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# The promotion and protection of diversity in European communication legislation

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### Abstract

This article offers a look at European and Spanish legal regulations in the area of audiovisual media services and electronic communications, to establish what “use” is made of the concept “diversity”. It concludes that, as a keyword, it functions from the pragmatic point of view as an a priori concept that is recognised by society and that justifies the adoption of restrictive market measures in favour of general interest. In the community regulation on electronic communications, it goes no further than being a declaration of intentions, whilst the Spanish regulation does not contain a single reference to diversity. With respect to audiovisual media services, diversity is also handled in the European regulation as a restrictive criterion of freedom of action of providers, although its specification is left in the hands of the Member States.

### Keywords

Diversity, audiovisual, electronic communications, regulation, European Union, Spain.

### Resum

L'article ofereix un recorregut per la normativa legal europea i espanyola en l'àmbit de la comunicació audiovisual i de les comunicacions electròniques, amb la finalitat de constatar quin és l'ús que es fa del concepte de diversitat. Es conclou que aquest, com a paraula clau, funciona des del punt de vista pragmàtic com un a priori que es reconeix en la societat i que justifica l'adopció de mesures restrictives del mercat en favor de l'interès general. En la normativa comunitària sobre comunicacions electròniques no passa de ser una declaració d'intencions, mentre que en l'espanyola no hi ha ni una sola referència a la diversitat. Pel que respecta als serveis de comunicació audiovisual, la diversitat es maneja també en la normativa europea com un criteri restrictiu de la llibertat d'acció dels prestadors, si bé la concreció es deixa en mans dels estats membres.

### Paraules clau

Diversitat, audiovisual, comunicacions electròniques, regulació, Unió Europea, Espanya.

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“Today, everybody wants to be different from the rest. However, in this wish to be different, they are the same.”

Han Byung-Chul

### Introduction

In the communication context, the concept of “diversity” (or to be more exact, of “diversity of offer”) is related to the multiplicity of stakeholders that intervene in the value chain (production, distribution, dissemination) from the point of view of its ownership, size or geographic origin. However, it is also related to the presence in the content of a multiplicity of

perspectives and social groups with criteria of variety, balance and disparity.<sup>1</sup>

UNESCO, on the event of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>2</sup> defines “cultural diversity” as “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.” It also states that “Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is

expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used”.

The convention also covers a fundamental aspect for the legitimization of diversity: that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”.

In the European Union, community literature refers to “cultural and linguistic diversity” in a wide variety of documents, with the reference given in the European Union Treaty in the framework of establishing a single market, in article 3.3. being paradigmatic:<sup>3</sup>

“It [the Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”

This article aims to take a look at the European legal regulation, as well as the Spanish one, in the area of audiovisual media services and electronic communications, to verify what “use” is made in this regulation of the concept “diversity”.

### Diversity in the Directive on electronic communications

The updating, in 2009, of the so-called “Telecoms Package” and, more specifically, of the 2002 Framework Directive on electronic communications,<sup>4</sup> represented a consolation of the taking into account of criteria of general interest in the regulation of the convergent society, such as the case of so-called “net neutrality”. Nevertheless, there is not a similar conceptual development with respect to diversity. As this regulatory framework carefully avoids extending the regulation of electronic communications to the field of content, the references to diversity show a clearly mechanistic label, in which this concept is clearly associated to technological development.

The 2009 Directive, in its recital 24, refers to the need to gradually withdraw the obstacles that prevent the efficient use of the radio spectrum from an economic and environmental point of view, as well as a social one, taking into account “the objectives of cultural diversity and media pluralism, and of social and territorial cohesion”.

These objectives to promote cultural and linguistic diversity and media pluralism, defined in keeping with Community Law, are also mentioned as suppositions that can justify the adoption of certain measures in the regulation of use of the radio spectrum and of access to certain services (recital 36). These measures, in any case, are at the discretion of the Member States (recital 37).

