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## The impact of new European policies on the regulation of Spanish public service media: a decisive influence?

**Abstract**

This study analyses the extent to which European legislation and, in particular, the latest regulatory initiatives for audiovisual media and for digital markets and services affect the regulation of public service media (PSM) in Spain. A three-fold analysis is performed using a document review methodology. Firstly, the influence of European competition policies on the origin, development and adaptation of PSM to the digital market is studied. Secondly, the transposition into Spanish law of the 2018 Audiovisual Media Services Directive (EU, 2018) is evaluated. Third and lastly, the impact of the draft European Acts referring to digital platforms on PSM in Spain and the European Union (European Commission, 2020a; 2020b) is analysed, as is that of the European Media Freedom Act (European Commission, 2022). The concept of Europeanisation (Harcourt, 2002) is taken as the basis for the assessment of such impact. The conclusions show that while the European regulatory umbrella is a necessary and influential framework, it is insufficient when it comes to understanding the regulatory and political development of PSM in Spain. The path dependence and circumstances of each country are crucial to understanding the why and how of specific regulation. There is European convergence on economic and competition policy

protection issues, but not on political and cultural issues, such as the definition of PSM governance or structure, where the European Union's influence is much weaker.

**Keywords**

**Public Service Media, Audiovisual Media Services Directive, Europeanisation, European Media Policy, European Media Freedom Act.**

### 1. Introduction

Beyond the importance and benefit of European Union (EU) membership, assessing the impact of European policies on a given sector is not an easy task if the aim is to get past the clichés of its influence –as a modernising force– being universally positive, or of its influence being key to the economic and political configuration of Member States. However, this general assessment varies if we delve into the detail of a sector and its economic and political actors.

In the case of the audiovisual media sector, studies about the impact of European policy on Spain are somewhat scarce and sectoral (Suárez, 2009; Cullell, 2010; Llorens, 1998, 2005;

Aguado & Bernaola, 2019; Mutu, 2021). Indirect analyses are much more common, and these can be grouped into two types depending on whether the selected perspective is European or national. In the first case, general or sectoral European audiovisual media policy is studied, and the analysis of national impact is secondary (Bustamante, 1999; Harcourt, 2005; Campos, 2007; Muñoz, 2007, 2008; Llorens, 2002, 2019; Rui Cádima, 2009; Crusafon, 2010, 2013; Donders, Loisen & Pauwels, 2014; Michalis, 2014; Casado, 2015; Donders, 2016; Corominas, 2017; Micova, Hempel & Jacques, 2018; Ala-Fossi & Bonet, 2018; Beceiro, 2019; García & Alborno, 2020; García, 2021). In the second approach, national audiovisual media policy with references to the European framework is studied, or such policy and framework are studied separately (Manfredi, 2008; Llorens & Alonso, 2010; Donders, 2011; Fernández-Quijada, 2013; Brevini, 2013; Castillejo & Chaparro, 2019). There are also many comparative studies in which an assessment of the European impact of European media policies is made. However, the conclusions drawn are general and do not focus on particular cases. The latter are descriptive, fast-consumption studies with a European scope, often funded by European bodies (Psychogiopoulou, Anagnostou, Smith & Stolte, 2017; Viķe-Freiberga, Däubler-Gmelin, Hammersley & Maduro, 2013; Šimunjak, 2016; Brogi, Nenadic, Parcu & De Azevedo, 2018).

Through document analysis, this study aims to describe and evaluate the impact of European audiovisual media policies in a specific country and sector based on the political science concept of “Europeanisation” used by Radaelli (2001, 2003), which he defines as:

Processes of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures and public policies (Radaelli, 2003, p. 30).

The “Europeanisation” phenomenon, which, by definition, is a process and not a snapshot, has three consequences at State level: a redefinition of political problems, the emergence of new political conflicts, and an ideological resource for changing or maintaining national policies (Harcourt, 2002, p. 737).

