Catalan audiovisual legislation: present and future

Antoni Bayona

The far-reaching transformation the audiovisual sector is undergoing, with the incorporation of new technologies, new uses, access and ways of communicating, among other factors, has highlighted the need to redefine broadcasting as a public service. In this respect, the legal community has been involved in debating the new bases that must establish an appropriate legislative framework for the new audiovisual situation. In Catalonia, the passing of Act 22/2005 on audiovisual communication attempts to provide a response to these changes in broadcasting. This article analyses Catalan legislation in this sphere, the situation of the public and private media, the functions of the Consell de l'Audiovisual de Catalunya (the Catalan Audiovisual Council) as the regulatory authority and, finally, there is a review of the future perspectives for Catalan audiovisual regulations.

Keywords

Regulation, Catalan legislation, audiovisual communication, public service, regulatory authority, Consell de l'Audiovisual de Catalunya, Act 22/2005 on audiovisual media in Catalonia.

Antoni Bayona
Lecturer in administrative law at the Pompeu Fabra University and lawyer for the Catalan Parliament

1. Initial considerations: the audiovisual legal framework from a constitutional perspective

A particularly characteristic element of the audiovisual legal framework in Spain has been the consideration of audiovisual communication as a public service owned by the state. This configuration was clearly established in the old Statute for radio and television in 1980 and also in the laws that allowed private intervention in this field under a system of licences (the private television act of 1988 and the local television act of 1995).

From a geographical point of view, we should note that the creation of channels for the autonomous communities was also established under a licence system by the state via the act for the third channel in 1983, a circumstance that underlined even more the state's monopoly in the area of broadcasting.

Considering this activity as a state-owned service led to an interesting debate on the extent to which this model was in line with the Spanish Constitution, especially regarding the right to information and communication guaranteed by article 20. Constitutional jurisprudence entered this debate and attempted to maintain a balance between these rights and other constitutional principles that recognise the power of public authority to reserve certain essential services for the public sector and the effects that may result from considering the electromagnetic spectrum as an asset that belongs to the state.

However, maintaining a solution so biased towards the public predominance over broadcasting could not withstand the consequences of its technological evolution and the necessary impact of making the legal framework more flexible. This meant a different conceptual approach with regard to cable and satellite television, and the general assertion that, with the new digital terrestrial television or

with whatever can be produced by means other than the electromagnetic spectrum, it was no longer possible to maintain the idea of a public service under a monopoly.

This new situation therefore meant that the audiovisual legal framework had to be rethought, using new bases in order to make it more coherent with a more balanced model, in which the public service and private activity could both make their play. These new bases should enable private broadcasting, considered as an exercise in constitutional and legal law, to live side by side with the publicly owned media. In other words, to evolve towards a mixed model of private business and public service, with the consequent modification of the status of those authorised to provide private audiovisual services via permits or licences.

In spite of there being significant agreement regarding the design of this new legal model, it has not yet been possible to establish this in general, as the circumstances have not allowed the state to pass a general act on audiovisual communication.

Notwithstanding this, over the last few years there have been several attempts to draw up and pass this law, a circumstance which Catalonia has taken advantage of to develop its own broadcasting act in parallel, compatible with the principles that are being used by the state administration.

But although the drawing up and passing of these two laws should have happened at the same time, what has actually occurred is that the Catalan audiovisual communication act has been passed (Act 22/2005, of 29 December) without the possibility to coincide and correspond with the more general framework provided by the Spanish general audiovisual communication act.

Certainly this legislative scenario is not ideal as it has inverted the usual sequence between state and Catalan law and results in a conceptual distortion due to the different philosophy behind the new Catalan audiovisual communication act of 2005 and the obsolete state legislation that is still currently in force.

However, without minimising the problems of legislative 'fit' that this entails, it should be noted that the Catalan audio-visual communication act has been able to implement its provisions, something that has led to the introduction in Catalonia of substantial changes in the regulation of audiovisual communication.

In this respect, the most significant innovations we can highlight are the definition of a new mixed audiovisual model in which the public and private sectors co-exist, the establishment of a new legal regime for private audiovisual communication that is now considered as exercising a right, and the reinforcing of the independent regulatory authority for the sector (the Consell de l'Audiovisual de Catalunya). At the same time, the passing of the audiovisual communication act has also provided the chance to systemise a notoriously fragmented legal area, something that has helped make it more coherent and has improved legal certainty.

