



The audiovisual sector in Spain

## New legal setting

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The General Law on Audiovisual Communication (Ley General de la Comunicación Audiovisual), of the 31st May 2010 has established a new legal framework for the audiovisual sector in Spain. Certainly it is an original legal framework, because revoking all the previous State audiovisual regulation the axis, that up till now prevailed audiovisual activities in Spain, has changed drastically. Besides, it is a general framework since it has a basic nature, excepting part of its regulation specifically applicable only to State audiovisual communication. That is the reason why Autonomous Communities will have to comply with that framework in their competencies.

**Keywords:** General Law on Audiovisual Communication, new legal framework, Autonomous Communities, development, Spain, State Council of Audiovisual Media.

La Ley General de la Comunicación Audiovisual, de 31 de mayo de 2010, ha establecido un nuevo marco legal para el sector audiovisual en España. Ciertamente es un marco jurídico nuevo, porque deroga todo el régimen anterior. El eje de la regulación audiovisual, que ha prevalecido desde entonces en España, ha cambiado drásticamente. Además, este es un marco legal básico, exceptuando la parte de la regulación específicamente aplicable a la comunicación audiovisual del Estado. Esa es la razón por la cual las Comunidades Autónomas tendrán que cumplir con ese marco al desarrollar sus competencias.

**Palabras clave:** Ley General de Comunicación Audiovisual, nuevo marco legal, Comunidades Autónomas, desarrollo, España, Consejo Estatal de Medios Audiovisuales

### 1. An expected law

UP UNTIL NOW, our audiovisual sector was ruled, along with the Statute for Radio and Television of 1980 (ERTV), as head rule, by a set of different un systematic laws that have been passed later in a successive way<sup>1</sup> with the aim of facing the requests of more dominance in the subject by the Autono-

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mous Communities, the development of private initiatives and the speeded up technological progress in this area. All these laws were presided, excepting a few fragmentary exceptions that were finally incorporated as well (such as the liberalization of cable tv or satellite tv) by the criteria of funds of the ERTV: radio television was an activity reserved for the public sector -in terms of strictly legal terms, the State- with its shaping being that of a “public service” being the legal category that synthesized this fact. A public service that the State rendered directly (through the entity known as Ente Público Radiotelevisión Española, RTVE), but whose management could also be “conferred” to other subjects (the Autonomous Communities, city halls or private individuals) all under the heading of being concessionaires.

Due to the inadequacy of this ruling – because of its profuse nature and in depth key issues – for a social and economic reality very different from that in which the declaration of the ERTV was in context with, the passing of a “general audiovisual law” unifying the regime of the different audiovisual media and surpassing the publicity conceptualization of those rulings, it turned into a general expectation. Above all, after the passing by the Council of Ministers in June 2004, of a reformation plan of the audiovisual sector which included the pronouncement in the future of three laws: a General Audiovisual Law, a Law for Radio and Television owned by the State and a Law whereby supervisory authority was created called the State Council of Audiovisual Media (CEMA).

Well, this reform programme is the one that, with delay, has ended up crowning the recent General Law for Audiovisual Communication (including the creation of that Council as independent regulatory organism), after the law passed in 2006 which was the Law of Radio and Television Owned by the State (LRTTE), this last one only applicable to radio and television managed by the State (by the RTVE Corporation), but which appeared to anticipate –logically only insofar as audiovisual activity is concerned of the state public sector – the keys of the new general regulatory model that now the LGCA has instituted in a general way.

## 2. Regulated audiovisual communications services

In its Exposition of Reasons, the LGCA expounds the reasons that justify its pronouncement. Besides those already commented regarding the complexity and obsolescence of the previous regulations, the need to adjust our regulations to those of the European Community Law, specifically, Directive 2007/ 65/ CE which modified the previous Directive 89/ 552/ CEE, known as “Television with no Frontiers” (hereon, the Directive), to be able to, in view of the convergence of the so called services for the society of information and media services, networks and elements, extend its scope of application beyond traditional services such as television, to the new audiovisual communications services that were cropping up.

In this way, the object of the new LGCA are the “audiovisual communications services”, in other words, those who through electronic communications, supply programs and contents with the main aim of informing, entertaining or educating the audience in general, and always with the editorial responsibility corresponding to the deliverer of the service (in other words, that the provider of content exerts effective control on the choice of the programs and their organization, either in a chronological schedule or in a catalog of programs made available to the audience who chooses the program and moment of its visualization or audition – Art. 2.2. LGCA –).

