[IT] Council of State Upholds RAI’s Obligation to Provide Programmes Free-to-air to all Distribution Platforms

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On 30 August 2013, the Third Chamber of the Council of State affirmed the judgment handed down by the Latium Administrative Court on 11 July 2012 (see IRIS 2012-8/31) concerning the encryption by RAI, the Italian public service media operator, of some of its programming and its refusal to supply them on a free-to-air basis with the satellite pay-tv operator Sky Italia.

For several years, Sky Italia users could view RAI’s programmes via their Sky Italia decoder box. In September 2008, RAI, RTI, and TI Media, the three main Italian free-to-air television operators, set up a joint venture named Tivù. The latter's corporate mission is to retransmit programmes by its parent companies and third parties on its DTT and satellite networks employing a proprietary encoding protocol. In April 2009, RAI started encoding some programmes falling within its public service remit employing Tivù's encryption protocol. As Tivù's proprietary protocol is different from the one employed by Sky Italia, Sky Italia users were effectively prevented from accessing RAI broadcasts through their Sky Italia decoder box.

In July 2009, the consumers’ association Altroconsumo lodged a complaint with the Italian Communications Authority, AGCom, claiming that, by encrypting some of its programmes, RAI had failed to meet its obligations under the 2007-2009 Service contract, i.e. the agreement between RAI and the Italian ministry of economic development setting out RAI’s public service remit. While AGCom, in its decision of 16 December 2009 no. 732/09/CONS, resolved to take no further action against RAI in view of the commitments offered by that broadcaster, both the Latium Administrative Court and the Council of State ruled that RAI had acted in breach of its obligations under Sections 26 and 31 of the 2007-2009 Service Contract.

Section 26 of the Service contract, entitled “Technological neutrality”, required RAI to ensure the “gratuitous provision, at no extra cost to the user, of its public service programming through different distribution platforms [...] without prejudice to specific commercial agreements”. In the course of proceedings before the Council of State, AGCom argued that that provision only ensured free access to users, while RAI remained free to charge distributors, such as Sky Italia, as per the applicable commercial agreements. The Council of State rejected that

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contention. It took the view that since the wording “at no extra cost for the user” entitled users to freely watch RAI broadcasts, the wording “gratuitous provision” was meant to grant distribution platforms free access to RAI’s programming. Moreover, the Council of State ruled that the technological neutrality goal of Section 26 and the universal access ethos of public service media called for the broadest possible dissemination of RAI’s programmes through all available distribution platforms. In contrast, the commercial exploitation of RAI’s programming advocated by AGCom could have prompted distribution platforms to charge users to recoup the costs incurred to gain access to RAI broadcasts. The Council of State also relied on Section 31 of the Service contract, which granted users that were unable to receive RAI broadcasts on DTT free-to-air access to RAI’s programming simulcast via satellite and cable.

Finally, the Council of State ruled on Section 3 of the 2010-2012 Service Contract, which required RAI to promote Tivù. Italy’s highest administrative court held that that provision amounted to an illegal state aid insofar as it compelled RAI, a state-funded company, to employ its resources for the benefit of Tivù’s parent companies and commercial partners, thereby distorting competition. The Council of State added that Section 3 was also incompatible with Section 47(4) of the Consolidated Act on Audiovisual and Radio Media Services, which prohibits RAI from employing its public revenues to finance activities that are not related to its public service remit.

Consiglio di Stato (Sezione Terza), sentenza n. 4336 del 30 agosto 2013

http://www.giustizia-amministrativa.it/DocumentiGA/Consiglio%20di%20Stato/Sezione%203/2012/201208483/Provvedimenti/201304336_11.XML

Council of State (Third Chamber), judgment no. 4336 of 30 August 2013

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