

## Independent Audiovisual Regulators in Spain: A Unique Case in Europe

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This article describes and analyzes the configuration process, characteristic features, and future prospects of the Spanish model of independent audiovisual regulators. This model currently has a national multisectoral regulator (Comisión Nacional de los Mercados y de la Competencia), which was created in 2013, and two regional audiovisual regulators, which were created more than a decade ago. This combination of a national multisectoral regulator and regional audiovisual regulators is unlike any other in the European Union.

*Keywords: independent audiovisual regulators, Spain, media policies*

### Introduction

Until 2013, Spain did not have a national independent regulator with broad powers in the audiovisual sector. Before that, the Telecommunications Market Commission (Comisión del Mercado de las Telecomunicaciones, or CMT), formed in 1998 and whose members were directly appointed by the government, had been the only authority responsible for promoting free competition in the audiovisual and electronic communications markets. However, it did not manage issues such as content control (practically nonexistent at that time, albeit legally in the hands of the government), which is a core activity of audiovisual authorities. There were regional audiovisual regulators in Catalonia, Andalusia, and Navarre, but only the first two are still in operation.<sup>2</sup>

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Date submitted: 2015-02-26

<sup>1</sup> This article was written within the context of a research and development project entitled *Las políticas de comunicación en la Europa mediterránea en el contexto de la crisis financiera (2008–2015). Análisis del caso español* [Communication policies in Mediterranean Europe in the context of the recession (2008–2015). Analysis of the Spanish case] (ref. CSO2013-42523-P), funded by the government of Spain's Ministry of Economy and Competitiveness. The text was translated by Steven Norris, member of the Institute of Translation and Interpreting, United Kingdom.

<sup>2</sup> In this article, the term *regional* is used as to refer to the territorial scope of an autonomous community. Spain is divided into 17 autonomous communities that have broad powers in many areas, including the media sector.

Thus, for many years, Spain was the only Western European country devoid of a national independent audiovisual regulator despite the recommendations made by European authorities—a good example of which is the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions dated December 14, 1999 (COM1999/657 final), which sets out a series of criteria for their articulation. According to Section 3.6 of the Communication:

Regulatory authorities should be independent of government and operators; content issues are essentially national in nature, being directly and closely connected to the cultural, social and democratic needs of a particular society . . . ; technological convergence requires increased cooperation between the regulators concerned (communication infrastructures, audiovisual sector, competition); regulatory authorities can contribute to the development and implementation of self-regulation.

These recommendations never became rules, yet Directive 2007/65/EC of the European Parliament and of the Council (Audiovisual Media Services Directive) assumes the existence of independent regulators, referring on several occasions to them and the tasks they perform. During the negotiations for the drafting of this Directive, no agreement was reached to compel member states to set them up or even to abide by common operational guidelines. According to Carbonell (2011), doing so would have implied a reinforcement of regulatory policies contrary to the approaches taken by some member states and sectoral stakeholders. There were concerns over the degree of independence of certain member states' regulators.

Despite their varying profiles, the European Platform of Regulatory Authorities, which has been operating since 1995, brings together more than 50 regulators. Some regulators (usually formed by integrating several preexisting ones) hold powers that extend to audiovisual media and electronic communications, such as the Office of Communications in the United Kingdom or the *Autorità per la garanzia nelle comunicazioni* in Italy; others have powers that are limited to the audiovisual sector, such as the *Conseil Supérieur de l'Audiovisuel* in France. The French regulator has been the inspiration behind not only Spain's regional regulators but its national authority, which, despite being foreseen in an Act of 2010, was never created. The only other multisectoral regulator with powers similar to Spain's is Slovenia's Agency for Communication Networks and Services (Mutu, 2015). A particular case is that of Germany, which, like Spain, has a decentralized administrative structure that obviously has implications on the regulatory model implemented. Unlike Spain, however, Germany has an authority that coordinates its regional regulators: the *Direktorenkonferenz der Landesmedienanstalten* (Directors Conference of the State Media Authorities).

This article focuses on the Spanish case, analyzing the distinctive features of the current regulatory model (understood as being functionally independent from other governments discussed in this article) with powers in the audiovisual sector, its configuration process, and its future prospects. I first examine the national multisectoral regulator, the National Markets and Competition Commission (*Comisión Nacional de los Mercados y de la Competencia*, or CNMC), and then the regional audiovisual regulators. As a case for analysis of the latter, I investigate the oldest regulator, which has always been considered a

point of reference: the Catalan Audiovisual Council (Consell de l'Audiovisual de Catalunya, or CAC), whose independence is increasingly brought into question in the context of the current sovereignty debate in Catalonia.

The 1978 Spanish constitution sets out the distribution of powers between the state and the autonomous communities. Whereas the state has exclusive powers over telecommunications (Article 149.1.21), the state and the autonomous communities share powers over the media. Regarding the latter, the constitution establishes that the state has exclusive powers to set the basic rules for the press, radio, and television regime and, in general, for all mass media, without prejudice to the powers that, in their development and execution, the autonomous communities may have (Article 149.1.27). The media issues over which the state and the autonomous communities have powers have therefore been determined by various rules and policy making in general.

