# Transformations in the media ecosystem and new patterns of the administrative regulation of audiovisual communication

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*The regulation of audiovisual communication in our country, as in other countries under the same legal regime, has historically been based on the definition of these activities as a* public service*. This definition has shaped the model of how public administrations should act on the sector. The progressive erosion of the idea of public service, its disappearance in part of the sector and the emergence of new technological possibilities, as well as the growing importance of spheres where communication is organised based on the freedom of expression, on the one hand, and on the freedom of enterprise, on the other, means that we have to rethink the manner and orientation of public intervention in the sector.*

**Keywords**

Radio and television, broadcasting rights, Internet, broadcasting regulatory authorities, freedom of expression.

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## 1. Trends in the evolution of our media panorama

The legal framework that, in Spain, currently governs the communication of ideas and opinions and the dissemination of information by audiovisual media is the consequence of the institutional architecture and peculiar dogma that our law has been endowed with over the last few years. The central element that explains the existing regulations has been (and continues to be at present, at least formally, in which it is substantial) the notion of *public service*. Rather than stopping to analyse the notion's specific foundations (and correct foundations, if necessary), an issue that has been analysed in detail in terms of doctrine and jurisprudence on numerous occasions (Bastida Freijedo 2004), at present it suffices to refer to a precipitated list of events that have shaped our audiovisual law, necessarily deduced from the traditional declaration, which still survives (at least, as has been said, formally, and with the exceptions of satellite and cable since 1995 and December 2003, respectively), that considers radio and television to be public services.

### 1.1. The 'publification' of the sector and its legal consequences

So, this declaration of public service involves the 'publification' and reservation of the sector and the correlative exclusion of the law of the market and freedom of enterprise. It obviously entails great public control, which will be exercised by the administration declared to be its owner. Something that, in Spain and until recently, has also had significant consequences in terms of competition. For example, it has allowed the whole system to revolve around the state administration, insofar as broadcasting, and most particularly television, has been reserved for the public sector and, within this sector, initially, it has been reserved exclu-

sively for the state. We must remember, for example, the particular nature of the fact that, legally, public television channels for the autonomous communities started their operations, as in the case of private television channels, as licence holders of a public service owned by the state, as provided for in the Third Channel Act (Barata i Mir 2007). Only very slowly and progressively has the authority to first manage and then own some services (FM radio at first, autonomous and local television channels more recently) passed into the hands of the autonomous community.

The broad decision-making powers that such a structure grants to the public administration range from deciding whether to accept new operators in the market and, if necessary, establishing the optimum number of operators, to establishing all kinds of controls and requirements with regard to the actions and contributions of those involved.

*a. The position of private operators and their subordination to the public administration*

The participation of private players in the audiovisual market is possible only after they have been accepted by the public authority and, for this reason, only in accordance with the limits and always within the margins established by the legislator and specified by the public administration. Starting with the first television channels for the autonomous communities and continuing with the radio and television channels that are normally called "private", in reality the operators are licence holders that are assigned to provide a public service on behalf of the public administration that has chosen them. They obviously do so within a framework of rights and obligations that are entirely conditioned by this situation, which may be as extensive as the public administration believes is appropriate. This is because a licence holder is actually an instrument that aims, albeit via private management and with the participation of companies from the sector, to achieve the objectives and goals pursued by the administration in providing the service, i.e. it is carried out exactly under the terms desired by the public authority.

This can be explained by the fact that the different private operators have traditionally been subject to an extensive and generous catalogue of provisions, in theory highly demanding and forcing them to operate so as to guarantee these objectives of public service. On the other hand, for this same reason these objectives do not differ between state public operators (RTVE) and the rest, including the "private" operators.

*b. The public predetermination of the economic architecture and conditions for competition in the sector*

It is evident that the whole model being organised around the notion of public service also has notable implications with regard to the legislator's different decisions, public policies and choices concerning financing for the different operators, or in determining the conditions for competition under which they must operate. Here we should not forget that the very decision to open up the market or not to a certain point, the decision to establish a specific number of administrative permits or the possibility of establishing operators with conditional access (subscriber) are public decisions that affect competition. And they do so from the same structural base as the television and radio markets. Any call for free competition in a sector affected in this way must be highly aware of the very special conditions under which a strongly intervened market is carried out, among others, with the specific intention of helping operators be economically viable.

These are not the only consequences of the 'publification' of the sector in terms of its economic organisation, resulting from the fact that it is legally considered to be a *public service*, and we could continue with a list of manifestly disproportionate dimensions, given the intention of this article. We will therefore limit ourselves to stating that they have historical restrictions regarding media ownership in order to guarantee internal plurality, as well as limitations to the concentration of media ownership, both being highly questioned by the sector (and not complied with, more or less flagrantly in quite a few cases).

