

The new regulatory framework for electronic communications

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- *How have videogames evolved from the appearance of Atari in the 60s and Nintendo Kids generation in the 80s until the present multimedia consoles and internet games industry? Which is the player profile and how much time do they devote to this activity? Finally, in what categories can videogames be classified? The author answers these questions and explains the main features which define the videogames industry nowadays.*

Introduction

In March 2002, the European Community adopted four directives and one decision that made up the new regulatory framework for the telecommunications sector (1) — now known as electronic communications — which substantially modified the previous one. Member States (2) had until 24 July 2003 to incorporate the new regulations into their respective legal systems.

The directives that previously regulated the telecommunications sector were regulations that pursued deregulation of the sector, while the current directives were approved in accordance with article 95 of the TEC (the Treaty establishing the European Economic Community), the legal basis for adopting harmonisation standards, aimed

at domestic market performance. In particular, one of the main novelties of the new regulatory framework was to apply the principles and regulations of trust law in determining the obligations of electronic communication service providers.

The new regulations are the fruit of a review that began in 1999, based on the evolution of the sector that resulted from the processes of digitalisation and convergence of the telecommunications, media and information technology sectors. The overhaul of the regulatory framework thus began from a reflection started in these other sectors, all of which are now characterised by an identical context. That may be the reason why we are now presented with a new concept of electronic communications (3) (having exceeded telecommunications), which includes telecommunication networks and services as well as the networks and services used for transmitting and broadcasting radio and television.

However, one of the main features of the regulation is the separation of transmission and content. It was felt that content is characterised by elements and objectives of regulatory policies that make it different and that requires specific regulation, although recognising the links between them.

Therefore, despite the exclusion of “programming content” from the sphere of application of the new regulatory framework, the new regulations modify the audiovisual landscape. The new framework does not treat content or the way it is marketed in any depth, but it does regulate transmission (i.e., infrastructure conditions) and reception (i.e., conditional access, interactive television services, electronic programming guides (EPGs), application programme interfaces (APIs) and must carry regulations.

I believe it is appropriate to analyse the new regulatory framework, in the perspective of its ties with the audiovisual world. I would like to analyse the main elements of the new

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regulatory framework with regard to signal-carrying infrastructure, as well as the equipment for receiving and accessing audiovisual content. I would like to begin with a description of the context and principles of regulation.

Context of the regulation

In 1997, the European Commission began a period of reflection in relation to the implications, especially of a legal nature, of the convergence between the telecommunications and audiovisual sectors with the publication of the *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and their Consequences for Regulation; in the Perspective of the Information Society*. It was therefore considered important to adapt the existing regulatory frameworks to the new technological environment.

Technological convergence between the audiovisual, telecommunications and IT sectors involved among other things new means of broadcasting and accessing information and relating them with society. Furthermore, in Europe, television was posited as the principle medium of access to the information society. When television is the access system to this new environment, the main difficulties in relation to legal systems applicable to sectors immersed in the convergence process appear, i.e., the television sphere of public communication, and the information society services of private communication.

One of the main conclusions from the reflection initiated by the European Community was the need to separate regulations on transmission and content. It was felt that content had to be regulated with regard to its nature and not according to the medium by which it reached viewers.

The convergence of technological platforms and network infrastructure was already a reality and so it was necessary to apply a similar regulation to all infrastructure, independently of the type of service provided. This *horizontal* approach to networks was complemented by another, *vertical* approach with regard to broadcast services or content, the regulation of which would continue to be determined by the characteristics of each service, i.e., the divergence elements that justified their different treatment.

In the case of audiovisual content, and more particularly

television, a review process of the Television Without Frontiers directive was initiated and which is currently in the public consultation phase, with the aim of presenting the reform proposal in early 2004 (4). Information society services were regulated by the Directive on Electronic Commerce (5).

In relation to transmission infrastructure, after two years of discussions between the European Commission, the Member States and the European Parliament, the “new regulatory framework on electronic communications” was approved, establishing the new legal system for infrastructure and the provision of signal-carrying services on electronic communications networks.

However, the separation of regulations on transmission and content are not absolute, and we shouldn't forget the links that exist between transmission and content. The framework directive also recognises this, considering that the separation between the regulation on transmission and the regulation on content should not prevent us from bearing in mind the links that exist between the two, in particular in order to guarantee pluralism of the media, cultural diversity and the protection of consumers (6). In fact, these links are determined in relation to aspects relating to access to audiovisual content, i.e., questions relating to authorisation and use of the broadcast spectrum, such as must-carry standards, APIs, EPGs, etc.