Translated to the sphere of regulators, all of this means that there could be only one national convergent regulator (with powers in the audiovisual and electronic communications sectors) and several regional regulators (with effective powers to act only in the audiovisual sector on operators providing regional and local services). It should be clarified that, regardless of the model adopted, the national regulator's scope of action must necessarily be limited to public or private audiovisual outlets whose coverage extends beyond a single autonomous community.

The method used for this study was qualitative and based on an analysis of the various documents (books, scholarly articles, press articles, legal texts) and on consultations and interviews, all of which have been noted throughout this article.

### **The Long Path Toward a National Regulator: The National Markets and Competition Commission**

The first political initiative to consider the expediency of creating an audiovisual council with powers throughout Spain can be found in the conclusions of a 1995 report produced in the Senate by the Special Commission on Television Content toward the end of the last term of office of the social-democratic governments led by Felipe González. Shortly after that, during the first legislature of the conservative Partido Popular (PP) government (1996–2000), up to five legislative proposals were recorded in the official gazettes of the General Courts (the Spanish legislature). Created by different parliamentary groups, the aim of these proposals was to set out the legal framework of a Spanish audiovisual authority. However, the drafting committee appointed to prepare a report incorporating them so that they could then be discussed in the Constitutional Committee of the Congress never got around to drafting it. In the following legislature (2000–2004), the PP used its absolute majority to reject the various initiatives put forward by the opposition to create an audiovisual council, arguing that this issue had already been contemplated in the general radio and television draft bill being prepared by the government. The last of these initiatives was submitted by the social-democratic Partido Socialista Obrero Español (PSOE) in October 2003.

The draft bill was not enacted due to the unexpected change of government in 2004 following the terrorist attack in Madrid.<sup>3</sup> This bill anticipated broadening the powers of the CMT, which had been in operation since 1998, thus turning it into a convergent regulator. However, if we simply consider that all of the members of hypothetical Telecommunications and Audiovisual Market Commission (Comisión del Mercado Audiovisual y de las Telecomunicaciones) would have been appointed by government royal decree following nomination by the Ministry of Science and Technology, then it is clear that the conservative executive at that time had no intention of delegating any of its media-related powers to a truly independent authority. Moreover, this Commission, affiliated with the Ministry of Science and Technology, would only have had the ability to sanction minor violations of general rules. In all other cases, it would have had to refer the proposed decision to the Ministry (Fernández Alonso, 2005).

The PSOE regained power in March 2004 (with a relative majority, which it retained until 2011), and, in its election manifesto, there was a commitment to create a Supreme Audiovisual Media Council, whose members would be elected by a parliamentary qualified majority from among people with relevant professional merit in the audiovisual, technological, cultural, academic, educational, or voluntary sectors. This commitment materialized in the 2010 General Broadcasting Act (Act 7/2010), which systematized the various sector-related rules and regulated several new issues, such as the organization and operation of a national audiovisual authority: the State Council for Audiovisual Media (Consejo Estatal de Medios Audiovisuales, or CEMA). Serious concerns have been raised about this Act, the passage of which was supported by social-democratic deputies on one hand, and Catalan and Canarian conservative nationalist deputies on the other, because it responds to the interests of the management bodies of private television outlets. But the Act was greatly needed to bring order to a diverse array of rules and regulations and to transpose the provisions of the Audiovisual Media Services Directive (2007/65/EC) into Spanish law (Blasco Gil, 2011).

Act 7/2010 anticipated that, in addition to specifically overseeing the fulfillment of the public-service function of the Spanish broadcasting corporation (Radiotelevisión Española), the CEMA would oversee compliance with the legal provisions applicable to all operators (particularly as regards content), granting it considerable powers to impose sanctions. At the same time, it would be responsible for maintaining a register of audiovisual communication service providers, for renewing or revoking licenses, and for authorizing the legal business that they endorse. Likewise, it would have a degree of rule-making capacity and considerable room to propose initiatives and issue reports on projects and provisions that might affect the audiovisual sector. On top of all this were other tasks, such as promoting media literacy, controlling concentration operations, overseeing the reliability of audience measurement systems, and acting as an arbiter should disputes arise among audiovisual stakeholders. However, it did not envisage powers for the new regulator to grant licenses to provide audiovisual communication services, especially licenses to broadcast. This is a highly relevant issue, as demonstrated by the fact that both academia and the firms affected have often denounced the high level of government interference in public invitations to tender for licenses to be granted (Arboledas, 2009; Fernández-Quijada & Arboledas, 2013).

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<sup>3</sup> I had access to this document in an interview with the then deputy of the Catalan parliamentary group *Convergència i Unió*, who provided me with a copy.

The General Broadcasting Act set out that the CEMA would have nine council members appointed by parliament (from among people of recognized competence in matters related to all aspects of the audiovisual sector) by a three-fifths qualified majority. However, if that majority is not reached within two months, then council members could be appointed by absolute majority.

