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The regulation of audiovisual media services

Report¹

Committee on Culture, Science and Education

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Summary

Technological progress of electronic audiovisual media has led to legislative changes at national level as well as to a new Directive on Audiovisual Media Services for the member states of the European Union (AVMS Directive) and means that it is necessary to revise the European Convention on Transfrontier Television of the Council of Europe.

While the AVMS Directive has the main objective of ensuring freedom of services within the internal market of the European Union, the Council of Europe's Convention seeks to ensure freedom of transmission and retransmission of broadcasting in Europe regardless of frontiers in accordance with Article 10 of the European Convention on Human Rights.

It is, therefore, proposed that the current revision of the Convention should respect this freedom and give a stronger role to the body supervising the implementation of the Convention. In addition, action is proposed regarding the allocation of radio-frequency spectrum, public service broadcasting and the independence of regulatory authorities for electronic media.

1. Reference to committee: [Doc. 10901](#), Reference No. 3302 of 22 January 2007



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A. Draft recommendation

1. The Parliamentary Assembly of the Council of Europe recalls that all media regulation in Europe must respect the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ETS No.5). The freedom to receive and impart information and ideas applies regardless of frontiers.
2. This freedom constitutes a necessary requirement for democracy and the cultural and social progress of each individual and society as a whole. Restrictions to this freedom are only admissible as far as they are necessary in a democratic society.
3. Traditional audiovisual media and print media are increasingly converging into new forms of electronic media for images, sound and text which are accessible via different fixed or mobile platforms using analogue or digital terrestrial transmissions, satellite or cable. Much of what is now considered broadcasting may in future be delivered over the Internet, where the user controls his or her access to countless sources of content which know no geographic boundaries.
4. Article 10 (paragraph 1) of the European Convention on Human Rights permits states to require "the licensing of broadcasting, television or cinema enterprises". The Assembly believes that broadcasting and television in this sense should not include Internet radio or Web television, which should not require national authorisations. Internet radio and Web television should be treated like Internet-based newspapers or Web sites with text, images and sound.
5. Technological progress is increasing the number of channels, programmes and services accessible through audiovisual media. This provides viewers and listeners with a wider choice, comprising linear and on-demand services. However, more audiovisual content does not necessarily mean greater plurality, diversity and quality of content, which remain priorities for audiovisual policies.
6. The viewer, listener or reader of new audiovisual media services is having to bear greater responsibility for the content he or she may select and potentially even contribute to, while content regulation through national regulatory authorities is becoming less feasible. National legislators are, therefore, compelled to review their existing regulation and set up new means for achieving their objectives regarding audiovisual media policy, with the latter objectives still remaining valid also in the new media environment.
7. The Assembly supports in this context the Committee of Ministers' Declaration of 20 February 2008 on the allocation and management of the digital dividend and the public interest. When deciding on the allocation of radio-frequency spectrum, member states should also balance the spectrum needs of various technologies relating to both broadcasting and telecommunications. It will be particularly relevant to look at the availability of the spectrum for countries outside the European Union and, for all countries, how spectrum resources can be allocated to optimise opportunities for public service broadcasting.
8. Referring to the European Convention on Transfrontier Television (ECTT) (ETS No. 132), the Assembly notes that technological progress of electronic audiovisual media requires the revision of the ECTT and has led to legislative changes at national level as well as to a new Directive on Audiovisual Media Services for the member states of the European Union (AVMS Directive).
9. The Assembly notes that the AVMS Directive of the European Union has the main objective of ensuring freedom of services within the internal market of the European Union in accordance with primary European Community law. This approach differs from the ECTT, which has the aim of ensuring freedom of transmission and retransmission of broadcasting in Europe regardless of frontiers in accordance with Article 10 of the European Convention on Human Rights.
10. Having noted the current progress in drafting an amending protocol to the ECTT in order to transform it into a new Council of Europe convention, the Assembly believes that the following considerations should be taken into account:
 - 10.1. the possibilities for guiding the interpretation and supervising the application of this new convention should be reinforced;
 - 10.2. the "public service mission" for audiovisual media services should be defined and explained;
 - 10.3. the role of the Standing Committee should be re-examined with regard to its supervisory function over the compliance of conventional obligations and arbitration;

