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Revision of the European Convention on Transfrontier Television

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr James CLAPPISON, United Kingdom, European Democrat Group

Summary

The European Convention on Transfrontier Television – which was the first multilateral treaty to ensure the unimpeded transmission of programmes across borders – is now 24 years old, having been revised only once around ten years ago. Originally intended to set minimum standards for programming, advertising and sponsorship, it has largely been overtaken by technological and societal changes. In European Union member States, it has also been superseded by a series of evolving European Union directives with the same aim. Indeed, plans for a further update to the convention were stopped in 2011 after objections from the European Commission that it alone had exclusive competence in this field as regards European Union member States.

And yet, as this report makes clear, 13 of the 33 Council of Europe States to have ratified the convention are not members of the European Union. In the current situation, these countries are prevented, in a constantly changing media environment, from having an updated legal instrument, with a consequent risk of diverging standards.

For the Committee on Legal Affairs and Human Rights, the way forward is for the Council of Europe to revise and modernise the convention so that it takes account of the latest technological standards. The European Union, for its part, should resume talks with the Council of Europe on this, in order to create a truly pan-European legal framework for media freedom issues.

1. Reference to committee: Doc. 12752, Reference 3820 of 25 November 2011.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls that the European Convention on Transfrontier Television (ETS No. 132, "the ECTT") was the first international legal instrument ensuring unimpeded transmission of programmes regardless of borders and that it was opened for signature shortly before the European Economic Community (now European Union) adopted its Directive 89/552/EEC "Television without Frontiers".

2. The Assembly notes that the European Union legal framework on audiovisual services has evolved with technological changes since 1989, in particular through the adoption of the Audiovisual Media Service Directive ("AVMS Directive") in 2007; by contrast, the ECTT has been revised only once, in 2002, and the work on its draft second amending protocol was discontinued in 2009 following the European Union's objection on the grounds that it had exclusive competence in this field.

3. The Assembly deplores that the revision of the ECTT and the work of its Standing Committee (T-TT) was discontinued. It notes that the current situation may lead to normative conflicts in member States bound by the updated European Union Directive and the unamended ECTT and prevents non-European Union member States from having an updated legal instrument in a constantly changing media environment.

4. It recalls that media regulation, closely linked to the right to freedom of expression, has been a priority of the Council of Europe, which has set relevant standards in this field. Therefore, the Assembly is convinced that the Council of Europe should revise and modernise the ECTT in order to adapt it to the newest technological standards.

5. The Assembly therefore calls on the European Union to:

   5.1. clarify which issues related to the regulation of audiovisual media services fall outside the scope of its exclusive competence;

   5.2. resume talks with the Council of Europe on the revision of the ECTT;

   5.3. consider other possible avenues aimed at adopting a modern legal framework governing media freedom issues at the pan-European level.

6. The Assembly also calls on member States of the European Union to:

   6.1. exert their influence within the European Union in order that work on the revision of the ECTT may be resumed;

   6.2. promote the establishment of a coherent pan-European legal framework for media freedom, protecting freedom of expression and taking into account recent technological changes.

7. The Assembly calls on all member States of the Council of Europe to promote the revision of the ECTT and to uphold the Council of Europe's leading role in setting standards on media policies and laws protecting freedom of expression in Europe.

2. Draft resolution adopted unanimously by the committee on 12 December 2013.

B. Draft recommendation[3]

1. Referring to its Resolution … (2014) on the revision of the European Convention on Transfrontier Television, the Parliamentary Assembly recommends that the Committee of Ministers:

1.1. resume work on the revision of the European Convention on Transfrontier Television (ETS No. 132) and negotiations with the European Union on this matter;

1.2. enable the Standing Committee on Transfrontier Television (T-TT) to resume its work;

1.3. if need be, consider drafting a new convention focusing on freedom of expression aspects of media regulation;

1.4. draft guidelines on media freedom adapted to the changing media landscape, based on existing standards, including those stemming from the case law of the European Court of Human Rights on the right to freedom of expression.

3. Draft recommendation adopted unanimously by the committee on 12 December 2013.

C. Explanatory memorandum by Mr Clappison, rappôrteur

1. Introduction

1. On 25 November 2011, the Parliamentary Assembly referred to the Committee on Legal Affairs and Human Rights, for report, the motion for a recommendation entitled "Revision of the European Convention on Transfrontier Television".[4] At its meeting on 13 December 2011, the committee appointed me as rapporteur. On 25 March 2013, I undertook a fact-finding mission to Brussels. During our committee meeting in April 2013, I proposed to hold an exchange of views regarding the relationship with the European Union with the Secretary General of the Council of Europe, Mr Thorbjørn Jagland. As Mr Jagland could not take part in such an exchange of views during the June part-session, he designated Mr Jan Kleijssen, Director of the Information Society and Action against Crime Directorate, with whom the committee held an exchange of views regarding the relationship with the European Union concerning transfrontier television on 27 June 2013. Subsequently, on 4 September 2013, at its meeting in Paris, the committee held a hearing with the participation of two experts:

– Mr Tarlach McGonagle, Senior Researcher, Institute for Information Law (IViR), Faculty of Law, University of Amsterdam, Netherlands;

– Mr Jean-Paul Jacqué, Honorary Director General and Special Counsellor to the Council of the European Union, Brussels, and visiting professor at the College of Europe, Bruges, Belgium.