As noted by Ricardo Carniel (2011), the regulator-related provisions set out in Act 7/2010 were pending development, meaning that, even if the regulator did come into existence, it would be impossible to check its true autonomy from both administrative and financial viewpoints.

However, the CEMA was not implemented in the manner set out in the General Broadcasting Act, despite the fact that, according to the then minister for the Prime Minister's Office, Ramón Jáuregui, the social-democratic government had never renounced that model. The former social-democratic minister said that the executive had ultimately decided not to create the CEMA because of a lack of consensus with the PP, which, according to all the polls at that time, was almost certainly going to win the elections in late 2011 and foreseeably put the project on hold (R. Jáuregui, personal communication, November 14, 2014). The supposed audit functions of a regulator such as the one foreseen in Act 7/2010 had always been regarded with suspicion by the main opposition party at that time. According to Jáuregui, the backdrop to this was a context of disgruntlement voiced by commercial television outlets and of very little interest expressed by other political forces.

It is worth qualifying this statement, though, because, in late 2010, an attempt to reformulate the design of the regulator was in fact made, orienting it toward a convergent model. During a debate in the Senate on the Sustainable Economy Act, a new project by the Telecommunications and Audiovisual Market Commission was proposed via an amendment by the parliamentary group called Entesa Catalana de Progrés, but it also did not get off the ground. This amendment was rejected by the full Senate in the session held on February 9, 2011. Another amendment by the Partido Popular that proposed CEMA's affiliation to the CMT was also rejected in the same session. The latter was in keeping with the draft bill, but on this occasion, it added the argument of cost reduction given the context of economic recession. However, for the reasons stated previously, CEMA did not get off the ground either, though it may well have done if the General Broadcasting Act had been passed a few years earlier and the social-democratic executive had had more leeway to implement it.

Then, in November 2011, the PP gained an absolute majority and formed the new government of Spain. In this new context, the creation of a multisectoral regulator was put forward (referred to as a *macroregulator* throughout the rest of this article), which was very different from other regulatory models in Europe. The CNMC was created by Act 3/2013 of June 4 (with support from only Basque and Catalan conservative nationalists), and it became operational on October 7 that same year.<sup>4</sup>

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<sup>4</sup> The votes were 26 for and 17 against, in the session of the Economy and Competitiveness Commission of the Congress of Deputies (on this occasion given full legislative powers), held on March 20, 2013.

The CNMC has functions of supervision and control of the electronic communications markets, the electricity and natural gas sector, the postal market, airport tariffs, the rail sector, and the audiovisual communication market (Articles 6–11). Consequently, the CMT, the National Energy Commission (Comisión Nacional de Energía), the National Postal Sector Commission (Comisión Nacional del Sector Postal), and the National Competition Commission (Comisión Nacional de la Competencia, or CNC) are now defunct, because their functions have been absorbed by the new macroregulator.

In the audiovisual communication market, the CNMC's functions and responsibilities are specified as:

- controlling compliance with the legal obligations of funding and broadcasting European audiovisual works;
- guaranteeing transparency in audiovisual communications;
- implementing the rights of minors and people with disabilities;
- supervising the compliance of audiovisual content with the law and with self-regulation codes, checking their conformity to existing rules;
- controlling compliance with the provisions relating to commercial communications, to the exclusive procurement of audiovisual content, to the broadcasting of content included in the list of general-interest events, and to the buying and selling of exclusive rights over regular Spanish football competitions;
- overseeing the fulfillment of the public-service function commissioned to national providers of public-service audiovisual communication and the appropriateness of public resources allocated to it;
- guaranteeing freedom of reception, in Spanish territory, of audiovisual services whose owners are established in a member state of the European Union, ensuring that such services do not infringe any legislation on the protection of minors or contain any incitement to hatred on grounds of race, gender, religion, or nationality;
- making decisions on the nonpromotional nature of public-service or charitable advertisements, upon request by the parties concerned (Article 9).

The CNMC's decision-making functions are performed by a commission of 10 members. All 10 members are appointed by the government for a six-year period without the possibility of reelection. Prior to their appointment, they must appear before a committee of the Congress of Deputies. Through the committee and by absolute majority decision, the Congress has the power to veto the appointment of the candidates within one calendar month from receipt of the corresponding communication. The commission may sit in plenary or in chamber. There are two chambers, one for competition and another for regulatory supervision. The rotation of commission members between the two chambers is foreseen (Article 13 et seq.).