- 10.4. the transmission of on-demand audiovisual media services should be treated in a comparable way to television broadcast services and should not be subjected to the more restrictive provisions taken from the AVMS Directive of the European Union;
 - 10.5. guidance should be provided regarding the requirement of programmes 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;
 - 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.
11. The Assembly invites the Parties to the ECTT to take this recommendation into account when revising the ECTT.
 12. The Assembly recommends that the Committee of Ministers:
 - 12.1. forward this recommendation to competent ministries;
 - 12.2. allocate sufficient resources to the Standing Committee set up by the ECTT to fulfil the required supervisory function over the compliance of Parties with their conventional obligations;
 - 12.3. invite interested non-member states to accede to the revised convention with a view to extending the scope of this convention to other countries;
 - 12.4. instruct its competent steering committee to analyse future challenges to the enforceability of existing broadcasting regulation in the increasingly converging audiovisual media sector and develop policy guidelines for new means of content control, including through media self- and co-regulation, content search and filtering tools for users, media literacy of users, public support for content of cultural quality, and international co-operation against illegal content;
 - 12.5. instruct its competent steering committee to analyse the feasibility of setting up common standards among the Council of Europe member states for commercial audiovisual content falling outside the revised convention as well as for audiovisual content produced and shared publicly by users.
 13. The Assembly invites the ministers participating in the Council of Europe’s Ministerial Conference on the Media and New Communication Services (Reykjavik, May 2009) to express their continued support for:
 - 13.1. regulating their audiovisual media policies nationally as part of their general cultural policies, while ensuring international co-operation and respecting the right to freedom of information through audiovisual media services under Article 10 of the European Convention on Human Rights and Article 19 of the International Covenant on Civil and Political Rights;
 - 13.2. ensuring through appropriate regulation and practice the independence of their national regulators for the audiovisual media sector from undue party political, governmental or commercial influences;
 - 13.3. preserving the principle of public service broadcasting in the changing media environment and extending it further to audiovisual media services as a whole.
 14. The Assembly invites member states of the International Telecommunication Union of the United Nations to:
 - 14.1. advance international coordination of the technological standards necessary for the technological convergence of audiovisual media, while ensuring the right to freedom of information regardless of frontiers under Article 19 of the International Covenant on Civil and Political Rights;
 - 14.2. prepare for the World Radiocommunication Conference in 2011 decisions on the allocation of radio-frequency spectrum following the analogue switch-off of broadcasting in many countries.

B. Explanatory memorandum by Mr McIntosh, rapporteur

1. The Sub-Committee on the Media, which I have the pleasure to chair, organised in Paris on 17 November 2008 a hearing on this subject with a number of experts. The contributions made by these experts were taken into consideration in this report. The following experts participated (in chronological order): Mr Christoph Dosch (Chairman, Study Group 6 – Broadcasting Service, International Telecommunication Union, Geneva), Ms Séverine Fautrelle (Chargée de mission, Affaires réglementaires et européennes, Canal +, Paris), Ms Catherine Smadja (Head of special projects, policy and strategy, BBC, London), Mr Jean-Pierre Teyssier (Chairman of the European Advertising Standards Alliance in Brussels and President of the French Autorité de régulation professionnelle de la publicité, Paris), Ms Eve Salomon (media consultant, London), Mr Harald Trettenbrein (Deputy Head of the Audiovisual and Media Policies Unit of DG Information Society and Media, European Commission, Brussels), Mr Xavier Inglebert (Member of the Standing Committee on Transfrontier Television and adjoint au chef du Bureau des affaires européennes et internationales de la Direction du développement des médias du Premier ministre, Paris), Mr Antonio Amendola (Office of the Secretary General of the Italian Communications Regulatory Authority, Rome), Mr Gian-Luca Marsella (Lawyer, Swiss Federal Office of Communication, Biel) and Ms Emmanuelle Machet (Secretariat of the European Platform of Regulatory Authorities, Strasbourg).

2. Having initiated this report through a Motion for a Resolution (Doc. 10901) in April 2006 and been appointed rapporteur of the Committee on Culture, Science and Education in January 2007, I am grateful to the many experts who participated in this hearing in Paris and, in particular, to Eve Salomon who was also commissioned to draft this memorandum together with me.

