

5 May 2017

Summary of the responses received from the members of the Steering Committee on Media and Information Society (“CDMSI”) on the questionnaire regarding possible revision of the Convention on Transfrontier Television (“the Convention”)

On 13 March 2017 the secretary to the CDMSI sent the CDMSI members the following documents:

- *Information note on the Revision of the European Convention on Transfrontier Television*, doc. CDMSI(2017)004,
- *Questionnaire concerning the revision of the European Convention on Transfrontier Television. With the view to facilitate discussion of the CDMSI at its 12th meeting (20-23 June 2017)*, doc. CDMSI(2017)005.

The questionnaire had been sent for consultation with the Bureau members on 6 March 2017.

CDMSI members were asked to reply by 19 April 2017 to the following questions:

1. What is the position of member States with regard to the Convention’s revision?
2. Is the Convention still useful?
3. For non-EU member states Parties to the Convention: What is the impact of the Convention on your national legislation? What are the main issues that its non-revision poses to you?
4. What steps have the European Union member States undertaken to engage in dialogue with the European Commission to overcome the current situation?
5. Is there a need to reflect on alternative solutions? If so, what could be such alternative solutions?

Until 5 May 2017, the Secretariat had received contributions from 11 member States:

- Austria
- Iceland
- Latvia
- the Netherlands
- Turkey
- Ukraine
- Moldova
- Czech Republic
- Belgium /la Federation Wallonie-Bruxelles
- Switzerland
- France

Russian Federation and the United Kingdom informed the Secretariat that they would abstain from commenting at this stage.

General observations:

The questionnaire was addressed to all Council of Europe member States, not only to Contracting Parties to the Convention.

8 out of 34 Contracting Parties decided to submit their observations. 3 other States currently not being Parties to the Convention have also sent their comments.

Given the limited response, it is difficult to make assumptions concerning the general or predominant direction among Council of Europe member States concerning the future of the Convention's revision.

Also, member States who replied, formulated their comments in a rather general way.

The conviction about the real value of the Convention has been generally expressed. While the need for revision of the Convention was often indicated, so was the concern that an attempt to break the deadlock in the dispute with European Commission might not be successful.

Apparently at this stage the member States of the European Union do not conduct any bilateral or multilateral discussions with the Commission concerning the precision of the scope of matters being subject to the exclusive external competences of the EU, nor regarding the possibility to negotiate in the future, in accordance with the European Union law, the revision of the Convention.

Some States indicated that the limitation of the scope of the Convention to the subject matter not covered by the Audiovisual Media Services Directive might be a solution worthy of exploration.

It is necessary to learn about the positions of the other Council of Europe member States, notably those being Parties to the Convention – in order to conduct a meaningful discussion on this issue among CDMSI delegations.

Comments of member States:

1. What is the position of member States with regard to the Convention's revision?

Austria - observed that this question should be primarily answered by Contracting Parties not being members of the European Union. Austria declared that there still is a need for a basic set of rules for the provision of audiovisual media services in a transfrontier context and for the settlement of "disputes" when it should once come to "conflicts" between EU members and States not being members of the EU and not having bilateral agreements with the EU. Austria reminded about its commitment and the effort put in the revision of the Convention in the years 2006 – 2009, when Austrian delegate actively participated at the former working group with the aim to prepare a draft proposal.

Iceland - expressed its support for a revision of the Convention. It is important to keep in mind that hundreds of television channels are operated in the UK, including many channels that are targeted to other countries. Iceland is within a satellite footprint of the UK and many Icelanders have satellite receivers to watch British television. Due to Brexit, it is most important to revise the Convention to ensure that countries outside the EU also have a basic set of rules for the provision of audio-visual media services in a trans-frontier context. There also need to be a mechanism for disputes in cases of conflicts between EU members and States not being members of the EU or States that do not have bilateral agreements with the EU

Latvia – observed that it has always supported the revision of the Convention and its alignment with the Audiovisual Media Services Directive. This would have ensured a level playing field between the EEA Member States and the 12 non-member States that have ratified the Convention. The Convention was already out of synch with the Directive and will be even further adrift once the revised Directive is adopted. For example, the Convention does not cover video sharing platforms, the jurisdiction criteria remain different, the rules on commercial communications will differ greatly if their proposed liberalisation is realised, to name but a few discrepancies.