Constant criticism has been leveled at this model (the justification for which is a €28 million saving and the existence of synergies among the merged entities), much of it questioning the expediency

of integrating regulators and the competition authority into a single authority.<sup>5</sup> Thus, before Act 3/2013 was passed, Helmut Brokelmann (2012) asserted that, although the integration of various regulators made sense (also for strengthening their independence from the firms in each sector and thereby avoiding the phenomenon known as “regulatory capture”), its merger with the competition authority did not. According to Brokelmann, competition law pursues objectives that are not always consistent with regulatory law, and it obviously applies methods that are completely different, meaning that the separation of the two authorities is fundamental. Evidence of this, as Brokelmann points out, is that, while a conduct may be covered or even imposed by regulatory law, it may be subject to, and even contravene, competition rules. An example would be the €152 million fine that the European Commission imposed on Telefónica in 2007 (and ratified in 2014) for abusing its dominant position in the Spanish broadband Internet access market, even though it had received the CMT’s endorsement despite the CNC’s objections. It is worth recalling that in 2013, the final year of its existence before being absorbed by the macroregulator, the CNC was in 10th place in the world and 5th place in Europe in the ranking produced annually by *Global Competition Review*.

Therefore, an authority that worked has been dismantled, and everything seems to suggest that the competition division of the CNMC will not enjoy the same prestige as the CNC, as illustrated by the significant drop in the number of investigations conducted and fines imposed in the first few months of the macroregulator’s operation.

This weakening of the competition division was foreseen in a report produced by the CNC after Act 3/2013 had been passed. This report contained clear misgivings about the new macroregulator’s ability to take real advantage of the synergies to enable it to shorten the times for dealing with cases. It also warned of the implications of eliminating the Information Society and Energy subdirectorates, since these dealt with the most complex cases in which considerable sums of money were at stake (Serraller, 2013).

In many respects, the design of Act 3/2013 responds to a report on the reform of regulatory authorities that the former Spanish public telecommunications operator (Telefónica) commissioned to PwC. As David Ugarte (2012) explained, Telefónica’s ultimate goal was to put an end to the neutrality of the Internet before a specific law was enacted.

The toughest criticism has been leveled by Brussels. During the parliamentary procedure of Act 3/2013, the European Commission sent several letters to the Spanish government, asking it to clarify the profile of this macroregulator. In the end, the European authorities opened infringement proceedings against the Spanish government for dismissing several commission members of the former CMT before the term had expired, and for diminishing the new macroregulator’s powers (compared to those of the previous sectoral regulators).

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<sup>5</sup> Unless another source is given, many of the arguments developed in this section are based on A. Trillas (2014).

It is along these lines that the tensions between the CNMC and the Ministry of Industry, Energy and Tourism in late 2014 should be interpreted. The Ministry, without notifying the CNMC, assumed control of electricity grid access tariffs, which, according to Directive 2009/72/EC of the European Parliament, on the internal market in electricity, is the domain of independent regulators. In this context, the CNMC is effectively the European regulator with the fewest telecommunications powers, because, unlike the situation in other countries, it is not responsible for the radio spectrum, user rights, network security, or Internet domain name registration (Noceda, 2014).

In the audiovisual sector, Elisenda Malaret (2014) has pointed out that the CNMC's scope of action is aimed at controlling content, leaving aside other tasks (for which the government is responsible), such as guaranteeing pluralism from the perspective of access to the audiovisual services provision market, at both the initial license-granting stage and subsequent stages (changes of ownership or legal business such as license leasing, which imply changes to editorial responsibilities). Malaret is critical of the fact that the executive is responsible for establishing the list of general-interest events that must be broadcast on free-to-air television throughout Spanish territory.

### **Regional Regulators: An Incomplete Model**

To date, only three regional audiovisual regulators have operated in Spain: one in Catalonia, created in 1996; one in Navarre, created in 2001; and one in Andalusia, created in 2004. Power sharing between the state and the autonomous communities allows the autonomous communities to create their own independent audiovisual regulators if they wish. Such regulators have the ability to act only with respect to radio and television outlets that do not go beyond the scope of their respective territorial coverage. These include private outlets (FM radio and regional and local digital terrestrial [DTT]), to which the autonomous communities grant broadcast licenses (via the regulator or government) following a public invitation to tender, and public outlets that are directly promoted by laws passed by the regional parliaments or by agreements reached by municipal councils. When there is no regulator, which is the case in 15 of the 17 autonomous communities, all audiovisual policy powers that do not impact on outlets with a supraregional scope fall to the respective executives of the autonomous communities.

The relationship between the regional audiovisual regulators and the Spanish macroregulator is minimal. Only in certain cases do the regional regulators notify the macroregulator that they have identified a potential breach of the law by national outlets and transfer such cases to it for decisions to be made.

The Navarre Audiovisual Council (Consejo Audiovisual de Navarra) was dismantled in 2011 due to "essential" public spending cuts, or so it was argued. Of the remaining two, the Catalan one unquestionably has more powers and a much longer and comprehensive track record. In fact, it had traditionally been held up as a model for the articulation of the national audiovisual council, which, as we have seen, never came to fruition.

The Andalusian Audiovisual Council (Consejo Audiovisual de Andalucía, or CAA) was created by Act 1/2004 and began operating in 2005. According to Moretón Toquero (2013), it was set up as a

tutelary oversight institution rather than a fully-fledged regulatory institution with the ability to intervene in the sector (e.g., to impose penalties and to grant licenses), unlike the European model and the Catalan Audiovisual Council. Moretón Toquero also considers it to be a content audit institution—that is, a consultative body of the executive whose activities focus mostly on producing reports and dealing with complaints made by citizens about audiovisual content.