To the same end, article 9.4.d of the Directive refers to “the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services” as a reason of general interest to assign the providing of an electronic communications service on a specific available bandwidth.

Along the same lines, the Digital Single Market Strategy<sup>5</sup> states, in part 2.4, that “Europe needs a more harmonised copyright regime which provides incentives to create and invest while allowing transmission and consumption of content across borders, building on our rich cultural diversity. To this end, the Commission will propose solutions which maximise the offers available to users and open up new opportunities for content creators, while preserving the financing of EU media and innovative content.”

However, it should be mentioned that the regulatory framework that governs electronic communications in Spain, the Information Society Services Law (LSSI,<sup>6</sup> does not mention the term “diversity” at any time.

### Diversity in the European audiovisual environment

The references to diversity found in a clear away in European legislation, specifically audiovisual or, better said, television.

The European Audiovisual Media Services Directive, in its 2010 consolidated version,<sup>7</sup> states in its recitals:

- In the light of new technologies in the transmission of audiovisual media services respect for cultural and linguistic diversity should be guaranteed (4).
- In line with the UNESCO Convention and what is also established in community literature from its origins, audiovisual media services are economic services as well as cultural services and, as such, they are important to guarantee freedom of information, diversity of opinion and media pluralism (5).

Recital 6 refers to article 167, part 4 of the Treaty on the Functioning of the European Union,<sup>8</sup> which obliges the Union to take the cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of European cultures.

- That the Member States must watch over not just the free circulation of television broadcasts, but also prevent the creation of dominant positions which would lead to restrictions on pluralism and freedom of information (8).
- That European regulating policies in the audiovisual sector must safeguard certain public interests such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection, and to increase media literacy (12).
- That the Directive does not affect the responsibility of the Member States and their authorities with regard to the content of programmes, so as to preserve the independence of cultural development in the Member

States, as well as cultural diversity of the Union (19).

- That it is essential to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised in article 11 of the Charter of Fundamental Rights of the European Union<sup>9</sup> (48).
- That on-demand audiovisual media services should, when practicable, promote the production and distribution of European works and thus contributing actively to the promotion of cultural diversity (69).

In its enacting part, the Directive reiterates in article 13 that on-demand audiovisual media services must promote, where practicable, and by appropriate means, the production of and access to European works, with the aim of cultural diversity. More specific are article 16 and 17, which establish that, whenever possible, broadcasters shall reserve for European works a majority proportion of their transmission time of fiction and 10% for European works created by producers who are independent of broadcasters with a suitable proportion of recent works (five years).

After the impact studies ordered by the Commission, which include aspects regarding cultural diversity, the proposal for the modification of the Audiovisual Media Services Directive,<sup>10</sup> which was in the processing phase when this article was written up, refers to recital 33 and article 30.2 in which activities of national regulatory bodies (a figure that it aims to notably boost with the new regulation) must guarantee respect for the objectives of media pluralism, consumer protection and cultural diversity.

Recital 38 mentions cultural diversity as an objective of general interest, together with media pluralism and freedom of speech.

And in article 13.1 of the proposed amendment, it specifies that on-demand audiovisual media service providers<sup>11</sup> should have at least 20% of European works in their catalogue, and ensure prominence of these works.<sup>12</sup>

In article 13.2, the Directive contemplates that Member States may require providers of on-demand audiovisual services to contribute financially to the production of European works, for example via direct investment in content and contribution to national funds, not only to the providers of on-demand audiovisual media services under their jurisdiction, but to on-demand audiovisual media service providers aimed at the public in their territory, even though they may be established in other Member States.

### The diversity of television offer in Spanish legislation

The Spanish General Audiovisual Media Law (LGCA)<sup>13</sup>, which incorporates the previously mentioned Audiovisual Media Services Directive into Spanish law, proposes television, radio and interactive service diversity as a requirement of the content offered to satisfy the rights of the “public”, in other words, “the

diverse interests of society.”<sup>14</sup>

This diversity of offer is associated (article 4) to the multiplicity of models of provision of service; with ideological, political and cultural pluralism, fundamentally with respect to sources of information and of opinion regarding current affairs, and with the variety of contents from the point of view of genre and formats.

