[FR] Playmédia/France TV: The Council of State passes several cases involving ‘must-carry’ requirements on to the CJEU

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Amélie Blocman
Légipresse

The dispute between Playmédia and France Télévisions will perhaps enable the Court of Justice of the European Union (CJEU) to clarify implementation of the ‘must-carry’ requirement. France Télévisions had called on the Conseil d’Etat (Council of State) to cancel the order issued by the national audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) to comply with the provisions of Article 34(2) of the Act of 30 September 1986 and to refrain from opposing its programmes being streamed and carried live by the company Playmédia on its website. France Télévisions claimed that the authority was exceeding its powers. The company, claiming it was a distributor of services within the meaning of Article 2(1) of the Act of 30 September 1986, held it was covered by the provisions of Article 34(2) of the Act, which entitled the broadcasting of programmes edited by the company France Télévisions. In support of its appeal against the CSA’s notice to comply on the grounds that the authority was exceeding its powers, the public-sector audiovisual group held that the conditions provided for in Article 31(1) of Directive 2002/22/EC were not met since it was not possible to assert that a significant number of Internet users used it as their principal means of receiving television broadcasts. It also held that the obligation to accept the broadcasting of its programmes on the Playmédia site would infringe its rights under intellectual property law. This was supported by a decision of the court of appeal in Paris in a decision on 2 February 2016, which had found the company guilty of unfair competition and infringement of copyright.

In its decision on 10 May 2017, the Conseil d’Etat, after recalling the terms of Article 31(1) on the ‘must-carry’ obligations contained in Directive 2002/22/EC on ‘universal service’ and Articles 34(2)(I) and 2(1) of the 1986 Act, stated that it was as a result of the combination of these provisions that the legislator had made provision for an obligation for certain television services that services distributors as defined were required to carry; these distributors may or may not be regarded as operators of electronic communications networks within the meaning of these Directives. Article 34(2) of the Act of 30 September 1986 does not repeat explicitly the conditions mentioned in Article 31(1) of Directive 2002/22/EC, and more particularly the condition that a significant number of final users of the networks subject to the broadcasting obligation must use them as their principal means of receiving radio or television broadcasts. It also follows from the

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provisions of Article 34(2) of the Act that the must-carry obligation incumbent on service distributors also requires the television services to accept such broadcasting, except where the distributor's offer of services is manifestly incompatible with respect for their public-service missions.

In light of these elements, the Conseil d'Etat found that the outcome of the dispute depended on the answers to five questions on the interpretation of the French legislation with regard to the Directive, which were specific to this case. Since they raise serious problems, the matter has been passed on to the CJEU.

Conseil d'Etat (5e et 4e sous-sect. réunies), 10 mai 2017, France Télévisions

Conseil d'Etat (4th and 5th sub-sections together), 10 May 2017, France Télévisions

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