This study does not therefore seek to analyse the Europeanisation of Spanish audiovisual media policy –an overly ambitious goal in this instance. Instead, the aim is to evaluate the impact of European audiovisual media policy on the configuration, weight and influence of Public Service Media (PSM) in Spain and thus be able to provide an initial analysis of media policy Europeanisation in a very specific sector. In order to conduct a comprehensive study of the EU’s role in the sector, it would also be necessary to analyse its impact on sports rights, the film industry, the MEDIA programme and copyright directives. Another example: the EU’s intervention to protect the policy of competition between private operators was key to the configuration of the audiovisual media system in Spain in the 1990s. It intervened in the 1996 football war between Sogecable and Via Digital by imposing events of general interest and facilitating the use of proprietary or open set-top boxes on pay-TV platforms (Llorens, 1998). In addition, it made the merger between Sogecable and Via Digital easier by referring the review thereof to the Spanish competition authorities in 2003. That is not the aim of this analysis.

The object of study here is Spain’s State PSM, the broadcasting corporation CRTVE, formerly the public entity RTVE. For reasons of space, the analysis cannot be extended to regional operators, which undoubtedly pose distinct problems and exacerbate the existing problems of funding and governance in the Spanish media space (Guimerà & Bonet, 2020), and which also interact with the EU but to a lesser extent.

Firstly, therefore, the historical relationship between the EU and the Spanish public entity (RTVE) in the specific field of competition policy is analysed.

Secondly, a study of the content of European legislation –both in force and in the process of being enacted– and of its impact on the text referring to PSM in Spain’s General Law on Audiovisual Media is conducted. The 2018 European Audiovisual Media Services Directive as well as the Digital Markets Act (DMA) and the Digital Services Act (DSA) (European Commission, 2021a, 2021b) have an impact on Spanish regulation of PSM. The two aforementioned Acts, while aimed at regulating large technological platforms, have a significant influence on the operations of the audiovisual media sector as they are a key instrument for the production, promotion and dissemination of audiovisual media content.

Third and lastly, the European Media Freedom Act (European Commission, 2022) addresses issues directly related to the mission and operating regime of PSM in Member States.

The aim of this study is also to establish which of the European elements relating to public service are included in Spanish regulation in order to be able to draw conclusions about the level of Europeanisation or EU influence on the public audiovisual media system in Spain.

These new European Acts must be contextualised within the technological, political and social changes of the past decade, which have resulted in a more fragmented and less trusted media space. This in turn has led to the imposition of a greater burden of public service obligations on private operators and to a more positive assessment of PSM in European institutions and countries.

The following section describes, in chronological order, the EU’s intervention in the configuration of the Spanish audiovisual media sector through its actions relating to the main PSM.

## **2. The relationship between European competition policies and the Spanish PSM (RTVE)**

### *2.1. The importance of EU competition policy (1990-2010)*

In the first period, the main EU influence on RTVE –and on regional public service television networks– was articulated through Community competition policy. It was justified by the fact that the European Commission (EC) had the power to apply it without the need to consult the Parliament or the Council of Ministers. There is no doubt about the decisive role that this European institution has played in the audiovisual media sector since the mid-1980s. Of the main functions exercised by the EC, two stand out in particular: (1) control of the State aid regime and (2) the power to bring a case before the Court of Justice of the European Union (CJEU) about Member States’ failure to comply with this component of Community law.

In fact, the first private operators to approach the EU in order to bring cases against public service television operators were Spanish. The commercial networks Tele5 and Antena3 filed the first case against regional public television networks in 1992 and the second against RTVE in 1993. These were followed by other cases brought by other European commercial operators against their respective public entities: against France Télévisions (1993); against RAI (1996); against the Danish public television network (2000); and against the Dutch television network (2002). After several years of prolonging the case process, and of a number of condemnatory rulings made by the CJEU against the EC for failing to deal with cases promptly, a political agreement was reached with Member States, which culminated in the adoption of the Protocol on public service broadcasting to the Treaty of Amsterdam (1997).