*c. Administrative intervention in a sector organised as a public service*

When applying the logic of *public service*, the relationship between the administration and the licence holder is naturally very intense with regard to organising the activity, and such powers may entail all kinds of instructions and prede-terminations on how this service should be provided. These include the orientation of the programming and service but can also go much further and establish all kinds of specific obligations. And they allow the administration to

inspect and take disciplinary measures that, logically and without this supposing any legal problem, can end up with the licence being withdrawn, if the catalogue of obligations established by the agreement between the public authority and the private operator are not met. This agreement is the means by which the administration specifies to the operator how audiovisual production should be carried out and under what exact conditions, namely those of opening up the market and the entrance of the private operator which, otherwise, would have had no other option than to remain outside the market.

### 1.2. The birth of independent authorities to control audiovisual communication that is still conceived as a public service

This is the specific panorama for the different independent administrative audiovisual authorities in Europe and in Spain, whose mission is to implement, in line with a different orientation and more legitimacy and technical thoroughness, the mission of public control that a schema such as the one described above confers, to a maximum degree, on the public administration (Tornos Mas 1998). We can only understand the creation of these independent authorities, the functions they are assigned and the specific position in the structure assigned by their respective regulations, in Spain or in other neighbouring countries, including a large number of public powers such as those of inspection and discipline, from this historical process, from this exact inclination of public functions in the audiovisual field, from *the structuring of the whole sector* and all *the public intervention in public service*. (However, it should be noted that these concepts, at least until 1995, were strictly synonymous in Spain and that even now they continue to overlap in what is essential, given that 'publified' intervention in broadcasting, although no longer equal throughout the sector, continues in almost all relevant communication models in economic and social terms).

Our familiar bodies to control broadcasting that were created, on the other hand, by laws rooted in the continent of Europe, are understood and make sense within a model of public service where there are private operators acting in the market with the corresponding administrative authorisation. In fact, it is not by chance that the most important body, the French Conseil Supérieur de l'Audiovisuel, appears within a traditionally highly interventionist context, namely that of French law. It is evident that the regulation of a free market, that administrative action on an area of economic activity where the freedom of enterprise prevails, although perfectly possible (and it being also conceivable that this should be carried out by an independent authority), must have different features. As happens, for example, in the North American market (Betancor Rodríguez). Features that are obviously not possessed by the authorities for audiovisual management in Europe, as they have been born within a context where public service still reigned (and reigns now formally), and their functions are based on traditional public action.

### 1.3. Beyond public service audiovisual communication: fractures and patterns for liberalising the industry

Notwithstanding this, the 'publification' of audiovisual communication is subject to growing pressure. As a consequence of technological, economic, social and also political evolution in our societies, the different reasons that have historically allowed us to comprehend and justify reserving this for the public sector have almost all declined. Moreover, they have done so by pressurising the institution from two radically different directions:

– On the one hand, there is growing pressure with respect to the areas subject to restrictions to the freedom of enterprise. If we take the Spanish example, from 1994 onwards areas have spread in which audiovisual services are provided without the need to apply for administrative authorisation. Some, such as local television channels or some radio stations, had operated up to that point on the margin of any legal or regulatory support, but various rulings from the Constitutional Court, taking note of the interposition of a right such as the freedom of enterprise on the sector and of the social and political importance of this right, since 1994 have protected their situation up to a point, supporting the notions that undermine the consideration of public service as the cornerstone of regulation. We cannot underestimate the legal relevance of this position and it probably marks the point when our constitutional regulations, understood according to the aforementioned constitutional jurisprudence, take the position of not allowing the state to

monopolise television completely (Muñoz Machado 1998; Bastida Freijedo 2004). In other cases this has become even more obvious since legal regulations themselves have taken note of growing social and political awareness concerning the liberalisation of the industry, as well as the technological impossibility of controlling certain audiovisual communication effectively and, lastly, of the economic maturity of the industry. Consequently, restrictions have been lifted, as happened in 1995 with satellite television and in December 2003 with cable television.

– At the same time, we can also discern an undeniable erosion of the legal consequences resulting purely from reservation for the public sector in those areas where this practice still survives (and it does so to a greater degree, or at least in the most socially and economically relevant areas). This means that the spaces where television and radio are still (and continue to be) a *public service*, are not perceived as such, not by a long shot. Not only by social and economic actors but also and even by the public administration itself. In fact, the inveterate practice of inaction when faced with repeated and notorious violations on the part of operators (in the area of content, but also with regard to requirements regarding the composition of shares and others) is explained precisely by this absence of awareness of the reality that the audiovisual sector continues to be a *public service*. So, it's not only the case that, for most citizens, "private" television and radio channels are, in general, just that, i.e. private, and that's why it's considered absolutely normal for their programming to be planned according to purely market criteria, i.e. that their content is not related to the mission of public service but to the search for market share that helps to improve commercial performance. Not only do operators and the audiovisual market generally function according to market criteria and not only are the structure of company ownership, the management, alliances and commercial strategies manifestly evident of this (Boix Palop and López Garcia 2006). But the very administrations responsible for inspecting and disciplining, legally responsible for a service that, albeit indirectly managed, is carried out under their name, act as if this authority and these powers actually didn't exist. Inspections are minimal, in general; disciplinary action, exceptional directly. Obviously, this very lack of action helps to create the typical sensation of surprise and relative controversy. As the ultimate proof of this situation, we only need to mention the widespread assumption in the industry that licensee companies have the "right" to their licence being renewed once it expires, irrespective of whether there are other actors in the market proposing more serious and solvent projects (which, it goes without saying, there are not, given that the industry assumes there's no point in applying for a licence, as a consequence of what we have mentioned before).