The European Commission considered that the convergence phenomenon involved important economic and social repercussions and that Europe had taken a risk with regard to economic development, the creation of jobs, cultural identities and social impact. The telecommunications sector is the area that can contribute the most to economic growth in the Union, whilst broadcasting is the most important area in terms of social and cultural impact. It was therefore “extremely important to create a new regulatory framework suitable for these sectors”(7). The Green Paper did not question the objectives that establish sectoral regulations, but it did advise a reconsideration of the way to achieve them.

In this regulation context, the European Commission felt that the new regulations must be based on the following basic principles:

- They had to respond to clearly defined political objectives
- including promoting and supporting an open and

competitive European market; guaranteeing universal access and consolidating the domestic market

- They had to be reduced to the minimum necessary to achieve the political objectives

- They had to find a way to improve legal security in a dynamic market, and

- They had to aspire to technological neutrality, i.e., no particular technology should be imposed nor should the regulations discriminate in favour of the use of one or other type of technology.

These principles were also considered valid for the regulation of audiovisual content. However, the European Commission, in its communication on audiovisual policy in the digital era (8), felt that it was important to bear in mind the specific nature of the audiovisual sector and, therefore, when it came to adopting the new regulation in this area other aspects should be taken into consideration, such as general interest objectives and regulatory focus at a European level, the recognition of the role of public broadcasters and the need for transparency in their funding and the participation of regulatory bodies.

Regulation of signal-carrying infrastructure

The regulation's focus with regard to infrastructure was made from a horizontal point of view, with a standardised treatment of all carrier networks and associated services, independently of their technology. The objective was to develop a stable regulatory framework in which the same principles would apply to all infrastructure, regardless of the services they carried.

The key aspects of the new regulation on signal infrastructure were as follows:

- The confirmation of the objective to establish effective competition in the electronic communications sector

- Shoring up sectoral regulation and the key role of national authorities in the regulation of the sector

- Making the rules of the game more flexible and the requirement to explain the need for all new regulatory measures that had until then been considered implicit because they were imposed by regulations

- The simplification and reduction of access conditions to electronic communications markets. This would see the

disappearance of individual licences as a system of granting licences to authorised owners (9) in favour of a system of general authorisations in which the providers of electronic communications services would only have to declare their wish to begin activity. It would establish the exception of individual rights to the use of scarce resources, i.e., radio frequencies and numbering, which would make it impossible to establish exclusive rights on cable networks.

- The consideration that the general rule of intervention in the market would be *ex post* regulation. It was felt that it was no longer necessary to determine the obligations that had traditionally been imposed on the old monopolies via a very detailed set of regulations aimed at previously creating ideal conditions, because the market could develop in competition among operators, i.e., *ex ante* regulation. It was felt there was competition among operators and that through a procedure in which the European Commission and national telecommunications regulation authorities would participate, a decision could be made on the markets that had enough competition to make it possible to eliminate *ex ante* intervention, and

- The establishment of Community coordination mechanisms between the different national regulatory authorities and the European Commission (10) and between sectoral and anti-trust authorities.

One of the main novelties introduced by the new regulatory framework was the application of anti-trust principles and standards, including the procedure and criteria for defining markets (11), market analyses, the concept of *significant weight in the market* assimilated to the position of dominance, the imposition of regulatory obligations only where the market was not competitive and the cooperation of regulatory authorities with trust authorities. It established the gradualness of regulatory intervention only where justified and with the explicit purpose of being able to abandon it as markets became more competitive.

Ex ante regulation is conditioned by its significant weight on the market, a concept that was no longer established in relation to the 25% market share but assimilated into the definition of the right to competition. This means that the regulatory authorities can impose specific obligations in cases where an operator represents approximately 40% or 50% of the market share.

We should remember that the overhaul started from a

technological evolution but was part of the EU's principle political goal of providing access to and developing the information society to bring about an economy based on the most competitive knowledge in the world .

The new regulatory framework thus also adapted the universal service concept to technological evolution, market development and changes in user demands. In particular, it extended the concept of *universal services* to the effects that “public telephone network connections from a fixed location must enable the transmission of voice and data at speeds high enough to access online services such as the ones offered over the Internet”.