2. Basic elements of the legal framework established by the audiovisual communication act

The following aspects are particularly of note in the new legal approach to audiovisual communication brought by the 2005 act:

a. The recognition of the freedom of audiovisual communication. This establishes, at a legal level, one of the rights from article 20 of the Constitution, which has legitimised private operators and the private sector, insofar as they are exercising their right and do not have the inevitable status of licence-holder for an activity owned by the state.
b. The principle of veracity of information as a responsibility resulting from exercising the right to information, which is essential to protecting this right.
c. The establishment and regulation of instruments that guarantee pluralism in audiovisual communication as a requirement resulting from the democratic principle and the need to ensure free public opinion.
d. Differentiation between the public and private audiovisual communication sectors. The former, made up of media owned by the Catalan government and local bodies and the latter by private providers of audiovisual services at a local or autonomous community level that have obtained the corresponding licence.
e. Protection of the rights potentially affected by communication, which are diverse and of a varied nature: personal rights (honour, privacy and own image), protecting the rights of children and young people with regard to audiovisual content and preserving copyright and

exercising the right to rectify.

f. Establishing a system of public intervention based on the recognition of a public service with regard to publicly owned media and organisation with regard to private activity, specified, essentially, in the need to obtain a permit, compliance with legally established obligations and being subject to an administrative disciplinary system in the case of violation, with the guarantee that an independent regulatory authority will be involved.

3. The public service regime

As we have already mentioned, in Catalonia the audiovisual communication act has led to the end of the public monopoly over audiovisual communication insofar as it establishes a regime of necessary competition between publicly-owned and private media. With the understanding, however, that this private presence is no longer provided with the format of a concession to manage a public service, but as a veritable act of exercising the right to information and communication.

The structure of the Catalan audiovisual service has a dual composition: on the one hand, the media owned by the Catalan government and, on the other, the media owned by local bodies. In accordance with the act, both must be managed directly, the former by the Corporació Catalana de Mitjans Audiovisuals (the Catalan Corporation of Audiovisual Media or CCMA in Catalan) and the latter by the municipalities themselves or by consortiums set up for this purpose.

With regard to public service communication, we should note the efforts made by the act to define those elements relating to private activity, which normally follow commercial or financial criteria.

Public service radio and television must be aimed at fulfilling public service missions provided by the act in article 26 and which the programme agreement between the government and the Corporation must specify. It is therefore not a question of competing with private television in the content broadcast but of providing society with a service that prioritizes certain values, which the legislator believes are the *raison d'être* of an audiovisual public service and which are closely linked to plural programming that respects people's dignity and content quality, without this necessarily leading to the abandonment of content of an entertaining or generalist nature.

In line with this approach, the act provides for a financing system that is principally made up of public contributions, with a partial or limited share from the advertising market. It should be noted that this model becomes almost indispensable in order to meet EU requirements to guarantee the principle of free competition in the audiovisual sector.

On the other hand, the establishment of a public service regime involves the need to ensure pluralism, in order to avoid its potential use in favour of the government majority. This guarantee is achieved via different means, as stated by article 29 of the act, among which we should note the recognition of the executive bodies' independence from the government in management terms, the participation of parliament and the Consell de l'Audiovisual de Catalunya in choosing the top executives for these bodies and the guarantee of professionalism in management. The internal aspect of this pluralism is complemented with the duty to ensure the participation of the most representative social and political groups in managing the public service by them forming part of an advisory council.

The act regulating the Corporació Catalana de Mitjans Audiovisuals has established a system to appoint members to the management council based on the requirement for a qualified majority in the parliament, but also requiring the accreditation of a suitable professional profile on the part of the candidates, duly verified by the Consell de l'Audiovisual de Catalunya. This is an important change from the previous system applicable to the Corporació Catalana de Ràdio i Televisió (Catalan Radio and Television Corporation) but it has not had the expected effect in its first and recent application. In fact, the professional criteria that should have been a priority for the candidatures presented by the parliamentary groups have given way to more political profiles, so that the previous system of political quotas has predominated which, in theory, the new Catalan Audiovisual Media act aimed to abolish.

The aim was also to preserve the guarantee of the internal pluralism of local providers of public audiovisual services, in a similar way to what happens in the area of the Catalan government, via organisational rules based on the same principles. Article 33 of the act contains these and, in theory,

they should be enough to achieve their objective, provided they are correctly incorporated into the organisational and functional regulations of the corresponding services.

With regard to private audiovisual communication, we have already noted that this conceptual change has an effect on the conditions for carrying out this activity. In accordance with state legislation, and apart from cable and satellite television, private audiovisual communication is carried out as a concession for a state-owned public service. However, in accordance with the audiovisual communication act of Catalonia, this private activity in the autonomous community or local area is carried out by means of administrative authorisation, so that the private nature of the operator appears with total clarity and transparency.

