

[FR] Request for preliminary ruling on constitutionality of ARCOM's powers to sanction broadcast of insulting comments

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In support of its application for the annulment of decision no. 2023-63 of 9 February 2023 in which it was fined by ARCOM (the French audiovisual and digital communications regulator), the C8 company requested that the *Conseil constitutionnel* (Constitutional Council) be asked to examine the constitutionality of several provisions of the Law of 30 September 1986 on freedom of communication. Under the disputed provisions, ARCOM is authorised to impose penalties without prejudice to any criminal court proceedings brought by the public prosecutor's office or individuals under ordinary law for any act committed in connection with the breach penalised.

C8's argument revolved around the inadequacy of the guarantees and limits applicable to ARCOM's exercise of its power to fine television service providers that broadcast insulting comments.

The *Conseil d'Etat* (Council of State) noted in particular that, when ruling on the constitutionality of the text adopted by the French parliament, which later became the Law of 17 January 1989 amending the Law of 30 September 1986 on freedom of communication, the *Conseil constitutionnel*, in its decision no. 88248 DC of 17 January 1989, considered that the power to issue sanctions conferred by the legislator on the *Conseil supérieur de l'audiovisuel*, which ARCOM replaced, was only likely to be exercised after formal notice had been given to licence-holders, ordering them to comply with their obligations, and only if they failed to comply with these obligations or formal notices.

According to the *Conseil d'Etat*, the contested provisions authorised ARCOM to impose one of the administrative sanctions listed on a service provider if it failed to comply with a formal notice requiring it to meet an obligation imposed on it by laws, regulations, the principles defined in Articles 1 and 3-1 of the Law of 30 September 1986 or its licence agreement. These provisions therefore had neither the purpose nor the effect of giving ARCOM the power to rule on the sanctioning of crimes and offences committed through the press within the meaning and application of the Law of 29 July 1881 on the freedom of the press, including insults, which were defined in Article 29 of the said law as "any offensive remark, expression of contempt or invective devoid of any factual accusation". The fact

that the content of a programme broadcast by a service provider could give rise to such criminal punishment under the conditions defined in the Law of 29 July 1881, and to ARCOM's exercise of its power to impose sanctions, was irrelevant in this regard.

The applicant's complaint of lack of jurisdiction, which was not new, was therefore not considered to be of a serious nature.

Secondly, the applicant claimed that the disputed legislative provisions, insofar as they allowed a service provider to be punished for acts constituting an offence committed through the press, infringed the rules derived from the principle of necessity of criminal offences and penalties, which required that the same person could not be the subject of more than one procedure aimed at punishing the same, identical acts with sanctions of the same nature in order to protect the same social interests.

However, the *Conseil d'Etat* pointed out that no criminal proceedings could be brought against the service providers referred to in Article 42 of the Law of 30 September 1986 for an offence of public insult committed by means of communication to the public by electronic means. Moreover, the contested provisions, in any event, did not give ARCOM the power to launch proceedings aimed at protecting the same social interests as the provisions mentioned in the Law of 29 July 1881, nor lead to the same people being sanctioned. They therefore did not infringe the principle of necessity of criminal offences and penalties.

Thirdly, the applicant submitted that the contested provisions infringed the principle of equality before the law in that they had the effect of depriving service providers, when they were sanctioned by ARCOM for broadcasting insulting remarks, of the guarantees provided for by the Law of 29 July 1881 and applicable to others, such as press publishers. The *Conseil d'Etat* considered that this claim, which was not new, did not raise any serious issue, since a service provider likely to be sanctioned by ARCOM was in a different situation to that of any other person likely to be punished for crimes and offences committed through the press.

Finally, in view of all the conditions and guarantees applicable to ARCOM's issuing of the sanctions provided for by the contested provisions, as well as to the limitation, in the event of a repeat offence, of the maximum penalty that could be imposed to 5% of the turnover of the service provider in question, the complaint that the legislator had adopted a manifestly disproportionate penalty, which was not new, was judged not to be of a serious nature.

The *Conseil d'Etat* therefore concluded that none of the complaints presented by the applicant raised a new question or were of a serious nature, and there was no reason to refer the question regarding constitutionality to the *Conseil*

constitutionnel.

Conseil d'État, 6 mai 2024, n° 472887, C8

<http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-05-06/472887>

Council of State, 6 May 2024, no. 472887, C8

