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Draft Council of Europe Convention on Cinematographic Co-production (revised)

Report[1]
Committee on Culture, Science, Education and Media
Rapporteur: Mr Mogens JENSEN, Denmark, Socialist Group

Summary

The Committee on Culture, Science, Education and Media commends the approach and principles inspiring the Draft Council of Europe Convention on Cinematographic Co-production (revised). In order to keep pace with the important changes in the world of cinematographic co-productions, it is crucial to update the common legal framework, building on economic realities, and to open the Convention to non-European countries. It is also necessary to recognise the multifaceted nature of Europe, seeking to encourage cultural diversity and intercultural dialogue.

However, the system should be completed by the establishment of a proper monitoring body; otherwise it would be deprived of the possibility to remain dynamic. This body should have the entitlement and means to achieve better co-ordination and harmonisation of the implementation of the convention, especially by the sharing of best practice and the development and analysis of data sets measuring the level of co-production activity.

In addition, the preamble of the revised convention should include an explicit reference to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society and should clearly state that film has a role in upholding openness between cultures and dialogue, and that co-production status shall be denied to those works that advocate discrimination, hate or violence or openly offend human dignity.

1. Reference to committee: Doc. 13915, Reference 4166 of 27 November 2015.

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A. Draft opinion[2]

1. The Parliamentary Assembly welcomes the initiative of the Committee of Ministers of the Council of Europe to draw up a revised Council of Europe Convention on Cinematographic Co-production (ETS No. 147) and it commends the principles inspiring the new text, which is intended to modernise the convention, keeping pace with changes in the landscape of film production and ensuring its continued relevance.

2. In particular, the Assembly appreciates the fact that the draft revised convention updates the common legal framework, building on economic realities and common practice in the sector, better reflects the ambition to open the convention to non-European countries and highlights the rationale of recognising the multifaceted nature of Europe and of encouraging cultural diversity and intercultural dialogue. Therefore, for the Assembly, the revised convention will enhance Convention No. 147 and uphold cinematographic co-productions in both their economic and cultural dimensions.

3. The Assembly notes, however, that the draft revised convention does not foresee the establishment of a monitoring body. In this respect, the Assembly considers that the system would be deprived of the possibility to remain dynamic. The simplified procedure for the revision of the revised Convention provided for in Article 22 – which entrusts the Board of Management of Eurimages with the responsibility to formulate proposals for amendments – is not entirely satisfactory.

4. Indeed, not all the States potentially Parties to the revised convention are represented on the Eurimages Board of Management; this Board, although highly competent, acts within the scope of the Partial Agreement and does not work with the whole film industry in all its dimensions and complexity. Moreover, a proper monitoring body should also be entrusted with other important functions, in order to achieve better co-ordination and harmonisation of the implementation of the revised Convention across countries, notably by providing for the sharing of best practice, and the development and analysis of data sets measuring the level of co-production activity under the revised convention.

5. The Assembly believes that a few amendments would contribute to clarifying and enhancing the current text; in this connection, it refers to the comments and explanations set out in the explanatory memorandum to the draft opinion by the Committee on Culture, Science, Education and Media (Doc. 13987).

6. The Assembly therefore recommends that the Committee of Ministers make the following amendments to the draft revised convention:

6.1. in the preamble:

6.1.1. at the end of the fourth paragraph, add the following text: “and that the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005 – CETS No. 199) recognises the role of cultural heritage in the promotion of cultural diversity”;

6.1.2. redraft the seventh paragraph as follows: “Aware that film is an important means of cultural and artistic expression with an essential role in upholding the freedom of expression, diversity and creativity, as well as openness between cultures, mutual understanding between people within countries and across borders, dialogue and democratic citizenship”;

6.1.3. at the beginning of the tenth paragraph, delete the words “achieve these objectives thanks to a common effort to”; the paragraph would then read as follows: “Resolved to foster co-operation and define rules which adapt themselves to cinematographic co-production as a whole”;

6.2. redraft Article 5.3 as follows: “Projects of a blatantly pornographic nature or those that advocate discrimination, hate or violence or openly offend human dignity cannot be accorded co-production status”;

6.3. redraft Article 9.*c* as follows: “help to promote cultural diversity and intercultural dialogue, and to uphold shared fundamental values”;

6.4. replace Article 22 with the following text (Article 22.7 corresponding to the task that the Board of Management of Eurimages would be entrusted with according to the current text):

“Article 22 – Follow-up mechanism

2. Draft opinion adopted unanimously by the committee on 26 January 2016.

1. The implementation of the Convention shall be monitored by a Committee of Experts composed of one member per Party, nominated by the Party concerned.

