[FR] Conseil d’État cancels CSA decision refusing DTTV channels’ switch to freeview

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Amélie Blocman
Légipresse

Two decisions handed down on 17 June 2015 by the Conseil d’État have cancelled the decisions made last July by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory authority - CSA) which refused the DTTV channels LCI and Paris Première authorisation to switch to freeview.

Article 42-3 of the Act of 30 September 1986, as amended by the Act of 15 November 2013, enables the audiovisual regulatory authority to authorise a switch from pay TV to freeview (or vice versa) by waiving the standard procedure which provides for allocating a freeview DTTV frequency after first calling for applicants (the “open procedure”). The approval required from the CSA is conditional on the channels observing pluralism, taking balance in the advertising market into account, and promoting the quality and diversity of programmes. On 29 July 2014, at the end of a thorough investigation process, the CSA refused to grant LCI and Paris Première the approvals they were requesting in order to switch from pay DTTV to freeview DTTV (see IRIS 2014-8/22). The two channels appealed to the Conseil d’État, claiming the CSA had exceeded its authority and calling for the CSA’s decisions to be cancelled. Almost one year later, the Conseil d’État has upheld their claim, finding that the procedure followed by the CSA was irregular.

It was claimed, inter alia, that the procedure was contrary to the “Authorisations Directive” (Directive 2002/20/EC of 7 March 2002) and the “Competition Directive” (Directive 2002/77/EC of 16 September 2002). The Conseil d’État found that, although the specific approval procedure for pay DTTV operators wishing to switch to freeview was not in breach of European Union law, the CSA ought to consider in each individual case whether or not there was any justification for using such a procedure, which was only meant to be used if this was in the general interest.

Examining the legality of the contested decisions made by the CSA, the Conseil d’État went on to recall that Article 42-3 requires the CSA to carry out an impact study before reaching a decision; the study must be made public. “In order to ensure the transparency of the procedure followed, it is the legislator’s intention that the impact study should be made public before the date on which the application is deliberated on”. In the absence of any regulatory provision defining

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the procedure applicable, the Conseil d'État held that the CSA must render the study public "in good time, so that the applicant and the other parties involved are able to make written observations or ask to be heard on the conclusions of the study". In the case at issue, however, the study carried out on the impact of the applications for approval submitted by LCI and Paris Première to switch from pay DTTV to freeview DTTV was not made public until the day on which the CSA published its decision. The decision was therefore cancelled.

The CSA took note of this interpretation, which makes no reference to the economic analysis behind the decisions to refuse the applications. It will therefore have to decide again on the applications from the channels within six months, taking the findings of the Conseil d'État into account. The decisions do not affect the outcome of the new examination by the CSA, which will take account of equilibrium in the advertising market in its deliberations. The CSA will also have to adapt its processing of all pending and future procedures to include an impact study, to ensure that the law is observed.

Conseil d'Etat (5e sect.), 17 juin 2015, LCI et Paris Première (2 espèces)

http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-17-juin-2015-societe-en-commandite-simple-La-Chaine-Info-LCI

Conseil d'État (5th section), 17 June 2015, LCI and Paris Première (two separate cases)

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