Therefore, in the regulations we find partially different ones for the distinct audiovisual media services, depending on whether they are television or radio: private, public or community; open or with conditional access; linear or on-demand. Different regulations which, from the diversity perspective, involve specific requirements, depending on whether we are talking about one or another technological-legal model of service provision.

### Broadcasting and financing of content obligations

However, diversity is specified in the LGCA, not only as a generic right of the public that audiovisual communication should reflect their culture and own languages (article 5.1). A series of appraised obligations of support to the European and independent audiovisual industry are also established that already appeared in the previously-mentioned community regulations, but which in national legislation are detailed in a more exhaustive way (article 5.2).

With respect to open linear television:<sup>15</sup>

- 51% of the annual broadcasting time of each channel is reserved for European works.<sup>16</sup>
- Half this share (25.5%) is reserved for European works in any of the Spanish languages.
- 10% of the broadcasting time is reserved for contents from independent service provider producers.
- Half (5%) of this is for contents produced in the last five years.

With respect to nonlinear or on-demand television audiovisual media services,<sup>17</sup> providers must reserve 30% of their catalogue for European works. Of this, half of them (15%) must be European works in any of the official languages of Spain.

It also contemplates another complementary measure to guarantee the diversity of offer through the strengthening of the audiovisual industry as a content provider: the obligation of economic contribution to the production of audiovisual works by television audiovisual media service providers, whether through direct participation in this production or through the acquisition of their exploitation rights.

In the case of private providers, whether of Autonomous Community or State coverage, this obligation refers to allotting 5% of the income yielded in the previous financial year in keeping with up its running account, corresponding to the channels on which these audiovisual products are broadcast and with less than seven years since their production date, to the European production of cinema films; films and series for television (including cartoons), and documentaries. At least 60%

of this amount must be dedicated to cinema films of any genre, and the remaining 40% to films, series or miniseries for TV.

In the case of state-owned audiovisual media service providers, with Autonomous Community or State coverage, this obligation increases up to 6% of the income, with 75% for cinema films. In keeping with what is mentioned for private channels, up to the 25% remaining must be allotted to films, series or miniseries for television, and at least half, specifically to films and miniseries.

In any case, 60% of this financial obligation shall be allotted to production in any of the official languages of Spain. Of this amount, at least 50% must be applied to works from independent production companies.

### Diversity and accessibility

Article 8.5 of the LGCA refers to the diversity of offer from another point of view: from the rights of people with disabilities. In this article, there is express reference to the audiovisual treatment of disability “as an enriching statement of human diversity”, avoiding “disseminating stereotypical, biased perceptions or those that are the product of social prejudices that may exist” and ensuring that their presence in the programming should be “proportional to the weight and participation of these people in society as a whole.”

### Diversity, variety of operators and concentration

Article 22 defines radio, television and related and interactive audiovisual media services as “general interest”. These services “are given in the exercise of the right of free speech, the right to communicate and receive information, the right to participate in political and social life and the right to freedom of enterprise and within the promotion of equality, plurality and democratic values”.

The same article (parts 2, 3 and 4) includes a criterion that can equally be associated to diversity: the limitations for local operators to broadcast on channel or through content syndication, in order to guarantee different broadcasts.

The plurality of offer also includes the so-called “must carry”, which aims to facilitate the broadcasting of open channels of a State area through conditional access to cable, satellite or IPTV platforms. Free of charge in the case of RTVE (state-owned public corporation), after negotiation to set an economic remuneration agreed between the parties in the case of private channels (article 31.3).

The LGCA also envisages, although since its approval it has not yet materialised, the obligation of the General State Administration to guarantee in all cases the availability of the necessary radio-electric public domain for providing non-profit community audiovisual media services (article 32.2).

