

# The protection of minors in the new audiovisual regulation in Spain

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**Abstract:** In 2010 the Spanish Parliament approved the General Law on Audiovisual Communication (GLAC), a new regulation which implements the European Audiovisual Media Services Directive (AVMSD). This research analyses how the regulations focused on the protection of children evolved throughout the legislative process, from the first text drafted by the Government to the text finally approved by Parliament. The research deals with the debates and amendments on harmful content which is prohibited or limited. The main objective of the research is to establish the extent to what the new regulation approved in Spain meets the requirements fixed by the AVMSD and the Spanish Government to guarantee child protection.

**Keywords:** Spain's audiovisual regulation; AVMSD; harmful content; minors.

**Summary:** 1. Introduction and objectives. 2. Methodology and documents under study. 3. The evolution of regulations on harmful content. 3.1. EU regulations. 3.2. Legislation in force in Spain before the GLAC. 3.3. Genesis of the GLAC. 3.4. Changes throughout the parliamentary process. 3.5. Conclusions. 4. Bibliography. 5. Notes. 6. Annex

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## 1. Introduction and objectives

The Spanish General Law on Audiovisual Communication (hence GLAC), which was approved on 18 March 2010 and came into effect on 1 May of the same year, has been presented as a regulation aimed to ensure the adequate protection of minors in the area of audiovisual contents and services.

In her defence of the Bill in Parliament, the Vice President of the Spanish Government, María Teresa Fernández de la Vega, stressed the desire to go beyond the requirements of European regulations in relation to three main issues: the protection of minors, accessibility for persons with disabilities, and the requirement of broadcasting quotas for European productions and financing of Spanish audiovisual contents [1].

This article aims to analyse the extent to what the finally adopted text meets the objectives stated by the Government and the requirements of EU legislation concerning the protection of minors. The objective is to establish the extent to what the new law responds to the “special sensitivity” that has been attributed by some [2], or whether it, conversely, abandons the protective principles of a quality communication [3] and neglects the protection of audiences [4].

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## 2. Methodology and documents under study

The analysis presented in this article is a detailed follow-up of the evolution of the law from its first draft in the form of draft bill, which was submitted to the consultation of certain agents, social organisations, and the Spanish Council of State [5], to the final version approved by Congress on 18 March, 2010, and published in the *Boletín Oficial del Estado* (Official Gazette of the Spanish Government) on 1 April.

This analysis, fundamentally, includes eight versions of the text: two correspond to the draft bill stage submitted to the consultation of organisations of consumers and users [6], and the rest are different versions of the bill stage: the text submitted by the Government to the Congress of Deputies [7]; the text submitted by Congress to the Senate [8], with the amendments approved by the Lower House [9]; the text returned by the Senate to the Congress [10], with the additional amendments introduced in the territorial chamber [11]; and the text finally adopted by the Congress [12], which came into effect on 1<sup>st</sup> May, one month after its publication in the Official Gazette [13].

The analysis also included the review of the records of parliamentary proceedings related to specific moments of the legislative process. We also made the corresponding comparative

analysis of the new law with the provisions contained in the 2007 Audiovisual Media Services Directive (AVMSD), amended in 2010 [14], and its precedent, the 1998 “Television Without Frontiers Directive”, amended in 1997, and the analysis of the transference of these directives to the Spanish system through the Law 25/1994 [15], amended in 1999 [16].

We also took into account the comments submitted by organizations of users and in particular the Communication Users Association, as it was the most active entity during the negotiation of bill, and the only association explicitly cited by the Government as consulted entity, but clearly with less influencing capacity than the Spanish association of private television operators, UTECA [17].

The main milestones of the process are briefly summarised below. On 26 June the Council of Ministers approved in its first reading the draft bill for the General Law on Audiovisual Communication, which was circulated and integrated some of the remarks made by social groups. On 17 September, the Spanish Council of State approved in a plenary session its report for the Government. On 16 October, the Council of Ministers approved the bill for the GLAC that was submitted to the Congress board. On 23 October, the Congress Board entrusted the discussion of the bill to the Constitutional Commission and opened a session for the submission of amendments.

On 17 December, the committee [18] in charge of writing the report on the bill approved a text that rejected most of the 633 partial amendments presented by the different parliamentary groups, thanks to an agreement between the parliamentary groups of the Socialist Party (PSOE) and the Catalonia’s “Convergence and Union” Party (*Convergència i Unió*, aka *CiU*), which supported all the amendments raised by the Socialist Group, most of the CiU, and some members of other parliamentary groups.

Once the voting date for the approval of the text was fixed in the Constitutional Commission with full legislative competence on 22 December, the claims of the parliamentary groups that were excluded from the agreement forced the postponement of the debate until 7 January [19]. The bill passed then to the Senate, where it was approved at the end of the deadline for amendments on 18 March. The law was enacted on 31 March, published on 1 April, and came into effect one month later.

### **3. Evolution of regulations on harmful content**

The core of the law regarding the protection of minors is constituted by the regulations on contents accessible through audiovisual media that may be harmful to children, regardless of

whether they are accessible in linear or on-demand services. Given the significance of this issue, we focus our analysis in the legislative proceedings of the second section of article 7.

The analysis must have as unavoidable reference the EU regulations in the field of audiovisual content, which the national legal systems of the member states must respect.

### 3.1. EU regulations

Article 22 of the 1989 Television without Frontiers Directive (TVWFD) [20] establishes a dual regime for harmful content for children and young people, distinguishing between those that might “seriously damage the physical, mental or moral development of minors” and, in particular, those that involve scenes of pornography or gratuitous violence and other programmes that can also harm minors, although to a lesser extent.

The broadcast of the first type of content is prohibited with general character, while the broadcast of the latter type is allowed when they are not scheduled in hours of regular consumption among children or when they ensure that their access by children is restricted.

The group of content whose broadcast is prohibited as a whole includes, apart from pornography and gratuitous violence, those contents that may incite hatred on the grounds of race, sex, religion or nationality. This is furthermore a law of basic regulations that empowers the Member States to set stricter rules.

