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EUROPEAN CONVENTION ON TRANSFRONTIER TELEVISION

**DRAFTING GROUP
ON THE REVISION OF THE EUROPEAN CONVENTION
ON TRANSFRONTIER TELEVISION**

(T-TT-GDR)

**6th meeting
11 and 12 September 2008
Istanbul (Turkey)**

**Secretariat note
on the amendments to the European Convention on Transfrontier Television
as proposed by
the Drafting Group of the Standing Committee on Transfrontier Television**

I. Background to the revision of the European Convention on Transfrontier Television

1. The possible need to update the Convention was discussed in the Standing Committee as from its 27th meeting in 2001, i.e. prior to the entry into force of the first amending protocol. It was recalled that given the changes taking place in the broadcasting sector, the Standing Committee was compelled to discuss the future of broadcasting regulation in the fields covered by the Convention. In effect, it was generally felt that as a result of the technological, market and legal developments taking place in the broadcasting sector, the Standing Committee would have to adopt a forward-looking approach and discuss how the changes in the broadcasting environment would/could affect the Convention. At the same occasion, the Observer Delegate of the European Commission reported on the steps taken in view of the re-examination of the “Television without Frontiers” Directive in 2002.

2. In the light of the above, the Standing Committee decided to organise an expert seminar to have a focused discussion on how to bring the Convention into line with the reality of broadcasting. This expert seminar on “Economic, Technical and other Developments in the Television Sector and their impact on the European Convention on Transfrontier Television” took place on 6 December 2001 and gathered over 100 persons from broadcasting organisations, governments, regulatory bodies and the advertising industry. The ideas presented by the rapporteurs/participants during the seminar have been taken forward by the Standing Committee in its further discussion on the review of the Convention¹

3. The Standing Committee decided to commission a new paper on the review of the Convention to Dr Andreas Grünwald, as a follow-up to his presentation at the December 2001 seminar. This “Report on possible options for the review of the European Convention on Transfrontier Television” was presented to the Committee in 2003². During its 34th meeting in July 2003 the Standing Committee agreed on a work plan for the review of the Convention, and underlined that the Standing Committee should continue to take account of the work carried out within the European Union concerning the review of the “Television without frontiers” Directive.

4. In the basis of this workplan and until its 41st meeting in October 2006 the Standing Committee considered the provisions of the Convention on the basis of discussion papers prepared by its delegates on the following questions:

- the scope of the Convention, jurisdiction, freedom of reception and retransmission, the duties of the Parties of the Convention, advertising directed at a single Party and the abuse of rights granted by the Convention;
- advertising, sponsorship and tele-shopping;
- the right to information and cultural objectives: access to major events, short reports, cultural objectives, media pluralism, right of reply ;
- the protection of minors and respect for human dignity;

¹ The full reports of the key-note speakers to this seminar can be found on the web site of the Standing Committee <http://www.coe.int/media>.

² Dr Grünwald’s report is available on the website of the Standing Committee.