One element that is directly related to the diversity of offer is the possible concentration of those responsible for the distribution or dissemination of contents; in other words, the existence or

not of monopolies or oligopolies that condition this diversity of offer. In article 36, the LGCA warns that, although natural and legal persons may simultaneously be holders of company shares or voting rights in different television audiovisual media service providers, none of them may acquire a significant participation in more than one state television audiovisual media service provider when the average audience of the providers’ set of channels considered is greater than 27% of the total audience during the twelve consecutive months before the acquisition. Nevertheless, if this 27% of total audience is exceeded after the acquisition of a new significant participation, this will have no effect on its ownership.

In the case of natural or legal persons of countries that are not members of the European Economic Area, the total percentage that may be held of the share capital of the television audiovisual media service provider must be, at all times, less than 50%.

In addition, no natural or legal person may acquire a significant participation or voting rights in more than one television audiovisual media service provider:

- When the audiovisual media service providers of a state area accumulate rights of use on the radio-electric public domain that are, as a whole, greater than the technical capacity corresponding to two multiplex channels.
- When the audiovisual media service providers of an Autonomous Community area accumulate rights of use on the radio-electric public domain that are, as a whole, greater than the technical capacity corresponding to two multiplex channels.
- When this implies preventing the existence of, at least, three different private television audiovisual media service providers in the state area, ensuring respect for informational pluralism.

In the case of radio audiovisual media services (article 37), one single natural or legal person may not, under any circumstances, control:

- More than 50% of the administrative licences of the terrestrial sound broadcasting service that substantially coincide in their area of coverage, whether directly or indirectly.
- More than five licences in a single area of coverage.
- More than 40% of the licences existing in areas in which a single license has coverage.
- More than a third of the terrestrial sound broadcasting service licences as a whole with total or partial coverage throughout Spain.

These limits do not count the radio broadcasting stations directly managed by public bodies. They are applied independently to licences for broadcasting with analogical technology and for the envisaged, but not immediate, licences for broadcasting in digital technology.

Cultural and linguistic diversity, in this case at a European level, is also the foundation for the freedom of reception of programming of bordering States, in the framework of the

European Convention on Cross-Border Television, according to article 38.1, with the limits and procedures stated in parts 2, 3 and 4 of this article.

### Diversity in public media

With respect to publicly owned audiovisual media services, given their nature, the LGCA appears particularly concerned about the guarantee of diversity. The previously mentioned article 4.1 establishes this with respect to pluralism, the variety of genre and attention to the “diversity of social interests.” In article 4.3, it talks about its specific contribution to the promotion of the cultural industry, in particular to that of audiovisual creations linked to the various languages and cultures that exist in Spain.

We have already commented on the additional obligations that govern matters of funding and dissemination of audiovisual works for public televisions.

Article 40.1 entrusts the audiovisual media public service with the mission of “disseminating contents that promote constitutional principles and values; contribution to the forming of a plural public opinion; informing about the cultural and linguistic diversity of Spain and disseminating knowledge and the arts, with special emphasis on fostering an audiovisual culture.” The idea of diversity is reaffirmed with the obligation to attend “citizens and social groups that are not the targets of mainstream programming.”

Compliance with these objectives, according to the LGCA, involves producing and disseminating in a linear and open way, through the various radio, television and interactive services channels, “diverse, balanced programmes for all publics, covering all the genres, destined at meeting society’s needs for information, culture, education and entertainment and at preserving pluralism.”

### The right to access

The public media also have a differential dimension that is closely related to diversity: the so-called “right to access”.

What is known *sensu stricto* as the “right to access” is the possibility of organised civil society, through the associations that represent it, to access the media to disseminate their ideas and opinions and their positions in the face of events that affect it.