2. The movers of the underlying motion regret the discontinuation of work on the draft second amending protocol to the Council of Europe's European Convention on Transfrontier Television (ETS No. 132, "the ECTT") of 1989, following the intervention of the European Commission, claiming that the European Union (and not its member States) is the only body competent to enter into international agreements in the field covered by the ECTT. As a consequence of this approach of the European Union, in January 2011, the Council of Europe stopped the process of revision of the ECTT. Therefore, those EU member States which have ratified the ECTT are bound by its provisions and also by those of the European Union's Audiovisual Media Service Directive 2007/65/EC[5] of 2007 ("AVMS Directive"), while non-EU member States are only bound by the ECTT. The movers of the motion stress that this situation affects non-EU members and that "work upon the revision of the Council of Europe Convention on Transfrontier Television must proceed without further delay or interference from the European Commission in the interests of the wider Europe not represented by the European Union".

3. In 2009, before the work on the revision of the ECTT was discontinued, the issue of its modernisation had already been the subject of a report by the Committee on Culture, Science and Education which resulted in the adoption, by the Assembly, of Recommendation 1855 (2009) on the regulation of audiovisual services.[6] In this recommendation, the Assembly considered that technological progress of electronic audiovisual media required the revision of the ECTT and noted that the approaches of both legal instruments were different: while the AVMS Directive's objective consisted in "ensuring freedom of services within the internal market of the European Union in accordance with primary European Community law", the ECTT was aimed at "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".[7]

4. The subject in question touches upon issues which are both legal and political. Is it still possible to "revive" the ECTT and adopt its draft second amending protocol? Or have they both become obsolete in the constantly changing media landscape? What would be the implications of a possible "death" of the ECTT on the Council of Europe's lead role in developing media law and policies? In my report, I have therefore decided to inquire into the reasons why the European Commission withdrew from the process of the ECTT revision, to study the relationship between the ECTT and the European Union's AVMS Directive and to reflect on the added value of the ECTT. I also propose possible avenues, other than adopting the draft second amending protocol to the ECTT, to handle this impasse stemming from the European Union's objection to its adoption by EU member States.

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4. Doc. 12752.
5. Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (amending Council Directive 89/552/EEC), OJEU L 332 of 18 December 2007, pp. 27-45.
6. See also Doc. 11775 (rapporteur: Mr Andrew McIntosh, United Kingdom, SOC).
7. Paragraphs 8 and 9 of the recommendation.

2. European legal framework on audiovisual services

2.1. Council of Europe legal framework

5. The regulation of the media, as a sub-field of freedom of expression, has been a priority for the Council of Europe for a significant period of time. The right to freedom of expression, guaranteed in Article 10.1 of the European Convention on Human Rights (ETS No. 5, "the Convention"), includes, *inter alia,* the right "to receive and impart information and ideas without interference by public authority and regardless of frontiers"; it can only be restricted under the conditions listed in paragraph 2 of Article 10. Similar provisions are found in Article 9 of the Framework Convention for the Protection of National Minorities (ETS No. 157) and Article 11 of the European Charter for Regional or Minority Languages (ETS No. 148). The transfrontier dimension of the right to freedom of expression is of particular relevance for national (linguistic) minorities, for which transfrontier television can be a crucial way of maintaining ties with their original cultures, languages and kin-States. In its case law, the European Court of Human Rights ("the Court") has further confirmed the role of the State in guaranteeing media pluralism and the public's right to receive a range of information and ideas.[8]

6. The European Convention on Transfrontier Television was opened for signature in 1989. It has been ratified by 33 member States of the Organisation, among which 20 are also member States of the European Union.[9] It was amended only once by a protocol in 2002 (ETS No. 171)[10] following amendment to the ECC Directive. There have, therefore, been no major changes to the provisions relating to broadcasting across Council of Europe member States' borders for almost 20 years.