The Netherlands – informed that the Convention has been signed by the Netherlands in 1989 but not ratified, due to legal problems with certain articles. As far as the revision of the Convention is concerned: years ago, the Netherlands participated as “Observer” in earlier attempts to revise the Convention, but this revision has come to a standstill. In the light of the developments within the EU, the Netherlands reserve to define a position with regard to the revision of the Convention at the later stage.

Turkey - reminded about the two key legal instruments regulating the audio-visual media sector at pan-European level; the Convention and the Directive. Technological developments, digitalization led to enormous transformations particularly in broadcasting and in ICT sectors. Conventional legal regulations and regulatory mechanisms failed to satisfy the respond to the new demands due to these infrastructural evolutions. Technological developments, new service types, new business models and differentiations in consumer rights require the amendment of the current legislation. Besides, there are some new problems pending for solutions due to the rapid technological developments such as protection of minors, human dignity and consumers, competitive audio-visual content industry, promotion of media literacy for information societies, the position of European works in terms of on-demand services and “country of origin” principle for the on-demand media services and jurisdiction issues.

As a consequence, Turkey strongly is in the opinion of necessity of the revision of the Convention as it is the only international legislation which Turkey is Party to in this field. This opinion was raised not only in CDMSI Meetings but also in PACE Sessions and Committee of Ministers Meetings many times.

Ukraine - expressed support for renewal of the process of revision of the Convention.

Moldova - The Coordinating Council of Audiovisual (CCA) of the Republic of Moldova believes that the current text of the Convention should be kept. Meanwhile, several provisions may require revision in the foreseeable future to be updated according to the latest developments in the audiovisual field.

Czech Republic – Convention has limited applicability in practice; however we should count on the potential it could have if the revision was undertaken. It has to be resolved primarily what scope it should cover.

Belgium /la Federation Wallonie-Bruxelles - indicated that its position did not change in that respect. The revision could only be successful if the Convention is limited to the subject matter other than that covered by the Audiovisual Media Services Directive. This approach would enable to the member States of the European Union and other Contracting Parties to the Convention to agree on modifications of this international legal instrument without risk of the negotiating problems at the EU level.

Switzerland - expressed regret on the standstill of the Convention's revision. Switzerland is a non-EU-State and for this reason, it is very important for the country to rely on a common European regulatory framework on audiovisual services. A framework, that not only applies to the EU but also to the wider range of (the signatory) Council of Europe member states. Against the background of a fast evolving audiovisual sector, the Convention, although still useful, has become a bit outdated; it is crucial to update the Convention, so that it reflects the current technological and economic developments in the audiovisual field.

France – expressed its attachment to the Convention and a wish to re-launch the discussions on its revision, taking into account the technological and market changes that took place since the last revision of the Convention. Besides the fact that only the revised Convention could harmonise the standard setting of the Council of Europe and the regulations of the Audiovisual Media Services Directive, France is convinced of the value of the possibility of accession to the Convention of the non-European States. It would enable to extend the underlying principles of European media regulation to the non-European States. A solution should be found to difficulties encountered when dealing with audiovisual media services which do not respect these European media regulations and which come from neighboring countries.

France accepts with regret the position of the European Commission on the discontinuation of the works leading to revision of the convention and it appeals to the Commission to change its decision.

France informs that the Convention on Transfrontier television is in force in France since 1 February 1995.

2. Is the Convention still useful?

Austria - no answer (this question though has been partially answered within the reply to question 1.

Iceland - Yes, the Convention has always been useful. However, after Brexit it is more useful than ever due to all the broadcasters operating in the UK.