This does not mean, however, that there are no conditions or limits to exercising this right. In this respect, the differentiation made by the act between private audiovisual communication that uses the electromagnetic spectrum and that which uses other transmission technologies is essential. In the first case, given that the spectrum is limited, private communication remains subject to obtaining authorisation (licence), while the other is free, the only obligation being to notify the Administration prior to starting.

4. System of administrative intervention in private audiovisual communication

In accordance with the above, there are two regimes that depend on the technology used and that translate into two different degrees of intervention. As we will see, it can be stated that the system of intervention is particularly intense in the case of using the electromagnetic spectrum, while in the other case (e.g. television by Internet) this intervention is minimal and essentially preventative in order to ensure compliance with the minimum obligations established by the law for these service providers as well.

The licensing system entails a particularly close relationship with the administration given the fact that the provider benefits from using an asset in the public domain, namely the electromagnetic spectrum. Technological evolution and the implementation of digital terrestrial television have notably extended the possibilities to take advantage of this space. But this does not detract from its limited nature, which justifies the application of an especially strong regime of intervention, as provided for in article 46 of the act, according to which the licence grants operational authorisation because it establishes the obligations of the service provider and determines the framework of the relationship with the regulatory authority throughout the lifetime of the licence.

In any case, the most important conditioning factor for private audiovisual communication results from the limited number of licences. Unlike other rights, the exercising of which does not have this kind of limitation and everyone can secure a licence provided they meet the legally established requirements, in the case of providers of audiovisual services the first thing to be resolved is how authorisation can be obtained, which has a *numerus clausus*.

For this reason, one of the basic aspects of the administrative regime is the holding of tenders via which the licences are granted. The tender is an instrument that guarantees the application of the principle of equality, providing the audiovisual authority responsible for running and deciding on the bids with criteria to evaluate them and allocate the licences. The regulation of these criteria in the same act and their specification in the call for tender applications lead to an essentially regulated scenario in order to evaluate the bids, limiting the room for manoeuvre in deciding how to allocate licences. It is therefore a system designed to provide those involved with a guarantee, in an area where the procedures followed to date have not always upheld the minimal requirements of transparency, objectivity or equal treatment. The more detailed regulation of the tender, as well as giving an independent body the authority to decide on the licences to be allocated, is also a significant change in orientation in this area that must be valued positively.

The result of the tender is also upheld with the establishment of precautionary clauses that deter alteration by other means. One of these is the non-transferable nature of the licences and another the measures provided for in the act to guarantee external pluralism and to control operations that might entail the excessive concentration of media control, either through ownership or management or by other indirect means.

The communication regime for operators not using the electromagnetic spectrum differs slightly from the interven-

tion we have just explained, insofar as the element that justifies intervention has disappeared. As, in this case, a restricted communication area is not being used, the activity can be liberalised without harming the application of rules affecting content that are common to all communication activities.

In this case, the act merely requires operators to make a formal declaration before they start broadcasting, in order to notify the broadcasting authority. This notification therefore ensures that the authorities are aware of the activity, which is completely necessary in order to be able to supervise compliance with the obligations established by law.

5. Reserving a public communication space

The result of the schema we have just explained is the existence of a public broadcasting space (via public ownership) and a private space (licensed private providers).

However, a provision in the act affects this schema, obliging the public authority to reserve a space for private non-profit entities so that audiovisual communication may be carried out in a way other than that of strictly private or public activity. Forming part of this third sector are the community communication services that offer content aimed at meeting the specific social, cultural and communication needs of the communities and social groups they cover, applying criteria of participation and pluralism, as well as audiovisual services carried out by universities, which in the act come under not-for-profit services.

6. The obligations of audiovisual service providers

The organisation of the audiovisual sector determined by the audiovisual communication act of Catalonia involves the need for providers to meet various conditions in carrying out their activity, resulting essentially from the content of the licence and from the need to respect the rules governing audiovisual content to safeguard users.

The establishment of a licensing system has been provided for in the act in order to place the commitments resulting from the tenders within its scope. The criteria for awarding licences assess the applications presented by the bidders according to pre-established parameters and barometers, so that there is an undertaking to comply as a result of the operator's declaration of intent, based on which the bid has been evaluated. This is a characteristic feature of a licensing system that individualises the degree of requirement achieved beyond the minimums established by law for each case. These are therefore the particular obligations and commitments from the licence itself.