- the role of the Standing Committee, the settlement of disputes and mutual assistance.
5. The discussion papers led to preliminary drafting proposals for articles 1 to 28 elaborated by 4 delegates of the Standing Committee which were discussed during its 41st meeting.
6. In addressing these questions the Standing Committee followed closely the developments at European Union level. The Standing Committee also considered the creation of new provisions to address Council of Europe's areas of concern regarding the protection of human rights, democracy and pluralism. It considered European Commission proposals on broadening the scope of the Convention to cover three subjects – the role of public service broadcasting in a democratic society, media pluralism as well as "TV" and the role of independent regulatory bodies. A proposal by the Permanent Conference of the Mediterranean Audiovisual Operators (COPEAM), to amend the existing articles 2 and 10 to the effect that reference be made to "Euro-Mediterranean audiovisual works" was equally discussed.
7. In view of the importance of progressing as efficiently as possible with the revision of the Convention, the Standing Committee decided to set up a drafting group made up of delegates from Austria, France, Germany, Poland, Switzerland, Turkey and the United Kingdom. Close cooperation between the European Union and the Council of Europe in revising the Television without Frontiers (TVWF) Directive and the European Convention on Transfrontier Television was ensured by the participation of an observer delegate of the European Commission in the drafting Group and the participation of the Secretary to the Standing Committee to the meetings of the TVWF Contact Committee discussing the contents and transposition of the Audiovisual media services (AVMS) Directive which was finally adopted on 17 December 2007.
8. The drafting group met twice, on 29 and 30 March 2007 and on 21 and 22 June 2007 before it submitted its first draft amendments to the Convention to the Standing Committee which were considered during its 42nd meeting, in October 2007. The Standing Committee provided further guidance to the drafting Group and invited delegates, including observer delegates, to send additional comments, including proposals on outstanding issues which could be covered by the Convention for consideration by the drafting Group. The drafting Group held four more meetings, one in 2007 (26 and 27 November 2007) and three in 2008 (on 27 and 28 March, on 19 and 20 June and on 11 and 12 September).
9. The drafting Group will submit its revised draft amendments to the European Convention on transfrontier television, as well as a revised explanatory report to the Standing Committee at its 43rd meeting on 12 to 14 November 2008. The Standing Committee agreed to start a preliminary consultation procedure prior to this meeting, so as to take into account comments received by international stakeholders. For this purpose, stakeholders have been notified that the draft revised Convention is to be found on the website www.coe.int/media and that they are invited to send in their comments by 31 October 2008. Delegations of the CDMC have also been informed. It is expected that the Standing Committee will have a follow-up meeting in the first quarter of 2009 and, provided this is approved by the Standing Committee, with an invitation to (major) stakeholders to attend the meeting.

II. Main new features of the European Convention on transfrontier audiovisual media services

10. Following adoption of the second amending Protocol to the European Convention on transfrontier television, the Convention will have a new title “European Convention on transfrontier audiovisual media services” to reflect the widening of its scope to transfrontier aspects of on-demand audiovisual media services.

11. Terms employed have been aligned, to the extent possible, with the definitions of the AVMS Directive to ensure greater compatibility between both instruments.

12. The role of co-and self-regulation in the fields covered by the Convention has been recognised and is encouraged (Article 5.1bis).

13. Jurisdiction criteria have been aligned with the AVMS Directive to avoid as much as possible cases of double jurisdiction (Article 5.4).

14. Transparency and information requirements to parties and audiovisual media service providers have been aligned with the AVMS Directive to ensure harmonisation of legal requirements in this field (Article 6).

15. Responsibilities of audiovisual media service providers for the content and presentation of audiovisual media services continue to be based on the dignity of the human being and the fundamental rights of others. This is reflected in the prohibition of these services to contain any incitement to hatred based on race, sex, religion or nationality as well as to give undue prominence to violence. The reference to indecency has been abolished because of its lack of clarity.

16. Instead, more emphasis has been put on the responsibility of audiovisual media service providers to ensure the adequate protection of minors against programmes which might seriously impair their physical, mental or moral development, in particular those that involve pornography or gratuitous violence. A distinction has hereby been made between television broadcasts, who should not contain any such programmes and on-demand services where these programmes should only be available in a way that minors will not normally see or hear them (Article 7).

17. Access of persons with a visual or hearing disability to audiovisual media services is promoted by the introduction of a new provision to the Convention Article 7bis.

18. The Right of reply contained in Article 8 remains limited to television broadcast. For on-demand services reference is made in the ER to Recommendation Rec(2004)16 of the Committee of Ministers on the right of reply in the new media environment.

19. Access of the public to information (Article 9) has been reinforced by the introduction of a duty for Parties to ensure a right for broadcasters to have access to short extracts on events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.

20. Article 9a concerning access of the public to events of major importance has been amended to improve the previous provisions on the mechanism for mutual recognition of lists

of events of major importance and corresponding measures foreseen in Article 9a, paragraphs 2 and 3, of the Convention. The Standing Committee concluded at its 42nd meeting that the previous wording lacked clarity and legal certainty in respect of the decision making procedure and possible effects of these decisions on the procedural rights of rightholders³.

