

## Council of Europe and media regulation

The closing lecture discusses the role of another important pan-European legislator – the Council of Europe – in the field of media. The opening part of the lecture discusses general issues related to legislation developed within the Council of Europe (e.g. the ratification process etc.). It then moves on to discuss the *European Convention on Transfrontier Television*. The lecture closes with an outline of resolutions that are the outcome of a series of Ministerial Conferences on Mass Media Policy.

### **The Council of Europe**

The Council of Europe was established in 1949<sup>1</sup> and its structure is rather loose, the most important unifying element is its members' assent to the European Convention on Human Rights. The Council of Europe has a decision-making body (The Committee of Ministers, composed of the Ministers of Foreign Affairs of the Member States), a deliberative body (The Parliamentary Assembly, its members are appointed by national parliaments) and a consultative body representing local and regional authorities (The Congress of Local and Regional Authorities of Europe).

#### The Committee of Ministers

This is the Council's decision-making body and is made up of the ministers of foreign affairs of each member state or their permanent diplomatic representatives in Strasbourg. The Committee of Ministers decides Council of Europe policy and approves its budget and programme of activities.

#### The Parliamentary Assembly (PACE)

This is the deliberative body and the driving force of the Council of Europe. The Assembly has initiated many international treaties, helping to create a Europe-wide system of legislation. Its members are appointed by the national parliaments of each member state.

#### The Congress of Local and Regional Authorities

The Congress is the voice of Europe's 200 000 regions and municipalities and provides a forum where elected representatives can discuss common problems, pool their experiences and develop policies. It works to strengthen democracy and improve services at local and regional level.

#### The European Court of Human Rights

This is the permanent judicial body which guarantees for all Europeans the rights safeguarded by the European Convention on Human Rights. It is open to states and individuals regardless of nationality. The 47 member states of the Council of Europe are parties to the Convention.

---

<sup>1</sup> Collins lists the founding members in the following order: the United Kingdom, France, Belgium, the Netherlands, Luxembourg, Sweden, Norway, Denmark, Italy and Ireland. He further draws attention to the fact that "the Council's conception is variously to Sully's 'Grand Design' of 1638 for a union of European Christendom and to Penn's 1693 programme of European political union put forward in his 'Essay towards the Present and Future Peace of Europe by the Establishment of a European Diet; Parliament or Estate'" (1994: 122). All the Member States of the European Union are also Member States of the Council of Europe.

### The Conference of INGOs

The Conference includes some 400 international Non Governmental Organisations (INGOs). It provides vital links between politicians and the public and brings the voice of civil society to the Council. The Council's work benefits extensively from the INGOs' expertise and their outreach to European citizens.

The *Council of Europe Treaty Series* groups together all the conventions concluded within the Organisation since 1949. Whatever they are called ("agreement", "convention", "arrangement", "charter", "code", etc.), all these texts are international treaties in the sense of the Convention of Vienna of 1969 on the law of treaties.

The conventions of the Council of Europe are prepared and negotiated within the institutional framework of the Council of Europe. Negotiations culminate in a decision of the Committee of Ministers to adopt the final text of the proposed treaty. It is then agreed to open the treaty for signature by member States of the Council and, if necessary, by the other States or organisations who have taken part in its elaboration.

The conventions of the Council of Europe are not statutory acts of the Organisation. They owe their legal existence to the consent of those member States that sign and ratify them.

Furthermore, the great majority of the conventions of the Council of Europe make provision for non-member States of the Organisation to become Parties thereto, upon invitation by the Committee of the Ministers of the Council of Europe and by means of the procedure of accession.

The Secretary General is the depositary of the conventions of the Council of Europe. He is the custodian of these conventions and presides over their signature and the deposit of the instruments of ratification, acceptance, approval or accession. It is also the Secretary General who is responsible for the notifications prescribed in the final clauses of the conventions, and who arranges for their registration with the Secretariat of the United Nations.