A review of its actions (as shown on its website) reveals that most of the decisions made by this council were connected with advertising and the protection of minors; that fewer penalties were imposed (only seven cases in the last three years, relating mainly to failures to provide information requested by the regulator and to the protection of minors); and that, up to the time of writing, it had approved only three mandatory instructions, just two of which remained in force (regarding the accessibility of audiovisual content to people with disabilities and advertising for dating services and sex-related services). In accordance with the findings of Moretón Toquero, no actions were observed in connection with the granting of broadcast licenses or with the authorization of rental, purchase, or other operations of a similar nature between firms in the audiovisual sector.

The CAA has 11 members, all of whom are elected by a three-fifths majority of the Andalusian parliament for a five-year term of office, renewable only once. The president is nominated by the council from among its members and is appointed by the regional government. Although a qualified majority is required for the appointment of its members, whose term of office cannot coincide with the legislature's, political interference in this body has been observed over the 10 years that it has been in operation. The most striking moment coincided with the resignation in 2008 of the then president Manuel Ángel Vázquez Medel, after losing—as the journalist Lourdes Lucio (2008) explained—the trust of the PSOE, the party that had nominated him as a member and as president. According to Lucio, division within the CAA was significant. Although it had been common knowledge for some time, the differences surfaced when Medel supported a resolution against the Andalusian public radio and television's coverage of the elections, which affirmed that it had violated news neutrality. Also according to Lucio, Vázquez Medel opposed the other five members nominated by the governing party in Andalusia (the PSOE). In a hearing before the parliament held on May 22, 2008, to justify the reasons for his resignation, he referred to the unspeakable behavior of some members who, in his opinion, had used the CAA in a mean-spirited way for party-political confrontation.

### **The Catalan Audiovisual Council**

Given the importance of the Catalan regulator, I analyze not only its architecture and functions but some aspects of its activity, focusing on the period that began with the massive Catalan pro-independence demonstration on September 11, 2012. This period was chosen for two reasons: first, because Catalan pro-independence is a topical issue and, second, because of the significant increase in the number of dissenting votes observed since then in agreements that the regulator adopts. In short, it is an ideal period for assessing the degree of independence from political power of the most long-standing regulator in Spain.

### ***Origin, Composition, Powers, and Budget***

The Catalan Audiovisual Council came into existence on March 19, 1997, within the framework of three articles of Act 8/1996 on the regulation of programming distributed by cable. This gives some idea of the initial weakness of this authority, whose powers at that early time were essentially advisory (not binding in nature) and supervisory, overseeing fulfillment of the rules on advertising and programming. It did not have any power to impose sanctions. It was also conceived of as a tool to support the process of standardizing the Catalan language, which had started during Spain's transition toward democracy, when Catalonia's self-government institutions were created following the approval of its Statute of Autonomy in 1979. In its initial form, the CAC was highly controlled by the regional government, which appointed the president and four members of the council (an additional four were appointed by the parliament, two by the Catalan Association of Municipalities and two by the Federation of Municipalities of Catalonia) for a five-year period (renewable for another five years) that did not coincide with the legislature.

The first president of the CAC, Lluís de Carreras (2013), asserted that the reason for its creation was to shield the media within the Catalan regional sphere from potential intervention by the state, since it was feared that a state authority would be constituted with powers over all media (national and regional) that could lead to state control of Catalan public media. This way of thinking ties in with the dominant political and academic discourse in Catalonia since the restoration of democracy. According to this discourse, communication policies are an instrument for articulating Catalonia's own communication space, which, in turn, is aimed at Catalonia's nation building; it is a space in which its own public media (radio and television, at that time) play a key role (Guimerà i Orts, 2014).

A series of factors, such as the demands made by the CAC and, above all, a conflictive and politicized process that took place in 1999 for the granting of 33 FM radio licenses (a power that the Catalan government has had since the 1980s), sparked public debate on the need to progress toward the formation of a truly independent audiovisual regulator, in keeping with others in Western Europe (Carreras, 2000).

The Catalan legislature unanimously approved Act 2/2000, on the Catalan Audiovisual Council, which includes points from the election manifestos of *Convergència i Unió* (CiU), the conservative nationalist party (a coalition, in reality) that had governed Catalonia from the establishment of the autonomous community regime in 1980 to 2003 (and which regained power in 2010). It was a model that gave the CAC effective powers over audiovisual content, while the executive retained powers to grant licenses and to appoint the president of the CAC. This article later comments on the provisions set out in that Act regarding the composition and functions of the CAC as well as the subsequent reforms that have gradually been implemented with respect to both issues, and their implications. This section ends by referring to the evolution of this regulator's budget in the years spanning the recession.