Under that Protocol, Member States were free to fund their public entities provided that such funding was granted to perform the public service function as attributed, defined and organised by each Member State. Said funding was not allowed to affect the trading and competition conditions in a manner contrary to the common interest, taking into account the performance of the attributed public service function. The EC, for its part, assumed responsibility for ensuring that no acts contrary to competition policies were carried out.

In order to ensure the fulfilment of its mission, the EC drew up the Communication on the application of State aid rules to public service broadcasting in 2001. That document, updated in 2009, established the criteria for ensuring that State aid to public broadcasters was in line with Community legislation. In summary, the basic requirements consisted of the prior, clear and precise definition of the public service mission eligible for funding; the explicit award to an operator for the provision of said service in accordance with the provisions of an official instrument (legislation, contract or tender conditions); the identification of a system of proportional and transparent funding that would not exceed the net costs necessary to fulfil the public service mission; the establishment of separate accounting for public service and commercial purposes; and lastly, the granting of supervisory powers to an independent authority (EC, 2001).

Based on that Communication, the Spanish public authorities had to adapt and follow the rules laid down by the EU. The government formed by Spain's conservative Partido Popular (PP), led by former prime minister José María Aznar, had to incorporate a reform of the 1980 RTVE Statute into the 2002 Budget Accompaniment Law<sup>1</sup>. This reform included the definition of public service broadcasting, the entity entrusted with that function and the body controlling its fulfilment, which in this case was Parliamentary Committee for RTVE Control in the Congress of Deputies. However, these reforms were not enough. In 2005, under the social-democratic Partido Socialista government led by prime minister José Luis Rodríguez Zapatero, the EC issued a note announcing that it would archive the cases against RTVE provided that the commitments entered into by the Government of Spain were fulfilled in full within the agreed period (EC, 2005).

The commitments consisted of removing the unlimited State guarantee for borrowing; separating the accounts of commercial and public service operations; abolishing the exemption from corporation tax payments; adapting relations with other commercial subsidiaries to market practices; paying the market price for rights; and not reducing the price for advertising broadcast by RTVE. Most of these commitments were contained in the report drawn up by the Committee of Independent Experts –a group of 14 experts set up to advise on the reform of State media– and presented in February 2005. The Government informed the EC that it would introduce the required reforms in a future law, and this gave rise to Law 17/2006, of 5 June, on State-owned radio and television. This Law created the Spanish broadcasting corporation (CRTVE), which would be run by a Board of Directors made up of 12 members elected by a two-thirds majority of the Congress of Deputies. It also introduced other measures aimed at the degovernmentalisation of the public corporation's management.

In the same period, the social-democratic government addressed the economic restructuring of the corporation. In so doing, staff numbers and programming services were cut, and the corporation's huge debt (€7.8 billion at the end of 2006) was spread across the budgets of several years. The development and application of these measures were simultaneous to a gradual loss of audience for the public entity.

Taking the above data into consideration, it could be said that the EU's influence on the reform of Spain's main PSM at that time was significant but not decisive. Thus, during Rodríguez Zapatero's first term, a three-fold reform was addressed (finance, governance and content), the Committee of Independent Experts was formed in 2004, and then a bill for publicly owned media was passed into law. However, the EU called for a reform of funding that would ensure the public television broadcaster's financial stability rather than a change in its governance. Despite being a force that triggered change, it was not the only or fundamental one. It marked out a broad playing field that could not be eluded; it offered a rhetorical resource that allowed politicians to justify reforms, but with considerable room for

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<sup>1</sup> Law 24/2001, sixteenth additional provision.

manoeuvre in terms of modulating PSM governance. Thus, the EU did not require a two-thirds majority of the Congress of Deputies in order to elect the 12 Board members. However, the social-democratic government established that proportion in order to end the partisan use of PSM and to steer, with broad consensus, the direction of State PSM. So, in accordance with Harcourt, the central issue of PSM in Spain had been “redefined” thanks largely to the EU.