Given that in the following amendments to the TVWFD the regulator maintains the aforementioned principles unchanged, we present the transcription of the full paragraph of the article that will serve as a general reference throughout the argumentative exposure offered in this work.

Television without Frontiers Directive (1989)

Article 22

“The Member States shall take appropriate measures to ensure that television broadcasts do not include any programmes that might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence. This measure shall also extend to other programmes that might impair the physical, mental or moral development of minors, except when it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of

transmission will not normally hear or see such broadcasts. Member States shall also ensure that broadcasts do not contain incitement to hatred on the grounds of race, sex, religion or nationality”.

The Directive 97/36/EC, which amended the previous directive, reiterates the prohibition and limitation to broadcast contents and also makes obligatory for broadcasters to add acoustic and visual warnings to the contents that are unsuitable for minors and are broadcast in un-encoded form, and therefore are subject to schedule constraints.

Finally, the 2007 European Audiovisual Media Services Directive (AVMSD), amended in 2010, updates the regime of restrictions on the broadcasting of content that may be harmful to minors, keeping the restrictions designed for television broadcasting (linear) services organised around different programming guides and differentiating them from the on-demand services. For the latter services, there is a different scheme that allows the possibility of incorporating contents that may “seriously” affect children, as long as their conditional access is guaranteed [21].

Furthermore, the prohibition to broadcast contents that infringe upon human dignity is transferred to a different article to ensure that this ban is understood universally and not only in relation to the protection of minors. As the Commission explains, this protection of fundamental rights “has a much more general reach than the protection of minors and also pursues the protection of adults from those programmes that could impair their physical, moral or spiritual integrity” [22].

Therefore, if we obey to the literality of EU regulations we can establish the following typology of contents:

- a) Contents that infringe upon human dignity: prohibited in all audiovisual communication services, whether they are linear TV broadcasting or on-demand services.
- b) Contents that might seriously damage minors and whose identification and characterisation are in the hands of the Member States:
  - Their broadcast is prohibited on TV broadcasting services (in both un-encoded and encoded and restricted access forms).
  - Allowed in on-demand audiovisual communication services.

c) Contents containing scenes of pornography or gratuitous violence

- Their broadcast is prohibited on TV broadcasting services (in both un-encoded and encoded and restricted access forms).
- Allowed in on-demand audiovisual communication services in separate catalogues.

d) Other contents that may damage minors

- Their broadcast is allowed in all systems but if they are broadcast in un-encoded forms they can only be schedule at certain hours and must be accompanied by acoustic and visual warnings.

As we can see, a key aspect of the EU regulation is the prohibition to broadcast programmes containing pornography or gratuitous violence, which is a prohibition that is maintained, in the case of TV broadcasting services, even if such contents are broadcast in encoded forms.

This interpretation is the most consistent with the spirit and wording of the EU regulation, according to the European Commission, which has explained that “the legislature intended, clearly, to ban all programmes that might ‘seriously impair’ children” [23].

The Commission stresses, in this sense, in the separation between “the programmes that are forbidden with a general character”, which expressly includes programmes containing pornography or gratuitous violence, and the “authorized programmes which use technical and schedule measures to ensure that they will not be seen by children” [24].

This principle of general prohibition to broadcast contents with pornography and gratuitous violence has been adopted by the British broadcasting regulator, Ofcom, which refers directly to article 22 of the European Audiovisual Media Services Directive and adopts this general principle and thus identifies the type of programmes and contents that are affected by this prohibition.

Thus when referring to programmes of sexual content, the latest version of the Ofcom’s Broadcasting Code distinguishes between content rated as R18 (equivalent to the “X” rating in Spain), which are prohibited in general; the so-called “adult content”, which only can be scheduled out of protected hours and is subject to access restrictions; other sexually-explicit content that are not qualified as “adult content” and can only be scheduled out of protected time and require the justification of the broadcaster; and programmes containing nudity, which can



only be scheduled in protected hours if they are adequately justified by the context of the programme [25].

The law on audiovisual communication adopted by the Parliament of Catalonia in 2005 integrates the exact wording of article 22.1 of the Directive 97/36 to its article 83.1 which states that the radio and television services providers may not offer any content that might seriously impair the physical, mental or moral development of minors, “in particular the dissemination [...] of scenes including pornography or gratuitous violence” [26].

This general prohibition is clarified, however, in the following section of the aforementioned article, which allows the possibility of including this type of content on broadcasting services, provided that their access is restricted through conditional access systems. The use of this double principle of general prohibition as a main standard open to exceptions was subsequently transferred to the development regulation issued by the Audiovisual Council of Catalonia [27].

On the other hand, the French legislation maintains the general prohibition on broadcasting contents that might seriously harm minors but does not mention explicitly pornography and gratuitous violence within this prohibition.

The 1986 Freedom of audiovisual communication law, amended in 2009 in order to adapt it to the European Audiovisual Media Services Directive, strengthens the controls applicable to operators to ensure that in general minors will not have access to content considered “harmful” or “very harmful” [28].

### **3.2. Legislation in force in Spain before the GLAC**

To what extent had the Spanish legislation integrated the EU standards before the General Law on Audiovisual Communication (GLAC) came into effect? Law 25/1994, which integrated into the Spanish system the Television without Frontiers Directive (TVWFD), incorporated in its article 17.1 the general prohibitions on the broadcast of any kind of programmes, scenes or messages that may seriously damage children, or infringe upon human dignity or promote hatred or discrimination.

However, instead of including pornography and gratuitous violence among the contents that might seriously damage minors, as the TVWFD did, the Law 25/1994 included these contents within the category of lower risk programmes for children and allowed their unencrypted broadcasting at night.