Following the practice introduced by the Committee of Ministers of the Council of Europe in 1965, explanatory reports have been published on most conventions. They are prepared by the committee of experts instructed to draft the convention in question and are published when the convention is adopted by the Committee of Ministers. These explanatory reports might facilitate the implementation of the provisions of the conventions, although they do not constitute instruments which provide an authoritative interpretation of them.

The text of all Council of Europe treaties, their explanatory reports, the status of signatures and ratifications, declarations and reservations made by States, as well as the notifications issued by the Treaty Office since 2005, are available on the website of the Council of Europe Treaty Office.

Collins makes the point that "the Council of Europe has enabled its Ministers to reach agreements and to develop initiatives which are both weaker and wider than those developed within other institutional contexts such as the European Communities" (1994: 123). Concrete

examples of such pro-active initiatives are policies supporting film production (EURIMAGES – The European Support Fund for the Co-Production and Distribution of Creative Cinematographic and Audiovisual Works) as well as partial agreements, which are impossible to develop within the European Union. WORD DOC

## **RESOLUTION (88) 15**

### **SETTING UP A EUROPEAN SUPPORT FUND FOR THE CO-PRODUCTION AND DISTRIBUTION OF CREATIVE CINEMATOGRAPHIC AND AUDIOVISUAL WORKS (« EURIMAGES »)**

(Adopted by the Committee of Ministers on 26 October 1988 at the 420th meeting of the Ministers' Deputies and amended by Resolutions (89) 6, (90) 34, (92) 3, (93) 10, (95) 4, (97) 65 and (98) 10 and decisions taken by the Ministers' Deputies on 15 December 1999 at the 692nd meeting and on 19 July 2000 at the 718th meeting)

The Representatives of the Committee of Ministers of Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden,

Considering the European Cultural Convention;

Considering the Committee of Ministers' Resolution (86) 3 on European cultural co-operation;

Considering Resolution N°1 on the promotion of European audiovisual works, adopted by the 1st European Ministerial Conference on Mass Media Policy, held in Vienna on 9 and 10 December 1986;

Considering the Committee of Ministers' Recommendation N° R (86) 3 on the promotion of audiovisual production in Europe and Recommendation N° R (87) 7 on film distribution in Europe;

Considering the work of the 5th Conference of European Ministers responsible for Cultural Affairs, held in Sintra from 15 to 17 September 1987, and of the informal meeting of the European Ministers responsible for Cultural Affairs, held in Brussels on 13 and 14 September 1988, as well as the conclusions of the Colloquy on film co-distribution in the European area, organised by the Committee of Governmental Experts on the cinema of the Council for Cultural Co-operation in Rimini on 3 and 4 July 1987;

#### 1. Purpose and functions of the Fund

1.1. The purpose of the European support Fund for the co-production and distribution of creative cinematographic and audiovisual works, -hereinafter referred to as « the fund » - shall be to encourage in any way to be defined by the Board of Management the co-production, distribution, broadcasting and exploitation of creative cinematographic and audiovisual works, particularly by helping to finance the co-production, distribution, broadcasting and exploitation.

1.2. The Fund shall receive, hold and utilise the resources allocated to it in accordance with paragraph 4 below, in pursuance of decisions taken by the Board of Management set up pursuant to paragraph 2 below.

1.3. By a decision of the Board of Management, the Fund may enter into arrangements with any organisation pursuing objectives of cinematographic and audiovisual interest, with a view to co-ordinating their work.

1.4. The headquarters of the Fund shall be in Strasbourg.

## 2. Board of Management

## 3. Management of Accounts

## 4. Resources of the Fund

### 4.1. The Fund's resources shall comprise:

4.1.a. the annual contributions of each of the Fund's Member States and associate Member States;

4.1.b. the amounts of repaid loans;

4.1.c. any other payments, donations or legacies, subject to the provisions of paragraph 4.3 below.