However, we should remember that audiovisual communication may have repercussions on the rights and interests of the audience that are worth protecting. A large number of these rights have extra protection since they result from the EU regulations on television without frontiers, regulations that have been transposed into national legislation. Notwithstanding this, the audiovisual communication act has systemised these again and we can find the following rights:

a. Respect for the dignity of people, non-discrimination, truthfulness of information and distinction between information and opinion.
b. Respect for the right to privacy (honour, intimacy and own image).
c. The prohibition of content that incites hatred due to reasons of race, sex, religion or nationality.
d. Compliance with rules to protect minors, specified in the absolute prohibition of certain content (e.g. pornography or gratuitous violence), in fixing a 'watershed' or in the obligation to provide warnings as to content.
e. Obligations with regard to the presence of the Catalan language and culture in the media.
f. Obligations concerning minimum quotas for broadcasting European audiovisual works.
g. Limits established concerning advertising, telesales and sponsorship.

Compliance with this wide and diverse range of obligations is supervised by the Consell de l'Audiovisual de Catalunya, which has the authority to apply the disciplinary measures provided for in the audiovisual communication act.

Some additional comments should be made concerning such a delicate aspect. Firstly, we should note that the existence of this administrative disciplinary regime is a legitimate option of the legislator that cannot, in any case, be seen as an act or instrument of censorship, which is prohibited by the Spanish Constitution. The possibility of an

administrative disciplinary regime being applied to an area in which a fundamental right is exercised is not excluded by the Constitution, provided the requirements are followed of the principle of legality and those affected are allowed to exercise their right to legal protection, as happens in this case. Secondly, we should also note the efforts made by the audiovisual communication act to encourage the implementation of formulas of self-regulation and co-regulation of content in order to minimise conflictive situations. Co-regulation is particularly of interest insofar as it is based on an agreement established between the provider and the audiovisual authority that leads to a situation of contractual commitment by delimiting and specifying the obligations and duties regarding content.

7. The consolidation of the audiovisual regulatory authority

One of the elements that characterise Catalan audiovisual legislation is the creation of an independent regulatory authority to exercise the functions attributed by this act to the public administration.

This existence of this kind of authority is unusual in the large majority of countries in our area and essentially responds to the need to separate the exercising of some powers from the ordinary administration by the government, powers that, due to their nature, might affect the exercising of the right to information and communication, so essential for a plural and democratic society. The allocation of these functions to an authority that is independent in nature supposes a guarantee of neutrality and objectivity in decision-making that would otherwise be in danger of being influenced by political or situational factors.

This provision by Catalan legislation comes as no surprise, but what is a surprise is the inexistence of an independent authority at a state level, which has yet to be created, most probably because of the same difficulties as those facing the approval of a general audiovisual communication act.

The creation of the Consell de l'Audiovisual de Catalunya has gone through different stages. At first, the council was created by the cable television act as a body related to the government and with strictly consultative functions.

Evidently, this format did not correspond to the characteristics of an independent authority in accordance with comparative law, so that this legal framework was modified with Act 2/2000, of 4 May, of the Consell de l'Audiovisual de Catalunya, establishing it as an authority independent of the government and attributing the functions of informing and also decision-making in some areas (e.g. disciplinary matters).

As from this point, we can say that the legislator clearly opted to reinforce this authority, with the firm will to convert it into an ordinary administration in the area of audiovisual communication. This process was consolidated with the audiovisual communication act of 2005, which delimits the basic functions that must continue in the hands of the government and assigns all others to the Consell de l'Audiovisual de Catalunya.

As a result of this last legislative modification, the Consell de l'Audiovisual de Catalunya now has the following powers in terms of decision-making, among others:

a. Those related to the guarantee of pluralism and respect for the rights and freedoms involved in audiovisual communication.
b. Monitoring compliance of the public service missions of the media owned by the Catalan government and by local bodies.
c. Granting authorisations (licences) for private broadcasters.
d. Holding tenders and awarding licences.
e. Exercising its powers of inspection, control and discipline in the area of audiovisual communication.

All these functions are executive in nature and must be related to the recognition that the audiovisual authority holds legislative powers to develop and specify various broad sectors of audiovisual legislation (conditions applicable to the licences and obligations of operators, basically).

The independence of the Consell de l'Audiovisual de Catalunya is achieved essentially in two ways. Firstly, via the guarantee of independence of decision-making without any kind of hierarchical supervision regarding the exercising of its functions. And, secondly, via a system to appoint members in which the government intervenes minimally and the weight falls to the parliament. The requirement for the candidates to have an appropriate profile, together with a super majority for the appointment, are instruments whose

aim is to guarantee the principle of independence, given the subjective position of the members that go to make up the regulatory authority.

