

Greece, Council of State, Case 1901/2014 (Supreme Administrative Court)

Deciding bodies and decisions

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Area of law

Freedom of expression -media freedom

Subject matter

What is the role of public media broadcaster in ensure media pluralism?

Summary Facts Of The Case

The case concerns an action for annulment, lodged by POSPERT - the Pan-Hellenic Federation of Public Radio and Television Employees, that is, ERT's trade union - and its president, against Decision 02/11.6.2013 of the Deputy Minister to the Prime Minister and the Minister of Finance of 11/6/2013 (FEK B 1414) on the "Abolition of the public undertaking "Hellenic Broadcasting Corporation", Public Limited Company (ERT SA)". The joint ministerial decision abolished ERT and its subsidiaries; provided for the interruption of the transmission of radio and television broadcasting, of the publishing, of the operation of websites and of any other activity of ERT after the end of its programme of 11/6/2013 until the establishment of a new PSB in the public interest, with due respect for the principles of transparency and good management; and ordered that ERT's frequencies should remain inactive until the creation of such a new PSB.

On 17 June 2013, the President of the Council of State, by means of a temporary injunction, ordered the partial suspension of the joint ministerial decision. This was confirmed by Decision 236/20.6.2013 of the Suspensions Committee of the Council of State, which was issued following a suspension petition by POSPERT and its president. The Decision ordered the suspension of the joint ministerial decision exclusively with regard to the interruption of the transmission of radio and television broadcasting by ERT, the interruption of the operation of its websites and the inactivity of its frequencies. The Decision also ordered the Minister of Finance, the Deputy Minister to the Prime Minister and the special liquidator to take all necessary organizational measures, including the hiring of personnel, for the broadcasting by an interim public organization, as soon as possible, of the necessary radio and television programs and the operation of websites until the establishment and operation of a new PSB.

On 10 July 2013, a transitional operator "Hellenic Public Radio and Television" started program transmission.

On 26 July 2013, Law 4173/2013 on the new public service operator was published.

The Council of State (CS) started its FR reasoning by interpreting relevant constitutional

provisions. The provisions of Article 14(1) and (2) Const. guarantee freedom of expression. A basic manifestation of free speech is considered to be the right to disseminate news, comments and opinions through the press, radio and television (right to inform). The same constitutional provisions, read in conjunction with Articles 5(1) (free development of personality) and 5A(1) (the right to information) Const. guarantee the right of everyone to be informed regularly and freely from any available source on any matter of interest (right to be informed). According to the CS, the above mentioned provisions, together with Article 10 ECHR, safeguard the freedom to inform and to be informed as a prerequisite for the free development of one's personality and a constituent element of the democratic system.

As regards radio and television broadcasters, the constitutional legislator, having regard to the wide scope, immediate effects and power of influence they have, has determined, in Article 15(2) Const., that their operation falls under the direct control of the State. This direct control involves both the granting of licences and ensuring that broadcasters' operation serves certain public interest objectives such as the objective and on equal terms transmission of information, news, products of speech and art, the quality of the programs in correspondence with the social mission of radio and television and the cultural development of the country, respect for the value of the human being and the protection of childhood and youth. Licensing responsibilities as well as the supervision of public interest objectives and the imposition of sanctions are granted to an independent authority, the "National Council of Radio and Television (NCRT)". Furthermore, Article 14(9) Const. provides for the adoption of laws on the disclosure of ownership, financial situation and means of financing the media and for the adoption of measures and restrictions necessary to ensure full transparency and pluralism in information. It also states that the concentration of the control of more media of the same or another type is prohibited.

Pursuant to Articles 5(1), 5A(1), 14(1)-(2) and (9) and 15(2) Const., the State is the ultimate guarantor of the functioning of the broadcasting sector and of pluralism. The State (i.e. the legislative and executive branches and the NCRT as an independent regulatory authority) has the positive obligation to take all necessary measures (legislative, administrative, procedural, substantive, etc.), including the imposition of administrative sanctions, to ensure that the universal provision of radio and television broadcasting services is in line with constitutional values, the principle of transparency of media ownership, the media's financial situation and funding, as well as the rules preventing ownership concentration, at the same time refraining from interfering with the content of the broadcasting organisations' programs. However, according to the CS, the aforementioned constitutional provisions do not impose a duty on the state to ensure the operation of a PSB. The legislator is entitled to decide, taking into account the financial situation of the State at any given time, whether or not it is necessary and feasible to establish a public service media organisation, with a view to guaranteeing the effective implementation of the constitutional provisions on radio and television. If a public broadcasting organisation is indeed established, it must have a pluralistic structure, be organised in ways that preclude political pressure from government and political parties and operate on the basis of the principles of objectivity, independence and pluralism.