4.2. The contributions of the Fund's Member States and associate members shall be determined each year by their representatives on the Board of Management, duly authorised to that effect by their respective governments, according to a scale approved by the Board of Management. The obligatory contributions calculated according to this scale may be supplemented by annual voluntary contributions.

4.3. The crediting to the Fund of payments, donations or legacies referred to in paragraph 4.1.c above, in excess of the amount fixed by the Board of Management, shall be subject to the agreement of the latter.

4.4. The Fund's assets shall be acquired and held in the name of the Council of Europe and as such shall enjoy the privileges and immunities accorded to the Council's assets under the relevant agreements. The Fund's assets shall be kept separate from the Council of Europe's other assets.

## 5. Conditions attaching to the award of financial aid

5.1. The Board of Management may grant financial aid to natural or legal persons governed by the legislation of one of the Fund's Member States, which produce films and/or audiovisual works as well as to natural or legal persons which distribute, broadcast or exploit them.

5.2. In reaching its decision on whether to grant aid, the Board of Management shall take into account the quality of the work and shall ascertain whether it is apt to reflect and to promote the contribution of the diverse national components to Europe's cultural identity.

5.3. Co-production aid may be granted for co-productions originating in the Fund's Member States and including at least three co-producers from the Fund's Member States. The Board of Management may derogate from this rule in accordance with the implementing regulations that it has adopted for this purpose.

Such aid may also be granted for co-productions involving co-producers from Member States on the one hand and associate member or non-member States of the Fund on the other hand, provided that the contribution by the latter States does not exceed 30% of the cost of producing the co-production.

The contribution, from public or private sources, of each of the co-producers from Fund Member States may not exceed 70% of the production costs. The Board of Management may derogate from this rule in accordance with the implementing regulations that it has adopted for this purpose.

- 5.4. Aid for the co-production of films and audiovisual works shall be granted in respect of co-productions of works primarily intended for cinema showing and of co-productions of works primarily intended for broadcasting by television or cable distribution, where such work is produced by producers independent of the broadcasting agencies.
  - 5.5. Aid for the distribution, broadcasting and promotion of a film or audiovisual work originating in one or more Member States of the Fund shall be granted to cover expenditure specified in the application for the manufacture of copies, subtitling and/or dubbing and recourse to various means of promotion. Such aid may not exceed 50% of such expenditure.
  - 5.6. Aid for exploitation shall be granted to support and develop the exploitation of European films or audiovisual works in the Member States of the Fund.
  - 5.7. Distributors and exhibitors from an associate Member State can benefit from the support scheme for distribution and cinemas.
  - 5.8. Aid shall be allocated in the form of grants, loans at a preferential rate or advances on receipts.
6. Accession and withdrawal
  7. Secretariat
  8. Operation

The major difference between audiovisual policies developed within the Council of Europe as compared to those developed within the European Union is the stress that is put on the European Human Rights Convention, article 10 most relevant for the purposes of the lecture:

**Article 10 – Freedom of expression**

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The most important initiative in the field of audiovisual regulation that has been implemented by the Council of Europe is the “European Convention on Transfrontier Television” of 5 May 1989 [further Convention]. [T-TT 2009 PDF](#)

### “European Convention on Transfrontier Television”<sup>2</sup>

Preparations of binding legal instruments on aspects of transfrontier broadcasting started after the 1<sup>st</sup> European Ministerial Conference on Mass Media Policy held in 1986. The preparation of the Convention was prompted by the development of communications satellites and wide-band cable systems. The text of the Convention was opened for signature on 5 May 1989 and it came into force on 1 May 1993. The development of the European Union “Television without Frontiers” Directive and of the “European Convention on Transfrontier Television” was undertaken in parallel. In the case of member states of both the European Union as well as the Council of Europe (which ratified the Convention) priority was given to the European Union “Television without Frontiers” Directive. The original “European Convention on Transfrontier Television” was revised in 2002 in order to align it with the “Television without Frontiers” Directive in a number of respects (including provisions on sponsorship, advertising, events of major importance). The wording of some articles is identical with those of the Directive.