Regulation of access to content

In a digital broadcasting environment, access to audiovisual content depends not only on content being accessible, but also on it being easily accessible. To browse the vast amount of content offered in a digital environment, users have to have an electronic programming guide (EPG) that not only allows them to browse each channel and service available, but also offer information on upcoming programmes and facilitate pay-per-view and a-la-carte video services. It can also offer advertising and support sophisticated filtering systems for the protection of minors. These features can all be integrated in an API, which determines which EPGs can be installed in decoders and digital TVs. It is clear, therefore, that the system and design of the way that APIs and EPGs work can influence both the presentation and availability of audiovisual content and therefore raise important questions in relation to pluralism.

In fact, if the appearance of digital television in Spain was determined by the war of the decoders (which concealed the war for football rights) and conditional access systems, APIs and EPGs are the new “bottlenecks” that may condition audiovisual supply. They may be business options on the market, but the broadcasting authorities must guarantee they do not violate pluralism in the media.

The new regulatory framework, as in the case of conditional access systems as set out in Directive 95/47/EEC, referred to systems of reception and access to digital television content and opted for a voluntary approach to favour market mechanisms and not force the use of any

one particular standard for interactive television, as long as interoperability and freedom of choice amongst users were guaranteed.

APIs and EPGs

The access directive (13) established the demand for Member States to promote the use of an open API for all interactive digital TV platforms, independently of the broadcast technology used, and all manufacturers of digital TV equipment, as far as strictly necessary to guarantee interoperability and promote freedom of choice amongst users.

The Multimedia Home Platform (MHP) standard involves an open API and is included amongst the regulations on standards the Member States must promote but not impose. The aim is to guarantee that all consumers can receive all interactive digital services, independently of the broadcast method or equipment used (14) .

However, the European Commission reserved the right to make European standards (15) compulsory where necessary to guarantee the interoperability of interactive services and advanced digital TV equipment.

Must-carry regulations

Must-carry regulations currently apply to cable and signal carriers but they could also be applied to television service editors in the sense, for example, of forcing satellite or digital terrestrial TV platforms to include public service stations in their basic packages. They could also apply to multiplex managers, who could be forced to group the signal of particular programmes onto a same channel before broadcasts.

As mentioned before, the new directives mark the transition from the current regulations specific to the telecommunications sector to the application of anti-trust regulations, in accordance with the principle of reducing sectoral rules to essential areas.

No specific regulatory obligation is therefore expected to, for example, facilitate access to service providers to cable television networks or mobile phone networks. This means

that any decision these access obligations impose on the owners of infrastructure will have to meet market circumstances, the effectiveness of competition and freedom of choice by customers (16), subject to regular coordinated review procedures.

However, in relation to must-carry standards, the European Commission accepted they could be justified in the digital environment and that the Member States should continue to have the option of imposing this type of obligation on carriers, as long as it met the principle of proportionality and was limited to channels with a public-service mission. This means that compliance with specific general interest objectives would have to be justified and a “reasonable remuneration” (17) anticipated.

The networks where these types of standards could be established include cable TV networks and satellite and terrestrial broadcast networks. They could also include other networks if an important number of end users used them as the principle method for receiving radio and television programmes (18).

Other access conditions

The access directive (19) established the obligation of carriers to accept productions in wide format and to maintain the format. It also anticipated that regulatory authorities would impose obligations on operators to guarantee access to APIs and EPGs (20) and access to technical interfaces, protocols or other key technologies that may be essential for guaranteeing service interoperability (21).

Finally, it determined the conditions to apply in relation to conditional access systems, which were basically the same as those set out in Directive 98/84/EC on conditional access (22). It anticipated access by operators in equal, reasonable and non-discriminatory conditions to any conditional access systems that broadcast digital radio or television.

Conclusions: coordination in the regulations

The new regulatory framework is the new legal system for electronic communications, and is a response to an evolution in the sector that has come about because of

digitalisation and technological convergence, with a view to the information society. Because technological convergence exists, as we have seen, there is an overlapping in terms of regulation and in some cases difficulties in locating laws in the legal system that can be applied to infrastructure or content. These are, I stress again, subjected to different legal systems because they are characterised by elements that make them different. The difficulties arise when the dividing line is not clear and especially when *audiovisual content* is the means of access to the *information society*.

Links with the regulations governing the broadcasting of content and regulations on trust involve, as the very legal system established in the directives of the regulatory framework show, mechanisms that, whilst not necessarily of organic convergence, do involve institutional coordination. These mechanisms must allow us to coordinate the existing links between content sent (or to be sent) and the medium on which it is broadcast.