[1] Third Channel Law of 1983, Law for Organisation an Control of city hall Radio broadcasting stations of 1991, Law of television radio broadcasting of 1994, Law for Satellite Telecommunications (concerning satellite tv), of 1995, Law for Cable Television of 1995, Law of Local Television by Land Wavelengths of 1995, Law for Digital Radio and Television of 1997, Regulatory Law for Sports Competitions and Events of 1997, Law for Urgent Measures for backing Digital Television, liberalisation of Cable tv and backing of Pluralism of 2005, Law for Urgent Measures for telecommunications of 2009, Royal Law Decree on TDT pay service by means of conditional access of 2009, among others.

The concurrence in audiovisual activity that the subject being dealt with of those elements of this definition thus determines that the subject is able to receive application of the new framework, otherwise not being able to be under the applicability of the regulatory framework.

The Law states the services that today are contracted under that definition of audiovisual communications services: radio services, television services and connected and interactive ones, specifying besides this, their modalities: services of audiovisual television communications, Television on demand, mobile television, radio, broadcasting by request and radio mobility. All of this taking into account that, when interpreting the law as stated by the Directive, in television audiovisual services (what the Directive calls “linear services”) it is necessary for it to include as well, analogical or digital television no matter what their means of broadcasting (land waves, cable, satellite, etc), live broadcasting in real time by Internet (“live streaming”), web casting and quasi-video on request and in the audiovisual television communication services on the demand (those the Directive refers to as “non linear”), video on request.

Thus delimiting the object of the Law, it however expressly excludes from its scope –doubtlessly with a clarifying pretension– electronic networks and communications services (which will be ruled by telecommunications legislation); audiovisual communication that do not have an economic nature, to not enter into competition with the audiovisual communications services; –audiovisual communications that are not geared for a significant part of the audience, not having a clear impact on the audience as well as any other activities that do not compete for the same audience of radio television broadcasting, and in sum, web sites whose objective is audiovisual content generated by private users –the Directive precises, with the same goal of exclusion in its scope– “with the aim of sharing it and exchanging it among groups of interest in it”. These are logical exclusions as the circumstances that we have viewed that delimit the legal definition of “audiovisual communication services” in which they do not concur. Yet, even so, I believe it would be necessary to clarify this by regulations that are more precise in some of these exclusions as these are somewhat generic.

### 3. A new regulation model

The LGCA regulates the audiovisual communication services as of a very different standpoint from that of the previous legislation.

- a. The ERTV of 1980 (and in the same way the rest of the preceding audiovisual regulations) was based on an abstract conception on the guarantee of the right to information that served it base implicitly exclusive reservation of ownership of the activity of the audiovisual media in favor of the public sector. Thus the effective development of that activity by private initiative required a necessary concession to be granted to it by the public power. In view of this, the new LGCA consecrates (in its Title II, ( its Title I is dedicated to general definitions), as a threshold and base of all its regulation, the express legal recognition both of the rights of the audience as well as those of the people rendering the service of audiovisual communications. Along with this, it undertakes, in the first case, a set of sections (pluralism, professional diligence in information, protection for minors comercial communications regime reservation for





European works, events of general interest to society, etc.) geared to the effective guarantee of those rights the public has, and in the second case, as a corollary of the rights of freedom of business and freedom of information, those corresponding to position of the renderer's of audiovisual communications (publishing freedom, access to telecommunications, self regulatory measures, exclusive contracts for contents, etc.).

b. This recognition of rights is at the base of the capital about turn produced in the legal configuration of the audiovisual activity. The LGCA liberalizes – makes no longer public – as such the audiovisual communication services which are no longer defined as “public service” but rather as “service of general interest” which is offered in a regime of free competency, although with the restrictions derived from the limitation of the radio electrical spectrum and the protection of the interests of the citizens. The liberalization does not exclude at any rate the peculiar regime that, as we will see, is established for the services rendered by the public sector as far as responsibility is concerned – this one – of a defined mission as a public service. Free initiative, public or private, thus presides the sector of audiovisual communications, both acting in principle concurrently, although not in strict competition.