Against this background, the CS rejected the applicants' argument that the joint ministerial decision should be annulled for breach of Article 15(2) Const. Although the applicants argued that Article 15(2) Const. should be interpreted as safeguarding the uninterrupted, continuous operation of the PSB, the CS took the position that Article 15(2) Const. did not require the establishment of a public broadcasting body. The position of the CS was influenced by the fact that ERT's abolition, besides being driven by budgetary considerations, was also aimed at establishing a new public broadcasting body and that the law providing for such a new body (Law 4173/2013) had been published shortly after ERT's shutdown (on 26/7/2013); that a transitional public broadcaster (Hellenic Public Radio and Television) had begun to operate (and would do so until the operation of the new public service entity); and that the operation of both the nation-wide and local private

broadcasters in Greece continued without problems, under the supervision of the NCRT. One of the other grounds put forward for the annulment of the contested joint ministerial decision was breach of Article 11 CFR on freedom of expression and information as well as breach of Protocol no 29 to the TFEU “on the system of public broadcasting in the Member States”. For the applicants, these provisions secured the existence and operation of ERT SA as the public service operator in the field of broadcasting.

Having referred to the relevant provisions, the CS declared that the competence to establish and organize a system of public broadcasting rests with the Member States; it is not governed by EU law. In particular, the CS interpreted the provisions of Protocol no 29 as authorizing the financing of public service broadcasting on condition that the Member State concerned has indeed chosen to set up a public service operator, underlining that Protocol no 29 does not oblige the Member States to introduce a system of public service broadcasting. In relation to the CFR, the CS held that in accordance with Article 51 CFR, the provisions of the CFR, and thus also Article 11 CFR, govern the actions of the Member States only when they apply Union law; they do not concern purely internal policy measures.

On this basis, the CS rejected the plea that the contested act should be annulled for breach of Protocol no 29 and of Article 11 CFR.

Another ground advanced for the annulment of the joint ministerial decision was infringement of Article 10 ECHR. This was also considered by the applicants to protect the existence and operation of ERT SA as the public service broadcasting provider. The CS declared that Article 10 ECHR should not be construed as obliging the contracting states to establish a public broadcaster where there are other means to ensure the quality and balance of programs. Considering that in Greece there were other media organizations that ensured the quality and balance of programs through the operation of a large number of private broadcasters under the control of an independent authority (the NCRT), the abolition of ERT SA (which was moreover intended to lead to the establishment of a new public service broadcaster) was not a violation of Article 10 ECHR.

Relation to the scope of the Charter

The CFR and in particular Articles 11 and 51 CFR have been mentioned and discussed by the CS because breach of Article 11 CFR was put forward as an argument for the annulment of the contested joint ministerial decision on the abolition of ERT SA.

The CS considered ERT’s closure to be a purely internal measure and rejected the argument about breach of Article 11 CFR as unfounded. It did not however rule on whether or not Article 11 CFR guarantees the existence and operation of a system of public service media.

Although the CS did not rule on whether or not Article 11 CFR guarantees the existence and operation of a system of public service media, it did so in relation to Article 10 ECHR. It held that Article 10 ECHR does not impose a requirement on states party to the ECHR to establish a public service broadcaster if there are other means to ensure balanced and quality programming.

It is also worth mentioning that when presenting the constitutional and legal framework concerning the right to free speech and information (thus before the examination of the grounds advanced by the applicants for the annulment of the contested decision), the CS referred to the relevant constitutional articles, in conjunction with Article 10 ECHR, but it did not mention Article 11 CFR.

Sources - EU and national law

Art 11 and 51 CFR

Protocol no. 29 to the TFEU on the system of public broadcasting in the Member States

Sources - ECtHR Case Law

Manole and Others v. Moldova, of 17 September 2009