1. Introduction

3. The European Convention on Transfrontier Television (ECTT) of the Council of Europe was opened for signature in 1989. Although it was amended by a Protocol in 2002, there have been no radical changes to the provisions relating to broadcasting across borders for nearly twenty years. The fact that the ECTT has stood the test of time is a testament to the fundamental principles which it espouses. However, although the principles may be robust, technological changes over the last two decades bring into question the relevance of the Convention's applicability. In particular, the introduction and widespread use of the Internet as a mechanism for the delivery of audiovisual material raises a potential inconsistency. Under the ECTT, services are only subject to regulation if they are delivered over terrestrial spectrum, cable or satellite. Those which operate under individual demand are specifically excluded.

4. In 1989, the Internet was a fledgling technology and there was no wish to fetter innovation by introducing burdensome regulation during its development. Whilst it may have been technically possible to put video on the Internet, the time it would take to download a few seconds of material would not be worth the poor quality pictures that would result. Furthermore, Internet service providers charged for every second on-line and 'television' over the Internet was not a realistic consumer proposition.

5. Two decades on and broadcasters are routinely offering catch-up television services over the Internet. The BBC in the United Kingdom has just announced (21 November 2008) that it will be broadcasting simultaneously its most popular programmes on-line. Cable and telecommunications operators have been providing on-demand film services for a number of years.

6. Without amendments to the ECTT, none of these services will be subject to the basic principles of the Convention – namely the right to free retransmission between Parties, subject to adherence to basic principles for the protection of fundamental rights and freedoms.

7. Article 10 paragraph 1 of the European Convention on Human Rights permits states to require "the licensing of broadcasting, television or cinema enterprises". The European Court of Human Rights decided in 1990 (*Groppera Radio v. Switzerland*) that Article 10 paragraph 1 has the purpose "to make it clear that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects." Broadcasting and television in this sense should not include Internet radio or Web television, which should not require national authorisations. Internet radio and Web television should instead be treated like Internet-based newspapers or Web sites with text, images and sound.

8. In 1989, the European Commission produced its own Directive, which deals with transfrontier television. Based on the ECTT, but focused on single market considerations, this Television Without Frontiers Directive was revised in 1997 and on 11 December 2007 into the new Audiovisual Media Services Directive 2007/65/EC (AVMS Directive). European Union member states have to implement it by the end of 2009.

9. In 2007, the Standing Committee of the ECTT started a drafting process to consider revisions to the ECTT. It is planned to have a final draft Protocol amending the ECTT in the first half of 2009.
10. Changes to the Television Without Frontiers Directive were triggered by changes in technology. Television is the most important mass media in Europe with over 6500 channels available. There has been a rapid uptake of on-demand services, with, according to European Audiovisual Observatory estimates, 338 such services, including 142 pay-per-view services, now available in the EU member states. The AVMS Directive has responded to these changes by extending its scope to include on-demand audiovisual services and introducing greater flexibility of advertising rules.
11. Whilst a general preference for harmonisation between the AVMS Directive and the ECTT may be desirable, it is important to bear in mind that the AVMS Directive is a Single Market instrument which has limited bearing on the concerns of the Council of Europe. In fact, the Council of Europe can apply regulation in relation to fundamental rights and freedoms which extend well beyond the competency of the European Commission. Care must be taken to ensure that, whilst those aspects of the revised EU Directive which correspond to Council of Europe concerns are retained, those which are market driven are not unwittingly introduced into the Council of Europe's ambit.
12. In addition, the European Commission is a very different legal structure to the Council of Europe. Through European Community law, EU member states have transferred national powers to the European Commission. Therefore, the European Commission can impose sanctions against member states that infringe European Community law. Member states of the Council of Europe commit themselves legally by signing public international law conventions, some of which have created supervisory organs with the power to impose sanctions, such as the European Court of Human Rights under the European Convention on Human Rights or the European Committee of Social Rights for violations of the European Social Charter. The ECTT has set up a Standing Committee, but its supervisory role is limited.
13. The AVMS Directive has introduced a range of procedural and legal safeguards to ensure consistent application of the Directive across the European Union. Not all of these procedures can be imported into the current draft revision of the ECTT. In particular, services could be interrupted in circumstances which are not foreseen in the Directive. This raises concerns about inconsistency for those states that are subject to both the Directive and the Convention.
14. This Explanatory Memorandum comments on the main issues raised by the draft revision of the ECTT as well as providing background to Council of Europe action concerning technological changes which are on the horizon and their possible consequences.
15. The Drafting Group of the Standing Committee on Transfrontier Television has proposed amendments to the ECTT as set out in their document T-TT-GDR(2008)003 (17 November 2008). Whilst many of the proposed changes are welcomed, some raise cause for concern. Each significant change is referred to below.