In the case of Spain, this right is derived from part 3 of article 20 of the Spanish constitution, according to which “The law shall regulate the organisation and Parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain.”<sup>18</sup>

In the same way, Legislative Royal Decree 1/2007, of 16 November, which approves the amended text of the General Law for the Defence of Consumers and Users and other

complimentary laws, states in article 17 that “the social media that is publicly owned shall dedicate non-publicity spaces and programmes to information and education of consumers or users. In these spaces and programmes, depending on their content and purpose, access or participation of the Associations of Consumers and Users and other groups or interested sectors shall be facilitated in the way that is decided by the competent public powers in this matter.”

In the case of the *Corporación RTVE*, its current regulation concentrates the exercising of this right to access with greater practicality.<sup>19</sup> Therefore, in the explanation of motives, Law 2006 states that “the activity of the publicly-owned media must be governed by a criteria of public service, which delimits its organisation and financing, the controls to which it is subject, as well as the contents of its broadcasting and the guarantees of right to access.”

To this end, it is clear (article 2.1) that the public service characteristics “essential for the community and the cohesion of democratic societies” include “the production, editing and dissemination of a set of radio and television channels with diverse, balanced programmes for all kinds of public, covering all the genres and aimed at satisfying Spanish society’s needs for information, culture, education and entertainment; at disseminating its identity and cultural diversities; at encouraging the information society; at promoting pluralism, participation and other constitutional values, guaranteeing access to significant social and political groups.” Furthermore, to “Promote the territorial cohesion, plurality and linguistic and cultural diversity of Spain (article 3.e) as well as “(..) to deal with the broadest audience, ensuring maximum continuity and geographical and social coverage, with a commitment of offering quality, diversity, innovation and ethical exigence” (article 3.p).

This right to access of the representative social and political groups must therefore be guaranteed (article 2.1)<sup>20</sup>to “promote democratic participation” through exercising it (article 3.2.d).

Article 28 of the regulation states that “The *Corporación RTVE* shall ensure in its programme the expression of the social, ideological, political and cultural plurality of Spanish society”, detailing that the right to access shall be applied in two ways:

- In an overall way through the participation of the significant social and political groups, as sources and carriers of information and opinion, and in the programming of RTVE.
- Directly, through specific spaces on the radio and the television with diverse formats, times and timeslots, set by the Board of Directors of the *Corporación* having heard the Advisory Board and in keeping with what is established in general audiovisual legislation.

This article also points out that the *Corporación RTVE* shall guarantee the availability of the technical and human means necessary for producing the spaces for providing right to access, and attributes the Board of Directors with the approval of the guidelines for exercising the right to access (on the favourable report of the audiovisual authority).

In other words, the right to access contemplated by this law combines two classic models of interpreting this right:

- The public interest model, according to which the media includes content of social interest and takes into consideration the point of view of civil society organised in the processing of themes (news, scripting in the fiction areas, etc.), highlighting its participation and contributing to its visibility. In this case, it is the media that decides on the content to be dealt with, disseminating it through its own and external production spaces.
- The public access model in which the media yield space/time to organised civil society to disseminate its contents. The organisations, associations and collectives, in a rotating way and/or with a criterion of representation, cover this space/time with their own resources or with resources provided by the operator, with them proposing the format and the content of the audiovisual productions.

The regulation of CRTVE expressly binds the Board of Directors as well as the Advisory Board, with the right to access, mentioning in its article 16.4.o), among its competences and functions, "To determine the internal procedure applicable by the *Corporación RTVE* and its companies that offer a public service for exercising the right of recognised access in article 20.3 of the constitution.

After this regulation, the Financing of CRTV<sup>21</sup> includes a series of additional public service obligations for the *Corporación*. Among these (article 9.1.a) "To dedicate at least 12 hours a week in non-residual timeslot among its various radio and television channels to broadcasting programmes and presence in interactive services in which it gives access to political, union and social groups." It also points out that "At an international level, the *Corporación* must assign a person responsible for carrying out this task through the Viewer, Listener and User of Interactive Media Ombudsman's Office or whomsoever they should deem fit from its Board of Directors."