The second legislature saw the so-called audiovisual media “counter-reform” (Bustamante, 2010), in which the political difficulties of the second social-democratic legislature, the advent of the 2008 financial crisis, and the digital terrestrial television (DTT) transition process led to an unwinding of the previous reform. The limits on mergers between television broadcasters were relaxed in 2009, which led to the return of the Tele5 and Antena3 duopoly, and advertising on RTVE was restricted in exchange for a special scheme for funding RTVE: 3% of private free-to-air networks’ revenues, 1.5% of pay-TV operators’ revenues, and 0.9% of telecommunications operators’ revenues, together with 80% of the fee for using the radioelectric space and State aid. Again, the European influence was minimal. The main source of inspiration for this change was the measures taken by the French president Sarkozy, who imposed almost identical rules on the France Télévisions group. Also a determining factor was the pressure from the private television outlets that, in exchange for boosting DTT and after the failure of the pay-TV offering with Quiero, demanded that CRTVE advertising should be limited (Morales, 2012, p. 434).

The “counter-reform” was culminated under the conservative government led by prime minister Mariano Rajoy, which promulgated Royal Decree 15/2012. This Decree allowed State public broadcasting to be controlled by the incumbent government by requiring only a simple majority for the election of Board members and its president.

## ***2.2. The discreet influence of European competition policy (2010-2020)***

In December 2009, the EC opened an investigation aimed at assessing the compatibility of the Spanish public entity’s new funding system established during the “counter-reform”<sup>2</sup> and subject to the principles of European competition. According to Harcourt, Europeanisation also redefines the problems, and in this case about how CRTVE should be funded. The EC expressed doubts about the compatibility of the planned system with European legislation. However, the matter was archived by the CJEU in August 2013. Nevertheless, the main Spanish telecommunications operators led by Redtel (Telefónica, Vodafone, Orange and Ono) lodged an appeal before the Spanish Supreme Court claiming that this financial burden was disproportionate and illegal. Said appeal was dismissed by the Spanish judicial authority in June 2017.

In its letter sent to the Government of Spain in 2009, the EC focused on two issues. Firstly, on the definition of the service provided by RTVE as a service of general economic interest (SGEI) and, therefore, on the obligation to apply the economic regime provided for in the Treaty on the Functioning of the European Union (TFEU, Articles 107 and 106.2) for services like these in the audiovisual media sphere. Secondly, on the need to have, as a reference framework for the above, the EC Communication on the application of State aid rules to public service broadcasting (adopted in 2001 and updated in 2009).

In keeping with these indications, Title IV of General Law 7/2010, of 31 March, on Audiovisual Media introduced the concepts and indications present in Community texts for SGEIs relating to the definition, award and funding of public service broadcasting. Thus, for example, Community vocabulary is incorporated and Spanish public service broadcasting in Spain is called an ‘SGEI;’ the body controlling it is defined; the application of the public value test is required if new services are to be offered; and separate accounting is imposed, along

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<sup>2</sup> BOE (Official Gazette of the Government of Spain), of 31 August 2009, pp. 74003-74015

with the introduction of transparency policies. Lastly, the EC is expressly cited by stipulating that PSM may not under-price their commercial offerings and services or use public compensation to overbid compared to private competitors for broadcast rights on high-value content in the audiovisual media market.

Therefore, although the EC's concerns about the Spanish funding system were archived by Community courts, it could be said that, on market and financial issues, and based on the Law passed in 2010, the considerations of that institution became part of the operating scheme laid down in Spanish legislation for the public service broadcasting entity.

### **3. European audiovisual media Directives and their impact on the regulation of the public service**

#### *3.1. The first audiovisual media Directives: 1989, 1997, 2007 and 2010*

The starting point for European audiovisual media regulation is Council Directive 89/552/EEC of 3 October 1989, colloquially referred to as the "Television without Frontiers" Directive, which established a minimum number of common rules for broadcasting in the EU. This Directive had been the mainstay of Community audiovisual media policy up to 2010. Even taking into account the limitations and gaps arising from the distribution of competences and their legal nature, both its content and interpretation indicated what the public service concept being used by European institutions actually was and, accordingly, what the pillars of its regulatory adaptation were, bearing in mind the technological, economic, political and social development affecting the operation of such services. In order to assess the Community Directives, it is first of all necessary to describe their evolution.