2. The Committee of Experts shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention. It shall subsequently meet annually.

3. The Committee of Experts shall draw up and adopt by consensus its own rules of procedure.

4. The Committee of Experts shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

5. The Committee of Experts shall collect and analyse information on the implementation of this Convention and assess its impact seeking to promote its effective use and, in particular:

a. to facilitate the exchange between States of experience and good practice, as well as the exchange of information on significant legal, policy or technological developments;

b. to identify any problems that may arise and the effects of any declaration or reservation made under this Convention;

c. to give advice on any questions concerning the application of this Convention and to make specific recommendations to Parties.

6. In order to discharge its functions, the Committee of Experts may, on its own initiative, consult relevant stakeholders and professional experts.

7. The Committee of Experts may, in the interests of ensuring their continued relevance to common practices in the cinematographic industry, propose amendments to the provisions of Appendices I and II of this Convention.

a. Amendments thus proposed shall be communicated by the Secretary General of the Council of Europe to the Parties;

b. After having consulted the Parties the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 1 by the majority provided for in Article 20.d, of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Parties. During this period, any Party may notify the Secretary General of any objection to the entry into force of the amendment in its respect;

c. If one third of the Parties notifies the Secretary General of an objection to the entry into force of the amendment, the amendment shall not enter into force;

d. If less than one third of the Parties notifies an objection, the amendment shall enter into force for those Parties which have not notified an objection;

e. Once an amendment has entered into force in accordance with paragraphs 1 to 4 of this Article and a Party has notified an objection to it, this amendment shall come into force in respect of the Party concerned on the first day of the month following the date on which the Party has notified the Secretary General of the Council of Europe of its acceptance of the amendment. A Party which has made an objection may withdraw it at any time by notifying the Secretary General of the Council of Europe;

f. If the Committee of Ministers adopts an amendment, a State or the European Union may not express its consent to be bound by the Convention without accepting at the same time the amendment."

6.5. If applicable, make the necessary amendments to the explanatory report to the draft revised convention so as to reflect the amendments to the draft text.

7. Lastly, the Assembly encourages all member States to initiate as quickly as possible the necessary internal procedures for the ratification of the new convention.

B. Explanatory memorandum by Mr Jensen, rapporteur

1. Introduction

1. The European Convention on Cinematographic Co-Production (ETS No. 147) of 1992 entered into force on 1 April 1994 and has been ratified by 43 Council of Europe member States. This convention provides a common legal basis governing the multilateral cinematographic relations of its Parties; it has also allowed many smaller countries to benefit from a legal framework for co-productions involving just two parties.

2. Today, as is highlighted by the explanatory report to the Draft Council of Europe Convention on Cinematographic Co-production (revised)[3] (hereafter "the revised Convention"), new technology has modified production, distribution and exhibition techniques, public funding at national and regional levels has evolved, fiscal incentives have multiplied and many smaller European countries now seek to enhance the international activities of their film sectors. Moreover, the European film industry has become increasingly open to exchanges with non-European partners. Thus, the revision is intended to modernise the convention, keeping pace with changes in the landscape of film production and ensuring its continued relevance.

2. Key elements of the revised Convention and main changes which are sought

3. The revised Convention does not modify the main thrust of Convention No. 147. The aim is the promotion of the official co-production of cinematographic works, in particular of fiction and animation and documentaries.

4. Audiovisual works remain excluded; this is because, on the one hand, their production is not usually governed by co-production agreements concluded between States and, on the other, there is currently no widely accepted definition of an audiovisual work, due to the rapid evolution of production and distribution technologies.

5. Concerning scope (Article 2), the revised Convention will continue to govern relations between the Parties in the field of multilateral co-productions originating in the territory of the Parties. It will apply to:

a. co-productions involving at least three co-producers, established in three different Parties to the Convention;

b. co-productions involving at least three co-producers established in three different Parties to the Convention and one or more co-producers that are not established in such Parties. The total contribution of the co-producers who are not established in the Parties to the Convention may not, however, exceed 30% of the total cost of the production.

