



Withdrawal of a French DDT TV channel broadcasting licence: French audiovisual regulator fights back

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In France since 2005, digital terrestrial television (DTT) has become the norm of transmission technology for TV channels, using DVB-T transmission technology and advertising to the audience a larger offering of programmes and of broadcasters. *Conseil supérieur de l'audiovisuel* (known as the CSA, the equivalent of the

Federal Communications Commission (FCC) in the United States or the Office of Communication (OFCOM) in the United Kingdom) is an independent agency, distinct from the French government, entitled to regulate various electronic media in France, such as radio and television, and to that extent to grant the available free TV licences that were needed to operate DTT channels.

To that extent, the CSA organised back in 2012 a call of tender concerning the attribution of available DTT frequencies for six national DTT HD channels, such frequencies being considered as public limited resources. The CSA auditioned every applicant including Diversité TV which was advertising a selection of TV programmes focused on diversity and

minority communities. On 27 March 2012, based on a full application file provided by the said new company, including corporate and shareholders' description of the applicant, formal business plan for the first five years of exploitation of the channel, as well as a description of the content of the programmes, the CSA confirmed that Diversité TV's project was selected as one of six new DTT HD channels.

On 3 July 2012, Diversité TV signed a formal convention with the CSA in order to operate under a proper broadcasting licence (the 'Convention') that would become the Numéro 23 channel.

By unilaterally withdrawing the Numéro 23's broadcasting licence on 15 October 2015, the formal decision of the CSA General Assembly was a significant event that stunned the TV broadcasters small community. Back in June 2015, the CSA had already formally notified Diversité TV of sanction proceedings, while they had just requested from the CSA an approval for a record-high shares transfer deal that had been negotiated with NextRadioTV Group – a French private media group operating radio, news TV channels and online websites, now controlled by Numericable/SFR Group – for over €88m.

To understand the magnitude of the CSA's sanction and its impact on the French market, one must examine the precise wording of the consolidated broadcasting licence of 3 July 2012. It incorporated strong commitments negotiated between the operator and the CSA in terms of both capitals' structure, funding of the early years of operation under the related business plan, as well as content workload and a TV channel programming plan. As such, and under Article 4-1-1 of the Numéro 23's Convention – 'Changes in share ownership' – it was clearly stated that any further capital distribution change shall be first notified to the CSA for an opinion and the final green light of the independent audiovisual regulator before closing the operation. Indeed, under the French 1986 Audiovisual Act (known as Act No 86-1067 on Freedom of Communication, dated 30 July 1986), the CSA is entitled to exercise a strict

control over both the TV editor/operator's attempts of modification of its share capital and of modification of its programming commitments.

When Numéro 23 started broadcasting in early 2013, Diversité TV was an SAS (simplified joint-stock company) with a registered capital of only €11,765. A few months later, its management brought a Russian partner UTH into its capital up to 15 per cent of the global available stock. Through a shareholders' agreement, Diversité TV committed itself to a quick sale of its whole share capital for the benefit of the best offering third party (and by extension to the benefit of all its existing shareholders, including the Russian company). Unfortunately, under the Convention with the CSA, Diversité TV had formally accepted to refrain from any change of control for a period of two-and-a-half years from initial broadcasting of Numéro 23; that is to say at least not until 6 January 2015. It seems that the shareholders' agreement signed with the Russian company was indeed neither disclosed nor submitted on time to the CSA, in any case not in the months following the effective entrance of UTH into the share capital of Diversité TV. It effectively took place only two months after the formal request for the change of control over Diversité TV, who notified the CSA on 9 April 2015 and the effective public announcement of the contemplated acquisition of a 100 per cent stake in the Diversité TV's share capital by NextRadioTV.

The CSA took umbrage of such regulation free behaviour and initiated a formal disciplinary proceeding against Numéro 23. In its findings, the CSA underlined that the main shareholder had primarily 'sought to enhance for his own benefit the authorisation that he had obtained [from the CSA] for the purpose of a quick sale'. Indeed, according to the CSA, the amount of the agreed sale price did not reflect at all either the effective turnover or existing revenue of the channel nor its heavy losses. It was completely out of its expected business plan which had been submitted to the CSA at the time of the negotiation of the Convention. It was describing a stable funding, programming and full ownership structure until 2019.

In other words, Diversité TV would have sought to mislead the CSA by wanting to simply get an immediate benefit and a direct profit from the *ex gratia* granting of a broadcasting frequency under the French

audiovisual regulation. In order to give further weight to the October ruling, the CSA also took time to stress that Diversité TV had not fulfilled its conventional commitments, notably for programmes, which had led the CSA to allegedly send numerous warnings and formal official notices to the broadcaster in order to encourage it to modify its behaviour and programming.

In view of the broadcasting licence granted under the Convention, one observes that the CSA has implemented the maximum penalty provided for by Article 42-1 of the 1986 Audiovisual Act although the Convention did not mention explicitly such a said sanction. It is probably in relation to what was described in the CSA ruling as a fraudulent abuse of right by the operator, and in blatant violation with the objectives of the existing regulation, that CSA has resorted to the heaviest penalty laid down by law. Most likely this is an attempt by the French independent audiovisual agency to clearly indicate, with a firmness that has probably been lacking in recent years, to the operators of a more and more concentrated TV market that it intends to exert its function as a fully-fledged regulator and 'watchdog' of the audiovisual sector.

To that extent, one may remember that the CSA had been highly criticised when back in September 2012 it had made no specific comments on the sale of Bolloré Media Group DDT free channels D8 and Direct Star and that the French Conseil d'État [the supreme administrative court], acting on a claim raised by both main free TV private TV channels TF1 and M6, had cancelled the CSA's authorisation on the deal, forcing the parties to renegotiate the said authorisation with the independent agency.

Concerning the pending case, the CSA has nevertheless stated in its recent ruling that the termination of the audiovisual licence will not take effect before 30 June 2016. This is probably one way to allow Diversité TV to comply with the existing Convention, and as part of an amicable administrative appeal which the CSA could consider. This does not close the door for Diversité TV to fight back with a formal litigation appeal proceeding before the *Conseil d'État* which may lead to an upcoming decision at the beginning of next year.