The first Directive of 1989 was incorporated into Spanish law by passing Law 25/1994, of 12 July, which introduced the following aspects into the national legal system: the principle of free reception, on Spanish territory, of television broadcasts from another Member State; the promotion and distribution of European works; the ban on tobacco advertising and restrictions on the advertising of alcoholic beverages; and the obligation to identify advertising as such, and also the maximum percentages of broadcasting time devoted to advertising.

The Television without Frontiers Directive was amended by Directives 97/36/EC and 2007/65/EC and codified in Directive 2010/13/EU. With the first update in 1997, the "country of origin" principle was incorporated, whereby broadcasters were subject to the sovereignty of the Member State in which they were based. In the second update of 2007, "on-demand audiovisual media services" available via the Internet were included.

More decisive than the latter, however, was the codification undertaken in 2010, which became known as the "Audiovisual Media Services Directive" because it considered the convergence of media as well as existing and potential technological changes. Without ignoring the updated objectives of previous versions (content accessibility, promotion of European audiovisual works, protection of minors and regulation of unfair commercial communication), this codified Directive included new matters surrounding personal data protection, persons with disabilities and media literacy. It also introduced the principle of technological neutrality whereby the same services are regulated in the same way regardless of the device on which they are consumed. However, it drew a distinction between linear (television broadcasts) and non-linear (on-demand) services, taking into account the degree of consumer control over the latter and also the fact that, according to the criterion used at the time, they warranted less strict regulation in certain areas. With regard to the scope of application, it was established that the content of the Directive would only affect media service providers, i.e., those with editorial responsibility. If a provider was responsible for the choice of content and determined its organisation, its services were subject to the Directive, regardless of the broadcasting and reception system.

However, in the text of the four Directives, references to PSM are either non-existent (1989), indirect (1997) or minimal (2007; 2010), and limited to the Recitals in the latter two cases. Thus, the 2007 Directive states:

...the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market (Recital 9).

And the 2010 Directive reproduces this same statement in Recital 13. Therefore, the near absence of references to PSM in the Directives shows that the EU considers the regulation of such operators to be the same as that of private operators, specifically by not making a distinction between them. This situation is not surprising because, as stipulated in the Protocol to the Treaty of Amsterdam of 1997 and further clarified by the EC in its 2001 and 2009 Communications, it is the responsibility of Member States to define, organise and fund the public service broadcasting provision. The EC only oversees compliance with the principles of competition policy.

### **3.2. *The “2018 Audiovisual Media Services Directive”***

The process of adapting the 2010 Directive to the new changes in the audiovisual media market began in 2015. The amendment proposal placed emphasis on moving towards simplification and a minimum level of harmonisation by allowing States, depending on their national circumstances, to adopt stricter measures.

The process took three years and was concluded in November 2018 after reaching a tripartite agreement between the EC, the European Parliament and the Council. The Directive was published in November 2018 (Directive [EU] 2018/1808). The main novelties introduced by the latter Directive can be summarised in the following points:

- a) Greater freedom to introduce advertising by changing quantitative limits from 20% per hour to 20% of the time between 6:00 and 18:00 and 20% of the time between 18:00 and 24:00.
- b) The protection of minors from harmful content was extended to on-demand services.
- c) The share of European works was extended to on-demand media service providers, who were compelled to have a minimum 30% in their catalogue and also to give them the prominence they deserved.
- d) Video-sharing platform services were included within the scope of the Directive in order to protect minors from harmful content and the general public from content containing incitement to violence and hatred, and provocation to commit a terrorist offence.

Again, following the patterns of the previous Directives, PSM are not mentioned in this new version of the Directive, not even in the recitals, which could serve as a legal source for the CJEU. However, taking the term “public service” in a broader sense, we can also see how the European influence has extended obligations, which in principle are more specific to PSM, to private operators. Thus, for example, obligations relating to accessibility and to the protection of minorities or children on new audiovisual media platforms are specified, thereby implying an extension of public service in a broader sense.