Lastly, on top of this state of affairs, superimposed on a clear opposing trend, appears the incipient impact on the emission of ideas and opinions and the dissemination of information in audiovisual format of the revolution in communications that has occurred in the last two decades. The evolution in telecom supports and advances in compression have created a panorama in which not only does the traditional argument of scarcity that used to justify public regulations no longer make any sense but, thanks to the digitalisation of content and the Internet, the field in which the industry moves has completely changed.

The legal protection in this industry (the aforementioned reservation) and its very economic structure have delayed the impact of these information and communication technologies so that we still have the audiovisual model inherited in its basic structure from the eighties. Not only does it still survive but it still has undeniable pre-eminence. However, apart from this fact, at times the emergence is already evident of new communication models, of growing influence and importance that, moreover, given the convergence of supports and the increasingly complementary nature of content, are designed to co-exist, with increasing weight, with the established audiovisual panorama that we know and in which we have been brought up.

The technical and legal conditions in which these new media are appearing are totally different to those of the past and, moreover, make it hugely difficult, and sometimes impossible, to redirect regulation along traditional patterns (Muñoz Machado 2000). So they become a new kind of pressure, growing stronger, on the model rooted in the idea of public service. And, in turn, they go to make up an increa-

singly larger and more important area where the structuring elements of the legal framework are the freedom of enterprise and the exercising of the freedom of expression. This is an additional factor, whose importance cannot go unnoticed. In an environment with a potential supply as large as the one we are considering, is it possible to maintain the old schema of regulation of content, so obsessed with detail and so meticulous? Probably not. Simply because it is unviable (Botella Corral 2007, 19). But neither is audiovisual communication in which alternatives are structured and appear in this way compatible with 'publification'. Consequently, this model of control is not only no longer viable but neither is it legitimised by any legal foundation.

However, as we have already mentioned, this does not mean that public intervention isn't possible in this area, with the aim of regulating the market in order to defend a number of assets and values of constitutional relevance. However, this must be carried out in another way, without the patterns that have appeared over the long years of intervention based on the idea that the sector was a public service. After a brief explanation of the context, we now dedicate the rest of this analysis of regulatory trends to a reflection of how this should come about, in an environment where, moreover, it is now evident that the independent audiovisual regulatory authorities will be increasingly important.

## 2. Independent audiovisual regulatory authorities and the emergence of a free market

### 2.1. Independent administrations and audiovisual communication in free competition

#### a. Generalisation of the model of independent audiovisual supervision

The legal framework current applied in Spain for the communication of ideas, opinions and information via audiovisual media is logically a consequence of the peculiar institutional and legal architecture it has been built around, as we have briefly described. But we can also note the emergence of a new model for managing public powers that is based, in part and at present (and will surely be totally based on this in the future) on assigning these powers to an independent administration, i.e. the establishment of a regulatory authority for the audiovisual sector in the corresponding area of authority, while broadly recognising its independence in terms of function, finance and personnel.

The emergence of different audiovisual bodies is a response to the need for public powers to guarantee the existence of a market and, at the same time, to intervene in the control of content, especially when the importance of this intervention is considered to be fundamental, and increasingly so, given the appearance of new media and a growing spread of supply. This is an unstoppable trend that has transferred to our country the intervention method that, in countries with regulations structured around the tradition of *public service*, has passed on the exercising of public powers by the administration (and the inevitable suspicion of it acting with political bias) to an independent authority. With an additional advantage, insofar as, in almost all countries, the public authority still has operators that depend on it directly, of separating the responsibility for decision-making from the body responsible for organising and supervising the industry, something that lessens the traditional suspicion that decisions are essentially adopted in line with the interests of the public operator more than those of the whole industry or general interest. In this context, it makes complete sense to set up authorities (by the way separate from those regulating telecommunications) provided their independence and, on the other hand, their technical capacity are assured (Tornos Mas 1998).

In Spain, we can start to see institutional support for the model established in several European countries (based on the action of the French Conseil Supérieur de l'Audiovisuel) as from the famous *Camps Report*, passed by the Spanish Senate in 1995, in which the proposal was already made to create an independent regulatory body. This initiative was followed by the effective implementation of authorities to develop growing powers in the industry in Catalonia, Navarre and Andalusia (Guichot and Carrillo, 2007, allow us to consult the legal landmarks accompanying the creation of the different bodies in their introduction to an analysis of Andalusia). Other cases appear in addition to these, such as in Galicia and Madrid, with peculiarities that force them to position themselves at a different level, beyond the political controversy that has surrounded them in some cases, given their less ambitious attributions of power (Barata i Mir, 2007, 259). Along similar lines, basing its incorporation on the

model but without actually putting it into practice, in 2006 the Community of Valencia passed a law on the autonomous community's audiovisual industry and planned to create an audiovisual *consell* (council) by means of a specific act (Boix Palop, 2007), although this has not actually come about as yet (so that these powers are still exercised by the administration of the autonomous community).

