[FR] Bonus channel - Conseil d’État rejects M6’s application

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Amélie Blocman
Légipresse

In a decision delivered on 22 October 2014, the Conseil d’État dismissed all the applications brought by the company that edits the channel M6, whose claim for the allocation of a ‘bonus channel’ had been turned down. Under Article 103 of the Act of 30 September 1986, introduced by the Act of 5 March 2007, the French legislator had allowed those “historic” operators (TF1, M6, and Canal+) which requested the possibility of being allocated a bonus channel to compensate for the prejudice suffered as a result of the early stoppage of their broadcasting in analogue mode and the appearance of competitive channels on digital TV. However, on 29 September 2011, at the end of a procedure lasting more than two years, the European Commission sent France a reasoned opinion, holding that this arrangement was contrary to European Union law as it penalised the channels’ competitors and deprived television viewers of a more attractive offer (see IRIS 2011-9/7). The legislator therefore adopted legislation on 15 November 2013 on the independence of the public audiovisual sector, which repealed this arrangement, so that the bonus channels were never actually allocated.

The editor of M6 referred to the Conseil d’État, requesting the cancellation of the implicit decision to turn down the request to be allocated a bonus channel it had submitted on 23 April 2012 resulting from the silence maintained for more than two months by the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA). The channel also asked for the State to pay compensation of almost €100 million for the various types of prejudice it had suffered as a result of the CSA’s contested decision. The Conseil d’État judge recalled that the allocation of a bonus channel had been subject to the condition that the editors “subscribe to more stringent obligations in support of creation in terms of the broadcasting and production of European and French-language cinematographic and audiovisual works laid down by decree by the Conseil d’État" (Article 104 of the Act). However, no decree defining these obligations has been adopted. Thus, in the absence of any detail in the Act regarding these more stringent obligations, it was not possible for either Article 103 or Article 104, which could not be separated from the former, to enter into force. The Conseil d’État found that under these circumstances, the CSA was required to reject M6’s application for the allocation of a bonus channel as provided for in the provisions.

The Conseil d’État then went on to examine the application for compensation submitted by the channel and found that since Article 103 of the Act had not

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entered into force, the CSA's rejection of M6's application under this Article did not constitute fault of a nature that would give rise to entitlement to compensation. Regarding the compensation for prejudice arising, according to the channel, from the failure to adopt an implementing decree covering this Article, the Conseil d'État found that any negligence should be appreciated by taking into account the date of the fact generating the prejudice, i.e. the date of the implicit decision of refusal resulting from the silence on the part of the CSA regarding the application submitted on 23 April 2012 with a view to benefiting from the provisions. The Conseil d'État recalled that a complaint had been submitted to the European Commission regarding the bonus channel arrangement in April 2008; this had resulted in the reasoned opinion ordering France to abolish the mechanism, delivered on 29 November 2011. The following day, plans for provisions repealing the mechanism were tabled in the French Parliament. In view of the circumstances, the Conseil d'État found that the fact that the decree had not been adopted on the date of the CSA's refusal for which cancellation was being called for, i.e. mid-2012, was not evidence of any fault that gave entitlement to any compensation. Thus M6, which could not be unaware of the risk of the provisions from which it was claiming benefit being called into question, was not justified in claiming compensation to cover cost it had nevertheless decided to incur from November 2010 in order to prepare its application. Lastly, having failed to establish the actual amount of the cost and lost earnings that the early extinction of the analogue signal would have caused the channel, M6's claims for compensation on this point were also rejected. TF1 referred to the administrative tribunal last spring for the same reasons; its complaint is currently being investigated.

Conseil d'État (4e et 5e s.sect.), 22 octobre 2014 - Société Métropole Télévision

Conseil d'État (4th and 5th sections), 22 October 2014 - the company Métropole Télévision

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