[FR] Strict Regulation by the Conseil d’Etat of the CSA’s Powers in Settling Differences

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On 7 December 2011, the Conseil d’Etat (Council of State) delivered a high-profile decision on the powers of the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) in the settlement of differences. Since 2004, the CSA has had a quasi-jurisdictional power as, under Article 17-1 of the Act of 30 September 1986, it may be referred to by an editor, a distributor of services, or an operator or supplier of access to digital radio or television services, with a view to settling any differences involving the distribution of a radio or television service.

In the case at issue, in the face of the refusal of a channel editor (Métropole Télévision/M6) to allow a company distributing audiovisual services by satellite (AB Sat) to engage in any negotiations whatsoever with a view to concluding a distribution contract, the editor company referred the difference of opinion to the CSA. In a decision made public on 8 July 2008, the authority called on the channel to send the distributor a commercial proposal for distribution within six months of notification of the decision. The channel therefore appealed to the Conseil d’Etat to cancel the CSA’s decision. The Conseil d’Etat took advantage of the opportunity to lay down a number of major principles intended to provide a clearer definition of the perimeter of the CSA’s powers in settling differences. The Conseil d’Etat stated that these powers, conferred by Article 17-1 of the Act of 30 September 1986, must be reconciled with the contractual freedom enjoyed, within the limits laid down by law, by the editors and distributors of audiovisual services. Thus, when a dispute was referred to it is based on a contractual relationship between an editor and a distributor or by offer of a contract, the CSA was acting within its powers, in order to ensure the observance of all the principles and obligations listed in Article 17-1 of the Act of 30 September 1986, if, under the supervision of a judge, it issued orders in relation to the conclusion, content or performance of agreements between the parties to the difference. On the other hand, when the case referred to did not involve a contractual relationship or an offer of a contract, as was the case here, the CSA did not have the authority to issue an order to make such an offer except in two cases: firstly, in respect of an operator specifically required by law to make a service available or to resume the same, or secondly if issuing such an order is necessary in order to prevent a blatant infringement of the pluralist expression of currents of thought and opinion, to preserve public order, to meet the demands of public service, or to protect minors, human dignity, or the quality and diversity of programmes.

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In the case at issue, the Conseil d'Etat noted that the private editor of the free television service that was a party to the dispute was under no legal obligation to make its signal available to a distributor using satellite. Furthermore, the distributor and the editor were not involved in any contractual relationship at the time the difference arose between them, and the editor had not made any offer to make its programme available. Consequently, the CSA, which had noted no blatant infringement of the principles listed above but merely discriminatory behaviour on the part of the editor, to the detriment of the distributor, could not issue the disputed order as doing so exceeded its powers. The Conseil d'Etat therefore cancelled the CSA's disputed decision.

Conseil d'Etat (5e et 4e s.sect.), 7 décembre 2011 - Société Métropole Télévision

Conseil d'Etat (5th and 4th sub-sections), 7 December 2011 - the company Métropole Télévision

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