A major difference between the “Television without Frontiers” Directive and the “Convention on Transfrontier Television” occurs at the level of objectives as well as underlining values, moreover the Convention sets common minimum rules that can be made stricter by the signing parties. The main objective (according to the explanatory report on the Convention) is “to strengthen the free exchange of information and ideas by encouraging the transfrontier circulation of television programme services on the basis of a number of commonly agreed basic standards.” Similarly, the Convention’s Preamble<sup>3</sup> states that the signatory Parties reaffirm “their commitment to the principles of free flow of information and ideas and the independence of broadcasters, which constitute an indispensable basis for their

---

<sup>2</sup> My analysis relies on the text of the “European Convention on Transfrontier Television,” *European Treaty Series* No. 132, 5.5. 1989 as amended according to the provisions of the “Protocol,” *European Treaty Series* No. 171, 1.3. 2002 and the accompanying explanatory report.

<sup>3</sup> The individual chapters of the Convention are as follows: Chapter I General provisions; Chapter II Programming matters; Chapter III Advertising and tele-shopping; Chapter IV Sponsorship; Chapter V Mutual Assistance; Chapter VI Standing Committee; Chapter VII Amendments; Chapter VIII Alleged violations of this Convention; Chapter IX Settlement of disputes; Chapter X Other international agreements and the internal law of the Parties; Chapter XI Final provisions.

broadcasting policy,” express the conviction that “the continued development of information and communication technology should serve to further the right, regardless of frontiers, to express, to seek, to receive and to impart information and ideas whatever their source” and express the desire

to present an increasing range of choice of programme services for the public, thereby enhancing Europe's heritage and developing its audiovisual creation, and [the Parties] being determined to achieve this cultural objective through efforts to increase the production and circulation of high-quality programmes, thereby responding to the public's expectations in the political, educational and cultural fields.

The same is reinforced in Article 4 of the Convention: “The Parties shall ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention”.

The values that can be identified in the Convention include: freedom (of expression, transmission, information, from economic and political pressure), quality, diversity (choice), pluralism (of options and media), independence (on the part of broadcasters), equality (between men and women in the media) etc. The wording of the Convention Article 10 (1) and of Article 4 (1) of the Directive both concern quotas on European works, yet the wording of the Convention is not so specific, for example in terms of defining what constitutes a European work. Similarly to the Directive, the Convention also has a clause that guarantees the access of public to events of major importance. In respect of public interest as reflected in the Convention, it includes an article dealing with the responsibilities of the broadcaster, namely Article 7 that contains provisions obliging to respect human dignity and fundamental rights of others as well as the protection of minors. However, more important in this respect is section 3 which stipulates that “the broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinions”.

The set-up of concrete mechanisms for implementation falls under the jurisdiction of ratifying states, however, clearly mostly behavioural and content (protection of minors, standards of decency, quotas etc.) regulation is involved. In terms of Feintuck's distinction of justifications for audiovisual regulation the “European Convention on Transfrontier



Television” involves above all effective communication. Numerous examples of justifications of regulation based on diversity and public service can be found in Council of Europe audiovisual policies. I have not been able to trace examples of the justification of economic interest in Council of Europe audiovisual policy documents analysed in this paper. Council of Europe audiovisual policies seem to provide more space for citizen-oriented provisions, however, it must be remembered that these are less binding (thus in effect weaker) than those of the European Union.

The Council of Europe has in the past two decades held a number of Ministerial Conferences on Mass Media Policy.