c. The liberalization, otherwise, does not imply de-regulation, but rather a new regulation based on these two key points. First, the audiovisual activity considered as a “service of general interest”, is subject, besides the LGCA, to a very different administrative intervention from the conventional one that has been active so far: the previous requisite of concession or authorization to be able to carry out audiovisual activities has disappeared, now it is enough to merely communicate beforehand by the service provider to the Administration – to the so called “audiovisual authorities” to carry out its activity. Although in the case the activity implies use of the radio electrical spectrum, it will be necessary to obtain a license to be granted by means of public bidding by the competent audiovisual authority. On the other hand, audiovisual services rendered by the public sector are connoted with the already mentioned “mission as a public service” to fulfill by public service offerers under an expressly specific regime in different sections, particularly, its financing.

d. The LGCA is applicable both to the public and private sectors, and its aim includes a set of basic rules that must be followed by the specific rules dictated to enable its application, be it on a State level for audiovisual communications with a national scope or those of the Autonomous Regions for the remaining sectors.

e. At any rate, and in comparison with the preceding regulations, the new model could not be less given the liberalization of the audiovisual exploitation that it consecrate, underlines above public intervention on the access of this exploitation, the regulation and supervision of the contents – both by public and private servers – as well as a guarantee of audiovisual offering through the so called “mission of public service”.

f. In sum, fulfillment of the audiovisual rules is insured by means of the corresponding supervision of the activities of the sector by the “audiovisual authority”, as well as a basic sanctioning regime which includes type



of the corresponding law breaking and sanctions (fines or in such cases, ceasing broadcasting by revoking the license – in the case of audiovisual services by land Hertzian waves– or ceasing of the effects of the necessary prior requirement communication to offer any other audiovisual communication service). This will be applied by the corresponding audiovisual authorities, State wide or on a Autonomous Regional base in their respective scopes of operation.

#### 4. The regulation of the audiovisual communications market.

Under the heading of “Regulation of the audiovisual communications market”, the LGCA groups (Title III) a series of rules that, conceptualizing radio, television and connected and interactive services, as we have seen, as “services of general interest”, subjects its development of only to a prior communication or license for exploitation. The new Law introduces in the regime of these last (if we compare them to what would be its traditional parallel, the concessions), novelties of interest: besides the radical difference underneath (the license presupposes the right to carry out the activity, the concession does not include this right), others that are functional in nature: the time span of duration of the licenses will be of 15 years and its renovation, in principle, is automatic, the possibility of subletting or leasing, etc. It already includes an integrated regulation concerning concentration of media: thus it does not permit, in the television market, acquisition of significant participations (those surpassing five per cent of the capital or 30 per cent of the voting rights) in another state level service renderer when average audience number in the past two months of the channels under control surpasses 27 per cent of the total audience at the time of acquisition (afterwards there are no limits due to the audience, which has led to the LGCA to be considered permissive on this point); on the other hand, special rules are established for crossed participations between operators of different coverages.

The LGCA adds to this specific provisions for chain emission of television services with local coverage, radio broadcasting and mobile and high definition television as well as the general provisions related to the State and Autonomous Registers of those offering audiovisual communications (thus the previous Registers of Concessionary Societies from the Television public service, of Radio Broadcasting Companies and the special one for Cable TV operators are extinguished).

#### 5. Public servers and the public audiovisual communications service

Audiovisual communication services offered by the public sector feature specific provisions in the LGCA derived from their already commented qualification as “public service”, yet this notion is understood in a different sense from the previous audiovisual regulation. If in this previous regulation the public service was identified as the entire audiovisual activity as far as it concerns the public sector to be directly rendered by or it by other subjects as concessionaires, now –and according to Community Law of Europe– it is just as a service that carried out by public servers, that it receives the connotation of a specific finality: a “mission of public service” delimited as such within the general activity of renderer’s of this type of service, which justifies that in this case the service is excluded from the equal treatment and effective competition with private service offerers.





The LGCA, which defines this mission in an abstract way (Art. 40.1), determines that the Parliaments or similar organisms on an autonomous level will specify the objectives of this mission for a nine year period, as of which the corresponding Executives must subscribe with their respective organisms for radio and television, the suitable “program contracts” in which contents of the public service will be specified, including the percentages of the programming genres that must be broadcast in the channels they manage (with this the LGCA generalizes in a basic nature what already was foreseen by the Corporación RTVE by the Radio Law and the State ownership of Television of 2006).

