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EUROPEAN CONVENTION ON TRANSFRONTIER TELEVISION

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STANDING COMMITTEE ON TRANSFRONTIER TELEVISION

(T-TT)

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Guidelines for the implementation of Article 9a

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Introduction

This document contains the guidelines for the implementation of Article 9a of the Convention, and in the appendix, a table with the information that Parties should submit when notifying measures under Article 9a of the Convention.

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Article 9a, paragraph 1

“Each Party retains the right to take measures to ensure that a broadcaster within its jurisdiction does not broadcast on an exclusive basis events which are regarded by that Party as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Party of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Party concerned may have recourse to the drafting of a list of designated events which it considers to be of major importance for society”.

1. In accordance with Article 9a, paragraph 1 of the amended Convention, Parties retain the right to draw up a list of events of major importance for society to be respected by broadcasters under their jurisdiction. Should they wish to extend the measures taken under Article 9a to broadcasters under the jurisdiction of other Parties, they must notify such a list to the Standing Committee -under Article 9a, paragraph 2(e)- with a view to obtaining mutual recognition and respect of the list by broadcasters in these other Parties.

Article 9a, paragraph 2

“Parties shall ensure by appropriate means, respecting the legal guarantees granted by the Convention for the Protection of Human Rights and Fundamental Freedoms as well as, where appropriate, the national constitution, that a broadcaster within their jurisdiction does not exercise the exclusive rights purchased by that broadcaster following the date of entry into force of the Protocol amending the European Convention on Transfrontier Television in such a way that a substantial proportion of the public in another Party is deprived of the possibility of following events which are designated by that other Party via whole or partial live coverage or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Party under paragraph 1, respecting the following requirements: (...)”

2. Paragraph 2 contains the mutual recognition principle and stipulates that Parties will have to take measures to ensure that broadcasters under their jurisdiction respect the list of events which has been drawn up by another Party and which has been positively assessed by the Standing Committee. Measures which could be envisaged in this respect could be positive obligations for broadcasters to offer qualifying broadcasters in other Parties the possibility of broadcasting listed events, or sanctions for not doing so and therefore infringing the mutual recognition provision of paragraph 2 of Article 9a.

3. Therefore, for example, if a broadcaster in Party A has acquired exclusive rights to an event considered as being of major importance in Party B, and its programme service is not available as “free television” (see below) in country B in its own language(s), such a broadcaster will have to make all reasonable efforts so that the event is made available on the programme service of a free/ universally available qualifying broadcaster in this country, for example by offering the latter the possibility of purchasing the rights on fair and reasonable terms.

4. Irrespective of the modality by which rights are ceded (sub-licensing agreement, access to the signal, etc) offers for the transfer of rights should be fair and reasonable. Assessing whether the offer made by the exclusive right holding broadcaster to qualifying broadcasters was reasonable will be one of the main tasks of national authorities responsible for administering the mutual recognition system in case of disputes. It is therefore considered

important that all broadcasters involved document well their negotiations, so as to prove, if necessary, whether or not the rights were offered/ negotiated in a fair and reasonable manner.

5. Parties should foresee proportionate sanctions for broadcasters which refuse to transfer or cede rights or that do so on unfair or unreasonable terms. No infringement of the system has occurred, however, when the broadcaster from country A can demonstrate that no qualifying broadcaster in country B was willing to take up the offer to transmit an event on fair and reasonable terms, such as price, time of transmission, etc.

6. Concerning which national authority or body should be responsible for administering the implementation of the mutual recognition system, the Standing Committee has agreed that this should be determined by each Party. The tasks of that authority will be to:

- co-operate with broadcasters and make available to them information concerning the lists of major events positively assessed by the Standing Committee;
- co-operate with other national authorities in the Parties to facilitate the implementation of Article 9a;
- impose sanctions in case of non-compliance.

7. The national authority in the “transmitting Party” administering the implementation of the mutual recognition system is bound only by the following provisions of the “receiving Party”:

- the list of major events,
- the definition of broadcasters qualifying as free/near-universally available,
- the rules concerning live or deferred, full or partial coverage.

The national authority of the “transmitting Party” should consider but is not bound by the decision of the relevant authority(ies) in the “receiving Party” as regards the negotiations, in particular whether the price offered was fair and reasonable. The national authority of the “transmitting Party” is entitled to take its own decision in this matter. Furthermore, the settlement of disputes between broadcasters remains a competence of an authority/body in the Party where the exclusive right holding broadcaster is established.

