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The regulation of audiovisual media services

Reply to Recommendation[1]: Recommendation 1855 (2009)
Committee of Ministers

1. The Committee of Ministers has examined Parliamentary Assembly Recommendation 1855 (2009) on "The regulation of audiovisual media services". It has drawn the attention of its member states to the recommendation and has forwarded it to its Steering Committee on the Media and New Communication Services (CDMC) and to the Committee of the Convention on Cybercrime (T-CY) for information and possible comments. The CDMC's opinion is appended to this reply (Appendix 1).

2. In addition, at their 1048th meeting (11 February 2009), the Ministers' Deputies agreed to bring Recommendation 1855 (2009) to the attention of the Standing Committee on Transfrontier Television (T-TT), asking the T-TT to supply information about the action taken on the recommendation at the time of transmission of a draft amending Protocol to the European Convention on Transfrontier Television. In October 2009, the draft Protocol was submitted to the Deputies for adoption; the T-TT's comments which are contained in Appendix 2 were also submitted to the Deputies on that occasion. Following a request for postponement, the decision to transmit the draft Protocol to the Parliamentary Assembly for an opinion is still pending.

3. The Committee of Ministers wishes to recall the many and varied activities which have been undertaken – and will continue to be undertaken – under its authority in the media field. Concerning the future work of the Council of Europe, the Committee of Ministers recalls that on 8 July 2009, it adopted terms of reference for several bodies answerable to the CDMC which could permit the future adoption of major policy instruments (for example recommendations or declarations of the Committee of Ministers). It refers in particular to the terms of reference of a Committee of Experts on New Media (MC-NM) responsible for preparing in 2010 a policy document redefining the concept of media in order to include the new media and mass communication services akin to media and the service suppliers concerned.

4. The Committee of Ministers also wishes to draw attention to the texts adopted at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, 28-29 May 2009), texts which the Committee has transmitted to the Parliamentary Assembly for information at its 1068th meeting (21 October 2009). The Committee has since then made the necessary arrangements to implement the actions envisaged in these texts. In particular, it has invited the CDMC to ensure multi-stakeholder participation in carrying out the relevant parts of its terms of reference and, in the framework of its activity, to give priority attention to the preparation of legal instruments designed (i) to maintain or strengthen protection of the transfrontier flow of Internet traffic and (ii) to protect the resources which are essential to the Internet's continuous functioning, transfrontier character and integrity (that is, crucial Internet resources).

5. The Committee welcomes the Assembly's interest in increasing international co-operation to combat illegal content. It recalls nonetheless that the Convention on Cybercrime (ETS No. 185) already covers an offence relating to the production or distribution of child pornography (Article 9) and makes provision for establishing as criminal offences infringements of intellectual property and related rights (Article 10). Besides, the additional Protocol to the Convention, adopted in 2003, extends the scope of the Convention, including

1. adopted at the 1081st meeting of the Ministers' Deputies (31 March 2010)

that of international co-operation, so that offences concerning racist and xenophobic propaganda are also covered. In these circumstances, it appears that the preparation of a new protocol to the Convention is not called for.

Appendix 1 to the reply

Comments of the Steering Committee on the Media and New Communication Services (CDMC)

1. The CDMC warmly welcomes Parliamentary Assembly Recommendation 1855 (2009) on "The regulation of audiovisual media services". It broadly agrees with the Assembly's position as regards the revision of the European Convention on Transfrontier Television. Moreover, the CDMC especially appreciates the Assembly's foresight in respect of certain emerging issues which, while broadly related to audiovisual media services, may well exceed the current understanding of what those services are.

In line with the CDMC's own thinking, the recommendation also signals new areas for Council of Europe work linked to the freedom of expression and information regardless of frontiers guaranteed by Article 10 of the European Convention on Human Rights.

The CDMC believes that the Parliamentary Assembly recommendations merit favourable consideration from various bodies concerned, having also regard to the observations set out below.

2. The CDMC notes that the Parliamentary Assembly considers that Internet radio or Web television should not be subject to licensing. The CDMC has not had the opportunity to gather information on the situation across Europe on this subject or to hold an in-depth discussion on the subject. It notes that Article 10 of the European Convention on Human Rights permits states to require the licensing of broadcasting, television or cinema enterprises. The CDMC understands from the relevant case law of the European Court of Human Rights that licensing may be used as an instrument to manage limited resources (e.g. in terms of radio-frequency spectrum) in the common interest (i.e. so as to ensure media pluralism and diversity). However, all such measures must meet the tests of legality, necessity in a democratic society and proportionality. It goes without saying that regulation concerning Internet radio and Web television must meet these general requirements. The CDMC will have to come back to this issue in the future.

3. The CDMC notes the Parliamentary Assembly's support for the Committee of Ministers' Declaration on the allocation and management of the digital dividend and the public interest, adopted on 20 February 2008 (cf. paragraph 7 of the recommendation). Council of Europe member states should indeed be encouraged to have regard to this important declaration when participating in the activities of relevant international bodies (e.g. those referred to in paragraph 14 of the recommendation, as well as the European Conference of Postal and Telecommunications Administrations – CEPT).