7. The ECTT, which had been opened for signature shortly before the European Union adopted its Directive 89/552/EEC on Transfrontier Television,[11] is the first international treaty creating a legal framework for the free transmission of transfrontier television programmes in Europe. The main aim of the convention is to implement minimum common standards in fields such as programming, advertising, sponsorship and the protection of certain individual rights. It entrusts the transmitting States with the task of ensuring that television programme services comply with its provisions. Furthermore, the right to receive and to retransmit programme services which comply with the minimum rules of the convention is guaranteed.

8. The ECTT applies to all transfrontier programmes regardless of the technical means of transmission used. The convention contains no distinction between on-demand and free media services. While protecting the core values enshrined in Articles 8, 10 and 14 of the European Convention on Human Rights, its main provisions cover: freedom of expression; protection and retransmission; access for the public to events of major importance defined by the Parties; right of reply; prohibition of pornography, violence and incitement to racial hatred; youth protection; advertising standards; advertising time; advertising break; and programme sponsorship rules. Finally, the ECTT contains provisions enhancing European productions and cinema by reserving a certain amount of time for them.

9. A Standing Committee on Transfrontier Television (T-TT) composed of representatives of each Party is responsible for monitoring the application of the convention. Procedures for conciliation and arbitration are also provided for. In 2007, the Standing Committee of the ECTT started a drafting process to consider revisions to the ECTT, which led to the elaboration of the draft second protocol amending the ECTT.[12]

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8. See, in particular, *Informationsverein Lentia and Others v. Austria*, Application No.13914/88, judgment of 24 November 1994, and *Demuth v. Switzerland*, Application No. 38743/97, judgment of 5 November 2002.

9. For an overview of the current signatures and ratifications, see: www.conventions.coe.int/Treaty/Commun/Cherche Sig.asp?NT=132&CM=8&DF=18/07/2012&CL=ENG.

10. So far the protocol has been ratified by 25 member States. For an overview of the current signatures and ratifications, see: www.conventions.coe.int/Treaty/Commun/Cherche Sig.asp?NT=171&CM=7&DF=18/06/2013&CL=ENG.

11. Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJEU L 298 of 17 October 1989, pp. 23-30.

12. The text of the draft second protocol amending the European Convention on Transfrontier Television and its explanatory memorandum is available at: www.coe.int/t/dghl/standardsetting/media/t-tt/T-TT_2009_007FIN_en%20second%20protocol%20amendment.pdf.

2.2. European Union legal framework

10. In 1989, the then European Community adopted its own Directive dealing with transfrontier television. Inspired by the ECTT, but primarily focused on internal market considerations, this Television without Frontiers Directive was revised in 1997 and turned into a new Audiovisual Media Service Directive 2007/65/EC (AVMS Directive) in 2007. European Union member States were bound to transpose it by the end of 2009.

11. The AVMS Directive amends and renames the Television without Frontiers Directive and provides less detailed and more flexible regulations. It also modernises television advertising rules to better finance audiovisual content. It covers all services with audiovisual content irrespective of the technology used to deliver the content and it is therefore governed by technological neutrality. The only existing distinction is between linear and on-demand services. In this two-tier system of rules, the Directive takes into account a set of core societal values applicable to all audiovisual media services and provides lighter regulation to on-demand services where the users have a more active, "lean-forward" approach and can decide on the content and the time of viewing.

12. Putting into practice the free movement of services under EU law and the Charter of Fundamental Rights of the European Union, the main provisions of the AVMS Directive deal with: guaranteeing freedom of reception and transmission; safeguarding media pluralism; providing rules to shape technological developments; preserving cultural diversity; protecting children and consumers; combating racial and religious hatred; and guaranteeing the independence of national media regulators.

2.3. Recent developments

13. Some sectors within the European Commission seem to be coming to the conclusion that a normative conflict between EU rules and the Council of Europe's ECTT is likely to occur. On 23 October 2009, the then European Union Commissioner for Information Society and Media, Ms Viviane Reding, expressed concern about the amendment process of the convention and about the material scope of the convention in general. She was especially concerned about Article 23 of the convention which provides that amendments to this instrument may enter into force by tacit approval. In a letter to the Portuguese Permanent Representative to the European Union, she expressed the view that the matters covered by the convention fell to a great extent within EU competence since the convention primarily dealt with matters covered by the AVMS Directive. She recalled the case law of the Court of Justice of the European Communities (now Court of Justice of the European Union) according to which EU member States may not enter into international agreements on their own in matters which fall within the European Union's field of competence.

14. Referring to the "Open Skies" rulings of the Court of Justice of the European Union,[13] Ms Reding reminded EU member States of their dual obligation not to enter into international commitments that conflict in substance with EU Law. If they fail to fulfil this obligation, the Commission may, pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU), launch an infringement procedure against EU member States which fail to fulfil their obligations under EU law.

