[FR] Opinion of the Conseil d'État on Article 40 of the Act of 30 September 1986 as Regards Canal +

IRIS 2002-7:1/20

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Article 40 of the Act of 30 September 1986 is intended to protect audiovisual communication companies from excessive foreign influence, thereby assuring a degree of cultural protection in the sector. It prohibits any one person (natural or legal) of foreign nationality from holding, either directly or indirectly, more than 20% of the company capital or voting rights at general meetings of shareholders of a company holding an authorisation to provide a French-language sound or television broadcasting service using Hertzian terrestrial technology. The arrival last December of the American company Liberty Media among the holders of the capital of Vivendi Universal, which has a 49% stake in Canal +, had forced the CSA to call on the Government to apply to the Conseil d'État for its opinion on the applicability of Article 40 (see IRIS 2002-6: 9). Two questions were raised. Firstly, was it enough, in order to assess the given threshold of 20%, to ascertain the nationalities of the shareholding companies, or was it necessary to go further and isolate within their company capital those shareholders from outside the European Union and include them in the calculation of the 20%? The Conseil d'État delivered its opinion on 27 June; it began by stating that, in keeping with Community law, case-law at the European Court of Justice and precedent at the Conseil d'État, natural or legal persons from a European Community member State other than France were to be treated on a par with persons of French nationality, particularly concerning the assessment of compliance with the statutory threshold of 20%. The Conseil d'État went on to state that, in order to be considered a company having French nationality, it was not enough for the company to have its registered office in France; there must also be a degree of control, ie the majority of the company capital or the voting rights at general meetings of shareholders must be held by persons of French nationality. If these latter were companies, it was necessary to determine their nationality by applying the same criteria (registered office and control), and this investigation should be continued further down the line if these companies were in turn held by others, until the indirect holders of shares in the company holding the authorisation to broadcast were known for sure.

The second question raised by the CSA involved the quoting of companies on the stock market, which did not begin until after the Act was adopted in 1986; should the threshold of 20% refer to the fixed part of the body of shareholders or to all the capital? The Conseil d'État provides a clear answer to this in its opinion - the "floating" capital should be taken into account, ie that part of the capital that was

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constantly on the move on the market (small shareholders), when determining if the threshold of 20% had been reached. At the invitation of the Conseil d'État the Government immediately passed the opinion on to the CSA which, in its capacity as the authority with responsibility for ensuring compliance with the provisions of Article 40 of the 1986 Act, called on Canal + to provide it with the necessary information concerning its shareholders to enable it to ensure, in keeping with the opinion of the Conseil d'État, that the threshold of 20% of shareholders from outside the European Union was not being exceeded, and that not more than 50% of the shareholders of Vivendi Universal were from outside the European Union. Last December Vivendi Universal stated that 5.3% of the shareholders of Canal + were from outside the European Union and that 73% of the capital of Vivendi Universal was European, including floating capital. The CSA will nevertheless have to consider more recent figures, particularly as the resignation of the managing director of Vivendi Universal on 2 July could result in further changes in the composition of the capital of the majority shareholder of Canal +.

Conseil d'Etat (section de l'Intérieur), séance du jeudi 27 juin 2002 - Avis extrait du registre des délibérations de l'assemblée générale

Conseil d'État (domestic section), session of Thursday, 27 June 2002 - Opinion taken from the register of deliberations of its general assembly

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