[BE] Council of State Confirms Conviction of Public Broadcaster for Discrimination of Political Party

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On 26 June 2007, the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) issued a decision admonishing the Flemish public broadcasting organisation (VRT) for breach of its obligation of impartiality and non-discrimination (former Article 111bis of the Media Decree). Prior to the federal elections of 10 June 2007, the VRT had organised two television debates during which three top politicians (Leterme, Vande Lanotte and Verhofstadt), who all held first place on the list of representatives of their respective political parties in the Senate, were invited. The fourth politician in this position, Vanhecke, who at the time was president of the extreme right political party Vlaams Belang, was not invited. The VRT justified this editorial choice by stating that it aimed to establish a debate between politicians who had been designated in other media as possible candidates for the office of prime minister. Given the so-called *cordon sanitaire* , an agreement between all political parties not to cooperate in any way with the Vlaams Belang, it was practically impossible for this party to take part in the formation of the government. Hence, delivering the next prime minister was all the more out of the question. The Flemish Regulator firmly held that in the federal State of Belgium only the members of the parliament, thus not the prime minister, are directly elected. By organising two television debates exclusively between politicians that were designated as candidate prime ministers by other media, thereby giving the impression that the purpose of the elections was electing a prime minister rather than the members of the parliament, the VRT created a distinction between the aforementioned politicians that was not objective and not justified in a reasonable way, leading to a breach of its obligation of impartiality and non-discrimination. In reaction to the imposed admonition, the VRT lodged a complaint with the *Raad van State* (Council of State) with a view to nullifying this decision. This move however was to no effect.

Before the Council of State, most of the arguments developed by the VRT were related to the interpretation of the former Article 111bis of the Media Decree (now Article 39). The VRT stated that its obligation of impartiality and non-discrimination should be judged in view of its programme offer in general (collective objectivity) and not on a programme by programme basis (individual objectivity). The Vlaams Belang had been given a chance to take part in various other programmes, hence, from an overall point of view, this party could hardly hold to be discriminated against. Although the Council of State approved of this

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way of reasoning, it also recognised the particular importance of the two debates in question, which functioned as the absolute climax of the reporting on the elections. Both debates were, given the specificity of the content, the selected participators and the time at which they were held, to be considered as so different in comparison to other information programmes concerning the elections that the Flemish Regulator legitimately could judge the VRT's objectivity in disregard of any other information programmes. The VRT further held that the selection criterion "designated by other media as candidate prime ministers" actually is objective, since the preferences of the VRT editorial room had not been taken into account. The Council of State replied that this consideration takes nothing away from the fact that this choice could breach the obligation of political and ideological impartiality. This vision is of particular value, given that these "other media" consisted, in essence, of the print media, which are not subjected to Article 111bis of the Media Decree and can therefore express partisan political and ideological preferences. Finally, the VRT invoked a violation of Article 10 ECHR. It stated that the argumentation of the Flemish Regulator leads to a prohibition on a specific debate format, namely a debate between persons who are generally designated as the most important candidates to lead the next government. The Regulator failed to demonstrate that such prohibition is necessary in a democratic society, as is required by Article 10 § 2 ECHR. Moreover, the VRT expressed its concern about an additional chilling effect, given the vagueness of the Regulator's decision. The Council of State countered this argument by saying that the Regulator in no way imposed a prohibition on organising a public debate about the future formation of a government. The VRT, as a public service, cannot invoke the right to freedom of expression to disregard the obligation of impartiality and non-discrimination formulated in Article 111bis of the Decree. Compliance with this obligation can be deemed necessary in a democratic society in order to protect the rights of others and can therefore legitimately be required by the Flemish legislator.

Zaak van Frank Vanhecke t. NV VRT, Beslissing nr. 2007/0032, 26 juni 2007

http://www.vlaamseregulatormedia.be/media/418/2007-032.pdf

Frank Vanhecke v NV VRT, 26 June 2007 (No 2007/032)

Raad van State, Arrest nr. 194.650 van 25 juni 2009 in de zaak A. 185.164/XII-5205

http://www.raadvst-consetat.be/Arresten/194000/600/194650.pdf

Council of State, 25 June 2009 (No 194.650)

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