6. As already provided by Convention No. 147, in the absence of a bilateral agreement, the revised Convention will also apply to bilateral co-productions, unless a reservation has been made by one of the Parties involved.

7. Cinematographic works falling within the scope of the revised Convention and meeting the conditions set forth in its Article 5 "shall be entitled to the benefits granted to national films by the legislative and regulatory provisions in force in each of the Parties to this Convention participating in the co-production concerned". This is the main aim of the co-production agreements: co-produced works shall be placed on an equal footing with national works and shall thus have access to the advantages available to the latter, such as national aids accorded for the production, distribution and exhibition of films or tax exemptions. They may also benefit from national rules regarding origin where television and on-demand audiovisual media services are concerned.

8. Concerning the conditions, there is however an important change: the "European" qualification of the co-production disappears. Indeed, the revised Convention aims at enhancing the international activities of the film sectors; thus, what is relevant is no longer the European nature of the co-production, but its connection with the countries Parties to the Convention (including non-European ones).

9. This is also reflected in Appendix II to the revised Convention, which defines the conditions under which a work can qualify as an official co-production and provides distinct points scales allowing for the evaluation of each of the principal types of cinematographic work: fiction, animation and documentary films. Under Convention No. 147, the competent authorities may grant co-production status to a work with a number of

3. Doc. 13915.

points lower than the one required, if they consider that the work nonetheless reflects a “European identity”. The reference to “European identity” does not appear in the revised Convention; the latter foresees, instead, that the competent authorities may grant co-production status even if the required number of points is not attained, “having regard to the characteristics of the co-production”.

10. Convention No. 147 foresees a minimum contribution level for multilateral co-productions of 10% and a maximum contribution level of 70%. However, in practice, the minimum contribution rate of 10% has proved difficult to apply in countries where the cinema industry is relatively fragile and producers cannot raise sufficient finance. Moreover, participation in higher budget co-productions alongside experienced partners would allow industry professionals in smaller countries to gain valuable expertise and establish useful contacts, as well as to provide helpful financial and creative input.

11. The revised Convention therefore reduces the minimum contribution rate to 5% and raises the corresponding maximum participation to 80%. Similarly, where the Convention is used to provide a legal framework for a bilateral co-production and in line with the aforegoing, the minimum contribution is reduced from 20% to 10% and the maximum contribution is increased from 80% to 90%.

12. Nonetheless, in the case of a minority contribution lower than the 20%, the country of origin of the minority co-producer may take steps to limit access to national co-production support mechanisms, notably where automatic support is granted irrespective of the national share in the co-production. Such access may also be barred where the minimum contribution does not include effective technical and artistic participation by the co-producer concerned.

13. Article 7 (Rights of co-producers to the cinematographic work) has been redrafted both to clarify the underlying concept of co-ownership of the rights to the work and to reflect technological evolution in the industry. The object of co-production is to establish joint ownership of all the tangible and intangible property rights necessary to the production, distribution and exploitation of the cinematographic work. The co-production contract signed between the co-producers must clearly specify this joint ownership, as well as the joint ownership of the physical material of the film, and should provide that the first completed version of the cinematographic work (“the master”) be deposited in a place mutually agreed by the co-producers. Each producer must be guaranteed free access to the “film material” and to the master.

14. In Article 8 (Technical and artistic participation), the revised Convention keeps the idea that the recognition of nationality must be reflected in genuine technical and artistic participation by cast and crew members from the countries involved, which in principle should be proportional to the financial participation of the co-producer. Where these participations are not proportional, the competent authorities may refuse to grant co-production status to the work in question.

15. However, as in Convention No. 147, Article 9 of the revised Convention provides for exceptions to the previous rule and allows for the possibility to grant co-production status if certain conditions are met. In this respect, the revised Convention replaces the previous condition “c. help to promote a European identity” with a new one: “help to promote cultural diversity”. The other conditions are unchanged.