15. The Steering Committee on the Media and New Communication Services (CDMC),[14] its Bureau[15] and the Standing Committee on Transfrontier Television[16] expressed deep concern about the standstill in the revision process. In the Assembly, the blocking of the second draft protocol was raised in written questions by Mr Andrew McIntosh (United Kingdom, SOC) in March 2010[17] and, after his death, by Mr Markku Laukannen (Finland, ALDE) in December 2010,[18] highlighting the existence of conflicts between the amended Directive and the convention as it stands.[19]

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13. ECJ, judgments of 5 November 2002 in Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98. The judgments mark the end to infringement proceedings brought in December 1998 by the European Commission before the European Court of Justice against seven EU member States that had concluded bilateral "Open Skies" agreements with the United States in the field of air transport (Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden) and against the United Kingdom in respect of its "Bermuda II" agreement with the United States. See, for example, Case C-467/98, Commission v. Denmark [2002] ECR, I-9519.

14. Report of the 12th meeting of the CDMC, 8-11 June 2010.

15. Reports of the meetings of the Bureau of the CDMC, 6-7 May 2010, CDMC-BU(2010)002 and 14-15 October 2010, CDMC-BU(2010)004.

16. Reply from the Committee of Ministers adopted at the 1116th meeting of the Ministers' Deputies (15-16 June 2011), to Written question No. 591, Doc. 12645.

17. Doc. 12182, Written question No. 584.

18. Doc. 12452, Written question No. 591.

19. Reply from the Committee of Ministers to Written question No. 591, op. cit.

16. Furthermore, there had been several contacts on this subject, including at high level, between the Secretariat of the Council of Europe and the European Commission, followed by an exchange of letters between the Council of Europe Secretary General and the Vice-President of the European Commission, Ms Neelie Kroes. In a letter of 10 December 2010, Ms Kroes informed the Secretary General that, in the light of Article 3.2 of the TFEU,[20] the European Union had exclusive competence to conclude an international agreement in the field of audiovisual media services. She explicitly stated that "the EU does not intend to become a party to the Convention, as this would constrain the speed and scope of any future policy response in the areas covered". She also promised that the European Commission would provide the Standing Committee with an "opinion on a list of issues related to the regulation of audiovisual media services, which are deemed to fall outside the European Union's exclusive external powers".[21] To date, the Standing Committee has not received such a list.

17. Some States (in particular Austria) criticised the European Commission's objection and complained about its timing, as it was only raised when the second draft amending protocol was already completed and was entering the final stages of discussion and approval before being opened for signature.[22] As a consequence of this objection, the Committee of Ministers declined to refer the proposed revision to the Assembly for its opinion.[23]

18. On 31 January 2011, Mr Kleijssen, then Director of the Directorate of Standard Setting, informed the members of the Standing Committee that the Committee of Ministers had decided to discontinue work on the revision of the ECTT, excluding any allocations of funds for it, and that the Legal Advice Department was preparing a general report on the pertinence and relevance of Council of Europe conventions.[24] The latter was published in May 2012 and noted that "it would appear that the European Convention on Transfrontier Television … still offers added value but that a revision would be desirable" and that its revision had been postponed *sine die* by the Committee of Ministers' decision of 4 November 2009.[25] It also included the ECTT on the list of conventions to which reference was made by the European Court of Human Rights in its judgments and decisions.[26] Moreover, the ECTT does not figure on the list of Council of Europe conventions discussed at the regular meetings of the European Union and the Council of Europe high representatives.[27]

3. Main issues at stake

3.1. Relationship between the two legal frameworks

19. Although the AVMS Directive contains a reference to the ECTT,[28] both legal instruments are very different. There are obviously technical aspects to the matter. The major difference between the two frameworks is the distinction between linear and on-demand services within the AVMS Directive which does not exist in the convention. As a consequence, the convention is designed as a homogeneous judicial framework, whilst the AVMS Directive contains a two-tier system with different links for different regulating standards.

20. Given the prime internal market objective of the AVMS Directive, a normative conflict with the convention is almost inevitable. That is why many parts of the two texts contain similar regulations. Nevertheless, the AVMS Directive goes into much more detail, while the convention only provides basic guidance to the Parties. Although the ECTT deals with more topics than the Directive, the latter covers a small

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20. "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".
21. See Appendix III to the report of the meeting of the T-TT on 1-2 July 2010 (T-TT(2010)2).
22. Minutes of the 31st meeting of the Contact Committee established by the Television Without Frontiers Directive (3 November 2009), DOC CC TVSF(2009)6.
23. 1069th meeting of the Committee of Ministers, 4 November 2009.
24. The latter issue was further discussed by our committee during its exchange of views with Ambassador Charles-Edouard Held, Chairperson of the Ministers' Deputies Rapporteur Group on Legal Co-operation (GR-J) on 11 December 2012. See also the reply from the Committee of Ministers to Written question No. 591, op. cit.
25. Report by the Secretary General on the review of Council of Europe Conventions, Information document, SG/Inf(2012)12, 16 May 2012, paragraph 48.
26. Appendix V.
27. Report of the meeting between the European Union's Troïka of the Article 36 Committee (CATS) and the Council of Europe, Strasbourg, 20 June 2013, DGI(2013)12 of 20 September 2013.
28. In Recital 3 (now recital 4 in the consolidated 2010 directive).

number of matters not covered by the former (for instance, a quota for independent production). Other than this general normative conflict, none of the provisions conflict. This is, in fact, far from the case, as the regulations appear to be complementary.