However, we should stress that this independence to act is not ensured only with the instruments formally established for appointing members but also in the selection of candidates, as candidatures must be presented that are justified more by a person's professional profile than by reasons of their connection or political links to the party proposing them. Appointment by super majority is provided as a formula to ensure consensus concerning the appropriateness of candidates; but the system is watered down when this process is used as a mere formula to distribute quotas among parties.

Regarding this issue, the same reflections made can be transferred to the executive bodies of the public media and, most particularly, the governing council of the Corporació Catalana de Mitjans Audiovisuals. It is significant that the new act governing this body (Act 11/2007, of 11 October) establishes a clearly professional profile for candidates, at the same time as making the Consell de l'Audiovisual responsible for drawing up a report on the suitability of the candidates proposed. However, in spite of such clear requirements, the application of the act has not been free from controversy due to the excessive politicisation that may have influenced the appointment of the first governing council.

8. Balance and perspectives for the future of Catalan audiovisual legislation

From an objective and formal point of view, it cannot be denied that the parliament of Catalonia has been particularly active in legislating for audiovisual communication. This has even more merit if we take into account the very small margin for action provided by the statutory framework at the time, which was subsequently extended with the Statute of 2006.

The creation, in 2000, of the Consell de l'Audiovisual de Catalunya, its gradual empowerment over a relatively short period of time and the passing of the audiovisual communication act of Catalonia in 2005 are a palpable demonstration of the will of the public authorities in Catalonia to regulate and update a sector subjected to obsolete and often too destructured and ancient rules.

In this respect, we should particularly note the changes that the audiovisual communication act has introduced in the legal regime governing audiovisual communication, with decisions as innovative as the elimination of the public monopoly in audiovisual activity in Catalonia and the establishment of new bases to regulate private audiovisual communication. All this has also been established within a single legal framework of reference, applicable systematically to all subsectors inherent in the audiovisual field.

But it is evident that regulatory changes are not always enough in themselves to eliminate a system's anomalies or dysfunctions, especially when its characteristics make it highly complex.

In this respect, the practical question of applying legislation has aspects on both sides that should make us reflect on the future. A few of these are explained below:

With regard to the tenders to award operator licences, we should praise how it has been applied to the area of local television. The leadership of this process on the part of the Consell de l'Audiovisual de Catalunya has provided a guarantee of objectivity and the removal of potential bias, making the result achieved contrast clearly with the way in which these processes have been resolved in some other autonomous communities.

However, the very existence of a local public and private audiovisual sector, which must come together and compete in a national and state audiovisual communication space, can lead to saturation in terms of supply that is difficult to assimilate, and can also compromise the viability of programmes, especially with regard to economic performance and the fulfilment of locally-based communication content. We therefore need to see how this complex model turns out and whether the market is sufficient to absorb all the supply.

Another aspect that must be assessed of the present and future is that of content. The deterioration of a lot of content is undeniable, with the corresponding negative social consequences on certain particularly sensitive groups (young people, minors) and on the ethical and moral values of citizens in general. Regarding this issue, the limits established by legislation have so far appeared to be relatively inoperative and some attempts at self-regulation have also notoriously failed. This is therefore an issue that

must be pursued in order to ensure that the private media maintain a minimum level of quality in content and also to ensure that the public media are not conditioned by competition within the audiovisual market and that they are always in line with the public service missions they have been commissioned with.

Lastly, and as an important issue that is still pending, we should also highlight the necessary passing of a general audiovisual act by the state that completes the regulatory changes advanced by the Catalan legislation and, moreover, that does so respecting and defining the respective areas of action in accordance with that provided for in the Spanish Constitution and the Statute of Autonomy for Catalonia.

This act should consolidate the different territorial areas of audiovisual communication (state, on the one hand, and autonomous community and local, on the other) so that Spain and the Catalan government can exercise their respective powers over these sectors. However, choosing this territorial criterion, which becomes inevitable, should take into account the inherent de-location of new television formats that do not use the electromagnetic spectrum but that are also aimed at the public of Catalonia. And, closely related to this problem, it is also necessary to organise the relationship between any state-level regulatory authority that is established in the future with the Consell de l'Audiovisual de Catalunya.

We must assume that the start of a new legislature after the elections of 9 March will also see the return to the political agenda of preparations for a general law of audiovisual communication. This is therefore the first challenge of the future that must be tackled, as the room for manoeuvre and the options available to audiovisual policy that necessarily affect the evolution of Catalan legislation in this area will largely depend on this general law.