21. The possible accession of non-European states to the Convention has been taken into account by reserving Article 10 concerning the promotion of European audiovisual works to European Parties.

22. Further to the adoption by the Committee of Ministers of Recommendation Rec(2007)2 to member states on media pluralism and diversity of media content as well as the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, Article 10a on media pluralism and diversity of content has been further elaborated to include provisions by which Parties commit themselves to promote and encourage media pluralism, including by promoting full transparency of ownership and by encouraging broadcasters with a public service mission to play an active role in the social cohesion of all members and communities of the society.

23. Rules on audiovisual commercial communication have been largely aligned with the AVMS Directive so as to ensure greater compatibility between both instruments. The main features introduced by the amendments are:

- greater flexibility for the quantity and insertion rules of television advertising and tele-shopping, in particular by the deletion of a maximum daily transmission time and number of tele-shopping windows (Articles 12 and 14)
- an encouragement for audiovisual media service providers to develop codes of conduct regarding audiovisual commercial communication in children's programmes of foods and beverages containing substances such as fat, salt sugar etc of which an excessive intake would not be commendable (Article 15.6)
- specific regulation of product placement –allowing Parties to permit product placement in certain type of programmes and circumstances- have been introduced by transposition in Article 15a of the corresponding AVMS Directive provision
- the obligation for audiovisual commercial communication not to encourage behaviour grossly prejudicial to the protection of the environment (General standards Article 11.3.iii.)

24. A consultation procedure to prevent circumvention of stricter national laws has been introduced in the Chapter dealing with mutual assistance, Article 19.3.cbis. The procedure to follow in case of alleged circumvention by broadcast targeted to another party has been aligned with the AVMS Directive. It is contained in Article 28 paragraphs 2, 3 and 4, in replacement of the previous article 24a on alleged abuses of rights conferred by the Convention. Article 16, which remains unchanged, contains a prohibition of circumvention in the field of television advertising and tele-shopping.

³ Reference is made to the report of this 42nd meeting (doc T-TT (2007) 007) paragraphs 8 to 12, published on www.coe.int/media.

25. Chapter VIII on “Restrictions to the principle of freedom of expression and retransmission” has changed its heading (previous heading “alleged violations of this Convention”) to introduce the procedures and measures applicable on on-demand services (Article 24bis). The latter have been aligned with the corresponding AVMS Directive and allow Parties to take measures not only in case of violation of the convention but also of stricter national law.

26. The measures referred to in Article 24bis and in Article 28 paragraph 3 have to be notified to the Standing Committee in view of an opinion. Article 21 concerning the functions of the Standing Committee contains a new provision (paragraph 3) to confirm this role.

27. Chapter VI dealing with the Standing Committee has furthermore been slightly adapted to

- take account of the need to have among its members persons with expertise in the regulation of audiovisual media services (Article 20.2)
- allow for electronic voting on decisions where consultation is not essential (Article 20.7bis)
- take into account the amendments made to Article 9a (Article 21.2)

28. In considering the functions of the Standing Committee particular attention was paid to the fact that its opinions, recommendations or decisions should only address State parties to the convention and should not affect the right of rightholders to have an effective remedy before a national authority against any alleged violation of his fundamental rights or freedoms as enshrined in the European Convention on Human Rights.

III. Nature of the amendments to the European Convention on transfrontier television

Widening of the scope of the Convention

29. The main, and most visible, amendment proposed by the drafting Group is the change of the title and scope of the Convention on Transfrontier Television. As a result of the widening of the scope, the Convention has been renamed to refer to transfrontier audiovisual media services. The Convention is no longer limited to transfrontier aspects of television (linear) broadcasting but includes regulation on transfrontier aspects of “on-demand” (non-linear) services.

30. Taking into account the growing importance of on-demand services in the society their regulation by the Convention was felt necessary by the fact that they are television-like, addressing the same audience as television broadcast and offering similar types of programmes by similar means of access.

