[BE] RTL Group Wins Battle against the CSA

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In its decision of 15 January 2009, the *Conseil d'Etat* (Belgian administrative court) repealed the decision of the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory body of the French-speaking Community - *CSA*) of 29 November 2006, which ruled that "since 1 January 2006, the S.A. TVi has been broadcasting RTL-TVi and Club-RTL services, of which it is the editor, without authorisation" and which imposed a fine of EUR 500,000 on TVi.

The case featured the CSA on one side and CLT-UFA, a Luxembourgish broadcasting company, and its Belgian subsidiary TVi, a broadcasting company under Belgian law which broadcast programmes on the RTL-TVi and Club-RTL TV networks, on the other.

Up until 2005, TVi had always sought (and obtained) a licence from the CSA for its broadcasting activities in Belgium. However, in October 2005, TVi decided not to renew this licence, since it had already received a licence from Luxembourg. Indeed, in 2005, the Luxembourgish government granted CLT-UFA a licence, valid until the end of 2010, to broadcast its channels "of international reach", these being RTL-TVi and Club-RTL. From that point onwards, TVi and CLT-UFA claimed that the editorial activities concerning RTL-TVi and Club RTL had been transferred from TVi to CLT-UFA and that consequently no Belgian licence was necessary for the broadcasting of these channels.

The CSA came to the opposite conclusion in its decision of 29 November 2006. According to the CSA, the channels were still edited by TVi, since the editorial decisions were taken in Belgium by that company. Consequently, it imposed a fine of EUR 500,000 on TVi for broadcasting without a licence. TVi and CLT-UFA filed an appeal before the Conseil d'Etat against the ruling.

The Conseil d'Etat based its reasoning on the provisions of the Television without Frontiers (TwF) Directive (Directive 89/552/EEC) and on the principle of the free movement of services. Under the provisions of the TwF Directive, broadcasts are submitted to the control of one authority, designated in accordance with the "country of origin" rule. Practical criteria are listed in the Directive: for example, if a broadcaster has its head office in one Member State, but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce

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involved in the pursuit of the television broadcasting activity operates (Article 2 of the TwF Directive).

However, the Conseil d'Etat did not assess whether the CSA had correctly applied the criteria contained in the TwF Directive. It merely noted that the CSA did not dispute the fact that RTL-TVi and Club RTL were covered by a Luxembourgish licence. Therefore, it ruled that the CSA could not assess whether the Grand Duchy of Luxembourg had exceeded its jurisdiction by granting a licence to a broadcaster not established on its national territory: the decision to grant a licence could only be challenged through the appropriate diplomatic or jurisdictional channels, but not incidentally during proceedings intended to impose a fine on a broadcaster, which - to the extent that the Luxembourgish licence is valid - does not need to seek further authorisation in a different Member State.

Therefore, according to the Conseil d'Etat, the CSA could not rule that "[the CSA] must check whether that licence allows the legal operation of the services concerned", that "the sole existence of a licence issued by another Member State is not sufficient to conclude that the alleged lack of a licence in the French Community of Belgium is unlawful" and that "we need to check whether the licence was granted by the Member State that has jurisdiction over the editor of the services in question". By doing so, the CSA in effect denied any validity, or at least any effect, *vis-à-vis* third parties, to the licence granted by the Luxembourgish authorities. The Conseil d'Etat underlined that this exceeds the authority of the CSA; indeed, if the broadcasting is authorised by the Luxembourgish authorities - whether lawfully or not - the broadcaster benefits from the principle of the free movement of services within the European Union and no authority of another Member State can subject them to further authorisation proceedings for distribution in its territory.

Accordingly, the Conseil d'Etat decided to repeal the CSA decision.

SA TVi et S.A. de droit luxembourgeois CLT-UFA c. CSA, Conseil d'État, section du contentieux administrative, arrêt n°189.503, 15 janvier 2009

S.A. TVi and S.A. CLT-UFA (company under Luxembourgish law v CSA, Belgian Administrative Supreme Court, judgment n°189.503, 15 January 2009

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