In 2007, the Board of Directors of the *Corporación RTVE* approved some guidelines for the exercising of right to access, ratified by the Advisory Board, which are specified in the following way:

- The right to access is defined as an authority recognised to "significant social and political groups" to use the state-owned media so that, in exercise of their free speech and information, they may broadcast and disseminate their ideas and their doctrines to society as a whole.
- It states that the right to access favours internal pluralism in the media and the forming of a free, plural public opinion.
- Social and political groups that are validly constituted and with a legal character, that can accredit being "significant" are expressly legitimated as beneficiaries of the exercising of right to access:<sup>22</sup> in the case of political groups, State or Autonomous Community parliamentary representation; among the syndicates, specific electoral representation; for religious groups, the criteria of "established roots"; and for other social organisations aspects such as the number of members, the declaration of public use, belonging to Councils and Federations at a State and Autonomous Community level, the number of projects financed by the

public administration.

- Apart from the case of time dedicated to political forces in an electoral period, marked by its specific regulation, the time granted for exercising the right to access of significant political and social groups shall be approved by the Board of Directors on the proposal of the Management of TVE and RNE, with the criteria of proportionality and also of established roots, implantation and social recognition. With respect to the specific location of the spaces, this will be in the hands of the Management of TVE and RNE.
- The right to access shall have a State and Autonomous Community level, with attention paid to the diverse languages and cultures of Spain, including those Autonomous Communities in which there is specific territorial programming.
- It also contemplates the possibility of broadcasting spaces prepared by RTVE itself as external production.
- In the first case, it indicates that "the professionals of RTVE responsible for preparing access content shall work in collaboration with the social groups to coordinate the professional criteria with the social purposes sought by the Association."
- The production of yielded spaces must be carried out using professional criteria, quality production and with the aim of being informative and interesting at the same time for a broad sector of the public. RTVE must guarantee these minimums of professionalism quality and suitability to the above-mentioned objectives.
- Should the groups decides to contract, at their own expense, part or all of the access spaces, it is established that these spaces "should be made with professional criteria, quality production, and with the aim of being informative and interesting at the same time for a broad sector of the public", with RTVE itself being responsible for "guaranteeing these minimums of professionalism, quality and suitability to the above-mentioned objectives" and even being able to "reject the end product when it does not adapt to the professional criteria and quality standards set by the *Corporación*."
- In addition, to guarantee that the right to access is subject to the same limits to which the free speech and information are subject, the *Corporación RTVE* shall get to know, before they are broadcast, the contents proposed by the groups when they are external production, reserving the right not to disseminate them if they are contrary to constitutional values and principles or if they violate fundamental rights of third parties.
- With the above-mentioned exceptions, the costs derived for the *Corporación RTVE* of exercising the right to access must be met with state public funding.
- To guarantee a fair distribution of time, RTVE shall carry out an effective follow-up on the participation in programmes with content that is not limited to the satisfaction of right to access, but that is a vehicle for it.

The Board of Directors has also approved a regulation, according to which:

- It entrusts the exercise of right to access, in keeping with the guidelines approved by the Board of Directors of the *Corporación RTVE*, to the directors of TVE and RNE and to the committees created for this purpose by them, composed by directors of both media.<sup>23</sup>
- Every semester, the presence and participation of significant social and political groups shall be evaluated, both in the general programming as well as the specific programming destined to them, as well as the request from significant social and political groups that have not exercised the right to access during the previous semester.
- At the end of each semester, a 15-day period will be opened, announced via the CRTVE website, so that significant social and political groups that have not had a presence during the previous semester in the general programming of TVE and RNE or in the specific programming destined to these groups, may present a request to exercise the right to access. The requests are to be directed to the director of each media, accrediting significance and activity, providing the required documentation.<sup>24</sup>
- Resolutions rejecting applications must be justified and an appeal may be lodged against them before the Board of Directors of the *Corporación*, which shall adopt its resolution once it has heard the Advisory Board. This resolution may be appealed against before the Audiovisual Council within 15 days from the reception of the notification.
- In the case of IRTVE.es, the application ways of the right to access shall have to be established, in keeping with the Public Service Committee of the Board of Directors.