8. For the implementation of the mutual recognition system, it is essential to know which broadcasters meet the double condition of being near universally available and free-to-air in each Party (qualifying broadcasters). The competent authority in each Party should draw up a list of qualifying broadcasters. The Standing Committee has agreed that the decision of which criteria should be used for the designation of such qualifying broadcasters should be left to each individual State. Nevertheless, criteria based on population/viewers/households or similar notions are in general considered the most appropriate for defining near universal coverage.

9. The notion of "free television" should be understood as the broadcasting of programme services which have near-universal coverage (as defined by the law of each Party) and are accessible to the public in their own language(s) without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Party (such as licence fee and/or the basic tier subscription fee to a cable system). Thus, broadcasting services may qualify as "free television" services irrespective of their distribution mode(s), the distinctive element being that

they have near-universal coverage and that there is no need for the public to make special additional payment (beyond the licence fee and/or subscription to basic tier cable services) in order to be able to have access to the relevant broadcasts.

(a) “the Party implementing the measures referred to in paragraph 1 shall draw up a list of national or non-national events which are considered by that Party as being of major importance for society”;

10. Events to which national measures apply must genuinely be of major importance for society in all or part of the relevant Party, which means that they should be outstanding events which are of interest to the general public or an important part of the population of a given Party to the Convention. Such events are, for example, the Olympic Games, the football World Cup and the European Football Championship. In general terms, on the basis of a case-by-case evaluation made in the light of the documentation provided by Parties, events may qualify as being of major importance for society if at least two of the following conditions are met:

- the event and its outcome has a special general resonance in the relevant Party, not simply a significance to those who ordinarily follow the sport or activity concerned;
- the event has a generally recognised, distinct cultural importance for the population in the Party concerned and in particular contains elements of its cultural identity;
- it involves the national team or a national representative in the sport concerned in a major international tournament;
- the event has traditionally been broadcast on free television and has commanded large television audiences in the Party concerned.

11. The Convention allows the Parties to include in their lists events taking place outside of their national territory. Since this will usually imply that rights holders established in other Parties or in third countries are affected by such measures, the Standing Committee, in the case of a dispute, will consider with special attention the inclusion of such events in national lists.

12. In any case, events must be specifically and clearly designated either individually or by reference to defined objective criteria. Interested parties (i.e., rights holders, rights brokers, broadcasters and broadcasting authorities) would find it impossible to carry out their activity if confronted with a lack of legal certainty as to the regime applicable to any given event.

13. The Standing Committee has decided against the possibility of including “ad hoc” events in the lists drawn up by Parties, in view of the uncertainty this would create for broadcasters and event organisers, who need to know well in advance if an event will be protected or not. For the same reasons, if a Party makes changes to a list of events which has previously been submitted to and positively assessed by the Standing Committee, a new notification of the revised list will have to be made by that Party.

(b) “the Party shall do so in a clear and transparent manner in due and effective time”;

14. In drafting or revising a list of major events, Parties should respect the criteria of transparency and proportionality. The procedure leading to the adoption of national measures and the choice of the listed events must be transparent. This implies, in particular, that the

criteria used to designate the listed events must be explicit and public, and that appropriate consultation with interested parties – such as the event organisers, broadcasters or members of the public - has taken place.

15. The moment in time from which measures apply to a given event should take due account of the practical implications for the operators, in particular the need for event organisers and broadcasters to be able to plan in advance their marketing and programming strategies (hence the reference to “due and effective time”). The obligation to act in due and effective time applies to all those involved, including the authorities mentioned in paragraph 6.

(c) “the Party shall determine whether these events shall be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage”;

16. When adopting its national measures, each Party shall determine how a listed event shall be retransmitted. Live coverage is naturally preferred by audiences, but may sometimes not be possible due to:

- the long duration of the event,
- the time at which an event takes place,
- the time difference between the State in which the event takes place and the State in which the event is designated.

The above circumstances would seem to be an objective reason for deciding on deferred or partial live coverage of the event.

(d) “the measures taken by the Party drawing up the list shall be proportionate and as detailed as necessary to enable other Parties to take measures referred to in this paragraph”;

17. The rationale behind this indent can be found in the need to ensure a smooth functioning of the mutual recognition system. Since the measures taken unilaterally by a Party in accordance with paragraphs 1 and 2 limits not only the exercise of exclusive rights by broadcasters in that Party, but also by broadcasters established in other Parties, a special need for transparency and legal certainty arises. Broadcasters established in other Parties and operating transfrontier services must be able to know (before entering into agreements for the purchase of broadcasting rights) to what restrictions and in respect of which events they will be subject to in another Party.