21. The Directive itself provides a "friendly" conflict settlement rule in Article 24, according to which the Directive shall not affect the rights and obligations of member States resulting from existing conventions dealing with telecommunications or broadcasting in fields which the Directive does not co-ordinate. As mentioned above, the convention came into force before the former Television without Frontiers Directive came into effect. The instant conflict clause was not amended or clarified in any way during the last amendment process in 2007.

22. As regards human rights considerations, the ECTT contains a reference to "indecency" in its Article 7, based on Article 10.2 of the European Convention on Human Rights, while the Directive refers to "public decency" in its Article 28.4. As regards the relationship between the two instruments, the ECTT itself contains a "disconnection clause"[29] in its Article 27.1, which stipulates that "parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this convention except in so far as there is no Community rule governing the particular subject concerned". That means that, for member States of the European Union, the convention governs relations between the State in question and any non-EU member States which have ratified it.[30]

3.2. Changes in the European Union legal framework following the entry into force of the Lisbon Treaty

23. The main argument of the European Commission, based on Article 3.2 of the TFEU, relates to the European Union's exclusive competence in concluding international agreements on audiovisual services; according to Professor Jacqué, the legal arguments used by the European Commission are correct. Internal market issues fall within the shared competences of the European Union and its member States, but since the European Union has already legislated in the area of audiovisual services, concluding an international agreement on matters covered by the AVMS Directive is within its exclusive competence (before it was codified in the Lisbon Treaty, this rule stemmed from the "ERTA doctrine"[31] of the Court of Justice of the European Communities). Moreover, concluding international commercial agreements on services is a part the common commercial policy, in which the European Union has exclusive competence (Article 3.1.*e*) of the TFEU). Therefore, EU member States have no right to participate in a convention such as the ECTT and the European Union would have to stand in for its member States to revise the ECTT. EU member States would not be able to participate themselves in the revision of the Convention and the European Commission would have the initiative and a monopoly in conducting negotiations. The result would be a Council of Europe convention between the European Union and the Council of Europe's non-EU member States. However, it would be difficult to conclude such an agreement against the will of the European Commission (unless the Council or the European Parliament can convince it to do so).

24. Even if there was a political will on the European Union side to enter into an international agreement on broadcasting such as the revision of the ECTT, unanimity would be required in the Council of the European Union for negotiating and concluding an agreement "in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity" (Article 207.4.*a* of the TFEU).

3.3. Geographical scope

25. One of the main arguments in favour of the revision of the ECTT is the pan-European scope of the convention, whilst the EU Directive covers only the 28 EU member States. Furthermore, a number of southern Mediterranean countries, which are not member States of the Council of Europe, have expressed an interest in acceding to an amended Convention.

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29. See, in particular, The specificity and added value of the acquis of the Council of Europe treaty law, working document prepared by Mr Jeremy McBride, expert, for the report of our committee colleague, Mr John Prescott (United Kingdom, SOC) "For a greater commitment of member States concerning the efficiency and implementation of the Council of Europe Treaty Law", AS/Jur (2009) 40, paragraphs 47-49 (text available on the committee's website).

30. D. Mac Síthigh, Death of a Convention: competition between the Council of Europe and European Union in the regulation of broadcasting, University of Edinburgh School of Law, *Research Paper Series* No. 2013/26, p. 5.

31. Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport, Case 22-70*. See also its opinion 1/94.

26. However, the application of EU *acquis* is extended to some non-EU member States, especially candidate States or other States wishing to join the European Union in due course, through bilateral agreements, including stability and association agreements. Some of these agreements, especially in the context of the European Union's "Neighbourhood Policy", may lead to "the extension of Union-led asymmetric multilateralism".[32]

27. This limits, in fact, the number of non-EU member States which have ratified the ECTT and which are not bound by EU provisions on audiovisual services. Thus, the European Commission has no interest in binding itself to EU non-member States in a convention as it has succeeded in extending the application of its Directive through bilateral co-operation agreements with neighbouring States, aimed at establishing a free trade zone including services and media.