4. The CDMC fully endorses the remarks made in paragraph 9 of the recommendation. It would add that there should be broad alignment between the provisions of the European Union Directive on Audiovisual Media Services and the European Convention on Transfrontier Television; it would be undesirable and unworkable for member states to be bound by two conflicting regulatory frameworks.

Against this background, it should be borne in mind that Council of Europe member states which are party to the European Convention on Transfrontier Television and that are also bound by European Union law must apply the latter in full compliance with the provisions of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights. The Standing Committee on Transfrontier Television (T-TT) must be especially attentive to these requirements during its subsequent interpretative work (including in respect of various recommendations made in paragraph 10 of the Parliamentary Assembly recommendation).

5. It is important that the T-TT should be allocated sufficient resources (cf. paragraph 12.2 of the recommendation) to respond to its real needs and its level of activity.

As already suggested by the Parliamentary Assembly itself (cf. paragraph 10.6 of the recommendation), decisions that may have a bearing on the exercise of the right to freedom of expression and information regardless of frontiers require significant procedural safeguards. In the CDMC's view, this requirement applies *mutatis mutandis* to the use by the T-TT of the proposed reinforced powers (cf. paragraph 10, in particular sub-paragraphs 1, 3 and 6, of the recommendation).

6. Due attention has to be paid to Article 10 of the European Convention on Human Rights also in respect of on-demand services and issues relating to circumvention (cf. paragraph 10, sub-paragraphs 4 and 5, of the recommendation). A restriction to the exercise of Article 10 freedoms on the basis of the provisions in the revised European Convention on Transfrontier television and those in the European Union Audiovisual Media Services Directive must, nevertheless, satisfy the Article 10 tests. The T-TT might be invited to provide in due course further guidance on this matter.

7. In line with its own views expressed on past occasions, the CDMC agrees that non-member states should be invited to accede to the revised Convention with a view to extending the scope of this Convention to other countries. Efforts might usefully be made to this end through awareness raising and technical assistance to countries which are at the source of audiovisual media services received within member states or the recipients of equivalent services emanating from Europe. Given common interests in this respect, European Union institutions would be an excellent partner. In the first instance, efforts could focus on selected southern Mediterranean countries, especially those that have already expressed interest in the European Convention on Transfrontier Television. Moreover, the CDMC would underline the importance of encouraging the fourteen Council of Europe member states that have not yet ratified the Convention to do so.

8. In so far as it concerns the CDMC, the recommendation to the Committee of Ministers contained in paragraph 12.4 of the Parliamentary Assembly's recommendation is very timely. The CDMC is currently finalising the preparation of the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services that will take place in Reykjavik, Iceland, on 28 and 29 May 2009. It will be the occasion to map out future Council of Europe work on media and new media or comparable media-like mass-communication services. The objective should be to reinforce their protection from undue interference, including in a cross-border context, in compliance with Article 10 of the European Convention on Human Rights and, on the other hand, to ensure that the providers of those services are adequately informed of their duties and responsibilities which also stem from Article 10.

Furthermore, a people-centred approach also requires that individuals are allowed to exercise their right to free expression and information and use new communication services to participate in social, political, cultural and economic life without undue restriction. Enabling them to exercise their rights without infringing the rights of others requires, as proposed by the Parliamentary Assembly, paying attention, *inter alia*, to media literacy.

9. The Parliamentary Assembly recommendation "to analyse the feasibility of elaborating common standards among Council of Europe member states for both commercial audiovisual content which are falling outside the revised Convention on Transfrontier Television and for publicly shared user generated audiovisual content" merits particular attention. The CDMC trusts that the Ministers who will participate in the above-mentioned Reykjavik Conference will consider this matter and, if appropriate, offer the necessary political backing for this standard-setting activity.

10. Finally, it is expected that issues referred to in paragraph 13 of the Parliamentary Assembly recommendation, in particular in sub-paragraph 3 thereof, will feature among the topics to be addressed during the above-mentioned Ministerial Conference and its outcomes.

11. The CDMC looks forward to further discussions on at least some of the above matters at the Reykjavik Conference. In view of this, it feels that it would be desirable that representatives of the Parliamentary Assembly – who will be present in Reykjavik for a Sub-Committee on the Media meeting just before the Ministerial Conference – also attend and take part in the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services.

Appendix 2 to the reply

Comments of the Standing Committee on Transfrontier Television (T-TT)

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 (draft revised convention, consolidated text in CM(2009)144 add3), 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 (CM(2009)144 add4) fulfil this role in a satisfactory manner. Reference is made in particular to paragraphs 88 to 149 of this 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 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 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 questions 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 draft revised convention by broadcasting services (Article 28 of the draft). 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 wider margin of interpretation 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 Standing 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[2]

The Standing Committee notes that, in the draft revised 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 paragraphs 72 and 414 of the 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 receiving Parties a wide margin of appreciation with regard to the restriction of on-demand audiovisual services from other state Parties, its paragraph 4 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 explanatory report to the draft convention gives further guidance on this issue (paragraph 438).

For European Union member states and for transfrontier media 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 (draft 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 to the convention, whether they are member states of the European Union or not.

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 explanatory report to the draft convention meets the needs of the Parties on this question (see in particular paragraphs 458 as well as 347 to 357). 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.

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2. Audiovisual Media Services Directive (AVMS). Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directive 89/552/EEC, on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services.