2. Scope of the ECTT

16. The Drafting Group has proposed changes in line with the AVMS Directive to include both linear and on-demand audiovisual media services. These changes are welcome in order to make the ECTT applicable and relevant to modern technological means of delivery and to ensure consistency with the scope of regulation in the European Union.
17. It is hoped that some guidance will be given to assist Parties in interpreting and applying the Convention, and in particular in determining what is and is not included within its scope. The AVMS Directive may be a useful model in this regard.
18. The Preamble to the AVMS Directive provides additional background and explanation to the definition of "audiovisual media services" including that the definition covers only those services which are mass media, "that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public". Furthermore, non-economic services are excluded from the Directive, "such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest." All private correspondence, such as e-mails, is specifically excluded, as are all services where audiovisual content is merely incidental to the service and not its principal purpose. It includes as examples "websites that contain audiovisual elements only in an ancillary manner; such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service." Electronic versions of newspapers and magazines are also specifically excluded.

19. Nonetheless, it is noted that a degree of flexibility remains for Parties to determine whether or not an audiovisual media service falls within the scope of the Convention.

20. At a recent meeting (29-31 October 2008) of the European Platform of Regulatory Authorities (“EPRA”), a discussion on this topic amongst EPRA members raised a degree of differing interpretation. The French regulator, the Conseil supérieur de l’audiovisuel, has identified difficulties in determining whether the extent of editorial control exercised by the service provider brings a service within the scope of the AVMS Directive. The Dutch are concerned with the definition of ‘programme’ and whether the principal purpose is the provision of programmes. They have queried whether the provision of audiovisual material on a newspaper’s website might bring the site within the scope of the Directive, notwithstanding the fact that no other member state has to date sought to include newspapers within the ambit of the Directive. The UK has also had concerns about editorial control, and also how to deal with a service which provides both linear and on-demand programming.

21. If there is inconsistency between the proposed revision of the ECTT and the new AVMS Directive, guidance at least equivalent to that in the Preamble to the Directive should be offered in support of the revised Convention, for instance through its Preamble and its Explanatory Memorandum.

3. Programming matters

3.1. Incitement

22. The draft revision of the ECTT extends the prohibitions relating to incitement to hatred to include incitement on the basis of sex, religion, and nationality in addition to race. This is welcomed.

3.2. Protection of Minors

23. In alignment with the AVMS Directive, the proposed draft removes the absolute prohibition on indecent and pornographic material and instead places the emphasis on protecting minors from accessing such material. This is appropriate given the changes in technology and regulatory tools which have developed since the ECTT was drafted in the 1980s.

3.3. News

24. The Drafting Group has retained the requirement that “news fairly presents facts and encourages the free formation of opinions” for television broadcasters and extended the obligation to on-demand services with a public service mission. It is welcomed that the Group has not removed the obligation on broadcast news nor sought to rely on various defamation cases involving journalists as assurance for the protection of journalistic standards on fairness and accuracy.

25. It would not be adequate to rely on jurisprudence regarding defamation as an alternative as it is quite possible to provide inaccurate or unfair news through omission, which is not necessarily actionable in law. The Parliamentary Assembly recommended a partial decriminalisation of defamation in its [Resolution 1577 \(2007\)](#). The principles distilled from defamation cases are unlikely to apply to situations where political, historical or cultural facts are distorted.

26. The obligation to provide fair and accurate news is vital for the support of freedom of expression under Article 10 of the European Convention of Human Rights. The right to receive information requires the ability to receive accurate news. In future, as citizens access a greater proportion of their news from on-demand sources, it will be vital to ensure that there remains at least one category of on-demand material which can be relied upon for accurate and fair news. The extension of the requirement to certain on-demand services is therefore strongly welcomed. However, for the sake of legal certainty, it might be helpful to include an explanation of what is meant by “a public service mission”.