The public service broadcasting missions of previous Directives (protection and promotion of European works, advertising regulation, protection of minors, right to reply, or access to general interest events) have been supplemented by new ones such as protection from hate speech and violence, media literacy, regulation of new forms of commercial communication, consumer protection, accessibility for persons with disabilities, strengthening of independent regulatory bodies, or fostering self-regulation and co-regulation initiatives in different areas.

In this respect, it could be said that this Directive, despite not mentioning PSM, is in no way extraneous to the public service objectives of audiovisual media services. In addition, it continues to leave Member States (legislators and existing audiovisual media regulatory bodies) free to adopt, within the established legal framework, stricter measures than those provided for in the Directive on matters such as the identification, award and funding of the fulfilment of those or other missions that they deem to be of general interest in their respective action areas.

Lastly, and with regard to public service broadcasting missions, a proper analysis of the Directive cannot overlook the content of Article 7a. This article gives Member States the power to make PSM stand out in a market awash with audiovisual content. This article states: “Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest.”

This “wild card” Article can therefore be applied to the linear or non-linear services of any operator and, based on the criterion of proportionality, Member States may define the forms of content prominence. The European Broadcasting Union (EBU), an alliance of Europe’s leading PSM, lobbied for this Article to ensure the PSM’s position within the menus of any third party that distributes audiovisual content regulated by the Directive, such as smart televisions or speakers (EBU, 2021). According to the European Regulators Group for Audiovisual Media Services (ERGA), its content is in the process of being applied in Germany as a result of the interstate agreement that has regulated the audiovisual media sector since November 2020. Regulatory authorities must draw up a list of media, public or commercial, that contribute significantly to a diversity of opinions in Germany in order to be able to apply the prominence mentioned in Article 7 to them. The remaining countries are waiting for a better definition of the concepts: “content of general interest” and “prominence” (ERGA, 2020). As an optional article whose transposition is not compulsory, there may be considerable disparities in its application, thereby accentuating policy differences between countries.

It should be noted here that the Directives, the main tool chosen by the European institutions to intervene in audiovisual media regulation since 1989, have enabled Member States to pursue the basic objectives –even the minimum ones, it could be said– established by European Acts by choosing the way and means of putting them into practice through transposition into their respective legal systems.

#### **4. The new General Law on Audiovisual Media**

Spain’s transposition of the 2018 Directive by passing General Law 23/2022, of 7 July, on Audiovisual Media is, in general, a minimum implementation thereof. Although the text incorporates the basic issues of the Directive, it falls short by not taking advantage of the possibility of adopting more specific and concrete measures to ensure that public service obligations are met at both PSM and other operator levels. For example, Article 7a is not incorporated, and prominence is reserved for European works in catalogues of on-demand television services (Article 114.4). The influence of the Directive on the passed Law is evident in other areas and covers several aspects: independent authorities are strengthened, video-on-demand and video-sharing platforms are regulated, the Netflix fee is imposed, etc.

As far as PSM are concerned, the European influence on the Spanish Law on this matter is practically non-existent because there is hardly any mention of such operators in the Directive. Thus, while there is a broad title specifically devoted to the provision of the public service audiovisual media in Title III, it could be said that there is no European influence apart from that on economic and financial matters. The new Law implements framework mandates and their content and duration of eight years; four-year programme contracts; governance bodies; control of the public service provision by the Congress of Deputies and Senate; economic financial control by the Court of Auditors; public value analysis in the introduction



of new services by public service audiovisual media providers; public service funding; the obligation to have separate accounts for the different activities; the structural separation of commercial activities; and the prohibition on unjustifiably lowering the prices of the commercial offering or on submitting disproportionately high bids.

Consequently, the influence of the 2018 Directive on the configuration of Spanish PSM is practically irrelevant. However, as mentioned previously, the European influence –exerted by the EC through the application of competition policies– does indeed significantly determine issues relating to the funding and operating regime of PSM. There are European limits, but again, there is room for the State to define them. Attention should be drawn to the changes in the PSM funding system included in the new Law, such as greater permissiveness in terms of advertising, the RTVE-funding Netflix tax, the absence of contributions by telecommunications operators, etc.