3.4. Shaping media policies in Europe

28. When the European Economic Community (EEC) adopted Directive 89/552/EEC in 1989, the Council of Europe was the main benchmark for media law and policy, in particular thanks to the case law of the European Court of Human Rights and its expert groups, such as the Steering Committee on the Mass Media (CDMM). The freedoms of establishment and to provide services, and not culture (which was not considered by the European Union until the Maastricht Treaty of 1992), were the legal basis for the Directive.[33] At that time, both legal instruments, the Directive and the ECTT could operate in parallel. However, since then the European Economic Community (which has since become the European Union) has expanded its role in broadcasting through its internal market directives.[34] Moreover, the relationship between the European Union and the Council of Europe has also changed, since the European Union has begun to move into areas hitherto covered exclusively by the Council of Europe, especially after the entry into force of the Lisbon Treaty.[35]

4. My fact-finding visit to Brussels

29. In order to shed light on the issues described above, I carried out a fact-finding visit to Brussels on 25 March 2013.[36] I met there with officials from the European Commission, the Council of the European Union and the European Parliament's Culture and Education Committee. I also talked to representatives of European broadcasters – Association of Commercial Television in Europe (ACTE) and European Broadcasting Union for public broadcasters (EBU).

30. Specifically, I met with officials from the European Commission's Legal Service, DG CNECT (Directorate-General for Communications Networks, Content and Technology), the European External Action Service and the Council of the European Union. The European Commission representatives reaffirmed the previous position of Commissioners Reding and Kroes, according to which the revision of the ECTT fell within the scope of the exclusive competence of the European Union, which was why work on the latter had to be discontinued. The European Union was not interested in adhering to the ECTT, as it had to be revised on a regular basis due to constant technological changes in the media environment. The argument of the added value of the wider geographical scope of the ECTT was no longer valid, since the European Union had concluded bilateral agreements with several non-member States of the European Union, which were members of the Council of Europe. EU accession to a revised version of the ECTT – as proposed in the draft second amending protocol – was excluded. Perhaps the European Union and its member States could envisage adhering through a mixed agreement to a new Council of Europe convention. However, such a convention would have to focus only on the human rights aspects of the use of audiovisual media services, and should not deal with specific issues such as rules on advertising.

31. The position of the European Parliament seemed to be more open on this issue, but would need further clarifications. I therefore wrote in August 2013 to the Chairperson of the European Parliament's Culture and Education Committee, Ms Doris Pack, in order to seek further information, but so far have not received any reply.

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32. Mac Síthigh, op. cit., p. 11.
33. Ibid, pp. 4 and 5.
34. Ibid, pp. 1 and 3.
35. See, for instance, the report by our colleague from the Committee on Political Affairs and Democracy, Ms Kerstin Lundgren (Sweden, ALDE), The impact of the Lisbon Treaty on the Council of Europe, Doc. 12713.
36. See press release of 26 March 2013.

32. Representatives of the broadcasters' associations strongly supported the idea of revising the ECTT and were generally in favour of the draft second amending protocol to the ECTT (although with a few reservations). They found that the wider geographical scope of the ECTT constituted its main added value. Even though some non-EU member States of the Council of Europe had signed bilateral agreements with the European Union, there was no mechanism for settling disputes arising from the application of such agreements. It would therefore be good to "revive" the ECTT and its Standing Committee.

5. The Council of Europe's current position

33. During the June 2013 exchange of views with the committee, Mr Kleijssen stated that the technological arguments used by the European Union to stop negotiations on the revision of the ECTT were well-founded, as the media landscape was changing quickly. However, the main arguments were political.[37] The European Union did not want to introduce new rules on advertising or to negotiate any rules in a multilateral context, as it preferred to impose its own rules. Mr Kleijssen recalled that representatives of the European Commission had taken part in the negotiations on the revision of the ECTT, before the latter had been stopped following a letter from Commissioner Reding. If there were a political will, negotiations could be resumed, like in the case of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108). In this case, the European Commission had obtained a mandate from the Council of the European Union to negotiate the modernisation of the convention.[38] Moreover, the argument of the wider geographical scope of the ECTT was still valid, as not all member States of the Council of Europe had signed bilateral agreements with the European Union and there was a lot of interest in adhering to the ECTT in the sub-Mediterranean countries.

34. Following the discontinuation of work on the revision of the ECTT, the latter had become obsolete (as, for example, it did not cover areas such as on-demand services and various forms of audiovisual content online). Mr Kleijssen indicated that one possible avenue to break this impasse could consist in drafting a more general convention (for example a framework convention) that would define guiding human rights principles with reference to the European Court of Human Rights' case law regarding Article 10 of the Convention and address issues like freedom of expression, pluralism, diversity and cross-border flow of content. Such a convention could also take into account the recent developments in the media world by including a new notion of media,[39] it could be technologically neutral and be a successor to the ECTT. It would certainly need the support of the European Union, which might be willing to consider an agreement relating to Article 10 of the European Convention on Human Rights, if it excluded issues concerning advertising. A new convention would also give the opportunity to countries on the southern shores of the Mediterranean to adhere to it. In the meantime, before the adoption of a revised/new convention, the Committee of Ministers could adopt some form of "guidelines" on the subject.