3.4. Access

27. The new proposal to encourage accessibility to services for people with visual and hearing disabilities is also welcomed.

3.5. Short Reports

28. The proposed amendments to the ECTT include detailed provisions on the access of the public to information of public concern through short reports or extracts. This replaces the broad provisions in the current Convention which leaves implementation to Parties, and mirrors the AVMS Directive. This was introduced in order to safeguard the freedom to receive information and to protect the interests of viewers and is therefore welcomed.

3.6. "European"

29. Whereas the ECTT is open for signature by non-member states, including those from outside the geographic territory of Europe, the requirement for Parties to aim for the majority of programming to be of European origin has been clarified to refer only to European Parties to the Convention. ("European" in this context is obviously wider than the European Union.) The requirement only applies to television broadcast services, although providers of on-demand services are to be encouraged to promote European audiovisual works. This is strongly welcomed.

3.7. Independent Production

30. A new provision is proposed, mirroring the AVMS Directive, for European Parties (where practicable) to reserve at least 10% of programming (or the programming budget) for independent production. Whilst the Drafting Group has claimed this is in support of media pluralism, it is, in fact, a measure aimed at developing a specific industry sector. Pluralism has to do with the ownership – and hence editorial control – of media. In this regard, it is the owners of the audiovisual media services who exercise editorial control and of whom pluralism is expected. Independent producers are commissioned to make programmes by service providers; they do not in themselves necessarily provide plurality any more than do individual journalists working for a newspaper.

31. Recommendation R(2007)2 of the Committee of Ministers on Media Pluralism and Diversity of Media Contents specifically refers to the importance of ownership regulation to promote pluralism but no reference is given to independent production companies.

3.8. Media Pluralism

32. The draft expands the current provisions on media pluralism to include diversity of content, particularly by public service broadcasters. This is welcomed, as is the intention to promote full transparency of ownership.

4. Commercial Communications

33. The proposed new Article 18 of the Convention deals with advertising, tele-shopping and self-promotion. The general standards provided for under Articles 7 (Responsibilities of the broadcaster) and 11 (General standards concerning advertising and tele-shopping), as well as the rules on transparency provided for under Article 6 are fully applicable to all commercial communications. However, due to their nature, on-demand commercial communications are not subject to the limits concerning the amount of advertising spots and tele-shopping spots within a given clock hour nor to the regulations about the scheduling of advertising and tele-shopping.

34. These proposed revisions together with the remaining provisions regarding commercial communications are to be supported.

5. Standing Committee and restrictions to the principle of freedom of expression and retransmission

5.1. Standing Committee

35. The draft revision of the ECTT identifies a number of instances where, in the event of a conflict between two or more Parties, the Standing Committee would have an adjudicatory role. This raises significant concern about the appropriateness of the Standing Committee as an organ to undertake such work, particularly in urgent cases. It also has major resource implications.

5.2. Restrictions on transmission of broadcasting services

36. As in the current ECTT, a process is set out to deal with situations where a Party finds an alleged contravention of the Convention in a television broadcast which is transmitted under the jurisdiction of another Party. In such a case, the two Parties are expected to find a friendly solution and, only in the event of failure, may they seek arbitration by a tribunal set up by the Secretary General of the Council of Europe. The onus is very much on the Parties to settle their own issues.

5.3. Restrictions on transmission of on-demand services

37. Different proposals are, however, suggested for on-demand services. There are a number of serious issues arising from the draft Article 24*bis* of the proposed revision of the ECTT, not only in procedure, but in substance.

38. It is proposed that the transmission of on-demand services may be restricted regardless of whether or not they contravene the Convention, or indeed if there is any contravention of any law at all. Transmission may be restricted for reasons of public policy, protection of health, public security, or the protection of consumers (including investors). This is an enormously wide brief. It suggests that a service could be blocked simply because it provided direct competition to a domestic service (on public policy grounds and to protect investors). Further, it leaves it open for Parties to block access to on-demand services which are critical of the receiving Party's government.