#### ***Composition: Distribution of Power Among the Majority Parliamentary Groups***

Act 2/2000 set out that the CAC would have nine council members (elected by a two-thirds qualified majority by the Catalan parliament, following nomination by at least three parliamentary groups)

and a president (appointed directly by the government). The nonextendable term of office would be six years and would not coincide with the legislature. The renewal of council members would have to be done every two years in blocks of three.

This model remained in force until the reform introduced by Act 2/2012, which cut the number of council members from 10 to 6 on grounds of austerity, and stipulated that the president would be elected by parliament and that a lower parliamentary majority would be required for the appointment of all the council members. Therefore, the council members (including the council member-president) of the CAC can now be elected by absolute majority (if a two-thirds majority is not reached in the first round of voting), following nomination by just two parliamentary groups. This clearly retrograde measure was taken within the framework of the government pact (not a coalition) between the CiU and the Catalan conservative nonnationalist Partit Popular de Catalunya (PPC) (Blasco Gil, 2013). Under this model, the parliamentary majority supporting the government could conspire to nominate all the members of the Catalan regulator that had to be appointed in each legislature.

Consistent with a line of argument widely shared in journalistic and academic debates, Lluís de Carreras (2013) has asserted that the principal cause of the CAC's lack of authority resided in the partisan stubbornness of Catalan parliamentarians, without distinction, to gain control of the council and, consequently, of the audiovisual landscape by appointing representatives of their parties to manage it. He went on to say that, contrary to the provisions of the Act, the majority of the CAC's members lacked professional experience of the sector on the one hand, and independence on the other. This is illustrated by the fact that only 5 of the 25 council members appointed up to 2012 had not held political positions.

Thus, in late 2014, at the height of the conflict generated by the pro-independence referendum that was intended to be called, the CAC had six council members.<sup>6</sup> Of these, the president, Roger Loppacher, had been nominated by the governing party at that time (CiU); Salvador Alsius, Yvonne Griley, and Eva Parera, by the CiU and ERC, which had been not only CiU's main supporting party since 2012 but a key ally in the independence race; Carme Figueras, by the Partit dels Socialistes de Catalunya (PSC); and Daniel Sirera, by the PP.

Therefore, in addition to the obvious political ties, there was a clear majority presence of nationalist and/or pro-independence council members in the CAC, which, as described later, explains the direction of many of the regulator's decisions.<sup>7</sup>

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<sup>6</sup> Those in favor of a referendum were the CiU; the moderate nationalist pro-independence party Esquerra Republicana de Catalunya; the left-wing nationalist Candidatura de Unitat Popular; the ecosocialist Iniciativa per Catalunya Verts-Esquerra Unida i Alternativa; and (provided the state consented to it) the Catalan social-democratic Partit dels Socialistes de Catalunya, although the latter two parties do not have a pro-independence profile. Against holding a referendum were the PPC and the center nonnationalist Ciutadans-Partit de la Ciutadania.

<sup>7</sup> It should be clarified, however, that Eva Parera is an activist of Unió Democràtica de Catalunya, a party that split from CiU in June 2015 because it did not share the pro-independence shift taken by the other party of the governing coalition: Convergència Democràtica de Catalunya.

### ***Gradual Broadening of Powers***

Regarding the CAC's powers, Act 2/2000 stipulated that it was an independent regulator with the ability to impose sanctions. It also granted it a rule-making capacity to formulate instructions to implement higher-order legal provisions.

As pointed out by Lluís de Carreras (2013), the functions assigned to the CAC in 2000 were already those that any other European regulatory authority would have had. Of note among these functions were: issuing reports on bills related to the audiovisual sector; promoting the adoption of self-regulation rules or acting as an arbiter between media; overseeing compliance with legislation on programming and advertising, paying special attention to the protection of children; and ensuring the fulfillment of the missions commissioned to public-service media.

Following a change of government in 2003 (a coalition of left-wing parties—social-democrats, ecosocialists, and pro-independence republicans with a marked nationalist profile would govern Catalonia until 2010), the CAC's powers were substantially increased by Act 3/2004 in two ways. First, its ability to impose sanctions was specified and strengthened. Second, it was assigned the mission of issuing mandatory and binding reports on processes of granting and renewing radio and television licenses and on matters of share capital modification by license-owning firms and the transfer or revocation of licenses. Shortly afterward, the Catalan regulator's power to impose sanctions was broadened with the approval of Act 22/2005, on Catalonia's audiovisual communication, which also strengthened its rule-making capacity, since the development of some of the provisions of the Act were dependent on the CAC's instructions. After the approval of the Act (the Catalan audiovisual sector's main legal text), the regulator also assumed full powers over issues in respect of which the 2004 reform required it to issue mandatory and binding reports.

Regarding its task of overseeing content, it should be underscored that the CAC can act *motu proprio*, or at the petition of any legal or physical person who feels that any audiovisual rule has been breached. At the same time, its effective power is limited to those operators to which it grants licenses (regional and local), by public tender or otherwise, and to the programming opt-outs of Televisión Española, the national public television outlet that broadcasts several hours of specific programs for each of Spain's autonomous communities.