6. Possible solutions

6.1. Adopting the draft second amending protocol

35. As the issues covered by the draft second amending protocol fall within the scope of the "exclusive competence" of the European Union, the revision of the ECTT would require the participation of the European Commission which would substitute itself to the EU member States. However, the European Union, and at least the European Commission (which would conduct negotiations in this respect), has no political will to conclude such an agreement. The main reasons invoked are that it would restrict EU flexibility regarding future changes of the AVMS Directive in the changing media landscape, and the limited "added value" of the ECTT in terms of its geographical scope.

36. The example of the Council of Europe's data protection convention shows that the European Union (and in particular the European Commission) may be interested in revising Council of Europe's conventions. However, as stressed by Professor Jacqué at the September 2013 hearing, this case differs from that of the ECTT, as the EU data protection regulation did not cover all relevant issues. The modernisation of the data protection convention would also allow the European Union to "export" its higher standards in this area to non-EU member States.[40]

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37. The full text of Mr Kleijssen's statement is available from the Secretariat.
38. See press release of 19 November 2012.
39. See, for instance, Committee of Minister's Recommendation CM/Rec(2011)7 on a new notion of media.
40. Mac Síthigh, op. cit., p. 14.

6.2. Adopting a new (framework) convention

37. If it proved impossible to revive the process of the revision of the ECTT, one could envisage adopting a new convention (or an amendment to the ECTT) focusing exclusively on issues relating to the Council of Europe's core competences – democracy, human rights and the rule of law. The Council of Europe could address other "non-EU" areas of media law and policy, such as "the role of public service broadcasting for a democratic society", "media pluralism and television" and "the role of independent regulatory authorities".[41] In the immediate context of the impasse in the revision of the ECTT, the following issues have been suggested: freedom of expression, pluralism, diversity, cross-border flow of content. The new convention could in particular consolidate the case law of the European Court of Human Rights on Article 10 of the European Convention on Human Rights. But the Standing Committee on Transfrontier Television and the CDMC already considered this idea in 2004 and did not support it.[42] One could also doubt the added value of such a consolidation or restatement of existing standards, as under the Court's "living instrument" doctrine,[43] the interpretation of the Convention, including its Article 10, may evolve over time.

38. According to Professor Jacqué, the possibility of adopting a convention on freedom of expression standards could be related to the fact the European Union has no competence to legislate with regard to fundamental rights, despite the existence of the European Union's Charter of Fundamental Rights. The problem should be broached from a democracy and human rights perspective and could lead to a mixed agreement (for instance a framework convention) between the European Union and Council of Europe member States. But, as stressed by Dr McGonagle at the hearing in September 2013, to base the (framework) convention on a list of issues approved by the European Union is an unstable starting point because the European Union's agenda could – and mostly likely will – evolve over time. In particular, the European Union has shown an ostensible political interest in developing media pluralism of late. For instance, Article 11.2 of the Charter of Fundamental Rights states that the "freedom and pluralism of the media shall be respected". The European Commission funded a major study to devise indicators for media pluralism and, at the beginning of 2013, the High Level Group on Media Freedom and Pluralism issued its report and a public consultation on the report's findings ensued.[44] These developments point towards a growing EU interest in a traditional Council of Europe field of activity.

39. The design of a new (framework) convention, with a system of State reporting and monitoring, could facilitate in-depth exploration of a range of issues in a systematic way, but the scope of such an exercise could also be limited due to the politically sensitive nature of the issues at stake and it could also duplicate the work of the European Court of Human Rights and of the Council of Europe's specialised monitoring bodies.

40. It is difficult at this stage to indicate what a "framework convention" should contain, as there are few precedents in this area (mainly the Framework Convention for the Protection of National Minorities). Such conventions are merely "programmatic"; they define objectives, to which States commit themselves, and they are typically implemented by national measures or bilateral agreements.[45]

6.3. Consolidating the existing guidelines

41. According to our experts, before attempting to find a normative solution, the Council of Europe could codify the existing legal standards in a set of political guidelines. As stressed by Dr McGonagle, it could also be useful to look at a revival of politically binding standards to address new media-related issues that had been left unaddressed due to the discontinuation of the ECTT revision. There is no need to adopt new standards, but it could be useful to draw up an inventory of what already exists, for example through a recommendation of the Committee of Ministers.