16. Article 10 maintains the concept of overall balance in cinematographic relations with regard both to the total amount invested and the artistic and technical participation in co-production cinematographic work; it allows Parties to insist upon re-establishing balance, where they have observed a lack of reciprocity in their co-production relations with a particular country. If a Party, over a reasonable period, observes a deficit in its co-production relations with one or more other Parties, it may withhold its approval of a subsequent co-production until restoration of the balance. The revised Convention judiciously removes the idea that the approval is withheld by a Party “with a view to maintaining its cultural identity”. This also reflects the approach of the revised Convention, which is aimed at recognising and promoting “cultural diversity”.

17. Appendix I brings the procedure for the awarding of co-production status by national authorities into line with the prevailing practice: an initial, provisional phase of recognition of the co-production prior to shooting is followed by the definitive award of official co-production status on completion of the film. The appendix lists the documents required for each phase, though national authorities may require additional documents as foreseen in national legislation.

18. It is worth mentioning that Article 22 introduces a simplified amendment procedure for the appendices, taking account of their technical nature. Indeed, technological and financial evolutions of the film industry could render some elements of Appendices I and II of the revised Convention obsolete; therefore the revised Convention foresees that the Board of Management of Eurimages be permitted to formulate proposals for the amendment of these appendices. The Parties would be however entitled to raise objections against any such amendment and would be subject to it only upon the withdrawal of the objection.

19. Finally, Article 24 regulates the cases where a co-production involves a combination of Parties who have ratified the revised Convention and Parties who have not and are thus subject to the provisions of the 1992 Convention. In this case, the 1992 Convention will apply. Only where all the participants in a co-production are established in States having ratified the revised Convention can the revised Convention apply.

3. Proposals for improvements

20. I would like to praise the work of the experts who drafted the revised Convention. I have however a major concern: the absence of a proper monitoring system (section 3.1). In addition, I would suggest improving some provisions (section 3.2).

3.1. The absence of a proper monitoring system

21. It is quite frequent that Council of Europe conventions include provisions for the establishment of a monitoring body. To me, the absence of such provisions in the text of the revised Convention is odd. True, there is no such a mechanism in the text of Convention No. 147. However, given the technical nature of issues covered by the revised Convention and the (acknowledged) need to keep pace with rapid changes in the sector of cinematographic co-production, the establishment of a monitoring mechanism would seem not only appropriate, but necessary.

22. In this respect, as mentioned before (see paragraph 18), Article 22 introduces a simplified amendment procedure for the appendices and entrusts the Board of Management of Eurimages with the core responsibility to formulate proposals for such amendments. As I see it, this solution is not sufficient, in particular for the following reasons:

– not all the States potentially Parties to the revised Convention are represented on the Eurimages Board of Management; in addition, this Board, although highly competent, acts within the scope of the Partial Agreement and does not work with the whole film industry in all its dimensions and complexity;

– a proper monitoring body should also be entrusted with other important functions, in order to achieve:

  - better co-ordination and harmonisation of the implementation of the Convention across countries, notably by providing for the sharing of best practice;

  - the development and analysis of data sets measuring the level of co-production activity under the revised Convention and the concrete impact of new provisions therein.

23. I therefore suggest redrafting Article 22. My proposal appears below (in bold print). The function foreseen in paragraph 7 corresponds exactly to the responsibility entrusted by the present text of Article 22 to the Eurimages Board of Management. The procedure for the adoption of the amendments is the same.

"Article 22 – Follow-up mechanism

1. The implementation of the Convention shall be monitored by a Committee of Experts composed of one member per Party, nominated by the Party concerned.

2. The Committee of Experts shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention. It shall subsequently meet annually.

3. The Committee of Experts shall draw up and adopt by consensus its own rules of procedure.

4. The Committee of Experts shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

5. The Committee of Experts shall collect and analyse information on the implementation of this Convention and assess its impact seeking to promote its effective use and, in particular:

a. to facilitate the exchange between States of experience and good practice, as well as the exchange of information on significant legal, policy or technological developments;

b. to identify any problems that may arise and the effects of any declaration or reservation made under this Convention;

c. to give advice on any questions concerning the application of this Convention and to make specific recommendations to Parties.

6. In order to discharge its functions, the Committee of Experts may, on its own initiative, consult relevant stakeholders and professional experts.