### ***Financial Asphyxia in the Context of the Recession***

Shortly after its creation, the CAC became one of the stellar projects of Catalan communication policies, which, as already mentioned, were aimed at Catalonia's nation building. Consistent with this approach, it has therefore received considerable public funding, which in 2010, at the height of the recession, amounted to well over €10 million. According to the information on its website, the precise figure was €10,667,921.12. As a consequence of austerity policies, the budget was subsequently cut by more than 50%, to €5,264,816 in 2014. This weakened the entity and basically led—as confirmed by council members Carme Figueras (personal communication, December 2011) and Daniel Sirera (personal communication, October 2014)—to a reduction in the number of council members (from 10 to 6) as well

as to the transfer of the headquarters and a considerable cutback in research activities (studies, publications, and work commissioned to third parties).

***Controversial Actions: The CAC as a Mirror of the Political Tensions in Catalonia***

As was to be expected, the CAC's actions have increased as its powers have broadened. However, in recent years, with the rise of the secessionist movement (spurred by the Spanish Constitutional Court's Decision 31/2010, which cut some of the provisions contained in the Statute of Autonomy of Catalonia that had been approved in that autonomous community in 2006), political tension within this regulator has been considerable.<sup>8</sup>

A good example of this tension is the significant proliferation of dissenting votes cast by the council members nominated by the so-called constitutionalist parties (in favor of coexistence within the state framework). At the same time, the council members nominated by the parties that now lead the pro-independence cause have given their support to an initiative put forward by the president of the CAC for these votes not to be made public.

On this point, it is worth recalling that, among other functions, the Catalan regulator oversees the fulfillment of this autonomous community's public media functions, with pluralism in its diversity of forms being a particularly important one. In addition, it is worth reiterating that, since their creation in the early 1980s, the public media have been a key instrument for Catalonia's nation-building process.

Thus, on November 12, 2012, the then CAC members Elisenda Malaret and Carme Figueras (both appointed by the Catalan parliament, following nomination by the PSC) made public a press release in which they reported a violation of their rights due to the fact that the president of the Catalan regulator had refused to incorporate their dissenting votes into Agreement 168/2012, of November 7, on the complaint made by the PPC about the news treatment that the regional public media had given to the demonstration under the slogan "Catalunya, nou estat d'Europa" (Catalonia, new state in Europe), held on September 11, 2012. Their dissenting votes (and the one cast by council member Daniel Sirera, appointed following nomination by the PPC) were therefore attached to the minutes of the session in which the agreement was adopted (restricted for five years) and were not made public or notified to the interested parties as a result.

To demand that their dissenting votes be made public, Elisenda Malaret (a CAC member until July 2014) and Carme Figueras took recourse to Article 20.2 of Act 26/2010, on the legal regime and procedure of the public administrations of Catalonia, which states that any members who oppose the

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<sup>8</sup> It is not the purpose of this article to evaluate this decision, but throughout the democratic period, Catalonia (and the other autonomous communities, albeit usually to a lesser extent) have gradually assumed an extensive array of powers regarding media, which range from granting regional and local radio and television licenses to awarding subsidies, and from setting obligations regarding content (which are very strict in terms of language issues) to the creation of their own public media.

agreement adopted by a majority of other members may formulate a dissenting vote in writing within a period of 72 hours, which must be incorporated into the text of the agreement (which is public). Likewise, they deplored the fact that the precedent of making dissenting votes public had been broken. Hence, in the interests of transparency that they considered CAC decisions should have, they chose to make public their dissenting votes. Both votes (based on Report 124/2012 by the CAC's Content Department) referred to a lack of pluralism, in the selection of the interviewees at least, on both the generalist television channel (TV3) and the radio channel (Catalunya Ràdio) regarding the news coverage given to the previously mentioned demonstration.

Just over one year later, the CAC plenary adopted Agreement 5/2014, of January 22, amending Section 2 of Article 6 of the CAC's Organic and Operational Statute. As a result, dissenting votes now must be notified to interested parties at the same time as the text of an agreement and must be immediately published on the CAC's website. The stance of several council members and the president had therefore changed, a fact that is hard to decouple from the publicity that the council members who had disagreed gave to their dissenting votes.

I have reviewed the agreements that the CAC adopted following the first of three large pro-independence demonstrations held on September 11 (Catalonia's national day) since 2012. The 2012 demonstration considerably changed the political situation in Catalonia. Since then, the Catalan government has joined those citizens demanding secession from Spain and has been working resolutely in that direction, even though independence has never explicitly figured in the governing party's election manifesto.

Between September 2012 and December 2014, I identified 15 CAC agreements with dissenting votes, and all but 1 were cast by council members nominated by parties that do not support the secessionist cause.<sup>9</sup> Specifically, they were nominated by the PSC (council members Elisenda Malaret and Carme Figueras) and the PPC (council member-secretary Daniel Sirera).