### **5. The Digital Services Act (DSA) and the Digital Markets Act (DMA)**

The DSA and the DMA together form a regulatory package that seeks to strengthen the single European digital market by establishing common responsibilities for all digital service providers, and especially for online platforms, regardless of the goods or services provided. In keeping with the provisions set out by the EC in its 2020 Communication on Shaping Europe's Digital Future, the aim of these Acts is to update the horizontal rules defining the responsibilities and obligations of digital service providers, and especially of online platforms. Neither the DSA nor the DMA replace or modify other sectoral legislation such as the 2018 Audiovisual Media Services Directive, the 2019 Copyright in the Digital Single Market Directive, or consumer protection acquis.

Regarding their scope, these two Acts do not affect video-on-demand platforms such as Netflix, Amazon Prime or Disney+, which come under the regulatory umbrella of the Audiovisual Media Services Directive, as these providers have editorial responsibility for the selection of content. Such editorial responsibility is a component that does not exist in the case of intermediaries such as YouTube and other similar video platforms, which are affected by these two Acts.

Indeed, the DSA specifies that “the obligations set out in Directive 2010/13/EC, as amended by Directive (EU) 2018/1808, on video-sharing platform providers as regards audiovisual content and audiovisual commercial communications will continue to apply.” Therefore, the content of the DSA would only apply to audiovisual media service providers (including PSM) if no other more specific Acts were applicable to them.

These two Acts neither modify the obligations of digital service providers with regard to content nor the obligations provided for in the area of digital audiovisual media services. Consequently, they do not have an influence on public service obligations/missions.

Could it be said, then, that these European Acts are completely extraneous to audiovisual media and, more specifically, to PSM and to the fulfilment of the missions entrusted to them? No.

The DSA and the DMA are horizontal content Acts whose obligations are more basic and general than those specifically laid down in European audiovisual media legislation and its respective national transpositions. Even so, it does not seem right to consider digital audiovisual media, including PSM, to be completely unconnected with the content of these Acts.

These regulations will have an impact on the future of all operators insofar as they impose restrictions on Internet giants to protect certain public service objectives; they are no longer mere providers of technological infrastructure, they are more responsible, and the rights of users and citizens with regard to platforms and social media are strengthened.

Thus, Recital 105 of the DSA states that its content should be interpreted and applied in accordance with those fundamental rights, including the freedom of expression and of

information, as well as the freedom and pluralism of the media. For its part, the DMA, in the Explanatory Memorandum, asserts that the task of safeguarding a free and plural media system means ensuring a level playing field that supports essential values such as cultural diversity and media pluralism.

In some ways, these European Acts bring the two worlds –audiovisual and digital– closer together to better preserve said objectives. By extending some of the public service functions and missions to other operators and not disregarding those specifically attributed to PSM, the existence and importance of those organisations that have such functions as their essential mission is all the more justified. Thus, they have the opportunity to become “islands of trust” in the media ecosystem (Sorensen & van den Bulck, 2020) and prevent “surveillance capitalism” (Zuboff, 2019).

## **6. The proposed European Media Freedom Act (2022)**

Disinformation multiplied by the algorithms of social media and caused, among other factors, by commercial, foreign policy or partisan interests, undermines European citizens’ trust in their democratic institutions. The EC, aware of this situation and its dramatic consequences for the functioning of democratic societies, has launched an initiative aimed at adopting common rules to safeguard and protect media pluralism and independence: the European Media Freedom Act. At the moment, it is only a proposal and is going through a consultation process (European Commission, 2022). It is intended to cover three areas: media transparency and independence, the conditions for their proper functioning, and the fair allocation of State resources. The latter section includes the independence of PSM and a fair distribution of institutional advertising.

