

Decision n° 2009-577 of March 3rd 2009

Act pertaining to Audiovisual Communication and the New Public Television Service

On February 6th 2009, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Messrs Jean-Pierre BEL et al.... Senators, and on February 9th 2009 from Messrs Jean-Marc AYRAULT et al ... Members of the National Assembly

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution as worded pursuant to Constitutional Act n° 2008-724 of July 23rd 2008 pertaining to the Modernisation of the Institutions of the 5th Republic;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to Institutional Act n° 2001-692 of August 1st 2001 as amended pertaining to Finance Acts;

Having regard to the Institutional Act pertaining to the appointment of the Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services enacted by Parliament on February 5th 2009 and to Constitutional Council decision n° 2009-576 of March 3rd 2009;

Having regard to the General Tax Code;

Having regard to the Post Office and Electronic Communications Code;

Having regard to Act n° 86-1067 of September 30th 1986 as amended pertaining to Freedom of Communication;

Having regard to the observations of the Government registered on February 18th 2009;

Having regard to the observations in reply made by the Senators and members of the National Assembly making the referral, registered on February 25th 2009;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. The Senators and Members have referred for review by the Constitutional Council the Act pertaining to Audiovisual communication and the New Public Television Service and contend that sections 1,14, 28 and 33 thereof are unconstitutional;

- WITH RESPECT TO THE APPLICABLE NORMS OF CONSTITUTIONALITY

2. Article 11 of the Declaration of The Rights of Man and the Citizen proclaims : " The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law ". The free communication of ideas and opinions would not be effective if the public for whom such audiovisual communication is intended were not able to have at its disposal, in both private and public sectors, programmes guaranteeing the expression of varying schools of thought while respecting the essential requirement of honest news-gathering and communication. The ultimate goal to be attained is that listeners and viewers , who are among the fundamental beneficiaries of the freedom proclaimed by Article 11, should be able to freely make their choice without having imposed upon them decisions taken by private interests or public bodies;

3. Under Article 34 of the Constitution as worded pursuant to Constitutional Act n° 2008-724 of July 23rd 2008 : "Statutes shall lay down the rules concerning ... freedom, diversity and independence of the media". It is up to Parliament, within the framework of the powers vested in it by the constituent power, to lay down the rules governing both freedom of communication, which derives from Article 11 of the Declaration of 1789, and the diversity and independence of the media, which are objectives of constitutional status;

4. Parliament is at all times at liberty, when acting in those fields reserved for it by Article 34 of the Constitution, to modify or repeal previous statutes and replace the same, if need be, by other provisions, provided that such measures do not deprive requirements of a constitutional nature of statutory guarantees.

-WITH RESPECT TO ARTICLE 13

5. Section 13 of the statute referred for review modifies paragraph 1 of Section 47-4 of the Act of September 30th 1986 referred to above. This paragraph provides : "The Presidents of the companies France Télévisions and Radio France and the company in charge of France's external audiovisual services shall be appointed by Decree for a period of five years after a favourable opinion by the Higher Council on Audiovisual Matters and after consultation with the relevant Parliamentary Committees in accordance with the Institutional Act pertaining to the appointment of the Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services";

6. The parties making the referral argue that by transferring from the Higher Council on Audiovisual Matters, which is an independent administrative authority, to the President of the Republic the power to appoint the Presidents of the national broadcasting bodies, Parliament has failed to respect freedom of communication which derives from Article 11 of the Declaration of 1789, the constitutional objectives of diversity of schools of thought and opinions and, consequently, the new provisions of Article 34 of the Constitution. They also contend that by providing for a favourable opinion on the part of the Higher Council on Audiovisual Matters, the statute infringes the final paragraph of Article 13 of the Constitution whereby the relevant standing committee of each House has sole authority to give an opinion as to the posts listed in the Institutional Act provided for in said Article;

7. Firstly, when submitting the appointment of the Presidents of national broadcasting bodies to the procedure provided for in the final paragraph of Article 13 of the Constitution, Parliament, when passing the Institutional Act, intended, in view of the importance of said posts in guaranteeing rights and freedoms, that such appointments be made after consultation with those representing the Nation, after a public hearing and opinion;

8. Secondly, under section 13 of the statute referred for review, the appointments of Presidents of national broadcasting bodies may only be made after the giving of a favourable opinion by the Higher Council on Audiovisual Matters. These appointments thus cannot be decided upon without the agreement of this independent administrative authority;

9. Lastly, contrary to what is contended by the parties making the referral, recourse to the procedure provided for in the final paragraph of Article 13 of the Constitution does not preclude Parliament, mindful of the constraints of the Constitution and in particular the principle of the separation of powers, from laying down or adding rules governing the power of the President of the Republic to make such appointments in order to guarantee the independence of said bodies and thus contribute to the implementation of freedom of communication.

10. As is shown by the foregoing, section 13 of the of the statute referred for review does not deprive the constitutional requirements deriving from Article 11 of the Declaration of 1789 of the requisite statutory guarantees.