## Conclusions

“Diversity”, as a keyword in audiovisual community regulations and electronic communications, functions from the pragmatic point of view as an “a priori” concept that is recognised in society (the cultural and social multiplicity of which UNESCO speaks), and which justifies the adoption, in the area of communication offer, of a series of restrictive market measures in favour of the general interest.

Diversity is thereby correlated with other concepts such as pluralism, variety, the difference or identity that limit the dynamics of the market which, in keeping with the perception of the legislator, left to the dynamics of free competition, would throw us into the monopolistic or oligopolistic concentration of the operators; to the standardisation of the contents and to the construction of equally standard publics who would have the right to free, informed decision taken away from them.

To this end, it is worrying to observe that the use of the concept “diversity” in the regulation on electronic communications is nothing more than a declaration of intentions that justifies a certain organisation of the radiofrequency, but is not decisively

committed to boosting the values of the public service, of the variety of contents, of the support to local initiatives of independent production that may find added value in what is “glocal”. The Spanish case is even more bloodsome if we take into account that in the reference legislation, the Information Society Services Law (the LSSI), there is not a single reference to diversity.

With respect to audiovisual communication services, diversity is also handled in the European regulation as a restrictive criteria of freedom of action of providers, although the specification of it is left in the hands of the Member States in keeping with the character “of minimums” of the corresponding directive: broadcasting fees of European and independent audiovisual works; financing obligations of audiovisual works; restrictions to the concentration, on occasions, of talking about diversity when in fact, it seeks to guarantee the sovereignty of the States, as happens with the actions in the case of contents of cross-border broadcasting. Therefore, it would be important that in the envisaged modification for the Audiovisual Media Services Directive, they were to effectively look in great depth at the meaning of diversity, making its defence a central feature of action of the European regulating authority that it aims to favour.

Thus, it would be necessary to strengthen the concept of diversity to consolidate and enhance, depending on the case, audiovisual public service as well as the offer of community and local media, which are found in the defence of this social and cultural diversity, which is precisely, one of the main justifications for its differential enhancement.

## Notes

1. For a systematic analysis of these concepts, see ALBORNOZ, L.A.; GARCÍA LEIVA, M. T. “Diversidad cultural, industria audiovisual y gobernanza”. In: ALBORNOZ, L.A.; GARCÍA LEIVA, M. T. (eds.), *Diversidad e industria audiovisual: el desafío cultural del siglo XXI*. Mexico D.F.: Fondo de Cultura Económica, 2017.
2. <<http://unesdoc.unesco.org/images/0014/001429/142919s.pdf>>
3. Treaty on European Union. OJEU, C83/15, 30.03.2010.
4. Directive 2009/140/EC of the European Parliament and of the Council, of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services. OJEU, L337/37, 18-12.2009.
5. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and to the Committee of the Regions. [A strategy for the European Digital Single Market](#). 28.10.2015 COM (2015) 550 final.
6. Spanish Law 34/2002, of 11 July, on Information Society Services and E-Commerce. Official State Gazette no. 166, 12/07/2002

7. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. OJEU, L 95/1, 15.04.2010.
8. Treaty on the Functioning of the European Union. OJEU. C 326 /101, 26.10.212.
9. Article 22 of this Charter establishes the respect that must be upheld in the EU for cultural, religious and linguistic diversity.
10. Proposal of European Parliament and of the Council of 10 March amending Directive 2010/13/EU, on the coordination of certain legal, regulatory and administrative provisions of the Member States, regarding the provision of audiovisual media services, in view of the development of the market realities. COM (2016) 287 final, 25.05.2016
11. See note 15.
12. Some amendments submitted by members of the European Parliament suggest raising the share of European works in the catalogue to 50%, and even that this obligation should affect not just on-demand services, but also the video distribution platforms (at least the ones with the largest turnover), which for the first time would be regulated by the Directive.
13. Law 7/2010, of 31 March, General on Audiovisual Media. Official State Gazette 79, 01.04.2010.
14. The diversity obligation in the contents could also be associated to people's right not to be discriminated against (made invisible or denigrated) for reasons of birth, race, gender, religion, opinion or any other condition or personal or social circumstance (article 14) and to be treated in the media in a dignified way (article 10). To this end, the LGCA states that audiovisual communication must respect human dignity and constitutional values (article 4). With respect to general interest service, "they are given in the exercise of the right of free speech, the right to communicate and receive information, the right to participate in political and social life and the right to freedom of enterprise and within the promotion of equality, plurality and democratic values" (article 22.1).
15. That which has free reception and offers a successive viewing of programs based on a programming timetable and in keeping with a schedule in which programmes are placed.
16. Excluding time allotted to news, sports events, games, advertising, teletext services and teleshopping.
17. That it offers the viewing of programmes and contents at the time chosen by the viewer and on their request and consent (in other words, à la carte), based on the catalogue of programmes selected by the audiovisual media service provider, and by means of economic compensation (subscription and/or payment by the viewer).
18. This is an "active" right to access (the right to generate contents and to express them in the media), as opposed to what we could call "passive" right to access to receive contents which, in the area of information, in addition to being plural, must also be truthful (article 20.2.d of the Constitution). Both access modalities, together with the possibility of participating in public decision-making through advisory or consulting boards, constitutes the basic line up of the citizen's rights in the audiovisual area.
19. Law 17/2006, of 5 June, on State-Owned Radio and Television. Official State Gazette 134, 06.06.2006.
20. The public service of State-owned radio and television is an essential service for the community and the cohesion of democratic societies (...) with diverse, balanced programmes for all kinds of public (...) aimed at (...) promoting pluralism, participation and other constitutional values, guaranteeing access to significant social and political groups.
21. Law 8/2009, of 28 August, on Financing *Corporación de Radio y Televisión Española*. Official State Gazette 210, 31.08.2009.
22. 1. Legitimation:  
 (...) Those significant social and political groups that accredit legal personality and social representation. Specifically, to determine this legitimation, they will be required to duly accredit the concurrence of the following requirements: that their nature should be political or social
- Political groups.
  - Unions implanted at a State or Autonomous Community level.
  - Business associations.
  - Religious faiths.
  - Associations and entities of social interest that are non-profit, paying special attention to those that work in favour of the most disadvantaged collectives.
- b) that are validly constituted and have a legal personality  
 (...) they must be registered in the corresponding Official Registry, whether they belong to the State or Autonomous Community in which they are found.
- c) that they are worthy of the qualification of significant  
 (...) *Political groups* shall have the criteria of parliamentary representation applied.  
*Religious groups* (...) shall have the criteria of "established roots" recognised by the Ministry of Justice as referred to in article 7 of Spanish Organic Law 7/1980, on 5 July, on Religious Freedom.  
 The *unions* (...), the conditions established in article 6 and 7 of Spanish Organic Law 1/1985, of 2 August, on Freedom of Association.  
 The *business associations*, (...) that form part of the Economic and Social Board.  
 For the rest of the social organisations, (...) demonstrated number of members, the declaration of public use, belonging to Councils and Federations of a State and Autonomous Community level (...) the number of projects financed by the public administration.
23. The Right of Access Committee in TVE /RNE shall have the following composition:
- Presidents: the Director of TVE/RNE
  - Members: The Director of News of TVE/RNE; the Director of Contents/Programming/Programmes; the Director of Radio 1
  - Secretary: The Head of GESI / the Director of Radio 5
24. Articles of association, foundation or entity.
- Certification of the registration in the corresponding



Public Register.

- If relevant, the declaration of public use or social interest.
- A short report of the entity's activities, which contains, at the very least, information about the number of members or associates, yearly budget —indicating public subventions received during the previous year— and the main programmes and activities of social interest that it develops.
- As many other documents as are considered relevant to accredit the significant nature of the applicant.

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