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41. K. Jakubowicz, Implementation and Monitoring: Upholding Human Rights and Cultural Values, in: S. Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules*, Strasbourg, European Audiovisual Observatory 2006, pp. 35-44, p. 42.
42. Mac Síthigh, op. cit., p. 21.
43. The European Convention on Human Rights is taken to be a "living instrument", which "must be interpreted in the light of present-day conditions"; see, for instance, *Tyrer v. the United Kingdom*, Application No. 5856/72, judgment of 25 April 1978.
44. K.U. Leuven – ICRI *et al*., Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach, July 2009.
45. F. Benoît-Rohmer and H. Klebes, *Council of Europe law: Towards a pan-European legal area*, Strasbourg, Council of Europe Publishing, 2005, p. 98.

7. Conclusion

42. There are two main reasons for the importance of the European Convention on Transfrontier Television: it is a legally binding treaty and it focuses on a very specific subject. As stressed by Dr McGonagle, the discontinuation of the revision of the ECTT, which was aimed at adapting it to the recent technological changes, led to a normative gap in the Council of Europe's legal area. This lacuna cannot be filled by some political recommendations, such as Committee of Ministers Recommendation CM/Rec(2011)7 on a new notion of media (which does not in fact mention the ECTT)[46]; in addition, there is a "gravitational pull towards an instrument that is extraneous to the Council of Europe" – the AVMS Directive.

43. EU member States which are Party to the ECTT have a real interest in completing the revision of the convention in order to minimise conflict with the European Union's legal framework. At present, there is on the one hand a non-revised convention dating back to 1998 (with a minor amendment made in 2002) and on the other hand a Directive which was adapted to the newest technical standards in 2007, but which is also now gradually becoming obsolete in a changing media landscape. This could potentially lead to a normative conflict when the different regulations are applied. Because it is still in force, the convention is binding on Parties, as is the case with any other international agreement. Therefore, the risk of a normative conflict is currently much greater than it would be after completion of the amendment process.

44. Moreover, regarding the fact that television and multimedia features can be very easily distributed over the Internet, the European Commission should have a vested interest in seeing that the convention is adapted to the new regulations of the AVMS Directive. The convention, with its pan-European ambit going beyond the European Union, could ultimately help to ensure that AVMS regulations are not undermined by non-EU member States.

45. Following my contacts with several stakeholders, I conclude that, as technological changes in the last two decades have brought into question the convention's relevance, there is a strong need to align it with the changed audiovisual landscape in Council of Europe member States and with the Audiovisual Media Services Directive of the European Union. The revision of the ECTT would have a positive impact on freedom of information within the geographical area of the Council of Europe and in its neighbouring countries. For the European Union to block its revision for formal (apparently legal, or competence) reasons is unacceptable and can be a bad precedent, which could later be invoked by the European Union regarding other Council of Europe conventions requiring revision or modernisation. I also find unacceptable the way in which the European Union unilaterally imposes its rules on audiovisual services on some non-EU Council of Europe member States, without trying to find a pan-European compromise on updating the ECTT to take into account technological changes.

46. It is clear that the European Union, at least the European Commission, is not interested in revising the ECTT. The question of the "exclusive competence" of the European Union in concluding an international agreement in the field of audiovisual media services seems to be more or less resolved, despite the lack of response from the European Commission to the request of the Standing Committee to provide clarifications on issues related to the regulation of audiovisual media services falling outside the external exclusive competency of the European Union. But listing such issues is of crucial importance before one starts considering any other possible avenues to update the ECTT, such as concluding a "mixed agreement" with the European Union and its member States and drafting a new, more general, convention ("framework" or "principles" convention).

47. The implications of the European Commission's position are thus very broad for the treaty-making activities of the Council of Europe in general if one considers that the Treaty of Lisbon has, once again, enlarged the competences of the European Union, at the expense of the member States. But despite this development, the Council of Europe is still well-placed to draft binding legal instruments on media law and policies, considering its experience in this field. Council of Europe decision-making bodies should reconsider the question of revising the ECTT, which is in fact becoming obsolete in view of the constantly evolving media technologies. The Standing Committee on Transfrontier Television should be enabled to resume its work and examine possible solutions to fill in the above-mentioned gap. If it is not possible to adopt the draft second amending protocol to the ECTT, due to the political resistance of the European Union, other avenues, such as drafting a new (framework) convention on issues related to freedom of expression, should be considered in the meantime. But since the adoption of any new treaty would take a lot of time, the Committee of Ministers should consider elaborating some guidelines (in the form of a recommendation), which would consolidate the existing Council of Europe standards on media freedom and adjust them to the current new media landscape.

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46. Recommendation CM/Rec(2011)7, op. cit.