- WITH RESPECT TO SECTION 14

11. Section 14 of the statute referred for review amends paragraph 1 of section 47-5 of the Act of September 30th 1986. This paragraph provides : "The Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services may be removed from office by a Decree setting out the reasons for said removal, after a favourable opinion, also reasoned, from the Higher Council on Audiovisual Matters, delivered by a

majority of the members thereof, and after public consultation of the relevant Parliamentary committees in the same conditions as those provided for by the Institutional Act n° 2009-257 of March 5th 2009 pertaining to the appointment of the Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services ";

12. The parties making the referral argue that giving the President of the Republic the possibility of removing from office the Presidents of national broadcasting bodies infringes the principle of freedom of communication, the diversity of schools of thought and opinions and the new provisions of Article 34 of the Constitution;

13. Firstly, in order to ensure the independence of national broadcasting bodies, Parliament provided that the decision to remove from office the Presidents of said bodies would be dependent upon a favourable opinion from the Higher Council for Audiovisual Matters and a public opinion of the relevant Parliamentary Committees. However by allowing the Parliamentary Committees to exercise a right of veto with a three fifths majority of votes cast, whereas the final paragraph of Article 13 of the Constitution only permits such a veto in the framework of the exercising of the power of appointment vested in the President of the Republic, the abovementioned provision fails to take into account the scope of said Article and infringes the principle of the separation of powers. Thus the provisions whereby the Parliamentary Committees are to exercise their power to give a public opinion "in the same conditions as those provided for the Institutional Act pertaining to the appointment of the Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services" must be held to be unconstitutional;

14. Secondly, under section 14 the decision taken by the President of the Republic to remove the Presidents of national broadcasting bodies from office requires the giving of reasons to explain the need to terminate before due date the five year term of office provided for by statute. Removal from office requires a favourable opinion, which must also be reasoned, from a majority of the members of the High Council for Audiovisual Matters The grounds for such a decision are to be submitted beforehand for the public opinion of the relevant Committees of each House of Parliament and lastly, these grounds may, if need be, be challenged before the administrative courts with jurisdiction over such matters;

15. The foregoing shows that section 14 of the statute referred for review as worded subsequent to the criticisms set out in paragraph 13, does not deprive the abovementioned constitution requirements of statutory guarantees.

- WITH RESPECT TO SECTION 28:

16. 11° of I of section 28 of the statute referred for review rewords VI of section 53 of the Act of September 30th 1986 referred to above. It forbids the inclusion of commercial breaks other than those for goods or services presented under

unbranded names in national television programmes broadcast by France Télévisions between 8 p.m and 6 a.m the following day to begin with, then also between 6 a.m and 8 p.m once these programmes have ceased being broadcast by hertzian waves in analogical form;

17. The parties making the referral contend that these provisions are devoid of all normative scope insofar as the Board of France Télévisions has already decided to end commercial breaks between 8 p.m and 6 a.m as from January 5th 2009. They also claim that Parliament, by suppressing the revenue from advertising of France Télévisions without providing for any alternative source of funding to guarantee the independence of the public audiovisual service, has not availed itself to the full of the powers vested in it under Article 34 of the Constitution;

18. Firstly, banning commercial breaks in national TV programmes of France Télévisions, the consequence of which is to deprive this national company of a substantial amount of its revenue, must be considered as affecting the guarantee of its funding, which constitutes an element of its independence. 11° of I of section 28 of the statute referred for review, which is not devoid of normative scope, is thus the preserve of statute law;

19. Secondly, under the final paragraph of VI of section 53 of the statute of September 30th 1986 referred to above as worded pursuant to the statute referred for review "The implementation of paragraph I of VI shall give rise to financial compensation on the part of the State. In the conditions determined by each Finance Act, the amount of said compensation shall be allocated to the company mentioned in I of section 44". It is therefore incumbent upon each Finance Act, in accordance with the independence of France Télévisions, to fix the amount of the financial compensation due from the State to set off the loss of commercial revenue sustained by said company in order to enable it to perform the public service duties entrusted to it. With this reservation, Parliament has not failed to exercise fully the powers vested in it nor failed to comply with the requirements deriving from Article 11 of the Declaration of 1789;

20. With the reservation set out in the foregoing paragraph, section 28 of the statute referred for review is not unconstitutional;

- WITH RESPECT TO SECTION 33

21 I of section 33 of the statute referred for review inserts into the General Tax Code article 302 bis KH. It introduces for the benefit of the State a tax on operators of electronic communications, calculated on the amount, before VAT, of subscriptions and other payments made to these operators by users in return for the electronic communication services they supply;

22. The parties making the referral argue that this new tax infringes the principle of equality before taxation insofar as the activity of operators of

electronic communications is unconnected with the funding of public audiovisual services. Based on the turnover of said companies, this tax does not reflect their contributive capacity. Since the proceeds of this tax have not been allocated to France Télévisions, it is not justified by any general interest other than that consisting in having a specific private sector finance public sector expenditure;

23. Firstly Article 34 of the Constitution provides : " Statutes shall determine ...the base, rates and methods of collection of all types of taxes....". Section 6 of the Institutional Act of August 1st 2001 referred to above provides that "The budgetary income and outgoings of the State are set out in the budget as revenue and expenditure. The budget specifies for one year all budgetary revenue and expenditure of the State. Each item shall be entered in full and no set off shall be made between revenue and expenditure.."