31. While most provisions now refer to all audiovisual media services, some provisions are limited to television broadcast. Others distinguish requirements to television broadcast from those applicable to on-demand services. Overall, regulation of transfrontier aspects of on-demand services is less strict, offering more flexibility to the Parties with regard to the duties of service providers and protection of the viewer.

32. The reason for this distinction is the fact that the viewer has more control over programmes on-demand; since the viewer chooses what to see and at which moment. On-demand television is also less invasive; it does not operate at a schedule decided by the media provider and lacks the immediacy and suggestive power of live broadcasts. On a number of issues however, such as the duration and insertion of advertising, a distinction exists simply because the requirements to broadcasters are irrelevant for on-demand services. .
33. For the reasons mentioned above, distinct regulation for television broadcast and on-demand services is foreseen in the following areas:
- a. Article 7 concerning the responsibilities of audiovisual media providers on programming matters contains the requirement in paragraph 2 that news fairly present facts and encourage the free formation of opinions. The drafting Group could not find a consensus as to extend this requirement to on-demand services. The Standing Committee will have to take a stand on this issue. Paragraph 3 concerning the level of protection of minors contains two sets of requirements including requirements to television broadcasts and less strict requirements for on-demand services.
 - b. Article 8 concerning the right of reply is limited to television broadcasters. Article 9 concerning the access of the public to information (short extracts) and Article 9a concerning the access of the public to events of major importance are equally reserved to television broadcast.
 - c. Article 10 on cultural objectives maintains requirements for television broadcasters to promote European audiovisual works and adds a requirement, of a different nature, for on-demand services.
 - d. Article 10a on media pluralism and diversity of content refers in its new paragraph 3 to the role of television broadcasters with a public service mission to play an active role in promoting social cohesion in a large number of aspects.
 - e. In the field of audiovisual commercial communication Article 12 on duration of advertising spots and tele-shopping windows as well as Article 14 on insertion of advertising and tele-shopping - only concern television broadcast. Article 15 concerning audiovisual commercial communication for particular products such as tobacco, alcohol and medicines, contains additional requirements for broadcasters with regard to medicines and medical treatment as well as for alcoholic beverages. The provisions of Article 16 concerning advertising and tele-shopping directed specifically at a single Party are limited to television broadcast. The same applies to Article 18new which concerns television broadcasting devoted exclusively to advertising, tele-shopping and/or self-promotion.
 - f. Chapter VIII concerning restrictions to the principle of freedom of expression and retransmission of audiovisual media services contains in Articles 24 and 24bis two different procedures governing the measures Parties may take against television broadcast and on demand –services. Article 24bis which concerns possible measures in respect of on-demand services, leaves Parties a larger range of discretionary powers.

- g. Similarly to Article [16], Article [28] paragraphs 2 and 3 which concern the possibility of action of a Party against broadcasters established in another Party in order to circumvent the stricter national law of the first party, only applies to Television Broadcast.

Alignment with the AVMS Directive

34. For EU member States compatibility of the Convention with the Audiovisual Media Services Directive is of paramount importance. In order to ensure the necessary coherence and to avoid incompatibility between these instruments, the terms employed (art 2) and provisions on issues of common concern have been aligned with the AVMS Directive. Alignment has been realised to the extent possible, taking into account the difference in nature between both instruments as well as the common interest of all the Parties, EU and non EU member States, to the Convention.

35. Provisions created or amended in alignment with the AVMS Directive include:

- Article 5.1bis, a new provision concerning the role of co-and self-regulatory regimes in enforcing the duties of Parties,
- Article 5.4, amending the ancillary jurisdiction criteria,
- Article 6.2, amending the requirements on transparency and information,
- Article 7.2 and 7.3, amending the responsibilities of audiovisual media providers, in particular by putting more emphasis on the protection of minors,
- Article 7bis a new provision concerning access of disabled persons to audiovisual media services,
- Article 9, amending the provision concerning access of the public to information (short extracts);
- Article 10.2, a new provision concerning the support by broadcasters to independent producers of European audiovisual works and
- Article 10.5, a new provision on the promotion by on-demand services of the production of and access to European audiovisual works
- Article 24bis, a new provision concerning restrictions to the principle of freedom of expression and retransmission with regard to on-demand services and, finally,
- Article 28.2 a new provision (replacing previous article 24a) dealing with alleged circumvention by broadcasts targeted to another party.