It also regulates, with a basic nature, among other ends, the peculiar financial regime of this public service, based on public financial coverage of its net cost (the specific cost of the mission of a public service) (for the public service of State ownership, in other words, for the Corporación RTVE, the LGCA also prohibits specifically its financing by means of publicity) the necessary representative nature of political and social pluralism of the organ that in the public servers would draw up the reglamentary criteria in the editorial management; and the control of the General Courts, the autonomous Parliaments and competent audiovisual authorities in fulfilling its function as a public service.

## 6. Audiovisual authority and its functions

The LGCA refers in a repeated way to the “competent audiovisual authority” which it acknowledges as having a basic character with a series of competencies for supervision and control of the audiovisual communication services. These competencies are truly important: granting the licenses (the LGCA specifies that in the case of audiovisual communication services with a state coverage, this granting will be done by the Government and in the rest of the cases, will be done by the organism that the Regional Governments decide); receive prior communications, authorise legal business operations on the licenses, exclude the broadcasting in coded format of the events of general interest to society (an expressly granted faculty – and only so – to the CEMA, which must fix a catalog with biennial duration in which must be included the events of general interest for society that must be broadcast in open television and with national coverage); control the management and fulfillment of the function as a public service; by the public servers, determine the rules to establish net cost of this function, obtain the compensation if it takes place and periodic control of public financing that the servers receive for the public service of audiovisual communication, state the audiovisual content criteria on the contents that could be harmful for minors and that may only be broadcast between 22 and 24 hours; promote among the servers the backing of conduct regarding commercial communications that are inadequate for minors; surveillance, control and sanction of suitable grading according to age groups of the programs by the servers of audiovisual communications; exert the sanctioning faculty in the administration of the subject, etc.

Of all these competencies we wish to point out the one that guarantees the right by the audience to participate in the control of the audiovisual contents, something that the LGCA states in (art. 9) in the following terms. Any physical or legal person can request from the “competent audiovisual authority” the suitability of control of the audiovisual contents from the current regulations or the codes for self regulation. In this case (as also by

routine law) the audiovisual authority, if it perceives that an apparently illegal content has been broadcast, will give an audience to the renderer of the service under consideration and to the person that requested its intervention, as of then the audiovisual authority may reach agreements with the renderer for the content to be changed or quit broadcasting the illegal contents, putting an end to the effective fulfillment by the renderer of the service and sanctioning that could have been started up. Doubtlessly, these determinations of the LGCA (which do not block specifications foreseen in the rules on sanctioning procedures in the Autonomous Regions -art. 9.5), can help a higher effectiveness of the legal dispositions on the audiovisual contents, which today as we all know, are frequently unfulfilled.

It must be taken into account at any rate that these functions mentioned earlier are recognized by the LGCA in the “competent” audiovisual authority. With this expression the LGCA refers to the organ or organism that must carry out these functions on a state level or in the respective Autonomous Communities which must be specified in nature of its legal authority of self-organization by the specific state regulation or by the regulation of the Autonomous. In sum, the concrete attributions of the state or Autonomous authorities in the State and Autonomous Communities (and the organ or organism that as audiovisual authority with competency exerts them) must be defined as of those foreseen for the audiovisual authority by the LGCA and to enable them to be exercised on a State level or Autonomous Community level derived from the general distribution of competencies in audiovisual matters.

Well, taking into account what is established in the Constitution (art. 149.1.27 ) as well as the determinations of the LGCA itself (final disposition no. six), we can delimit the respective fields of competency of the State and the Autonomous Communities on audiovisual matters in the following terms (whose functions must consequently be limited to the exercise of their functions by the corresponding audiovisual authority). State competencies will be audiovisual coverage on a national level, quality that according to the LGCA (art. 2<sup>o</sup>.3 ) will have: a) “the public service of audiovisual communication whose reservation for direct management has been agreed by the State” (this legal expression re-directed to its just terms, in other words, those of audiovisual services of the state public sector, specifically, of the Corporación RTVE ); b) “the service of audiovisual communication whose license has been granted by the State”, this circumstance which will concur after the following; c) “the audiovisual service that is rendered to the audience of more than one Autonomous Community” (although “it will not be considered of national coverage in the suppositions of natural overlapping of the broadcasting signal for the territory in which the service has been enabled for”).