Latvia - It is still useful up to a point for the non-EEA States where there is cross-border transmission between them. However, should any dispute arise, for example, over jurisdiction, the Convention is of very little use as there is to all intents and purposes no dispute resolution mechanism.

The Netherlands – no answer

Turkey – Convention is an important document which has a standard setting feature and address to the large geography of the CoE. Also, even the current text of the Convention is a guide for the bilateral relations on the grounds of transfrontier television broadcasting.

Convention is the primary reference for the problems among states in CoE which are not members of the EU. Particularly, for the jurisdiction problems of the media service providers which transmit whole or major parts of their broadcasts to the countries other than that which has jurisdiction over them and violate their national legislation, the Convention is used during the bilateral negotiations between the

competent bodies of the concerned states but due to lack of functioning it needs to be revised and re-enabled.

Ukraine – confirmed that it found Convention still useful. The provisions of the Convention are applied in order to regulate the presence of foreign programmes in the networks of programme service providers of Ukraine, which are the licensees of the National Regulatory Authority. In particular, an economic subject, which is under the jurisdiction of Ukraine and intends to retransmit programmes under the obtained permit from a copyrighter (producer) which is out of the jurisdiction of an EU Member-State or of a state which has ratified the European Convention on Transfrontier Television, has the right to retransmit programmes only subject to their conformity with the requirements of the legislation of Ukraine, of the European convention on Transfrontier Television, and subject to their inclusion into the List of programmes that are to be retransmitted according to the decision of the media regulator.

In order to include a foreign programme to the above mentioned List, the media regulatory authority carries out monitoring of the programme content and of compliance with the national legislation, as well as with the requirements of the Convention (Article 7 of the Convention which provides for obligations of a broadcaster, including, children’s protection obligations).

As of April 2017, the List of the Foreign Programmes Content of which meet the Requirements of the European Convention on Transfrontier Television and of the legislation of Ukraine includes 159 foreign programmes.

Moreover, according to the provisions of Article 24 of the Convention in 2014-2017, measures were taken in relation to 78 foreign TV programmes which were restricted for their dissemination in the territory of Ukraine. Based on the Convention Ukraine cooperates with regulatory authorities of countries which have ratified this legal instrument.

Moldova - Yes, the Convention is useful. The Republic of Moldova is a non-EU country and still applies the provisions of the Convention. As the country doesn’t have its legislation fully aligned to the EU AVMS Directive, the provisions of the Convention are up till now applied. Some of them are used in the CCA’s normative activities.

Czech Republic - considers Convention useful regarding transmission and retransmission of programmes originating in States that are not member States of EU.

Belgium /la Federation Wallonie-Bruxelles – Belgium is not a Party to the Convention and it did not observe any difficulty or problems for this reason.

Switzerland - Switzerland still regards the Convention as valid and applicable legislation. As already mentioned, Switzerland heavily relies on the Convention, because it is the only international framework applicable in that country, which sets common standards and protects common values regarding the retransmission and broadcasting of transfrontier European television broadcasts. It is indispensable for Switzerland to refer to the Convention’s provisions if it has to coordinate its television broadcasting policy with its neighbour States (France, Germany, Austria and Italy). One prime example is the issue of so-called “advertising windows” from our neighbour states that exclusively target the Swiss audience.

The Swiss authorities regularly enter into dialogue with the competent authorities of the neighbouring states to find appropriate solutions to the problems created by those windows. The Convention has proven to be helpful in such cases.

France – Taking into account the multiplication of the forms of transmission of the audiovisual media services in Europe (cable, satellite, OTT), the transfrontier transmission is no longer the exception, specific case it was 30 years ago. A common basic regulatory framework is always useful, and the revision taking into account the new technical forms of transmission is even more necessary.

3. For non-EU member states Parties to the Convention: What is the impact of the Convention on your national legislation? What are the main issues that its non-revision poses to you?

Austria - no answer

Iceland - Iceland is a member of the EEA and thus transposes the AVMS Directive.