At a state level, the trend is also along these lines and recent legislative reform affecting the state public media in 2006 also plans to set up an audiovisual council in charge of administratively supervising compliance with the public service obligations established by law. Although the council hasn't actually started operating yet, something which would allow us to verify the scope and ambition of its powers, it is evident that this is following the same general lines we have described earlier.

In any case, the delay in Spain, which is trivial at these critical times, is always assessed from the perspective of transferring powers from the administration to an independent authority, i.e. from an analysis of whether the powers remain in the hands of the political authority or not. It is not a question of critically passing judgement on a model that might be different and freer, less regulated and more judicially-based, for example (Botella Corral 2007, 17), but of calling attention to the fact that the administration has retained its powers, always without abandoning the logic that, in the hands of one body or another, the order in which we move is that of traditional *public service*.

**b. Fractures in actions by audiovisual authorities coherent with the appearance of a competitive environment and of a market**

The fact is that regulatory councils (also in Spain, at last) are appearing at a time when the customary passivity, self-limitation and secular prevention that used to afflict the administration in taking action on the audiovisual industry is starting to be overcome. This is a consequence of the convergence of a number of factors that, just as they explained the earlier panorama of restriction, provide a context for transition towards a more active role for public powers. The dominant trends that can be noted today are of a diverse order, sometimes seemingly contradictory but, at heart, they are in line with the idea we have already mentioned: the progressive assumption, de *facto* and *de jure*, of the industry's competitive and market-driven nature and the unrelenting evolution towards this situation that, now, it is hoped to control in increasingly more detail. So:

- The *appearance of independent authorities* allows them (in those cases, such as the Catalan case, where the powers are more complete) not only to assume all the administrative powers the territorial public administrations had historically retained and exercised in order to control the market (especially, and in this particular case, the political power of licences, which in Catalonia is the responsibility of the Consell de l'Audiovisual, the body that, for example, is responsible for the tender for local TDT in Catalan regions). It also allows them to assume powers of supervising the area of public service content. This is probably due to the elimination of the "original sin" that the traditional administrations still committed when exercising these powers, namely that they were perceived, on the one hand, as a "judge and party", as has already been explained, and, on the other hand, because their actions in this field, in spite of exercising powers resulting from classifying an activity as a public service, were eternally suspected of attempting to silence the media that might criticise their actions, using these instruments unfairly. Consequently, prudence was the dominant note but, in a new context, we can see a rise in actions as the independent authorities establish themselves (Amenós Álamo and García Quintana, 231).
- *Growing evidence of a social perception that mostly disapproves or accepts this kind of action with a lot of reservations*, justified or not. The fear of the 'chilling effect' these controls may have, either mediately or immediately, together with citizens' increasingly sharper perception that the media, including audiovisual media, operate *de facto* (for many they have the right) under a free market regime, makes any pattern of control incredibly difficult when based on the idea of guaranteeing certain content or a certain orientation in programming, which is defined not on the concurrence of market forces but on regulations concerning a certain orientation (in values, for example, or in pluralism or neutrality) which afterwards, moreover, must be interpreted administratively. Beyond strict time-based neutrality or the equivalent (in which the French CSA has shown itself to be

passionately interested), this kind of action is not easy to implement, nor is it understood by citizens, not even when it comes from independent authorities. Essentially, once again the reason for this reaction is merely the realisation that the audiovisual media's real economic and social functioning is currently the same as that of the printed media, for example, in terms of substance, and this is how their positioning and how they handle information and facts are perceived, this therefore not requiring any intervention, supervision, control or administration guidance.

– *Tendency to equal action on media acting under a free market regime with those media fulfilling a public service function*. The social dynamic lends itself to this as well as industry legislation in the area of content (which feeds back into the feeling that, at heart, all radio and television channels are legally the same). The regulations on the powers of regulatory councils for the media, although clearly based on the idea that control functions must be essentially focused on those operators fulfilling a *public service* (beyond very specific additional requirements that do establish legislation for everyone and that can also control), has been overtaken by an expansive interpretation of these bodies. This presents many problems, given that it is not evident, not even remotely, that all their powers and authority (which are very broad and inherited from a public service model) can be transferred lock, stock and barrel to the audiovisual media.