On the other hand, the competency of the Autonomous Communities –delimited as opposite from the previous criteria– will be extended to the audiovisual communication services that are not State coverage (in the terms expressed previously). Thus this is taken into account by art. 56 of the LGCA that (within its provisions on the basic sanctioning regime, even though it can be extrapolated with a general nature) refers to the competency of the Autonomous Regions in the field of “the services of audiovisual communications whose scope of coverage, no matter what transmission method is used, does not surpass their respective territorial boundaries”. A nuclear criteria that the Law contemplates –also as opposed to those foreseen to determine state competency– under the following terms: “Also





competent will be in regards to audiovisual services whose services are directly carried out by them (the Autonomous Communities) or by entities that have received their management within the corresponding autonomous scope". All this should be understood to be that, according to the doctrine of the Constitutional Court (STC 31/ 2010, FJ 89, that includes the new Statute of Cataluña), the audiovisual media will be within the competency of the Autonomous Communities, must be dealt with in all cases of broadcasting that are issued from the Autonomous Community and received there by them.

## 7. The State Council of Audiovisual Media

As we have shown, each Autonomous Community will decide the organ or organism that in its scope will exert the functions attributed by the LGCA to the audiovisual authority, this is something that in principle could be done in favor of its own governing Administration or by a regulatory organism that is independent. In fact, already before the passing of the LGCA, some Autonomous Communities had opted for granting a large amount of the regulatory functions and supervision in audiovisual matters they were competent in, to an organism equipped with organic and functional autonomy concerning the Autonomous Executive, their respective Audiovisual Council. Thus they continued besides the example of the so called independent Administrations that already existed in other sectors (National Commission of Energy, Commission of the Stock Market, Commission of Telecommunications, etc.), those coming from this model that already existed for the audiovisual sector in other countries (British Ofcom, French Audiovisual Superior Council, etc). Well, in the same way, which is that of the European Directive (which refers to the existence in Member States of the corresponding independent regulatory organisms), the LGCA – in this case as a non basic regulation and therefore only applicable to the State and not the Autonomous Communities – has created the State Council of Audiovisual Media (CEMA) as an independent regulatory organism for the audiovisual sector on a State level to which are attributed most of the functions that are contemplated with a basic nature for the so called audiovisual authority.

In a general way, the CEMA is in charge of adopting precise measures for full efficiency of the rights and obligations established in the LGCA; survey the fulfillment of the LGCA as well as of the European regulations requirable for the audiovisual sector; survey fulfillment by the public renderer of the audiovisual communications service of their mission as public service and suitability of public resources to this end and guarantee independence and impartiality of the public sector audiovisual media.

As well as this, and in a specific way, the CEMA has a series of faculties granted to it in the more significant sections of the development of services of audiovisual communications. Thus, as far as access for exploitation of the services and media, receive communications of start up of activity of those rendering audiovisual communication services; inform the conditions and requirements in bids for granting licenses for audiovisual communications that the competent Government sectors convene, as well as the diverse offers presented to it and the decisions it takes on renovation of licenses; authorization of holding legal business on them and declare them extinguished in conformity with what is established in the LGCA; the carrying out of the State Register of audiovisual communications state servers, etc. In the area



of guaranteeing pluralism and free competition, it is in charge of insuring a competitive; audiovisual market that is transparent and competitive supervise the fulfillment of the legal limitations for acquisition of participations between operators of the audiovisual communications service and inform on these operations when, due to them being concentration operations, must be authorized by the National Competency Commission; pass the catalog of events of national interest for society, etc. Aside from this, the LGCA attributes to the CEMA practically all the administrative sanctioning competencies in audiovisual communications on a state level.

Along with these executive competencies, the CEMA will carry out important consulting functions: advising the General Courts, the Government, regulatory organisms, and upon request by these, the autonomous independent authorities in matters relative to the audiovisual sector. It also is in charge, in particular, of issuing a prior report on projects and dispositions that could affect the audiovisual sector; propose the elaboration of dispositions to the Government of a general nature regarding audiovisual activity; sending a yearly report to the Government and the General Courts on the audiovisual sector; elaborate studies, reports, statistical balance sheets and dictates on matters of its competency on its own account or as an initiative of the General Courts or the Government on any of the matters of its competency; and in a regular way report procedures started by any regulatory organism of a state scope that affect or can have an effect on the audiovisual sector.