39. The wording of draft Article 24*bis* comes from the AVMS Directive, but with neither the policy history which informed the AVMS Directive nor the procedural safeguards provided by the European Commission.

40. Special provisions relating to on-demand services were included in the AVMS Directive because of the requirements of the e-Commerce Directive, which dates back to 1998. This Directive has as its specific purpose the smooth running of the internal market in Information Society Services. It is sponsored by the European Commission's DG Internal Market and not by DG InfoSoc.

41. The Preamble to the e-Commerce Directive specifically states that the scope of the Directive "should not prevent member states from taking account of the different social, societal and cultural implications inherent in the advent of the Information Society; whereas, in particular, the use of the procedural rules laid down (in the Directive) should not affect cultural policy measures, particularly in the audiovisual field, which member states might adopt in accordance with Community law, taking account of their linguistic diversity, their specific national and regional characteristics and their cultural heritage..."

42. It further specifies, "that the development of the Information Society should ensure, in any event, proper access of European citizens to the European cultural heritages supplied in a digital environment." Importantly, it says that the Directive "is not intended to apply to national rules relating to fundamental rights, such as constitutional provisions concerning freedom of expression".

43. So why are on-demand services subject to specific and potentially broad ranging restrictions in the AVMS Directive? The reason is that they are included in the definition of "Information Society Services" in the e-Commerce Directive. It is likely that they would have remained subject to the e-Commerce Directive, but, according to DG InfoSoc, it was considered advisable for the sake of clarity to include the specific derogations also in the AVMS Directive.

44. However, this does not provide any explanation as to why on-demand services should be included in the ECTT. The Council of Europe has no equivalent to the e-Commerce Directive, nor does it have the mandate to regulate the European Union's internal market in Information Society services. The fact that on-demand services may face tougher regulation within European Union member states is a matter for those states, and will continue to be the case regardless of different, less onerous Commission provisions. To seek to import European Commission internal market provisions into the ECTT is inappropriate and beyond the remit of the Council of Europe.

45. There are additional procedural problems with the proposed amendment. First, the proposal sets out that before taking action to restrict transmission, the Party must notify the Standing Committee of its intention to take measures. In the case of urgency, this too must be notified to the Standing Committee "in the shortest possible time". No procedure is set out to explain what happens after the Standing Committee is so notified.

46. By contrast, the AVMS Directive says, "the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time. Where it comes to the conclusion that the measures are incompatible with Community law, the Commission shall ask the member state in question to

refrain from taking any proposed measures or urgently to put an end to the measures in question.” Without an equivalent provision in the ECTT, there is a possibility that access to services could remain blocked for considerable periods, with the only recourse being to the European Court of Human Rights under Article 10 of the European Convention on Human Rights.

47. If the intention is for the Standing Committee to act as would the European Commission, this is unrealistic. The Standing Committee does not have the same authoritative role. It cannot, for example, bring administrative or judicial proceedings for infringements. It is a body composed of the Parties to the ECTT, but not a suitable adjudicator for urgent issues.

48. It is strongly recommended that this provision is deleted and that on-demand services are treated in a comparable way to television broadcast services.

5.4. Internal laws of the Parties and restrictions on retransmission

49. Draft Article 28 of the proposed revision of the ECTT deals with the relations between the Convention and the internal law of the Parties, and especially circumstances where a Party considers that a broadcaster has established itself in another jurisdiction in order to circumvent the application of stricter rules. In such cases, the Party must assess that the broadcast is “wholly or mostly directed towards its territory.”

50. In order to avoid unnecessary dispute, it would be helpful to offer some guidance to help Parties determine whether a broadcast is, or is not, “wholly or mostly directed towards its territory.” The AVMS Directive introduces a similar test, but helpfully includes in its Preamble that, when assessing the matter on a case-by-case basis, reference may be made “to indicators such as the origin of the advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the member state where they are received.” The inclusion of similar guidance in the new Convention would be welcomed.

51. The proposed new Article 28 raises considerable issues with regard to the ability of Parties to take measures against broadcasters in other jurisdictions. Under the existing provisions (Article 24 of the ECTT), a Party cannot, without prior agreement, take any measures against a broadcaster until a set of procedures has been exhausted.