For now, the regulations I have commented on in this article anticipate coordination mechanisms with Community authorities (supra-State decision level) and trust (a different area of regulation). The Autonomous Communities (an infra-State decision level) and audiovisual authorities (a different field of regulation) clearly have missions relating to the aspects involved with the new regulatory framework and with which it is also important to establish coordination mechanisms. The latest communication from the European Commission on the application of the Television Without Frontiers directive says, “technological convergence requires better cooperation between the regulators involved, i.e., communication infrastructure, audiovisual sector, competition, etc.”.

However, that is not how it is viewed at the Spanish level. Provision 70 of the General Telecommunication Bill establishes “obligations in terms of conditional access, access to particular radio and television services, wide-format television and transmission obligations” which at no time take into consideration the authority attributed to the Autonomous Communities in relation to the broadcast media.

Preserving the pluralism of the media in a digital environment will depend more on controlling access than regulations about ownership of the media. Guaranteeing third parties equal access to conditional access systems on

broadcasting platforms and guaranteeing the technical interoperability of decoders will become the main objectives of the regulation on audiovisual communication.

Regulation of the systems of reception and access is based on interoperability as a guarantee of universal access and supply, in pluralism that goes beyond regulations on the ownership of the media. It is important to adapt these regulatory mechanisms and functions to this new reality.

Notes

1. The new regulatory framework includes a framework directive (Directive 2002/21/EC), authorisation directive (Directive 2002/20/EC), access directive (Directive 2002/19/EC), universal service directive (Directive 2002/22/EC) and directive on privacy and electronic communications (Directive 2002/58/EC).
2. Other legislation that complements the new regulatory framework are Regulation No. 2887/2000 on unbundled access to the local loop; the radio spectrum decision (Decision 676/2002/EC); the directives of July 2002 on market analysis and assessment of significant weight; the directive on competition (Directive 2002/77/EC) and the Recommendation of 11 February 2003 on markets susceptible to ex ante regulation. All these regulations are available at:
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm
With regard to the Spain, as this article was going to print the new General Telecommunications Bill was being discussed in Parliament. See the text and its processing in the section on legislative initiatives at the House of Commons webpage <http://www.congreso.es/>
3. In particular, and in accordance with article 2 of the framework directive, electronic communications network is understood to mean "transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other radiomagnetic means, including satellite networks, fixed circuit- and packet-switching (including Internet) and mobile terrestrial networks, electricity cable systems to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed". Electronic communications service is understood to mean "a service normally provided for remuneration which consists wholly or mainly of the conveyance of signals on electronic communications networks used for broadcasting, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly of the conveyance of signals on electronic communications networks."
4. Fourth report of the European Commission on the application of Directive 89/552/EEC [COM Document (2002), 778 final, 6 January 2003].
5. Directive 200/31/EC of 8 June on particular aspects of the information society, in particular electronic commerce on the domestic market; transposed to the Spanish legal system through Act 34/2002, of 11 July, on the information society and electronic commerce services (LSSI).
6. Considering number 5 of Directive 2002/21/EC (framework directive)
7. Communication from the European Commission: Results of the public consultation on the Green Paper [COM Document (1999) 108 final].
8. Communication from the European Commission on the principles and directives of the Community policy in the audiovisual sector in the digital era [COM Document (1999) 657 final].
9. The new regulations only affect signal-carrying infrastructure and not the ability of Member States to anticipate a system of granting individual licences for the provision of radio or television services.
10. We could consider that these coordination mechanisms and the execution authority attributed to the European Commission were compensation for the agreement to not create a European authority on telecommunication regulation.
11. See the Recommendation from the European Commission of 11 February 2003 on markets belonging to products and services in the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and Council relating to a common regulatory framework of networks and electronic communication services.
http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomes.pdf
12. Objective set out in the European Council in Lisbon in June 2000 and reaffirmed in Barcelona at the meeting that took place in March 2001.
13. Article 18, framework directive
14. Considering no. 31 of the framework directive
15. Article 18.3 of the framework directive.
16. Communication of the Communication: Results of the public consultation on the 1999 Review of the communications sector and orientations for the new regulatory framework [COM Document (2000) 239 final, page 27].
17. Considering nos. 43 and 44 and article 31 of the universal service directive.
18. See reference above.
19. Article 4.2, access directive
20. Article 5.1. b) access directive
21. Article 12 e) access directive
22. Article 6 and part of Appendix I of the access directive