  It's only fair to acknowledge that this has been helped by the growing demands, based on community law, shown by regulations on content. Notwithstanding this, we should note, however, the importance of the law that has transposed community requirements, the regulation known as *Televisió sense Fronteres* (Television without Frontiers), in the 1994 version and in the 1999 reform, which is notably evolving due to the marked requirements of the European Union, precisely in determining a legal anchor that allows intervention. We must therefore not lose sight of the fact that this law, whose importance is only too well known as it is the only regulation establishing obligations of content and programming for operators, at heart regulates only three broad areas: commercial advertising on television, the establishment of programming quotas for European works and the protection of minors from television programming in general and advertising in particular. All three are evidence of the possibility of establishing restrictions that do not require the administration to control in terms of *public service*. All three can be applied to limit the freedom of expression due to the need to regulate the market so that it protects other goods and interests protected constitutionally. That's why the disappearance of the 1994 wording is perfectly coherent, which circumscribed the area of application to "broadcasts carried out from Spanish territory for entities providing, directly or indirectly, *public service* television", which was replaced by the territorial criterion, assuming the regulation would be applied to all broadcasts (including those in liberalised markets). The scope of application is defined without referring to the increasingly weaker concept of public service, taking the criterion of establishment as its central element (Gay Fuentes 1999, 3). Community law and subsequent Spanish regulations are evolving, and we can note the appearance and growing importance of areas where it is the market and not public service that regulates the audiovisual media. Given this situation, the option chosen is to regulate so that the rules include all operators. This option is legitimate and reasonable but we must realise that the possibilities for intervention will be fewer. The fact that the very reform previously used in public service to restrict is now the one that obliges all operators equally (as well as the fact that the administrative instances that must comply with this new legislation are the same ones) helps to increase confusion. It might suggest that the community endorses the extension of all the old public control over *public service* broadcasting to any sphere concerning the media exercising its freedom of expression and freedom of information, and nothing can be further from the legal reality.

The intention to establish a single regulation and type of intervention with the same aims in all spheres, however, has not made much of an effort to investigate this issue. It is increasingly clear that the idea is for control and supervision to be carried out under equal conditions for all broadcasts, whether they are public service or not. This even happens, for example, with Internet audiovisual services, where the attempts to supervise them are clear proof of such an intention, given that it entails

advocating an overall model of content control of administrative origin that, no matter how much it is based on regulatory bodies, would involve a radical differentiation between the regime for audiovisual and other models of communication (Barata i Mir 2006). In this respect, the opinion of the Consell de l'Audiovisual de Catalunya, for example, is clear. But it is not the exception, given that it agrees with the notion that the audiovisual regulatory authorities in Europe that can be officially approved have more or less agreed to adopt (Domènech and Costafreda).

In this respect, we should point out that, although it is obvious that the Internet has not been born in a vacuum and that audiovisuals via the Internet, as a free market, can perfectly well have their own regulation, this regulation must be based on the recognition of free speech, not on the traditional pattern of public service. This does not mean that limitations cannot exist, in fact there are limitations and with highly diverse types of intervention (García Morales). The problems appear when this attempt at equal treatment aspires to transfer limitations to audiovisual communication working under a free market regime, or to the exercising of free speech occurring on the Internet, that are common to the rest of audiovisual communication that follows the logic, which is necessarily more limiting, of public service.

– Precisely for these reasons, in part, and also because the market dynamic is clear in the sense that it does not take kindly to more intense intervention than that required to regulate free speech, intervention by regulatory bodies (clearly shown by the actions of the Catalan Consell de l'Audiovisual) has adopted an approach that is increasingly more anchored in indirect and mediated mechanisms of intervention, based on the idea of *auctoritas* more than on the exercise of *potestas* (Gichot Reina and Carrillo Donaire) and has developed a broad panoply of *soft law* mechanisms (reports, recommendations, workshops to reflect on how to organise communication, etc.), whose effectiveness may be questionable but which are better than nothing in a context where direct intervention can be seen to be scarce. Moreover, this goes wonderfully with the kind of public action that is effective in a competitive market under the scrutiny of public opinion, the conditioning factors of image and where market logic rules. This tendency proves, once again, the failure of the hard option in the industry, where the greater the detail and rigour of the regulation, the more it is violated (Celeste Gay, 9).

– The examples of this are increasingly varied. As an example of this trend we can mention the text "Consideracions del Consell de l'Audiovisual de Catalunya sobre el tractament televisiu del atemptat de Madrid del dia 11 de març de 2004 i dels esdeveniments posteriors fins a les eleccions del dia 14", (Considerations of the Catalan Audiovisual Council on the television treatment of the Madrid attack on 11 March 2004 and the subsequent events up to the elections of the 14 March) (*Quaderns del CAC*, no. 19-20, pp. 79-85), produced on 31 March 2004, together with a protracted document that analyses the grids and programming of the different media and studies to what extent they fulfil their duty of objectivity and impartiality, as well as how they treat the rights of victims and their relatives. But the direct legal effects of this, even when referring to the public Catalan radio and television stations, are in any case of an indirect type. Along the same lines, the CAC, by mandate from the Catalan parliament, produces reports on news programmes, sent to the parliament itself and used to assist parliamentary control (see López, C. "Methodology of the Catalan Audiovisual Council for monitoring pluralism in news broadcasts" in *Quaderns del CAC*, no. 26, pp. 9-16). This situation, on the other hand, is widespread in Europe, as pointed out by Anna Estrada in "Monitoring news pluralism on the radio and television in Europe" in *Quaderns del CAC*, no. 26, pp. 17-27).