52. Before referring the matter to the Standing Committee, both the receiving Party and the Party where the broadcaster is established shall endeavour to reach a friendly settlement. If they have not done so within three months, the matter can be referred to the Standing Committee which will give an opinion within six months. If the Standing Committee decides there has been an abuse of rights, the receiving Party may take appropriate measures to remedy the abuse. If the Party which has jurisdiction fails to take the appropriate measures within six months, an arbitration procedure can be invoked. The receiving Party may not itself take any action until completion of the arbitration procedure.

53. By contrast, the new proposed provisions permit the receiving Party to take measures directly against the broadcaster concerned if liaison with the Party with jurisdiction does not achieve satisfactory results within two months. There is no requirement to obtain an opinion from the Standing Committee or to seek arbitration. Whilst there is a requirement to notify the Standing Committee of the proposed action, it is only in view of an opinion; there are no mandatory prerequisites before action can be taken.

54. The proposed new provision seeks to replicate the AVMS Directive, but without importing the safeguards provided by European Community law.

55. The Preamble to the AVMS Directive explains, “To deal with situations where a broadcaster under the jurisdiction of one member state provides a television broadcast which (...) is wholly or mostly directed towards the territory of another member state, a requirement for member states to cooperate with one another and, in cases of circumvention, the codification of the case law of the European Court of Justice, combined with a more efficient procedure, is an appropriate solution that takes account of member state concerns without calling into question the proper application of the country of origin principle. The notion of rules of general public interest has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The requesting member state should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner, suitable for attaining the objectives which they pursue and do not go beyond what is necessary to attain them.”

56. In other words, there is a requirement under the AVMS Directive for the receiving Party to ensure that its own, national laws are fully compliant with European Union law in both content and proportionality before taking action against a broadcaster for non-compliance with those national laws. By contrast, there is no requirement in the proposed revision of the ECTT for the receiving Party's national laws even to be compliant with the European Convention on Human Rights (ECHR). Under the new proposals, it would be open for a receiving Party to restrict retransmission of a broadcaster who, while exercising freedom of expression rights under Article 10 of the ECHR, was critical of the receiving Party's government.

57. Furthermore, the proposed revision of the ECTT does not contain the procedural safeguards set out in the AVMS Directive. The Directive states that measures can only be taken by the receiving member state if the European Commission has been notified *and* has decided that the measures are compatible with Community law *and* that the assessment made by the receiving Party is correctly founded. The European Commission will reach a decision within three months of notification and no action can be taken until then.

58. Whilst it is understandable and reasonable for Parties to wish to be able to have redress against broadcasters who broadcast into their country but deliberately establish themselves outside of the country with the intention of circumventing national rules, it is not acceptable for proper rules of procedure and natural justice to be ignored. There is, in particular, no justification for Parties to be allowed to take unilateral action where national laws are disregarded, whereas proper procedures must be followed before taking action against a violation of the Convention itself (see Article 24).

59. Accordingly, it is strongly recommended that rules are included to prevent action being taken to restrict transmission without the prior agreement of the Standing Committee that such measures are warranted and proportionate.

6. Future Technologies and the European Convention on Transfrontier Television

60. By 16 June 2015, analogue television signals throughout the Parties to the ECTT will have been switched off. Within the European Union, switch-off will have happened sooner, by 2012. Already, Luxembourg, Andorra, Switzerland, the Netherlands, Finland and Sweden have completed the transition to digital, and many other countries have begun the process.

61. The Declaration of the Council of Europe's Committee of Ministers dated 20 February 2008 on the allocation and management of the digital dividend and the public interest, discusses the need to take into account social, cultural and general public interest considerations when determining the allocation of the digital dividend (the radio-frequency spectrum which will become available as a result of the switchover from analogue to digital television broadcasting).

62. It declares that member states should: (1) acknowledge the public nature of the digital dividend resulting from the switchover and the need to manage such a public resource efficiently in the public interest, taking account of present and foreseeable future needs for radio spectrum, (2) pay special attention to the promotion of innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services in the allocation and management of the digital dividend and, for this purpose, take in due account the needs of broadcasters and of the media at large, both public service and commercial media, as well as those of other existing or incoming spectrum users, and (3) consider the benefit that the allocation and management of the digital dividend may bring to society in terms of an increased number of diversified audiovisual services, including mobile services, with potentially improved geographical coverage and interactive capability, as well as services offering high definition technology, mobile reception, or easier and more affordable access.