Law 25/1994

Article 17

a) “TV broadcasts will not include any kind of programmes or scenes or messages that might seriously impair the physical, mental or moral development of minors, and programmes that promote hatred, contempt or discrimination on the grounds of birth, race, sex, religion, nationality, opinion or any other personal or social circumstance.

b) The broadcasting of programmes likely to impair the physical, mental or moral development of minors and, in any case, those containing pornography or gratuitous violence will only be broadcast from 10 p.m. to 6 a.m. and should be accompanied by acoustic and visual warnings about their contents.

This shall also apply to the spaces dedicated to the promotion of programming”

Therefore, the law incorporating the European standard into the Spanish system not only did not prohibit, without exception, the TV broadcasting of any pornography and gratuitous violence, like the TVWFD did, but also authorised their unencrypted broadcast from 10 p.m. onwards.

It was therefore a double violation of the European law: firstly, because it authorised the broadcasting of such contents and, secondly, because it also expressly authorised their unencrypted broadcast.

Law 22/1999 amended Law 25/1994 through the incorporation of changes that were in turn introduced in the TVWFD and the introduction of some significant variations [29], including: the elimination of the license to broadcast pornographic and gratuitously violent content in restricted hours in unencrypted forms. This modification allowed restoring the provisions of the EU law but only in part, since the broadcast of this type of content was still allowed in restricted forms, by technically conditioning the access to them [30].

### **3.3. Genesis of the GLAC**

Regarding the General Law on Audiovisual Communication (GLAC), the analysis of its parliamentary evolution has exposed the major deficiencies of the first draft sent by the Government to organisations of users and other agents for consideration and comments.

It should be noted that a central objective of the new law is to incorporate into the Spanish system the content of the European Audiovisual Media Services Directive (AVMSD), which as



we saw above inherited the spirit of the Television without Frontiers Directive (TVWFD) regarding the protection of minors.

However, the translation of the EU law in the draft bill for the GLAC, which was approved in first reading in the Council of Ministers on 26 June 2009, departed to such extent from the spirit of the EU regulations that it was even more liberal than Law 25/1994.

In fact, the second section of article 6 of the first draft allowed, in practice, the unencrypted broadcasting of any type of content, including pornography and gratuitous violence, at any time of the day, with the only restriction that these contents had to be accompanied by acoustic and visual warnings when they were aired before 10 pm. The draft also allowed X rated content to be aired in unencrypted forms during early morning hours [31].

The draft bill was circulated among consumers and users, through the Observatory of Television and Audiovisual Contents (OCTA), an entity of broad social basis formed by, among other groups, the union groups Madrid's Labour Commissions (CCOO), and Madrid's General Union of Workers (UGT), the Catholic Confederation of Parents of students (*Concapa*), the Red Cross, the Iberian Federation of Associations of TV-viewers and Radio-listeners (*Fiatyr-iCmedia*), Save the Children, and UNICEF. OCTA took a concrete position towards the aforementioned article 6.2.

This position was an exercise of equidistance between two extremes: the one marked by the text drafted by the Government, and the content of article 22 of the EC directives. In its paper, the OCTA highlighted that the wording of article 6 in the draft bill would allow the unencrypted broadcasting of any type of content, including those contents that could seriously impair children and adopted a "quid pro quo" position.

The OCTA manifested, in this sense, its willingness to lower the minimum standards established by the Directive, by accepting the inclusion of high-risk content for children in the programming guides, provided broadcasters guaranteed conditional access and parental control. In return, OCTA demanded the prohibition to broadcast these contents in unencrypted forms, at any time [32].

Some of the comments transmitted by the Communication Users Association (AUC) were supported by the Government and taken into account in the report approved by the Spanish Council of State on 17 September [33] and included in the next version of the draft bill, dated 29 September 2009, whose main modifications with respect to the previous draft were the elimination of the authorisation to broadcast X rated contents in open-to-air television and the

transference of programmes dedicated games of chance and betting to the early morning hours. The broadcasting of programmes suitable only for over 18s but not X-rated was still allowed at any time, provided these programmes were accompanied by visual and acoustic warnings [34].

Between July and October 2009 the Government heard the positions of other social organisations, including the Catholic Confederation of Parents of Students (Concapa) and the Iberian Federation of TV-viewers and Radio listeners, which operates under the iCmedia brand. All these organisations considered that the protection of minors in the draft bill was inadequate.

Finally, on October 23 2009 the Government sent to Congress its bill for the General Law on Audiovisual Communication, which integrated in full the aforementioned proposal made by AUC-OCTA [35]. Regarding the linear broadcasting of content arranged in programming guides, article 7.2 of the bill for the GLAC, in summary, stated the following:

- Prohibition of the unencrypted broadcasting of content that might seriously damage children, including pornography and gratuitous violence.
- These contents may be broadcast but only with controlled access and during restricted hours (between 10 p.m. and 6 a.m.)
- Other contents considered harmful to minors may be broadcast, but only between 10 p.m. and 6 a.m. and accompanied with sounds and visual.
- Programmes dedicated to gaming and betting can only be broadcast between 1 and 5 a.m.

If we compare the draft bill presented in June with the bill submitted by the Government to the Courts, and if we look at its evolution in the light of the EU law and the previous Spanish legislation, it seems that the government sought a scenario of discussion between minimums and maximums standards to locate a consensual proposal that was acceptable to all, including the operators established in the market.

In this case, the minimum standards expressed in the draft of June was set so low that next to it the EU legislation - which in turn is a legislation of minimum standards, we must not forget-seemed a scenario of maximums that allowed justifying an intermediate position.

Whether it is the result of a predefined strategy or not, the bill for the General Law on Audiovisual Communication submitted by the Government to the Congress does protect the rights of children from harmful content better than the initial draft bill did.

But the bill still does not comply with the minimum objectives required by the EU regulation, since it still allows the inclusion in programming guides of contents that can seriously damage minors, even if such content may only be broadcast between 10 p.m. and 6 a.m. and accompanied by conditional access and parental control systems to reduce their accessibility by minors [36].

In addition, following the provisions established by the European Audiovisual Media Services Directive (AVMSD), the bill for the GLAC, in the chapter on the rights of the public, establishes the general prohibition on the broadcasting of contents that incite hatred or discrimination, or infringe in any way upon human dignity [37].