7. The Committee of Experts may, in the interests of ensuring their continued relevance to common practices in the cinematographic industry, propose amendments to the provisions of Appendices I and II of this Convention.

a. Amendments thus proposed *shall be communicated by the Secretary General of the Council of Europe to the Parties;*

b. After having consulted the Parties the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 1 by the majority provided for in Article 20.d, of the Statute of the Council of Europe. The amendment shall enter into force following the expiry of a period of one year after the date on which it has been forwarded to the Parties. During this period, any Party may notify the Secretary General of any objection to the entry into force of the amendment in its respect;

c. If one third of the Parties notifies the Secretary General of an objection to the entry into force of the amendment, the amendment shall not enter into force;

d. If less than one third of the Parties notifies an objection, the amendment shall enter into force for those Parties which have not notified an objection;

e. Once an amendment has entered into force in accordance with paragraphs 1 to 4 of this Article and a Party has notified an objection to it, this amendment shall come into force in respect of the Party concerned on the first day of the month following the date on which the Party has notified the Secretary General of the Council of Europe of its acceptance of the amendment. A Party which has made an objection may withdraw it at any time by notifying the Secretary General of the Council of Europe;

f. If the Committee of Ministers adopts an amendment, a State or the European Union may not express its consent to be bound by the Convention without accepting at the same time the amendment."

3.2. Other proposed changes

24. I have a few other proposals, which I hope will be considered constructive. They are the following.

25. Include in the preamble a reference to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199, "Faro Convention") and strengthen the idea that film has a role also in upholding openness between cultures and dialogue. The proposals appear below in bold print:

"...

Considering that fostering the cultural diversity of the various European countries is one of the aims of the European Cultural Convention ***and that the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005 – CETS No. 199) recognises the role of cultural heritage in the promotion of cultural diversity****;*

Having regard to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005), which recognises cultural diversity as a defining characteristic of humanity and strives to strengthen the creation, production, dissemination, distribution and enjoyment of cultural expressions;

Considering that cinematographic co-production, as an instrument of creation and expression of cultural diversity on a global scale, should be reinforced;

Aware that film is an important means of cultural and artistic expression with an essential role in upholding the freedom of expression, diversity and creativity, as well as ***openness between cultures, mutual understanding between people within countries and across borders, dialogue and*** *democratic citizenship.*

..."

26. Paragraph 10 of the preamble also appeared in the preamble of Convention No. 147; however the text preceding this paragraph has been changed and the initial sentence "Resolved to achieve these objectives thanks to a common effort to foster cooperation …" refers to "objectives" which are no longer in the preceding

paragraphs. To achieve better co-ordination, I suggest deleting the words “achieve these objectives thanks to a common effort to”; the paragraph would then read as follows: “Resolved to foster co-operation and define rules which adapt themselves to cinematographic co-production as a whole.”

27. Redraft Article 5.3 as follows: “Projects of a blatantly pornographic nature or those that advocate **discrimination, hate or** violence or openly offend human dignity cannot be accorded co-production status.” This addition is intended to explain the factors (correlated with violence and offences to human dignity) which the Council of Europe is firmly determined to combat in all their forms.

28. Redraft Article 9.*c* as follows: “help to promote cultural diversity **and intercultural dialogue, and to uphold shared fundamental values***;*”. This addition is intended to clarify and widen the scope of the exception; the reference to cultural diversity sounds too limited if not coupled with the idea of dialogue and adherence to our common values.

4. Conclusions

29. I consider that the Assembly should welcome the initiative to revise Convention No. 147 and commend the approach and principles inspiring the draft revised Convention: it is certainly appropriate to reflect in the text the ambition to open the Convention to non-European countries, to update the common legal framework building on economic realities and common practice in the sector and to move from the rationale of safeguarding national identities and promoting a monolithic idea of the “European identity” to the rationale of recognising the multifaceted nature of Europe and of encouraging cultural diversity and intercultural dialogue. In this respect, the revised Convention would enhance Convention No. 147 and uphold cinematographic co-productions in both their economic and cultural dimensions.

30. The proposals for amendments which are included in the draft opinion correspond to those that I have sought to justify in the previous section; they are intended to strengthen the effective implementation of the revised Convention – and therefore its value for all the partners – through the establishment of a proper monitoring mechanism, to highlight its cultural dimension and to correct a technical issue.