication service to the public’.¹²¹

A second round of national transposition of the Copyright Directive 2019/790 has extended the obligations applicable to online content providers.¹²² Online content-sharing service providers¹²³ can now be held liable for content shared by their users without obtaining the authorisation of the author, and must exert best efforts to obtain the authorisation of the rights holders.¹²⁴ Similar to the rights granted to press publishers and news agencies, authors and performers must now receive appropriate and proportionate compensation for the use of their works on such online content-sharing services.¹²⁵

iv On-demand services and video-sharing platforms

With the national implementation of the AMSD, on-demand audio-visual media services are now further regulated through national law. An Order dated 23 June 2021 specifies additional rules applicable to on-demand services.¹²⁶ New obligations imposed on on-demand video services now include, among others, the obligation to devote at least 20 per cent of their revenue generated in France to the financing of European or French works, of which a certain proportion must be reserved for European, French and independent works; the obligation to include in their offers at least 60 per cent of European works, of which at least 40 per cent must be of French origin; and obligations regarding advertising which were formerly only applicable to television media.¹²⁷

VI THE YEAR IN REVIEW

i Creation of a new authority to regulate the audio-visual sector

Law No. 2021-1382 of 25 October 2021 relating to the regulation and protection of access to cultural works in the digital age recently merged two major regulatory authorities of the audio-visual sector to create the ARCOM, which officially began its functions on 1 January 2022.

120 Article L218-4 of the Intellectual Property Code.

121 *ibid.*

122 Ordinance No. 2021-580 of 12 May 2021 transposing Articles 17 to 23 of the Directive on copyright and related rights in the digital age concerning the responsibility of large platforms for the content published by their users and the fair remuneration of authors and performers.

123 Defined under Article L137-1 of the Intellectual Property Code as ‘a person who provides an online public communication service, of which the main purpose or one of the main purposes is to store and provide public access to a significant quantity of works or other protected subject matter uploaded by its users, which the service provider organises and promotes for direct or indirect profit’.

124 Articles 1-3, Ordinance No. 2021-580 of 12 May 2021 *supra*.

125 Article 11, Ordinance No. 2021-580 of 12 May 2021 *supra*.

126 Decree No. 2021-793, 22 June 2021.

127 *ibid.*

The ARCOM inherited all missions formerly entrusted to the two merged authorities: the protection of intellectual property rights over works of art and literature on the internet (this mission originally belonged to the Hadopi), and the general regulation of the audio-visual sector (which was entrusted to the CSA, and included the regulation of the broadcasting or on-demand video content and the allocation of television and radio frequencies).¹²⁸

The powers of the ARCOM are also significantly larger than its predecessors. Unlike the Hadopi, the ARCOM's reach includes illegal television offers, direct downloads and fraudulent streaming. The ARCOM takes advantage of two innovative mechanisms: (1) a 'blacklist' system for infringing websites (which may be made public); and (2) enhanced tools for blocking 'mirror' sites (the ARCOM may require internet access providers or other intermediaries against whom a final decision is issued to block all websites mirroring an online public communication service that contains all or a substantial part of content struck down or protected in the original decision).¹²⁹

The graduated response mechanism has also been improved. This mechanism allows the ARCOM (and formerly, the Hadopi) to send three successive warnings to infringers of intellectual property laws and, eventually, to refer the case to a court. Individuals may now submit intervention requests to the ARCOM, while such a possibility had only been reserved for collective management organisations.¹³⁰

On a more subsidiary note, Law No. 2021-1382 of 25 October 2021 implemented an ad hoc interim proceedings mechanism to combat the illegal transmission of sporting events and competitions (live streaming).¹³¹

Finally, the ARCOM is now able to communicate and exchange information with the French Competition Authority, in particular regarding merger projects in the audio-visual sector. Merger actors will not be able to oppose business secrecy arguments to the either authority.¹³²

ii New cybersecurity certification obligation for operators of online platforms and number-independent interpersonal communications services (NI-ICS)

Law No. 2022-309 of 3 March 2022 relating to the introduction of a cybersecurity certification of digital platforms created a new provision in the French consumer code which provides that operators of online platforms, as defined under Article L111-7-3 of the same code, and NI-ICS, as defined under Article L32 of the French Postal and Electronic Communication Code, meeting thresholds still to be defined by decree, must carry out a cybersecurity audit, the results of which shall be presented to the consumer in a visible, clear and comprehensible manner supplemented by a colour-coded presentation, covering both the security and location of the data hosted, either directly or through a third party, as well as their own security.¹³³ The audit can only be carried out by an ANSSI-qualified provider and will need to meet the criteria that will be set forth by the competent ministries.