63. The Parliamentary Assembly should welcome and support this Declaration in the context of this report.

64. When deciding on the allocation of the digital dividend, member states will need to balance the spectrum needs of various technologies relating to both broadcasting and telecommunications. But even within the broadcasting sphere, there are several technological developments which will impact upon spectrum allocation.

6.1. High Definition Television ("HDTV")

65. HDTV offers higher resolution services which are broadcast digitally. Viewer enjoyment is enhanced, particularly of live action sporting events and films. As HDTV uses more spectrum than standard definition, member states will need to consider the extent to which HDTV should be offered as against the provision of a greater overall number of services.

66. In the UK, the regulator Ofcom has recently announced that part of the digital dividend will be used to give existing public service broadcasters capacity to deliver HDTV. There is evidence to suggest that in France the availability of HDTV has led to the growth of the digital terrestrial television platform, especially for Pay-TV.

6.2. Mobile Television

67. Although there is a range of different technologies and technical standards available around the world for delivering mobile television, the standard which has been declared as the “preferred” standard by the European Commission is DVB-H. DVB-H can use the same spectrum block as used by digital television in Europe.

68. A new, more spectrum efficient standard, DVB-H2, has recently been developed for use from 2010. Some European countries, such as France and Italy, have launched mobile television services, whereas others, including Germany and the UK, have abandoned early trials. Nonetheless, there is a large interest in developing mobile television, particularly amongst receiver manufacturers, such as Nokia.

6.3. Advanced Compression Standards

69. Using the current compression standard of MPEG2, one digital frequency channel can carry either four TV programme channels (plus audio and data services) or one HDTV service (plus audio and data services). By comparison, an analogue frequency channel could only carry one television channel (with no additional audio or data services).

70. An improved compression standard, MPEG4, is now available, allowing about 50% more data to be sent down the same channels as MPEG2. Not all existing operators are interested in moving to MPEG4 as this will involve updating existing equipment. But those countries that have yet to introduce digital broadcasting will no doubt wish to consider adopting the most up-to-date, efficient technology available.

6.4. IPTV

71. IPTV is a television service delivered over the Internet (usually by broadband), and typically supplied by a telecommunications supplier using a closed network. Where web access, IPTV and Voice over Internet Protocol (VoIP) are bundled together in a commercial package to consumers, this is called “Triple Play”. IPTV can be streamed video, or video on demand.

72. Most developed economies now have IPTV offerings. The world’s leading markets are currently France with over 4 million subscribers, South Korea with nearly 2 million, Japan, Italy, Spain, Belgium, and China.

6.5. LTE and WiMAX

73. There are a number of new technologies which enable delivery of data at very high speeds, making more efficient use of broadband, including wireless, and thus offering greater possibility of mobile TV over the Internet. WiMAX is compatible with both 2G and 3G telecoms networks, whereas LTE (3GPP Long Term Evolution) would use a so-called 4G network.

6.6. The Issues

74. The switch-over to digital transmission and the cessation of analogue transmission will release substantial amounts of radio spectrum. Countries are currently considering how to exploit this resource. It will be particularly relevant to look at the availability of the spectrum for non-European Union countries and, in the case of all countries, for example, how spectrum resources can be allocated to optimise opportunities for public service broadcasting.

75. Technological progress will increase the number of channels, programmes and services. This will provide viewers and listeners with a wider choice. However, plurality and diversity of content remain priorities. More channels do not necessarily mean more diverse content.

76. Eventually, much, if not all, of what we now consider broadcasting may be delivered over the Internet. This may obviate the need for, or the possibility of, much regulation (for example, licensing) and means that this is an area which should be the subject of a future report.

77. Although it is hoped that the new Convention will remain fit for purpose for a number of years, as the balance of viewing shifts to on-demand and Internet delivery, the provisions of the Convention will need to be revisited to ensure not only that any provisions are enforceable, but also that they remain relevant and proportionate in a world where the viewer controls his or her access to countless sources of content which know no geographic boundaries.

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N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mr Grayson, Mr Ary, Mr Dossow