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EUROPEAN CONVENTION ON TRANSFRONTIER TELEVISION

STANDING COMMITTEE ON TRANSFRONTIER TELEVISION

(T-TT)

**44th meeting
11 and 12 June 2009
Agora Building
Room G 01**

REPORT

Executive summary

The T-TT finalised the revision of the European Convention on Transfrontier Television (ECTT).

Decisions taken:

The T-TT agreed on:

- the draft text of the second amending protocol to the ECTT and its explanatory report (Document T-TT (2009)007)
- the Explanatory report to the revised ECTT (Document T-TT(2009)009)
- the Report of the Standing Committee to the Committee of Ministers on the revision of the ECTT (Document T-TT(2009)011)
- its comments to the Committee of Ministers on the follow up given to Recommendation 1855 (2009) of the Parliamentary Assembly on the regulation of audiovisual media services (Appendix to Document T-TT(2009)011)

The T-TT decided to forward the above mentioned texts to the Committee of Ministers with a view, in particular, to the adoption and opening for signature of the second amending protocol to the European Convention on Transfrontier Television.

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7. Given the time constraints of this particular meeting, delegates agreed to limit their interventions on this point of the agenda to priority matters. No urgent issues were raised.

Item 5 of the agenda: Revision of the Convention

8. The Standing Committee examined the draft second amending protocol to the European Convention on Transfrontier Television and its explanatory report (Document T-TT (2009)007). The draft, based on the provisional agreement on the draft amendments to the Convention as reached during the 43rd meeting of the T-TT on 12 to 14 November 2008 and confirmed, with a few amendments, during the consultation meeting held on 25 to 27 February 2009, had been sent for comments to the Council of Europe Legal Advice Department. The Standing Committee discussed the proposals made by the Legal Advice Department as well as a proposal by Reuters (Document T-TT (2009)008). Parties had no further comments on the provisional agreement.

9. The Committee discussed the proposal by Reuters to incorporate a reference to intermediaries in Article 9 (Access of the public to information - short news reports). The proposal referred to recitals 38 and 39 of the AVMS Directive dealing with the right to short news reporting and underlined that the role of intermediaries, i.e. news agencies, was substantial to facilitate the purpose of the right of access to information. The Committee recalled that a similar debate within the EU had concluded in mentioning intermediaries only in the recitals to the Directive. The Standing Committee, noting that the role of intermediaries was mentioned in the explanatory report to the Convention, concluded that the Convention should not go further than the Directive.

10. The Standing Committee agreed with the proposals made by the Legal Advice Department. With regard to the proposed disconnection clause, the Swiss delegation observed that the clause did not cover the situation of Parties, other than States belonging to the European Union or the European Economic Area, who had accepted to be bound by Community law on the subject covered by the Convention. The Standing Committee, recalling the importance of respecting the results of earlier negotiations between the Council of Europe and the European Commission on the issue of disconnection clauses, instructed the Secretariat to find an appropriate formulation in consultation with the Legal Advice Department and Switzerland.

11. In conformity with Article 23, paragraph 3, of the Convention, the Standing Committee finalised the text of the draft second amending protocol to the European Convention on Transfrontier Television and explanatory report thereto and agreed to forward it to the Committee of Ministers for adoption and opening for signature, with the amendment for the disconnection clause to be settled by the Secretariat along the lines mentioned above. The United Kingdom reiterated its reservation in respect of Article 33, paragraphs 3 and 4, as worded in Article 46 of the draft amending protocol. No other reservations or objections were expressed.

Item 6 of the agenda: Revision of the Explanatory Report to the Convention

12. The Standing Committee examined, in detail, the revised Explanatory Report to the Convention, taking account of the comments in respect thereof (Document T-TT (2009) 010). The comments concerned the paragraph related to Article 6, paragraph 3, on the prohibition of pornographic material on television. Further to some minor amendments, the Standing Committee agreed to the text of the Explanatory Report as reflected in document T-TT(2009)009rev.

Item 7 of the agenda: Report of the T-TT to the Committee of Ministers

13. The Standing Committee examined its report to the Committee of Ministers on the revision of the ECTT and adopted it further to some minor changes (Document T-TT(2009)011rev).

14. The Committee also addressed the request made by the Committee of Ministers, during the 1048th meeting of their Deputies on 11 and 12 February 2009, “to provide information on the follow up given to Recommendation 1855 (2009) of the Parliamentary Assembly on the regulation of audiovisual media services when submitting an amending protocol to the European Convention on Transfrontier Television”. The Standing Committee adopted the comments as appended hereto (Appendix III).