Finally, to end the tour around the development of the GLAC, it is important to note that the advertising of programming, which as we saw was mentioned in the law 25/1994 and its amendment, the Law 22/1999, in the article corresponding to the protection of children from harmful content, was governed by the same rules governing programming.

The bill for the GLAC removed this reference from the article on audiovisual content but included it in article 13, pertaining to the rights of audiovisual service providers to produce commercial communications.

The relevant part of the reference contained in this article, which recognises the right of audiovisual service providers to broadcast programmes informing about their programming or ads of their own programmes, is that the content of these programmes and advertisements is subject to the obligations and prohibitions laid down with general character for commercial advertising and not, as it was until then, to the obligations and prohibitions laid down for audiovisual programmes.

This approach has remained unaltered in the finally adopted text [38], in apparent contradiction with the provisions of the European Audiovisual Media Services Directive, according to which the ads containing extracts of programmes should also be treated as programmes.

During its negotiation in the Senate, the *Union del Pueblo Navarro*, aka *UPN*, (Navarrese People's Union) and the *Entesa Catalana de Progrés* (Catalonian Progress Agreement) parliamentary group proposed two amendments so that the commercial communications of a pornographic nature could only be broadcast in on-demand audiovisual media services. However, these proposals were rejected.

### 3.4. Changes throughout the parliamentary process

During its passage through the Congress and the Senate, the regulation aimed at protecting minors was reinforced by some changes incorporated in various stages of the parliamentary proceedings. However, these changes, although important, have not affected the core of article 7.2 regarding contents that may seriously affect children, since this has remained unchanged until the final approval.

The Communication Users Association argued during the negotiation of the law that the authorisation to broadcast pornographic and gratuitously violent content, although in the form of conditional access, “represents a decline in the level of protection of children when compared to the provisions of the Directive, because it increases the possibility of minors accessing this type of inappropriate content that can affect them seriously or severely”. Therefore, the proposal of the Communication Users Association was to modify the third paragraph of article 7.2, so that such contents may only be accessible, as stated in the European Audiovisual Media Services Directive, through on-demand services (not linear).

The Communication Users Association argued that “on-demand television services, in which the user expressly requests a content or service and chooses the time of reception, is different from a linear conditional access offer, whose broadcasting time is predetermined, even if it is technically possible to block the reception of certain channels or programmes” [39].

With regards to the amendments adopted in Congress, of the 30 amendments proposed for article 7, only 3 were approved by the committee in charge of writing the report on the bill. The parliamentary group of the Popular Party did not submit any amendment to this article. The most active groups in relation to article 7 were the mixed group, and within it the BNG (Galician Nationalist Bloc) and UPD (Union, Progress and Democracy), and the group formed by the *Esquerra Republicana*, United Left and the Initiative for Catalonia [40].

The interesting thing about the parliamentary process is that the changes that were more far-reaching and involved greater guarantees in the protection of minors from harmful contents were added directly during the final review of the text in the plenary session of the Constitutional Commission [41]. The changes made were:

- Audiovisual communication services providers are obliged to maintain the acoustic and visual warnings about the nature of the programmes broadcast between 10 p.m. and 6 a.m. and are susceptible to harm minors, throughout their entire duration [42].

- The obligation to relegate to late night hours (10 p.m. and 6 a.m.) those programmes containing pornography or gratuitous violence was eliminated. These programmes may only be broadcast through systems that prevent the general reception.
- A powerful, far-reaching concept is introduced: hours of enhanced protection, during which the broadcasting of content qualified as suitable only for people over 13 years of age is not allowed [43].
- Audiovisual communication service providers are held liable for the frauds that may occur in programmes dedicated to gaming and betting, which are in any case relegated to early morning hours [44].
- The restrictions relating to programmes dedicated to games of chance and betting do not apply to the draws and lotteries conducted by public entities, such as *Apuestas y Loterías del Estado* (State Gambling and Lotteries) and ONCE (National Organization of Blind Spaniards).
- The advertising of slimming products and cosmetic surgery is added to the group of commercial content aimed at children and whose broadcast is prohibited in children's schedules [45].
- The advertising of toys is added to the group of restricted commercial content that affects minors [46].
- In addition, audiovisual communication services providers are encouraged to adopt a code of good practice in relation to commercial communication about foods and beverages that appears during children's programmes (7.4) [47].

It should also be noted, that of the 633 amendments presented in Congress only one, made by the BNG (Xesús Jorquera), demanded the adaptation of the Spanish law to the EU regulation regarding the prohibition to broadcast pornography and gratuitous violence, except in the form of on-demand television (amendment 35).

The text submitted by the Congress to the Senate [48] incorporated, thus, some significant changes that did not affect, however, the core of article 7.2 as it was drafted in the bill submitted by the Government to Congress in October 2009. During his time in the Senate, several additional amendments were admitted:

- A clause was added to the first paragraph, concerning the prohibition on the unencrypted broadcasting of contents that might seriously harm minors. This clause demands that the conditional access to the contents must offer the possibility of parental control.
- A new paragraph is introduced to indicate that the digital encoding must allow parental control. This encoding must be approved by the audiovisual authority.
- A new reference is added regarding the specific scheduling of programmes dedicated to esotericism and parasciences.
- The reference about *Apuestas y Loterías del Estado* and ONCE are removed and replaced by a generic reference to drawings with social cause.

The proposal of the parliamentary groups *Entesa Catalana de Progrés* and the UPN (Navarrese People's Union) (Mixed Group) strongly justified amendments in favour of the general prohibition on the broadcasting of contents that could seriously impair minors, including those that contain pornography or gratuitous violence, through television broadcasting systems. Again, as it happened in Congress, these amendments were rejected.

The Spanish Congress also rejected the amendments proposed by *Entesa Catalana de Progrés* and the UPN to ban commercial communications about sexual goods, services or contacts, either completely in broadcast TV (and only accessible through on-demand systems) or at least outside between 1 and 5 a.m.

