# [FR] Conseil d'Etat clarifies scope of “must-carry” obligation of distributors of audiovisual services

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A decision taken by the Conseil d’Etat on 24 July 2019 finally ended a long-running dispute dating back to 2014 between the public broadcaster, France Télévisions, and the Playmédia company. Playmédia live-streams television programmes on its website (playtv.fr) and receives most of its funding from advertising. The Conseil d’Etat, referring to a judgment of the Court of Justice of the European Union (CJEU), explained the scope of the “must-carry” obligations of distributors of audiovisual services.

Article 34-2 of the Act of 30 September 1986 lays down a “must-carry” obligation requiring distributors of audiovisual services to “make available to their subscribers, free of charge”, terrestrially broadcast public radio and television channels. Claiming the status of a service distributor, Playmédia argued that these provisions entitled it to distribute the France Télévisions channels. However, this was disputed by the public broadcaster, which also live-streamed its channels on the site Pluzz.fr. Nevertheless, on 27 May 2015, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel – CSA), ordered France Télévisions to comply with the must-carry obligation by ceasing to oppose Playmédia carrying its programmes. France Télévisions then asked the Conseil d’Etat to cancel the CSA’s decision and, at the same time, sued Playmédia for unfair competition and piracy.

Faced with the difficult task of interpreting the notion of a “distributor of services”, which has no equivalent in Community law, the Conseil d’Etat submitted several preliminary questions to the CJEU. It pointed out that, under Article 31(1) of the Universal Service Directive (2002/22), member states could only impose must-carry obligations if there were a significant number of end-users of electronic communications networks who used them as their principal means of receiving television broadcasts. Under French law, meanwhile, must-carry obligations applied to “distributors of services” (whether they used electronic communications networks or not), without the conditions set out in Directive 2002/22 – including the reference to a significant number of end-users. Since the CJEU had issued its reply on 13 December 2018 (case no. C-298/17), the Conseil d’Etat ruled on the merits.

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In its judgment of 24 July 2019, it ruled that, under the CJEU's interpretation, Playmédia's activity was not covered by the must-carry obligation provided for in Article 31 of the Directive. However, the CJEU had also stated that the provisions of the Directive did not prevent a member state, in a situation such as that in the present case, from imposing a must-carry obligation on undertakings which, without providing electronic communications networks, offered the viewing of television programmes via live-streaming on the Internet.

Although Playmédia, through its activities, was a distributor of services within the meaning of Article 2-1 of the Act of 30 September 1986, the must-carry obligation enshrined in Article 34-2 of the Act only applied to services distributed to "subscribers". Referring to the preparatory work for the Act, the Conseil d'Etat considered that the notion of "subscribers" must mean users linked to the distributor of services in accordance with a commercial contract under which a payment is made.

In this case, in order to judge whether the condition laid down by Article 34-2 of the Act of 30 September 1986 concerning the distribution of the service to subscribers was met, the CSA noted that Playmédia's offer was partly aimed at users who "subscribe to a contractual undertaking by accepting the general conditions for use, and by indicating a number of items of personal information such as e-mail address, date of birth and gender". Since access to the service was offered free of charge, the Conseil d'Etat ruled that the CSA had wrongly applied these provisions. It accordingly annulled the CSA's decision ordering France Télévisions not to oppose Playmédia's carriage of its programmes.

### *Conseil d'État, 24 juillet 2019, N° 391519*

*Conseil d'Etat, 24 July 2019, no. 391519*

### *Arrêt n°640 du 4 juillet 2019 (16-13.092) - Cour de cassation*

*Court of Cassation judgment no. 640 of 4 July 2019 (16-13.092)*

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