Ultimately, the different lines of rupture outlined here are totally coherent with this dominant trend, which explains all the changes as a result of the progressive transformation of the regulatory model, which must adapt to the new challenges, being necessarily lighter but without abandoning regulation, beyond access to the market as an operator, which is generally seen as a fundamental right by citizens and not as authorisation granted by public powers (Botella Corral 2007, 21). For this reason, basing the relationship between public administration and providers of audiovisual services on administrative authorisation is no longer the determining factor it used to be, particularly in

understanding and analysing the regulation of the sector (Barata i Mir 2007, 255). Consequently, and once their independence has been won, audiovisual bodies should not attempt to continue with the control patterns based on the idea that there is collaboration between the owner of the services and those responsible for providing these services. Their actions must be redirected to regulate the exercising of freedom of expression and information and their limits in a context comparable to a free market. The question is how to organise intervention in this context, which is based on the freedom of expression and the free market, with the necessary corollary of the possibility of free entrance to this market, de facto. It's important to do this properly as this is the industry that will have to be attended to in the future (Petit 2007). Or perhaps it is already necessary.

## 2.2. Regulating an audiovisual industry from the perspective of the freedom of expression/ enterprise and free entrance into the industry

Such regulation of an industry must logically be completely different, even though it comes from the same base. Given the public service model that (at least legally) allows a great degree of control, as shown by the fact that, in abstract, it could even appear to 'publify' the sector under a monopolistic regime (something which, a *maiore ad minus*, gives an idea of the extensiveness of powers that could be deployed), the structuring of public intervention supported by the freedom of enterprise and the exercise of free speech must be radically different, as shown by the model of administrative intervention, developed over decades, in a sector that operates under this regime: the printed press.

Notwithstanding this, the authorities that control audiovisual communication, born in a different explanatory context and whose design is based on this context, will be those that must act in this new environment. In principle, there is nothing against this. We must remember that, just because the industry is seen as a free economic area where the freedom of enterprise reigns, this does not mean there can be no administrative intervention. The economic regulation of different markets, with the aim of achieving highly diverse public goals, is a habitual practice. In fact, within a context such as that of the European Union, markedly liberalising, sector regulation is promoted, for example, in the area of content or most particularly in that of advertising, in order to protect European works and audiences. However, it must take on this task being highly aware of the fact that this modification in the conceptual framework necessarily means rethinking the way intervention is carried out and its possible limits. And at present it's only fair to acknowledge that we are still very much anchored in the traditional explanatory schema, which is to some extent logical because, as we have already mentioned, this is the origin of its powers and its actions (this can be clearly seen, for example, in the report by the Consell de l'Audiovisual de Catalunya, *La definició del model de servei públic al sector de l'audiovisual*, 2001).

What are the structural bases of this new model of intervention, of this new foundation of audiovisual control that will have to be carried out by the controlling authorities in the future, assuming the radical transformation of the panorama and context? Summarised very briefly, the basic elements revolve around two key notions: on the one hand, radical respect for an extremely broad regime of free speech as the basis of the system and, on the other, accepting that the administration can outline how this right can be exercised.

*a. Freedom of expression, an ancillary point in the model of regulation and supervision*

Intervention that aims to be global, omni-restrictive and common for all types of audiovisual communication, that aspires to act over all of them, must assume the impossibility, at present, of seeking out theories such as that of public service, given the restriction imposed on its ambitions by the recognition and interposition of a fundamental right such as that consecrated in article 20 of the Spanish Constitution. From this we can deduce, necessarily, a significant decrease in the possibilities for public action, given the demanding jurisprudence of the Constitutional Court (Barata i Mir 2000, 37). It's obvious that restrictions imposing prohibitions, such as that of prior censorship, go to make up a paradigm of control that is different from and more paralysing than the licence-based model (Amenós Álamo and García Quintana 2007, 251).

It's important to accept this reality right from the start but, in

turn, we must also be fully aware of the possibilities for intervention that survive in spite of this. No matter how well the model provided by the printed press with regard to how intervention can be structured in a sector where the two constitutive aspects (free speech and free market) are as we have mentioned, this does not necessarily mean that any market structured around both characteristics must be regulated administratively, by force, identically. Although, with regard to the printed press, the choice of our law has been that of minimal intervention and control based on the *a posteriori* repression of excess via judicial channels, the Constitution does not state that these patterns must be generalised just because we also assume that, from now on, the audiovisual industry will also be based on these two elements. It could be thus but it doesn't have to be. Just as many other sectors are regulated administratively without this affecting the freedom of enterprise, in order to achieve justified goals of general interest, the audiovisual industry can also be regulated in this way. And, of course, there is also the possibility of accepting limits to free speech within the framework of the Spanish Constitution and the European Convention on Human Rights. The traditional intervention in the United States (not exactly based on the notion of *public service*) shows to what extent it is perfectly possible, by other channels, to accept controls and restrictions: from setting up a technical classification of the sector to restrictions on media concentration, the regulation of advertising and even recognising a broad capacity for supervision and proscription regarding the "obscenity", "indecency" and "irreverence" of messages transmitted (Betancor Rodríguez, 33-34).