Item 8 of the agenda: Planning of future work

15. The Secretariat recalled that, in line with the Committee of Ministers’ requirements, the texts agreed upon by the Standing Committee will be subject to editorial checking before they are submitted to the Committee of Ministers. In addition, the Parliamentary Assembly will be asked to give an opinion on the draft second amending protocol to the ECTT. The Standing Committee underlined that, through their delegations in the CDMC, all Council of Europe member states had been informed on the revision process and been invited to comment on the draft Convention in the consultation procedure.

16. The Standing Committee expressed the hope that the Committee of Ministers will adopt the draft second amending Protocol and open it for signature as soon as possible. It was recalled that the Protocol will enter into force after acceptance or ratification by all Parties to the ECTT. However, Article 55 of the draft protocol enables Parties to declare that they will apply the amending protocol on a provisional basis.

Item 9 of the agenda: Other business

17. The Standing Committee welcomed the announcement by the Secretariat that it was envisaged to present the revised ECTT, renamed “Council of Europe Convention on transfrontier audiovisual media services” during a half day Conference to be organised possibly in the autumn.

Item 10 of the agenda: Dates of forthcoming meetings

18. The 45th plenary meeting of the Standing Committee will take place during the first months of 2010.

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APPENDIX I

List of participants

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APPENDIX II

Agenda

1. Opening of the meeting and adoption of the agenda

Working document

- Annotations on the draft agenda
(Document T-TT(2009)OJ2Notes)

2. Information by the Secretariat

3. Signatures and ratifications of the Convention

4. Exchange of information on the implementation of the Convention

5. Revision of the Convention

Working Documents

- Draft second amending protocol to the European Convention on Transfrontier Television and explanatory report (Document T-TT(2009)007)
- Provisional agreement on the draft amendments to the European Convention on Transfrontier Television and its preamble
(Document T-TT(2009)005) (merging documents T-TT(2008)002 + T-TT(2008)003Rev)
- Comments on the provisional agreement (Document T-TT(2009)008)

Information documents

- Audiovisual Media Services Directive 2007/65/EC amending the TVWF Directive
- Report of the Consultation (Feb. 2009) on the revision of the ECTT (Document T-TT(2009)006)
- Report of the 43rd meeting of the Standing Committee
(Document T-TT(2008)004)
- Secretariat memorandum on the proposed amendments to Articles 2, 10 and 27 of the European Convention on Transfrontier Television and their compatibility with Community law
(Document T-TT(2009)002)
- Rules of procedure
(Document T-TT(2006)024)

6. Revision of the Explanatory Report to the Convention*Working Documents*

- Draft explanatory Report to the revised ECTT
(Document T-TT(2009)009) (previously T-TT-GDR(2008)002Rev)
- Comments on the draft explanatory report of the revised Convention
(Document T-TT (2009)010)

7. Examination of the Report of the Standing Committee to the Committee of Ministers*Working Document*

- Report of the Standing Committee to the Committee of Ministers on the revision of the ECTT (Document T-TT(2009)011)

Information document

- PACE Recommendation (1855) 2009 on “The regulation of audio-visual media services”

8. Planning of future work**9. Other business****10. Dates of forthcoming meetings**

APPENDIX III

Comments of the Standing Committee on Recommendation 1855 (2009) of the Parliamentary Assembly on “the regulation of audiovisual media services”

10.1 The possibilities for guiding the interpretation and supervising the application of this new convention should be reinforced

The Standing Committee supports the view of the Assembly that the new Council of Europe Convention, revising the European Convention on Transfrontier Television, should provide sufficient guidance to its Parties in interpreting and applying its provisions, and in particular in determining what is and what is not included within its scope. The Standing Committee is of the opinion that the explanations contained in the explanatory report to the draft revised Convention (document T-TT-(2009)009) fulfill this role in a satisfactory manner. Reference is made in particular to paragraphs 88 to 149 of this draft report. It is furthermore recalled that one of the principal functions of the Standing Committee is to make recommendations to the Parties concerning the application of the Convention. It is also possible that questions concerning its interpretation will arise, all the more so since the Convention deals with an area which is subject to rapid changes. Article 25 of the draft revised Convention empowers the Standing Committee to examine any such question raised by a Party.

10.2 The “public service mission” for audiovisual media services should be defined and explained

The Standing Committee recalls that the purpose of the Convention is not to regulate the provision and activities of audiovisual media services as a whole, nor is it designed to harmonise the Parties’ rules on this issue. It aims to lay down basic standards by which audiovisual media services may enjoy unhindered transfrontier circulation. The Standing Committee concludes that this Convention is not the appropriate legal instrument to give an answer to the questions surrounding the definition of “public service mission” of media services. It furthermore underlines that there is no common European definition of public service media and/or mission. The Standing Committee notes that the draft explanatory report to Article 12, paragraph 3, of the draft revised Convention (paragraph 272) refers to the contents of Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society which contains guidance on the key elements of the public service remit. Paragraph 273 of the draft explanatory report explains that “broadcasters who have a public service mission may include privately-owned broadcasters whose licences or other conditions of operation require them to transmit programming which is of benefit to cultural, educational, or other public objectives”.