36. Similarly, many amendments to Chapter III of the Convention concerning audiovisual commercial communications have been motivated by the intention of alignment with the AVMS Directive. These include:

- Article 11.3, 11.4, amending the general standards of audiovisual commercial communication,
- Article 12 amending the requirements on the duration of television advertising,
- Article 13.1 amending the requirements on the form and presentation of audiovisual commercial communication,
- Article 14 amending the requirements on the insertion of television advertising and tele-shopping,
- Article 15 amending the requirements on audiovisual commercial communication for particular products,
- Article 15a a new provision on product-placement and
- Article 17 amending the requirements on sponsorship.

Variations from the AVMS Directive to meet specific policy concerns of the Council of Europe

37. Although alignment with the AVMS Directive has been sought on questions where the Directive pursues policy goals which are similar to those of the Council of Europe, the following - remaining or newly created- differences deserve to be highlighted.

38. The most important differences reside in the very nature of the Convention. Unlike the Directive, the Convention limits its scope to programme services which are *transfrontier in character*. The nature of this Council of Europe Convention also implies that the implementation of the Convention is based on co-operation between the Parties. Unlike the European Commission, who enforces the implementation of community law, including the AVMS Directive, the body in charge of following the implementation of the Convention, the Standing Committee, has no powers to take sanctions or impose its views on the Parties.

39. Other differences are linked to specific Council of Europe policy objectives justifying the existence in the Convention of obligations which are not in the Directive.

40. Article 7 paragraph 2 requiring [broadcasters]/[audiovisual media services]⁴ to ensure that news fairly present facts and encourage the free formation of opinions has been maintained and is specific to the Convention.

41. Article 10 on cultural objectives, as well as the definition of European audiovisual works will continue to differ from their equivalents in the AVMS Directive, in spite of efforts of alignment on the promotion of independent producers and on-demand services. In the context of the Convention, audiovisual works are considered as “European” when they originate from a member state of the Council of Europe or a Party to the Cultural Convention. The definition of European works in the AVMS Directive is more restrictive since it does not cover European works originating from non Parties to the Convention. A second difference concerns the quota requirements which due to the intergovernmental nature of the Convention

⁴ See comments in §32 sub a above.

and its Standing Committee are more lenient. Thirdly, in anticipation to the accession to the Convention by non-European States, whose participation in the promotion of European works is not to be imposed, Article 10 is the only provision of the Convention addressed at “European” Parties.

42. Article 10a on media pluralism and diversity of content has been further developed to take account of Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content as well as the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration and has no equivalent in the Directive.

43. The Convention’s provisions on commercial communication have been largely aligned with the AVMS Directive although some differences remain. One of these differences is the fact that in the Convention the definitions of audiovisual commercial communication (Article 2j) and television advertising (Article 2k) also cover “images designed to advance a cause or idea, or to bring about some other effect desired by the advertiser or the broadcaster”. The Convention, unlike the AVMS Directive, also contains provisions concerning “announcements in the public interest and charity appeals free of charge” (Article “X”).

44. A more important divergence from the AVMS Directive and community law’s country of origin principle, is the existence in the Convention of Article 16 on television advertising and tele-shopping directed at a single Party, designed to protect Parties against circumvention of their national rules. This provision which prohibits circumvention of advertising rules is specific to the Convention. Specific to the Convention is also a new provision, Article 19, paragraph 3 *cbis* which aims to prevent circumvention by consultation between Parties prior to issuing an authorisation with a broadcaster whose programme service is to be wholly or principally directed at the territory of that other Party⁵.

⁵ See however recital 66 to the AVMS Directive which mentions a similar procedure.