24. Parliament was at liberty, when having the budget of the State compensate for the loss of advertising revenue by the group France Télévisions, to introduce a new tax intended to increase the revenue of the budget of the State to meet this commitment. It was under no constitutional or institutional requirement to depart from the abovementioned principles of budgetary unity and universality by allocating the proceeds of this tax to a specific item;

25. Secondly, Article 13 of the Declaration of 1789 proclaims "For the maintenance of the forces of law and order and administrative expenses a general tax is indispensable and shall be equally borne by all citizens in proportion to their ability to pay the same". Under Article 34 of the Constitution it is up to Parliament to determine, taking into account constitutional principles and the nature of each tax, to lay down the rules for appraising the ability of each citizen to pay taxes. In particular, to comply with the principle of equality, this appraisal must be based on objective and rational criteria in view of the purpose it is sought to achieve. This appraisal must not however lead to any clear infringement of the principle of equality before public burden sharing;

26. Firstly, all electronic communications operators, within the meaning of Article L 32 of the Post Office and Telecommunications Code, supplying services in France and having duly registered with the Authority for regulating electronic communications and postal services pursuant to Article L 33-1 of the same Code, will be required to pay this new tax. When thus defining the category of companies required to pay said tax, insofar as said companies differ from other companies in particular because of the specific nature of their business and the manner they carry it on, Parliament based its decision on objective and rational criteria directly connected with the purpose it was sought to achieve;

27. Secondly, this tax is calculated on the amount before VAT of subscriptions and other payments made to these operators by users in return for the electronic communication services they supply. Certain amounts paid by operators for services such as access and interconnections, for the supply or distribution of audiovisual communication services and the use of universal directory enquiries

services are excluded from the tax computation base. In addition depreciation allowances covering at least ten years for material and equipment necessary for electronic communication infrastructures and networks are also deducted from this base. A deduction of five million euros, designed to preserve new operators in this rapidly growing sector, is also made from the computation base. In view of all the foregoing provisions, neither the fixing of the computation base for this new tax, nor the fixing of the rate thereof at 0.9% can be considered as being a patent infringement of the principle of equality before public burden sharing;

28. In consideration of all the foregoing, section 33 of the statute referred for review is not unconstitutional.

- WITH RESPECT TO SECTION 25

29. Section 25 of the statute referred for review amends section 48 of the Act of September 30th 1986. In particular indent 2 of 3° of this section inserts a third indent whereby "All new terms of reference and conditions shall be transmitted to the Committees in charge of cultural matters in the National Assembly and the Senate. Where the company in charge of France's external audiovisual services is concerned, any new terms of reference shall also be transmitted to the Foreign Affairs Committees of the National Assembly and the Senate. The Committees may give their opinion as to said terms of reference with a period of six weeks".

30. Article 16 of the Declaration of 1789 proclaims : " Any society in which no provision is made for guaranteeing rights or for the separation of powers has no Constitution". The Constitution vests the Government and Parliament with powers specific to each of them;

31. The first indent of section 48 of the Act of September 30th 1986 provides that the terms of reference are "fixed by Decree". They are thus of a regulatory nature. Indent 2 of 3° of section 25 of the statute referred for review thus has Parliament intervene in implementing a power to make regulations and as such must be held to be unconstitutional;

- WITH RESPECT TO SECTION 30:

32. Section 30 of the statute referred for review, which amends I of Article 1605 of the General Tax Code and VI of section 46 of Finance Act n° 2005-1719 of December 30th 2005 pertaining to the finances of 2006 firstly excludes as from January 1st 2010 from the beneficiaries of the audiovisual licence fee the public interest group "France Télé Numérique" and secondly, suppresses the corresponding entry in the mission " Advances to the audiovisual sector";

33. In 3° of I of section 34, the Institutional Act of August 1st 2001, to which reference is made in Article 34 of the Constitution, reserves for a Finance Act the

laying down of all provisions for the allocation of revenue within the budget of the State;

34. When excluding the public interest group "France Télé Numérique" from the beneficiaries of the audiovisual licence fee and deleting an entry from a financial support account, section 30 of the statute referred for review modifies the appropriation of this licence fee and thus encroaches upon the field exclusively reserved for Finance Acts. It must therefore be held to be unconstitutional;

35. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - The following provisions of the Act pertaining to Audiovisual Communication and the New Public Television Service are unconstitutional :

- in the 2nd paragraph of section 14, the words "in the same conditions as those provided for by the Institutional Act n° 2009-257 of March 5th 2009 pertaining to the appointment of the Presidents of the companies France Télévisions and Radio France and of the company in charge of France's external audiovisual services"
- indent 2 of 3° of section 25
- section 30

Article 2 - Sections 13, 28 and 33 of said statute and the remaining part of section 14 thereof, subject to the qualifications set out in paragraph 19 above, are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on March 3rd 2009 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Mr Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.