The dates and topics of the individual conferences are as follows:

- 1<sup>st</sup> European Ministerial Conference on Mass Media Policy: The Future of Television in Europe (Vienna, 9-10. 12. 1986)
- 2<sup>nd</sup> European Ministerial Conference on Mass Media Policy: European Mass Media Policy in an International Context (Stockholm, 23-24. 11. 1988)
- 3<sup>rd</sup> European Ministerial Conference on Mass Media Policy: Which Way Forward for Europe’s Media in the 1990’s? (Nicosia, Cyprus, 9-10. 10. 1991)
- 4<sup>th</sup> European Ministerial Conference on Mass Media Policy: The Media in a Democratic Society (Prague, 7-8. 12. 1994)
- 5<sup>th</sup> European Ministerial Conference on Mass Media Policy: The Information Society: a Challenge for Europe (Thessaloniki, 11-12. 12. 1998)
- 6<sup>th</sup> European Ministerial Conference on Mass Media Policy: A Media Policy for Tomorrow (Cracow, 15.-16. 6. 2000)
- 7<sup>th</sup> European Ministerial Conference on Mass Media Policy: Integration and Diversity: the New Frontiers of European Media and Communication Policy (Kyiv, 10-11. 3. 2005)

1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services: A New Notion of Media? (Reykjavik, May 28-29, 2009)

The output of the Conferences includes a number of recommendations, resolutions and declarations. For example, in respect of public service broadcasting the most important was the 4<sup>th</sup> Ministerial Conference on Mass Media Policy (held in Prague on 7-8 December 1994). The proposed objective of “Resolution No. 1: The Future of Public Service Broadcasting” is to outline general principles related to public service broadcasting and to provide a detailed policy framework for public service broadcasting. The general principles affirm the commitment to maintain and develop strong public service broadcasting systems,

acknowledge that both privately and publicly owned organizations can provide such service, undertake to guarantee at least one “comprehensive wide-range programme service comprising information, education, culture and entertainment accessible to all members of the public” (*Texts* 1998:35-36). Further, the participating states in the conference undertake to “define clearly, in accordance with appropriate arrangements in domestic law and practice and in respect for their international obligations, the role, missions and responsibilities of public service broadcasters and to ensure their editorial independence against political and economic interference” (*ibid.*). The policy framework deals with key issues such as public service requirements, funding, economic practices, independence and accountability as well as means of transmission, new communication technologies and European co-operation. In respect of the framework the following values associated with public communication and in particular public service broadcasting can be identified: freedom and independence (from political and economic interference), universality (of access and content), social cohesion, diversity respectively pluralism, public discussion (for which public service broadcasting provides a forum), quality (of programming) and accountability to the public.

A particularly interesting element of the framework is its section entitled “economic practices” which stipulates that “participating states should endeavour to ensure that economic practices such as the concentration of media ownership, the acquisition of exclusive rights and the control over distribution systems such as conditional access techniques, do not prejudice the vital contribution public service broadcasters have to make to pluralism and the right of the public to receive information” (*ibid.*: 37). The reason why this is so strikingly different from previously analyzed documents is that it in effect puts the public service remit above competition and rather takes a reversed stance as compared to that of the European Union (it does not effectively justify breaches of undistorted competition by public service broadcasters but suggests that competition law cannot be unproblematically applied to public service broadcasting). Similarly, the earlier “Resolution No. 1: Media Economic and Political and Cultural Pluralism” of 1991 (one of the outcomes of the 3<sup>rd</sup> European Ministerial Conference on Mass Media Policy held in Nicosia on 9-10 October 1991) expresses the conviction that “the issue of media concentrations should not only be regulated on the basis of economic criteria but should be dealt with primarily from the perspective of measures designed to safeguard political and cultural pluralism” (*Texts* 1998:21). A consistent theme running through the documents relating to the Ministerial

Conferences is the obligation to support “audio-visual works produced by those European partners with a low audio-visual output or limited geographic or linguistic coverage” (*Texts* 1998:33).

ECHR – case law – short survey WORD DOC