Article 7.2 of the finally enacted law reads as follows:

General Law on Audiovisual Communication  
Article 7.2

“[This article] “prohibits the unencrypted broadcast of audiovisual content that might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence. Conditional access must enable parental control.

Other contents that may be harmful to the physical, mental or moral development of minors may only be broadcast between 10 p.m. and 6 a.m. and must always be preceded by an acoustic and visual warning, according to the criteria established by the audiovisual



authority. The visual sign should appear during the whole duration of the programme that includes such content.

Moreover, three time slots are considered of enhanced protection, taking as reference the mainland time: between 8 and 9 a.m. and between 5 and 8 p.m. in weekdays and between 9 a.m. and noon on Saturdays, Sundays and State holidays. Content classified as suitable only for people over 13 years of age shall be broadcast outside of these slots, and must keep the visual indication about their age suitability during their entire duration.

The time slot of enhanced protection for Saturdays and Sundays will also be applied in the following days: 1 and 6 January, Good Friday, 1 May, 12 October, 1 November and 6, 8 and 25 December.

All TV broadcasting services providers, including on-demand services providers, must use for the age classification of their contents a digital encoding that allows parental control. The coding system shall be approved by the Audiovisual Authority.

Programmes dedicated to games of chance and betting may only be broadcast between 1 and 5 a.m. Programmes dedicated to esotericism and parasciences may only be broadcast between 10 p.m. and 7 a.m. In any case, audiovisual communication service providers will have subsidiary liability on the frauds that could occur on these programmes. This time restriction does not apply to drawings with public causes.

In hours of enhanced protection for minors, audiovisual communication service providers not may include commercial ads promoting the worshipping of the body and the rejection of the self-image, such as ads about slimming products, surgical interventions and aesthetic treatments, which encourage social rejection on the grounds of physical condition, or encourage success based on of weight or aesthetic factors”.

### **3.5. Conclusions**

Does the General Law on Audiovisual Communication meet the expectations about the special protection of minors? The answer to this question would require the joint consideration of the whole law. However, regarding the aspects we have discussed, the GLAC does not constitute an audacious progress in comparison to the preceding law and given the expectations about the need to transpose the EU directive to the Spanish legislation.

The analysis of the previous laws and the EU legislation currently in force shows that the restrictions on the broadcasting of high-risk content for children required by the 1989 Television without Frontiers Directive and ratified by the European Audiovisual Media Services Directive in 2007 go beyond those established by the GLAC. The EU directives extend the ban to all television broadcasting services, regardless of whether the emission is unencrypted or its access is restricted by technical means, so that the broadcasting of high-risk content is limited online or on-demand services.

However, the analysis of the legislative proceedings of the GLAC highlights the positive evolution of the law from its first formulation, which was openly infringing EU legislation, until it adopted ideas that were closer to the approaches of the Catalan regulation of 2005, although without reaching the specificity dictated by Ofcom in the UK, which maintains the absolute prohibition on certain types of content that can seriously harm minors.

Finally, we should also give special consideration to the references, also in article 7, to the technological tools that encourage the parental control of content and allow making families and citizens responsible, once again, for the care and protection of minors. These references, which allow empowering citizens and giving them control over the contents and also support the promotion of media literacy that is included in the GLAC, should be concretised in standards of development, because without them the text could become a worthless scrap of paper [49].

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General Sub-Department of Audiovisual Media (2008): “Cuadro comparativo entre la Directiva de Televisión sin Fronteras, la nueva Directiva de Servicios de Comunicación Audiovisual y la vigente Ley 25/1994 de transposición de la primera. Parte II” (Comparative table between the Television without Frontiers Directive, the new European Audiovisual Media Services Directive and the existing 25/1994 Law, which incorporates the first law. Part II). In *Autocontrol*, nº 132, pp. 15-38.

Zallo, R. (2010): “La política de Comunicación Audiovisual del Gobierno Socialista (2004-2009): un giro neoliberal” (The audiovisual communication policy of the socialist Government (2004-2009): A neoliberal turn), in *Revista Latina de Comunicación Social* 65, La Laguna (Tenerife): University of La Laguna, pp. 14-29 retrieved on 8 May 2010, from:

[http://www.revistalatinacs.org/10/art/880\\_UPV/02\\_Zallo.html](http://www.revistalatinacs.org/10/art/880_UPV/02_Zallo.html)

DOI: 10.4185/RLCS-65-2010-880-014-029, p. 21)

## 5. Notes

[1] "[The bill] must be incorporated by the last week of December 2007 and the transposition to the Spanish legislation must be done by the end of this year. Among other things, it offers a revision of the basic regulations that must govern advertising on television, lays down certain obligations on audiovisual communication services relating to the protection of minors and disabled people, certain provisions promoting the European audiovisual industry, and guarantees on the right to information in situations of contracts of exclusivity. All this, which would not be possible otherwise, is included in this Bill, but we want to go beyond in some respects, for instance in ensuring the accessibility for people with disabilities or the protection of children, the mandatory conservation of European production in the different Spanish languages, and the support to the film industry". Intervention by María Teresa Fernández de la Vega, First Vice President of the Government of Spain, Minister of the Presidency and Government Spokesperson. Records of parliamentary proceedings. Congress of Deputies. N° 130, Plenary session of 3/12/2009, p.16.