(e) “the Party drawing up the list shall notify the list and the corresponding measures to the Standing Committee, the time limit for which shall be fixed by the Standing Committee”;

18. The Standing Committee shall be informed by the Parties of the lists of designated events (and corresponding measures) which are drawn up by them pursuant to paragraph 1. Such information shall include all necessary elements in order to enable the Standing Committee to carry out an assessment of the compatibility of national measures with the spirit and the wording of paragraph 2 of Article 9a. The Standing Committee may request additional information needed to make its assessment.

(f) “the measures taken by the Party drawing up the list shall be within the limitations of the guidelines of the Standing Committee referred to in paragraph 3 and the Standing Committee must have given a positive opinion on the measures”.

19. The basic criteria which a Party should respect when drawing up a list of major events are those contained in paragraph 2 of Article 9a (and the corresponding sections in the Explanatory Report). The present reference document builds on these criteria on the basis of the discussions which have taken place in the Standing Committee, and can therefore be considered as the guidelines for the implementation of Article 9a.

20. In order to benefit from mutual recognition, measures notified by Parties must obtain a positive opinion from the Standing Committee. To this effect, the following procedure will apply:

- parties shall communicate the lists of events and corresponding measures to the Secretariat of the Standing Committee; the latter shall notify this information to all Parties;
- the Secretariat of the Standing Committee shall carry out an initial study of the notified lists and measures from the point of view of their compliance with Article 9a, paying particular attention to the transparency, proportionality and legal certainty of the measures as presented by the Party, and whether they pursue a genuine public interest objective;
- on the basis of the preliminary study carried out by its Secretariat, the Standing Committee shall conduct its own assessment and decide if all, or part, of the notified list/measures are acceptable under the Convention.

“Measures based on this paragraph shall apply only to those events published by the Standing Committee in the annual list referred to in paragraph 3 and to those exclusive rights purchased after the entry into force of this amending Protocol”.

21. Only listed events and corresponding measures which have been notified by the Secretariat General of the Council of Europe to the contracting Parties to the Convention and published on the web site of the Media Division of the Council of Europe, and in respect of which exclusive rights have been acquired after the entry into force of the Protocol, are relevant for the implementation of the mutual recognition system.

Article 9a, paragraph 3

“Once a year the Standing Committee shall:

(a) publish a consolidated list of the enlisted events and corresponding measures notified by Parties in accordance with paragraph 2 (e);

22. After the list of major events and corresponding measures notified by a Party has obtained a positive opinion from the Standing Committee, the list and other provisions specified in paragraph 7 of the guidelines will be published by the latter on the web site of the Media Division of the Council of Europe. In addition, a consolidated list of all the enlisted events and corresponding measures will be published once a year on the same web site. The

list of events and corresponding measures will only acquire legal value vis-à-vis other Parties from the date of their notification by the Secretariat General of the Council of Europe to the contracting Parties. The representatives of the Parties on the Standing Committee will inform the competent authorities in their respective countries about the list/measures once the latter have been approved and published.

(b) draw up guidelines to be adopted by a majority of three quarters of the members in addition to the requirements listed up in paragraph 2 (a) to (e) in order to avoid differences between the implementation of this Article and that of corresponding European Community provisions”.

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**APPENDIX TO THE GUIDELINES FOR THE IMPLEMENTATION
OF ARTICLE 9a OF THE CONVENTION**

Basic principles for implementing Article 9a	Information to be supplied to the Standing Committee
Legal basis of the listed events regime	Indicate the law(s)/regulation(s) which transpose the listed events regime into national law, and specify how the principle of mutual recognition is implemented
Consultation procedure	Describe the consultation process and indicate who/which organisations and rights holders were consulted and how, and what assessment procedures of the consultation results were applied, prior to establishing list of major events
For each event on the list	Indicate which of the criteria in paragraph 10 of the guidelines are met by the event. Where appropriate, provide information to show that it has traditionally attracted large audiences and provide concrete viewer ratings/audience figures for the last time the event was broadcast. Indicate if the event has traditionally been shown on free TV (and for how many years). Any additional elements which show the relevance of the event for society should be presented. Explain why live or deferred coverage of the event is preferred.
Qualifying broadcasters	List which broadcasters (national or foreign) are near universally available and free-to-air, and reach a “substantial proportion of the population” (justify the % chosen as a criterion for qualifying broadcasters)
Authority responsible for the listed events regime	Indicate which body is responsible for administering the listed events regime. What sanctions can it impose if a broadcaster does not comply with the system and refuses to share the rights on reasonable terms with a broadcaster in another country for an event listed by that Party and accepted by the Standing Committee. Indicate what arbitration procedures are available in case of disputes.