In launching this proposal, the EC is convinced that European regulation in this area will improve the internal media market and help to solve problems affecting all EU Member States as a whole. In the specific case of PSM, it takes as its basis the fact that political interference raises questions about special treatment with regard to internal market rules and the receipt of State aid. The EC argues that if public funding is used to offer partisan opinions and information rather than fulfil a public service mission that benefits all viewers, competition between market players may be distorted. Ultimately, it will affect the conditions of the EU’s internal market. Once again, and as was the case in 1998 with Mario Monti’s failed Concentration and Pluralism Directive proposal (Llorens, 2001), the EC wants to intervene on the basis permitted by the Treaties: competition laws and the existence of internal market distortion.

However, it will be difficult for Member States to accept that this potential distortion is significant enough to require direct Community intervention. Member States will most likely adhere to the principle of subsidiarity and refuse to be told by the EU how they should organise their PSM or to have specific tools imposed upon them to ensure their independence. On the one hand, and as explained earlier, it is impossible to ignore the fact that it is up to each Member State to define how its PSM are organised and governed. This has been the case since 1997 and is recognised under the Protocol to the Treaty of Amsterdam. However, the mere presentation of this new proposal indicates a change in comparison to the provisions laid down at European level at that time. The EC’s shift towards a more cultural and political defence of PSM is a fact.

The European Media Freedom Act affects PSM insofar as it uncompromisingly addresses the importance of their existence and the need to preserve their independence. Thus, the text reveals an interesting shift in approach to PSM by the EC: from considering them an impediment to the proper functioning of the internal market to being an important element in preserving the democratic construction of Member States and of the EU itself within a new framework of debate: that of human rights (Smith, 2021). For Community institutions, there is a need to consider how to ensure their independence from political power, a process that

has already been formalised with the independent audiovisual media regulatory authorities and which should now also be implemented in these operators at European level. However, with the data currently available, it is too early to be able to rigorously assess the concrete impact it could have on the future of European PSM.

## **7. Conclusions and Discussion**

Taking into account the review of historical legislation, the analysis of current and proposed regulation, and the considerations made throughout the study, it can be concluded that:

- The phenomenon of Europeanisation of audiovisual media legislation relating to PSM is clear and evident in the area of economic issues linked to funding and to the protection of competition rules. Taking place at EU level is a process of constructing, disseminating and institutionalising formal and informal rules –the Commission’s communications of 2001 and 2009– which are then incorporated into the logic of national discourse, political structures and public policies.
- Regarding the 2018 update of the Audiovisual Media Services Directive, the DSA and the DMA, Europeanisation is also seen in the extension of public service mission obligations to new ways of communicating, such as video-on-demand and audiovisual content-sharing platforms. It will be necessary to analyse whether the proposed European Media Freedom Act, which is in its early stages and seeks to ensure the independence of PSM, is ultimately enacted and institutionalised in national regulations.
- The EU does not appear to have any direct impact on the definition, governance or structure of PSM. These decisions remain, to this day, the exclusive competence of national authorities. Proof of that is the absence of European regulation of these issues on the one hand, and the importance of the political initiative of the reforms and counter-reforms carried out by Spain’s social-democratic and conservative governments on the other. Once again, the statements made by Humphreys (1996) are now truer than ever: the EU is converging economically and technologically, but differs culturally and politically by the strength of historical and political path dependence. It should be pointed out, however, that if the new European Media Freedom Act proposal were to prosper, it would represent a major change because its influence would be felt from a more democratic perspective –that of EU Fundamental Rights– on the consideration of PSM.
- Of the three consequences of “Europeanisation” described by Harcourt (2002, p. 737) – the emergence of new political issues, the redefinition of old political problems, and a rhetorical and ideological resource for changing or maintaining national policies– we can see how, in the case of Spain and PSM, the EU turns them into a resource for justifying and providing the grounds for the successive reforms, thereby instrumentalising European provisions to fuel the partisan battle surrounding the configuration of PSM.
- The question posed in the title of this article can therefore be answered in part: the impact of new European policies on the regulation of Spanish PSM has been decisive in terms of their funding and free competition but, with proposals for change currently on the table, less so in terms of their definition and governance.

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