Latvia - no answer

The Netherlands - no answer

Turkey – informed that being a Party to the Convention, it continues the membership negotiations with the EU. Therefore, Turkish national legislation has been harmonized with the EU *acquis communautaire*. Meanwhile, in accordance with the Article 90 of the Turkish Constitution, international agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Ukraine – no answer

Moldova - Following the signing and ratification of the Convention by the Republic of Moldova, the national audiovisual legal framework has been revised to bring it closer to the Community legislation. The revision of the Convention could be necessary to align the Convention's provisions to the new needs of the digital era. The non-revision of the Convention will lead to unchanged provisions that will not be applied in practice later on, as they will not cover the new realities and developments.

Czech Republic – no answer

Belgium /la Federation Wallonie-Bruxelles - no answer

Switzerland - As already stated in replies to questions 1 and 2, the Convention is applicable and valid law in Switzerland and relies on this common European legal framework for the television sector. The Convention has helped to shape the Swiss regulation for example on advertising matters, the retransmission of TV broadcasts, the promotion of European works or the introduction of the "list of major events" to a great extent.

One of the most important issues is the discontinuation of the work of the Standing Committee on Transfrontier Television (T-TT). Every now and then, OFCOM Switzerland is confronted with cases of potentially illegal broadcasts of television stations, that are received by the Swiss audience and which are located abroad. In the cases, where OFCOM Switzerland starts to investigate these stations, questions arise on the legal interpretation of certain Convention provisions. To be able to submit these questions to an opinion finding body such as the T-TT would be very helpful.

Another important issue is the “petrification” of the significant legal gap that exists between Non-EU and EU-Member states, since the revision of the Convention has been stopped. There is, for example, a gap regarding the jurisdiction rules in the Convention and the AVMSD. This situation could lead to competence conflicts between Switzerland and its neighbour States (although there were no cases until today). Further, on-demand-services are not covered by the Convention. On the other hand, Switzerland regards Article 16 of the Convention to be far more useful than Article 4 of the AVMSD when it comes to enforcing stricter advertising rules on foreign broadcasters with “advertising windows” targeted to the Swiss audience. It has to be considered, too, that possible amendments and new provisions in the future AVMSD (new rules for videosharing-platforms, amendments to the jurisdiction provisions, etc.) could lead to an even bigger gap.

France – no answer

4. What steps have the European Union member States undertaken to engage in dialogue with the European Commission to overcome the current situation?

Austria - Austria has on several occasions questioned the European Commission’s strict legal view but has never succeeded in receiving very much support of other Member States.

Iceland - Iceland is only a member of the EEA.

Latvia - Latvia attempted to raise this question with the Commission in light of the UK leaving the UK but with no luck. We have regularly reminded the Commission that there are over 850 TV channels under UK jurisdiction targeting EU Member States. Even if the UK were to transpose the revised AVMSD, there is no dispute resolution mechanism. As Prime Minister Theresa May wrote in her letter of 29 March 2017 to Donald Tusk, invoking Article 50 of the Treaty on European Union: “We should therefore prioritise how we manage the evolution of our regulatory frameworks to maintain a fair and open trading environment, and how we resolve disputes.” The UK cannot look to the Commission for decisions or the ECJ for prejudicial opinions or judgements, and the ECtHR is a non-starter – concluded Latvia.

The Netherlands – no answer

Turkey - the EU Member States made an effort in the past, but it is clear that more efforts are needed.

Ukraine - no answer

Moldova – no answer

Czech Republic - Czech Republic has along with some other countries highlighted the issue at several previous meetings of the Contact Committee (under the framework of audiovisual media services directive), it has also bilaterally discussed it with the DG CONNECT during the transposition of the directive into the national law. Neither of these occasions led to a concrete proposal which would enable to keep the Convention active along with the directive.

Belgium /la Federation Wallonie-Bruxelles - none.

Switzerland - Switzerland is aware that there have been not very successful protests by certain signatory States after the European Commission intervened into the on-going revision procedure.

