[FR] CSA Sanction Procedure and Prior Questioning of Constitutionality

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Since 1 March 2010, anyone under the jurisdiction of a court may claim in proceedings before a court, either administrative or judicial, “that a legislative provision infringes the rights and freedoms guaranteed by the Constitution” - this is the prior questioning of constitutionality.

Thus Canal+, in support of its application to the Conseil d’Etat for the cancellation of a decision by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) in March 2010 ordering it to broadcast a communiqué (see IRIS 2010-4: 1/22), called for a referral to the Constitutional Council on the question of the constitutionality of Article 42-4 of the Act of 30 September 1986 (as amended). According to this provision, “in all cases of failure to perform the obligations incumbent on editors of audiovisual communication services, the CSA may order the inclusion in programmes of a communiqué, laying down the terms and conditions for broadcasting it. The CSA shall call on the party concerned to submit its observations to the CSA within two clear days starting from the date of receipt of the request. The decision shall then be pronounced without implementing the procedure provided for in Article 42-7. (This procedure provides for the CSA to notify the grievances to the ‘contravening’ editor of the audiovisual services, which has the possibility of consulting its dossier, presenting its observations in writing, being heard before the CSA with the possibility of being represented) (...)”. Canal+ claimed that the procedure instituted under Article 42-4 would be contrary to the principle of respect for rights of defence.

In a decision issued on 18 June 2010 the Conseil d’Etat stated that, on the basis of Article 23-5 of the Order of 7 November 1958 instituting the Constitutional Council that “matters involving prior questioning of constitutionality shall be referred to the Constitutional Council on the three-fold condition that the contested clause is applicable to the dispute or procedure, that it has not already been declared in compliance with the Constitution in the grounds and operative part of a decision issued by the Constitutional Council, unless there has been a change in the circumstances, and that it is new or is of a serious nature”. It goes on to recall that, as the Constitutional Council set out in its Decision No. 88-248 DC of 17 January 1989, the disputed provisions have neither the purpose nor the effect of dispensing the CSA from proceeding with the noting of failure on the part of an editor of audiovisual services to observe rights of defence. This implies, even if the sanction procedure provided for in Article 42-7 has not been implemented

(i.e., at the time of implementing the contested Article 42-4), that the editor has been put in the position of being able to access its dossier and present its observations on the complaints made against it, and been given a sufficient period of time in relation to the nature of the grievances. Thus the period of two clear days provided for in the contended arrangement only concerns the observations that the party concerned may submit on the content and the conditions for broadcasting the draft communiqué sent to it by the CSA. The Conseil d'Etat therefore holds that the prior questioning of constitutionality raised by Canal+ is not new and is not of a serious nature, and therefore the matter does not need to be referred to the Constitutional Council. It seems likely that the question of the constitutionality of other provisions of audiovisual legislation will be submitted to the Conseil d'Etat, and even perhaps to the Constitutional Council, in the near future.