As is evident, there are limitations to fundamental law which we all bear in mind, that constitutional jurisprudence has outlined and that community law, as we have seen, supports. Based on these limitations, it will be possible to restrict the freedom of expression and regulate and structure the exercising of this right. But we must not go too far and, moreover, we must always maintain due proportion between restrictions and the benefits and guarantees resulting from these limitations for other assets of constitutional importance, such as respect for honour, for personal privacy and one's own image, the rights of minors, the preservation of pluralism and non-discrimination, instances of illicit advertising or the protection of other rights of consumers and users.

However, we must also take into account the fact that free speech involves an undeniable limit and that the constitutional prohibition of censorship, given the concern of the Spanish Constitutional Court to avoid the *chilling effect*, also constitutes a significant barrier, as numerous rulings (STC 77/1982, 52/1983, 13/1985, 52/1995, 176/1995, 187/1999) have reaffirmed the idea that interdiction must be extended to "as many measures as can be adopted by the public authority that not only openly impede or prohibit the dissemination of certain opinion or information but any other that simply restricts or may have an undesirable dissuasive effect". The specific way in which the model of audiovisual control is organised and structured can therefore have effects that must be taken into account. Similarly, there are certain rules that could come up against the constitutional prohibition of prior censorship.

The conclusion of all the above, albeit brief, is clear. The administration can intervene but it is important to do so also accepting that it must have good legal reason and that it must redirect practice to also become an active bastion in defending the freedom of expression and information in the audiovisual media. It is essential for the administration to accept this in order to reposition itself correctly within the context that beckons.

*b. Administrative delimitation of the exercising of fundamental rights and public freedoms*

In a way, the discussion therefore focuses, ultimately, on determining whether these functions, necessarily redirected based on the assumption that the structuring elements recognise the abovementioned freedoms, may be modulated or delimited when a public administration exercises them. And how this should be done. Especially when one freedom, free speech, has the rank of a fundamental right, which entails some alterations with regard to the legal architecture of its framework of action. In that case, it is useful to delimit actions and powers, rulings that have frequently been incompatible with the new legitimising paradigms we are developing, as a consequence of their roots being sunk in the old model of intervention.

Regarding this, we must first point out that the open paradigms that currently grant broad powers to the bodies responsible for regulating broadcasting present problems,

based as they are on justified intervention in the confluence of numerous indeterminate and evanescent legal concepts,. It is evident that, in any perfectly legitimate market regulation, such as *Television Without Frontiers*, must be provided with regulatory delimitation that respects the principles of legality, type and, in general, all requirements in terms of disciplinary administrative law. In such a context, these open and ambiguous paradigms present numerous problems (Amenós Álamo and García Quintana 2007, 230-231). So that, with a view to profiling positive administrative action that aims to be global, first we must globally rethink the regulations that specify the types and possible interventions and restrict them from exercising policies with a capacity to limit free speech.

We must also reflect on the possibility of continuing to control certain facets of broadcasting. If we take as an example the powers held by the Consell de l'Audiovisual de Catalunya, its functions include safeguarding "respect for political, religious, social, linguistic and cultural pluralism, and also for suitable territorial balance overall in Catalonia's audiovisual system" (article 115 of the Audiovisual Communication Act of Catalonia). It is clear that this kind of attribution (mentioned by way of example but normal in the industry), cannot operate in a free market context and would entail an unconstitutional restriction to free speech if attempts were made to impose this on broadcasters not subject to the requirements of *public service*. Think, for example, of the evident limitation on free speech represented by transferring these to the printed press. With regard to audiovisual communication, given the evolution of the medium, this perception will be no different in the future. Moreover, we could say that, at present, it is already accepted as perfectly normal that the different private operators can markedly define their political leanings (and this within a context of public service!) if they have such leanings, when these form part of their identity or constitute a market strategy they judge to be useful.

In this respect, we should remember that the freedom of expression makes sense precisely as a guarantee for expression that might bother society, that might injure or offend. And it goes without saying that it's also expression that has not been considered. So it must be the case that any non-neutral, partial manifestation that does not respect pluralism must be understood as equally covered in the case of free market regulation, and not in the case of a licenser that must safeguard the market. The proliferation of audiovisual media on the Internet has helped to highlight, once again, this important assumption (Boix Palop 2002). So that, as we have pointed out in another context, the capacity to inspect and discipline in line with these parameters, when we are not within the sphere of public service, is not constitutionally admissible in our opinion (Boix Palop 2007).