[2] "In general, it has been verified that the regulation takes into consideration a special sensitivity because the nature of the broadcast contents, both programmes and commercial ads, can be potentially harmful for minors" (Ángel García Castillejo, Adviser of the Committee of the Telecommunications Market and former advisor to the State Department of Communication, and Alfonso María Morales Fernández, advisor to the State Department of Communication, "The regulation of television content and children in Spain [2004-2009]". Euro-Latin American Congress. Media Literacy and Digital Cultures. Seville, 13-14 May, 2010)

[3] Ramón Zallo, a Senior Lecturer at the University of the Basque Country, who has studied the evolution of the audiovisual policy of the Government headed by Rodríguez Zapatero, points out in regards to the draft bill for the General Law on Audiovisual Communication that "indeed, it is a liberal de-regulating bill full of uncontrollable processes of concentration between strong enterprises, but at the same time, does not fully guarantees citizens' right to a quality communication" (Zallo, Ramón (2010): "The audiovisual communication policy of the Socialist Government (2004-2009): A neoliberal turn", in Revista Latina de Comunicación Social, 65, pp. 14-29. La Laguna (Tenerife): University of La Laguna, retrieved on 8 May 2010 from: [http://www.revistalatinacs.org/10/art/880\\_UPV/02\\_Zallo.html](http://www.revistalatinacs.org/10/art/880_UPV/02_Zallo.html) DOI:10.4185/RLCS-65-2010-880-014-029, p. 21)

[4] As noted by Corredoira, the evolution followed by the current legislation in Spain before the General Law on Audiovisual Communication and in particular by the Private Television Law

and the regulation that occurred afterwards, highlights the tendency of the regulator to focus more on the technological and economic aspects, and to neglect other issues such as the protection of audiences (see Corredoira, “Veinte años de la Ley de Televisión Privada (1988/2008): cambios y perspectivas de futuro sobre el derecho audiovisual” (Twenty years of the Private Television Law (1988/2008): changes and future perspectives on audiovisual law), in *Textual & Visual Media* N. 2, 2009, p.144)

[5] Spanish Council of State. Report on the Draft bill for the General Law on Audiovisual Communication. File number: 1387/2009 (Presidency). Approval date: 17/09/2009

[6] Ministry of the Presidency. Draft bill for the General Law on Audiovisual Communication. Text dated 29/06/2009 and new text dated 28/09/2009

[7] BOCG (BOLETÍN OFICIAL DE LAS CORTES GENERALES - Official Gazette of the General Courts). Congress of Deputies. N° A-45-1 of 23/10/2009. Initiative

[8] BOCG. Senate n° II-41-a. of 28/01/2010. Text sent by the Congress

[9] BOCG. Congress of Deputies. N° A-45-6 of 17/12/2009. Amendments. BOCG. Congress of Deputies. N° A-45-8 of 05/01/2010. Committee’s Report. BOCG. Congress of Deputies. N° A-45-10. BOCG. Congress of Deputies. N° A-45-9 of 25/01/2010. Approved by the Commission with full legislative powers. BOCG. Congress of Deputies. N° A-45-11 of 28/01/2010

[10] BOCG. Congress of Deputies. N° A-45-12 of 17/03/2010. Amendments of the Senate

[11] BOCG. Senate. N° II-41-c of 19/02/2010. Amendments. BOCG. Senate. N° II-41-d of 09/03/2010. Committee’s Report. BOCG. Senate. N° II-41-c of 10/03/2010. Report of the Commission and individual opinions. BOCG. Senate. N° II-41-f of 16/03/2010. Text approved by the Senate.

[12] BOCG. Congress of Deputies. N° A-45-13 of 12/04/2010. Final approval.

[13] The 7/2010 Law, of 31 March, General Law on Audiovisual Communication. Official Gazette of the Spanish Government, 1 April 2010.

[14] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain legal, regulatory and administrative provisions of the Member States relating to the provision of audiovisual communication services (OJEU [Official Journal of the European Union] L 95 of 15/04/2010, p.1), codified version. This directive repeals article 1 of Directive 2007/65/EC of the European Parliament and of the Council of 11 December, which



amended Directive 89/552/EEC of the Council on the coordination of certain legal and regulatory provisions of the Member States relating to the exercise of television broadcasting activities (OJEU L 332, 18/12/2007, p.27).

[15] The 25/1994 Law, of 12 July 1994, which incorporates into the Spanish legal system the Directive 89/552/EEC on the coordination of legal, regulatory and administrative provisions of the Member States relating to the exercise of television broadcasting activities.

[16] The Law 22/1999, of June 7 1999, which amended Law 25/1994 of 12 July 1994, which incorporated into the Spanish legal system the Directive 89/552/EEC on the coordination of legal, regulatory and administrative provisions of the Member States, relating to the exercise of television broadcasting activities.

[17] In her defence of the bill, the First Vice President of the Government of Spain highlighted the “efforts of dialogue and consensus” which led to the writing of the bill, indicating that “in the posterior hearing proceedings the drafting of the bill has been improved by the debate within the Council of Ministers and the contributions made by numerous actors, especially by the contributions of the institutions and bodies involved in the mandatory hearing processes, like the Spanish Council of State and the National Commission of Telecommunications Market, the National Competition Commission, and the Communications Users Association”. Records of parliamentary proceedings. Congress of Deputies. Nº 130, Plenary session of 3/12/2009, p.15. Ramón Zallo notes that “the worrying fragility of the Government against UTECA” (p.16) and the “remarkable lack of transparency and participation of social actors in the drafting of the law, with the exception of the television employers association: UTECA” (op.cit., p. 22)

[18] Members of the committee: Pedro María Azpiazu Uriarte (Group formed by Basque/EAJ-PNV); Meritxell Batet Lamaña (Socialist Group); Ferrán Bono Ara (Socialist Group); Miguel Angel Cortes Martin (Popular group); Josep Antoni Duran i Lleida (Group Catalan-CiU); Ana María Oramas González-Moro (Mixed Group); Joan Ridao I Martin (Group formed by Republican *Esquerra*, United left, and the Initiative for Catalonia); Francisco José Villar García-Moreno (Popular Group).

[19] Source: *Observaciones de la Asociación de Usuarios de la Comunicación ante el Proyecto de Ley General de la Comunicación Audiovisual. Documento de Posición* (Observations of the Communications Users Association about the General Law on Audiovisual Communication bill. Position Paper).December 2009 [<http://www.auc.es>]



[20] Directive 89/552/EEC of the Council, of 3 October 1989 on the coordination of certain legal, regulatory and administrative provisions of the Member States, relating to the exercise of television broadcasting activities. OJEU L 298, of 17/10/1989, p. 23-30

[21] Art. 12. “The Member States shall adopt the appropriate measures to ensure that the audiovisual communication on-request services that are offered by the communication service providers under their jurisdiction and might seriously damage the physical, mental or moral development of minors are made available only in a way that ensures that, normally, minors will not see or hear these audiovisual communication on-request services”

[22] Ibid.