128 Article L331-12 of the Intellectual Property Code.

129 Article L331-25 and L331-27 of the Intellectual Property Code.

130 Article L331-19 et seq. of the Intellectual Property Code.

131 Article L333-10 II. of the Code of Sports.

132 Law No. 86-1067, 30 September 1986, Article 41-4 (as modified).

133 Article L111-7-3 of the French Consumer Code.

This new requirement will enter into effect on 1 October 2023. Non-compliance with this requirement will be sanctioned with an administrative fine which cannot exceed €75,000 for natural persons and €375,000 for legal persons.¹³⁴

iii Limitation on the retention of traffic data in the context of French criminal investigations in consideration of the EU case law

In a decision dated 12 July 2022, the French Supreme Court held that the former version of Article L34-1(III) of the French Postal and Electronic Communication Code was not compliant with EU law where it required that operators of electronic communication services the general and undifferentiated retention of traffic data in view of fighting against criminality generally.¹³⁵ The French Supreme Court also held that Articles 60-1, 60-2, 77-1-1 and 77-1-2 of the French Code of Criminal Procedure do not comply with EU law as far as the access to traffic and location data by criminal investigators under these provisions is not subject to a prior control by a court (e.g., an investigation judge) or an independent administrative authority, it being noted that a prosecutor is not a court.¹³⁶ This later non-compliance will not automatically nullify the investigations carried out on its basis as the investigated individuals will need to demonstrate a harm resulting from an unjustified interference with their privacy and the protection of their personal data as (1) the relevant data could not be retained under the expedited preservation regime and (2) the categories of data targeted, as well the duration of the access to these data, was not, given the circumstances of the case, limited to what was strictly justified by the necessity of the investigations.¹³⁷

The French Supreme Court will also need to take into account the decision from the Court of Justice of the European Union (CJEU) of 20 September 2022 which answered a question it referred in relation to the former version of Article L621-10 of the French Monetary and Financial Code enabling investigators to be provided with data retained and processed by telecommunications operators in the context of Article L34-1 of the French Postal and Electronic Communication Code.¹³⁸ Indeed, the CJEU ruled that legislative measures which, as a preventive measure, to combat market abuse offences including insider dealing, provide for the general and indiscriminate retention of traffic data for a year from the date on which they were recorded are not compatible with EU law.

These case laws do not mean that operators of electronic communication are no longer expected to retain traffic data under certain circumstances to answer French law enforcement authorities' requests. Indeed, the new version of Article L34-1 of the French Postal and Electronic Communication Code which entered into effect on 31 July 2021 still provides that such operators must retain traffic data for a one-year period as of the connecting or the use of the terminal equipment for the purpose of answering to law enforcement authorities requests in view of combating crime and serious delinquency, preventing serious threats to public security and safeguarding national security.¹³⁹

134 Article L131-4 of the French Consumer Code.

135 Cass., Crim., 12 July 2022, No. 21-83710.

136 *ibid.*

137 *ibid.*

138 Decision of Court of Justice, 20 September 2022, c-339/20 and c-397/20.

139 Article L34-1 of the French Postal and Electronic Communication Code.

iv A February 2022 ministerial decree shortened the mandatory film no-diffusion period

The Ministerial Order of 24 January 2022 relating to the agreement on the reorganisation of the media chronology enforced the agreement reached between the Ministry of Culture and key private actors of the audio-visual sector on 24 January 2022.¹⁴⁰

This order replaces the piece of legislation, which gave effect to the former 2018 agreement, and applies to all businesses of the cinema sector, editors of audio-visual on-demand media services and television editors, and will govern for the next three years.¹⁴¹ Actors that have reached an agreement with the Ministry of Culture are now required to abide by a 15-month mandatory delay prior to diffusing a film on demand after the film's release in the cinemas, instead of a 17-month period pursuant to the 2018 agreement. The other actors that have not negotiated the agreement are now required to abide by a 17-month period, instead of 36 months pursuant to the previous agreement.¹⁴² Actors offering paying television services must abide by a 6-month delay (9-month if no agreement was reached), as opposed to an 8-month delay in the previous agreement.

VII CONCLUSIONS AND OUTLOOK

The recent adoption of the Digital Markets Act and of the Digital Services Act will likely prompt significant changes in the French TMT regulatory framework in the year to come. The implementation and interpretation of these laws by French and European courts should therefore be closely monitored.

In addition, future decisions or recommendations of the newly arrived ARCOM may noticeably alter the French legal landscape.

140 Ministerial Order of 4 February 2022 enforcing the agreement on the reorganisation of the media chronology reached on 24 January 2022.

141 *id.*, Article 2.

142 *id.*, Article 1.4 et seq.

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