The CEMA will in sum, exert arbiter functions as the LGCA grants it the right to do so when this has been agreed upon beforehand by the parties, in conflicts that could arise between renderer's of audiovisual communication services as well as those which are produced between audiovisual producers, suppliers of contents, owners of channels and audiovisual communication servers, all within the effects established by the Law of Arbitrage.

In carrying out its competencies, the CEMA may dictate dispositions and precise acts for adequate exercise of them (the dispositions will adopt the name of "Instruction" when they are linked and "Recommendation" in other cases); require from the servers of audiovisual communications the necessary data to verify the fulfillment of their obligations, carry out inspections, request cessation of practices that are contrary to the dispositions stated in the LGCA and its development rules, and instruct and sanction conduct stated as breaking the law of the LGCA when they take place in the state audiovisual market.

At any rate, the most significant thing about the CEMA as a regulator of the audiovisual sector is its configuration as an independent organism, which is articulated by means of its peculiar organization. The CEMA is formed by a President, Vice-President and seven Councilors, all designated by the Government by means of a Royal Decree, proposed by the Congress of Deputies with a majority of three fifths among persons with recognized competency in matters relative to the audiovisual sector in all its aspects. Nomination by the Government seems to be automatic as of the proposal of Congress (the legal text – art. 49 LGCA – mentions "designation" by Congress and, if otherwise, there would be no sense in the requirement of a reinforced majority required for such a designation). The rule, aside from this, does not distinguish in this respect between President, Vice-President and Councilors, thus it appears to be that it must be the Congress of Deputies itself which designates the President and Vice-President (in fact if designation of the President and Vice-President were a faculty of the Government, the independence of the CEMA would be affected).





The mandate of the members of the CEMA will have a duration of six years that is not renewable. This time span – which goes beyond the alternation of the parliamentary majorities – insures institutional independence of the members of the Council who, aside from this, is reinforced by its non changing position except in the cases that include causes that are also foreseen: expiration of mandate, renouncement of the position accepted by the Council; separation agreed by the Council of Ministers and ratified by Congress of Deputies with a three fifths majority (the same as for the nomination), prior instruction of the file, due to permanent incapacity, incompatibility or serious breach of obligations, and a firm sentence of condemnation due to breach of the law (art. 50 LGCA).

Thus, the independence of the CEMA is insured with respect to government and parliamentary powers, it is also independent with regards to any other public or private instance. Thus the strict regime of incompatibilities of the members of the CEMA that must carry out their positions with exclusive dedication and absolute independence from the Government and operators in the field and under the regime of incompatibilities of the high positions of the State Administration. Aside from this, the condition of being a member of the CEMA is incompatible with maintaining economic interests directly or indirectly both in the specific sector of audiovisual communications as well as in the production or distribution business of contents for it or its auxiliary industries, as well as in the sector of telecommunications and that of services to the public of information. These incompatibilities will be demanded during the mandate and up to two years after conclusion of the mandate.

Organization of the CEMA includes, a so called Consultive Committee as an organism for citizen participation and consultation. The Committee will be presided -although lacking voting rights in issuance of reports of the Committee- by the President of the CEMA and its members will be designated in representation of the service renderer's of audiovisual communication services on a state level, the organizations that represent the sector of audiovisual production and advertisers, the more representative unions of the sector on a state level, associations of consumer protection for services of audiovisual communications with accredited membership on a state level as well as the Council of Consumers and Users (art. 51 LGCA).

This consulting Committee must inform in a general way tendencies of the audiovisual policies, situation of the sector and offering of programming of the services of audiovisual communications as well as proposals of the dispositions of the CEMA and criteria for interpretation and application of the regime for infractions and sanctions foreseen in the LGCA ( art. 51.3 LGCA ). This last faculty deserves to be pointed out as by means of this it could be possible to grant opportune legitimacy on a social level and equity in the exercise of one of the most important functions and controversial one of the CEMA: its sanctioning capacity.