[23] Commission of the European communities, *Report on the implementation of the Directive 89/552/EEC in accordance with article 26 and Proposal for a Directive of the European Parliament and of the Council*. Brussels, 31/05/1995 COM(95) 86 final, p.13

[24] Idem, p.50

[25] *The Ofcom Broadcasting Code, September 2010, Section 1, “Protecting the under eighteens”*

[[www.stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code](http://www.stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code)].

[26] The 22/2005 Law, of 29 December 2005, for audiovisual communication in Catalonia. Official Gazette N° 38, of 14 February, 2006.

[27] See Agreement 296/2007, of 19 December, which approves the general instruction of the Catalan Audiovisual Council for the protection of children and adolescents, orienting signs and television users’ right to information. *Diario Oficial de la Generalitat de Catalunya*. N° 5037, of 28 December 2007

[28] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, art.15 (modifié para la loi n1 2000-719 du 1er août 2000, par la loi n° 2004-669 du 9 juillet 2004 et par la loi n° 2009-248 du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision.

[29] A summary of these changes can be found in the working paper created by the General Sub-Department of Audiovisual Media entitled “Cuadro comparativo entre la Directiva de Televisión sin Fronteras, la nueva Directiva de Servicios de Comunicación Audiovisual y la vigente Ley 25/1994 de transposición de la primera. Parte II” (Comparative table between the

Television without Frontiers Directive, the new Audiovisual Media Services Directive and the existing 25/1994 Law, which incorporates the first law. Part II), and published in the journal *Autocontrol*, N° 132, pp. 15-38.

[30] Article 17 of Law 22/1999 read as follows: “1. the television broadcasts will not include programmes or scenes or messages of any kind that might seriously damage the physical, mental or moral development of minors, or programmes that promote hatred, contempt or discrimination on the grounds of birth, race, sex, religion, nationality, opinion or any other personal or social circumstances. 2. The broadcast of programmes likely to damage the physical, mental or moral development of minors will only be possible between 10:00 PM and 06:00 AM of the following day, and should include warnings about their content through visual and audible signs. When such programmes are broadcast unencrypted, they shall be identified with a visual symbol throughout their entire duration. The provision shall also be applied to advertising, teleshopping and the programming promotion”.

[31] Ministry of the Presidency. General Law on Audiovisual Communication bill, of 29 June 2009, article 6.2. “The broadcast of harmful audiovisual content for children is prohibited between 6 and 10 p.m. In any case, harmful content is understood as are gratuitous violence, pornography and programmes dedicated to gaming and betting. Outside of this time slot, in television broadcasting the abovementioned contents must be always preceded by an audible and visual warning, according to the criteria established by the audiovisual authority. X-rated audiovisual content can be only broadcast between 1 and 5 AM or with conditional access and parental control”.

[32] The text is extracted from the document entitled “the regulation of the protection of minors in the draft bill for the General Law on Audiovisual Communication”, generated by the Communication Users Association and circulated among the associations that are part of the *OCTA* (Observatory of Televisual and Audiovisual Content) for the adoption of a common position. The document is not dated but presumably was generated and circulated in July 2009. In this document, the signatories manifested they are “willing to accept that the content that may ‘seriously’ or ‘severely’ damage children may be broadcast by television broadcasting service providers as long as they guarantee conditional access and the possibility of parental control. Even in the case of linear service (inserted in a programme guide) and not of a nonlinear or on-request offer, which is what the directive really demands. But we consider it is essential to ban the broadcast of such contents (all, not only the X-rated) in open-to-air TV at any timeslot”.

[33] Spanish Council of State. Report 1387/2009.

[34] Ministry of the Presidency. Draft bill for the General Law on Audiovisual Communication. Text circulated on 28 September 2009, article 6.2.

[35] Article 7 pertaining to the “Rights of the minor” is contained in the Title III, dedicated to the Rights of the Public. As Carlos Millán Raynaud, Director of the Legal Services of RTVA (Radio and Television of Andalusia), points out in a general analysis of the draft submitted by the Government to the Congress of Deputies, the first paragraph of this article contains issues that are already covered by the current legislation on the protection of minors and in particular those issues relating to the prohibition on the media to use the children’s voice and image without their consent or the consent of their legal representative, and any information that can identify children in the context of criminal offences or broadcasts questioning their tutelage or affiliation (see “Draft bill for the General Law on Audiovisual Communication: the regulation of content and the legal framework of public service, an urgent outline”, in *Diario La Ley* n° 7353, *Tribuna* section, 2 March 2010).

[36] Draft bill for the General Law on Audiovisual Communication (BOCG of 23/10/2009), article 7.2.

[37] Article 4.2. “Audiovisual communication may never incite hatred or discrimination on the grounds of gender or any personal or social circumstance and must be respectful towards human dignity and the constitutional values, with special attention to the eradication of situations promoting the inequality towards women”.

[38] Article 13.2. “Audiovisual communication service providers have the right to broadcast programmes to inform about their programming or ads about their own programmes and accessories/products directly derived from those programmes. These programmes and advertisements are not considered commercial communication for the purposes of this Law. However, in television broadcasting, the time devoted to advertising about their own programmes and products may not exceed 5 minutes per hour and their contents will be subject to the general obligations and prohibitions established for commercial advertising”.

[39] Position Paper, December 2009, p.17

[40] BOCG. Congress of Deputies. N° A-45-8 of 05/01/2010. Committee’s Report.

[41] BOCG. Congress of Deputies. N° A-45-9 of 25/01/2010. Approved by the Commission with full legislative power.

