

SOME FACTS ABOUT FLEXIBLE RESPONSE

Origin of the expression “flexible response”

The expression "flexible response" originally designated the strategy of nuclear response established by Robert McNamara during the cold war, a strategy that was one of the reasons for general De Gaulle to decide that France would leave the NATO.

The first time this term was used in a European assembly to designate a strategy to fight against the exchange of music and film files over the Internet was in December 2005 by Renaud Donnedieu De Vabres, the Culture Minister of the previous French government. It was during the debate on law proposal called DADVSI for the implementation of the directive 2001/29EC. (DADVSI is the French acronym for the law “on authors' rights and related rights in the information society”, the law implementing the 2001 European Copyright Directive).

The purpose of this legislative project

The purpose of this project is to authorise the producers to perform large scale scans of the Internet for copyright infringements, and to oblige the providers to cooperate with those companies, supervised by an administrative authority, in particular to enforce sanctions against internet users suspected, all this without intervention of a judicial authority.

The sanctions considered by the entertainment industries that drive this project vary from filtering content to access cut-off for a year, plus fining, while criminal prosecution is still possible.

A project rejected in France

In December 2005, several elements of this project have been rejected by the French National Assembly. The French parliament members decided that bypassing a judicial authority for the purpose of intercepting communication and large scale data storage of presumed trespassers by private companies was obviously disproportional.

In July 2006, the French Constitutional Council (*Conseil Constitutionnel*) considered that the establishment of two parallel sanction systems for counterfeiting - on the one hand leading to summons, on the other hand to string punishments - violated the principle of legal equality.

In April 2007, the French criminal law professor Jean Cédras, formerly judge at the French Supreme Court (*Cour de Cassation*), published a report commissioned by Minister Renaud

Donnedieu De Vabres. This report emphasised that guilt could not be established at a distance. Professor Cédras concluded that *“the idea of an automatic flexible response, however attractive it may seem [for the minister and for the record and film industry] therefore should be abandoned.”* The minister subsequently tried to hush up this report.

In September 2007, Marc Lefur, vice-president of the National Assembly, member of the presidential majority, published a communiqué titled *“Report Olivennes: no to the law of exception!”*, opposing against the flexible response advocated by the mission led by Denis Olivennes, at the time president of the FNAC (principal distributor of CDs and DVDs in France).

“This transfer of competence from the courts to an administrative authority leads to the creation of a true exception jurisdiction for downloaders that violates the principle of equality before the law and the courts, fundamental principles of the laws of the French Republic”.

In January 2008, the Commission for French Freedom and Growth (*Commission pour la Libération de la Croissance française*), presided by the former president of the European Bank for Reconstruction and Development, Jacques Attali, uniting personalities of various backgrounds, including European Parliament members, submitted its report to Nicolas Sarkozy. On page 62 it reads:

“The establishment of individual control mechanisms (general filters, facilities to monitor exchanges) could constitute a major inhibitor to the growth of this key sector [ICT]. Even under the supervision of an independent authority or a court, such mechanisms would introduce a monitoring such that private life and individual freedoms would be affected, completely contrary to the requirements of the creation and the true nature of a digital economy”.

A project rejected in Europe

In March 2008, the Swedish Ministers of Justice and Culture have rejected the new French model based on the threat of discontinuation of Internet access, explaining in a communiqué that: *“Many have noted that the discontinuation of an Internet subscription is a measure with strong effects that may have a severe backlash on a society where internet access is an absolute need for participation in society.”*

On 10 April 2008, the European Parliament also condemned the flexible response, at the time supported by the French Minister Christine Albanel. MEPs adopted an amendment to a resolution on the entertainment industries, submitted by rapporteur Guy Bono, supported by deputies from all sides. This amendment requires the member states *“to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access”.*

The cabinet of the French Minister of Culture then explained that the members of the European Parliament were “*off-topic*”, and the minister herself declared to the press: “*The European Parliament does not properly understand what we are going to do, and we will explain it to them. The system is not based on repression.*”

Michel Rocard, member of the European Parliament and former French Prime Minister, co-signatory of the amendment, answered in the press to these proposals: “*The potential cut-off from the Internet is a collective punishment, something that is forbidden by all legal systems. The letter of the text is clear, and there is no sophistic problem of understanding behind. We can read and that is sufficient.*”

A civil resistance, plural and international

After the vote of the European parliament, but also facing the growing opposition from associations defending civil freedoms, consumer unions and, recently, from trade unions and web companies, the French government has delayed *sine die* the debate on his draft law without mentioning a new date.

Fundamental rights advocates from France, Germany, Sweden, Finland, Denmark, Spain, United Kingdom and the United States, fully conscious of the objectives pursued by the industries, mobilised themselves to prevent that France would become the first country in the world implementing the flexible response.

The French collective « *La Quadrature du Net* » (Squaring the Net) thus obtained the support of fifteen French, European and international NGOs, who are afraid that France, the country which was first to adopt human rights in history would be used as a Trojan Horse by the entertainment industry, which is very influential in this country.

Very recently, the Spanish syndicate COMFIA, which represents 100 000 employees in the banking, insurance and IT sector, member of the powerful syndical federation *Comisiones Obreras*, joined the list of opponents against the flexible response. A public prosecutor from Madrid also submitted a statement supporting the French collective, saying: “*We see – and we enjoy – how citizens in France react to the flexible response, that would create a legal exception mechanism that would eventually deprive the individual from his right to electronic communication.*”

Finally the ASIC association, who unites web players such as Yahoo, Google, Dailymotion declared that it has sent a note to the Prime Minister and the Ministers of Culture and Justice in France. Excerpts of the note that became public show that these industries agree with the analyses of the parliament members, the judges and the associations for the risks for the freedom of communication, private life, due process of law, ...

Will the flexible response be rushed through during the French presidency?

The increasing attention of the media for this dossier apparently prohibited France from adopting the flexible response before summer – as the popularity of Nicolas Sarkozy is too weak to exert more pressure in this country. But the industries still think to be able to benefit from the French presidency of the European Union that starts on the first of July to get the flexible response adopted at the European level. This is demonstrated by a bunch of amendments that tries to “pirate” the Telecom Package.

In fact Nicolas Sarkozy is an indefatigable defender of the flexible response. He has defended it from the beginning, when he was only the president of the UMP party (french right wing). He promised it in public to the entertainment industry during the campaign for his presidency. Subsequently, he has presented it as a tool for his “*civilisation policy*” (*politique de civilisation*). He has even appointed Renaud Donnedieu De Vabres as ambassador in charge of the cultural dimension of the French presidency.

Will the only former minister of European affairs who became minister of culture after being condemned for money laundering succeed to convince the members of the European Parliament, while he failed in 2005 to convince the French deputies of the appropriateness of the flexible response ?