Of the 15 cases in which dissenting votes were cast, 9 involved the three previously mentioned council members. To be adopted, the CAC agreements therefore required the casting vote of the president, who, as mentioned, was nominated by the CiU, the conservative nationalist governing party in Catalonia.

Most of the agreements with one or more dissenting votes (7 out of 15) referred to the news treatment of the political situation by the Catalan regional public television outlet (Televisió de Catalunya). However, agreements on other matters have also led to major discrepancies within the CAC. An example

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<sup>9</sup> I would like to thank the council member-secretary, Daniel Sirera, who provided the information I requested on this matter, because, as noted, not all of it was public. I am also grateful to Elisenda Malaret for her utmost willingness to be on hand. On completion of her term of office as a council member of the CAC in July 2014, she returned to her position as professor of administrative law at the University of Barcelona.

is Agreement 52/2014 authorizing the lease of local DTT frequencies licensed to the company Publicitat i Comunicació del Vallès to the company Xarxa de Serveis i Comunicacions 2014. The main reason for the discrepancy in this case was the warning made by Figueras, Malaret, and Sirera (based on documents provided by the applicants) that the lessee did not intend, as required by law, to broadcast part of its specific programming for each local DTT demarcation, though it did intend to articulate a sole broadcast providing coverage to a large part of Catalonia. Events have shown that they were right, since El Punt Avui TV, a channel with a clearly pro-independence profile, effectively broadcasts the same content in every demarcation where the CAC has allowed it to lease the license from the company Publicitat i Comunicació del Vallès.

### Conclusion

Since late 2013, Spain has had a national macroregulator about which the European Commission has raised many concerns, particularly in relation to the regulator's lack of independence and to the loss of powers it represents compared to the preexisting regulators. This new authority has been especially criticized because it assumes the functions of the former CNC. In fact, a considerable reduction has already been observed in the number of infringement proceedings related to competition (unlike those related to audiovisual content), despite the short amount of time it has been in operation. There have also been complaints that the Spanish regulatory model—even though it has been justified on grounds of budgetary savings and synergies among the preexisting regulators—responds to the reality of the recommendations made in a report on the regulatory model commissioned by Telefónica to PwC.

Along similar lines, and just prior to finalizing this article, the Supreme Court of Spain (after analyzing the appeals lodged by the previous president and one former member of the CMT) had submitted questions to the Court of Justice of the European Union for a preliminary ruling, seeking its opinion on whether the CNMC, as configured, was compatible with EU law.

The Spanish regulator lacks spectrum, license granting, network security, and Internet domain name registration powers. The license granting matter is particularly important at a time when a public invitation to tender has been issued for the award of six national DTT licenses, which may allow new operators to join a market controlled by Mediaset and Atresmedia, in what is practically a duopolistic regime.

The potential change of government in Spain in late 2015 threatens the survival of this macroregulator, which was created without parliamentary consensus. The PSOE (which may be able to govern with support from other left-wing parties such as Podemos and Izquierda Unida or from the emerging moderate and reformist party Ciudadanos) has expressed its willingness to separate the competition and sectoral regulation functions if it has government responsibilities in the future. Nevertheless, it seems likely that the future model chosen for the national regulator will be a convergent regulator.

Regarding the regional model, the emergence of new audiovisual regulators is unlikely in an economic context that has led to the loss of one of the three that had been created and to a 50% cut in

the budget of the CAC, the most emblematic of the three. It is also worth mentioning the evident failure of the regional and local DTT model in Spain. Operators are closing down—a circumstance that is unlikely to foster the creation of new regional regulators. However, the political changes that have occurred since the regional elections in May 2015, with the formation in several autonomous communities of left-wing governments that are much more inclined to create new audiovisual councils, suggest that debate on regional regulators is likely to be opened up, as is the case in Castilla-La Mancha.

Regarding the CAC, which has broad powers, the striking increase in the number of dissenting votes cast during the adoption of agreements is worrying, and particularly so if the intention is to render invisible those votes (which were rigorously argued). Ultimately, however, these attempts to render them invisible were not successful because of the public complaint made by the dissenting council members. Regarding the role attributed to the CAC in Catalonia's so-called nation-building process, it seems unlikely that the parties with a more radical nationalist tendency (which currently have a majority in the regional parliament and have also nominated the majority of the CAC members) will opt for the appointment of people who, for example, might bring into question any of the content broadcast on public media about which professionals working in them have begun to raise concerns, owing to its excessive pro-independence bias.

Within this context, since the change of Spain's national government and the intensification of nationalist demands in Catalonia, it is possible to conclude that what has happened in recent years with audiovisual regulators in Spain is undeniable proof of increased government intervention and political parallelism, both of which are characteristic of the polarized pluralist media systems in Mediterranean Europe (Hallin & Mancini, 2004).

Finally, as the title of this article points out, the current regulatory model in Spain is a unique case within the European Union because only Slovenia has opted for a macroregulator that acts in as many areas as the CNMC, and only Germany has regional regulators, thus bearing some similarity to the system implemented in Andalusia and Catalonia.

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