10.3 The role of the Standing Committee should be re-examined with regard to its supervisory function over the compliance of conventional obligations

It is recalled that the Convention confers the Standing Committee functions related to the interpretation and application of the Convention. They are listed in Article 25 of the draft revised Convention and include the possibility to make recommendations to the Parties on the application of the Convention, examine question concerning the interpretation of the Convention and secure friendly settlement of any difficulty referred to it in the context of the conciliation procedure foreseen under Article 30 of the draft. It is acknowledged that, with regard to alleged violation of the Convention, the Standing Committee has until now had a purely advisory role, including in the

conciliation procedure. This role of the Standing Committee seems still adequate in most cases, including in the case of alleged violations of the Convention by broadcasting services (Article 28). The Standing Committee shares however the viewpoint that it should be given an increased supervisory role with regard to possible measures against programmes in on-demand services (Article 29 of the draft) or against broadcasters who established themselves in the jurisdiction of another Party in order to circumvent the stricter rules, in the field covered by the Convention, of the Party to the territory of which their television broadcast is wholly or mostly directed (Article 33 of the draft). The Standing Committee notes that measures in the context of Articles 29 and 33 leave a larger margin of discretion to Parties, as compared to television broadcast (Article 28 of the draft). It underlines that the draft Convention now foresees to introduce a procedure whereby Parties will notify any measures they envisage to take on the basis of Articles 29 or 33 to the Standing Committee in view of an opinion and that they will refrain from taking them if the Standing Committee comes to the conclusion that the measures are incompatible with the Convention. In case of provisional and urgent measures foreseen under Article 29, paragraph 2, Parties will notify these measures to the Standing Committee in the shortest time possible and will urgently put an end to them if the Committee concludes that they are incompatible with the Convention.

10.4 The transmission of on-demand audiovisual media services should be treated in a comparable way to television broadcast and should not be subjected to the more restrictive provisions taken from the AVMS Directive of the European Union

The Standing Committee notes that, in the Convention (as in the corresponding European Union Directive), 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. The reason for this distinction (as explained in §72 of the draft explanatory report to the draft Convention) is the fact that the viewer has more control over on-demand programmes 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. The provisions of draft Article 29 have partly been aligned with the corresponding AVMS Directive (Article 2a.4) and allow Parties to take measures not only in case of violation of the convention but also of stricter national law. The measures referred to have to be notified to the Standing Committee with a view to a previous opinion and may not be taken or pursued (in the case of emergency procedures) if the Standing Committee comes to the conclusion that the measure is incompatible with the Convention.

The general objective of this Convention, as defined in its draft Article 3, is to ensure freedom of expression and information via the free circulation of audiovisual media services which comply with the terms of the Convention. Although draft Article 29 gives a wide margin of discretion with regard to the restriction of on-demand audiovisual services from other state Parties, its paragraph 3 makes it clear that any measures which might be taken by the Parties under this Article must nevertheless comply with Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights. This implies that such measures respect the requirements laid down by the European Court of Human Rights to accept a restriction to freedom of expression and information. In this context, the proportionality requirement is particularly important and subject to careful examination. The draft Explanatory Report to the draft Convention gives further guidance on this issue (§437).

For European Union member states and for transfrontier providers compatibility of the Convention with the Audiovisual Media Services Directive is of paramount importance. In order to ensure the necessary coherence and to avoid inconsistency between these instruments, the terms employed (Article 2) and provisions on issues of common concern have been aligned with the AVMS Directive. This is also the case of this provision. 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, whether European Union and non-European Union member states, to the Convention.

10.5 Guidance should be provided regarding the requirement of programme services of broadcasters being “wholly or mostly” directed towards the territory of a Party with the intention of circumventing the national laws of that Party

The Standing Committee is of the opinion that the guidance provided in the draft explanatory report to the draft Convention meets the needs of the Parties on this question (see in particular §§455 to 470). The report states that “The assessment of whether a television broadcast is wholly or mostly directed at the territory of another Party should be made on a case-by-case basis. Significant indicators might include the main language of the service, the origin of the television advertising or subscription revenues, and the existence of programmes or commercial communications targeted specifically at the public in the other Party.”

10.6 Procedural safeguards, such as a prior opinion from the Standing Committee or arbitration, should be required before a Party can take measures directed against a broadcaster established abroad for having allegedly circumvented the receiving Party’s national laws, as far as such measures restrict the right to freedom of information through audiovisual media services

The Standing Committee supports this recommendation and observes that the draft Convention now foresees to introduce in its draft Article 33 a procedure whereby Parties will refrain from taking such measures without a previous opinion by the Standing Committee. Reference is furthermore made to the comments on Recommendation 10.3 above.