[42] Amendment n° 102 submitted by UPD (Mixed group)

[43] Amendments n° 102, presented by UPD, and 424 by Republican Esquerra -United Left - Initiative for Catalonia.

[44] Amendment n° 314, presented by CiU

[45] Amendment n° 107, presented by UPD

[46] Amendment n° 106, presented by UPD and n° 431 by Republican Esquerra -United Left - Initiative for Catalonia

[47] Amendment n°. 432 of Republican Esquerra -United Left - Initiative for Catalonia

[48] BOCG. Senate. Series II. N° 41(a), 28 January 2010. Draft bill 621/000041 for the General Law on Audiovisual Communication.

[49] See Fuente Cobo, “La protección de la infancia en la nueva ley audiovisual: hacia un modelo de responsabilidad distribuida” (Protection of children in the new audiovisual law: towards a model of distributed responsibility), in UTECA, *La televisión en España. Informe 2010* (Television in Spain. 2010 Report). Madrid, CIEC, 2010, pp. 279-295

## 6. Annex






### SUMMARY OF THE EVOLUTION OF REGULATIONS ON THE TV BROADCASTING OF CONTENTS SUBJECT TO RESTRICTIONS

EU DIRECTIVES TVWFD/AVMSD	LAW 25/1994	LAW 22/1999	DRAFT BILL FOR GLAC July 2009	DRAFT BILL FOR GLAC September 2009	BILL FOR THE GLAC October 2009	AMENDMENTS BY CONGRESS	AMENDMENTS BY SENATE
<ul style="list-style-type: none"> <li>• Prohibits the broadcasting of contents that infringe upon human dignity (hate, contempt, discrimination)</li> <li>• Contents that might seriously damage minors</li> </ul>	<ul style="list-style-type: none"> <li>• Prohibited the broadcasting of contents that infringe upon human dignity</li> <li>• Prohibited the broadcasting of contents that might seriously harm minors, but</li> </ul>	<ul style="list-style-type: none"> <li>• Deleted the explicit reference to pornography and gratuitous violence as contents suitable for open-to-air broadcasting (extreme ambiguity)</li> </ul>	<ul style="list-style-type: none"> <li>• Deleted the reference to contents that might seriously harm minors</li> <li>• Allowed the broadcasting of pornography, gratuitous violence, and games of</li> </ul>	<ul style="list-style-type: none"> <li>• Maintained the deletion of the reference to contents that might seriously harm minors (therefore, any content can be broadcast on television, with only the limits</li> </ul>	<ul style="list-style-type: none"> <li>• Reintegrates the reference prohibiting the unencrypted broadcast of contents that might seriously harm children, includes those containing pornography or gratuitous</li> </ul>	<ul style="list-style-type: none"> <li>• Acoustic and visual warnings in programmes broadcast between 10 pm and 6 am must be kept for the entire programme.</li> <li>• Programmes with pornography</li> </ul>	<ul style="list-style-type: none"> <li>• Maintains and strengthens the prohibition on the unencrypted broadcasting of content that might seriously harm minors and in particular programmes</li> </ul>

<p>– Prohibition on their TV broadcasting</p> <p>– Each State identifies the type of content</p> <p>– In any case include pornography and gratuitous violence</p> <ul style="list-style-type: none"> <li>• Pornography and gratuitous violence: can seriously harm minors; prohibition on their TV broadcasting even with conditional access</li> <li>• Other contents that may harm minors: broadcasting allowed unencrypted by in restricted schedules and accompanied by acoustic and visual warnings.</li> </ul>	<p>they are not specified.</p> <ul style="list-style-type: none"> <li>• broadcasting of content with pornography or gratuitous violence is allowed in unencrypted forms between 10 pm and 6 am and accompanied by visual and acoustic warnings</li> <li>• Other programmes not suitable for minors (programmes for over 18s) must be scheduled between 10 pm and 6 am and accompanied by visual and acoustic warnings</li> </ul>	<p>extreme since the articles did not include these contents among those considered high risk for minors and unsuitable for broadcasting )</p> <ul style="list-style-type: none"> <li>• Programmes qualified as suitable for over 18s can be scheduled at any time if they go accompanied by conditional access systems</li> </ul>	<p>chance and bets in unencrypted forms at any time.</p> <ul style="list-style-type: none"> <li>• If these contents are scheduled between 6 am and 10 pm they must be preceded by an acoustic and visual warning</li> <li>• Allowed the broadcast of X rated contents in unencrypted form between 1 and 5 am, and at any time with conditional access.</li> </ul>	<p>set by the general legal system)</p> <ul style="list-style-type: none"> <li>• Allowed the broadcasting of harmful content for children between 10 pm and 6 am</li> <li>• Allowed the broadcasting of harmful content for children between 6 am and 10 pm accompanied by visual and acoustic warning</li> <li>• Allowed x rated content at any time, with conditional access and parental control</li> <li>• Allowed games of chance and gaming in unencrypted form between 1 and 5 am.</li> </ul>	<p>violence.</p> <ul style="list-style-type: none"> <li>• However, contents with pornography or gratuitous violence can be broadcast between 10 pm and 6 am with conditional access and control parental.</li> <li>• Other content harmful to minors can be broadcast between 10 pm and 6 am and if accompanied by visual and acoustic warnings</li> <li>• Maintains the reference to programmes dedicated to gaming and gambling.</li> </ul>	<p>or gratuitous violence may be scheduled anytime but with conditional access.</p> <ul style="list-style-type: none"> <li>• Introduces the hours of enhanced protection for children. No programmes for over 13s may be broadcast during this time.</li> </ul>	<p>containing pornography or gratuitous violence.</p> <ul style="list-style-type: none"> <li>• Conditional access systems must enable parental control to ensure that the access to content that may seriously harm minors can be blocked</li> <li>• Maintains the regime of the previous text regarding the broadcasting of content unsuitable for minors</li> <li>• Adds an additional limitation on content about esotericism and parasciences: it may only be broadcast between 10 pm and 7 am</li> </ul>
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