France – In 2008, in a view to consider the consequences of the last revision of the directive “On Transfrontier Television” by the amending Directive 2007/65/EC on Audiovisual Media Services on the Convention, the Standing Committee of the Convention mandated a working group to prepare the draft amendments to the Convention. French delegation participated in this working group together with German, Austrian, British, Polish, Swiss and Turkish delegates.

More recently, in 2014 at the meeting of the Contact Committee of the Audiovisual Media Services Directive several delegations had invited the Commission to adopt a position on subjects falling outside the exclusive external competence of the EU. Unfortunately, as the Council of Europe had decided to suspend the work of the Standing Committee of the Convention, the Commission did not consider it necessary to respond to this request.

5. Is there a need to reflect on alternative solutions? If so, what could be such alternative solutions?

Austria - there is no alternative (to an international “treaty”) that could provide for the same or similar legal certainty and clarity.

Iceland - there is no alternative to an international convention. No other solutions could provide for the same or similar legal certainty and clarity as a convention.

Latvia - Yes, because it is very unlikely that the Committee of Ministers will agree to opening up the Convention again and it is improbable that the Standing Committee will be revived. Because so much of audiovisual media service provision is of a transfrontier nature, it is imperative that there should be the level playing field of legal certainty for all the States that wish to enjoy the benefits of free movement of services, uniform rules on the protection of minors, commercial communications, promotion of European works etc. Some research could be carried out to see if there are a precedent for this kind of situation and how it was resolved.

One solution might be for the 12 non-EEA Member States that have ratified the Convention to enter into 12 bilateral or one joint agreement with the EU on transposition of the AVMSD into their domestic legislation. Such an agreement should also envisage a dispute resolution mechanism acceptable to all parties, which could be in the form of a small ad hoc arbitration panel, possibly on the lines of the EFTA court.

The question of the status and future role of the Convention (particularly in the light of Brexit), has not been discussed in the relevant Council of the EU Working Party on OSCE and the Council of Europe (COSCE), which seems to us to be a mistake but one that can be rectified. We believe this would be an ideal forum for a brainstorming session between EU Member States, the European Commission and the Council of Europe.

The Netherlands – expressed the view that currently there is no need for alternative solutions.

Turkey - Unless European Union does not lift its reservation, it will be useful to review the current Convention to cover different issues and new broadcasting technologies. It would be very useful if a high level meeting could be organized by the Secretary General of the CoE within the agenda of next Ministerial Conference in order to raise this issue and negotiate and find a concrete solution.

Ukraine - Ukraine supports the renewal of the process of revision of the European Convention on Transfrontier Television as an efficient instrument. Thus, Ukraine does not suggest any alternatives.

Moldova - Taking into account the previous recommendations, Member States should consider drafting a new convention focusing on freedom of expression aspects of media regulation and if not, reviewing the current provisions of the Convention.

Czech Republic - would prefer current situation to be resolved, but at the same time Czech Republic cannot foresee any alternative solution without cooperating with the European Commission.

Belgium /la Federation Wallonie-Bruxelles – The limitation of the scope of the Convention to the subject matter not covered by the Audiovisual Media Services Directive - might be a solution. In fact, such possibility has been mentioned in 2010 during the meeting of the Contact Committee of the directive on audiovisual media services. At the time two possible approaches has been proposed and one of them was to limit the future Convention to the issues not covered by the scope of competences of the EU.

Switzerland - It would be desirable if at least the Convention could resume its work. Still, Switzerland would prefer a review of the Convention, which could close the legal gaps between the Audiovisual Media Services Directive and the Convention.

France – One solution that France identified in 2011 was to limit the revision of the Convention to areas that do not fall within the competence of the European Union, that is to say the provisions of the second protocol other than those which are limited to align the Convention with the Directive.

As it is mainly a political matter, any progress in this area must require a clear mandate from the Commission, which must take its responsibilities in this matter. Mobilisation at the highest level of the member States of the Council of Europe might be appropriate.