In addition to these initial concerns regarding the legal specification of restrictions and the consequent administrative capacity to inspect and discipline, as well as the need to delimit restrictions differently (excluding controls such as the ones mentioned), there are at least two additional structural issues that must be analysed regarding the repositioning of administrations responsible for controlling audiovisual communication, both related to the possibility that they might go beyond controlling compliance with the aforementioned legal requirements.

The first is whether, excluding the capacity to control, inspect and discipline contained in the functions that can be carried out by the administration to determine the ideal nature of the message, it can even be understood that intromission for the purposes of evaluating, criticising or guiding may be a problem, even when there is no disciplinary issue. In this respect, we only need remember the huge controversy accompanying the rulings of the Consell de l'Audiovisual de Catalunya, such as the one from December 2005 on the possible violation of constitutional limits to exercising the fundamental rights of free speech and freedom of information, or the agreement of September 2006 on the television advertisement for the platform that promotes Catalan squads in sport.

In general, we should note that it is precisely a broad interpretation of free speech that supports the fact that the manifestations of independent administrative bodies to regulate broadcasting can, in turn, take full advantage of this broad interpretation in order to combat, precisely in the terrain of the debate of ideas, certain ways of communicating or of using freedoms. So that, in a free market (this consideration cannot be transferred, however, precisely to the *affaire* on behalf of the COPE channel, whose relationship with the CAC is one of a service licensee), there is no reason why this kind of denouncement, condemnation or evaluation cannot be formulated provided that it does not

lead to effective measures of retorsion. Evaluating the suitability of certain advertising, on the other hand, when involving withdrawal (evident silencing effect) forces action within a strict framework of analysis of the possibilities for limitation given the considerations already mentioned. On the other hand, if the idea is to take part as an authoritative voice in the consensus of self-regulating mechanisms in this field, it is obvious that the respective independent administration's capacity to guide and establish guidelines must be seen as highly superior.

Lastly, there is the absolutely basic question of whether the generally acknowledged disciplinary measures that can be validly adopted by these bodies, framed within the aforementioned terms, may lead to the definitive or temporary closure of the medium in question, or whether this decision is only possible via judicial ruling. There are numerous opinions against the possibility of closure being the responsibility of an administration, albeit temporary, although this may be the result (penalty) established by the law on exercising the powers of inspection and control on aspects of economic activity of the medium (related to the composition of shares, for example, or any other issue related to the administrative organisation of the economic sector) or of the content, which can indeed be controlled by the administration without this presenting problems of free speech (for example, those affecting the rights of minors). The opinion I have given coincides with these opinions on other occasions (Boix Palop 2007), along similar lines to the idea that this is only admissible when undertaken by a judge (Betancor Rodríguez, 58). Other authors, such as De la Quadra-Salcedo, believe this action to be at least "shocking" (*apud* Torns Mas 2007, 179). For Salvador Coderch (*El País*, 13 February 2006), this possibility would not only constitute a case of prior censorship (prohibited by the Spanish Constitution) but, more directly, it would be its own "apotheosis, as it would not only be the case that the authority demands to control, before each programme, the content in order to purify it, but that it would prohibit *a priori* any broadcast for a period of three months, which would ruin the channel in question, would be its financial demise". Slightly more qualified, there are those who believe, nonetheless, that in these cases it's not technically correct to talk of censorship and they claim that the suspension of activity always occurs *a posteriori* (Torns Mas 2007, 179, who none-theless admits that, in any case, criticism is also possible.

It is my belief, however, that the opinion against an authority other than judicial being able to close down a broadcaster is not too difficult to justify. Not only the opportunity, which liberal constitutionalism has made clear and which our constitutional system of values is very keen on. But also its absolute correctness in legal terms, which I believe is unquestionable. With our current media environment, in the light of what I have described, it is totally evident that the aforementioned generous doctrine of the Constitutional Court is totally applicable, in order to believe that not only censorship but any kind of measure with an equivalent effect is constitutionally prohibited. But it also seems obvious that, from a minimally demanding legal point of view, this is not only a question of interposing section 2 of article 20 of the Spanish Constitution ("The exercising of these rights cannot be restricted by means of any kind of prior censorship") but also that established by section 5 of article 20, which states that "the seizure of publications, recordings or other means of information can only be agreed by virtue of judicial ruling". In other words, it seems complicated enough to argue, given the constitutional prohibition, that the simple seizure of publications, information or any other means of information is banned for any authority other than judicial when, on the other hand, the administration can close them down without any problem. This must be denied radically because, in law, it is not simple to accept, a m*inori ad maius*, that a party that cannot carry out the *minori* should, on the other hand, be entitled to carry out what is *maius*. Whoever isn't convinced of the coherence of our regulations by this structural principle should remember that the Constitutional Court has already ruled on this and assumed its validity (STC 199/1987) and the correlative impossibility of Spain closing down the media via actions that are not jurisdictional in nature (Mira Benavent 1987).

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